DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0148
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
EDDIE JOE CELAYA,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-008686-001 DT

The Honorable Margaret R. Mahoney, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and William S. Simon, Assistant Attorney General
Attorneys for Appellee

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Attorney for Appellant

H A L L, Judge

¶1 Eddie Joe Celaya (defendant) appeals from his convictions and sentences for two counts of aggravated assault, one count of misconduct involving weapons, one count of

possession of marijuana, and one count of leaving the scene of an injury accident. Defendant challenges the sufficiency of evidence supporting his drug conviction, and he claims the misconduct involving weapons charge and one of the aggravated assault charges are multiplicitous. Defendant also argues the trial court erred in admitting photographs into evidence. Finally, defendant raises three issues regarding the final jury instructions. For the following reasons, we reject these claims of error and therefore affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 The following evidence was presented at trial. In the afternoon of December 9, 2005, Officer M.K. of the Phoenix Police Department was conducting undercover surveillance of a suspected drug house in Phoenix. Officer M.K. observed defendant exit the residence and drive away in a white Kia with a female passenger. Officer M.K. radioed this information to uniformed officers P.K. and D.J. who were nearby in a fully-marked patrol car. Officers P.K. and D.J. followed defendant and observed him commit a traffic violation. The officers initiated a stop, and defendant pulled into a liquor store parking lot. As officer D.J. parked behind the Kia, defendant ducked into the seat.

[1] We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against defendant. *See State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 The officers exited the patrol car and approached the Kia. Jones instructed defendant to place his hands on the steering wheel. Defendant did not comply, and his passenger, T.V., exited the vehicle as defendant was reaching under his seat. Defendant rapidly accelerated in reverse and "slammed" into the patrol car. Defendant then drove forward and turned the vehicle in Officer D.J.'s direction. Thinking he was going to be run over, Officer D.J. drew his weapon. Defendant ignored the officer's orders to stop and continued turning the Kia causing Officer D.J. to maneuver to avoid getting hit. As he steered with one hand, defendant pleaded with Officer D.J. to let him leave, and he pointed a handgun at the officer. Fearing for his life, Officer D.J. shot defendant in the shoulder. Defendant sped away and, at a nearby intersection, caused a vehicle accident that resulted in physical injuries to the other driver. Defendant did not stop.

¶4 Meanwhile, Officer M.K. slowly drove by the parking lot and observed defendant "trying to run over [Officer D.J.]." Officer M.K. followed defendant as he fled the scene and saw him throw a handgun and two or three small baggies out the driver's side window. Officer M.K. did not stop to retrieve the gun and baggies; instead, he continued to follow defendant.

¶5 Other police officers quickly responded to Officer D.J.'s radio broadcast of the "situation," and defendant was

apprehended and arrested in a nearby residential neighborhood. As he recuperated later that evening in the hospital, defendant made incriminating statements during an audio-taped interrogation. He denied, however, having a handgun or anything resembling a handgun in the Kia.[2] Although police conducted an extensive search for the baggies and gun defendant threw from his vehicle, the items were never located.

¶6 The State charged defendant with two counts of aggravated assault,[3] class two dangerous felonies; one count of misconduct involving weapons, a class four dangerous felony; and one count each of possession of marijuana and leaving the scene of an injury accident, both class six felonies. At trial, defendant admitted to possessing marijuana, but he denied having a gun and instead claimed to have had a cell phone in his hand during the incident in the parking lot. He also claimed he fled the accidents he had caused because he was "running for his life" and feared being shot again.

¶7 The jury found defendant guilty as charged, and the trial court sentenced him to presumptive concurrent terms of imprisonment. This timely appeal followed. We have

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[2] Defendant testified at trial that he was a convicted felon, and therefore he knew possessing a gun was unlawful.

[3] Count 1 referred to defendant's use of a gun, and count 2 referred to defendant's use of a car, in intentionally placing Officer D.J. in reasonable apprehension of imminent physical injury.

jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

I. Sufficiency of Evidence: Possession of Marijuana

¶8 Defendant first contends the trial court erred in denying his motion for judgment of acquittal as to the possession of marijuana charge. *See* Ariz. R. Crim. P. 20(a) (Rule 20). Specifically, defendant argues the State presented no evidence that defendant possessed a usable quantity of marijuana. This argument is without merit.

¶9 "We review a trial court's denial of a Rule 20 motion for an abuse of discretion and will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001).

¶10 To survive defendant's Rule 20 motion, the State had to present substantial evidence that defendant knowingly possessed or used marijuana. *See* A.R.S. § 13-3405(A)(1) (2010).[4] A "usable quantity" is not an element of possession of marijuana. *See State v. Cheramie*, 218 Ariz. 447, 451, ¶ 21, 189 P.3d 374, 378 (2008) (holding "usable quantity" is not an

[4] We cite a statute's current version when it has not been amended in any material respect since the date of the alleged offense.

element of possession of dangerous drugs); *compare* A.R.S. § 13-3407(A)(1) (2010) ("A person shall not knowingly[] [p]ossess or use a dangerous drug.") *with* A.R.S. § 13-3405(A)(1) ("A person shall not knowingly[] [p]ossess or use marijuana."). A usable quantity of marijuana is instead one evidentiary tool by which a factfinder can infer a criminal defendant's unlawful possession when the amount of drugs at issue is so small that a question arises as to whether defendant knew of the drugs' presence. *Cheramie*, 218 Ariz. at 451, ¶ 21, 189 P.3d at 378.

¶11 Here, the jury heard defendant's admission during his interrogation that he panicked because he had "weed" and that he threw baggies containing "a little bit of weed" out the window as he fled from the scene of the shooting. This is substantial evidence that defendant knowingly possessed marijuana.[5] *See State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980) ("'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt."). Consequently, the trial court acted within its discretion when it denied defendant's Rule 20 motion.

[5] Defendant's testimony at trial was consistent with his admissions during the hospital interrogation. See *supra*, at ¶ 6. Defendant further testified that he specifically had approximately two grams of marijuana in the Kia when he was stopped by Officers D.J. and P.K.

II. Multiplicitous Charges

¶12 Defendant next asserts that the indictment was multiplicitous and in violation of the Double Jeopardy Clause of the U.S. Constitution because he was charged with aggravated assault (gun) and misconduct involving weapons, both alleged as dangerous offenses. He contends that his conduct that gave rise to the aggravated assault charge – pointing a gun at Officer D.J. – was the same conduct used to allege the misconduct involving weapons charge as a dangerous offense. Because defendant failed to object at trial, we review this argument for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). On fundamental error review, defendant has the burden to prove error, that the error was fundamental, and that the error caused her prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608. We find no error, fundamental or otherwise.

¶13 We conclude that the indictment was not multiplicitous and, because he received concurrent sentences, defendant's convictions for both offenses did not violate the Double Jeopardy Clause. A charging document "may be defective as multiplicitous when it charges a single offense in multiple counts." *State v. Barber,* 133 Ariz. 572, 576, 653 P.2d 29, 33 (App. 1982). In determining multiplicity, a court considers whether each count "requires proof of a fact that the other

counts do not." *Id.* (citing *Blockburger v. United States,* 284 U.S. 299, 304 (1932)). Similarly, because of double jeopardy concerns, courts will presume that the legislature did not intend to authorize consecutive sentences when two statutes proscribe the same conduct. *State v. Eagle,* 196 Ariz. 188, 190, ¶ 6, 994 P.2d 395, 397 (2000). Double jeopardy analysis also employs the test set out in *Blockburger* – whether each offense requires proof of an additional fact that the other does not. *Id.* Arizona's double punishment statute also prohibits consecutive sentences for single acts that are punishable under separate statutes. A.R.S. § 13-116 (2010); *State v. Gordon*, 161 Ariz. 308, 312, 778 P.2d 1204, 1208 (1989). Conduct constitutes a single act under the statute when, subtracting the evidence necessary for the ultimate charge, sufficient evidence necessary for the other charge does not remain. *Gordon*, 161 Ariz. at 312, 778 P.2d 1208.

¶14 Defendant was charged with the dangerous offense of aggravated assault upon a peace officer, which required proof that defendant intentionally placed Officer D.J. in reasonable apprehension of imminent physical injury when defendant pointed the gun at Officer D.J. and knew or should have known he was a peace officer engaged in official duties.[6] *See* A.R.S. §§ 13-

[6] Regarding the aggravated assault charges, the jury was instructed:

1203(A)(2), -1204(A)(2), (A)(8)(a) (2010). He was also charged with misconduct involving weapons, similarly alleged as a dangerous offense, which required proof that defendant was a prohibited possessor at the time he pointed the gun at Officer D.J. *See* A.R.S. § 13-3102(A)(4) (2010). Thus, each offense as charged required proof of additional facts that the other did not. The indictment was therefore not multiplicitous. Although the charges' dangerous allegations in the indictment arose from a single act – defendant pointing a weapon at Officer D.J. – the act was punishable by both aggravated assault and misconduct involving weapons. *See, e.g., Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Because the indictment was not multiplicitous and the court appropriately imposed concurrent sentences, *see* A.R.S. § 13-116, there was no error, much less fundamental error.

III. Photographs

¶15 Defendant next claims the trial court erred in admitting into evidence six photographs of him taken immediately

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> The crime of Aggravated Assault requires proof of the following:
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> 1. The defendant committed assault, *and*
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> 2. The assault was aggravated by the following factors:
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> - The defendant used a deadly weapon or dangerous instrument; *and*
>
> - The defendant knew or had reason to know that the person assaulted was a peace officer performing official duties.

after he was interrogated in the hospital. He argues the photographs were cumulative and had "no evidentiary value to any of the contested issues at trial, and were offered to create a negative impression on the jury based on [defendant's] body tattoos . . . ."

¶16 We review the admission of photographs for abuse of discretion. *State v. Montano*, 204 Ariz. 413, 425, ¶ 55, 65 P.3d 61, 73 (2003). Trial judges have broad discretion in deciding whether to admit photographic evidence. *State v. Bocharski*, 200 Ariz. 50, 56, ¶ 27, 22 P.3d 43, 49 (2001). In determining whether to admit such evidence, the court first considers whether it is relevant, that is, whether it aids the jury's understanding of any issue in dispute. *State v. Amaya-Ruiz*, 166 Ariz. 152, 170, 800 P.2d 1260, 1278 (1990). The court next considers "whether the photographs would tend to incite passion or inflame the jury. In the event that they are inflammatory, the court balances their probative value against their potential to cause unfair prejudice." *Id*.

¶17 Three of the photographs at issue depict defendant from three different viewpoints in a semi-reclined position wearing a hospital gown and blanketed from the waist down. Tattoos on his forearms and upper chest are visible. The remaining three photographs are headshots, one each from the front and both sides. These photographs depict small tattoos

near defendant's left eye and on either side of his neck. Before and during trial, defendant sought to preclude these photographs arguing they were cumulative, irrelevant and had unduly prejudicial effect based on the depictions of defendant's tattoos. The trial court found the photographs to be relevant as to the voluntariness of defendant's statements made during the interrogation and as to his identification. The court further found that the photographs were not cumulative and their prejudicial effect did not outweigh their relevance because the jury already was exposed to evidence of defendant's tattoos. Accordingly, the court admitted the photographs.

¶18 We find no abuse of discretion in admitting the photographs. They show defendant as awake and alert. Thus, the photographs are relevant as to the voluntariness of defendant's statements, an issue he raised at least marginally. They are also relevant as to defendant's identification. *See State v. Hall*, 136 Ariz. 219, 221, 665 P.2d 101, 103 (App. 1983) ("It is axiomatic that the burden is always on the state to prove . . . the identity of the person who committed the crime beyond a reasonable doubt.").

¶19 As for the pictures' prejudicial effect, defendant does not explain how the evidence of his tattoos was inflammatory. *See State v. Pandeli*, 215 Ariz. 514, 525, ¶ 29, 161 P.3d 557, 568 (2007) (noting "the mere presence of tattoos

is not shocking or prejudice-inducing"). In any event, we note the jury was presented with an audiotape and a transcript of the radio broadcasts among the various police officers involved in apprehending defendant. During one of those broadcasts, defendant was referred to as a "Hispanic male, tatted up, sleeved . . . ." Moreover, the record reflects that the jury could see defendant's tattoos on his neck and face during trial. Because the jury had before it this other evidence of defendant's extensive tattoos, the photographs' were not themselves inflammatory. Even if they were, we find that whatever prejudicial effect remained was not substantial enough, in light of the photographs' relevancy, to conclude that the trial court abused its considerable discretion in admitting the photographs. *See Bocharski*, 200 Ariz. at 55, ¶ 21, 22 P.3d at 48 (relevant photographs may be admitted even if they tend to prejudice the jury against the defendant).

¶20 Finally, the trial court found the photographs were not cumulative because they depict different views, angles and perspectives. Based on our review of the photographs, we determine this finding is within the court's discretionary powers. No error occurred.

IV. Jury Instructions

¶21 Defendant raises three claims of error regarding the final jury instructions. Because defendant did not raise these

issues at trial, we review for fundamental error only. Ariz. R. Crim. P. 21.3(c); *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986). We reject defendant's arguments.

¶22 Defendant first contends the trial court fundamentally erred in failing to instruct the jury that the State was required to prove defendant's handgun was authentic and operable. As defendant acknowledges, however, such an instruction is only required if there is evidence at trial that creates a doubt as to the weapon's authenticity or operability. *See State v. Valles*, 162 Ariz. 1, 7, 780 P.2d 1049, 1055 (1989). As defendant further concedes, his defense at trial was that he had a cell phone - not a gun - during the incident at the parking lot. Defendant does not direct us to any trial evidence showing that the gun he allegedly used was a replica or was otherwise inoperable, and our independent review of the record has not revealed any such evidence. Accordingly, the trial court did not err in sua sponte failing to give an instruction regarding the gun's authenticity or operability. *See id.*; *State v. Vandever*, 211 Ariz. 206, 208, ¶ 7, 119 P.3d 473, 475 (App. 2005) (trial court acts within its discretion if it refuses an instruction that lacks a factual basis).

¶23 Defendant next argues the trial court should have instructed the jury that, to find defendant guilty of the marijuana possession charge, the State was required to prove

defendant possessed a usable amount of marijuana. We have already explained that "usable quantity" is not a necessary element of unlawful possession of marijuana under the circumstances of this case. *Supra,* ¶ 10. Because an instruction on usable quantity would have not correctly reflected Arizona law, the trial court properly did not give such an instruction. *See State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996) (the purpose of jury instructions is to inform the jury of the applicable law).

¶24 Finally, with respect to the charge of leaving the scene of an injury accident, defendant claims the trial court fundamentally erred in failing to provide the jury with the instruction set forth in the Revised Arizona Jury Instruction (RAJI) Statutory Criminal 2.025 (affirmative defense). Specifically, defendant points to the absence of that instruction's directive, "If you find that the defendant has proven the affirmative defenses of duress and necessity by a preponderance of evidence you must find the defendant not guilty of the offense of leaving the scene of an injury accident."

¶25 Pursuant to defendant's request, the court instructed the jury based on RAJI Statutory Criminal 4.17 (necessity defense) and RAJI Statutory Criminal 4.12 (duress) as applicable to the charged offense of leaving the scene of an injury accident. *See* A.R.S. §§ 13–412, -417 (2010). When discussing

the final jury instructions, the parties and the court addressed the applicability of the last paragraph of the duress and necessity defense instructions that required the State to prove beyond a reasonable doubt that defendant did not act with such justification. *See* RAJI Stat. Crim. 4.17; RAJI Stat. Crim. 4.12. Because the offense was committed before April 24, 2006, the parties agreed to substitute the last paragraph of each instruction with a "simple sentence that says the defendant must prove this defense by a preponderance of evidence[.]" The "use note" for RAJI Statutory Criminal 4.17 and RAJI Statutory Criminal 4.12, however, specifically requires the court to include the affirmative defense instruction in RAJI Statutory Criminal 2.025 for offenses committed before April 24, 2006. *See* RAJI Stat. Crim. 4.17; RAJI Stat. Crim. 4.12. Thus, we will assume, but not decide, that the failure to instruct the jury on the general affirmative defense instruction in its entirety was error.[7]

[7] The State, citing *Pandeli*, 215 Ariz. at 528, ¶ 50, 161 P.3d at 571, claims that any error was invited because defendant acquiesced in the jury instruction and therefore "contributed" to the claimed error. *Compare State v. Lucero*, 224 Ariz. 129, 137, ¶¶ 23-26, 220 P.3d 249, 257 (App. 2009) (majority) (limiting invited error to "independent, affirmative" action initiating the error) *with id*. at 141-42, ¶¶ 41-45, 220 P.3d at 261-62 (Hall, J., specially concurring) (analyzing invited error "through an estoppels lens" to determine whether defendant contributed to the error and therefore should be stopped from receiving the benefit of fundamental error review). We need not address this argument because we conclude that, in any event, the instruction did not constitute fundamental error.

¶26 This error, however, did not go to the foundation of defendant's case and thereby deprive defendant of a fair trial. The jury was instructed that defendant was presumed innocent and that the State had the burden of proving the elements of each offense beyond a reasonable doubt. Importantly, the jury was specifically instructed, "If . . . you think there is a real possibility that [defendant] is not guilty, you must give him the benefit of the doubt and find him not guilty." The jury was further instructed on the proper definitions of "beyond a reasonable doubt" and "preponderance of evidence." We conclude that, when the necessity and duress instructions given to the jury are considered with the foregoing instructions, the jury properly understood it was required to find defendant not guilty of leaving the scene of an accident if he proved the elements of the justification defense(s) by the applicable standard of proof. *See State v. Rosas-Hernandez*, 202 Ariz. 212, 220, ¶ 31, 42 P.3d 1177, 1185 (App. 2002) ("The test is whether the instructions, viewed in their entirety, adequately set forth the applicable law to the case."). Accordingly, the failure to specifically instruct the jury that it must acquit defendant of leaving the scene of an injury accident if defendant proved the duress or necessity defenses by a preponderance of evidence, was not fundamental error. *See Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608 (fundamental error is error that "goes to the

foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial").

¶27 Further, defendant cannot sustain his burden of proving he was prejudiced by the error. To show prejudice, defendant must show that absent error, a reasonable jury could have reached a different result. *See id.* at 569, ¶ 27, 115 P.3d at 609. He merely speculates that the jury would have found him not guilty of leaving the scene of an accident had it specifically been instructed to acquit him of the crime if he proved the duress or necessity defenses by a preponderance of evidence. Such speculation is insufficient under fundamental error review. *See State v. Munninger,* 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (speculative prejudice not sufficient to find reversible error).

¶28 In other words, we will not presume prejudice where none appears affirmatively in the record. *See State v. Trostle*, 191 Ariz. 4, 13-14, 951 P.2d 869, 878-79 (1997). The verdicts on the aggravated assault charges reflect the jury found that defendant, while assaulting Officer D.J. with the Kia, pointed a gun at him and then fled the scene before the accidents occurred. Thus, even if the jury believed defendant fled because he feared for his life, it could not reasonably have found duress or necessity because defendant intentionally,

knowingly or recklessly placed himself in the situation that caused him to flee. *See* A.R.S. § 13–412(B) (duress defense "is unavailable if the person intentionally, knowingly or recklessly placed himself in a situation in which it was probable that he would be subjected to duress"); A.R.S. § 13–417(B) (necessity defense is not available "if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct"). No reversible error occurred.

CONCLUSION

¶29 Defendant's convictions and sentences are affirmed.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge