DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0162
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
SHANE NICHOLAS EVANS, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-0632

The Honorable Steven F. Conn, Judge

AFFIRMED

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

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

B A R K E R, Judge

¶1 Shane Nicholas Evans ("Defendant") appeals his convictions and sentences for aggravated assault and unlawful flight from a pursuing law enforcement vehicle. He argues the

trial court erred in failing to inquire into Defendant's relationship with his appointed counsel when Defendant requested one month before trial that he be allowed to represent himself. Defendant also asserts the trial court should have continued trial when, on the morning trial commenced, Defendant withdrew his waiver of counsel. Because trial proceeded as scheduled, Defendant further contends his trial counsel was insufficiently prepared, and therefore, Defendant received assistance of counsel that was constitutionally ineffective *per se*. Finally, Defendant argues the court erred in admitting improper character evidence and his aggravated assault conviction was based on a duplicitous indictment. For the reasons that follow, we disagree with these assignments of error. We therefore affirm.

Facts and Procedural Background

¶2 The trial evidence[1] revealed that, during the spring of 2008, Defendant was involved in a dispute with M.O. regarding M.O.'s car. Defendant had borrowed the vehicle to go to California, and while there, he was arrested for driving under the influence and for driving without a valid driver's license. As a result of the arrest, California authorities impounded

[1] "[W]e view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant." *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009) (quoting *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984)).

M.O.'s car. Defendant and M.O. agreed that M.O. would keep Defendant's car until Defendant retrieved M.O.'s car from California. Two or three days later, M.O. agreed to allow Defendant to use his car to collect money for purposes of retrieving M.O.'s vehicle as long as Defendant would take M.O.'s wife to work. Defendant picked up M.O.'s wife the following morning for work, but failed to do so thereafter. Defendant avoided M.O.'s attempts to contact him.

¶3 On June 3, 2008, M.O. and T.W. were driving in Bullhead City when they saw Defendant driving his own car. After the vehicles pulled to the side of the road, M.O. exited and stood next to Defendant's car. As M.O. leaned on the driver's side door and talked to Defendant through the open window, Defendant suddenly "[took] off" and ran over M.O.'s right foot. M.O. fell to the ground and looked up to see that Defendant had "turned his car back around" and "was making a beeline at [M.O.] . . . ." To avoid getting run over, M.O. jumped on the hood of T.W.'s car. Defendant was "within a few inches" of hitting M.O.

¶4 The next day, Officer C. of the Bullhead City Police Department was dispatched to a local commercial parking lot where Defendant was observed in a vehicle. Officer C. was driving a fully marked police SUV. Officer C. followed Defendant as he exited the parking lot, and when Defendant

started speeding, Officer C. activated his lights and siren. The ensuing car chase ended when Defendant's car finally "got stuck . . . in the dessert." After a short foot chase and struggle, Officer C. took Defendant into custody.[2]

¶5 On June 12, 2008, the State charged Defendant with one count of aggravated assault, a class three felony ("Count 1"), and one count of unlawful flight from a pursuing law enforcement vehicle, a class five felony ("Count 2"). On June 20, 2008, Deputy Public Defender Arthur Higgs, III, entered his appearance on behalf of Defendant. Unsuccessful plea negotiations followed, trial was set for January 14, 2009,[3] and Defendant filed a *pro per* motion to waive counsel on December 8, 2008. Defendant set forth no reason for his request to represent himself.

¶6 Three days later, December 11, 2008, the court held a hearing on Defendant's motion and engaged in an extensive colloquy with Defendant regarding the perils of proceeding without counsel. Specifically, the court warned that trial, which was set to begin in just over thirty days, would not be

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[2] Defendant has remained in custody since June 4, 2008.

[3] Trial was originally set for January 13, 2009. For the court's own scheduling purposes, the trial date was subsequently continued to January 14, 2009. Because the one-day continuance and the reasons therefore are not relevant to this

continued due to problems associated with Defendant's self-representation. The court also warned that if Defendant withdrew his waiver "at the last minute," Defendant would be appointed counsel – most likely Higgs – who would be forced to try the case "without being prepared at all." The State also indicated it would object to any continuances. In response, Defendant indicated he desired to proceed *pro per*. The court found Defendant knowingly, intelligently, and voluntarily waived his right to counsel, and accordingly ordered that Defendant would represent himself. *See* Arizona Rule of Criminal Procedure ("Rule") 6.1(c). The court further ordered appointing the Mohave County Public Defender's Office ("PDO") as advisory counsel. Higgs objected to the appointment of the PDO as advisory counsel and moved to withdraw. Defendant similarly objected, stating, "I had no help from them from the gate and . . . you know they don't see what's my best interest . . . ." The court allowed the PDO to withdraw. However, the court advised Higgs:

> I have no problem with not appointing anyone to represent the Defendant as advisory counsel as long as your office, Mr. Higgs, agrees that you are subject to my calling you up on the date of the trial and ordering you to be re-appointed and come over here and try this case without any notice . . . .

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decision, we refer throughout to January 14, 2009 as the trial date.

> As long as you recognize that if I allow you to withdraw as advisory counsel there is at least the possibility that you could be re-appointed on this case with little or no notice and required to actually try this case.

Higgs did not object to the court's statement that he could be re-appointed with "little or no notice" to try this case.

¶7 Defendant filed numerous pre-trial motions. As relevant here, Defendant two times moved to continue trial so he could "conduct interviews, do research, and put together a defense." The trial court denied the motions. Defendant also requested assistance of advisory counsel other than the PDO. The court denied the request noting Rule 6.1(c) (1) does not require the appointment of advisory counsel, but rather permits a court to do so; and (2) does not indicate a defendant is entitled to advisory counsel of his or her choosing.

¶8 Trial commenced on January 14, 2009. Before voir dire was to begin, Defendant again requested a continuance and assistance of advisory counsel. The court denied the motions. As the court and the parties discussed matters pertaining to the impending voir dire, Defendant withdrew his waiver of counsel and requested the court reappoint counsel. Recognizing "it is absolutely horrible that the [PDO] is being put in this position . . . ," the court ordered reappointing the PDO's office to represent Defendant.

¶9 Higgs appeared and requested a one-week continuance arguing he could not ethically proceed to represent Defendant without "bringing myself up to speed on [the] case . . . ." The State objected to a continuance because its witnesses had been subpoenaed and were prepared to testify that day. The court denied Higgs' motion, ordered Higgs to represent Defendant, and ordered jury selection to begin after a ten-minute break.

¶10 Trial lasted for one-and-one-half days. Referring to his ethical concerns in representing Defendant, Higgs did not participate in the trial: he did not give an opening statement or closing argument, he did not cross examine the State's witnesses nor did he object to any of their testimony, and he did not move for a directed verdict of acquittal pursuant to Rule 20. The jury found Defendant guilty as charged, and the court imposed presumptive consecutive terms of imprisonment. Defendant timely appealed. We have 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

1. Failure to Inquire into Defendant's Relationship with Counsel; Failure to Appoint Advisory Counsel

¶11 Defendant first argues the trial court erred in failing to inquire into the complete breakdown in communications

between Defendant and Higgs before it granted Defendant's motion to waive counsel. Alternatively, Defendant contends the court should have appointed advisory counsel – either Higgs or someone else – when it granted the PDO's motion to withdraw as advisory counsel. As described below, we find no merit to these arguments.

¶12 Regarding his first argument, Defendant implies that his request for waiver of counsel required the court to engage in the inquiry that a court normally performs when presented with a criminal defendant's request for new counsel. That is, when a defendant requests substitute counsel, a trial court inquires into the defendant's relationship with his attorney if the defendant sufficiently alleges an "irreconcilable conflict or a completely fractured relationship[.]" *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 29, 119 P.3d 448, 453 (2005). Defendant points to no Arizona authority, and we are aware of none, that imposes a similar duty on a court when it considers a defendant's motion to waive counsel. Defendant did not ask for a substitution of counsel. Accordingly, we reject this argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("The appellant's brief shall include . . . the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on."); *see also State v. Moody*, 208 Ariz.

424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised.") (quoting *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989)).

¶13 Turning to Defendant's argument regarding the appointment of advisory counsel, we note that Defendant stipulated that the PDO would not be his advisory counsel. We are not aware of any authority that mandates appointment of advisory counsel – let alone advisory counsel of a defendant's choice – when a defendant desires to represent himself. Rule 6.1(c) provides that a trial court *may* appoint advisory counsel when a defendant waives his right to counsel. Ariz. R. Crim. P. 6.1(c); *see also State v. Rigsby*, 160 Ariz. 178, 182, 772 P.2d 1, 5 (1989) ("Rule 6.1 does not require advisory counsel."). In light of Defendant's insistence in exercising his constitutional right to represent himself[4] and his objection to the PDO acting as advisory counsel, we cannot say that the trial court abused its discretion in failing to appoint advisory counsel. *State v. Gonzales*, 181 Ariz. 502, 510, 892 P.2d 838, 846 (1995) (stating

[4] *See State v. Lamar*, 205 Ariz. 431, 435, ¶ 22, 72 P.3d 831, 835 (2003) ("The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and represent himself.").

that appointment of advisory counsel is discretionary under Rule 6.1(c)); *cf. State v. Fayle*, 134 Ariz. 565, 577, 658 P.2d 218, 230 (App. 1982) (stating a defendant does not have the right to the appointment of counsel of his choosing in a setting where advisory counsel was at issue).

2. Defendant's Motions for Continuance

¶14 Defendant contends the trial court abused its discretion by denying his *pro per* requests for a continuance. By not continuing the trial, Defendant claims the court effectively forced him to withdraw his waiver of counsel. We reject this argument.

¶15 "A continuance . . . shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." Ariz. R. Crim. P. 8.5(b). The decision whether to grant a *pro per* defendant's motion for a continuance of trial is within the trial court's discretion. *State v. Lamar*, 205 Ariz. 431, 436, ¶ 26, 72 P.3d 831, 836 (2003). As our supreme court explained:

> A trial court maintains discretion because a defendant's right to represent himself does not exist in a vacuum. The court must consider the defendant's right in conjunction with a victim's constitutional right to a speedy trial and the trial court's prerogative to control its own docket. Scheduling a trial presents the practical challenge of "assembling the witnesses, lawyers, and jurors at the same place at the same time." Consequently, when

> a defendant asserts his right to self-representation and the trial court is prepared to grant the defendant's motion to proceed pro se but not his request for a continuance, "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates" the defendant's constitutional right to self-representation.

Id. at 436-37, ¶ 27, 72 P.3d at 836-37 (internal citations omitted) (footnote omitted).

¶16 Thus, a "critical factor" in determining whether a trial court has abused its discretion in denying a *pro per* defendant's request for a continuance is the explanation the defendant offers to justify the request. *Id*. at 437, ¶ 31, 72 P.3d at 837. If a defendant fails to articulate specific reasons for a continuance, a trial court does not abuse its discretion in denying a defendant's request for a continuance. *Id.* at 437-38, ¶¶ 32-34, 72 P.3d at 837-38; *see also State v. Sullivan*, 130 Ariz. 213, 216, 635 P.2d 501, 504 (1981).

¶17 Here, Defendant provided in his three written motions[5] the following reasons for his continuance requests: (1) "a delay in recieving [sic] his pro per status and [Defendant] has not had enough time to become familiar with Arizona Criminal Procedures regarding his charges. The multiple charges and the

[5] *See* Ariz. R. Crim. P. 8.5(a) (stating a motion for continuance "must be in writing and state with specificity the reasons(s) justifying the continuance").

severity of the charges requires more time by the Defendant to be able to accurately and knowledgeably file [relevant] motions . . . ;" (2) "Defendant still need [sic] to conduct interviews, do research, and put together a defense . . . perform the investigations needed, the lack of law materials . . . ;" and (3) "[t]here is much needed investigative work to be done in this case in order for the Defendant to be able to properly defend himself at trial."

¶18 We find these reasons lack the specificity required to conclude the trial court abused its discretion in denying Defendant's motions for a continuance. We further note that Defendant could not reasonably have been surprised that the court denied his motions. The court very clearly explained to Defendant at the hearing on Defendant's request to waive counsel that trial would not be continued for reasons associated with the fact Defendant represented himself. Accordingly, we find no abuse of discretion.

3. Higgs' Motion for Continuance

¶19 Defendant asserts the trial court abused its discretion in denying Higgs' motion for a continuance made on

the first day of trial after Defendant withdrew his waiver of counsel.[6] We disagree.

¶20 A defendant who has waived counsel may withdraw his waiver "at any time." Ariz. R. Crim. P. 6.1(e). However, such a withdrawal "cannot delay a scheduled proceeding . . . solely because of a change of heart concerning his ability to represent himself." Ariz. R. Crim. P. 6.1(e) cmt. In denying Higgs' motion to continue, the trial court reasoned:

> There is . . . no easy answer here. I suppose an easy answer for me would be to just do what the Defendant has wanted me to do all long [sic] and that is continue this trial date and I would feel that I had been manipulated by the Defendant. I would have thought this was a completely foreseeable event on the part of the Defendant. I would think that he could have taken steps to avoid this happening.
>
> The State has subpoenaed witnesses. People have taken time off. It would be inconvenience [sic] for them to not be able to get their testimony done today. There are potential jurors that have been summoned.

¶21 Under circumstances similar to this case where an eleventh-hour request for counsel precipitated counsel's continuance request based on lack of preparation, we have

[6] In making this argument, Defendant refers to case law that addresses ineffective assistance of counsel claims based on a lawyer's lack of preparation. We do not address such ineffective assistance of counsel claims on direct appeal. *See infra* ¶¶ 23-24.

previously addressed the propriety of a trial court's reliance on the comment to Rule 6.1(e) to deny a continuance. *State v. Dixon*, 126 Ariz. 613, 615, 617 P.2d 779, 781 (App. 1980).[7] In holding that the trial court properly exercised its discretion in refusing to continue trial, we noted, "The right to assistance of counsel, while fundamental, may not be employed as a means of delaying or trifling with the court." *Id.* at 616, 617 P.2d at 782. Further, as discussed in the next section, the basis for the motion to continue goes to a claim of ineffective assistance of counsel which is properly addressed only in Rule 32 proceedings.

4. Appointing Counsel on Day of Trial and the Claim of Ineffective Assistance of Counsel

¶22 Defendant next argues the trial court's order appointing Higgs as counsel resulted in ineffective assistance of counsel because Higgs' lack of preparation prevented him from participating at trial. Relying on *United States v. Cronic*, 466 U.S. 648, 661 (1984), and *State v. Lamoreaux*, 22 Ariz. App. 172, 525 P.2d 303 (1974), Defendant contends this issue is

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[7] Defendant attempts to distinguish *Dixon* by arguing appointed counsel in that case was at least somewhat prepared, whereas here, Higgs "was not involved in the case during the month proceeding [sic] trial . . . ." We reject this argument because the record is not clear as to Higgs' level of preparedness to proceed to trial on January 14, 2009.

appropriately raised on direct appeal as opposed to a Rule 32 proceeding because Higgs' total lack of participation at trial amounted to *per se* ineffective assistance of counsel. We are greatly troubled by Higgs' total lack of representation of Defendant after the court's reappointment. Regardless of the stage at which counsel was appointed, it is clear to us that Higgs could have done something to advance his client's cause. Rather, he, along with his supervisor, stood mute. Notwithstanding, we disagree with Defendant that an ineffective assistance of counsel claim is properly before us on direct appeal.

¶23 Although the *Lamoreaux* court did address on direct appeal a claim of ineffective assistance of counsel when the defendant's lawyer "stood mute" at trial, the viability of determining such issues on direct appeal is questionable in light of *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002). In that case, the Arizona Supreme Court expressly held that "ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts *regardless of merit*." *Spreitz*, 202 Ariz. at 3, ¶ 9, 39 P.3d at 527 (emphasis added). In a different case, this court subsequently applied a so-called *per se* approach to address an ineffective assistance of counsel claim on direct appeal. *State*

ex rel. Thomas v. Rayes, 213 Ariz. 326, 330-31 n.5, ¶¶ 11-12, 141 P.3d 806, 810-11 n.5 (App. 2006). Our supreme court reversed, reiterating its holding in *Spreitz*. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) ("We therefore hold, consistent with *Spreitz,* that a defendant may bring ineffective assistance of counsel claims *only* in a Rule 32 post-conviction proceeding -- not before trial, at trial, or on direct review."). We must obey the dictates of our supreme court. *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) ("[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them."). Consequently, we do not address Defendant's purported *per se* ineffective assistance of counsel claim.

5. Character Evidence: Defendant's Arrests in California

¶24 Defendant argues the trial court fundamentally erred in allowing into evidence M.O.'s testimony that Defendant was arrested for driving under the influence and driving without a valid driver's license while in California with M.O.'s car. Defendant claims this evidence of his character was inadmissible pursuant to Arizona Rule of Evidence 404(a). We find no fundamental error.

¶25 To obtain relief under fundamental error review, Defendant has the burden to show that error occurred, the error

was fundamental, and that he was prejudiced thereby. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 20-22, 115 P.3d 601, 607-08 (2005). 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." *Id*. at 568, ¶ 24, 115 P.3d at 608. 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.

¶26 Assuming it was error to allow the testimony, the error was not of such a magnitude that resulted in an unfair trial. The testimony by M.O. regarding Defendant's arrest was necessary to explain the dispute between Defendant and M.O. regarding M.O.'s car that in turn led to the events underlying the charged offenses. Further, any prejudice resulting from M.O.'s brief and apparently unanticipated reference to the nature of the offenses underlying Defendant's California arrest was alleviated by the trial court's curative instruction to the jury. The court instructed:

> Evidence has been presented in this case that the Defendant was arrested in California on criminal charges unrelated to this case. Such evidence was not presented and may not be considered by you to suggest that the Defendant is a bad person or that he is disposed to engage in criminal behavior. Such evidence may be considered only for the limited purpose of explaining

> the issue between the Defendant and [M.O.]'s vehicle.

¶27 Accordingly, we conclude that any error in admitting the challenged evidence was not fundamental error. Further, because we must presume juries follow their instructions, *State v. McCurdy*, 216 Ariz. 567, 574, ¶ 17, 169 P.3d 931, 938 (App. 2007), we find that any purported error did not prejudice Defendant. *See State v. Trostle*, 191 Ariz. 4, 13-14, 951 P.2d 869, 878-79 (1997) (stating we will not presume prejudice where none appears affirmatively in the record). Consequently, no reversible error occurred based on the admission of evidence regarding Defendant's California arrests.

6. Duplicitous Indictment: Aggravated Assault Conviction

¶28 Finally, Defendant argues his aggravated assault conviction was based on a duplicitous indictment, thus depriving him of his right to a unanimous verdict. Defendant claims because the trial court instructed the jury to consider the three theories of assault pursuant to A.R.S. § 12-1203(A) when determining Defendant's guilt as to Count 1, and evidence was presented showing Defendant recklessly caused physical injury to M.O. (driving over M.O.'s foot), and that Defendant placed M.O. in reasonable apprehension of physical injury (driving towards M.O.), the unanimous guilty verdict on Count 1 could have been the result of a jury divided as to which crime of assault

Defendant actually committed. *See State v. Sanders*, 205 Ariz. 208, 216, ¶ 33, 68 P.3d 434, 442 (App. 2003) (concluding "types of assault are in fact distinctly different crimes").

¶29 Because Defendant failed to raise this issue at any time before the trial court, he has waived his objection absent fundamental error.[8] *See Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Defendant thus bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice. *Id.* at 567-69, ¶¶ 19-26, 115 P.3d at 607-09; *State v. Paredes-Solano*, 223 Ariz. 284, 287-88, ¶¶ 7-8, 222 P.3d 900, 903-04 (App. 2009); *cf. State v. Petrak*, 198 Ariz. 260, 268, ¶ 28, 8 P.3d 1174, 1182 (App. 2000) (noting that, if a defendant suffers no prejudice from a duplicitous indictment, his conviction need not be reversed).

[8] The State argues that Defendant has waived even fundamental error review. In *State v. Urquidez*, 213 Ariz. 50, 138 P.3d 1177 (App. 2006), we noted that our supreme court had recently suggested, but did not "expressly" conclude, "that unpreserved claims of error concerning a defect in the charging document might not be subject to review of any kind." *Id.* at 51, ¶ 4, 138 P.3d at 1178 (citing *State v. Anderson*, 210 Ariz. 327, 335-37, ¶¶ 13-20, 111 P.3d 369, 377-79 (2005)). However, we note that Defendant's assignment of error goes not to the indictment on its face, but to the trial evidence used to prove a count of the indictment. Moreover, because we ultimately conclude that Defendant has not established fundamental error, we need not consider the State's argument that we follow our suggestion in *Urquidez.* *See Urquidez*, 213 Ariz. at 51-52, ¶¶ 4-5, 138 P.3d at 1178-79.

¶30 A defendant has the right to a unanimous jury verdict in a criminal case. Ariz. Const. art. 2, § 23. "A violation of that right constitutes fundamental error." *State v. Davis*, 206 Ariz. 377, 390, ¶ 64, 79 P.3d 64, 77 (2003) (citations omitted).

¶31 We initially note that Defendant's argument, because it addresses the State's trial evidence of multiple criminal acts in support of Count 1, is technically not a challenge to the purported "duplicitous indictment" but rather is what our supreme court has termed a "duplicitous charge." *See State v. Klokic*, 219 Ariz. 241, 243-44, ¶¶ 11-12, 196 P.3d 844, 846-47 (App. 2008). Regardless, the potential problems posed by either flaw are the same: a defendant can be deprived of "adequate notice of the charge to be defended;" there is a possibility of a non-unanimous jury verdict; and precisely pleading "prior jeopardy . . . in the event of a later prosecution" can be impossible. *Davis*, 206 Ariz. at 389, ¶ 54, 79 P.3d at 76 (2003) (quoting *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989)).

¶32 When confronted with a duplicitous charge, i.e. when the State introduces evidence of multiple criminal acts to prove a single charge, a trial court normally should require "the state to elect the act which it alleges constitutes the crime, or instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can

be found guilty." *Klokic*, 219 Ariz. at 244, ¶ 14, 196 P.3d at 847 (citing *State v. Schroeder*, 167 Ariz. 47, 54, 804 P.2d 776, 783 (App. 1990) (Kleinschmidt, J., concurring)). However, such curative measures are unnecessary if the separate acts that the State introduces into evidence are part of a single criminal transaction. *Klokic*, 219 Ariz. at 244, ¶ 15, 196 P.3d at 847. In other words, the rule requiring remedial measures does not apply if "a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense." *Id.* at 245, ¶ 17, 196 P.3d at 848 (quoting *State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96, 101 (1968)); *see also Davis*, 206 Ariz. at 390, ¶ 65, 79 P.3d at 77 (noting that a conviction can be upheld when the series of events form a single transaction); *State v. Encinas*, 132 Ariz. 493, 496-97, 647 P.2d 624, 627-28 (1982) ("Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.") (citation omitted); *cf. State v. Ramsey*, 211 Ariz. 529, 534, ¶ 12, 124 P.3d 756, 761 (App. 2005) (recognizing that "a continuing scheme or course of conduct may properly be alleged in a single count") (citing *State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985) ("[W]here numerous transactions are

merely parts of a larger scheme, a single count encompassing the entire scheme is proper.")).

¶33 We find no error, let alone fundamental error, in the trial court's failure to remedy *sua sponte* the duplicitous charge of aggravated assault. The trial evidence indicates M.O. suffered an injury when Defendant drove over his foot, causing M.O. to fall to the ground, whereupon Defendant immediately turned the car around and steered it toward M.O. causing M.O. to reasonably apprehend getting run over and suffering further physical injury. This brief uninterrupted sequence of events was a single transaction for purposes of determining whether the trial court should have instituted curative measures with respect to Count 1.[9] *See Counterman*, 8 Ariz. App. at 529, 531-32, 448 P.2d at 99, 100-02 (stating no curative measures necessary when evidence showed the defendant shot victim while she telephoned police and shot her again after struggling with another all in support of single assault charge).

[9] We note that the State referred to the events as one continuous assault.

Conclusion

¶34 Defendant's convictions and sentences are affirmed.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge