DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0230
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JESUS JACINTO BRICENO, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200800360

The Honorable Andrew W. Gould, Judge

CONVICTIONS AFFIRMED;
PRESENTENCE INCARCERATION CREDIT CORRECTED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
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and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Michael A. Breeze, Yuma County Public Defender — Yuma
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Attorneys for Appellant

I R V I N E, Presiding Judge

¶1 Jesus Jacinto Briceno appeals his conviction for threatening or intimidating on grounds of insufficient evidence and the erroneous calculation of presentence incarceration credit on his sentence for this conviction and his convictions for attempted second degree murder and aggravated assault. For reasons that follow, we affirm his conviction and correct the presentence incarceration credit. We also modify the sentencing minute entry to reflect the correct credit on each count.

FACTS AND PROCEDURAL HISTORY

¶2 A grand jury indicted Briceno on count one, attempted first degree murder, and count two, aggravated assault, both counts arising from an assault on his ex-wife on March 15, 2008, and on count three, threatening or intimidating her on November 3, 2007. The indictment alleged that all events took place in Yuma County, Arizona. At an evidentiary hearing before trial, the judge ruled that the threats Briceno made to his ex-wife (in Yuma County, Arizona) and his ex-wife's mother (in Mexico), and the damage to his ex-wife's truck (in Yuma County, Arizona), were admissible at trial as evidence of his premeditation, intent, and motive to attack his ex-wife. The jury subsequently heard evidence about the threat Briceno made in Mexico, that he admitted to damaging his ex-wife's pickup truck because he had seen her driving in it with her new boyfriend, and that he threatened to kill her during a phone call to her in Yuma on

November 3, 2007. The jury also heard evidence that Briceno attacked his ex-wife with a rubber mallet five months later at her home in Yuma, causing a laceration to her head that required seven staples, breaking her finger, and bruising her arms, hands, and stomach. At trial, Briceno admitted that he damaged his ex-wife's truck, but denied threatening to kill her, attacking her, or trying to kill her.

¶3 The jury convicted Briceno of attempted second degree murder and aggravated assault, both dangerous offenses, as well as the misdemeanor offense of threatening or intimidating. The judge sentenced him to concurrent terms, the longest of which was 10.5 years. Briceno timely appealed.

DISCUSSION

A. Insufficiency of the Evidence on Count Three

¶4 Briceno argues that the evidence was not sufficient to sustain his misdemeanor conviction for threatening or intimidating his ex-wife because the evidence did not establish beyond a reasonable doubt that he committed the crime in Arizona, and not in Mexico. In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against the defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no

hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶5 The State introduced sufficient evidence to convict Briceno of the charged crime of threatening or intimidating his ex-wife on November 3, 2007, in Yuma County, Arizona. A person commits the offense of threatening or intimidating if he "threatens or intimidates by word or conduct . . . [t]o cause physical injury to another person or serious damage to the property of another." Arizona Revised Statutes ("A.R.S.") section 13-1202 (Supp. 2009).[1] Briceno's ex-wife testified that Briceno admitted that he damaged her truck because he saw her in it with her new boyfriend and threatened to kill her during a phone call to her in Yuma. The police officer who heard the confrontation call on a speaker phone testified to the same effect. This evidence was more than sufficient to convict defendant of the charged crime of threatening or intimidating his ex-wife in Yuma County, Arizona. *See id.*

¶6 We further determine that Briceno invited any risk that some members of the jury may have erroneously convicted him on the basis of his conduct in Mexico by arguing in closing argument that if the jury found that he had made the threat to

[1] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

his ex-wife's mother in Mexico, it could convict him of count three.

¶7 The procedural background on this claim is as follows. Immediately after swearing in the jury, the clerk read the indictment charging Briceno with committing offenses, including threatening or intimidating his ex-wife, in Yuma County, Arizona. Following the close of evidence, the judge instructed the jury that the crime of threatening or intimidating required proof that Briceno threatened or intimidated by word or conduct to cause physical injury to another person, or to cause serious damage to the property of another person. Moreover, the judge instructed the jurors that they could consider the threats Briceno made to his ex-wife (in Yuma County, Arizona) and his ex-wife's mother (in Mexico), and the damage to his ex-wife's truck (in Yuma County, Arizona), as evidence of motive and/or intent in the aggravated assault and attempted murder charges.

¶8 The prosecutor argued in closing argument that Briceno's threat to his ex-wife during the phone call to her in Yuma, as well as the damage to the truck, proved beyond a reasonable doubt that Briceno had committed the offense of threatening or intimidating. The prosecutor argued:

> Evidence to support the conviction of Count Three beyond a reasonable doubt. The Defendant and the victim were married. The Defendant caused damage to the victim's GMC pickup truck and the Defendant threatened to

> kill the victim and admitted to damaging the truck during a telephone conversation that was overheard by Officer M[.]. Again, there is the truck. There is the window, steering column with the paneling missing, and there's the ignition.
>
> Conclusion as to Count Three. On November 3rd, 2007, the Defendant did cause damage to the victim's truck in order to intimidate her by word or conduct. The Defendant also threatened to kill her in order to further intimidate her.

The only suggestion that the threat made to the victim's mother in person in Mexico could form the basis of a conviction in an Arizona court for threatening or intimidating was made by defense counsel in his closing argument as follows:

> The last charge is threatening and intimidation. If you believe that Mr. Briceno went to mom's house in Mexico and made threats about killing [the victim] and pulling out the pistol, then that's it. If you are firmly convinced that that really happened, that's it for that charge, okay. But in 20 years they'd never seen him with a pistol. Thirty-nine years. They met in the same rural area in Mexico, married, came to the United States, lived together. Never had a pistol.

Neither party made any further reference to the evidence supporting count three.

¶9 Therefore, Briceno invited error by the jurors convicting him on the basis of his conduct in Mexico. Because Briceno invited the error, he is precluded from raising it on appeal. *See State v. Logan,* 200 Ariz. 564, 566-67, ¶ 15, 30 P.3d

631, 633-34 (2001) (holding that invited error doctrine barred a defendant from claiming as error on appeal a jury instruction that he had requested). The invited error doctrine is designed to prevent a defendant from "inject[ing] error in the record and then profit[ing] from it on appeal," as in this case. *Id.* at 566, ¶ 11, 30 P.3d at 633 (citation omitted). This is not a case in which a defendant simply acquiesced in the error. *See State v. Lucero*, ___ Ariz. ___, ___, ¶ 31, 220 P.3d 249, 258 (App. 2009). This is a case, rather, in which the defendant injected the error into the record, whether unwittingly or because of strategic considerations, arguing that the jury could find him guilty of this offense if it found beyond a reasonable doubt that he had engaged in the conduct in Mexico. *See id.* at ¶¶ 29-30. Because Briceno affirmatively and independently invited any error, we decline to consider his claim that the jury might have erroneously convicted him for his conduct in Mexico. *See id.* at ¶ 31; *Logan,* 200 Ariz. at 566-67, ¶ 15, 30 P.3d at 633-34.

¶10 Alternatively, Briceno argues that the judge fundamentally erred in failing to instruct the jury that it could not consider the threats he had made in Mexico in determining his guilt or innocence on this charge. Because he failed to request this instruction at trial, we review for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Briceno bears the burden of

establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608. We review the adequacy of jury instructions in their entirety to determine if they accurately reflect the law. *State v. Hoskins,* 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). We will not reverse "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (citation omitted).

¶11 We find no error, much less fundamental error that prejudiced Briceno, in the judge's failure to *sua sponte* instruct the jury not to consider the threat Briceno made in person in Mexico in determining his guilt or innocence on count three. The instructions given in this case appropriately directed the jury to the elements of the offense of threatening or intimidating. The instructions also directed the jury as to the limited use it might make of the threats and property damage in determining Briceno's guilt or innocence of the offenses of aggravated assault and attempted murder. Moreover, "[c]losing arguments of counsel may be taken into account when assessing the adequacy of jury instructions." *State v. Bruggeman,* 161 Ariz. 508, 510, 777 P.2d 823, 825 (App. 1989). Here, the State argued that it met its burden of proving the threatening or intimidating offense by establishing both that Briceno damaged

the victim's truck because he saw her boyfriend riding in it and that Briceno threatened to kill her during his phone call to her in Yuma. On this record, the instructions as a whole, when coupled with the prosecutor's closing argument, did not mislead the jury. We decline to reverse on this basis.

B. Presentence Incarceration Credit

¶12 Briceno next argues that the trial court erred when it miscalculated his presentence incarceration credit by giving him 351 days credit instead of the 356 days he served prior to sentencing, and failed to apply the entire amount to all counts, including count three. The State agrees that Briceno is entitled to 356 days credit on all three counts.

¶13 Under A.R.S. § 13-712(B) (Supp. 2009), "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment otherwise provided for by this chapter."[2] "[F]or purposes of presentence incarceration credit, 'custody' begins when a defendant is booked into a detention facility." *State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993). A trial court's failure to credit the defendant for the entire time he spent in custody for a crime constitutes fundamental error. *See State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). We have the

[2] Renumbered from § 13-709(B)(2001). See footnote 1.

authority to correct computational errors in awarding presentence incarceration credit on appeal. *See State v. Stevens,* 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992); A.R.S. § 13-4037 (2001).

¶14 The record in this case indicates that Briceno was indicted on March 20, 2008, arrested on March 28, 2008, and booked into Maricopa County Jail on March 28, 2008. The record further reflects that he remained in custody until he was sentenced on March 19, 2009. Therefore, Briceno was in custody 356 days before sentencing, and was entitled to a total of 356 days of presentence incarceration credit, not the 351 days the judge awarded. We correct the sentencing minute entry to reflect an award of 356 days of presentence incarceration credit. *See id.*

¶15 We also correct the sentencing minute entry to credit this amount of presentence incarceration on count three. When a defendant is sentenced to concurrent terms of imprisonment, he is entitled to presentence custody credited to each concurrent sentence. *See State v. Cruz-Mata*, 138 Ariz. 370, 375-76, 674 P.2d 1368, 1373-74 (1983). Although the sentencing minute entry and minute entry order reflect only 180 days of presentence incarceration credit on count three, the judge orally awarded Briceno full credit in count three. Where the trial court's intention is clear, its oral pronouncement of sentence controls

over its written orders. *State v. Verdugo*, 180 Ariz. 180, 186, 883 P.2d 417, 423 (App. 1993). Accordingly, we order the sentencing minute entry corrected to reflect full credit for presentence incarceration credit on count three. *See id.*

CONCLUSION

¶16 For the foregoing reasons, we affirm Briceno's convictions and sentences, but correct the presentence incarceration credit to reflect 356 days on each count.

/s/
_____
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
DONN KESSLER, Judge