NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 10-05-2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JOHN ANGEL GARCIA, Appellant.	)	1 CA-CR 09-0366 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa

Cause No. CR 2008-157680-001 DT

The Honorable Christopher T. Whitten, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Angela Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

W E I S B E R G, Judge

¶1 John Angel Garcia ("Defendant") appeals from his convictions for unlawful imprisonment, aggravated assault and

misconduct involving weapons following a jury trial and from the sentences imposed. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The State filed a ten-count indictment against Defendant for multiple offenses committed on September 14, 2008 involving several victims. It alleged historical prior felony convictions and that Defendant was on release from confinement when he committed the instant offenses. Prior to presenting its case, the State moved to dismiss Count 9 of the indictment. At the close of the State's case, the court granted Defendant's motion for judgment of acquittal on Counts 2, 3, 4, 6, 7 and 8 of the indictment. The jury considered the remaining charges of kidnapping and aggravated assault as to one victim (Counts 1 and 5) and misconduct involving weapons (Count 10, designated as Count 9). Viewing the evidence in the light most favorable to sustaining the verdicts, the following facts were presented at trial as to those counts.

¶3 Defendant is the father of the victim's four children. On September 14, 2008, Defendant's mother drove Defendant and his brother and sister to the house where the victim resided so Defendant could see his children. When they arrived, Defendant began yelling and demanded that the victim leave with him. Although she did not want to go, she acquiesced after Defendant threatened the victim's grandmother with a gun. They drove to

Defendant's house. When Defendant's mother said they were going to stay in the car, Defendant responded, "You don't want to get out, you want to pick [the victim's] brains up off your lap."

¶4 After they went inside the house, Defendant became angrier, starting throwing things off the kitchen counter and lost track of his gun. Defendant's family and the victim went outside and tried to leave, but Defendant attempted to prevent them from doing so. He kept yelling, "where is the gun, where is the gun." The victim testified that although Defendant never pointed the gun directly at her, she was afraid that she would be seriously injured or killed. She said, "I thought I was going to die that day."

¶5 Defendant's brother testified that Defendant never pointed the gun at anyone. Defendant's sister testified that Defendant waved the gun around in the air, but did not point it at anyone. She stated, however, that she was afraid of what Defendant might do to the victim. She further testified that Defendant had threatened to kill himself.

¶6 Defendant was arrested, but no gun was found on him. Pursuant to a search warrant, police seized a box of .45 automatic ammunition located in Defendant's bedroom closet, but could not determine the type of gun for which it was used.

¶7 Defendant testified at trial. He admitted to a prior felony conviction for unlawful flight from a law enforcement

vehicle. He testified that he had the gun in his waistband until he took it out and placed it on his kitchen counter. He denied pointing the gun at the victim or threatening her with imminent physical injury. He claimed he was suicidal and that his family took the gun from him when they left his house. The parties stipulated that Defendant was a prohibited possessor. Defendant testified that because he was on probation at the time, he knew he was not permitted to have a weapon.

¶8 The jury convicted Defendant of unlawful imprisonment, a lesser-included offense of the charge of kidnapping and of aggravated assault, both dangerous offenses and domestic violence offenses, and of misconduct involving weapons. The court found that Defendant had a prior felony conviction and was on probation when he committed the instant offenses. The court imposed presumptive, concurrent prison terms of 2.25 years for unlawful imprisonment, 7.5 years for aggravated assault and 4.5 years for misconduct involving weapons with one prior felony conviction.

¶9 Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(2010).

DISCUSSION

¶10 Defendant raises one issue on appeal. He alleges that on the charge of aggravated assault, the trial court committed fundamental, reversible error in the manner in which it instructed the jury on the lesser-included offenses of disorderly conduct and assault. He argues that the erroneous instructions confused the jury and "improperly foreclosed the [jury's] consideration of the assault lesser denying [Defendant] his right to a fair trial."

¶11 The court initially instructed the jury that the crime of aggravated assault includes the lesser offense of assault and that it could consider the lesser offense if either (1) it found Defendant not guilty of aggravated assault; or (2) after full and careful consideration of the facts, it could not agree on whether to find Defendant guilty or not guilty of aggravated offense. This instruction followed the "reasonable efforts" method approved by the Arizona Supreme Court in *State v. LeBlanc,* 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996), for consideration of lesser-included offenses and tracked the language recommended in that case.

¶12 The next day, after giving notice to counsel, the court gave the jury supplemental instructions that eliminated the previously given instruction regarding assault as a lesser-included offense of aggravated assault. The court instead gave

instructions stating that disorderly conduct was a lesser-included offense of aggravated assault and that assault was a lesser-included offense of disorderly conduct. These instructions contained the *LeBlanc* language advising the jury to first use reasonable efforts to reach a verdict on disorderly conduct before considering the lesser offense of assault. The court also indicated that the changes were reflected in the verdict forms. One verdict form permitted the jury to find Defendant guilty of the lesser-included offense of disorderly conduct and the other verdict form permitted it to find Defendant guilty of the lesser-included offense of assault. When asked, defense counsel stated he had no objection to the supplemental jury instructions.[1]

¶13 Because Defendant failed to object to the supplemental instructions, we review solely for fundamental error. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); Ariz. R. Crim. P. 21.3(c). To establish fundamental error, Defendant must prove that error occurred, that the error "complained of goes to the foundation of his case or takes away

[1]The jury was instructed that "the crime of disorderly conduct requires proof that the defendant, with intent to disturb the peace or quiet of the neighborhood, family or person, or with knowledge of doing so, engages in fighting, violent or seriously disrupted behavior or recklessly handles, displays or discharges a deadly weapon or dangerous instrument." The jury was also instructed that "the crime of assault requires proof that the defendant intentionally placed another person in reasonable apprehension of immediate physical injury."

a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial," and that such error resulted in prejudice. *Henderson,* 210 Ariz. at 568, ¶¶ 23-26, 115 P.3d at 608. A defendant has the burden of establishing that fundamental error occurred and that the error caused him prejudice. *Id.* at ¶ 22. "With regard to jury instructions, fundamental error occurs 'when the trial judge fails to instruct upon matters vital to a proper consideration of the evidence.'" *State v. Edmisten,* 220 Ariz. 517, 522, ¶ 11, 207 P.3d 770, 775 (App. 2009) (citation omitted). However, even if a court concludes fundamental error resulted from erroneous instructions, the defendant must demonstrate prejudice, i.e., had the jury been properly instructed, there is a reasonable probability the jury would have reached a different result. *Id.* at 523, ¶ 18, 207 P.3d at 776.

¶14 "The purpose of jury instructions is to inform the jury of the applicable law." *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). Although the "instructions need not be faultless," they must not mislead the jury and must provide an understanding of the issues. *Id.* Jury instructions must be viewed as a whole to determine if they adequately reflect the law and are substantially free from error or whether the jury would be confused or misled by them. *State v. Gallegos,* 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). However,

"[m]ere speculation that the jury was confused is insufficient to establish actual jury confusion." *Id.* at 11, 870 P.2d at 1107.

¶15 Here, the parties agree that assault under A.R.S. § 13-1203(A)(2)(2010) is a lesser-included offense of aggravated assault under A.R.S. § 13-1204(A)(2)(2010) (assault using "deadly weapon or dangerous instrument").[2] *State v. Noriega,* 142 Ariz. 474, 481, 690 P.2d 775, 782 (1984), *overruled on other grounds in State v. Burge,* 167 Ariz. 25, 28, 804 P.2d 754, 757 (1990). They also agree that disorderly conduct under A.R.S. § 13-2904(A)(6)(2010) is a lesser-included offense of aggravated assault under A.R.S. § 13-1204(A)(2). *State v. Angle,* 149 Ariz. 478, 479, 720 P.2d 79, 80 (1986). The parties further agree, as do we, that assault under A.R.S. § 13-1203(A)(2) is not a lesser-included offense of disorderly conduct under A.R.S. § 13-2904(A)(6) because assault under that subsection requires that a defendant act intentionally while disorderly conduct under that subsection only requires that a defendant act recklessly.

¶16 The State argues that despite mischaracterizing simple assault as a lesser-included offense of disorderly conduct, the court nonetheless correctly instructed the jury to consider the more serious offense of disorderly conduct, a class 6 felony,

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

before considering the less serious offense of assault, a class 2 misdemeanor. Defendant responds that the jury was entitled to consider disorderly conduct and assault as two separate lesser-included offenses. Even assuming arguendo that the court incorrectly instructed the jury to first consider disorderly conduct as a lesser-included offense of aggravated assault before considering the lesser-included offense of assault, the error was not fundamental, prejudicial error requiring reversal.

¶17 First, the jury was instructed that it could consider the lesser offense of disorderly conduct if it found Defendant not guilty of the offense of aggravated assault or if it could not agree as to his guilt on this charge. Because the jury was instructed that the State was required to prove every element of the offense of aggravated assault beyond a reasonable doubt and the jury found Defendant guilty of that offense, the jury did not have to consider the elements of any lesser-included offense. On this point, we reject Defendant's suggestion that the evidence did not support the greater offense because Defendant did not point his gun directly at the victim. To the contrary, there was ample evidence in the record that Defendant committed aggravated assault. Second, although the progression from disorderly conduct to assault may have been incorrect, if the jury believed the State had only proved the elements of assault, it clearly had the option of finding Defendant guilty

of that offense and was not "foreclosed" from doing so. The verdict form for assault expressly permitted the jury to find Defendant guilty of assault "as to the lesser-included offense" of aggravated assault.

¶18 Third, during closing argument, defense counsel told the jury that Defendant "is guilty of assault," and that although it could find him guilty of disorderly conduct . . . what he's guilty of is assault." Counsel's argument clearly advised the jury that it could and should find Defendant guilty of the lesser offense of assault. *See State v. Johnson,* 205 Ariz. 413, 417, ¶ 11, 72 P.3d 343, 347 (App. 2003)(noting that appellate court will consider jury instructions in conjunction with arguments of counsel). Although Defendant claims the jurors were confused by these instructions, which affected their deliberations and their verdict, this is mere speculation and insufficient to show actual jury confusion. *Gallegos,* 178 Ariz. at 10, 870 P.2d at 1106.

¶19 Viewing the instructions as a whole, we do not believe that any error in the instructions took from Defendant a right essential his defense or was of such magnitude that he could not possibly have received a fair trial. *Compare State v. Valenzuela,* 194 Ariz. 404, 407, ¶ 15, 984 P.2d 12, 15 (1999)(noting that in non-capital case, failure to give lesser-included offense instruction if requested and supported by

evidence constitutes fundamental error if failure impedes defendant's ability to present his defense). Finally, Defendant has failed to meet his burden of proving prejudice. On this record, we conclude that even if the jury had been instructed as Defendant suggests, there is no reasonable probability that the jury would have reached a different result. The trial court did not commit fundamental, reversible error.

CONCLUSION

¶20 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
PHILIP HALL, Presiding Judge

/s/_____
PETER B. SWANN, Judge