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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>RENE ANTHONY CASTILLO,<br><br>Appellant. | ) | 2 CA-CR 2011-0043<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094341001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

**¶1** Following a jury trial, appellant Rene Castillo was convicted of two counts of attempted armed robbery, one count of armed robbery, and three counts of aggravated assault with a dangerous weapon. He was sentenced to a combination of concurrent and consecutive sentences totaling eighteen years' imprisonment. On appeal, he argues the trial court erred by granting the state's motion in limine, precluding him from presenting certain evidence at trial, and by effectively ordering him to serve two of his sentences consecutively in violation of A.R.S. § 13-116. For the following reasons, we affirm Castillo's convictions and sentences.

## Background

**¶2** We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In November 2009, B.M., R.R., and E.R., a minor, were getting into a car in a store parking lot when Castillo approached them, brandished a gun, and demanded money. B.M. gave him eighteen dollars and he also took her purse, which contained a marked envelope with five $100 bills inside and some personal items. M.B. came out of the store, saw Castillo, went back inside, and called 9-1-1. Castillo then threatened to kill R.R. and take E.R. with him if R.R. did not open the door to the store, which M.B. had locked. Castillo fled in the van when a siren sounded, and police arrived shortly thereafter. R.R. gave them the license plate number of the van Castillo was driving.

**¶3** Later that night, police spotted the van being driven erratically, stopped it, and by its license plate number determined it had been used by a suspected armed robber.

Castillo, who had been driving the van, fled on foot. When an officer caught and tackled him, a black semiautomatic gun, similar to the gun used in the robbery, fell from Castillo and slid across the parking lot. Upon searching the van, officers found about seventeen dollars in cash, B.M.'s purse, the marked envelope, which had been opened, and B.M.'s personal items. Another $508 cash was found in Castillo's pants pocket.

**¶4** Castillo was charged by indictment with several counts relating to the robbery. Prior to trial, he filed a motion for a mental examination pursuant to Rule 11, Ariz. R. Crim. P. An expert appointed by the court evaluated Castillo, reporting that Castillo previously had suffered blackouts but that any memory loss relating to the crimes likely resulted from drinking alcohol while taking his prescribed medication. Based on the expert's report, the court found Castillo competent. Following his trial, Castillo was sentenced as described above, and this appeal followed.

## Discussion

Observation Evidence

**¶5** Castillo first argues the trial court erred by granting the state's motion in limine seeking to preclude him from introducing at trial evidence of his history of blackouts. He contends such evidence was admissible "observation evidence." Castillo had filed a disclosure statement indicating he intended to call as witnesses his wife and the physician who had conducted the Rule 11 examination. The state anticipated the physician would testify that Castillo was "depressed, anxious, and suffered blackouts" and that Castillo's wife "could testify that [his] behavior [had] changed." The state

argued in its motion in limine that such evidence was inadmissible evidence of diminished capacity.

**¶6** It appears from the record before us that Castillo did not file a response to the state's motion. But at a pretrial hearing, Castillo explained that his wife would testify that he had experienced a series of "blackouts," periods during which he did not recall what had transpired, and that the physician would testify that certain medications, including one Castillo had been prescribed, could cause blackouts. The trial court concluded the testimony did not qualify as admissible observation evidence and granted the state's motion. Although a trial judge generally is vested with the discretion to determine the admissibility of evidence, the question whether testimony is admissible as "observation evidence" is a question of law that we review de novo. *State v. Wright*, 214 Ariz. 540, ¶ 5, 155 P.3d 1064, 1066 (App. 2007).

**¶7** Evidence about a defendant's mental state is not admissible in Arizona to prove diminished capacity, but such evidence is admissible if it is "observation evidence" used to rebut the applicable mens rea. *Id.* ¶¶ 10-12. "Observation evidence includes evidence of a defendant's behavior, statements, and expressions of belief around the time of the offense." *Id.* ¶ 15; *see also Clark v. Arizona*, 548 U.S. 735, 757 (2006) (observation evidence includes "behavioral characteristics"); *State v. Mott*, 187 Ariz. 536, 544, 931 P.2d 1046, 1054 (1997) (evidence of "behavioral tendencies" admissible). Observation evidence is "the kind of evidence that can be relevant to show what in fact was on [a defendant]'s mind when he [committed his crime]." *Clark*, 548 U.S. at 757.

Thus, it may be used only to show that a defendant did not form the requisite intent; it cannot be used to show that a defendant was incapable of forming the requisite intent because of impairment due to mental illness. *See Wright*, 214 Ariz. 540, ¶¶ 10-12, 15, 155 P.3d at 1067-68, 1068-69.

**¶8** At the hearing on the state's motion, Castillo argued that evidence of his history of blackouts was admissible observation evidence under *Wright*. However, in making his argument to the trial court, he specifically stated:

> [T]he argument is that Mr. Castillo . . . doesn't remember anything, that he saw his wife, and then after he left his wife, he doesn't remember anything until he woke up in jail, and basically the argument to the jury would be that his—he couldn't form the requisite mens rea to perform these [crimes] because it wasn't him. He wasn't in his right mind. He didn't know what he was doing.

Castillo's argument before the trial court was that he could not have formed the required mental state, rather than that he did not form it. Furthermore, Castillo proffered no evidence connecting the blackouts to a failure to form intent at the time of the robbery. We therefore conclude the evidence was not admissible observation evidence but rather inadmissible evidence of diminished capacity. *See id.* ¶¶ 10-12. Consequently, we also conclude the trial court did not err by precluding this evidence, given the arguments Castillo had made to the court.

Sentencing

**¶9** Castillo next claims his rights under A.R.S. § 13-116 were violated because the trial court effectively sentenced him to consecutive prison terms for a single act.

Section 13-116, the statutory prohibition against double punishment, provides that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." But, the statute does not preclude consecutive sentences for offenses involving multiple victims. *State v. Hampton*, 213 Ariz. 167, ¶¶ 64-65, 140 P.3d 950, 965 (2006). We review de novo the question whether a defendant's rights under the statute have been violated. *See State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

**¶10** The trial court imposed concurrent sentences on all but count three, the aggravated assault of R.R., which was consecutive to count two, the armed robbery of B.M. Section 13-116 "does not apply to sentences imposed for a single act that harms multiple victims," which Castillo acknowledges. *State v. Riley*, 196 Ariz. 40, ¶ 21, 992 P.2d 1135, 1142 (App. 1999). Castillo concedes "the consecutive sentences for armed robbery of [B.M.] and aggravated assault of [R.R.] are proper." But, he argues, because he will not begin to serve the sentence for count three until he completes the sentence on count one—the attempted armed robbery of R.R.—the court effectively made the term on count three consecutive to that of count one. Castillo, insists this violates § 13-116 because R.R. was a victim in both counts one and three and the offenses relate to one act for purposes of the prohibition against multiple punishment.

**¶11** At the outset we note Castillo did not object to the sentences on this ground before the trial court. And as the state correctly asserts, Castillo has therefore waived the

right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We acknowledge that in *State v. Vermuele*, 226 Ariz. 399, ¶ 14, 249 P.3d 1099, 1103 (App. 2011), this court refused to regard the defendant's failure to challenge her natural life term of imprisonment at the time of sentencing as a waiver of all but fundamental, prejudicial error. We reasoned that the sentence had become final upon its oral pronouncement and "immediately after its rendition but before the [sentencing] hearing . . . concluded" and the defendant "had no clear procedural opportunity to challenge the rendition of sentence." *Vermuele*, 226 Ariz. 399, ¶¶ 8-9, 249 P.3d at 1012. But *Vermuele* is distinguishable from the case before us because Castillo did have an opportunity to raise this issue before the sentence was imposed.

**¶12** On January 24, 2011, four days before the sentencing hearing, Castillo filed a sentencing memorandum in which he stated, "[t]he Court has discretion as to whether the sentences are concurrent with or consecutive to each other." He therefore demonstrated he was aware of the distinction between concurrent and consecutive terms and believed the trial court could impose either as to all of the counts, failing to argue that the terms imposed on counts one and three had to be concurrent under § 13-116. In addition, at the sentencing hearing the court asked the prosecutor whether she had a sentencing recommendation. She responded by requesting slightly aggravated, consecutive terms for the armed robbery and attempted armed robbery convictions, thereby placing the issue of consecutive versus concurrent terms before the court.

Castillo again had the opportunity to assert that the terms on counts one and three had to be concurrent. Finally, although we concluded in *Vermuele* that a defendant would not be regarded as having forfeited a sentencing challenge simply because the defendant could have, but did not, raise a challenge pursuant to Rule 24.3, Ariz. R. Crim. P., we noted that the rule provides defendants with a procedural means of arguing a sentence is illegal or was unlawfully imposed. *Vermuele*, 226 Ariz. 399, ¶ 12, 249 P.3d at 1102. We therefore conclude Castillo has forfeited his right to seek relief for all but fundamental, prejudicial error.

**¶13** As we previously stated, the trial court imposed consecutive sentences only as to counts two and three, ordering that the term on count three was to be served consecutively to the term on count two. Because these offenses involved different victims, consecutive terms on those counts were permitted. *See Riley*, 196 Ariz. 40, ¶ 21, 992 P.2d at 1142; *see also Hampton*, 213 Ariz. 167, ¶ 65, 140 P.3d at 965 ("'[A] single act that harms multiple victims may be punished by consecutive sentences.'"), *quoting State v. Gordon*, 161 Ariz. 308, 313 n.4, 778 P.2d 1204, 1209 n.4 (1989). Castillo argues, however, that despite the fact that the court ordered the terms on counts one and three to be served concurrently, those concurrent terms were effectively rendered consecutive once the court ordered consecutive terms on counts two and three. And because counts one and three are based on one act for purposes of the statute, he argues, consecutive prison terms on these counts was improper under § 13-116.

**¶14** We agree with Castillo that counts one and three are based on one act for purposes of § 13-116, *see State v. Gordon*, 161 Ariz. 308, 315-16, 778 P.2d 1204, 1211-12 (1989), and that consecutive terms on those counts, viewed in isolation, would render the sentences for those counts illegal.[1] We also agree that by ordering the term on count three to be served consecutively to the term on count two, the court, in effect, ordered consecutive terms on counts one and three. And, an illegal sentence is fundamental error. *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002). Nevertheless, we need not disturb the sentences because Castillo has not sustained his burden of establishing the error was prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Nor does any such prejudice appear from the record before us. As we stated, it was entirely proper for the court to order that the term on count three be consecutive to the term on count two; thus, the overall sentence would be the same whether the terms on counts one and three were consecutive or concurrent. Therefore, Castillo has not been prejudiced by the court's failure to order the terms on counts one and three to be served concurrently to each other but consecutively to count two.

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[1]The ultimate crime was attempted armed robbery. *See State v. Alexander*, 175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993) (ultimate crime usually "primary object of the episode"). We agree with Castillo that, subtracting the evidence necessary to establish the ultimate crime—the attempted armed robbery of R.R.—there is insufficient evidence remaining to support Castillo's conviction for the secondary crime—the aggravated assault of R.R. with a deadly weapon. *See State v. Price*, 218 Ariz. 311, ¶¶ 14-16, 183 P.3d 1279, 1283-84 (App. 2008). And, considering the transaction as a whole, it was factually impossible for Castillo to commit the ultimate crime without committing the secondary crime as well. *See State v. Viramontes*, 163 Ariz. 334, 339, 788 P.2d 67, 72 (1990); *see also Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Thus, while Castillo may be punished under both criminal statutes for a single act against R.R., "in no event may [the] sentences be other than concurrent." § 13-116.

## Disposition

**¶15** We affirm the convictions and sentences imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge