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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. PATRICIA JOYCE LEE, Appellant.	)	2 CA-CR 2011-0082 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201000856

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Nicholas Klingerman — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Patricia Lee appeals her conviction for aggravated assault of a peace officer. She argues on appeal that "the evidence was insufficient to sustain a guilty verdict for the offense charged." We affirm.

¶2 We view the evidence in the light most favorable to sustaining the verdict. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In February 2009, a fatal traffic accident on Interstate 10 caused the interstate to be closed and traffic to be diverted to an alternate route through local streets near Lee's property. Lee called 9-1-1 to report that vehicles were driving onto her property and she threatened to block her driveway. Pinal County Sheriff's Deputy Heath Rankin advised Lee that she should not block traffic.

¶3 The Sheriff's Office later received a call that Lee was blocking traffic and threatening people with a rifle. When Rankin and another deputy arrived, they found Lee seated in her jeep blocking traffic. Rankin approached Lee's vehicle and, after confirming she was not armed, opened the driver's side door, grabbed Lee's arm, and instructed her to get out of the jeep. Lee then attempted to punch Rankin but missed. As Rankin pulled Lee from the vehicle, both fell to the ground. Lee continued "kicking and swinging" at Rankin until he handcuffed her.

¶4 The state charged Lee via a direct complaint with aggravated assault of a peace officer pursuant to A.R.S. § 13-1204(A)(8)(a), a class 6 felony.[1] The complaint also cited the assault statute, A.R.S. § 13-1203, specifically subsection (A)(3), which states that a person commits assault by "[k]nowingly touching another person with the intent to injure, insult or provoke such person." The state then filed a superseding indictment charging Lee with aggravated assault of a peace officer pursuant to § 13-

[1]In this decision, we refer to the version of § 13-1204 in effect at the time of Lee's offenses. *See* 2008 Ariz. Sess. Laws, ch. 301, § 52.

1204(A)(8)(a). That indictment also cited § 13-1203 but omitted the reference to subsection (A)(3). Before trial, the state moved to amend the indictment to designate the aggravated assault charge as a class 1 misdemeanor pursuant to A.R.S. § 13-604(B)(1), which the trial court confirmed on the day of trial.

¶5 After a bench trial, the trial court noted that the "charging document" stated the "simple assault" was under § 13-1203(A)(3). The state replied that it "should be (A)(2)," which defines assault as "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury." § 13-1203(A)(2). The court also observed the indictment "just cites [§ 13-]1203."[2] The court further stated that Lee had not "request[ed] any kind of specificity with regard to the subparagraph of [§ 13-]1203, so we're going under the general allegations under [§ 13-]1203" and "the real issue here is did Ms. Lee intentionally place Deputy Rankin in reasonable apprehension of imminent physical injury." It then reviewed the evidence presented, noted it had not found Lee's testimony credible, and found her guilty of aggravated assault as a class 1 misdemeanor. The court placed Lee on a two-year term of unsupervised probation.

¶6 Lee argues on appeal that, because there was no evidence she "actually touched" Rankin, her conviction cannot stand because her aggravated assault charge was predicated on her alleged violation of § 13-1203(A)(3). Thus, she reasons, when the trial

[2]Lee asserts the trial court denied the state's motion to amend. Conversely, the state asserts the court granted it. But it is not clear the state moved to amend the indictment; the court asked if the state wished to amend the indictment and noted the indictment did not specify a subsection of the assault statute. The state responded only that subsection (A)(2) was the applicable subsection. In any event, the court apparently believed an amendment was unnecessary.

court found that she had violated § 13-1203(A)(2), it found her guilty "for something she was not originally charged with." But, although Lee acknowledges the superseding indictment removed the reference to (A)(3), she does not discuss the ramifications of that change. A superseding indictment replaces the previous charging document. *State v. Superior Court*, 137 Ariz. 534, 536, 672 P.2d 199, 201 (App. 1983). Although the superseding indictment may have been duplicitous,[3] Lee did not raise that issue below nor does she argue on appeal that the indictment was defective. Accordingly, we do not address that question further. Nor does Lee cite any authority suggesting the state was restricted by its superseded direct complaint to proving that she committed assault pursuant to § 13-1203(A)(3).

¶7 In an apparent attempt to clarify the argument made in her opening brief, Lee contends in her reply brief that she lacked notice "as to the particular charge for which she was placed on trial." Lee fails to cite any relevant authority in her brief.[4] *See*

[3]A duplicitous indictment charges two or more offenses in a single count. *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009). "[T]he three subsections of § 13–1203(A) are not simply variants of a single, unified offense; they are different crimes." *In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App. 2006). Thus, the state must allege the specific type of assault under § 13-1203(A) when charging a person with aggravated assault. *See State v. Sanders*, 205 Ariz. 208, ¶ 48, 68 P.3d 434, 445 (App. 2003), *overruled in part on other grounds by State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009).

[4]In a notice of supplemental authority, Lee cites *State v. Sanders*, 205 Ariz. 208, 68 P.3d 434 (App. 2003). But she fails to provide the relevant page numbers of the supplemental authority or a statement of the legal proposition for which it is cited as required by Rule 31.22, Ariz. R. Crim. P. *Sanders* holds that an amendment to an indictment that violates Rule 13.5, Ariz. R. Crim. P., is prejudicial per se based on the Sixth Amendment notice requirement. 205 Ariz. 208, ¶¶ 47-48, 50, 68 P.3d at 445-46. Our supreme court rejected that approach in *State v. Freeney*, 223 Ariz. 110, ¶ 26, 219

Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument "shall contain . . . citations to the authorities, statutes and part of the record relied on"). And, to the extent Lee's opening brief reasonably can be read to raise a claim based on notice, she did not raise this claim below and therefore has waived it absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). And Lee has alleged neither on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal if not argued).

¶8 But, because the Sixth Amendment requires that defendants have adequate notice of the charges against them and a lack of constitutionally adequate notice is prejudicial per se, we nonetheless address Lee's claim. *See State v. Freeney*, 223 Ariz. 110, n.2 & ¶ 26, 219 P.3d 1039, 1040 n.2 & 1043 (2009). "[F]or Sixth Amendment purposes, courts look beyond the indictment to determine whether defendants received actual notice of charges, and the notice requirement can be satisfied even when a charge was not included in the indictment." *Id.* ¶ 24. Lee plainly had adequate notice here. The state observed in pretrial motions that Lee had "swung her fist at the deputy" and "[h]e ducked her attempt to punch him"—clearly suggesting it intended to proceed under § 12-1203(A)(2), not (A)(3). And the police report disclosed before trial stated that Lee only attempted to strike the deputy.

P.3d 1039, 1043 (2009), concluding that a defendant must show actual prejudice. In any event, because the complaint here was superseded well before trial, we find *Sanders* inapplicable to Lee's notice argument.

¶9 In her reply brief, Lee asserts for the first time, and again without citation to authority or evidence, that Rankin's testimony was "simply not credible." *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). But we do not address arguments raised for the first time in a reply brief. *State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998).

¶10 Last, as we understand her argument, Lee argues the trial court erred by finding her guilty of a class 1 misdemeanor, asserting that assault based on § 13-1203(A)(2) is a class 2 misdemeanor. But Lee was not found guilty of simple assault, but rather aggravated assault of a peace officer, a class 6 felony that the state reduced to a class 1 misdemeanor pursuant to § 13-604(B)(1). *See* §§ 13-1203(B), 13-1204(B).

¶11 For the reasons stated, Lee's conviction and sentence are affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge