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NOV 28 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALAN EUGENE LINEBARGER, Appellant.	2 CA-CR 2012-0021 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103863001

Honorable John S. Leonardo, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Alan Linebarger was convicted of aggravated assault on a peace officer resulting in physical injury, a class four felony. The trial court suspended the imposition of sentence and placed Linebarger on eighteen months' supervised probation. On appeal, Linebarger challenges his conviction, arguing: (1) the indictment and charge as presented against him at trial were duplicitous and permitted the jury to reach a potentially non-unanimous verdict; and (2) there was insufficient evidence that he caused any physical injury. For the reasons that follow, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to upholding Linebarger's conviction. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On October 30, 2010, Tucson Police Officer Kyle Frank responded to a call for assistance from a liquor store employee who reported that a man had entered the store and caused a disturbance by ripping signs and harassing customers. When he arrived, Frank observed Linebarger, who matched the caller's description, sitting at a bus stop in front of the store. Frank asked Linebarger what had happened inside the liquor store, and Linebarger immediately became agitated and aggressive and turned to walk away. Frank attempted to detain Linebarger by placing him in handcuffs, but Linebarger turned and swung at Frank's face with his fist. A struggle ensued, with both men falling to the ground and punching each other. Several individuals from inside the store saw the altercation and came to Frank's assistance, enabling him to handcuff Linebarger.

¶3 Linebarger was indicted for aggravated assault of a peace officer. He was convicted as charged and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Discussion

¶4 Linebarger argues the indictment and charge as presented at trial were duplicitous and resulted in a potentially non-unanimous jury verdict. He points to the state's closing argument, which he claims "encouraged the jury to find either that [the officer] was placed in reasonable apprehension of immediate physical injury or that . . . Linebarger injured him in three different ways, as a result of three separate acts." Whether a charge is impermissibly duplicitous is a question of law we review de novo. *State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶5 A defendant must challenge a defective indictment before trial to afford the state an opportunity to cure the defect. *State v. Hargrave*, 225 Ariz. 1, ¶ 28, 234 P.3d 569, 579 (2010); *see also* Ariz. R. Crim. P. 13.5(e), 16.1(b). Because Linebarger failed to make a timely objection before trial, he has forfeited review of this claim for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). To meet his burden of establishing fundamental error, Linebarger first must prove error. *Id.* ¶ 20. A duplicitous indictment is one "which charges two or more distinct and separate offenses in a single count." *State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App. 1990). Here, the aggravated assault charge as alleged in the indictment was not duplicitous because it charged a single offense in a

single count—aggravated assault against a police officer "resulting in any physical injury." *See* A.R.S. § 13-1204(A)(8)(a), (E). Accordingly, we find no error, let alone fundamental error, with respect to the indictment.

¶6 We turn next to Linebarger's argument regarding the evidence presented at trial and the jury instructions.[1] Unlike his argument relating to the indictment, this argument was not forfeited. *See State v. Klokic*, 219 Ariz. 241, ¶ 13, 196 P.3d 844, 847 (App. 2008) (objection before end of trial sufficient to challenge duplicitous charge because asserted error involves evidence presented at trial). During the settling of jury instructions, Linebarger argued the state had presented evidence of "four separate assaults" that occurred during his brief struggle with Frank. He requested interrogatories on the verdict forms "to see if [the jury could] get unanimity on any of them." The trial court declined Linebarger's request, noting the altercation involved a "single episode . . . and the defense [to all acts was] the same."

¶7 On appeal, Linebarger reasserts the arguments he presented to the trial court, namely, that the charges here were duplicitous because the state asked "the jury to

[1]To the extent Linebarger argues he did not receive adequate notice of the charges against him, *see* Ariz. R. Crim. P. 13.2(a), we disagree. Although the indictment here did not cite the assault statute, A.R.S. § 13-1203, it did cite the aggravated assault statute, A.R.S. § 13-1204, and put Linebarger on notice that he was charged with an assault involving "any physical injury." *See* A.R.S. § 13-1203(A)(1) (assault committed by "[i]ntentionally, knowingly or recklessly causing any physical injury"); A.R.S. § 13-1204(A) (aggravated assault is an assault pursuant to § 13-1203 committed under particular circumstances). Moreover, at a pretrial hearing regarding a plea offer extended by the state, Linebarger acknowledged that he understood the charges and that he faced a class four felony. *See State v. Freeney*, 223 Ariz. 110, n.2, ¶ 24, 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.").

find either that . . . Frank was placed in reasonable apprehension of immediate physical injury or that . . . Linebarger injured him in three different ways, as a result of three separate acts." *See State v. Anderson*, 210 Ariz. 327, ¶ 20, 111 P.3d 369, 378-79 (2005). He maintains the trial court compounded the error by instructing the jury on all three types of assault pursuant to A.R.S. § 13-1203(A), "with no instruction that [it] had to be unanimous both as to which assault . . . Linebarger committed and as to which injury the jury found." He argues "the jury likely convicted [him] based on any combination of underlying facts."

¶8 A duplicitous charge arises "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847; *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009). Like a duplicitous indictment, a duplicitous charge presents potential problems. *Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847. "Depending upon the context, it can deprive the defendant of 'adequate notice of the charge to be defended,' create the 'hazard of a non-unanimous jury verdict,' or make it impossible to precisely plead 'prior jeopardy in the event of a later prosecution.'" *Id.*, *quoting State v. Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003) (alteration in *Klokic* omitted).

¶9 During its direct examination of Frank, the state elicited testimony regarding various acts that had caused his injuries. And, during its closing argument, the state urged the jury to find that Linebarger had committed assault under both § 13-1203(A)(1) and (A)(2), alleging not only that he had caused a physical injury, but also that he had placed Frank "in fear that he was going to be injured from the very

beginning." We agree with Linebarger that, in combination, this resulted in a "duplicitous charge" because evidence of multiple criminal acts was presented to prove a single crime. *Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847.

¶10 When a duplicitous charge arises, the trial court normally must take one of two remedial measures to ensure a unanimous verdict. *Id.* ¶ 14. "It must either 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.'" *Id.*, *quoting Schroeder*, 167 Ariz. at 54, 804 P.2d at 783 (Kleinschmidt, J., concurring). Neither of these remedial measures are required, however, when the acts involved are a part of the same criminal transaction. *State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96, 101 (1968). In *Klokic*, this court, relying on guidance from our supreme court in *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), analyzed the circumstances under which multiple acts may constitute "part of the same criminal transaction" such that remedial measures are not required. 219 Ariz. 241, ¶¶ 23-32, 196 P.3d at 849-51. We concluded such measures are not required when the defendant offers the same defense to each act and there is otherwise no reasonable basis for distinguishing between them. *Id.* ¶ 32.

¶11 Here, the state presented evidence that Frank sustained separate injuries as part of a continuous criminal transaction. It is the brief uninterrupted struggle in this case that distinguishes it from *Davis* and *Klokic*, on which Linebarger relies. *See Davis*, 206 Ariz. 377, ¶ 65, 79 P.3d at 77 (two acts eleven days apart and not part of single transaction); *Klokic*, 219 Ariz. 241, ¶ 6, 196 P.3d at 845-46 (prosecution presented

evidence defendant pointed handgun at victim on two separate occasions). A continuing course of conduct may be alleged properly in a single count. *See 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."). And a charge, like an indictment, is not rendered duplicitous merely because "'one of the elements of the crime alleged is a separately indictable offense.'" *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989), *quoting Baines v. Superior Court*, 142 Ariz. 145, 151, 688 P.2d 1037, 1043 (App. 1984). Moreover, we disagree with Linebarger's argument that his defense was different as to each act. Linebarger primarily relied on a theory of self-defense but also argued that Frank "was not injured as a result of anything that [he] did." The defenses applied equally to each act. The trial court therefore did not err by refusing to give the jury interrogatories on the verdict form.

¶12 Linebarger next argues the trial court erred by denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. He asserts there was "not a scintilla of evidence . . . produced that showed . . . [he] caused any physical injury to . . . Frank." We review the denial of a Rule 20 motion de novo, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), and will reverse a conviction only if there is no substantial evidence to support the jury's verdict, *State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). Substantial evidence is proof that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997).

¶13 A person commits aggravated assault by committing an assault pursuant to § 13-1203 and "knowing or having reason to know that the victim is . . . [a] peace officer." A.R.S. § 13-1204(A)(8)(a). Aggravated assault against a peace officer is a class four felony if it "results in any physical injury." A.R.S. § 13-1204(E). "'Physical injury' means the impairment of physical condition." A.R.S. § 13-105(33).

¶14 At the close of evidence, Linebarger moved for a judgment of acquittal, arguing "there is no reason to put a class four [felony] to th[e] jury" because Frank did not sustain a physical injury. *See* A.R.S. §§ 13-105(33), 13-1204(E). Linebarger maintained he did not cause Frank's wrist injury; rather, Frank caused it by punching him in the face. Moreover, he argued the "red mark" on Frank's eye was too insignificant to constitute a physical injury. Linebarger makes these same arguments on appeal.

¶15 The interpretation of a statute poses a question of law, which we review de novo. *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007). When interpreting statutes, "'our primary goal is to discern and give effect to the legislature's intent.'" *State v. Aguilar*, 218 Ariz. 25, ¶ 16, 178 P.3d 497, 502 (App. 2008), *quoting State v. Fell*, 203 Ariz. 186, ¶ 6, 52 P.3d 218, 220 (App. 2002). "The best source of that intent is the statutory language itself." *State v. Brown*, 204 Ariz. 405, ¶ 16, 64 P.3d 847, 851 (App. 2003). Therefore, "[w]e give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning." *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990).

¶16 As to Frank's wrist injury, the state contends that under § 13-1204(E), an assault need only "result in" a physical injury, and, thus, the precise cause of the injury is

irrelevant. We agree. We acknowledge the tension between § 13-1203(A)(1), which provides a person commits assault by "[i]ntentionally, knowingly or recklessly *causing* any physical injury to another person," and § 13-1204(E), which designates aggravated assault as a class four felony when it "*results in* any physical injury to [a] peace officer." But here, Linebarger's Rule 20 motion clearly was directed at the classification of the offense as a class four felony under § 13-1204(E). And because aggravated assault under § 13-1204(E) requires only that the assault "result in" any physical injury, and the jury was presented with substantial evidence that Frank sustained an injury, we find no error in the trial court's denial of Linebarger's Rule 20 motion on that issue.

¶17 We also address Linebarger's argument that the red mark on Frank's eye was not a "physical injury" within the meaning of § 13-105(33). The jury was instructed that "'physical injury' means the impairment of physical condition" and that "'impairment' means to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." There was substantial evidence from which the jury could reasonably conclude that Frank had sustained an injury to his eye during the assault.

¶18 Linebarger nonetheless maintains the red mark was not a physical injury as a matter of law because the definition of "physical injury" contained in the child abuse statute, which includes "skin bruising, pressure sores, bleeding, . . . [and] soft tissue swelling," A.R.S. § 13-3623(F)(4), demonstrates a legislative intent to exclude these types of injuries from the general definition of physical injury in § 13-105(33). We disagree. Rather than comparing § 13-105(33) with the definition of physical injury

contained in the child abuse statute, § 13-3623(F)(4), a more meaningful comparison is to the definition of "serious physical injury" in § 13-105(39). "'Serious physical injury' includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(39). We have previously interpreted this definition as encompassing "significant rather than minor" injuries. *State v. George*, 206 Ariz. 436, ¶ 7, 79 P.3d 1050, 1054 (App. 2003). Conversely, the most sensible interpretation of "physical injury" pursuant to § 13-105(33) reasonably encompasses minor injuries such as red marks, scratches, bruises, or cuts.

¶19 In sum, the state presented substantial evidence that Frank suffered from multiple physical injuries as a result of Linebarger's assault. *See* A.R.S. §§ 13-105(33); 13-1204(A)(8)(a), (E). We thus find no error in the trial court's denial of Linebarger's Rule 20 motion.

Disposition

¶20 For all of these reasons, Linebarger's conviction and sentence are affirmed.

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

CONCURRING:

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

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