

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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NOV -8 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0028
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LUCAS STERGION,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause No. CR201100067

Honorable Monica L. Stauffer, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Diane Leigh Hunt

Tucson
Attorneys for Appellee

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By Jeremy J. Waite

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H O W A R D, Chief Judge.

¶1 After a jury trial, Lucas Stergion was convicted of aggravated assault causing temporary but substantial disfigurement, a domestic violence offense. On appeal,

Stergion contends the trial court erred by denying his motion under Rule 20, Ariz. R. Crim. P., because insufficient evidence supports his conviction, by not instructing the jury on a lesser-included offense, and by denying his motion for a new trial based on prosecutorial misconduct. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining Stergion's conviction. *See State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). After a night at the fair, a dance, and a bar, Stergion and Kimberly F., an unwed couple then living together, returned to their residence where they began arguing. The argument escalated, and Stergion began hitting Kimberly on her face, arms, and head. Stergion then grabbed Kimberly and bit her head, causing a three- to four-inch laceration. He let Kimberly go, then forced soiled cat litter into her mouth. Kimberly escaped to a neighbor's house who phoned the sheriff's office on her behalf. Paramedics arrived on scene and transported Kimberly to a medical center where a doctor applied staples to the laceration on her head.

¶3 Stergion subsequently was charged with and convicted of aggravated assault causing temporary but substantial disfigurement, a domestic violence offense and was sentenced to ten years in prison. Stergion appeals from his conviction and sentence.

Sufficiency of Evidence

¶4 Stergion first argues the trial court erred by denying his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., in which he contended the state had produced insufficient evidence that he caused serious physical

injury to the victim. But evidence of serious physical injury is not required to satisfy the elements of the crime with which Stergion was charged and convicted: aggravated assault causing “temporary but substantial disfigurement,” a class four felony. *See* A.R.S. §§ 13-1204(A)(3), (D); 13-1203(A)(1). Proof of “serious physical injury” is required for a conviction of aggravated assault causing serious physical injury, a separate offense under § 13-1204(A)(1) and punishable as a class three felony. A.R.S. § 13-1204(D).

¶5 Stergion does not argue insufficient evidence supported his conviction for aggravated assault causing temporary but substantial disfigurement, although he mentions in the fact section of his opening brief that he argued to the trial court under Rule 20 that no evidence of disfigurement was presented. Merely mentioning an argument in “the ‘fact’ section of [Appellant’s] brief” without making any argument regarding it “constitutes abandonment and waiver of that claim.” *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review). Accordingly, we will not address this argument further.

Requested Jury Instruction

¶6 Stergion next argues the trial court erred in denying his request to instruct the jury on simple assault, a lesser-included offense of aggravated assault, relying on Rule 23.3, Ariz. R. Crim. P. We review a trial court’s refusal to give a jury instruction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

An abuse of discretion occurs when the court’s refusal to instruct the jury on a particular point of law is clearly untenable, legally incorrect, or amounts to a denial of justice. *See State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶7 Rule 23.3, Ariz. R. Crim. P., requires the trial court to submit verdict forms to the jury for “all offenses necessarily included in the offense charged.” Additionally, the court shall, upon the request of a party, instruct the jury on an offense necessarily included in the charged offense if the evidence supports the instructions. Ariz. R. Crim. P. 23.3 cmt; *State v. Wall*, 212 Ariz. 1, ¶ 13, 126 P.3d 148, 150 (2006). Either party may also request that the court give additional jury instructions once the jury has retired to begin deliberations, but it is within the court’s sole discretion to instruct the jury based on such a request. Ariz. R. Crim. P. 22.3 & cmt. And Rule 21.2, Ariz. R. Crim. P., requires that: “At the close of the evidence or at such earlier time as the court directs, counsel for each party shall submit to the court counsel’s written requests for instructions and forms of verdict and shall furnish copies to the other parties.”

¶8 Here, Stergion was charged with aggravated assault causing temporary but substantial disfigurement, in violation of A.R.S. §§ 13-1204(A)(3) and 13-1203(A)(1).¹ Section 13-1203(A)(1) defines assault as “intentionally, knowingly or recklessly causing any physical injury to another person.” A conviction for aggravated assault causing

¹Stergion argues that simple assault as defined by A.R.S. § 13-1203(A)(3) applies to his case. However, because he specifically was charged with violating § 13-1203(A)(1), and this subsection requires proof of different elements than subsection (A)(3), these are distinct and separate crimes, *see State v. Freeney*, 223 Ariz. 110, ¶¶ 16-17, 219 P.3d 1039, 1042 (2009), and we only look to subsection (A)(1) in our analysis.

temporary but substantial disfigurement requires proof that Stergion committed assault, as defined above, “by [using] any means of force that causes temporary but substantial disfigurement.” *See* A.R.S. §§ 13-1204(A)(3); 13-1203(A)(1). Accordingly, assault is a lesser-included offense of aggravated assault causing temporary but substantial disfigurement because the greater offense of aggravated assault cannot occur unless an assault also occurs. *See Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150; *see also* A.R.S. §§ 13-1203(A)(1); 13-1204(A)(3).

¶9 Before trial, the court instructed the parties to submit all jury instructions by December 9, 2011. On December 9, the state filed requested jury instructions that did not contain an instruction on assault as a lesser-included offense of aggravated assault causing temporary but substantial disfigurement.² Stergion did not submit a request for jury instructions. At the close of trial, after the court instructed the jury, each party made closing arguments, and the court advised the jurors that they “may be excused to begin . . . deliberations,” Stergion asked the court to instruct the jury on assault as a lesser-included offense of aggravated assault. The state objected, stating that both parties discussed this instruction and “it was specifically agreed to that . . . it [would be] deleted” and not be read to the jury.³ Stergion then argued the instruction was necessary

²The title of the state’s requested jury instructions stated “Stipulated Jury Instructions,” but neither Stergion nor his counsel signed the stipulation.

³Although this conversation the state refers to is not part of the record, because Stergion did not disagree with the state’s assertion and the court’s minute entry instructed the parties to meet in chambers to discuss the final jury instructions, we may presume the conversation occurred as the state asserted during trial. *See State v. Rivera*, 168 Ariz.

“[c]onsidering all that’s . . . gone on and the prejudicial testimony that’s been elicited by the . . . State.” The court denied Stergion’s request, stating it did not deny he would have been entitled to a lesser-included instruction had he made his request in a timely manner.

¶10 Stergion argues the trial court erred by finding untimely his request for an instruction on assault. But he did not submit his request for the instruction by the December 9 deadline or by the close of evidence. Stergion had the opportunity to ask for an instruction on assault as a lesser-included offense but instead specifically requested that it be deleted and not be read to the jury when the parties were finalizing jury instructions. The state already had made its closing arguments based on the final instructions already given⁴ and the jury had just been excused to begin deliberations, when he chose to request that the court give an instruction on assault. Because the court set a schedule for submitting requests for jury instructions, his request was untimely and he has not explained the untimeliness. *See* Ariz. R. Crim. P. 21.2 (court may direct timing of requests for instructions). Further, as Stergion notes, Rule 22.3 gives the court discretion to determine whether additional instructions requested by parties should be given once deliberations have begun. Because Stergion agreed to delete the instruction on assault before the court read the final jury instructions, the evidence had been adduced

102, 103, 811 P.2d 354, 355 (App. 1990) (“Where matters are not included in the record on appeal, the missing portion of the record will be presumed to support the decision of the trial court.”).

⁴Although we do not have a transcript of the state’s closing arguments, we may presume that its argument supported the trial court’s ruling. *See Rivera*, 168 Ariz. at 103, 811 P.2d at 355.

without regard to any necessarily included charges, and he requested the instruction only after the state's closing arguments and the jury was excused to begin deliberations, we cannot say the court abused its discretion in refusing to give the instruction.

¶11 Stergion also argues the trial court was required to instruct the jury on assault pursuant to Rule 23.3. But Stergion did not base his argument below on Rule 23.3. Stergion may not assign as error on appeal the failure to give an instruction under Rule 23.3 unless he objected, on cognizable grounds, to such failure in the trial court. *See* Ariz. R. Crim. P. 21.3(c) (defendant may not claim as error on appeal court's failure to give instruction unless he objects before jury retires to deliberate, stating distinctly matter and grounds of objection). Because Stergion did not base his argument below on Rule 23.3, he therefore has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) (“[A]n objection on one ground does not preserve the issue [for appeal] on another ground.”); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object below forfeits review for all but fundamental error); *see also State v. Tschilar*, 200 Ariz. 427, ¶ 39, 27 P.3d 331, 341 (App. 2001) (if defendant does not request lesser-included instruction, he waives issue on appeal and we review only for fundamental error). Because he has not argued that the absence of a jury instruction on assault amounted to fundamental error and we do not find that it was, this argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived if not argued on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650-51 (App. 2007) (we will not ignore fundamental

error if we find it); *see also State v. Whittle*, 156 Ariz. 405, 406-07, 752 P.2d 494, 495-96 (1988) (defendant has no constitutional right to sua sponte instructions on all lesser-included counts in noncapital cases).

Prosecutorial Misconduct

¶12 Stergion also argues the trial court erred in denying his motion for a new trial based on claims of prosecutorial misconduct. We review a trial court’s denial of a motion for a new trial based upon prosecutorial misconduct for an abuse of discretion. *State v. Anaya*, 170 Ariz. 436, 441, 825 P.2d 961, 966 (App. 1991). To establish prosecutorial misconduct the defendant must show both (1) misconduct, and (2) that ““a reasonable likelihood exists that the misconduct could have affected the jury’s verdict, thereby denying defendant a fair trial.”” *State v. Morris*, 215 Ariz. 324, ¶ 46, 160 P.3d 203, 214 (2007), *quoting State v. Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382 (2005). Reversible misconduct ““permeates the entire atmosphere of the trial”” such that its cumulative effect works to deny the defendant a fair trial. *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). We are wary of reversing a conviction as a means of deterring prosecutorial misconduct. *See State v. Valdez*, 160 Ariz. 9, 14, 770 P.2d 313, 318 (1989), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). We usually will affirm if the error was harmless. *Id.* If we can conclude beyond a reasonable doubt that the error did not contribute to or affect the verdict, it is harmless. *State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009).

¶13 Stergion argues the prosecutor engaged in misconduct by questioning a police officer about statements Stergion made to him, referring to uncharged injuries to

the victim's body, eliciting testimony about Stergion forcing the victim to eat soiled cat litter, and by questioning a witness about a conversation between the witness and defense counsel prior to trial. Yet Stergion cites no authority to support his position that these tactics, in context, constituted misconduct and he fails to show how he was prejudiced. Even assuming the conduct Stergion complains of was error, he has waived this argument by his failure to demonstrate, or even argue, how the conduct affected the jury's verdict, thereby denying him a fair trial. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to argue claim on appeal constitutes abandonment and waiver of claim). Thus, the trial court did not abuse its discretion in denying Stergion's motion for mistrial.

Conclusion

¶14 For the foregoing reasons, we affirm Stergion's conviction and sentence.

/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*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.