IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

HENRY ALEXANDER CONGRESS,
Appellant.

No. 2 CA-CR 2015-0097
Filed February 4, 2016

Appeal from the Superior Court in Pima County
No. CR20142401001
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Scott A. Martin, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 After a jury trial, Henry Congress was convicted of robbery and sentenced to an enhanced, presumptive, 4.5-year prison term. On appeal, he contends the trial court erred by allowing him to be impeached with his pro se notice of defenses and by denying his motion for new trial based on the same underlying facts. He also claims the impeachment violated his constitutional right to self-representation. Although the court erred by allowing the impeachment, because Congress cannot demonstrate prejudice, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Harm,* 236 Ariz. 402, n.2, 340 P.3d 1110, 1112 n.2 (App. 2015). The victim, W.H., lived next door to V.M., an acquaintance of Congress. On the day of the incident, Congress and V.M. were drinking and went to W.H.'s property. Congress challenged W.H. to punch a punching bag over an extended period of time. After W.H. did so, he noticed two dollars on the ground. Assuming they were his, he picked them up and put them in this pocket. Congress claimed the money was his and punched W.H. repeatedly, demanding his wallet. Congress took W.H.'s wallet, a bank card, California driver's license, a cell phone, and $120 cash, and then left.

¶3 V.M. called 9-1-1, stated she was an "eyewitness" to the attack, and said Congress had "beat up [W.H.] for no reason." Although she later claimed someone else had attacked W.H., she told a detective she changed her story because "she was afraid of what [Congress] would do to her if she told the truth."

¶4 At trial, Congress testified in his defense. He claimed that W.H. had wanted $20 of crack cocaine but did not have the money to buy it. Congress "fronted" him the cocaine and took the bank card and driver's license as security, as well as a small bag of marijuana. He claimed the cell phone and cash were originally his. Congress further testified he then "played around" with the punching bag when a hundred dollars fell out of his pocket. He claimed W.H. had picked it up and tried to keep it, and when he confronted W.H. about it, W.H. kicked Congress and swung at him. Congress said he then hit W.H. two or three times and left.

¶5 The jury convicted Congress and the trial court sentenced him as noted above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Discussion

¶6 Congress first argues the trial court erred by allowing him to be impeached, in violation of Rule 15.4(c), Ariz. R. Crim. P., with his pro se notice of defenses which listed, along with other defenses, mistaken identity. Congress claims this issue was sufficiently preserved below, but, if not, it should be reviewed for fundamental error. The state, on the other hand, claims the issue was not properly preserved and is only susceptible to fundamental error review.

¶7 Congress conducted his own defense during the initial stages of the case. During that time, he filed a hand-written notice of defenses which listed mistaken identity, justification and fifteen other defenses.

¶8 Congress testified in his defense, admitting he had been at W.H.'s trailer and giving his version of the events. Before cross-examining Congress, at a bench conference, the prosecutor stated that he intended to impeach him with his pro se notice of defenses which listed mistaken identity as a defense. Defense counsel strongly objected, noting that disclosure statements often contain defenses not ultimately pursued at trial. The trial court allowed the impeachment, apparently finding the notice was a party-opponent statement pursuant to Rule 801(d)(2), Ariz. R. Evid. During the

impeachment, Congress noted he had no legal training and had listed other defenses as well, including justification.

¶9 After the impeachment, Congress's counsel again objected, stating that allowing the jury to hear that a man with no legal training had checked off some boxes was improper. The trial court noted that Congress had obtained continuances for DNA[1] testing based on his claim that he was not present during the offense, that he had handwritten his defenses, as opposed to checking off boxes, and that impeachment based on a statement of a party-opponent was proper. Defense counsel did not specifically mention Rule 15.4(c), on which Congress now relies, to the trial court.

¶10 A contemporaneous objection must state the specific grounds in order to preserve an issue for appeal. *State v. Moody*, 208 Ariz. 424, ¶ 39, 94 P.3d 1119, 1136 (2004); *see also* Ariz. R. Evid. 103(a)(1)(B). "The purpose of the rule requiring that specific grounds of objection be stated is to allow the adverse party to address the objection and to permit the trial court to intelligently rule on the objection and avoid error." *State v. Granados*, 235 Ariz. 321, ¶ 19, 332 P.3d 68, 74 (App. 2014). Although a party need not cite a specific rule or case, "the nature of the objection" must be "sufficient to alert the trial court that [the] defendant" is relying on a particular legal theory. *See State v. Sosnowicz*, 229 Ariz. 90, n.5, 270 P.3d 917, 922 n.5 (App. 2012) (objection that expert presented legal opinion sufficient to alert trial court to reliance on Rules 702 and 704, Ariz. R. Evid., despite failure to cite specific rules).

¶11 Rule 15.4(c) states:

> The fact that a witness' name is on a list furnished under this rule, or that a matter contained in the notice of defenses is not raised, shall not be commented upon at the trial, unless the court on motion of a party, allows such comment after finding that the

[1]Deoxyribonucleic acid.

> inclusion of the witness' name or defense constituted an abuse of the applicable disclosure rule.

¶12 The trial court was correct that, absent this rule, the notice of defenses could be construed as a party-opponent's prior statement and non-hearsay under Rule 801(d)(2). Rule 15.4(c), however, overrides that analysis for a notice of defenses. *Cf. State v. Jackson,* 210 Ariz. 466, ¶ 26, 113 P.3d 112, 118 (App. 2005) ("we give preference to specific statutory provisions over general ones").

¶13 Therefore, citing Rule 15.4(c) to the trial court, or alerting the court that such a rule existed, was critical in this situation; we have no doubt the court would have followed the rule and precluded the impeachment. *See Granados*, 235 Ariz. 321, ¶ 19, 332 P.3d at 74 (purpose of "rule requiring that specific grounds of objection be stated is to allow the adverse party to address the objection and to permit the trial court to intelligently rule on the objection and avoid error"). The prosecutor could then have attempted to employ a different avenue to impeach Congress with prior statements.

¶14 We cannot fault defense counsel for having been caught off guard by this unusual tactic of the prosecutor. But the focus of the rule requiring specific grounds for an objection is on the effect on the trial, not the nature of counsel's efforts. *See id.*; *see also* Ariz. R. Evid. 103(a)(1)(B). The purposes of requiring a specific objection were not fulfilled here because the prosecutor and the trial court did not have the opportunity to respond appropriately in view of Rule 15.4(c). And Congress's counsel did not request a continuance to research the issue. Accordingly, we must find the argument forfeited and review solely for fundamental, prejudicial error. *See State v. Henderson,* 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶15 To prevail under this standard of review, Congress must first establish that error occurred. *See id.* ¶ 20. Rule 15.4(c) prohibits any comment if "a matter contained in the notice of defenses is not raised." By impeaching Congress with his notice of

defenses, the prosecutor violated this rule and the trial court erred by allowing it. Therefore, error occurred.

¶16 The state argues, however, and the trial court noted, that Congress had made repeated representations to the court that he was going to present a mistaken identity defense at trial. The state, however, did not seek to admit these other representations, and relied solely on the notice of defenses to impeach Congress, which was improper. Consequently, Congress's other statements are irrelevant to whether the admission of the notice of defenses violated Rule 15.4(c).

¶17 Congress must also show the error, assuming it was fundamental, "'caused prejudice sufficient to constitute fundamental error.'" *State v. Butler*, 230 Ariz. 465, ¶¶ 22, 24, 286 P.3d 1074, 1080-81 (App. 2012), *quoting State v. Velazquez,* 216 Ariz. 300, ¶ 50, 166 P.3d 91, 102 (2007); *see also Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. In the context of improper admission of evidence, he must show "'a reasonable jury could have come to a different result.'" *Butler*, 230 Ariz. 465, ¶ 22, 286 P.3d at 1081, *quoting State v. Martin*, 225 Ariz. 162, ¶ 14, 235 P.3d 1045, 1049 (App. 2010). He has failed to do so for several reasons.

¶18 First, a large body of other evidence impeached Congress's credibility. He admitted he had smoked marijuana and had been drinking that day. He admitted he was a seller of illegal drugs. He admitted he had multiple prior felony convictions. He admitted he had attempted to prevent a police officer from taking the shoes on which W.H.'s DNA was found and had said he had "beaten people like [the officer] before." And he claimed the cell phone was his although the police officer said he returned the phone to W.H. after W.H. established ownership. Lastly, V.M. told the 9-1-1 operator that Congress had attacked W.H. "for no reason" and later told the detective she did not want to admit Congress was the attacker because she was "afraid of [him]."

¶19 Compared to this credibility evidence, the improper impeachment with the notice of defenses was relatively minor. When the prosecutor impeached Congress with the notice, Congress explained he had listed several defenses, including mistaken

identity and justification, and stated "I'm not a lawyer, but yes. I threw everything in the book on the table because in this courtroom, I don't know what's going to be accepted or what's not." He also stated he did not know when the DNA evidence was received, in relation to when his disclosure was filed. These explanations left the impeachment with little effect.

¶20 Congress's conviction, consequently, did not rest on his notice of defenses. *See State v. Vargas*, 127 Ariz. 59, 618 P.2d 229 (1980) (defendant's impeachment with signed document attesting to truthfulness of earlier statements to police reversible error where conviction rested largely on those statements). Finally, we note that the trial court, in denying Congress's motion for a new trial, decided that he had received a fair trial.

¶21 Additionally, if Congress had brought Rule 15.4(c) to the prosecutor's and trial court's attention, the prosecutor could have impeached Congress with other statements he made suggesting he was raising mistaken identity as a defense. In *State v. Thomas*, our supreme court approved of the use at trial of a defendant's admission of guilt at an initial appearance as a judicial admission. 78 Ariz. 52, 65-67, 275 P.2d 408, 417-18 (1954), *overruled in part on other grounds*, *State v. Pina*, 94 Ariz. 243, 245, 383 P.2d 167, 168 (1963); *see also State v. Stoneman*, 115 Ariz. 594, 597, 566 P.2d 1340, 1343 (1977) ("the defendant's testimony at his first trial was clearly admissible at his second trial"); *State v. Allen*, 111 Ariz. 546, 548, 535 P.2d 3, 5 (1975) (defendant's plea of guilty to misdemeanor charges admissible in burglary prosecution); *State v. Anderson*, 110 Ariz. 238, 241, 517 P.2d 508, 511 (1973) ("'When a defendant makes a statement at trial which is inconsistent with an earlier statement his credibility is clearly in question.'"), *quoting Johnson v. Patterson*, 475 F.2d 1066, 1068 (10th Cir. 1973); *United States v. Jenkins*, 785 F.2d 1387, 1392-93 (9th Cir. 1986) (defendant's civil deposition testimony admissible); *People v. Kiney*, 60 Cal. Rptr. 3d 168, 172 (Ct. App. 2007) (self-represented defendant's closing arguments at first trial properly admissible as party-opponent statements in second trial). Based on the other evidence introduced or potentially admissible at trial, Congress cannot show he was prejudiced by the improper impeachment.

¶22 Moreover, errors affecting credibility determinations have generally fallen short of the standard required for reversal based on fundamental, prejudicial error. *See State v. Taylor*, 127 Ariz. 527, 530, 622 P.2d 474, 477 (1980) (error in failing to give limiting instruction concerning use of prior conviction not fundamental because error "did not deal with the definition of the elements of the crime . . . but went to the issue of credibility"); *Anderson*, 110 Ariz. at 241, 517 P.2d at 511 (attack on defendant's credibility by comment on right to remain silent fundamental error, but not reversible); *State v. Vild*, 155 Ariz. 374, 378-79, 746 P.2d 1304, 1308-09 (App. 1987) (prosecutor's comment on defendant's right to remain silent fundamental error but harmless). Accordingly, although error occurred, in the circumstances of this case, we cannot find that the error "'caused prejudice sufficient to constitute fundamental error.'" *Butler*, 230 Ariz. 465, ¶ 24, 286 P.3d at 1081, *quoting Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d at 102.

¶23 Nevertheless, Congress relies on *Vargas* to support his argument that fundamental, prejudicial error occurred. In *Vargas,* the trial court allowed the state to impeach the defendant's testimony that his earlier statements to police had been false with a document, signed by the defendant during plea negotiations, which affirmed that his earlier statements to police were truthful. *Id.* at 60-61, 618 P.2d at 230-31. Our supreme court found that, not only did the admission violate Rule 410, Ariz. R. Evid. (statement made during plea negotiations generally inadmissible), but it was also reversible error because "[t]he basic issue at trial was credibility." *Id.* at 61, 618 P.2d at 231. The defendant's conviction rested on the testimony of the two others involved in the crime, each of whom had provided some, but not all, of the details of the defendant's incriminating behavior and were testifying under plea agreements, and the defendant's own statements to police. *Id.* Based on the importance of those earlier statements, and the effect the impeachment had on the evidence, the court could not say, "on balance, . . . that the use of a statement signed by defendant verifying his earlier admissions was not prejudicial." *Id.*

¶24 We find *Vargas* inapplicable. The potential prejudice to Congress from the admission of impeachment evidence simply

cannot compare to that suffered by Vargas. Vargas's attempt to renounce his earlier statements to police was subject to specific impeachment by his signed statement. Here, the state relied on a single entry in a notice of potential defenses to impeach Congress's credibility generally—and Congress was, to a large extent, able to rebut that effort. *See supra* ¶ 19. Furthermore, in *Vargas,* the supreme court reviewed for harmless error, on which the state has the burden; but here we review for fundamental error, on which Congress bears the burden. *Id.*; *see also Henderson*, 210 Ariz. 561, ¶¶ 18-19, 115 P.3d at 607. Finally, unlike the defendant's conviction in *Vargas*, because of the other impeachment evidence in the record, Congress's conviction did not rest on his notice of defenses.

¶25 Congress next argues the trial court erred by denying his motion for new trial, in which he alleged a violation of Rule 15.4(c), prosecutorial misconduct based on that violation, and the denial of a fair trial. We review the denial of a motion for new trial for an abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000).

¶26 As we have determined above, the trial court erred as a matter of law in allowing the state to impeach Congress with his notice of defenses. However, a timely contemporaneous objection during trial is required to preserve an issue for a motion for new trial. *State v. Dann*, 205 Ariz. 557, ¶ 71, 74 P.3d 231, 249 (2003) (failure to bring error to trial court's attention waives the error as ground on which new trial may be predicated); *State v. Davis,* 226 Ariz. 97, ¶ 12, 244 P.3d 101, 104 (App. 2010). Accordingly, we review an issue raised for the first time in a motion for new trial for fundamental, prejudicial error. *Id*. As discussed above, Congress has failed to carry his burden of showing such error occurred.

¶27 Congress also claims the trial court improperly denied his motion for a new trial on the grounds that the prosecutor committed misconduct by impeaching him with his notice of defenses. Prosecutorial misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger

of mistrial or reversal." *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). We will reverse a conviction for prosecutorial misconduct "if the cumulative effect of the alleged acts of misconduct 'shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant.'" *State v. Bocharski,* 218 Ariz. 476, ¶ 74, 189 P.3d 403, 419 (2008), *quoting State v. Roque,* 213 Ariz. 193, ¶ 155, 141 P.3d 368, 403 (2006).

¶28 Here, the trial court did not make a finding of prosecutorial misconduct in its ruling on Congress's motion for a new trial. And, because there is no indication in the record that either the trial judge or the prosecutor knew that Rule 15.4(c) prohibited the use of Congress's notice of defenses for impeachment, we cannot conclude that the prosecutor committed intentional, improper conduct, as opposed to "legal error, negligence, [or] mistake." *Pool*, 139 Ariz. at 108, 677 P.2d at 271. Accordingly, the court did not abuse its discretion in denying Congress's motion for a new trial based on allegations of prosecutorial misconduct.

¶29 Congress also claims the trial court erred in denying his motion because he was denied a fair trial when the court allowed him to be impeached with his notice of defenses. Because Congress vigorously argued that the impeachment was improper and unfair, he has preserved this issue for review.

¶30 The trial court denied Congress's motion for new trial because "[Congress] ha[d] failed to show substantial prejudice which would have affected the trial's outcome given the cumulative weight of the remaining evidence." Because the trial judge is in the best position to determine prejudice and the impact of a witness's testimony and erroneously admitted evidence, "we defer to the trial judge's discretionary determination." *Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d at 244.

¶31 The use of the notice of defenses was clearly improper and, in some cases, could have affected the jury's determination. *See Vargas,* 127 Ariz. at 60-61, 618 P.2d at 230-31; *see also State v. Sepulveda*, 120 Ariz. 178, 181, 584 P.2d 1169, 1172 (1978) ("fundamentally unfair," and thus reversible error to impeach

defendant claiming self-defense with erroneously admitted statements made to probation officer going to his state of mind when victim approached). However, in view of the other evidence damaging Congress's credibility, and deferring to the trial judge's assessment as we must, we cannot say that the trial court abused its discretion in denying the motion for a new trial. *See Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d at 1012.

¶32 Finally, Congress claims the trial court penalized him for exercising his right to self-representation by permitting his notice of defenses as impeachment, because it would not have allowed such impeachment by a notice of defenses filed by counsel. Because Congress did not raise this issue below, it is forfeited absent fundamental, prejudicial error. *See Henderson,* 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶33 First, we note that an opposing party's statement is not hearsay if offered against that party whether "made by the party in an individual or representative capacity." Ariz. R. Evid. 801(d)(2). Our cases have allowed the introduction of a representative's statement as an admission against the party. *Ryan v. San Francisco Peaks Trucking Co.*, 228 Ariz. 42, ¶ 16, 262 P.3d 863, 868 (App. 2011) (disclosure statements prepared by plaintiff's attorney admissible as party-opponent statements); *see also Henry ex rel. Est. of Wilson v. HealthPartners of S. Ariz.,* 203 Ariz. 393, ¶¶ 5-9, 55 P.3d 87, 89-90 (App. 2002) (factual allegations made in complaint written by plaintiff's attorney admissible as party-opponent statements). Consequently, the trial court and prosecutor were in error to draw any distinction between a statement of a party and a statement of the party's representative in this circumstance.

¶34 Additionally, by noting the motions for continuances granted based on Congress's assertion of a mistaken identity defense, the trial court was referring to statements made by defense counsel after Congress requested representation. Congress's right to self-representation therefore was not implicated by this reference.

¶35 More importantly, as noted above, Congress has not carried his burden of showing prejudice. *See Henderson,* 210 Ariz.

561, ¶ 20, 115 P.3d at 607. Because he has failed to establish that fundamental, prejudicial error occurred, we reject his argument.

Disposition

¶36 For the foregoing reasons, we affirm Congress's conviction and sentence.