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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OF ARIZONA, Appellee, v. GENARO MAYORGA RODARTE III, Appellant.	2 CA-CR 2010-0126 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091947001

Honorable Clark W. Munger, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Genaro Mayorga Rodarte III appeals from his conviction and sentence for aggravated assault of a peace officer. He argues the trial court erred by denying his new trial motion based on the admission of improper testimony, that the indictment was duplicitous, and that he was sentenced improperly for a class five instead of a class six felony because the jury did not find the officer had been injured. We affirm.

¶2 We view the facts in the light most favorable to sustaining the verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In May 2009, a peace officer heard gunshots nearby and saw a car speeding away from the area. The officer followed the car into a neighborhood and saw Rodarte and another man get out of the car and run away. The officer attempted to detain Rodarte, telling him to stop, turn around, and show his hands, but Rodarte did not comply. When the officer used his baton in an effort to subdue Rodarte, Rodarte punched the officer in the face two or three times, injuring the officer. Rodarte was charged with aggravated assault of a peace officer, "resulting in . . . physical injury," and was convicted as charged after a two-day jury trial. The trial court sentenced him to a presumptive, five-year prison term.

¶3 Rodarte moved before trial to preclude, inter alia, evidence of shell casings found in the car. The trial court did not rule on the motion expressly, apparently because the state advised that it would present such evidence only if the defense "open[ed] the door," and Rodarte stated he found the state's position "satisfactory." But, on the second day of trial, a peace officer testified about finding those shell casings. Rodarte promptly objected and requested the court instruct the jury to disregard the testimony, which the court did. And the court reminded the jury before deliberations that it was to disregard

any stricken testimony. After trial, Rodarte filed a motion for a new trial arguing he had been prejudiced by the testimony. The court denied the motion.

¶4 Rodarte reurges on appeal that the officer's testimony was sufficiently prejudicial to warrant a new trial. "'Motions for new trial are disfavored and should be granted with great caution.'" *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996), *quoting State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). We review the denial of a motion for new trial for an abuse of discretion. *Id.* When improper testimony has been presented unexpectedly, the trial court should consider: "(1) whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993). The court has considerable discretion when deciding to fashion a remedy short of mistrial to cure unsolicited prejudicial testimony. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). We give great deference to the court's decision because it "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.*

¶5 Rodarte supports his argument with several cases in which the appellate court gave relief based on improper testimony concerning a defendant's misconduct unrelated to the charged crime. *See State v. Jacobs*, 94 Ariz. 211, 213-14, 382 P.2d 683, 685 (1963) (admission of photograph described as "mug shot" improper evidence of prior crime); *State v. Saenz*, 98 Ariz. 181, 183, 403 P.2d 280, 281 (1965) (testimony defendant admitted previously being charged with but acquitted of drug crime improper); *State v.*

Gallagher, 97 Ariz. 1, 7-8, 396 P.2d 241, 245 (1964) (testimony suggesting defendant previously had been in jail improper), *disapproved on other grounds by State v. Greenawalt*, 128 Ariz. 388, 395, 626 P.2d 118, 125 (1981). But, in contrast to the matter before us, in none of those cases did the trial court instruct the jury to disregard the improper testimony. And the evidence in those cases was substantially more prejudicial than the evidence here because it demonstrated the defendant previously had been arrested or charged with a crime. Here, the evidence at most suggested gunshots had been fired from a car Rodarte recently had occupied. The trial court did not abuse its discretion in using a curative instruction to prevent any prejudice, and we presume the jury followed the instruction.[1] *See State v. Jeffrey*, 203 Ariz. 111, ¶ 18, 50 P.3d 861, 865 (App. 2002) (jury presumed to follow instructions); *State v. Herrera*, 203 Ariz. 131, ¶¶ 7-8, 51 P.3d 353, 357 (App. 2002) (curative instruction sufficient to prevent prejudice from improper opinion testimony defendant drove while impaired); *State v. Schroeder*, 167 Ariz. 47, 50-51, 804 P.2d 776, 779-80 (App. 1990) (no prejudice when court promptly instructs jury to disregard improper testimony concerning credibility of victim).

¶6 Rodarte next argues the indictment was duplicitous because it did not specify which subsection of A.R.S. § 13-1203(A) formed the basis for his aggravated assault of a peace officer under A.R.S. § 13-1204(A)(8).[2] *See State v. Anderson*, 210

[1]Because we find no error, we need not address the state's argument that Rodarte invited any error by acquiescing to the trial court's curative instruction instead of immediately requesting a mistrial.

[2]The aggravated assault statute was amended in 2010. *See* 2010 Ariz. Sess. Laws, ch. 97, § 1 and ch. 276, § 2. We refer in this decision to the version of the statute in

Ariz. 327, ¶ 13, 111 P.3d 369, 377 (2005) (indictment duplicitous "if it charges more than one crime in the same count" of indictment); *State v. Sanders*, 205 Ariz. 208, ¶ 44, 68 P.3d 434, 444-45 (App. 2003) (state must inform defendant of specific subsection of assault statute forming basis for charge); *accord In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App. 2006). "Duplicitous indictments are prohibited because they fail to give adequate notice of the charge to be defended, present the potential of a non-unanimous jury verdict, and make a precise pleading of prior jeopardy impossible in the event of a later prosecution." *Anderson*, 210 Ariz. 327, ¶ 13, 111 P.3d at 377.

¶7 Rodarte acknowledges he did not raise this argument below and therefore has forfeited this claim absent fundamental, prejudicial error. *See State v. Paredes-Solano*, 223 Ariz. 284, ¶¶ 6-8, 222 P.3d 900, 903-04 (App. 2009) (objection to indictment must be raised twenty days before trial or defendant forfeits all but fundamental, prejudicial error). The indictment alleged Rodarte had committed aggravated assault of a peace officer, "resulting in any physical injury," and cited § 13-1204(A)(8). Although the indictment did not cite the assault statute, its reference to physical injury could be construed as a reference to § 13-1203(A)(1), which states a person commits assault by "[i]ntentionally, knowingly or recklessly causing any physical injury to another person." But the indictment's reference to physical injury tracks the language of § 13-1204(C), providing that aggravated assault of a peace officer "resulting in any physical injury" is a class five rather than a class six felony. *See also* § 13-1204(B). And, any lack of clarity

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effect at the time Rodarte committed his offense. 2008 Ariz. Sess. Laws, ch. 301, § 52 and ch. 179, § 1.

in the indictment arguably was exacerbated by the assault instruction given the jury, which stated the jury could find assault based on any of the three subsections of § 13-1203(A). *See Paredes-Solano*, 223 Ariz. 284, ¶ 18, 222 P.3d at 906-07 (risk of non-unanimous jury verdict exacerbated by jury instructions and state's closing argument); Ariz. Const. art. II, § 23 (requiring unanimous verdict); *cf. State v. Rivera*, No. 2 CA-CR 2010-0176, ¶¶ 5-8, 2011 WL 242736 (Ariz. Ct. App. Jan. 27, 2011) (jury instruction cannot materially amend indictment).

¶8 Although the indictment is not a model of clarity, Rodarte does not argue, and the record does not suggest, he lacked sufficient notice his aggravated assault charge was based on assault under § 13-1203(A)(1). *See State v. Freeney*, 223 Ariz. 110, ¶ 29, 219 P.3d 1039, 1044 (2009) ("touchstone of the Sixth Amendment notice requirement is whether the defendant had actual notice of the charge, from either the indictment or other sources"). Nor does Rodarte argue the indictment is insufficient to permit him to plead prior jeopardy effectively in the event of additional prosecution.

¶9 Moreover, we see no reasonable risk the jury's verdict lacked unanimity. The state maintained during its closing argument that the basis for the assault was that Rodarte intentionally, knowingly, or recklessly had injured the officer. It did not mention any other basis for the jury to find assault as a predicate for aggravated assault on a peace officer. Nor did Rodarte address any other basis in his closing argument. In these circumstances, any theoretical risk of a non-unanimous verdict that might have been caused by the indictment and the jury being instructed on § 13-1203(A)(2) and (3) was eliminated. *See State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App. 1993)

(no prejudice based on possibility of non-unanimous jury verdict when state clearly delineated during closing arguments what specific conduct constituted offenses charged in separate counts); *see also Paredes-Solano*, 223 Ariz. 284, ¶ 18, 222 P.3d at 906-07. Thus, Rodarte has not demonstrated he was prejudiced by any error in the indictment or the court's instructions to the jury.[3]

¶10 In a related argument, Rodarte argues he should have been sentenced for a class six instead of a class five felony because the jury did not determine the officer had been injured. *See* § 13-1204(B), (C). He reasons that, because the jury was instructed it could conclude he had committed assault based on any of the three subsections of § 13-1203(A), the jury did not necessarily conclude the officer had been injured. Again, Rodarte did not raise this claim below, limiting our review to fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). As we have explained, there is no reasonable possibility that Rodarte's conviction was based on anything other than § 13-1203(A)(1) and § 13-1204(A)(8), which required the jury to find

[3]To the extent Rodarte argues the charge was duplicitous and further created the danger of a nonunanimous verdict, he likewise has failed to meet his burden of demonstrating fundamental, prejudicial error. A duplicitous charge occurs "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). In that situation, "the trial court is normally obliged to take one of two remedial measures to insure that the defendant receives a unanimous jury verdict" by either requiring the state to elect the act it alleges constituted the crime or instructing the jury that all of its members must agree unanimously on which specific act constituted the crime in order to find guilt. *Id.* ¶ 14. Here, because during closing argument the state elected the act that formed the basis of the assault, Rodarte has failed to demonstrate he was subjected to the danger of a nonunanimous verdict. *See id.*

the officer had been physically injured. Accordingly, the trial court properly sentenced Rodarte based on his having committed a class five felony.

¶11 We affirm Rodarte's conviction and sentence for aggravated assault.

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

CONCURRING:

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

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