FILED BY CLERK
OCT 24 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MAXAMILLANO SOLANO PAREDES, Appellant.	2 CA-CR 2010-0286 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091212001

Honorable Clark W. Munger, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Maxamillano Solano Paredes was convicted of second-degree murder as an accomplice and sentenced to a presumptive prison term of sixteen years. On appeal, Solano Paredes argues the trial court erred by giving incorrect

jury instructions, failing to allow him to argue based on a new jury instruction, and reconsidering a previous ruling on the admission of a recording. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Solano Paredes and his codefendant, Stewart, attacked a third man, Q. Q. was stabbed several times, including in his back. Paramedics took Q. to the hospital, where he died shortly thereafter.

¶3 Police officers arrested Solano Paredes and Stewart and charged both with first-degree murder. The trial court granted their motions to sever their trials. Because the jury was unable to reach a verdict at the end of Solano Paredes's first trial, the court declared a mistrial. The parties then stipulated to the dismissal of the premeditated, first-degree murder charge. After a second trial, the jury found Solano Paredes guilty of second-degree murder and all jurors found that he committed the offense as an accomplice. Solano Paredes was sentenced as stated above and this appeal followed.

Jury Instructions

First Accomplice-Liability Instruction

¶4 Solano Paredes argues the trial court erred in its first jury instruction on accomplice liability because the instruction included language concerning foreseeability, which was inapplicable to his case and was added to the statute after the offense. He

contends that including language from the later-revised statute violated ex post facto provisions of the United States and Arizona Constitutions.

¶5 However, as Solano Paredes admits, before deliberations, the trial court gave a new jury instruction on accomplice liability without the foreseeability language. And the court instructed the jury to "discard the original [instruction] and utilize only the Court's Amended Instruction." Because we presume the jury followed the court's instruction, *State v. Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d 91, 103 (2007), any error was harmless, *see State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998) ("Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict.").

Second Accomplice-Liability Instruction

¶6 Solano Paredes also argues the trial court erred in giving the second jury instruction on accomplice liability because the instruction "omitted the requirement that the accomplice have the mental state required to commit the offense." He focuses on the mental state required by A.R.S. § 13-303(B) as applied to an accomplice defined under A.R.S. § 13-301(2): agreeing or attempting to aid or actually aiding another in the commission of an offense.

¶7 To preserve an argument for review, the defendant must make sufficient argument to allow the trial court to rule on the issue. *State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). As Solano Paredes concedes, he did not object to content of the instruction and therefore has forfeited the right to seek relief for all but

fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court forfeits all but fundamental error). Fundamental error requires the defendant to establish that: (1) an error occurred; (2) the error was fundamental; and (3) the error resulted in prejudice. *See id.* ¶¶ 19-20. "With regard to jury instructions, fundamental error occurs 'when the trial judge fails to instruct upon matters vital to a proper consideration of the evidence.'" *State v. Edmisten*, 220 Ariz. 517, ¶ 11, 207 P.3d 770, 775 (App. 2009), *quoting State v. Laughter*, 128 Ariz. 264, 267, 625 P.2d 327, 330 (App. 1980). And only "'rarely will an improperly given instruction justify reversal of a criminal conviction when no objection has been made in the trial court.'" *State v. Gomez*, 211 Ariz. 494, ¶ 20, 123 P.3d 1131, 1136 (2005), *quoting State v. Van Adams*, 194 Ariz. 408, ¶ 17, 984 P.2d 16, 23 (1999).

¶8 Solano Paredes was convicted of second-degree murder as an accomplice under A.R.S. §§ 13-303 and 13-1104. Second-degree murder may be committed intentionally, knowingly or recklessly. § 13-1104. At the time of the offense, § 13-303, as relevant here, provided for accomplice liability as follows:

> A. A person is criminally accountable for the conduct of another if:
>
> . . . .
>
> 3. The person is an accomplice of such other person in the commission of an offense.
>
> B. If causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense if:

> 1. The person solicits or commands another person to engage in the conduct causing such result; or
>
> 2. The person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result.

1980 Ariz. Sess. Laws, ch. 229, § 4; *see also* 2008 Ariz. Sess. Laws, ch. 296, § 1. Section 13-301 defines accomplice as:

> a person, . . . who with the intent to promote or facilitate the commission of an offense:
>
> 1. Solicits or commands another person to commit the offense; or
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense.
>
> 3. Provides means or opportunity to another person to commit the offense.

1977 Ariz. Sess. Laws, ch. 142, § 43; *see also* 2008 Ariz. Sess. Laws, ch. 296, § 1.

¶9 The jury instructions given here tracked the language of § 13-303(A)(3) and stated that a person could be held criminally liable if that person acted as an accomplice in the commission of an offense. The instructions defined an accomplice as a

> person who, with the intent to promote or facilitate the commission of an offense:
>
> 1. solicits or commands another person to commit the offense; or
>
> 2. aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense; or
>
> 3. provides the means or opportunity to another person to commit the offense.

The instructions further stated that criminal liability "requires only proof of intent to promote or facilitate the conduct of another rather than proof of intent to promote or facilitate some unintended result of the conduct."

¶10 Solano Paredes contends the trial court committed fundamental error because second-degree murder is a crime which includes a result as an element of the offense and the instructions did not require the jury find, under § 13-303(B), that he acted at least recklessly with regard to the result, Q.'s death. The state agrees that Solano Paredes was required to have the mental state required by § 13-303(B), but contends any error was not fundamental.[1]

¶11 The instructions required the jury find Solano Paredes had "the intent to promote or facilitate the commission of an offense" and specified this "require[d] only proof of intent to promote or facilitate the conduct." The only charged offense in this case is the killing of Q. and the undisputed evidence showed Q. was killed by stabbing. Therefore, the trial court effectively instructed the jury that it must find Solano Paredes had the intent to promote or facilitate the conduct of stabbing Q. in order to find him guilty as an accomplice. Aiding the stabbing shows at least a reckless indifference to human life under § 13-1104(A)(3), and would have subjected Solano Paredes to accomplice liability under § 13-303(B). *See State v. Garnica*, 209 Ariz. 96, ¶ 24, 98 P.3d 207, 212-13 (App. 2004) (giving clip of ammunition to shooter reckless when clear

[1]We need not decide whether § 13-303(A) and (B) provide alternative theories of accomplice liability or whether both apply to a crime which has a result as an element of the offense. Moreover, § 13-303(A) has been amended by the legislature since the commission of this offense. 2008 Ariz. Sess. Laws, ch. 296, § 1.

shooter would keep shooting). Therefore, the jury necessarily found the requisite elements for criminal liability under § 13-303(B), despite the lack of a specific instruction based on that statute, and additional instruction under § 13-303(B) was not vital to the jury's proper consideration of the evidence. *See Edmisten*, 220 Ariz. 517, ¶ 11, 207 P.3d at 775. Accordingly, any error was not fundamental. *See id.*

¶12 On appeal, Solano Paredes claims "he did not know a knife was involved" and that the jury could have found him guilty for intending to aid in a fistfight. But Solano Paredes never argued to the jury that he intended to be involved only in a fistfight or that he was unaware there was a knife. Instead, he maintained he was never involved in the fight at all. The jury obviously rejected this defense by convicting Solano Paredes. Therefore, the additional instruction under § 13-303(B) was not vital to the consideration of Solano Paredes's defense and was not fundamental error. *See Edmisten*, 220 Ariz. 517, ¶ 11, 207 P.3d at 775; *State v. Fullem*, 185 Ariz. 134, 139, 912 P.2d 1363, 1368 (App. 1995) (error in jury instruction not fundamental when defense theories did not put error at issue).

¶13 Solano Paredes further contends the trial court erred by instructing the jury that one method of being an accomplice was to "[p]rovide[] means or opportunity to another person to commit the offense." *See* § 13-301(3). He argues that because § 13-303(B) does not create criminal accountability for providing the means or opportunity to commit an offense, the court should not have instructed the jury that accomplice liability required only the intent to promote or facilitate the conduct as permitted under §§ 13-303(A) and 13-301. Because he did not object to the instruction in the trial court, we

again review for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶14 Solano Paredes fails to explain how, given the facts of this case, he could have provided the means or opportunity to Stewart to commit the offense but not aided or attempted to aid him. To aid means to help or assist. *The American Heritage Dictionary* 89 (2d college ed. 1991). Solano Paredes notes that the state argued he could have held Q. down, held Q.'s arms behind his back, or otherwise subdued Q. so that Stewart could stab him. But if Solano Paredes acted in any of these ways, he would have been helping or assisting Stewart in stabbing Q.

¶15 And, as we understand his argument, Solano Paredes also asserts that if he were present at the scene during the fight and gave Stewart the knife to stab Q., he would be providing the means for Stewart to commit the offense, but not aiding him. However, handing someone a deadly weapon under these circumstances plainly constitutes aiding the stabbing. *See Garnica*, 209 Ariz. 96, ¶ 24, 98 P.3d at 212-13. Thus, Solano Paredes does not identify any way he could have provided Stewart the means or opportunity to stab Q., but not aided or attempted to aid him. Thus, even if the trial court erred in giving this instruction, any error was not detrimental to Solano Paredes's defense and does not constitute fundamental error.

Closing Argument on Jury Instructions

¶16 Solano Paredes also argues the trial court erred by failing to sua sponte permit him to make a second closing argument based on the second accomplice jury instruction. He contends the lack of a second closing deprived him of his right to due

process and right to counsel. But he concedes that he did not request additional closing argument at the appropriate time. Therefore, we review for fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶17 In *State v. Govan*, 154 Ariz. 611, 612-13, 744 P.2d 712, 713-14 (App. 1987), the trial court instructed the jury on self-defense, but used an instruction that had previously been found to be fundamental error. This court held it was not error for the trial court to have called the jury back after it had reached a verdict, given a new self-defense instruction and, without argument by counsel, sent the jury to deliberate again with the new instruction. *Govan*, 154 Ariz. at 614, 744 P.2d at 715. If giving an additional instruction after the jury had reached a verdict without providing an opportunity for further argument was not error, not sua sponte allowing argument here could not have been fundamental error.

¶18 And Solano Paredes cites no controlling authority supporting the proposition that a defendant is entitled to additional argument after a revised jury instruction. Instead, he cites to cases that generally support the importance of closing argument.[2] But counsel for Solano Paredes gave a closing argument.

¶19 Additionally, the first accomplice instruction allowed Solano Paredes to be held accountable for "reasonably foreseeable consequences" of the acts he intentionally aided. That language was removed from the second instruction, which only permitted the

[2]Solano Paredes also relies on several Texas cases, which he concedes are based on a provision of the Texas criminal code. As Solano Paredes also concedes the provision "does not appear to have an analogue in Arizona law," these cases are inapposite.

jury to find Solano Paredes accountable for offenses he intended to aid. Thus, the second instruction was more favorable to Solano Paredes, as he acknowledges. His closing argument that he could not have been held liable under the less favorable first instruction was equally applicable to the more favorable second instruction. Therefore, he has not met his burden of showing any error was fundamental or prejudicial. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶20 Moreover, the additional language concerning intent to aid the conduct rather than the result was included to correct Solano Paredes's misstatement of the law during closing argument in that regard. We cannot find that the trial court fundamentally erred by failing to sua sponte give Solano Paredes additional closing argument. *See Govan*, 154 Ariz. at 614, 744 P.2d at 715.

Admissibility of Evidence

¶21 Last, Solano Paredes contends that the trial court abused its discretion by admitting a recording of a witness's 9-1-1 call reporting that Q. had been stabbed. Solano Paredes argues the court improperly reconsidered the admissibility of the call, because it had been decided at the first trial and no good cause existed to reconsider it.

¶22 We review a trial court's reconsideration of an earlier ruling under Rule 16.1(d), Ariz. R. Crim. P., for an abuse of discretion. *State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994). Nonetheless, we "'will not reverse a conviction if an error is clearly harmless.'" *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). "Error is

harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict." *Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176.

¶23 The trial court redacted the portion of the recording where the witness said two people had attacked Q. And, on appeal, Solano Paredes does not object to any statements in the recording but argues only that the recording was "highly emotional." However, in the recording, the witness calmly reports that Q. had been stabbed and in a level tone reports their location. The call does not contain any relevant facts that were not admitted otherwise. Because we cannot find that a recording of unobjectionable statements, made in a level tone, and cumulative to other evidence contributed to the verdict, any error was harmless. *See id*.

Conclusion

¶24 For the foregoing reasons, we affirm Solano Paredes'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