

**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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JUL 21 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0323
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
TIMOTHY FRANK SHOULTS,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094816001

Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex D. Heveri

Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 Following a jury trial, appellant Timothy Shoults was convicted of four counts of aggravated assault of a peace officer, three counts without physical injury and one count with physical injury.¹ The trial court sentenced him to concurrent prison terms, the longest of which is five years.² On appeal, Shoults claims that the verdicts were multiplicitous—even though the charges were not—and argues that two of the four verdicts should therefore be vacated. We affirm.

¶2 “On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant.” *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). In December 2009, Pima County Deputies Weeks and Villanueva observed the vehicle Shoults was driving had stopped in front of a driveway, both obstructing the driveway and “blocking [the] entire lane” of traffic onto the street. The vehicle then continued into a trailer park and ultimately stopped. The officers, who were in uniform, activated the “take down” lights on their patrol vehicle, got out to investigate, and identified themselves as sheriff’s deputies. Shoults began yelling at Villanueva, opened his jacket and reached for something inside, then began backing up and reaching for his waistband. Weeks then drew his gun. Villanueva ran toward Shoults, who grabbed Villanueva’s sleeve, and a struggle ensued. Both officers and Shoults began fighting on the ground, after which Shoults briefly broke free. Weeks

¹Shoults incorrectly suggests the jury did not find him guilty of having caused any physical injury.

²Shoults also incorrectly states “the court imposed concurrent 3.75 year prison terms for all counts.”

unsuccessfully attempted to subdue Shoults with his taser gun, and Shoults began striking Villanueva in the head and “push[ed him] on to the vehicle.” Villanueva testified he was not injured after Shoults struck him in the head and pushed him. After Villanueva subdued Shoults temporarily with his taser, Shoults began kicking at him, and ultimately kicked Weeks’s right leg, causing “the ligament between [his] knee and the muscle on [his] leg [to become] inflamed and irritated.” Shoults then began throwing rocks and gravel at Weeks. Weeks testified that, although he experienced an eye infection “right after” the incident with Shoults, he was not sure it was caused by the rocks and dirt Shoults had thrown at him.

¶3 Shoults was charged with four counts of aggravated assault of a police officer: two counts alleged he caused physical injury to Weeks; one count alleged he caused physical injury to Villanueva; and one count alleged aggravated assault without physical injury to Villanueva. The jury found Shoults guilty of one count of aggravated assault causing physical injury to Weeks, one count each of the lesser-included offense of aggravated assault without injury to Weeks and Villanueva, and one count of aggravated assault to Villanueva without injury.

¶4 Shoults acknowledges that, because he did not raise the argument he raises on appeal below, he has forfeited this claim absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). ““To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.”” *State v. Paredes-Solano*, 223

Ariz. 284, ¶ 8, 222 P.3d 900, 904 (App. 2009), *quoting Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶5 Although Shoults concedes the indictment itself was not multiplicitous, he nonetheless contends that, because he “only committed two acts of assault upon two peace officers,” we should vacate two of his convictions. He argues that, “because two of the counts were aggravated assault charges where the victims were peace officers, and the other two counts alleged the offenses to be aggravated for causing temporary but substantial injuries,” the verdicts were, therefore, multiplicitous. In support of his argument, Shoults asserts “the evidence adduced at trial did not support convictions for causing temporary but substantial injury.”

¶6 Notably, however, the three counts of the indictment charging physical injury alleged that Shoults committed aggravated assault of a peace officer “resulting in any physical injury,” and not “temporary but substantial injuries,” as he asserts. Nor has Shoults directed us to any evidence in the record suggesting the state charged him with or intended to prove he had caused “temporary but substantial injuries.” We can only infer that Shoults mistakenly is referring to A.R.S. § 13-1204(A)(3), a portion of the aggravated assault statute that mentions “temporary but substantial” injuries.³ Nor does it

³The 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 effect at the time Shoults committed his offenses. *See* 2008 Ariz. Sess. Laws, ch. 301, § 52 and ch. 179, § 1. Additionally, although the indictment cites A.R.S. § 13-1204(A)(5) (intentional assault after entering private home of another), on the counts alleging physical injury, no assault in a private home is implicated by the facts here. We therefore infer the intended reference was to § 13-1204(A)(8)(a), which elevates a simple assault committed under A.R.S. § 13-1203 to aggravated assault “[i]f the person commits

appear that either the state or Shoults referred to “temporary but substantial injuries” during opening statement or closing argument. Moreover, the court’s jury instructions on both the greater offense of aggravated assault with injury and the lesser-included offense without injury made no reference to “temporary but substantial injuries.”

¶7 In a less than clear argument, Shoults further contends that, because the evidence did not support a finding of “temporary but substantial injuries,” the jury “properly returned verdicts on the lesser included offenses for simple assault upon peace officers,” suggesting the jury did not find Shoults had caused any physical injury. We disagree for several reasons. First, as noted above, Shoults was not charged with having caused “temporary but substantial injuries.” Second, the jury did, in fact, find him guilty of having caused physical injury to Weeks.

¶8 Moreover, the convictions, which relate to four distinct acts, are not multiplicitous. *See Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004) (multiplicitous charges “charge a single offense in multiple counts”). The injury to Weeks’s knee supports a conviction for aggravated assault of a peace officer causing injury, a class five offense. *See* § 13-1204(A)(8)(a), (C). In addition, the following three incidents support the three convictions for aggravated assault of a peace officer without injury, class six offenses: throwing gravel and rocks at Weeks’s eyes; striking Villanueva’s head; and grabbing Villanueva’s shirt sleeve during the initial struggle with the officers. *See* § 13-1204(A)(8)(a), (B).

the assault knowing or having reason to know that the victim is . . . [a] peace officer . . . engaged in the execution of any official duties.”

¶9 Accordingly, because Shoults has failed to meet his burden of demonstrating fundamental, prejudicial error, we affirm.

/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