DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JOHN FLOYD CASTILLO, III, Appellant.	)	No. 1 CA-CR 11-0588 DEPARTMENT D MEMORANDUM DECISION (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201001133

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and
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Attorneys for Appellee

Mohave County Appellate Defender's Office — Kingman
by Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Defendant, John Floyd Castillo, III, timely appeals

from his conviction on one count of aggravated assault, a class 3 dangerous felony. He argues that: (1) insufficient evidence supports the finding that he intentionally or knowingly inflicted serious physical injury and/or the finding of dangerousness; (2) the guilty verdict was not unanimous; and (3) the court "refused" to weigh the mitigating factor that he had "family support" when it imposed an aggravated sentence. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the evidence in the light most favorable to sustaining the conviction and resolve all reasonable inferences in support of the verdict. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶3 The charge arises out of a fight that occurred in October 2010 in the parking lot of Buffalo Wild Wings in Bullhead City, Arizona. All of the individuals involved had been drinking for some time.

¶4 Castillo and his friend, Steven Prindle, followed the victim, Richard Huffines, into the parking lot so that Prindle could "confront" Huffines regarding the "nice shorts" comment he made to Prindle while inside Mad Dogs, a nearby bar. When confronted, Huffines was in the parking lot with his friends Harold Pinkard, Amanda Scott, and Ivanna McFaul. During the confrontation, Castillo allegedly made the comment, "I didn't

like the way you disrespected my friend."

¶5 McFaul and Pinkard attempted to deflect Prindle and persuade him and Castillo to leave, but Prindle engaged in a shouting match with McFaul and assaulted Pinkard. Huffines and Scott got into Scott's vehicle but could not leave because her vehicle was blocked. At some point, Huffines exited the vehicle because he was concerned that his friends were defending him and he "wanted to get out to defend himself." Scott remained in her car, found her telephone, dialed 9-1-1, gave the police their location, and then exited the car.

¶6 What happened after Huffines got out of Scott's car was highly contested at trial. Pinkard testified that he saw "an arm" connecting with Huffines's face "with one punch, [a] direct mouth nose face hit," after which Huffines "went down real slow and fell and hit his head." According to Pinkard, Huffines "fell like a tree" and went "straight back." Pinkard heard Huffines's "head hit the ground" and then "heard him snoring." Pinkard saw "some kind of kicking" somewhere in the "upper area" of Huffines's body, but he could not tell "who was kicking who, or who punched who" because he himself was being hit at the time.

¶7 McFaul testified that she saw Huffines, already on the ground, "being kicked in the head" by Castillo. McFaul, however, admitted that she mistakenly wrote in a statement for

police that she saw somebody hit or kick Pinkard in the head. She also admitted to incorrectly describing Prindle to police as "being Hispanic" and at some point also incorrectly describing the person who kicked Huffines as "the thin one."

¶8 Prindle testified that, while he was engaged with Pinkard, he saw Huffines get out of the truck and walk toward Castillo. Prindle saw Castillo punch Huffines only once, "in the nose/mouth area," and then he saw Huffines "hit the ground" and start "snoring . . . like somebody in a deep sleep." At that point, Prindle stopped "observing" the actions taken between Castillo and Huffines.

¶9 Castillo testified that Huffines suddenly ran up to him "with his hands raised," and he was "caught . . . off guard" and very scared because Huffines was "a big guy" coming at him "at a very fast pace." There was no doubt in his mind that Huffines intended to assault him. Huffines never hit Castillo, but Castillo "punched [Huffines] once, maybe twice, maybe three times" and then Huffines "hit the ground." He categorically denied kicking Huffines in the head and also denied having any intention to "hurt" him.

¶10 After undergoing several medical interventions, Huffines died of blunt force trauma to the head. He suffered multiple lacerations or contusions of the nose, mouth, lips, eyelids, and right temporal area, as well as a fracture of the

skull. He also suffered a subdural hemorrhage, which occurs when a "severe force" causes the brain to move in a different rotation from the dura, the membrane attached to the brain with blood vessels, causing the blood vessels connecting the two to tear. The coroner opined that the injuries to Huffines's skull could have been caused by being hit by a punch and subsequently hitting his head on the ground with a great deal of momentum or by a kick to the head.

¶11 The State charged Castillo with two counts of second-degree murder and one count of aggravated assault.[1] A jury found Castillo guilty of aggravated assault and acquitted him of the two murder charges.[2] In a separate finding, the jury found that the aggravated assault was a dangerous offense.

¶12 After the State's evidence was presented at trial, Castillo moved for a directed verdict, which was denied. Castillo later filed a motion for new trial in which he argued that the guilty verdict should be set aside because insufficient evidence supported the jury's finding of "serious physical injury." At trial, Castillo testified that he punched the victim in self defense and he denied having kicked him. Castillo argued in his motion that the jury "must have found the

[1] A second count of aggravated assault and a count of aggravated robbery were dismissed before trial.

[2] The court instructed the jury on the lesser included offense of manslaughter, which the jury also rejected.

self defense justification . . . persuasive on the blows from [Castillo's] fists" and that, once that evidence was removed, "the jury was left with no further evidence . . . regarding the element of 'serious physical injury' to another," given "the complete lack of evidence substantiating that there was any injury suffered by Mr. Huffines from the alleged kick he received." The trial court denied the motion.

¶13 In exchange for the State withdrawing allegations that the victim's family suffered financial harm and that Castillo committed the crime out of malice based on his perception of the victim's sexual orientation, Castillo stipulated to the aggravating factor that the victim's family suffered emotional harm. The court sentenced Castillo to an aggravated prison term of 14 years.

¶14 Castillo timely appeals, and we have jurisdiction in this matter pursuant to Arizona Constitution Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).[3]

DISCUSSION

Sufficiency of the Evidence

¶15 The State charged Castillo with aggravated assault as a dangerous offense by intentionally or knowingly causing

[3] We cite to the current versions of the statutes when no revisions material to this decision have occurred since the date of the alleged offenses.

serious physical injury to the victim. A.R.S. § 13-1204(A)(1) (Supp. 2012). Castillo argues that there is insufficient evidence to support the jury's finding that he acted "intentionally or knowingly" or the finding that he caused a "serious physical injury." He maintains that the evidence at trial only supports a finding that he "landed a serious punch in the victim's face, causing facial injuries, and causing [the victim] (who was extremely intoxicated as well) to fall straight backwards, hitting his head," which eventually caused "the brain injury and bleeding which caused death." He contends that there is "no evidence" to show that he acted "more than recklessly" because no evidence shows that he "intended or knew that he could cause such [a serious injury] with one punch." He maintains that, at best, the evidence only supports a finding that he may have acted "recklessly."

¶16 We review a trial court's denial of a motion for a judgment of acquittal for an abuse of discretion. *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.2d 280, 282 (App. 2009) (citation omitted). "In conducting our review, we view the facts in the light most favorable to upholding the jury's verdict." *State v. Alvarado*, 219 Ariz. 540, 542, ¶ 7, 200 P.3d 1037, 1039 (App. 2008) (citation omitted). Our review is limited, however, to determining whether "substantial evidence" supports the jury's verdict. *State v. Stroud*, 209 Ariz. 410,

411, ¶ 6, 103 P.3d 912, 913 (2005).

¶17 "Substantial evidence is proof that 'reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Bearup*, 221 Ariz. 163, 167, ¶ 16, 211 P.3d 684, 688 (2009) (citation omitted). Evidence is no less substantial simply because the testimony is conflicting or reasonable persons may draw different conclusions from it. *State v. Mercer*, 13 Ariz. App. 1, 2, 473 P.2d 803, 804 (1970). If reasonable persons may fairly differ concerning whether certain evidence establishes a fact in issue, that evidence must be considered as "substantial." *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87, 84 P.3d 456, 477 (2004) (citation omitted). Furthermore, direct and circumstantial evidence have equal probative worth. *State v. Pettit*, 194 Ariz 192, 197, ¶ 23, 979 P.2d 5, 10 (App. 1998) (quoting *Lohse v. Faultner*, 176 Ariz. 253, 259, 860 P.2d 1306, 1312 (App. 1992)).

¶18 Consequently, reversible error based on insufficiency of the evidence occurs only if there is a complete absence of probative facts to support the conviction. *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citing *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there

sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶19 A person acts "intentionally" if, "with respect to a result or to conduct described by a statute defining an offense, that person's objective is to cause that result or to engage in that conduct." A.R.S. § 13-105(10)(a) (Supp. 2012). A person acts "knowingly" if, "with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists." A.R.S. § 13-105(10)(b). A "'[s]erious physical injury' includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(39).

¶20 "Criminal intent, being a state of mind, is shown by circumstantial evidence. [A defendant's] conduct and comments are evidence of his state of mind." *Bearup*, 221 Ariz. at 167, ¶ 16, 211 P.3d at 688 (quoting *State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983)). A jury may infer state of mind from a defendant's behavior at or near time of offense. *State v. Greene*, 192 Ariz. 431, 440, ¶ 39, 967 P.2d 106, 115 (1998). Furthermore, when a defendant elects to proceed with his case

after losing a motion for directed verdict, as Castillo did here, his own testimony, as well as the testimony of any other defense witness, may cure any deficiencies in the State's case; and this court considers all such evidence on appeal when determining the sufficiency of the evidence. *State v. Eastlack*, 180 Ariz. 243, 258-59, 883 P.2d 999, 1014-15 (1994).

¶21 Substantial evidence supports the jury's finding that Castillo committed aggravated assault as a dangerous offense by intentionally or knowingly causing "serious physical injury" to Huffines by punching Huffines in the face multiple times with sufficient force that Huffines fell backward to the ground and hit his head. *See* A.R.S. § 13-1204(A)(1). Prindle testified that he "told" Castillo that he wanted to go over and contact Huffines specifically to "confront" Huffines about his comment. Castillo admitted he knew Prindle was going to "confront" Huffines and he voluntarily followed Prindle across the parking lot to where Huffines and the others were preparing to leave in their vehicles. Although Castillo maintained that he just stood by and never intended to get involved, Scott testified that, when he and Prindle approached them, Castillo stated, "I didn't like the way you disrespected my friend." Pinkard testified that when he asked Castillo if he had walked "all the way over here just to start crap with us," Castillo replied, "yeah" or "yep."

¶22 Castillo argues on appeal that "no evidence" established that he intended or knew "one punch" would cause a serious physical injury. Uncontradicted evidence established that Huffines was punched directly in the face – "nose/mouth area." Pinkard and Prindle only observed one punch to Huffines's face because they were engaged in their own scuffles at the time. Castillo's own testimony established, however, that he actually punched Huffines "once, maybe twice, maybe three times," within the space of "a couple seconds," which immediately caused Huffines to hit the ground unconscious. His testimony alone that he punched the victim in the face repeatedly and in rapid succession supports the jury's finding that Castillo either intended or knew that his conduct would cause a serious physical injury.

¶23 Additionally, Pinkard testified that the punch he observed caused the victim to fall straight back with his "head tilted back" and that he actually "heard" Huffines's "head hit the ground." The medical examiner testified that the type of brain injuries Huffines suffered required "a greater force than just simply standing and falling, as if fainting;" however, the injury could be caused when there has been "enough momentum transferred from the punch to the person" that it "put that energy into the head as it hit the ground." Thus, according to the medical examiner, the momentum driven into the victim by

punching alone, which then caused him to fall back and hit his head, could have contributed to the fracture of his skull. This evidence coupled with Castillo's testimony support's the jury's conclusion that Castillo intended or knew that his conduct would cause serious physical injury.

¶24 Castillo argues that "[f]ists alone are not dangerous instruments," but that argument is not relevant in this case because the State did not allege that Castillo committed aggravated assault with the use of a "deadly weapon or dangerous instrument." A.R.S. § 13-1204(A)(2). An aggravated assault committed using fists is still "dangerous" if the evidence shows that victim suffered "serious physical injury." A.R.S. 12-1204(A)(1).

¶25 Sufficient evidence supports the jury's guilty verdict and its finding that the assault was a dangerous offense. The trial court therefore did not abuse its discretion when it denied Castillo's post-verdict motion for judgment of acquittal.

Non-Unanimous Guilty Verdict

¶26 Castillo next argues that "[t]he court's failure to require the jury to elect whether it was a punch or kick that caused serious physical injury and death created a real risk of a non-unanimous verdict and fundamental error" that requires our reversal of his conviction. He also argues that, as in *State v. Klokic*, 219 Ariz. 241, 243, ¶ 10, 196 P.3d 844, 846 (App. 2008),

the aggravated assault charge was "duplicitous" because there was "never any clear indication which underlying act of assault supported aggravated assault." These arguments are unpersuasive.

¶27 Initially we note that Castillo concedes that he did not raise these arguments before the trial court and that our review is limited to fundamental error review. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). The onus is on Castillo to establish that fundamental error exists and that the error caused him prejudice. *Id*. at 567, ¶ 20, 115 P.3d at 607.

¶28 Although a defendant has the right to a unanimous jury verdict in a criminal case, Ariz. Const. art. 2, § 23, the jury is not required to unanimously agree upon the precise manner by which the defendant committed the charged offense. *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982); *State v. Cotton*, 228 Ariz. 105, 108, ¶ 5, 263 P.3d 654, 657 (App. 2011).

¶29 A "duplicitous charge" exists "when the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Paredes-Solano*, 223 Ariz. 284, 287, ¶ 4, 222 P.3d 900, 903 (App. 2009) (citation omitted). A duplicitous charge implicates a defendant's right to a unanimous verdict and constitutes fundamental error. *State v. Davis*, 206 Ariz. 377, 390, ¶¶ 63-64, 79 P.3d 64, 77 (2003). Therefore, when a duplicitous charge

is submitted to a jury, upon request by the accused, the trial court must take cautionary methods to ensure a unanimous verdict, such as requiring the State to elect which act it alleges constitutes the crime or instructing the jury that it must unanimously agree on which act constitutes the crime in finding the defendant guilty. *Klokic*, 219 Ariz. at 244, ¶ 14, 196 P.3d at 847.

¶30 The record is clear that Castillo knew from the beginning that the State would introduce evidence that he both punched and kicked Huffines and also knew that the State's theory was that the punch constituted the basis for the aggravated assault and the kick constituted the basis for the second-degree murder charges. Both the prosecutor and Castillo referred to the "kick" in their opening argument as the act that "caused" or "resulted in" the victim's death.

¶31 Likewise, in closing argument the prosecutor argued the kick as the basis of the two murder charges as well as the lesser-included manslaughter charge. In contrast, when arguing the aggravated assault charge, the prosecutor stated:

> We know that John Castillo intentionally struck Richard Huffines with his fist. Even with just his fist, even if you believe the defense case that he struck him with his fist, we know he did it on purpose, so he did it intentionally; and we know that John Castillo caused serious physical injury to [Richard] Huffines because he died . . . . so minus self-defense, John Castillo

> committed aggravated assault and he did so intentionally. So John Castillo did commit aggravated assault against Richard Huffines.

¶32 Furthermore, defense counsel acknowledged that the kick was the sole basis for the murder charges when he argued in his closing argument:

> We contend that the [S]tate has been unable to prove that a kick caused any damage. There was no evidence of damage; there was no information provided to you about what that kick did, as opposed to the hit and fall. Without that, they can't get beyond where they want to go, *because that kick is their murder case.* It's not John Castillo defending himself. They want to say that kick is their murder case, that he shouldn't have done that; and we say there's no evidence that he did that.

(Emphasis added.)

¶33 From our review of the record, it is clear that the State offered the evidence of Castillo's punch or punches to the victim's face as proof of the aggravated assault charge in this case and that, in contrast, the evidence of the kick formed the basis for the murder charges.[4] This is consistent with the jury's verdicts acquitting Castillo of the murder and manslaughter charges while finding him guilty of the aggravated

[4] This case is therefore distinguishable from *Klokic* where the State introduced "separate facts surrounding the two alleged acts of assault" in support of one count of aggravated assault against a single victim. 219 Ariz. at 247, ¶¶ 29-30, 196 P.3d at 850. Here, the only evidence the State introduced and argued regarding the aggravated assault was the evidence that defendant had punched Huffines in the face.

assault. Under these circumstances, the charge was not duplicitous and we do not agree that the jury's verdict in this case was non-unanimous. Castillo therefore fails to meet his burden of showing that the trial committed any error, let alone fundamental error, because it did not *sua sponte* require a special verdict on this charge.[5]

Consideration of Mitigating Factors

¶34 Castillo further contends that the trial court abused its discretion "when it refused to weigh the mitigating factor of [Castillo's] family support, that it conceded had been proven," along with the mitigating factor of "no prior felony convictions" when the court imposed an aggravated sentence that was "one year shy" of the maximum. Castillo did not raise this issue before the trial court. He has therefore waived it on appeal, unless he can prove that fundamental error occurred and that the error in his case caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. "Imposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203

[5] Castillo also complains that the indictment failed to specify which action supported the murder counts and that the indictment was therefore duplicitous. By failing to raise any challenge to the indictment before trial, defendant has waived any objection regarding those counts or a duplicitous indictment. *State v. Anderson*, 210 Ariz. 327, 336, ¶¶ 17-18, 111 P.3d 369, 378 (2005); Ariz. R. Crim. P. 13.5(e), 16.1(b), (c). In any event, Castillo's claims are unavailing because, as stated above, it is clear from the trial record that the kick was the basis for the homicide charges.

Ariz. 339, 340, ¶ 4, 54 P.2d 368, 369 (App. 2002). Our review of the record reveals that Castillo cannot prove that any error, let alone fundamental error, occurred.

¶35 As long as a jury finds or a defendant admits at least one statutorily enumerated aggravating circumstance, a trial court may impose up to a maximum sentence provided for by the legislature. A.R.S. § 13-701(C) (Supp. 2012); *State v. Brown*, 212 Ariz. 225, 231, ¶ 28, 129 P.3d 947, 953 (2006). "Provided the trial court fully considers the factors relevant to imposing sentence, we will generally find no abuse of discretion." *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003). Furthermore, the weight to be given any factor asserted in mitigation is well within the sound discretion of the trial court. *Id*. Thus, although a trial court is required to consider all the relevant mitigating factors, the court is not required to find that they outweigh the relevant aggravating factor or factors.

¶36 It is clear the trial court here considered the mitigating factor of "family support" when deciding the sentence to impose. Prior to sentencing Castillo, the court heard defense counsel's arguments regarding the mitigating factors, which were Castillo's "lack of any felony criminal record" and his "family support," as well as statements from five members of Castillo's family. As Castillo points out, the court stated

that it was "clear" Castillo had "significant family support." The court also stated it had considered, among other things, "every letter that was submitted by anybody in connection with this case . . . [the] presentence report . . . [and] everything that has been presented by anyone that has spoken at this hearing."

¶37 Contrary to Castillo's contentions, the trial court did not "reject" the mitigating factor in sentencing him. It appears instead the court simply found that both it and the lack of a criminal record were outweighed by the weight of the aggravating factor of "emotional harm" to the victim's family. This finding was well within the trial court's discretion and did not constitute error.

CONCLUSION

¶38 For the foregoing reasons, we affirm Castillo's conviction and sentence.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Judge

_____/s/_____
ANDREW W. GOULD, Judge