

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MIGUEL MARTINEZ, *Appellant*.

No. 1 CA-CR 18-0120

FILED 11-15-2018

Appeal from the Superior Court in Maricopa County

No. CR2017-001748-001

The Honorable Ronda R. Fisk, Judge

AFFIRMED IN PART, VACATED IN PART AND REMANDED

COUNSEL

Arizona Attorney General's Office, Phoenix

By Vineet Mehta Shaw

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix

By Joel M. Glynn

Counsel for Appellant

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MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Maria Elena Cruz joined.

T H U M M A, Chief Judge:

¶1 This is a criminal case in which the State of Arizona agrees on appeal that two of the defendant's three convictions should be set aside as duplicitous. After a jury trial, Miguel Martinez was sentenced as a Category Two repetitive offender to concurrent presumptive 4.5 year prison terms for three convictions of aggravated assault – temporary disfigurement, Class 4 felonies, committed in November 2016. As the State notes on appeal, the trial evidence showed Martinez swung at the victim three times, with two punches connecting and with one punch likely causing all of the victim's injuries. This court has jurisdiction over Martinez' timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033(A)(2018).

¶2 Martinez argues his three convictions are multiplicitous. "Multiplicity occurs when an indictment charges a single offense in multiple counts . . . [and] raises the potential for multiple punishments, which implicates double jeopardy." *State v. Powers*, 200 Ariz. 123, 125 ¶ 5 (App. 2001). Martinez' opening brief makes a compelling argument that "[t]he indictment charged a single offense in three counts" and that the three convictions and resulting sentences (rather than one conviction and sentence) constitute fundamental error resulting in prejudice. *See generally State v. Escalante*, 245 Ariz. 135 (2018). Accordingly, Martinez asks that the convictions and sentences on Counts 2 and 3 be vacated.

¶3 The State confesses error, noting that, "[b]ased upon the State's theory of the case as set forth at trial, [the State] agrees that this was essentially a one-punch assault, and the resulting convictions were multiplicitous and that counts two and three should be merged into count one." *See generally Merlina v. Jejna*, 208 Ariz. 1 (App. 2004).

¶4 Having considered the parties' briefs and the relevant portions of the record, this court accepts the State's confession of error. As a result, (1) Martinez' convictions and sentences for Counts 2 and 3 are

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merged into Count 1; (2) the convictions and sentences for Counts 2 and three are vacated and (3) Martinez' conviction and sentence for Count 1 are affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA