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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

JOVONTAE MARQUES SALINAS-RUSSELL, *Appellant*.

No. 1 CA-CR 19-0320
FILED 08-27-2020

Appeal from the Superior Court in Maricopa County
No. CR2018-001445-002
The Honorable Monica S. Garfinkel, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Brian Coffman
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jennifer Roach
Counsel for Appellant

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Cynthia J. Bailey joined.

CATTANI, Judge:

¶1 Jovontae Salinas-Russell appeals his conviction for misconduct involving weapons (prohibited possessor) and the resulting sentence. He asserts that his indictment and charge were duplicitous. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In January 2018, an undercover police officer saw Salinas-Russell get into an argument with another person. Salinas-Russell and someone else then got into a car and drove away, with Salinas-Russell driving. Salinas-Russell committed several traffic violations and was pulled over and arrested. Officers then searched the car and found two handguns—a revolver wedged in between the passenger seat and center console and a pistol in the passenger-side glove box.

¶3 Salinas-Russell was charged with one count of misconduct involving weapons. Specifically, the indictment alleged that Salinas-Russell “knowingly did possess handgun(s), deadly weapons, while being a prohibited possessor.”

¶4 After a six-day trial, the jury found Salinas-Russell guilty as charged, and he was sentenced to eight years’ imprisonment. Salinas-Russell timely appealed, and we have jurisdiction under A.R.S. § 13-4033(A).

DISCUSSION

¶5 Salinas-Russell argues that the indictment and charge were duplicitous and violated his right to a unanimous jury verdict. Because Salinas-Russell did not raise this objection in superior court, our review is limited to fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, 138, ¶ 1 (2018). To establish fundamental error, Salinas-Russell must show error that (1) went to the foundation of his case, (2) denied him a right essential to his defense, or (3) was so egregious as to deny the possibility of

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a fair trial. *See id.* at 142, ¶ 21. Under the first two prongs, he must also show prejudice. *Id.*

¶6 Arizona law requires that multiple offenses be charged in separate counts. *State v. Whitney*, 159 Ariz. 476, 480 (1989); *see also* Ariz. R. Crim. P. 13.3(a). A duplicitous indictment improperly “charges two or more distinct and separate offenses in a single count.” *State v. Klokic*, 219 Ariz. 241, 243, ¶ 10 (App. 2008) (citation omitted). “For an indictment to be duplicitous, the error must be apparent from the language of the charging document itself; it does not depend on the evidence admitted at trial.” *State v. Waller*, 235 Ariz. 479, 489, ¶ 31 (App. 2014).

¶7 Here, the indictment alleged that Salinas-Russell committed misconduct involving weapons by knowingly possessing “handgun(s).” Thus, it was not apparent from the face of the indictment whether the State intended to introduce evidence of one or both guns at trial, and Salinas-Russell has not established error in the indictment.

¶8 To establish that a charge as presented at trial was duplicitous, a defendant must show that “the text of an indictment refers only to one criminal act, but multiple alleged criminal acts [were] introduced to prove the charge.” *Klokic*, 219 Ariz. at 244, ¶ 12. A duplicitous charge raises concerns regarding the (1) failure to give adequate notice of the charged offense, (2) danger of a non-unanimous jury verdict, and (3) exposure to the possibility of double jeopardy. *State v. Schroeder*, 167 Ariz. 47, 52 (App. 1990).

¶9 If the State introduces evidence of multiple criminal acts to prove a single charge, the superior court must take one of two remedial measures to ensure a unanimous jury verdict: it must either require the State to specify which act constitutes the charged crime or instruct the jury to unanimously agree on a specific act constituting the crime charged. *Klokic*, 219 Ariz. at 244, ¶ 14. These remedial measures are not required, however, when “all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction.” *Id.* at ¶ 15. “[M]ultiple acts may be considered part of the same criminal transaction when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them.” *Id.* at 245, ¶ 18 (citation omitted).

¶10 Salinas-Russell contends that his defenses for each gun were different because they were “fact-specific and tailored to the circumstances of each gun.” His argument fails, however, because he did not dispute that

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both guns were in the car while he was driving, and his defense as to both guns was that he was not aware that they were in the car. Thus, Salinas-Russell offered essentially the same defense to each of the guns.

¶11 Salinas-Russell relies on *Klokic* in asserting that factual differences between the two guns were sufficient to distinguish his defenses for each of them. In *Klokic*, however, the defendant was charged with one count of aggravated assault after he was involved in a road-rage incident. *Id.* at 243, ¶¶ 1–2. At trial, the State introduced evidence that the defendant had pointed a gun at the victim on two separate occasions. *Id.* at 243–44, ¶¶ 3–4, 6. Because the State introduced evidence of multiple acts, this court concluded that the two separate occasions on which the defendant pulled out a handgun were not part of the same criminal transaction. *Id.* at 249, ¶ 38.

¶12 In contrast, the instant case involves only one relevant criminal transaction—Salinas-Russell was a prohibited possessor and was in a car containing two guns. And although the guns were found in different areas of the car and only one contained Salinas-Russell’s DNA, the underlying legal defenses for both guns were the same: Salinas-Russell did not know the guns were in the car and he did not possess them. His reliance on *Klokic* is thus unavailing.

¶13 Finally, Salinas-Russell has not established that he was prejudiced by the allegedly duplicitous charge. Both guns were found in the car Salinas-Russell was driving and were within his reach from the driver’s seat. And although only one of the guns had Salinas-Russell’s DNA on it, this simply provided the State with an additional means of proving possession of that gun. See *State v. Arnett*, 158 Ariz. 15, 20 (1988); *State v. Gonsalves*, 231 Ariz. 521, 523, ¶¶ 9, 11 (App. 2013). Because the two guns were part of a single criminal transaction, the superior court was not required to *sua sponte* take any curative measures to correct a duplicitous charge, and Salinas-Russell has not established fundamental, prejudicial error.

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CONCLUSION

¶14 For the foregoing reasons, we affirm Salinas-Russell's conviction and sentence.



AMY M. WOOD • Clerk of the Court
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