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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/25/2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-1026
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
MARK CHRISTOPHER GEGENHEIMER,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-111645-001 SE

The Honorable James T. Blomo, Judge Pro Tem

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Mark Christopher Gegenheimer appeals his conviction

for attempted second-degree murder. He argues that the trial court violated his constitutional right to notice by permitting the indictment to be amended during trial. He also argues that the amendment of the indictment violated Rule 13.5, Arizona Rules of Criminal Procedure. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 Gegenheimer became angry with his girlfriend after discovering that she had developed a relationship with another man. When she told Gegenheimer she was leaving him, Gegenheimer asked if they could make love one last time. She agreed, but Gegenheimer was unable to become aroused. At some point while on her knees with Gegenheimer behind her, she felt a sharp pain in the back of her neck and realized Gegenheimer had a knife and had cut her. She struggled with Gegenheimer in an attempt to get the knife away from him. Gegenheimer wrestled her to the floor and choked her, causing her to pass out.

¶13 Upon regaining consciousness, she felt a warm liquid on her body and discovered Gegenheimer had slit his throat and was bleeding on her. She testified at trial that Gegenheimer appeared surprised to see her awaken and told her she was going down with him. The girlfriend pushed Gegenheimer off her and ran for help.

¶14 Gegenheimer was charged with attempted second-degree

murder, a class 2 dangerous felony and domestic violence offense. As alleged in the indictment, the charge read:

MARK CHRISTOPHER GEGENHEIMER, on or about the 15th day of February, 2008, without premeditation, under circumstances manifesting extreme indifference to human life, recklessly engaged in conduct which created a grave risk of death and thereby attempted to cause the death of [the girlfriend], in violation of A.R.S. §§ 13-1001, 13-1101, 13-1104, 13-3601, 13-710, 13-702, 13-702.01, and 13-801.

The State of Arizona further alleges that the offense charged in this count is a dangerous felony because the offense involved the discharge, use, or threatening exhibition of a KNIFE, a deadly weapon or dangerous instrument and/or the intentional or knowing infliction of serious physical injury upon [the girlfriend], in violation of A.R.S. § 13-604(P).

(Emphasis added.)

¶15 At the conclusion of the State's case-in-chief, the defense moved for judgment of acquittal, arguing that the indictment was fatally flawed because it alleged a non-existent offense, specifically, attempt to commit reckless murder. The State conceded the error, but requested that the indictment be amended to allege that Gegenheimer attempted to knowingly or intentionally murder the girlfriend. After hearing argument, the trial court denied the motion for judgment of acquittal and granted the motion to amend the indictment.

¶16 Gegenheimer testified in his own defense and admitted

to being devastated when his girlfriend professed love for someone else, but denied telling her she was going down with him. According to Gegenheimer, he grabbed the knife because he was suicidal. He further admitted squeezing her neck, but testified it was just to get her to let go of the knife. Gegenheimer stated he never intended to physically hurt her, explaining he only wanted to cause her emotional pain by killing himself.

¶17 The jury found Gegenheimer guilty of attempted second-degree murder and further found the offense to be dangerous. The jury also found five aggravating factors. The trial court sentenced Gegenheimer to an aggravated 12 year term of imprisonment with credit for 253 days of presentence incarceration. Gegenheimer timely appeals.

ANALYSIS

¶18 We first address Gegenheimer's constitutional argument. Then we address his Rule 13.5 argument.

No Constitutional Violation Occurred

¶19 Gegenheimer argues that the trial court violated his constitutional right to notice by amending the indictment after the State had concluded its case-in-chief. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."). We review a ruling on a motion to amend an

indictment for abuse of discretion. *State v. Sammons*, 156 Ariz. 51, 54, 749 P.2d 1372, 1375 (1988).

¶10 The purpose of an indictment is to give notice of the offense charged to permit the accused to prepare a defense. *State v. Schwartz*, 188 Ariz. 313, 319, 935 P.2d 891, 897 (App. 1996). In determining whether an amendment would change the offense or prejudice the accused, we consider whether the amendment would violate either the right to notice or the right against double jeopardy on the original charge. *State v. Barber*, 133 Ariz. 572, 577, 653 P.2d 29, 34 (App. 1982), *approved*, 133 Ariz. 549, 653 P.2d 6 (1982). Neither right is violated here.

¶11 There is no doubt that the indictment was inartfully drafted. There is no such offense as attempted reckless second-degree murder in Arizona. *State v. Curry*, 187 Ariz. 623, 627, 931 P.2d 1133, 1137 (App. 1996). "The offense of attempted second-degree murder requires proof that the defendant intended or knew that his conduct would cause death." *State v. Ontiveros*, 206 Ariz. 539, 542, ¶ 14, 81 P.3d 330, 333 (App. 2003). The indictment should not have included the language of recklessness from A.R.S. § 13-1104(A)(3) (Supp. 2009).¹

¹ Reckless conduct, by definition, does not require intent to achieve a result. *State v. Adams*, 155 Ariz. 117, 119-20, 745 P.2d 175, 177-78 (App. 1987). It is not logically possible to intend to achieve an unintended result. See *id.*; see also

¶12 The erroneous reference to reckless conduct rendered the indictment defective but did not deprive Gegenheimer of any constitutional protections. The indictment charged Gegenheimer with attempted second-degree murder because it specifically cited A.R.S. §§ 13-1001 (2001) and 13-1104 and asserted that Gegenheimer attempted to cause the death of his girlfriend. Section 13-1001 defines the offense of attempt and § 13-1104 defines second-degree murder. The only subsection of 13-1001 that could apply under these facts is 13-1001(a)(2), which provides:

A. A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person . . .

2. *Intentionally does or omits to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense[.]*

(Emphasis added.) Accordingly, the State necessarily put Gegenheimer on notice that he was being charged with "intentionally" engaging in "a course of conduct planned to culminate" in the death of the victim. A.R.S. § 13-1001(A)(2). Amending the indictment to confirm that the defendant was

People v. Krovarz, 697 P.2d 378, 381-82 n.9. (Colo. 1985) ("[E]very state court that has considered this question has declined to extend attempt liability to reckless crimes, on the ground that one cannot intend to commit a crime defined as having an unintended result.").

charged with intentionally attempting to murder his girlfriend -
- by eliminating the inconsistent language of recklessness --
did not change the offense (attempted second-degree murder),
prejudice Gegenheimer, deprive him of notice, or create a double
jeopardy risk for him.

**No Reversible Error Occurred When
the Trial Court Amended the Indictment**

¶13 In amending the indictment, the trial court relied on
State v. Delgado, 174 Ariz. 252, 848 P.2d 337 (App. 1993) and
granted the amendment to conform to the evidence. In *Delgado*,
the indictment was similarly defective in that it alleged the
defendant attempted to cause the victim's death by recklessly
engaging in conduct that created a grave risk of death. *Id.* at
254, 848 P.2d at 339. At the close of evidence, the trial court
denied a motion to dismiss the attempted murder count and
granted the motion to have the indictment amended to conform to
the evidence that defendant attempted to commit an intentional
act. *Id.* On appeal, this court affirmed the trial court's
decision, holding that the defendant had forfeited right to seek
a Rule 20 dismissal on this basis:

The trial court has considerable discretion in
resolving motions to amend an indictment. *State v.*
Sammons, 156 Ariz. 51, 54, 749 P.2d 1372, 1375 (1988).
Rule 13.5, Arizona Rules of Criminal Procedure,
governs amendments to and defects in charging
documents. Under Rule 13.5(b):

The preliminary hearing or grand jury

indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

Rule 13.5(c), Arizona Rules of Criminal Procedure, provides that "No issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16." The comment to Rule 13.5(c) states:

This provision makes any defects harmless error unless timely raised under Rule 16. This treatment is consistent with expanded pretrial discovery in the light of which the formal document is of decreased significance.

Official Comment, Ariz.R.Crim.P. 13.5(c).

Rule 16.1(b) provides in pertinent part that: "All motions shall be made not later than 20 days prior to trial." Rule 16.1(c) further provides that:

Any motion, defense, objection, or request not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not then known, and by the exercise or reasonable diligence could not then have been known, and the party raises it promptly upon learning of it.

We believe defendant is precluded from raising the issue. In this case, defendant did not make a timely motion under Rule 16 and therefore waived the right to raise it at the end of trial. State v. Anaya, 165 Ariz. 535, 542, 799 P.2d 876, 883 (App. 1990). Moreover, the defect was one which defendant could easily have discovered by the exercise of reasonable diligence prior to trial. State v. Puryear, 121 Ariz. 359, 362, 590 P.2d 475, 478 (App. 1979). In any event, we do not believe defendant has

been prejudiced by such amendment.

Under Rule 13.5(b), Arizona Rules of Criminal Procedure, the charging document shall be deemed amended to conform to the evidence adduced at any hearing and no motion or formal action is required. *Official Comment*, Ariz.R.Crim.P. 13.5(b). . . .

Under the facts of this case, the amendment to conform to the evidence was not improper. Because of extensive discovery, defendant had adequate notice of the act with which he was charged and had an opportunity to prepare and defend against it.

174 Ariz. at 254-55, 848 P.2d at 339-40 (emphasis added).

¶14 The analysis in *Delgado* is instructive in the present case. As in *Delgado*, the indictment was defective in that it alleged that defendant "attempted to cause the death of [the girlfriend]" and did so recklessly "under circumstances manifesting extreme indifference to human life." Also as in *Delgado*, Defendant Gegenheimer did not file a pre-trial motion in accordance with Rules 13.5(e) and 16.1 challenging the defect in the indictment. Rule 13.5(e) provides that "[n]o issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16." And Rule 16.1 requires that motions be filed at least 20 days prior to trial, Rule 16.1(b), and that any defense not timely raised under Rule 16.1(b) is generally precluded. Rule 16.1(c). As in *Delgado* and in accordance with the Rules of Criminal Procedure, we conclude that Gegenheimer forfeited any defense under our rules based on the defective indictment, and he was not entitled

to challenge the legal sufficiency of the indictment by virtue of a Rule 20 motion for dismissal.

¶15 We further note that in granting the amendment of the indictment, the trial court simply clarified that the jury had to find that Gegenheimer acted "intentionally" rather than "recklessly," thereby eliminating the inconsistency in the description of charge. The only effect was to require that the State prove a more culpable mental state, specifically, that Gegenheimer acted intentionally rather than recklessly. See A.R.S. § 13-202(C) (2001) (establishing culpable mental state hierarchy of intentionally, knowingly, recklessly, and negligently); *Delgado*, 174 Ariz. at 255, 848 P.2d at 340 (referring to requirement that State prove intentional rather than reckless mental state as a "higher burden of proof"). The amendment had no impact on the defense, which was that Gegenheimer did not intend to harm the victim. Indeed, the amendment merely conformed the indictment to the evidence and made it consistent with how both parties approached trial on the charge: The State sought to prove Gegenheimer intended to kill his girlfriend and Gegenheimer argued the contrary.

¶16 Gegenheimer's claim that the amendment deprived him of notice of the charge against him is not persuasive. As already noted, the indictment cites §§ 13-1001 and 13-1104 and thereby charges attempted second-degree murder. See ¶ 12 *supra*. The

allegation of dangerousness further provided notice that the State planned to prove that Gegenheimer acted intentionally in attempting to cause the death of the victim. As the trial court noted, there was extensive discovery that would give Gegenheimer notice that the State's case was based on intentional conduct. Additionally, the prosecutor in her opening statement told the jury that they would have to be firmly convinced that when Gegenheimer "came up behind" his girlfriend "and put a knife to her neck and pulled it across her neck, that his intent was to kill her."

¶17 Finally, even assuming the trial court erred in granting the State's motion to amend the indictment, we find any such error to be harmless. Our supreme court in *State v. Freeney*, 223 Ariz. 110, 114, ¶ 26, 219 P.3d 1039, 1043 (2009) has confirmed harmless error analysis must be applied in this context. 223 Ariz. at 114, ¶¶ 25-26, 219 P.3d at 1043. We reject Gegenheimer's claim that he was prejudiced by the amendment in that he would have questioned witnesses differently in defending against attempted intentional murder as opposed to attempted reckless murder. Gegenheimer offers no specifics to support this claim. Further, because Arizona law provides commission of a reckless act can be established by also proving knowing or intentional conduct, Gegenheimer had the same interest in defending against a charge involving an allegation

of reckless conduct as knowing or intentional conduct. See A.R.S. § 13-202(C) (2001) ("If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly."). Therefore, on this record we do not believe that the erroneous allegation of reckless conduct can be said to have misled Gegenheimer or to have prejudiced his defense strategy.

CONCLUSION

¶18 For these reasons, we conclude that there was no error by the trial court in finding that Gegenheimer had notice of the charge of attempted second-degree murder and the event upon which the charge was based, and further that Gegenheimer had an adequate opportunity to prepare for and defend against it. Gegenheimer's conviction and sentence are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
SHELDON H. WESIBERG, Presiding Judge

_____/s/_____
PHILIP HALL, Judge