DIVISION ONE
FILED: 09/21/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0391
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
TRISTAN JAMAL HALEY, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-006618-001 DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Bruce Peterson, Office of the Legal Advocate — Phoenix
by Frances J. Gray, Deputy Legal Advocate
Attorneys for Appellant

I R V I N E, Presiding Judge

¶1 Tristan Jamal Haley appeals from his convictions for Resisting Arrest, Aggravated Assault, Threatening or Intimidating and Assisting a Criminal Street Gang. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On April 1, 2008, Phoenix Police Officers Narbaez and Nelson patrolled a neighborhood of the Vista Bloods street gang in uniforms and a fully marked police car. Around 7:11 p.m., they drove down 1400 East Grover Street, where Haley was playing basketball with two other men. The ball bounced in front of the police car, which slowed for Haley to retrieve it. He picked up the ball but did not move out of the way, forcing Officer Narbaez to veer right to avoid hitting him. As the patrol car passed with its windows rolled down, Haley stared directly at the officers.

¶3 Officer Nelson recognized Haley as a member of the Vista King Trojans and knew there was an outstanding warrant for his arrest.[2] They stopped and Officer Nelson told Haley about the warrant for his arrest. Haley replied, "Hold up. Hold up. I

---

[1] We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts. *State v. Robles,* 213 Ariz. 268, 270, ¶ 2, 141 P.3d 748, 750 (App. 2006).

[2] The Vista King Trojans are affiliated with the Vista Street Bloods, which was in a territorial war against the Lindo Park Crips.

ain’t going nowhere.” He refused to comply “with verbal commands to relax and put his hands behind his back” and resisted by “tensing up his body, flexing his arms.” The officers managed to handcuff Haley, and dragged him to the patrol car because he refused to walk. Haley called Officer Nelson, “M----- f-----,” several times and threatened, “Take these cuffs off, b----. Let me f--- you up.”

¶4 A crowd gathered, screaming at the officers. Haley yelled, “What are you doing on my street? This is my block, M----- F-----. You ain’t seen nothing yet. What have you seen? I’m going to beat your ass.” Officer Nelson understood this as threats of violence against him for invading the gang territory. As they placed Haley in the patrol car, He violently jerked his body backwards and hit Officer Nelson on the temple with his head, causing the officer pain, tenderness, bruising, and a minor headache. A test taken at the precinct showed Haley had a blood-alcohol concentration of 0.14.

¶5 On April 19, 2008, police executed a search warrant at Haley’s house, where they seized additional gang indicia of his affiliation with the Vista King Trojans.[3]

[3] “Gang indicia” is any gang-related paraphernalia, including items “with the gang’s name on it, the colors or clothing that the gang represents, [and] photos of hand signs of the individual.”

¶6 Haley was charged with Count 1: resisting arrest, a class 6 felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-2508 (2010); Count 2: aggravated assault, a class 6 felony in violation of A.R.S. § 13-1203 (2010); Count 3: threatening or intimidating, a class 3 felony in violation of § 13-1202(A)(3), (C) (2010); and Count 4: assisting a criminal street gang, a class 3 felony in violation of §13-2321(B), (D) (2010).[4] After an eight-day trial, the jury convicted Haley of the first two counts, but were hung on Counts 3 and 4.

¶7 In March and April 2009, Haley was retried for Count 1: Threatening or Intimidating in order to promote, further or assist in the interests of a criminal street gang (previously and hereafter "Count 3"); and Count 2: Assisting a Criminal Street Gang," (previously and hereafter "Count 4"), both Class 3 felonies. Lieutenant P.R. testified at the new trial that he filled out a Gang Member Information Card ("GIMC") in 2006, indicating Haley met four of seven statutory characteristics of a gang member, after Haley admitted he has been a Vista King Trojan since he was "jumped in" at age thirteen. An expert witness testified that additional evidence seized from Haley's home showed Haley met all seven statutory characteristics. He further testified Haley's statement, "[T]his is my block,"

[4] We cite to the current version of applicable statutes because no revisions material to this case have occurred.

promoted the Vista Blood gang generally, and his confrontation with police elevated Haley's status within his gang.

¶8 The trial court submitted the following final jury instructions, in pertinent part:

> Count 1
>
> A person commits threatening or intimidating if the person threatens or intimidates by word or conduct:
>
> 1. To cause physical injury to another person; and
>
> 2. In order to promote, further or assist in the interests of a criminal street gang.
>
> Count 1(lesser crime)
>
> The crime of threatening or intimidating, the greater crime, includes the lesser crime of threatening or intimidating. The State may prove the lesser crime but fail to prove the greater crime.
>
> . . . .
>
> A person commits threatening or intimidating if the person threatens or intimidates by word or conduct:
>
> 1. To cause physical injury to another person.
>
> Count 2
>
> The crime of assisting a criminal street gang requires proof that the defendant committed threatening or intimidating, for the benefit of [~~, at the direction of,~~] or

> in association with any criminal street gang.[5]
>
> . . . .
>
> Threatening or intimidating is a felony act.
>
> . . . .
>
> The state has alleged that with respect to Count 1, the greater charge, and Count 2, the defendant intended to promote, further or assist any criminal conduct by a criminal street gang and that the Vista King Trojans are such a criminal street gang.
>
> The state must prove these allegations beyond a reasonable doubt.
>
> . . . .
>
> You will be requested on each verdict form to determine this issue.
>
> . . . .
>
> Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count. You may find that the State has proved beyond a reasonable doubt, all, some, or none of the charged offense. Your finding for each count must be stated in a separate verdict.

¶9 The jury reached an impasse during deliberations and showed confusion about the verdict forms and distinctions between the elements of Counts 3 and 4. The trial court explained the verdict forms and answered additional questions.

---

[5] During a break in deliberations, the parties agreed to remove the phrase "at the direction of" from this instruction.

The jury found Haley guilty of Threatening and Intimidating: the lesser-included offense of Count 3, a class 1 misdemeanor, and guilty of Count 4: Assisting a Criminal Gang, a class 3 felony. On Count 4, however, it did not find Haley "intended to promote, further or assist any criminal conduct by the Vista King Trojan criminal street gang." On May 7, 2009, Haley was sentenced to concurrent terms of three years' intensive probation for each of the four convictions from both trials.

DISCUSSION

¶10 Haley argues the trial court committed structural error by entering judgment and sentence for Count 4 despite his conviction for only the lesser-included offense of Count 3.[6] He contends the jury should have acquitted him of Count 4 because the greater offense in Count 3 is a predicate felony. We disagree.

¶11 Haley's argument is based on the flawed premise that, as to Count 3, the jury acquitted him of all the charges of the

[6] Structural error deprives a defendant of a basic protection necessary for the trial to serve as a vehicle for determination of guilt or innocence. *State v. Fimbres*, 222 Ariz. 293, 303, ¶ 35, 213 P.3d 1020, 1030 (App. 2009) (citing *State v. Valverde*, 220 Ariz. 582, 584, ¶ 10, 208 P.3d 233, 235 (2009)). Fundamental error, on the other hand, is a deprivation of a right essential to the defense and "error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005)). Unlike structural error, in which prejudice is presumed, the defendant bears the burden of showing prejudice in a fundamental error analysis. *Fimbres*, 222 Ariz. at 303, ¶ 35, 213 P.3d at 1030.

greater crime by rendering verdict on the lesser crime. He asserts the jury's verdict "specifically rejected as unproved" the essential "gang" element of Count 4.[7] The jury made no such finding, nor can we imply from the jury's verdict acquittal of the greater crime. *See State v. Harvey*, 193 Ariz. 472, 477, ¶ 20, 974 P.2d 451, 456 (App. 1998) (holding "it is not true that the guilty verdict as to negligent homicide reflects an acquittal as to murder and manslaughter."); *Lemke v. Rayes*, 213 Ariz. 232, 237-38, ¶ 14, 141 P.3d 407, 412-13 (App. 2006) (holding a conviction for theft was not "implicit acquittal" of armed robbery where jury was hung on felony murder, for which armed robbery was a predicate felony).

¶12 In *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996), our supreme court rejected the rule that a jury must first acquit a defendant of a charge before considering lesser-included offenses. It held the better rule is to permit the jury to render verdict on a lesser charge if it *"either* (1), finds the defendant not guilty of the greater charge, *or* (2) *after reasonable efforts, cannot agree whether to acquit or convict on that charge*." *Id.* at 438, 924 P.2d at 442 (emphasis added).

¶13 The jury in this case was instructed consistent with *LeBlanc* as follows:

[7] The Reply Brief states that Haley does not assert an insufficient evidence argument.

> The crime of threatening or intimidating, the greater crime, includes the lesser crime of threatening or intimidating. The State may prove the lesser crime but fail to prove the greater crime.
>
> You may find the defendant guilty of the lesser crime only if:
>
> 1. You find the defendant not guilty on the greater crime; or
>
> 2. *After reasonable efforts any of you cannot agree whether to acquit or convict on the greater crime*.

(Emphasis added.) The jury notified the trial court it was not "making progress in [its] deliberations" due to disagreement over "element number two" of Count 3 (the gang-related charge).[8] The trial court replied, "If you're unanimous, you can acquit, or you can just say we're at an impasse, and we can't decide on that; and then, you go to the the [sic] lesser included." Under these circumstances, it is likely the jury considered the lesser crime simply because, after reasonable efforts, it could not reach unanimity to acquit or convict Haley of the greater charge.

¶14 Even assuming the jury had acquitted Haley of the predicate felony in Count 3, we discern no error because the parties agreed that Count 4 was an entirely separate and

[8] The jury asked: "Should the Jury Not decide on a verdict, do we come back another day? If not, what will happen?" It also asked whether the finding that "Defendant intended to promote, further or assist any criminal conduct by the Vista King Trojan criminal street gang" had to be "unanimous." The court replied, "Yes."

distinct offense. Haley incorrectly contends that acquittal of the predicate felony necessitates acquittal of Count 4 because all the elements cannot be proven beyond a reasonable doubt. This argument was expressly rejected by the United States Supreme Court in *United States v. Powell,* 469 U.S. 57 (1984).

¶15 In *Powell*, the defendant argued that her acquittal for two counts of possession with intent to distribute cocaine entitled her to reversal of convictions for telephone facilitation charges predicated on findings she possessed with the intent to distribute cocaine. 469 U.S. at 60. The Ninth Circuit agreed, explaining that acquittal of the predicate felony necessarily indicated there was insufficient evidence to support the telephone facilitation convictions. *Id.* at 61. The United States Supreme Court reversed, holding:

> [I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. *It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense*. . . .
>
> [T]he possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest.

Id. at 65 (reaffirming the rationale in *Dunn v. United States*,

284 U.S. 390, 393 (1932), which held we cannot inquire into inconsistent verdicts supported by the evidence because "either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of defendant's guilt.") (emphasis added).[9]

¶16 Arizona also permits inconsistent verdicts on separate counts. *State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *State v. Digiulio*, 172 Ariz. 156, 162, 835 P.2d 488, 494 (App. 1992). We have similarly held that inconsistent verdicts may be the result of leniency or compromise by the jury, and reversal is not warranted simply on this basis. *State v. Garza*, 196 Ariz. 210, 212, ¶ 7, 994 P.2d 1025, 1027 (App. 1999) (citing *Zakhar*, 105 Ariz. at 32-33, 459 P.2d at 84-85).

¶17 In this case, the trial court instructed the jury:

> Each count charges a *separate and distinct* offense. You must decide each count *separately* on the evidence with the law applicable to it, *uninfluenced by your decision on any other count*. You may find that the State has proved beyond a reasonable doubt, all, *some*, or none of the

[9] Haley argues, however, that *Powell* does not apply to situations "where a guilty verdict on one count logically excludes a finding of guilt on the other." *See* 469 U.S. at 69 n.8 (citing, e.g., *United States v. Daigle*, 149 F.Supp. 409 (D.C. 1957)). This is not a case like *Daigle*, "where a guilty verdict on one count negatives *some fact* essential to a finding of guilty on a second count." 149 F.Supp at 414. Here, no factual findings were made in Count 3 that contradicts a factual finding essential to Count 4.

> charged offense. Your finding for each count must be stated in a *separate* verdict.

(Emphasis added.) Three separate verdict forms were submitted to the jury: one for Count 3, one for the lesser-included crime of Count 3 and one for Count 4. *See State v. Smith,* 160 Ariz. 507, 774 P.2d 811 (1989) (stating multiple forms of verdict are more desirable in the guilt phase). When it appeared the jury did not fully understand the verdict forms, the trial court explained distinctions between the charges and reasserted they were separate, stating:

> Count [4] concerns *assisting* a criminal street gang by committing threatening or intimidating *for the benefit* ~~or at the direction~~ *or in association with* any criminal street gang.
>
> Count [3] is a *separate charge* of intimidating or threatening to (1) cause physical injury to another person and (2) *in order to promote, or further or assist in the interest of* a criminal street gang.

(Emphasis added.) We cannot further inquire or speculate into why the jury returned inconsistent verdicts.[10] Finally, substantial evidence supports the verdicts, and Haley does not otherwise challenge on appeal the sufficiency of the evidence for Count 4. *See State v. Money,* 110 Ariz. 18, 25, 514 P.2d

[10] We reject Haley's argument that this is not a case of inconsistent verdicts since the jury "followed the instructions." *Powell* applies regardless of how the jury "arrived at an inconsistent *conclusion* on the lesser offense," whether "through mistake, compromise, or lenity." 469 U.S. at 65 (emphasis added).

1014, 1021 (1973). We thus find no error, let alone structural or fundamental error.

CONCLUSION

¶18 For the reasons stated, we affirm.

/s/
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Chief Judge

/s/
JOHN C. GEMMILL, Judge