DIVISION ONE
FILED: 02/22/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JEFFERY JOSEPH HAUSNER, Appellant.	)	1 CA-CR 09-0472 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-007313-001 DT

The Honorable Roland J. Steinle, Judge

AFFIRMED

Thomas C. Horne, Arizona 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. Hass, Maricopa County Public Defender — Phoenix
by Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Presiding Judge

¶1 Jeffery Joseph Hausner ("Hausner") appeals his convictions and sentences for attempted first-degree murder and aggravated assault. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In a church parking lot on a night in May 2006, Hausner stabbed a man in the back several times while his brother, Dale Hausner, distracted the victim and Samuel Dieteman ("Dieteman") watched. The victim was unable to see who stabbed him, but after police arrested Dale Hausner in connection with unrelated serial shootings, the victim recognized him from a newscast as the person who had distracted him just prior to the stabbing. The victim also recognized the car that Dale Hausner was in from the same newscast.

¶3 At trial, Dieteman testified that he was a passenger in the vehicle driven by Dale Hausner at the time of this incident and witnessed Jeffery Hausner stab the victim.

¶4 The jury convicted Hausner of attempted first-degree murder and aggravated assault, both dangerous offenses. The court sentenced Hausner to 18 years on the attempted murder conviction and 11.25 years on the aggravated assault conviction; the terms were to be served concurrently with each other but consecutive to the term Hausner was already serving for a previous aggravated assault conviction.

¶5 Hausner timely appealed. This Court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-120.21(A)(1) (2003) and 13-4033(1) (2010).

DISCUSSION[1]

I. Prosecutorial misconduct and evidentiary error.

¶6 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403. Evidence is unfairly prejudicial when it has "'an undue tendency to suggest decision on an improper basis' . . . such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (quoting Fed. R. Evid. 403 advisory committee's note).

¶7 To determine whether a prosecutor's remarks are improper, we consider whether the remarks called the jurors' attention to matters they would not be justified in considering

[1] We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 1, 94 P.3d 1119, 1130 n.1 (2004).

and the probability that the jurors were influenced by the remarks. *State v. Jones,* 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (citation omitted). Conduct must be more than "legal error, negligence, mistake, or insignificant impropriety" to rise to the level of prosecutorial misconduct. *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984). It is, taken as a whole, "intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial." *Id*. at 108-09, 677 P.2d at 271-72 (internal footnote omitted). To require reversal, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation and internal quotation marks omitted).

¶8 Hausner failed to object to any of the claimed errors or misconduct at trial, thus limiting our review to one for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Fundamental error is error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not have received a fair trial. *Id*. at ¶ 24. Thus, Hausner bears the burden of

establishing error, that the error was fundamental, and that the error caused him prejudice. *Id.* at ¶ 22.

¶9 The background on this issue, to the extent that the record reveals it, is as follows. Dieteman, who had pleaded guilty before trial to several offenses in connection with his role in the serial shootings, was the key witness against Hausner at trial. Before trial, Hausner withdrew his alibi, mistaken identity, and lack of intent defenses and notified the court that his defense would instead rely solely on putting the State to its proof by challenging Dieteman's credibility. Hausner's counsel said, "I think the case both lives and dies by that issue."

¶10 Based on this avowal, the trial court denied the State's Rule 404(b) motion to admit evidence of Hausner's conviction for aggravated assault arising from a prior stabbing that also involved Dale Hausner and Dieteman. The court later granted the State's motion to use the terms "recreational violence" or "random violence," but only "[a]s long as you make it this case . . . rather than a series of acts" and "without him saying [']we were out cruising like we had been on other occasions.[']" The court also directly admonished Dieteman before he testified that he was to limit his testimony to the stabbing at issue.

¶11 During a pre-trial hearing, Hausner acknowledged that "the pretrial publicity" would be the "biggest issue" during *voir dire*. Hausner further agreed to a statement of facts that the court eventually read to the *venire* panel to ascertain whether exposure to pretrial publicity on the serial shootings might affect their judgment in this case. The statement described the incident giving rise to the charges against Hausner but also referred in pertinent part to the serial shootings as follows:

> Although this incident was reported to police, that night or early morning hours, no suspect was identified until the witness, Samuel Dieteman, was interviewed by police following his entry of a guilty plea to other crimes.
>
> During the interview Dieteman told them that he was inside the car when the stabbing occurred and identified the driver as Dale Hausner, and the assailant as the defendant Jeff Hausner.
>
> Sam Dieteman and Dale Hausner were arrested in August of 2006 for shooting and/or participating in shooting of several persons across the valley, and for committing or assisting in committing two arsons.
>
> The shootings happened dubbed [sic] by the media as the serial shooter. The plea agreement that Sam Dieteman entered into was in reference to the serial shooter case.
>
> * * *
>
> [T]he question is [] whether or not having been exposed to media coverage you can be a fair and impartial juror in this matter.

The court excused all potential jurors who cited publicity or media coverage as the reason why they could not serve on the jury.

¶12 We have reviewed the entirety of the record and find no reversible error as to Hausner's claims of prosecutorial misconduct and erroneous admission of unfairly prejudicial evidence.[2] We find unpersuasive Hausner's claim that, by referring to the serial shootings in argument and examination of witnesses, "the prosecutor was insinuating that Jeff was equally as violent and dangerous as his notorious brother Dale" or that "[t]he prosecutor's constant emphasis on the 'serial shooting case/investigation' was an attempt" to link Hausner to the serial shootings.

¶13 The prosecutor made clear in her opening statement that Dale Hausner and Dieteman were the two serial shooters, and Jeffery Hausner was on trial only for his role in this one stabbing. A review of the record indicates the prosecutor's references throughout trial to Dale Hausner and the serial shootings were not designed to unfairly prejudice Hausner by implying guilt by association. Rather, the references regarding the serial-shooter investigation and Dieteman's and Dale Hausner's role in this stabbing were relevant to prove Jeffery

[2] The State argues that Hausner invited the error. We need not address this argument because we find that Hausner has not shown that any error occurred.

Hausner's responsibility for this stabbing. In his testimony, Dieteman himself made clear that he and Dale Hausner were the only two people involved in the serial shootings. Finally, when the jury asked questions about the shootings after Dieteman's testimony, the court advised the jury that it must only consider Hausner's role in this stabbing:

> Members of the jury, this is one count of aggravated assault.
>
> While we told you that Mr. Dieteman was involved in the serial shooter case, the only thing for you to be concerned with in this case is whether the State has proved this case beyond a reasonable doubt.
>
> So, I've restricted the lawyers in terms of questions. And so any question that has to do with what this in relationship [sic] to any other case in the serial shooter case is not relevant to this matter. And I stopped the lawyers from going into it, so I'm not going to ask any questions.
>
> So please confine your inquiry to this case and this case alone.

¶14 Also, because Hausner told the trial court before trial his defense rested on Dieteman's credibility, it was not improper for the prosecutor to argue in her opening that Dieteman was credible. During the opening statement, the prosecutor contended Dieteman was credible because he agreed to testify against both Dale and Jeffery Hausner even though he faced the death penalty and he confessed to the stabbing and implicated Jeffery Hausner despite being labeled a snitch.

Further, Hausner's brief opening statement consisted solely of telling the jury that the only evidence that would implicate him was the testimony of Dieteman, "an admitted murderer and an admitted liar . . . [with] every reason in the world to lie."

¶15 Nor do we find it improper for the prosecutor in her opening statement to identify Dale Hausner as the second serial shooter and the brother of Jeffery Hausner, after outlining Dale Hausner's role in this incident. After all, the victim was expected to and did testify that he first identified Dale Hausner when he saw him on television in connection with the serial shootings.

¶16 Because police first learned of Hausner's identity while interviewing Dieteman about the serial shootings, it was not improper for the prosecutor to refer to the serial-shooting investigation in asking the investigating detectives what they learned, when they learned it, and whether they were able to verify the details that Dieteman provided about this stabbing. The context of Dieteman's revelation to police was highly probative on the issue of his credibility, the keystone of Hausner's defense. We are not persuaded that this testimony was unfairly prejudicial.

¶17 Nor are we persuaded that it was unfairly prejudicial or improper for the prosecutor to ask the victim if the detectives who interviewed him two years after the stabbing had

initially told him that they were involved in investigating the serial shootings. Both detectives testified that the victim told them he knew who had distracted him that night because he had seen that person on television after the person was arrested in the serial shootings. In context, the prosecutor was simply attempting to confirm that the detectives had not predisposed the victim to identify Dale Hausner by first suggesting that his stabbing might be connected to the serial shootings.

¶18 We also find unpersuasive Hausner's argument that the prosecutor's references to Dieteman's role in the serial shootings while examining Dieteman were improper or unfairly prejudicial. In context, these references were highly probative on the issue of Dieteman's credibility. In offering Dieteman's testimony against Hausner, the prosecutor could hardly ignore Dieteman's initial unwillingness to admit to murder and his subsequent guilty plea to two murders and conspiracy with Dale Hausner to shoot thirteen other victims in the serial shootings. It was Dieteman's role in the serial shootings, and his initial unwillingness to admit to the killings, to which Hausner had alluded in his opening statement, as casting doubt on his credibility and supplying his motive to lie in this case.

¶19 We additionally find no merit in Hausner's argument that the prosecutor violated the court's ruling limiting Dieteman's testimony to the stabbing at issue. Hausner contends

that the prosecutor went too far in eliciting testimony that Dieteman had murdered two women and conspired with Dale Hausner to shoot thirteen other victims; had subsequently pleaded guilty to these crimes; had signed an agreement to provide truthful information and testimony on related crimes; and had been charged with additional crimes, including arson, that he had told police about during a "free talk." The court had precluded Dieteman from testifying about other crimes he committed that would suggest to the jury that he and Dale Hausner had made a practice of engaging in recreational violence, and that this stabbing was part of that practice. The court did not indicate that it intended to preclude Dieteman's testimony about the terms of his plea agreement; the minimal details on the two murders to which he had pleaded guilty; or charges pending from other crimes, including arson, after he confessed to police.

¶20 Finally, the prosecutor clarified during closing argument that this stabbing was "not part of the serial shooter investigation." It was not improper to tell the jury that even if Dieteman had access to police reports on the serial shootings, Dieteman would not have been able to provide the information he gave police on this stabbing.

¶21 Therefore, the prosecutor's references to the serial-shooter investigation did not constitute prosecutorial misconduct or error, much less fundamental error.[3]

II. Sufficiency of evidence.

¶22 Hausner also argues that the evidence was insufficient to support his convictions because it consisted solely of "self-serving statements of Samuel Dieteman, a man who had his own agenda . . . desperately trying to spare himself from death row for the crimes and murders he committed as one of the serial shooters."

¶23 In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). The credibility of witnesses and the weight given to their testimony are issues for the jury, not the trial court or the court of appeals. *State v. Just,* 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983). "To set aside a jury verdict for

[3] Hausner also argues that the prosecutor engaged in misconduct by mentioning that a telephone in Hausner's townhouse was "his" landline. This argument also has no merit. The testimony revealed that the telephone was in the townhouse in which Hausner lived with his girlfriend and Dieteman. The reasonable construction of repeated references to "Jeff Hausner's home phone number" is that this was simply shorthand for the phone at the residence where Hausner lived. We cannot agree that this shorthand misled the jury, or that the prosecutor engaged in misconduct by failing to correct the witness each time he used this shorthand.

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).

¶24 The evidence was more than sufficient to sustain these convictions. Dieteman was an eyewitness to the stabbing and testified that Hausner stabbed the victim several times in the back. The victim testified that he could not see who stabbed him but recognized Dale Hausner as the driver who distracted him while the other person stabbed him in the back, consistent with Dieteman's testimony. The victim also recognized the car Dale Hausner drove the night of the stabbing and confirmed Dieteman's testimony about where the stabbing had occurred. Dale Hausner's cellphone records were consistent with the victim's and Dieteman's testimony; and, as we have discussed *supra* at note 3, we do not believe the reference to the phone at the residence where Hausner lived as "his" phone misled the jury.

¶25 We reject Hausner's argument that his conviction should be overturned because neither the victim nor forensic evidence implicated him in the stabbing. Nor do we find any merit in Hausner's argument that Dieteman's testimony was undermined by his failure to identify the weapon used from the knives found at Dale Hausner's residence and his purportedly inaccurate recollection as to the number of stab wounds

inflicted. The issues above are issues of credibility and the weight of the testimony, and the evidence presented supports the jury's decision to believe Dieteman's testimony about Hausner's role in the stabbing. *See United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 286, 681 P.2d 390, 438 (App. 1983) (holding that a "verdict based upon conflicting evidence is binding upon the appellate court" when substantial evidence supports the verdict).

¶26 Therefore, viewing the evidence in the light most favorable to upholding the verdicts, we find sufficient evidence to support the convictions.

III. Verdict forms.

¶27 Hausner argues the court fundamentally erred in failing to include on the verdict form the choice of "unable to decide." He argues the absence of this choice "infringe[d] on [] defendant's constitutional right to a unanimous decision," and had "the potential to coerce a jury into reaching a decision of either 'guilty' or 'not guilty,' without realizing that 'unable to decide' is also an acceptable option." We disagree.

¶28 As Hausner concedes, our review is limited to one for fundamental error because Hausner failed to object to the verdict form at trial. *See Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608.

¶29 Hausner has failed to meet his burden to show any error, much less fundamental and prejudicial error. The Arizona Rules of Criminal Procedure provide that, except in specified cases not present here, "the jury shall in all cases render a verdict finding the defendant either guilty or not guilty." Ariz. R. Crim. P. 23.2(a). The rule's failure to direct that a jury be given the option of finding "unable to decide" does not offend the constitutional right to a unanimous verdict because "unable to decide" is not a verdict, but rather an inability to reach a unanimous verdict. The court instructed the jury in this case that the State had the burden of proving every element of each charge beyond a reasonable doubt and the jury could find that the State had done so on "all, some or none of the charged offenses." The court further instructed the jury that it must reach a verdict unanimously: "All 12 of you must agree on any verdict reached. All 12 of you must agree whether the verdict is guilty or not guilty." We presume that the jurors here followed the court's instruction on this issue. *See State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) (holding that jurors are presumed to follow instructions). Accordingly, because the jury checked the box on the verdict form for each offense "guilty," the jury unanimously found Hausner guilty. *See id*.

¶30 This is not a case like the ones on which Hausner relies, in which the trial court failed to give the jury the option of finding the defendant "not guilty" on a lesser-included offense or failed to provide a special verdict form in a capital case for sentencing purposes. *See State v. Walton*, 159 Ariz. 571, 593-94, 769 P.2d 1017, 1039-40 (1989) (Feldman, V.C.J., and Moeller, J., concurring) (recommending that for purposes of sentencing, special verdict forms be provided to distinguish convictions for first-degree murder based on a felony-murder theory in capital cases); *State v. Knorr*, 186 Ariz. 300, 304, 921 P.2d 703, 707 (App. 1996) (holding that it was fundamental error to fail to give the jury a verdict form for "not guilty" on a lesser-included offense).

¶31 Hausner's public policy arguments in favor of a new rule requiring a verdict form to include the choice of "unable to decide" are best directed to the Arizona Supreme Court in its rulemaking capacity, not this court sitting as an appellate court. *See* Ariz. R. Sup. Ct. 28 (setting forth procedure to petition the court to adopt, amend, or repeal rules of procedure).

¶32 Moreover, Hausner relies on speculation that some members of the jury may have felt coerced to convict him because they did not realize "unable to decide" was also an option. Speculation is an insufficient basis for establishing prejudice

on fundamental error review. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (a defendant may not rely on speculation to meet his burden). On this record, the court did not err, much less fundamentally err, in failing to include "unable to decide" as one of the choices.

CONCLUSION

¶33 For the foregoing reasons, we affirm Hausner's convictions and sentences.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
SHELDON H. WEISBERG, Judge