

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
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: 11/30/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0765
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MICHAEL JAMES COOPER,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-007839-001 DT

The Honorable James T. Blomo, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

James Haas, Maricopa County Public Defender Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Michael James Cooper appeals from his convictions and sentences for one count of discharge of a firearm at a

residential structure and one count of drive-by shooting. For the following reasons, we affirm.

BACKGROUND¹

¶2 In October 2007, Cooper fired a gun at an occupied residence while he was riding in a car. When questioned by police, Cooper admitted firing a gun at a home he believed was the intended victim's.² The State charged Cooper with one count of discharge of a firearm and one count of drive-by shooting,³ both class two dangerous felonies. Cooper was also charged with a third count of discharge of a firearm at a residential structure, stemming from shots allegedly fired towards a second residence. However, the State later dismissed that count.

¶3 A jury found Cooper guilty of both counts. The trial court then sentenced him to concurrent mitigated prison terms of 8.5 years. This timely appeal followed.

¹ We view the evidence in the light most favorable to sustaining the convictions. *State v. Robles*, 213 Ariz. 268, 270, ¶ 2, 141 P.3d 748, 750 (App. 2006).

² Although the intended victim's residence was the target of the offense, evidence at trial revealed that the bullets entered a neighboring home.

³ The State charged Cooper pursuant to Arizona Revised Statutes ("A.R.S.") sections 13-1211 and 13-1209 (2010), respectively. Absent material revisions after the date of an alleged offense, we cite the statute's current version.

DISCUSSION

¶4 Cooper argues he was wrongfully convicted of both discharge of a firearm and drive-by shooting, in violation of the Double Jeopardy Clause of the Fifth Amendment. See U.S. Const. amend. V (providing that no person shall “be subject for the same [offense] to be twice put in jeopardy of life or limb”). Cooper failed to raise this issue before the trial court and therefore has forfeited review absent fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). A double jeopardy violation, however, constitutes fundamental error, and we review de novo an assertion that such a violation occurred. *State v. Musgrove*, 223 Ariz. 164, 167, ¶ 10, 221 P.3d 43, 46 (App. 2009).

¶5 “The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense.” *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9, 206 P.3d 769, 772 (App. 2008). But double jeopardy is implicated only when the “same act or transaction” violates two distinct criminal statutes. *State v. Eagle*, 196 Ariz. 27, 31, ¶ 21, 992 P.2d 1122, 1126 (App. 1998). Multiple shots fired at the same time and place are considered separate acts. *State v. Miranda*, 198 Ariz. 427, 430, ¶ 17, 10 P.3d 1213, 1217 (App. 2000) (finding that defendant’s multiple convictions did not violate the principles of double jeopardy

because defendant's three gun shots constituted three separate acts); see also *State v. Singleton*, 66 Ariz. 49, 57, 182 P.2d 920, 925 (1947) (stating that multiple gunshots are distinct and severable and therefore allow for prosecution of multiple offenses); *State v. Devine*, 150 Ariz. 507, 510, 724 P.2d 593, 596 (App. 1986) (finding that three assault convictions were proper where three assaults were committed on three separate victims).

¶16 Although not raised by the State, we conclude that Cooper's convictions do not violate the Double Jeopardy Clause because his convictions were not based on the same criminal act. See *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (holding that a reviewing court is obligated to affirm the trial court's ruling if the result was legally correct for any reason). Evidence was sufficient to allow the jury to find, beyond a reasonable doubt, that the defendant fired at least three shots. One witness testified she heard the sound of three "backfires," which she later realized were gunshots. Two other witnesses testified they heard approximately five shots. Additionally, a police officer testified that five shell casings were found at the scene. Based on these facts, each shot fired by Cooper constituted a separate act for which he could be charged; thus, Cooper's convictions for discharge of a firearm

and drive-by shooting did not violate the constitutional ban on double jeopardy.

CONCLUSION

¶7 For the foregoing reasons, we affirm Cooper's convictions and sentences.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

JOHN C. GEMMILL, Judge