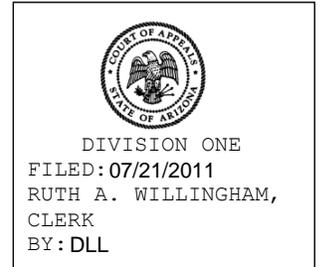


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0248
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MARGIE S. HANSEN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-137801-001SE

The Honorable Barbara L. Spencer, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals Section/Capital Litigation Section
And Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Karen M. V. Noble, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Margie S. Hansen (Hansen) appeals her conviction of attempted second degree murder, a class two felony. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 During an argument with her husband, John Hansen (Husband), Hansen reached into the night stand drawer, grabbed Husband's pistol, removed it from the holster, and shot him. The first shot hit him in the chest and knocked Husband off balance causing him to fall. As he was getting back up, Hansen fired a second shot hitting Husband. During trial, husband testified "I assumed that I was a dead man because, I mean, the first shot I'm thinking maybe was just anger. The second shot I'm thinking, 'she really wants to kill me.'"

¶3 Hansen called the police and asked for assistance because she had just shot her husband. After receiving her *Miranda*¹ warning, Hansen told officers that she shot Husband because she "wanted to just shut him off." The State charged Hansen with one count of attempted second degree murder, a class two felony, or aggravated assault, a class three dangerous felony. A jury convicted her of attempted second degree murder.

¶4 Hansen filed a timely appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution,

¹ See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1. (2003), 13-4031 and -4033.A.1 (2010).²

DISCUSSION

¶5 On appeal, Hansen contends the court committed fundamental error in its instructions to the jury regarding attempted second degree murder.

¶6 Because this issue was not raised below, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (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 possibly have received a fair trial." *Id.* The burden to show both fundamental error and resulting prejudice falls on the defendant. *Id.* at ¶ 20. In order to show prejudice, it must be shown that a reasonable jury could have reached a different result had the alleged error in the jury instruction not occurred. *See id.* at ¶¶ 26-27.

¶7 Jury instructions are not required to be faultless; their purpose is to inform the jury of applicable law in understandable terms, give the jury an understanding of the issues, and to not mislead the jury. *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). In *State v. Ontiveros*,

² We cite to the current version of applicable statutes where no revisions material to this decision have since occurred.

206 Ariz. 539, 542, ¶ 14, 81 P.3d 330, 333 (App. 2003), we held that a defendant may not be convicted of attempted second-degree murder by merely knowing his actions would result in serious physical injury. Instead, "[t]he offense of attempted second-degree murder requires proof that the defendant intended or knew that his conduct would cause death." *Id.* Allowing the jury to convict Hansen of attempted second-degree murder by concluding that she intended or knew her actions would cause serious physical injury, instead of death, would be convicting her of a non-existent crime, and therefore would be fundamental error. *Id.* at ¶ 19.

¶18 In this case, the court instructed the jury as follows:

The crime of Second Degree Murder requires proof of the following: Without premeditation, the defendant:

1. Intentionally caused the death of another person; or
2. Caused the death of another person by conduct which the defendant knew would cause death or serious physical injury.

The crime of Attempted Second Degree Murder requires proof that the defendant:

1. Intentionally committed any act that was a step in a course of conduct that the defendant planned or believed would end in the commission of a crime.

Attempted Second Degree Murder requires proof that the defendant either intended to or knowingly attempted to cause the death of another. It is not sufficient to show that

the defendant intended to do serious bodily harm.

On appeal, Hansen makes two arguments for fundamental error: (1) the instruction's explanation of attempt, allowed the jury to conclude that Hansen knew her conduct would "harm her husband, rather than kill him;" and (2) using the term "serious physical injury" under second degree murder and "serious bodily harm" under attempted second degree murder allowed the jury to believe that a finding that Hansen intended to do serious physical injury was permissible under attempted second degree murder.

Jury Instruction's Explanation of Attempt Not Error

¶19 The jury instructions for attempted second degree murder explain that attempt is intentionally committing any act that is a step or act which the defendant would believe would result in the commission of the crime. Hansen argues that because the instruction of second degree murder includes, "caused the death of another person by conduct which the defendant knew would cause death or *serious physical injury*," she claims the jury may have convicted her of attempted second degree murder because she could have known her actions would have caused serious physical injury to the victim. However, the instructions clearly state in order to convict Hansen of attempted second degree murder, "[i]t is not sufficient to show that the defendant intended to do serious bodily harm," to convict of attempted

second degree murder. Therefore, we find that these instructions were not given in a manner that would lead the jury to believe it could make a finding contradictory to the instructions.³ See *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (“We presume that the jurors followed the court’s instructions.”); see also *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986) (“It is only when the instructions taken as a whole are such that it is reasonable to suppose the jury would be misled thereby that a case should be reversed for error therein.”) (citation omitted).

Interchanging of “Physical Injury” and “Bodily Harm” Not Error

¶10 The jury instructions define “serious physical injury” as including “physical injury which creates a reasonable risk of death, or which causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.” Black’s Law Dictionary defines “serious bodily harm” as “serious bodily

³ Furthermore, we agree with the State’s argument that the “closing arguments of both counsel . . . made it clear to the jurors that to convict [Defendant] of attempted second degree murder, they had to find that [she] intended to kill, or knew that her actions would result in her husband’s death. Thus, even if she could show the trial court’s instructions constituted error, she still could not meet her burden on fundamental error review of showing prejudice.”

injury,"⁴ which is a "[s]erious physical impairment of the human body; esp., bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement or protracted loss or impairment of the function of any body part or organ." Black's Law Dictionary 802, 1398 (8th ed. 2004). These definitions, are so similar that we do not find error in the instructions' interchanging these words, let alone fundamental error.

¶11 These instructions properly informed the jury of the applicable law and that attempted second degree murder requires proof that Hansen intentionally or knowingly attempted to cause the death of another.

CONCLUSION

¶12 For the aforementioned reasons, we affirm Hansen's conviction and sentence.⁵

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Judge

/S/

PHILIP HALL, Judge

⁴ "[S]erious bodily injury" is synonymous with terms such as "serious bodily harm; grievous bodily harm; [and] great bodily injury." Black's Law Dictionary 802 (8th ed. 2004).

⁵ The State invites us to revisit our analysis in *Ontiveros*, we decline this invitation. 206 Ariz. 539, 81 P.3d 330.