IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL S. JONES,
Appellant.

No. 2 CA-CR 2019-0020
Filed March 20, 2020

Appeal from the Superior Court in Pima County
No. CR20174148001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

OPINION

Judge Brearcliffe authored the opinion of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Michael S. Jones appeals following a jury trial at which he was found guilty of aggravated assault with a dangerous instrument and aggravated assault causing temporary but substantial disfigurement. The trial court sentenced him to concurrent prison terms, the longest of which is 7.5 years. Jones contends that there was insufficient evidence to sustain his conviction for aggravated assault with a dangerous instrument. We affirm.

Factual and Procedural Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). On May 27, 2017, M.F. was riding his bicycle when he saw Jones and his four dogs. The dogs were "circling around [Jones]," unleashed, and not under his control. Jones raised his hand, and M.F. stopped approximately thirty feet from Jones.

¶3 At that time, one of the four dogs approached M.F., in a "stalking-type stance," not running, but also not walking, and circled around behind him. M.F. took his eyes off that dog briefly to look at the other dogs, and then the dog to the rear of him bit him from behind and between his legs, in the "groin area." Jones then came up to M.F., with his other dogs, also off leash, and the two men got into a "verbal altercation."

¶4 M.F. then attempted to leave the area, and told Jones to go the other way and to get his dogs away from him; Jones then yelled something indiscernible and said, "get him." All four dogs then bit and latched onto M.F.'s legs. M.F. yelled until the dogs stopped biting him. Jones then left with the dogs, and M.F. called 9-1-1.

¶5 Jones was charged with, count one, aggravated assault causing serious physical injury under A.R.S. § 13-1204(A)(1), count two, aggravated assault with a dangerous instrument (a dog) under A.R.S. § 13-1204(A)(2), and, count three, causing a dog to bite and inflict serious

physical injury on a person under A.R.S. § 13-1208(A). The jury found Jones not guilty of both count one as charged and of count three, but guilty of count two and of aggravated assault causing temporary but substantial disfigurement, a lesser-included offense of the charge in count one. Jones was sentenced as described above and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

¶6 Jones does not challenge his conviction for aggravated assault causing temporary but substantial disfigurement. He argues only that he was wrongfully convicted of aggravated assault with a dangerous instrument under A.R.S. § 13-1204(A)(2) because "the definition of dangerous instrument refers only to inanimate objects," thus excluding dogs, and "the legislature explicitly created a specific crime of aggravated assault with a vicious animal in A.R.S. § 13-1208(A)."[1] Jones did not, however, raise these objections below and therefore failed to preserve these issues for harmless error review on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005).

¶7 When a defendant fails to object to an alleged error, his claim is subject to review only for fundamental error. *Id.* Jones argues it was fundamental error for the trial court to allow the charge of aggravated assault with a dangerous instrument to go to the jury and to provide an erroneous jury instruction as to that charge. Fundamental error occurs only when the defendant can show trial error exists, that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not have possibly received a fair trial. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If the error is such that it goes to the foundation of the case or takes away an essential right, the defendant must additionally show such error was prejudicial. *Id.* If the error is so egregious that the defendant could not have possibly received a fair trial, prejudice is presumed. *Id.* In a fundamental error examination, if the defendant fails to carry his burden of persuasion as to any element of fundamental error, then his claim fails. *Id.* Consequently, in our review, we first must determine if error occurred at all. *Id.*

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[1]For the first time in his reply brief, Jones attempts to make "void for vagueness" and overbreadth arguments. However, because these arguments are raised for the first time in a reply brief, we do not address them. *See Long v. City of Glendale*, 208 Ariz. 319, n.6 (App. 2004) ("[A]rguments raised for the first time in the reply brief are waived.").

¶8 Jones principally frames his argument as challenging the sufficiency of the evidence to sustain a conviction for aggravated assault with a dangerous instrument, asserting there was no evidence of the use of a statutorily defined dangerous instrument. Sufficiency of the evidence is a question of law we review *de novo*. *State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). It is "fundamental error to convict a person for a crime when the evidence does not support a conviction." *State v. Stroud*, 209 Ariz. 410, n.2 (2005) (quoting *State v. Roberts*, 138 Ariz. 230, 232 (App. 1983)).

¶9 Jones argues that dogs are not "dangerous instruments" because that term, as defined in A.R.S. § 13-105(12), does not include animals. Under § 13-105(12) a dangerous instrument is "anything that under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or serious physical injury." This court has already concluded, in *State v. Fish*, 222 Ariz. 109, ¶ 75 (App. 2009), however, that a dog may be a dangerous instrument. The statutory definition of dangerous instrument provided in § 13-105(12) has not changed since that holding in *Fish*.

¶10 Jones claims, however, that the language in *Fish* concluding that a dog may be a dangerous instrument was merely dictum and thus not controlling. We disagree. "Dictum" is a "court's statement on a question not necessarily involved in the case before it." *Creach v. Angulo*, 186 Ariz. 548, 552 (App. 1996). But "[a]n expression which might otherwise be regarded as dictum becomes an authoritative statement when the court expressly declares it to be a guide for future conduct," and it "should be followed in the absence of some cogent reason for departing therefrom." *See State v. Fahringer*, 136 Ariz. 414, 415 (App. 1983). In *Fish*, the question before us was whether the trial court had erred in refusing to instruct the jury that the victim's dog, under § 13-105(12), could be a dangerous instrument. 222 Ariz. 109, ¶¶ 69, 71. We expressly stated, "We hold that a person can be responsible in a criminal setting for using a dog or a vicious animal as a dangerous instrumentality." *Id.* ¶ 75. And further that "the [trial] court should instruct the jury on the dogs as dangerous instrumentalities if the evidence at the new trial supports such an instruction." *Id.* ¶ 77. Although we reversed and remanded the case on other grounds, this statement—in addition to being expressly identified as a holding—addressed a contested issue in the case and served as both direction to the trial court on remand and guidance to trial courts generally. It was not mere dictum.

¶11 Jones further contends that *Fish* was "effectively overrule[d]" in 2011 when, two years after *Fish*, the legislature amended A.R.S. § 13-

1208(A) to create criminal liability for one "who intentionally or knowingly causes any dog to bite and inflict serious physical injury on a human being or otherwise cause serious physical injury to a human being." *See* 2011 Ariz. Sess. Laws, ch. 213, § 3 (codified as amended at § 13-1208). Jones argues that "the timing of the amendment to § 13-1208(A) suggests that this amendment was a response to *Fish*, and clarified that vicious animal assault is not part of § 13-1204(A), but is a separate offense governed by § 13-1208(A)."

¶12 We do not agree that the creation of liability under § 13-1208(A) overruled *Fish*, effectively or otherwise. First, the timing of the amendment, within two years after *Fish*, does not necessarily reveal the legislature's intent. *See Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 269 (1994) (noting that the "timing of this statute's adoption tells little about the legislature's intent" where timing was more than a year after the relevant court opinion). Correlation is not causation, nor is coincidence. Any number of events independent of a state intermediate appellate court opinion, or no particular event at all, could have motivated the legislature to enact the law.[2]

¶13 Moreover, the enactment of § 13-1208(A) does not demonstrate the legislature's intent to make § 13-1208(A) the sole statute under which a defendant may be charged for a dog assault, particularly because the legislators left § 13-105(12), as interpreted by *Fish* to include dogs, unchanged. *See Rosenberg v. United States*, 346 U.S. 273, 294 (1953) ("When there are two acts upon the same subject, the rule is to give effect to both if possible."); *State v. Lopez*, 174 Ariz. 131, 143 (1992) ("When conduct can be prosecuted under two or more statutes, the prosecutor has the discretion to determine which statute to apply."). We presume that if the legislature intended to change the interpretation of the definition of dangerous instrument, it would do so explicitly, rather than by implication. *See Gibbs v. O'Malley Lumber Co.*, 177 Ariz. 342, 345 (App. 1994) (Because the

[2]Even so, attempting to glean legislative intent by something other than the words of the statute is a tricky endeavor. *See Summerfield v. Superior Court*, 144 Ariz. 467, 475 (1985) (Rather than assuming or divining legislative intent "the solution must be found in a study of the statute, the best method to further the general goal of the legislature in adopting such a statute, and common law principles governing its application."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 394 (2012) ("We believe that references to *intent* have led to more poor interpretations than any other phenomenon in judicial decision-making.").

holding of the case was clear and direct, "if the legislature had ever intended to change either [the statute] or the supreme court's interpretation of that statute, it would have done so explicitly, not by implication."), *disapproved of on other grounds by Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 405 (1995). The legislature knows how to make a change explicit. *See State v. Peek*, 219 Ariz. 182, ¶ 19 (2008). The legislature could have easily amended § 13-105(12) to exclude dogs and other animals from the definition of dangerous instrument, had it intended to do so. *See Gibbs*, 177 Ariz. at 345.

¶14 Finally, Jones claims that *Fish* is not persuasive because, there, we relied on court opinions from states that do not have a separate vicious dog assault statute, like § 13-1208. Nonetheless, because the analysis in *Fish* was based on the plain language of a discrete statute (as it read then and now), without respect to an examination of the broader statutory scheme, the fact that our sister states' broader statutory schemes differ from ours today is immaterial.

¶15 We have been given no persuasive reason to depart from *Fish*. *See State v. Patterson*, 222 Ariz. 574, ¶ 19 (App. 2009) (We should not depart from prior Court of Appeals decisions, "unless we are convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as the render these prior decisions inapplicable." (quoting *Scappaticci v. Sw. Sav. & Loan Ass'n*, 135 Ariz. 456, 461 (1983))). We thus conclude that, notwithstanding the legislature's enactment of § 13-1208(A), a dangerous instrument as defined in § 13-105(12), as held in *Fish*, may include a dog. Therefore, Jones's conviction of aggravated assault with a dangerous instrument was proper, and we cannot conclude that the trial court erred, much less that it committed fundamental error.

Disposition

¶16 For the foregoing reasons, we affirm Jones's conviction and sentence challenged here.