IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AARON GALLEGO RODRIGUEZ,
Appellant.

No. 2 CA-CR 2019-0085
Filed March 22, 2021

Appeal from the Superior Court in Pima County
No. CR20182044001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

OPINION

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

E P P I C H, Presiding Judge:

¶1 Aaron Gallego Rodriguez appeals from his convictions for two counts of aggravated assault, four counts of vulnerable adult abuse, and one count of credit card theft. He argues he was improperly convicted of multiple counts of vulnerable adult abuse and aggravated assault, there was insufficient evidence that vulnerable adult abuse occurred under circumstances likely to produce serious physical injury, and there was insufficient evidence to prove the dangerousness allegations for the two counts of aggravated assault. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the jury's verdicts. *State v. Dunbar*, 249 Ariz. 37, ¶ 2 (App. 2020). One morning in May 2018, Rodriguez attacked his eighty-two-year-old father, H.R., at an independent living facility. Rodriguez repeatedly whipped H.R. with a cord and a metal-pronged plug from an electric clothes iron. H.R. subsequently pulled the emergency cord in his apartment, alerting others he was in danger, and began knocking on doors for help. The facility worker who responded found H.R. frightened and confused.

¶3 After first responders arrived, H.R. stated that his son, Rodriguez, had assaulted him with an electrical cord from an iron. Rodriguez escaped the facility unseen with H.R.'s credit cards and subsequently withdrew $1,000 from H.R.'s bank account. He was located the following day and arrested.

¶4 Rodriguez was charged with thirteen counts.[1] After a three-day trial, a jury found him guilty of two counts of aggravated assault causing temporary but substantial disfigurement (pertaining to injuries to H.R.'s scalp and finger), one count of vulnerable adult abuse under circumstances likely to cause serious physical injury or death (pertaining to an injury to H.R.'s head), three counts of vulnerable adult abuse under circumstances not likely to cause serious physical injury (pertaining to injuries to H.R.'s chest, back, and abdomen), and one count of credit card

[1]The state did not proceed to trial on counts one (attempted first-degree murder), ten (armed robbery), eleven (computer tampering), or twelve (attempted computer tampering) of the indictment. Counts two (aggravated assault) and nine (kidnapping) of the indictment were dismissed after the trial court granted Rodriguez's motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P.

theft. The trial court sentenced Rodriguez to concurrent prison terms, the longest of which is six years. Rodriguez appealed, and this court has jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 120.21(A)(1), 13-4031, and 13-4033(A)(1).

Double Jeopardy

¶5 Rodriguez argues his double jeopardy rights were violated because he was convicted multiple times—four counts of vulnerable adult abuse and two counts of aggravated assault—of the same offense even though his convictions arose "from a single, uninterrupted course of conduct involving the same object and resulting in similar injuries." *See* U.S. Const. amend. V; Ariz. Const. art. II, § 10. He maintains that he could only be convicted of one count of vulnerable adult abuse and one count of aggravated assault based on the evidence presented.

¶6 As Rodriguez concedes, we review this issue for fundamental, prejudicial error only because he did not object below. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). But, as the state acknowledges, a successful double jeopardy claim constitutes fundamental, prejudicial error. *See State v. Price*, 218 Ariz. 311, ¶¶ 3-4 (App. 2008).

¶7 "The Double Jeopardy Clause protects against multiple punishments for the same offense." *State v. Jurden*, 239 Ariz. 526, ¶ 10 (2016); *see also* U.S. Const. amend. V. This clause is triggered "if multiple violations of the same statute are based on the same conduct" because "there can only be one conviction if there is a single offense." *Jurden*, 239 Ariz. 526, ¶ 11. We look to the statutory definition of the individual crime to determine the "allowable unit of prosecution" or, in other words, "the scope of conduct for which a discrete charge can be brought." *Id.* (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)).

¶8 Our aim when interpreting statutes "is to give effect to the legislature's intent." *Id.* ¶ 15. "If the statutory language is unambiguous, we apply it as written without further analysis." *Id.* But if "the statute is subject to more than one reasonable interpretation, we consider secondary principles of statutory interpretation, such as the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." *Id.* We review de novo issues of statutory and constitutional interpretation. *State v. Dann*, 220 Ariz. 351, ¶ 96 (2009).

Vulnerable Adult Abuse

¶9 The parties disagree whether a defendant may be convicted under A.R.S. § 13-3623(A), (B) of multiple counts of vulnerable adult abuse resulting from a single, uninterrupted course of conduct involving multiple injuries.[2] Section 13-3623 states in relevant part:

> A. Under circumstances likely to produce death or serious physical injury, any person who causes a . . . vulnerable adult to suffer physical injury or, having the care or custody of a . . . vulnerable adult, who causes or permits the person or health of the . . . vulnerable adult to be injured or who causes or permits a . . . vulnerable adult to be placed in a situation where the person or health of the . . . vulnerable adult is endangered is guilty of [vulnerable adult abuse] . . . .
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> . . . .
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> B. Under circumstances other than those likely to produce death or serious physical injury to a . . . vulnerable adult, any person who causes a . . . vulnerable adult to suffer physical injury or abuse or, having the care or custody of a . . . vulnerable adult, who causes or permits the person or health of the . . . vulnerable adult to be injured or who causes or permits a . . . vulnerable adult to be placed in a situation where the person or health of the . . . vulnerable adult is endangered is guilty of [vulnerable adult abuse] . . . .

¶10 Rodriguez argues that § 13-3623 is event-directed and that the unit of prosecution "is each type of abuse, not each injury suffered by a victim." He thus contends that the single, uninterrupted course of conduct of vulnerable adult abuse constitutes one offense, regardless of how many injuries a victim suffers. The state, on the other hand, argues that § 13-3623

[2]Because the state does not dispute that this case involves a single, uninterrupted course of conduct, we assume, without deciding, that it did.

is victim-directed and that a defendant can be charged for each harm inflicted on the victim.

¶11 Rodriguez asserts the language of the vulnerable adult abuse statute "focuses on the relationship between the victim and the defendant, not on the occurrence of a particular injury." Section 13-3623(A), (B), however, is an alternative-means statute that defines three ways of committing vulnerable adult abuse. *See State v. West*, 238 Ariz. 482, ¶¶ 19, 21-22 (App. 2015).[3] While a relationship can be an element of these offenses in some circumstances, *see* § 13-3623(A), (B) (two ways of committing vulnerable adult abuse require vulnerable adult to be in care or custody of defendant), the language of § 13-3623(A), (B) in all circumstances is focused on a particular harm—injury, abuse, or endangerment. Section 13-3623(A), (B) is unambiguous because the language indicates the unit of prosecution is each harm; therefore, each separate harm inflicted can be separately charged, notwithstanding that multiple harms are serially inflicted over the course of a single event.[4] As such, we do not look to secondary statutory construction methods, *see Jurden*, 239 Ariz. 526, ¶ 15, and there was no double jeopardy error here with respect to the multiple counts of vulnerable adult abuse.

Aggravated Assault

¶12 Rodriguez similarly argues one of his two aggravated assault convictions should be vacated because he was convicted twice for the same

[3]*West* only describes § 13-3623(A) as an alternative-means statute, but given the almost identical language in § 13-3623(B), we treat both sections the same.

[4]To the extent Rodriguez analogizes this case to *Jurden*, 239 Ariz. 526, and *State v. Powers*, 200 Ariz. 123 (App. 2001), we find those cases distinguishable because they involved statutes that had the primary purpose of protecting a broad societal interest. In *Jurden*, our supreme court concluded the primary purpose of A.R.S. § 13-2508(A)(1) was to prevent resistance to state authority and, therefore, the unit of prosecution was "a single, continuous act of resisting arrest." 239 Ariz. 526, ¶¶ 16, 26. In *Powers*, we determined the primary purpose of A.R.S. § 28-661 was to prevent leaving the scene of the accident. 200 Ariz. 123, ¶¶ 9, 13. Section 13-3623, however, is more directed at individualized protection. *See State v. Nereim*, 234 Ariz. 105, ¶ 17 (App. 2014) (§ 13-3623 intended to protect individuals who might be "unable to protect [themselves] from abuse, neglect or exploitation by others" (quoting § 13-3623(F)(6))).

offense, which violates his double jeopardy rights. He relies on *State v. Counterman*, 8 Ariz. App. 526 (1968), and argues that we have already found a defendant should only be charged with a single count of aggravated assault for using a weapon multiple times on a single victim if it is part of a single, uninterrupted course of conduct. [5]

¶13 Rodriguez's reliance on *Counterman* is misplaced. In *Counterman*, the defendant argued on appeal that the trial court erred in failing to require the state to elect which assault it was charging, when it charged one assault but presented evidence of two. *Id.* at 530. We affirmed Counterman's conviction, in part, because his acts were "part of one and the same transaction." *Id.* at 531, 534 (quoting *People v. Jefferson*, 266 P.2d 564, 565 (Cal. Dist. Ct. App. 1954)). But we also recognized that if it is not a single transaction and "where more than one offense than that charged in the information is admitted in evidence[,] the trial court has the duty to require the State to elect upon which of the offenses it relies for conviction." *Id.* at 531.

¶14 Here, Rodriguez is not arguing that the state should have been required to elect which assault it intended to establish, nor is he arguing that the state presented evidence of a multitude of assaults but only charged him with one. To the contrary, the state charged multiple assaults, and Rodriguez argues this was error because the injuries in this case occurred during a single, uninterrupted course of conduct. *Counterman* did not hold that the state can only charge a defendant with a single count of aggravated assault in a single, uninterrupted course of conduct, as Rodriguez suggests. *See id.* at 530-32. Rather, it held that the state may present evidence of multiple assaults and is not required to elect a specific assault for the factfinder's consideration in a case involving a single transaction. *Id.* at 530-31. Accordingly, Rodriguez has not established his double jeopardy rights were violated with respect to the aggravated assault counts.

Sufficiency of the Evidence

¶15 Rodriguez argues there was insufficient evidence to (1) support that he committed vulnerable adult abuse under circumstances

[5]Because Rodriguez does not address the language or purpose of the aggravated assault statute to determine the unit of prosecution of the offense, *see Jurden*, 239 Ariz. 526, ¶ 11, any potential argument under *Jurden* is waived because it is not developed. *See State v. Sanchez*, 200 Ariz. 163, ¶ 8 (App. 2001); Ariz. R. Crim. P. 31.10(a)(7).

likely to produce serious physical injury, and (2) support that he used an iron as a dangerous instrument so as to make counts three and four of the indictment dangerous offenses.[6]

¶16 We review the sufficiency of evidence de novo. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). Evidence is insufficient only where there is no substantial evidence to support a conviction. *See State v. Mathers*, 165 Ariz. 64, 67 (1990). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.* (quoting *State v. Jones*, 125 Ariz. 417, 419 (1980)). Evidence is sufficient if "reasonable minds can differ on inferences to be drawn therefrom." *State v. Landrigan*, 176 Ariz. 1, 4 (1993).

Vulnerable Adult Abuse

¶17 Rodriguez argues, as he did below, that the state presented insufficient evidence to prove count five—vulnerable adult abuse under circumstances likely to cause serious physical injury. *See* § 13-3623(A)(1). He contends the state only presented sufficient evidence to prove § 13-3623(B)(1), a lesser-included offense that does not require the abuse to be likely to produce serious physical injury. *See State v. George*, 206 Ariz. 436, ¶¶ 13-14 (App. 2003) (appellate court may modify conviction to lesser-included offense if evidence only sufficiently supports lesser-included offense); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 11 (App. 1998) (defining lesser-included offense). As a result, he argues his conviction for count five of the indictment must be reduced from a class two felony to a class four felony. *See* Ariz. R. Crim. P. 31.19(d).

¶18 Count five of the indictment charged Rodriguez with vulnerable adult abuse under "circumstances likely to cause serious

[6] Although Rodriguez moved for a judgment of acquittal on the vulnerable adult abuse count (count five of the indictment), he did not object to the submission of the dangerousness allegations, with respect to counts three and four of the indictment, to the jury. Any claim on the dangerousness allegations is therefore forfeited absent fundamental, prejudicial error. *Cf. State v. Fimbres*, 222 Ariz. 293, n.1 (App. 2009). However, a conviction unsupported by sufficient evidence constitutes such error. *Id.* Sufficiency of the evidence is analyzed in the same manner on appeal irrespective of whether the issue was raised below. *See id.* ¶ 4 & n.1.

physical injury or death," a class two felony in violation of § 13-3623(A)(1). Specifically, the indictment alleged

> On or about the 9th day of May, 2018, . . . Rodriguez, under circumstances likely to produce death or serious physical injury, committed vulnerable adult abuse by intentionally or knowingly, causing H.R. to suffer physical injury; or having the care or custody of H.R., causing or permitting his . . . person or health to be injured; or having the care or custody of H.R., causing or permitting him . . . to be placed in a situation where his . . . person or health was endangered, laceration to head, in violation of A.R.S. § 13-3623(A)(1), 13-3601.

¶19 A person commits vulnerable adult abuse, under circumstances likely to produce death or serious physical injury, by causing a vulnerable adult to suffer physical injury, causing or permitting a vulnerable adult to be injured while "having the care or custody of [that] vulnerable adult," or permitting a vulnerable adult to be placed in a situation where the person or health of the vulnerable adult is endangered while "having the care or custody of [that] vulnerable adult." § 13-3623(A). The offense is punished more severely if it is committed under circumstances likely to produce death or serious physical injury. *See* § 13-3623(A), (B). "'Serious physical injury' includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(39).

¶20 We only address whether the state presented sufficient evidence that H.R. was abused under circumstances likely to produce serious physical injury because Rodriguez does not challenge the other elements of the offense and the state did not argue at trial that the circumstances in this case were likely to produce death. *See* § 13-3623(A)(1). We conclude the state presented sufficient evidence for a jury to find beyond a reasonable doubt that Rodriguez caused a laceration to H.R.'s head under circumstances likely to produce serious physical injury.

¶21 The evidence at trial established that Rodriguez repeatedly whipped his eighty-two-year-old, diabetic father in the head with a metal-

pronged plug of an iron's cord. A police detective testified that H.R. had injuries consistent with the plug, and photographs showed that he had at least two lacerations on his head. The plug was found separated from the iron's cord. H.R.'s other son testified that H.R.'s physical and mental health was declining, including troubles with dementia, diabetes, high blood pressure, taking medication, weakness, and hygiene issues. Dr. Madsen, H.R.'s treating emergency physician, testified that diabetes "[c]ertainly" makes individuals heal more slowly and increases their risk for developing infections. He also testified that older individuals are more sensitive to head injuries, may have very thin skin that cannot be stitched, bruise easier, and heal slower. Given the close proximity of the lacerations on H.R.'s head to his eye, the amount of force required for the plug to separate from the iron's cord, and H.R.'s overall poor physical and mental condition, we conclude that a jury could reasonably conclude that Rodriguez's whipping the cord at H.R.'s head could have likely produced blindness or some other serious impairment to H.R.'s health.[7]

Dangerousness Allegations for Aggravated Assault Counts

¶22 Rodriguez argues that there was insufficient evidence the iron was used as a dangerous instrument for counts three and four and that the jury's dangerousness findings must therefore be vacated and the case remanded for resentencing on those counts. As Rodriguez concedes, we review this issue for fundamental, prejudicial error only. *See Henderson*, 210 Ariz. 561, ¶ 19.

¶23 Count two of the indictment alleged that Rodriguez committed aggravated assault against H.R. "with a deadly weapon or dangerous instrument, to wit: iron, in violation of" A.R.S. § 13-1204(A)(2). Count three of the indictment alleged that Rodriguez committed aggravated assault against H.R. by "causing temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part, laceration to scalp, in violation of" § 13-1204(A)(3). Count four of the indictment alleged the same as count

[7]Rodriguez argues on appeal that the prosecutor misstated the law in closing remarks when he said that "evidence of 'the potential' or 'capacity' to cause serious physical injury is sufficient to prove the abuse occurred 'under circumstances likely to produce death or serious physical injury.'" Because Rodriguez does not develop this argument on appeal, we do not address it. *See Sanchez*, 200 Ariz. 163, ¶ 8 (failure to develop argument results in waiver); Ariz. R. Crim. P. 31.10(a)(7).

three but regarding a laceration to H.R.'s finger. The state alleged that, under A.R.S. § 13-704, counts two, three, and four were "of a dangerous nature involving the intentional or knowing infliction of serious physical injury, and/or involving the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument, upon H.R., to wit: iron."

¶24 "'Dangerous instrument' means 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." § 13-105(12). "'Serious physical injury' includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." § 13-105(39).

¶25 Again, there was sufficient evidence for a jury to conclude beyond a reasonable doubt that the iron's cord was used as a dangerous instrument because it was used in a manner that was readily capable of causing serious physical injury to H.R.'s scalp and finger.[8] Dr. Madsen confirmed that when H.R. was brought to the hospital he had lacerations to his scalp and both arms were bruised with skin tears and lacerations. A police detective also confirmed that H.R. suffered lacerations to his scalp and a laceration to his finger that appeared to be caused by the plug from the iron's cord. As discussed above, Dr. Madsen testified that older individuals with diabetes are at a higher risk of delayed recovery and are more sensitive to head injuries. In light of the location of the lacerations, the level of force required for the plug to separate from the iron's cord, and H.R.'s overall poor physical and mental condition, we conclude that a jury could reasonably conclude that Rodriguez's conduct was likely to produce

[8]Rodriguez contends that because the state used the word "iron" instead of "electrical cord" in the dangerousness allegations, it needed to present sufficient evidence that the iron itself was used as a dangerous instrument and could not use evidence of the electrical cord to support that claim. Notwithstanding that the trial court dismissed count two of the indictment based on a lack of sufficient evidence that an iron, rather than its cord, was used, we conclude that the iron's cord and plug are integrated components of the iron and there is no principled reason to distinguish them from the iron as a whole.

a head injury, a serious impairment to H.R.'s health, or protracted impairment of the function of H.R.'s finger. Therefore, we find no error.[9]

Disposition

¶26 For the foregoing reasons, we affirm Rodriguez's convictions and sentences.

[9]Rodriguez also argues on appeal that the trial court's judgment of acquittal on count two of the indictment should have precluded the state from arguing to the jury that counts three and four were of a dangerous nature because the court granted the acquittal on count two of the indictment based on the lack of sufficient evidence of an iron being used as a dangerous instrument. However, the two cases Rodriguez cites to support this proposition only discuss the preclusive effect of an acquittal in the context of a retrial. *See Evans v. Michigan*, 568 U.S. 313, 318-20 (2013) (acquittal precludes retrial even if based on an erroneous decision by the trial court); *Yeager v. United States*, 557 U.S. 110, 115-23 (2009). He cites to no authority, nor have we found any, suggesting this applies equally in the context of a singular trial. Because he has not meaningfully developed this argument on appeal, we do not address it. *See* Ariz. R. Crim. P. 31.10(a)(7); *see also Sanchez*, 200 Ariz. 163, ¶ 8.