

**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.

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APR 19 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

)
)
) Appellee,)
)
)

v.)
)
)

ERNESTO SANTAMARIA,

)
)
) Appellant.)
)
)

2 CA-CR 2012-0233
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102397001

Honorable Howard Hantman, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Alan L. Amann

Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Ernesto Santamaria was convicted of three counts each of aggravated assault and armed robbery. The trial court sentenced him to enhanced, presumptive, concurrent prison terms, the longest of which was 15.75 years. On appeal, Santamaria argues the court erred by giving an erroneous instruction on accomplice liability and by allowing the jury to consider a sentencing allegation during the guilt phase of trial. For the reasons that follow, we affirm.

Factual Background and Procedural History

¶2 We view the facts and the inferences drawn from them in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). Late one evening in July 2010, as E.N., A.C., and C.C. were leaving a party at a residence in Tucson and walking back to their vehicle, a silver Nissan Altima pulled up next to them. The driver, Santamaria, and his younger brother, Trinidad Valles, got out of the car and robbed the victims at gunpoint, taking their wallets, cellular telephones, and jewelry. After Santamaria drove away, one of the victims called 9-1-1, and police stopped the vehicle a short time later.

¶3 Santamaria was indicted on three counts each of aggravated assault and armed robbery, convicted as charged, and sentenced as described above. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Jury Instruction

¶4 Santamaria first argues he “was denied his due process right to a fair trial” under the state and federal constitutions “when the [trial] court gave an erroneous accomplice instruction.”¹ Santamaria acknowledges that, because he did not object to the jury instruction below, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Fundamental error requires the defendant to establish that: (1) an error occurred; (2) the error was fundamental; and (3) the error resulted in prejudice. *See id.* ¶ 20.

¶5 Pursuant to A.R.S. § 13-301, a person may be convicted of a crime as an accomplice if, “with the intent to promote or facilitate the commission of an offense,” the person solicits, aids, or “[p]rovides means or opportunity to another person to commit the offense.” *See also State v. King*, 226 Ariz. 253, ¶ 16, 245 P.3d 938, 943 (App. 2011). An accomplice is criminally accountable for the conduct of another, A.R.S. § 13-303(A)(3), but “[a]ccomplice liability requires intent or acting intentionally,” *State v. Garcia*, 176 Ariz. 231, 233, 860 P.2d 498, 500 (App. 1993). In other words, “[a] defendant may be

¹Although Santamaria argues the jury instruction violated his rights under both the Fifth Amendment of the United States Constitution and article II, § 4 of the Arizona Constitution, he presents no separate argument based on the state constitutional provision. We therefore consider his claim only under the United States Constitution. *See State v. Dean*, 206 Ariz. 158, n.1, 76 P.3d 429, 432 n.1 (2003) (applying principle in Fourth Amendment context).

liable as an accomplice . . . ‘only for those offenses the defendant intended to aid or aided another in planning or committing.’” *State v. Ellison*, 213 Ariz. 116, ¶ 67, 140 P.3d 899, 917 (2006), *quoting State v. Phillips*, 202 Ariz. 427, ¶ 37, 46 P.3d 1048, 1057 (2002).

¶6 Santamaria suggests the trial court’s instruction was improper because it did not quote verbatim the statutory definition of “accomplice.” The court instructed the jury that an accomplice is one who “intends to promote or assists the commission of a crime,” in contrast to the statutory language, which defines an accomplice as one who acts with the “intent to promote or facilitate the commission of an offense.”² *See* § 13-301. Santamaria asserts that the jury “could only have interpreted this instruction to mean that an accomplice is a person who intends to promote, or [without such intent] assists . . . the commission of an offense” And, he maintains the instruction took away from him the right to be found guilty only upon proof of every element of the crime because the jury may have concluded “that he assisted in the commission of the offense without deciding that he did so with the intent to commit the offense.”

²The instruction specifically provided:

An accomplice is a person who intends to promote or assists the commission of a crime; and

1. Asks, solicits, or commands another person to commit the crime, or
2. Aids, counsels, agrees to aid or attempts to aid another in planning or committing the crime; or
3. Provides means or opportunity to another person to commit the crime.

¶7 On appeal, we do not review a single sentence of a jury instruction out of context. *State v. Rutledge*, 197 Ariz. 389, ¶ 15, 4 P.3d 444, 448 (App. 2000). Rather, we review the instructions in their entirety to determine if they adequately reflect the law. *Id.* The instructions given “need not be faultless,” *id.*, quoting *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996), and we will not reverse a conviction on the basis of improper instructions “unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors,” *State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995).

¶8 Here, considered in their entirety, the jury instructions adequately stated the law. *See Rutledge*, 197 Ariz. 389, ¶ 15, 4 P.3d at 448. The trial court accurately instructed the jury on the elements of the crimes of aggravated assault and armed robbery, on the presumption of innocence, and the state’s burden of proving the defendant’s guilt beyond a reasonable doubt. *See State v. Preston*, 197 Ariz. 461, ¶ 11, 4 P.3d 1004, 1009 (App. 2000) (presumption of innocence and state’s burden of proof fundamental to criminal justice system). The court also instructed the jury that it is not a crime to be “merely present” at the scene of a crime. And, although the accomplice instruction did not track the language of § 13-301 verbatim, it did include the applicable mens rea—intent—required for the commission of the offense. Finally, we also agree with the state that “to assist” involves a greater degree of participation than “to facilitate,”³ so any error in the jury instruction actually favored Santamaria. *See*

³To “assist” means “to give support or aid.” *Webster’s Ninth New Collegiate Dictionary* 109 (1983). To “facilitate” means “to make easier.” *Id.* at 444.

Henderson, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (fundamental error must result in prejudice to defendant). Given the subtle differences between the statutory definition of accomplice and the definition contained in the jury instruction, we cannot reasonably conclude the jurors were misled by the instruction. *See Strayhand*, 184 Ariz. at 587, 911 P.2d at 593.

Sentencing Aggravator

¶9 Next, Santamaria argues the trial court violated Rule 19.1(b)(1), Ariz. R. Crim. P., by instructing the jury and providing it a verdict form on a sentencing allegation during the guilt phase of trial. Specifically, he contends the court improperly allowed the jury to simultaneously consider whether he was guilty of the charged crimes and whether they were “dangerous offenses.” Again, Santamaria acknowledges that he did not object to the jury instruction and verdict forms, so we review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶10 Rule 19.1(b) provides that the state’s allegation of prior convictions or non-capital sentencing allegations such as dangerousness should not be considered by the jury during the guilt phase of trial. *See also* A.R.S. § 13-704 (sentencing for dangerous offenses); *State v. Patterson*, 230 Ariz. 270, ¶ 29, 283 P.3d 1, 8 (2012). Under Rule 19.1(b), “unless such conviction or allegation is an element of the crime charged . . . no instructions shall be given, reference made, nor evidence received concerning” the allegations. The purpose of the rule is to prevent the jury from considering unfair propensity evidence during the guilt phase of trial. *See State ex rel. McDougall v. Municipal Court*, 160 Ariz. 324, 326, 772 P.2d 1177, 1179 (App. 1989).

¶11 Here, the trial court instructed the jury that, if it found Santamaria guilty of either aggravated assault or armed robbery, it “must determine whether or not the offense was a ‘dangerous offense.’” The court defined a dangerous offense as one “involv[ing] the threatening exhibition of a deadly weapon or dangerous instrument.” The verdict forms also included an interrogatory asking the jury to decide whether or not the aggravated assaults and armed robberies were dangerous offenses, which it needed to consider only if it found Santamaria guilty of those crimes. The court further instructed the jury that the state must prove dangerousness beyond a reasonable doubt and the jury’s finding of dangerousness must be unanimous.

¶12 Santamaria was charged with three counts each of aggravated assault and armed robbery. By definition, armed robbery involves the use or threatened use of a deadly weapon, simulated deadly weapon, or dangerous instrument. *See* A.R.S. § 13-1904(A); *State v. Garza Rodriguez*, 164 Ariz. 107, 111-12, 791 P.2d 633, 637-38 (1990) (elements of armed robbery). Aggravated assault can be committed in various ways, including when the person commits an assault and “uses a deadly weapon or dangerous instrument.” *See* A.R.S. § 13-1204. Here, the offenses were charged in the indictment as involving a deadly weapon or dangerous instrument, specifically a firearm, and the jury was instructed only on the form of aggravated assault involving the use of a deadly weapon or dangerous instrument. And, although the court instructed the jury that armed robbery can be committed with a “simulated deadly weapon,” there was no evidence or argument that the weapon involved was anything other than a real firearm. Thus, because the offenses as charged and proven were dangerous by their very nature, the finding of

dangerousness was implicit in the jury's verdicts and Santamaria was not prejudiced by the trial court submitting the dangerousness allegation to the jury during the guilt phase of trial. *See State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980) (jury's finding of guilt on armed robbery charge necessarily involved conclusion defendant committed dangerous offense).

¶13 Our supreme court reached essentially the same conclusion in *Patterson*. There, the court stated that, based on Rule 19.1(b), it was error to submit the dangerousness allegation to the jury during the guilt phase of trial, but that the error was harmless because the defendant did not dispute killing the victim with a butcher knife, "which any reasonable jury would find to be a dangerous instrument." *Id.* ¶¶ 30-31. The court noted the evidence of dangerousness was the same as that for the underlying murder, and the jury was instructed to consider dangerousness only if it first found the defendant guilty of murder. *Id.* ¶ 31. In those circumstances, the court concluded the "dangerousness finding was implicit in the guilty verdict." *Id.*

¶14 Santamaria, however, asserts that he denied participating in the charged crimes, unlike the defendant in *Patterson*. Therefore, he argues that allowing the jury to consider the dangerousness allegation during the guilt phase "affected its decision to find [him] guilty of aggravated assaults and armed robberies, rather than the lesser included offenses of assault, robbery and/or theft." We are not persuaded by this argument. As in *Patterson*, the dangerousness finding was implicit in the jury's verdicts, and the evidence to support a conviction of the underlying charges and a finding of the sentencing allegation was the same. *See id.* Moreover, the jury was instructed to consider the

dangerousness allegation only if it found Santamaria guilty of the armed robbery and aggravated assault charges. *Id.* Thus, even assuming it was error for the trial court to give the jury instruction and verdict forms on dangerousness, we cannot conclude the error was fundamental, prejudicial error.

Disposition

¶15 For the reasons set forth above, Santamaria's convictions and sentences are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge