

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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MAR 27 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0409
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BARNABUS JOSE GONZALES,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103441001

Honorable Jose Robles, Judge Pro Tempore

VACATED IN PART AND REMANDED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and William Knight, a
student certified pursuant to Rule 38(d),
Ariz. R. Sup. Ct.

Phoenix
Attorneys for Appellee

Altfeld & Battaile P.C.
By Robert A. Kerry

Tucson
Attorneys for Appellant

ESPINOSA, Judge.

¶1 Barnabus Gonzales was convicted after a jury trial of aggravated driving under the influence and aggravated driving with a blood alcohol concentration of .08 or

greater, both while his driver license was suspended, revoked, or restricted; criminal damage; fleeing from a law enforcement vehicle; and two counts of endangerment. For the endangerment convictions, the trial court sentenced Gonzales to concurrent, 2.25-year prison terms. For his convictions of aggravated driving, criminal damage, and fleeing from a law enforcement vehicle, the court suspended the imposition of sentence and placed Gonzales on terms of probation, the longest of which were four years, to run concurrently to each other but consecutively to his prison terms. On appeal, Gonzales argues the court erred in “entering a verdict of guilty and imposing a sentence” for criminal damage as a class five felony because the state “conceded at trial that no evidence of the dollar amount of damage was introduced.” The state concedes error on appeal. We vacate the conviction and the court’s disposition on that count, and remand with instructions.

¶2 At the close of the state’s case, Gonzales moved for a judgment of acquittal on, inter alia, the charge of criminal damage, arguing that “there’s been no evidence whatsoever about the dollar extent of the damage” and, therefore, “the most that . . . the jury should be allowed to consider is” whether Gonzales could be guilty of criminal damage as a class two misdemeanor instead of a class five felony as charged in the indictment. *See* A.R.S. § 13-1602(B)(3), (6). The trial court and the state agreed. The court determined the verdict form for criminal damage would omit any reference to damages except in the amount of \$250. The signed verdict form nonetheless stated the jury had found Gonzales guilty of criminal damage “as alleged in . . . the indictment.”

¶3 At sentencing, the trial court, without objection, entered judgment that Gonzales “is guilty of . . . criminal damage in an amount of more than \$2,000 but less than \$10,000, a Class 5 felony.” We agree with Gonzales and the state that the court erred in doing so, apparently inadvertently.¹ It had granted Gonzales’s motion for a judgment of acquittal on that charge and had instructed the jury solely on the lesser offense of criminal damage for defacing property or causing damage to property in an amount less than \$250. *See* § 13-1602(A)(1), (B)(6). Any ambiguity in the verdict form was also clearly inadvertent and, in light of the court’s grant of Gonzales’s Rule 20 motion and its instructions to the jury, did not permit the jury to find Gonzales guilty of criminal damage as a class five felony. *See* Ariz. R. Crim. P. 20(a); *State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006) (we presume jury followed court’s instructions). The court thus had no basis to enter a judgment of guilt on the greater charge. *Cf. State v. Virgo*, 190 Ariz. 349, 352, 947 P.2d 923, 926 (App. 1997) (court had no authority to sentence defendant “for a higher-level offense than the jury instructions and verdict forms permitted”).

¶4 Accordingly, we vacate the court’s entry of a judgment of guilt for criminal damage and its imposition of probation for that conviction. We remand the case with instructions to enter a judgment of guilt for criminal damage as a class two misdemeanor

¹Despite trial counsel’s failure to object, the error here was patently fundamental and prejudicial. *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).

and resentence Gonzales accordingly.² See *State v. Rushing*, 156 Ariz. 1, 5, 749 P.2d 910, 914 (1988); see also Ariz. R. Crim. P. 31.17(d).

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

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge

²To the extent Gonzales suggests we should vacate his conviction, he cites no authority in support of that proposition, and we are aware of none. Indeed, he concedes there was sufficient evidence for the jury to find him guilty of criminal damage as a class two misdemeanor.