IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MELVIN ELEM,
Appellant.

No. 2 CA-CR 2014-0167
Filed November 30, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20124581001
The Honorable Scott Rash, Judge

AFFIRMED AS MODIFIED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 After a jury trial, Melvin Elem was convicted of drive-by shooting, discharging a firearm at a residential structure, endangerment, and disorderly conduct. He was sentenced to concurrent and consecutive prison terms totaling 19.5 years. On appeal, he argues: (1) the evidence was insufficient to support any of the convictions; (2) the evidence was insufficient to support the trial court's finding that he had historical prior felony convictions; (3) the court erred in admitting or failing to "sanitize" evidence of a prior dispute between Melvin and the victim's boyfriend, or failing to give the jury a limiting instruction as to that evidence; and, (4) the court improperly ordered consecutive rather than concurrent sentences.[1] Although we agree with Melvin's fourth contention in part and modify his sentence accordingly, we affirm in all other respects.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Nelson,* 214 Ariz. 196, ¶ 2, 150 P.3d 769, 769 (App. 2007). One afternoon in December 2012, C.S. was at home with her two sons when she heard a knock at her front door. As she opened the door, she saw Melvin's brother, Larry. C.S. knew both Melvin and Larry from the neighborhood. Larry repeatedly demanded to speak with C.S.'s boyfriend A.A., who also lived there. Larry wanted to speak to A.A. about an accusation of

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[1]For the sake of organization and clarity, we address Melvin's contentions in a different order than he did in his opening brief. *See State v. Lavers*, 168 Ariz. 376, 381, 814 P.2d 333, 338 (1991).

arson involving Melvin. C.S. told Larry repeatedly that A.A. was at work and not home. C.S. asked Larry to leave numerous times but he refused and started yelling angrily. C.S. called the police.

¶3 After hanging up with the police, C.S. looked out at the street and saw Melvin sitting in his car. She went out to speak with Melvin to ask if he could convince Larry to leave. As she spoke with Melvin, she saw a gun next to him in the car, which made her "really, really scared." Melvin got out of the car with gun in hand and followed her back toward the house.[2]

¶4 C.S. testified that Melvin was yelling at her from outside, shouting obscenities and "very mean, violent things" such as "'Bitch, I'm going to kill you'" and "'I'm going to hurt you,'" and threatening to kill her children as well. Calling 9-1-1 again, C.S. told the operator that "Melvin Elem" was outside her house and was threatening to "shoot [her] and kill [her]."[3]

¶5 Melvin threw a rock through C.S.'s front living room window, shattering it. C.S.'s four-year-old son was standing about eight feet away from the window at that point. She ran to get her one-year-old son out of his crib and placed both children in one bedroom. Then she went outside to see what Melvin and Larry were doing, fearing that they might try to shoot her through the window or invade the home. She saw Melvin standing in her yard with a rock in one hand and a gun in the other. When Melvin saw her, he started "coming after" her as though "[h]e was . . . getting ready to run towards [her], like lunge." C.S. pulled her own gun out of her pocket and fired about three shots; one hitting Melvin and causing him to fall.[4] She went back inside, shut the screen door, and checked on her children.

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[2]The state did not allege a criminal act from this interaction.

[3]The call was recorded and admitted at trial.

[4]In another recorded 9-1-1 call later admitted as an exhibit, C.S. can be heard telling the operator that just before the call, she "had to shoot at" a man who had been "throwing rocks at [her] window" and "threatening [her] and [her] son."

¶6 By this point, Larry had parked his pickup truck at an angle in the street in front of the house. Standing on the ground between the open driver's door and the cab of the truck, Larry fired one or two shots at the house.[5]

¶7 Shortly thereafter, a neighbor across the street who had heard the commotion came outside and began recording video using his cell phone. The video showed Melvin in the street hobbling toward his car after having been shot, and he could be heard saying to Larry, "C'mon bro, I'm gonna get my gun." It further showed Melvin climbing into the driver's seat of his car, beginning to drive away slowly, and then pointing the gun at C.S.'s house and firing one shot.[6] The neighbor who was filming testified he saw the muzzle of Melvin's gun flash in "a bright line of light extending from the [car] window towards [C.S.'s] house." C.S. testified she heard a single gunshot a minute or two after she shot Melvin, but did not see who fired it. She also testified she saw Melvin and Larry drive away just after the shot was fired. She observed them through the open front door or the front window, which both faced the street. Melvin was apprehended minutes later, the sole occupant of the black car visible in the video.

¶8 Melvin was charged with endangerment, discharging a firearm at a residential structure, drive-by shooting, and aggravated assault with a deadly weapon or dangerous instrument. Larry was charged as a co-defendant on all counts, and the jury was instructed on accomplice liability. The jury found Melvin guilty on the former three counts, but instead of aggravated assault, the jury found Melvin guilty of the lesser-included offense of disorderly conduct.

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[5] Larry was charged with multiple criminal acts and tried jointly with Melvin, but his convictions are not the subject of this appeal nor do they affect it.

[6] This shot can also be heard in the recording of a 9-1-1 call from another neighbor. The neighbor then says that "[t]he guy in the black, that was yelling, took off." The cell phone video shows Melvin wearing black and yelling, and then driving away after he fires the shot.

At a separate hearing, the trial court found Melvin had three historical prior felony convictions for sentencing purposes. He was sentenced as detailed above and now appeals. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Sufficiency of the Evidence and Rule 20 Motions

¶9 Melvin argues the trial court erred by denying his post-verdict motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., as to the disorderly conduct conviction, and appears to argue the court erred by denying his pre-verdict Rule 20 motion as to the aggravated assault charge. He further contends the evidence was insufficient to support his convictions for endangerment, drive-by shooting, or discharging a firearm at a residential structure.

¶10 We review de novo a challenge to the sufficiency of the evidence. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). A jury verdict cannot be vacated for insufficient evidence unless it clearly appears that "upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Nor will we disturb the trial court's denial of a Rule 20 motion unless there is a "complete absence of 'substantial evidence' to support the conviction." *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996), *quoting* Ariz. R. Crim. P. 20(a). Substantial evidence is "evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005), *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997); *see also West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191 ("'[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

Disorderly Conduct

¶11 A person commits disorderly conduct if he recklessly handles or displays a deadly weapon or dangerous instrument with intent to disturb the peace or quiet of a person or knowledge of

doing so. *See* A.R.S. § 13-2904(A)(6). C.S. testified that Melvin threw a rock through her front window and yelled death threats and obscenities at her. When she went outside to investigate, she saw him with another rock and a gun. He began to run toward her and stopped only after she shot him. A reasonable juror could conclude that Melvin was aware that there were substantial and unjustifiable risks associated with handling and displaying a gun in the heat of an argument, in a residential neighborhood, with children present, just after throwing a rock through C.S.'s window—not least that he himself might get shot in self-defense by a frightened C.S., which he did—but he consciously disregarded those risks by handling and displaying the gun. *See* A.R.S. § 13-105(10)(c) (defining "recklessly").

¶12 To the extent Melvin argues the trial court erred by denying his Rule 20(a) motion as to the aggravated assault charge at the close of the state's case-in-chief, we disagree, in light of this same evidence. There was not a complete absence of substantial evidence that Melvin had committed aggravated assault. *Sullivan*, 187 Ariz. at 603, 931 P.2d at 1113. A reasonable juror could conclude Melvin intentionally placed C.S. in reasonable apprehension of being shot when, after throwing a rock through her window and saying he was going to kill her, he began to lunge toward her with a gun in his hand. *See* A.R.S. §§ 13-1203, 13-1204(A)(2).

¶13 There also was enough evidence for a reasonable finder of fact to conclude that Melvin knew or intended that the gun would disturb C.S.'s peace. Indeed, a reasonable person could conclude that he chose to use a gun to emphasize his threats to hurt or to kill C.S., which also had the effect of enhancing the disturbance of the peace. And substantial evidence established C.S.'s peace had, in fact, been disturbed. "A 'disturbance of the peace' . . . may be created by any act which molests inhabitants in the enjoyment of peace and quiet or excites disquietude or fear." *State ex rel. Williams v. Superior Court*, 20 Ariz. App. 282, 283, 512 P.2d 45, 46 (1973). C.S. testified that she felt "completely vulnerable" and "very scared" for her own life and her children's lives during the entire ordeal. An officer who interviewed her shortly after the incident said she was "hysterical" and "crying a lot." A rational trier of fact could have

found Melvin guilty of disorderly conduct beyond a reasonable doubt.

Drive-by Shooting

¶14 Melvin next argues the evidence was insufficient for a rational trier of fact to have found him guilty of drive-by shooting, which is committed by intentionally discharging a weapon from a motor vehicle at a person. A.R.S. § 13-1209(A). A person also commits drive-by shooting by intentionally discharging a weapon from a motor vehicle at an occupied structure, *see* § 13-1209(A), which is implicated by shooting at the house. However, count four of the indictment alleged only that Melvin had committed drive-by shooting by intentionally discharging a weapon from a motor vehicle at C.S. or either of her two children. Thus, the state was required to prove that Melvin intentionally fired the gun at C.S. or either of her children, not at an occupied structure. *See State v. Rivera*, 226 Ariz. 325, ¶¶ 4-9, 247 P.3d 560, 562-64 (App. 2011).

¶15 Melvin's statement, "C'mon bro, I'm gonna get my gun," together with the video showing Melvin aiming the gun before firing, was sufficient evidence for a rational trier of fact to conclude that he intentionally fired the gun. *See* § 13-105(10)(a). As to which victim was the intended target, Melvin's statements, "Bitch, I'm going to kill you" and "I'm going to hurt you" were evidence that C.S. was targeted. Finally, the video shows the gun aimed from inside the motor vehicle toward the front of C.S.'s house while she was near enough to the front door or window to watch him. This was sufficient evidence from which reasonable persons could conclude beyond a reasonable doubt that Melvin intentionally had fired at C.S. in a drive-by shooting.

¶16 Citing *Rivera*, 226 Ariz. 325, ¶ 5, 247 P.3d at 562-63, as he did below, Melvin argues that under count four of the indictment, which alleged he committed drive-by shooting by intentionally firing "at [C.S.'s younger son] and/or [C.S.'s older son] and/or [C.S.]," the state was required to prove that Melvin intentionally shot at all three of the named individuals, not just one. We disagree. The use of the disjunctive "or" in count four of the indictment and in the verdict form on that count as to Melvin, means that the state was

only required to prove that Melvin intentionally had fired at one or more of the named victims, not necessarily all three. *See, e.g.*, *State v. Bowsher*, 225 Ariz. 586, ¶ 7, 242 P.3d 1055, 1056 (2010) ("The word 'or' generally means '[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.'"), *quoting Or*, Black's Law Dictionary (6th ed. 1990). The trial court did not err in finding *Rivera* distinguishable, because in that case the state failed to identify any evidence that the defendant shot at the one particular victim named in the indictment. 226 Ariz. 325, ¶¶ 4-5, 247 P.3d at 562-63.

Discharging a Firearm at a Residential Structure

¶17 Largely relying on his insufficiency argument involving the drive-by shooting charge, Melvin contends the evidence was insufficient to convict him of knowingly discharging a firearm at a residential structure in violation of A.R.S. § 13-1211(A). We understand this argument to challenge whether he (1) knowingly discharged his weapon and (2) knew it was a residence. The testimony regarding his threatening statements to harm C.S. constituted indirect, but substantial evidence to establish he purposefully fired his gun. *See* A.R.S. §§ 13-105(10)(a), 13-202(C). And the evidence that Melvin knew C.S. and A.A. lived in the house was sufficient for a reasonable juror to conclude the house was a permanent structure adapted for human residence. *See* § 13-1211(C)(2).

¶18 Furthermore, a reasonable juror could conclude Melvin fired "at" the house. Viewed in the light most favorable to sustaining the verdicts, the video showed Melvin pointing the gun out the passenger window of the car toward C.S.'s house just before the muzzle flash. In addition, the neighbor who was filming testified he saw "a bright line of light extending from the [car] window towards [C.S.'s] house." Based on this evidence, reasonable persons could conclude Melvin knowingly had discharged a firearm at a residential structure.

Endangerment

¶19 A person "commits endangerment by recklessly endangering another person with a substantial risk of imminent death . . . ." A.R.S. § 13-1201(A). The state must also show defendant's conduct actually did place the victim at substantial risk of imminent death. *See State v. Doss*, 192 Ariz. 408, ¶¶ 8-9, 966 P.2d 1012, 1015 (App. 1998). The endangerment statute does not require that the victim actually be physically injured, *Campas v. Superior Court*, 159 Ariz. 343, 345, 767 P.2d 230, 232 (App. 1989), nor does it require the victim to be aware of the risk, *State v. Morgan*, 128 Ariz. 362, 367, 625 P.2d 951, 956 (App. 1981).

¶20 Assuming the state was required to prove Melvin had endangered all three victims listed in the indictment,[7] the state presented more than a mere scintilla of evidence that he had done so. As discussed above, there was sufficient evidence for a reasonable jury to conclude Melvin intentionally fired his gun at the front of the house. And C.S. testified she watched Melvin drive away immediately after he fired the shot, meaning she must have been in the immediate vicinity of the street side front door or front window when he began to drive away and shot at the house. Viewed in the light most favorable to sustaining the verdict, C.S. was actually placed at risk of imminent death.

¶21 There was also more than a mere scintilla of evidence that C.S.'s sons were actually placed at risk of imminent death from at least one of the shots fired by the Elems. Testimony established that C.S. moved her children to a bedroom just before she shot Melvin. Police found a bullet hole in the wall of the house just a few feet above the front window. The jury reasonably could have found that the bullet hole came from the shot Melvin had fired, or from one of the bullets Larry had fired, and found Melvin guilty under the

[7] As discussed next, the charge lacked a coordinating conjunction between the names of the victims making it duplicitous; however, the duplicity was not prejudicial as to Melvin.

accomplice theory on which the jury was instructed.[8] *See* A.R.S. §§ 13-301, 13-303(A)(3). Photographs of the interior of the house established the floor plan was such that a bullet through the front window might have passed through that room and into an adjacent room. On these facts, a reasonable juror could have concluded the bullet that narrowly missed the front window placed the children in actual substantial risk of imminent death. *Cf. State v. Carreon*, 210 Ariz. 54, ¶¶ 38, 42, 107 P.3d 900, 909, 910 (2005) (evidence that children's bedroom shared thin wall with room where shooting occurred and bullet recovered from doorjamb of that bedroom was sufficient for jury to find children in bedroom at actual substantial risk of imminent death).

¶22 *Doss*, which Melvin relies on, is distinguishable. There, the court observed that "ambigu[ity]" about the locations of seven individuals within a house at which the defendant fired two shots left open an argument about whether each of those individuals actually had been placed at substantial risk. *See Doss*, 192 Ariz. 408, ¶¶ 11, 13, 966 P.2d at 1015, 1016.[9] Here, however, there was sufficient evidence of the locations of each of the three victims in the house at the time of the shootings for a reasonable juror to infer that they each were actually placed at risk of imminent death. The trial court did not err in denying the Rule 20 motion.

Proof of Historical Prior Felony Convictions

¶23 Melvin contends, as he did below, his sentence should not have been enhanced because the state failed to prove he had three historical prior felony convictions. *See* A.R.S. § 13-703(C). To

[8]It was not clear whether the bullet causing the hole was fired from Melvin's gun or Larry's gun because the bullet was never recovered.

[9]The court in *Doss* did not rule on the state's argument that the possibility of bullet ricochets meant that anyone within the house was actually placed at risk, leaving that issue to be explored upon a remand ordered for unrelated reasons. 192 Ariz. 408, ¶ 13, 966 P.2d at 1016.

prove a historical prior felony conviction, it is sufficient for the state to introduce a certified copy of the prior conviction and prove that the defendant is the person to whom the document refers. *See State v. Lee*, 114 Ariz. 101, 105, 559 P.2d 657, 661 (1976). Melvin contends the evidence does not show he was the person named in the state's documentary evidence. We disagree. The state introduced certified copies of the judgments and sentences from each of Melvin's prior convictions, as well as a certified copy of Melvin's "pen pack," a packet of information assembled by the Arizona Department of Corrections detailing Melvin's history of criminal convictions and incarceration, his personal information, his fingerprints, and more. The three case numbers listed in the pen pack correspond to the three case numbers in the court records. A photograph of Melvin in the pen pack matches a photograph of Melvin introduced as a separate exhibit at the priors hearing. And at the hearing on the state's allegation of prior felony convictions, an officer testified he had met Melvin at the hospital on the day of the crime and testified about Melvin's date of birth from his medical records, which matched the birthdate listed on the court and correctional records. The trial court did not err in finding this evidence sufficient to establish each of Melvin's three historical prior felony convictions. *See id.*

Admission of Evidence Regarding Prior Dispute

¶24 Melvin argues the trial court erred in granting the state's motion in limine and allowing C.S. to testify that her boyfriend A.A. had previously accused Melvin of arson, and that Melvin and Larry went to C.S.'s house on the day of the crime to confront A.A. about it. We review a trial court's ruling on a motion in limine for an abuse of discretion. *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 182, 644 P.2d 1266, 1268 (1982).

¶25 Relevant evidence is admissible in Arizona unless otherwise prohibited by law. *See* Ariz. R. Evid. 402. Evidence is relevant if it has any tendency to make any fact of consequence to the action more or less probable. Ariz. R. Evid. 401. The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 403.

¶26 Here, evidence of A.A.'s prior accusation that Melvin had committed arson was relevant to the issue of Melvin's motive and intent. Ariz. R. Evid. 401; *State v. Jeffers*, 135 Ariz. 404, 418, 661 P.2d 1105, 1119 (1983) (evidence of prior quarrel between victim and accused relevant as tending to show motive and making commission of crime more probable); *see also State v. Tuttle*, 58 Ariz. 116, 120, 118 P.2d 88, 90 (1941) ("[P]roof of motive is always relevant."). The testimony tended to prove Melvin held a grudge against A.A., and by extension, against C.S. In addition, the evidence related to C.S.'s state of mind when she saw Melvin and Larry on the afternoon of the crimes. Nor did the trial court abuse its discretion in implicitly determining that the probative value of the arson evidence was not substantially outweighed by the danger of unfair prejudice to Melvin. Ariz. R. Evid. 403; *see State v. Williams*, 183 Ariz. 368, 377-78, 904 P.2d 437, 446-47 (1995) (testimony defendant had previously burned murder victim's car and otherwise been hostile to her probative of motive and intent, and not unfairly prejudicial). The court did not abuse its discretion in admitting the evidence.[10]

¶27 Similarly, Melvin maintains the trial court erred by denying his request to "sanitize" the arson testimony and only allow C.S. to testify that there was a prior "incident" or "dispute" between him and A.A., rather than that A.A. had previously accused Melvin of arson.[11] The trial court reasonably could have concluded that evidence A.A. had accused Melvin of committing arson, rather than

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[10]Melvin argues in his opening brief that the arson accusation evidence should have been precluded under Rule 404(b), Ariz. R. Evid., but in his reply brief he expressly withdraws that argument. He also appears to argue in passing that admitting the evidence violated Rule 104(b), Ariz. R. Evid., but he does not develop this argument or provide relevant citations to the record; therefore, we decline to consider it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004).

[11]Because Melvin requested these constraints on the testimony below, mentioned in his opening brief that his request was denied, and argued in his reply brief that such denial was error, we disagree with the state's position that the issue is not properly preserved.

sanitized testimony about a dispute or disagreement, was more accurate and would allow the jury to fairly determine whether Melvin's actions giving rise to this appeal were motivated by a grudge. *See* Ariz. R. Evid. 401(a). The court did not clearly abuse its discretion in denying Melvin's request to limit the testimony.

¶28 Melvin appears to argue that the trial court erred by failing to give the jury a limiting instruction as to the arson evidence. At the hearing on the state's motion in limine, the court granted Melvin's request for a limiting instruction. An instruction was not given. Because Melvin did not submit a written request for a limiting instruction with his other proposed instructions, nor did he object to its absence from the final instructions, he has waived the issue as to all but fundamental error. *See* Ariz. R. Crim. P. 21.2 (counsel has duty to timely request instructions in writing); *State v. Islas*, 132 Ariz. 590, 591, 647 P.2d 1188, 1189 (App. 1982) ("Normally, failure to request any special instructions preclude[s] appellate review unless error is fundamental."). Because Melvin does not argue the alleged error was fundamental he forfeits the analysis. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Consecutive Sentences

¶29 Melvin argues that the trial court violated A.R.S. § 13-116 by ordering him to serve the concurrent sentences for disorderly conduct and endangerment consecutively to his concurrent sentences for drive-by shooting and discharging a firearm at a residential structure. Citing *State v. Hampton*, 213 Ariz. 167, ¶¶ 63-64, 140 P.3d 950, 964-65 (2006), he argues the offenses were based on one act for purposes of the statute, which was the shot he fired from the car. Melvin failed to raise this argument at sentencing, which limits our review to fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, "[i]mposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶30 Section 13-116 provides, in relevant part, as follows: "An act or omission which is made punishable in different ways by

different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." To determine whether two convictions arise out of a single "act" for purposes of § 13-116, the court applies the test from *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). First, the court considers the facts of each crime separately. *Id.* If, after subtracting the facts necessary to convict on the "ultimate charge" (often the most serious charge and the one "at the essence of the factual nexus"), there is still enough evidence to satisfy the elements of the other charge, then consecutive sentences may be permissible under the statute. *Id.* Next, the court asks "whether, given the entire 'transaction,' it was factually impossible to commit the ultimate crime without also committing the secondary crime." *Id.* If so, the likelihood that the two crimes are a single act increases. *Id.* The court then considers whether the defendant's conduct in committing the other crime subjected the victim to "an additional risk of harm beyond that inherent in the ultimate crime"; if so, then consecutive sentences ordinarily are appropriate. *Id.*

¶31 Melvin's consecutive sentence for disorderly conduct does not violate the *Gordon* test. His convictions for drive-by shooting and discharging a firearm at a residential structure, which could equally be regarded as the ultimate charge under *Gordon*,[12] both arose out of the one shot he fired from the car. After subtracting those facts, there remains enough evidence to support his disorderly conduct conviction, which is based on his recklessly

[12]Drive-by shooting and discharging a firearm at a residential structure are class two felonies. §§ 13-1209(D), 13-1211(A). Disorderly conduct under § 13-2904(A)(6) is a class six felony, § 13-2904(B), as is endangerment involving a substantial risk of imminent death, § 13-1201(B). Whether we view drive-by shooting or discharging a firearm at a residential structure as the ultimate charge in this case makes no practical difference. Both crimes are class two felonies, both arise out of the one shot Melvin fired, which is at the heart of the factual nexus of the case, and Melvin received equal 15.75-year sentences for both convictions, to be served concurrently.

displaying a firearm in C.S.'s front yard just before she shot him. It was not factually impossible for him to commit the ultimate crimes without also committing disorderly conduct. He could have shot at C.S. and her house from his car without ever getting out and recklessly displaying his gun in her yard. Finally, Melvin's disorderly conduct subjected C.S. to an additional risk of harm beyond that inherent in the ultimate crimes; namely, the risk that her peace would be disturbed. *Compare* §§ 13-1209 and 13-1211 (no element of disturbing peace), *with* § 13-2904 (element of intent to disturb or knowledge of disturbing person's peace or quiet). The trial court did not violate *Gordon* when it set Melvin's disorderly conduct sentence consecutive to his sentences for drive-by shooting and discharging a firearm at a residential structure.

¶32 In its answering brief, however, the state concedes error with respect to the sentence for endangerment, which is consecutive to the sentences for drive-by shooting and discharging a firearm at a residential structure. We agree. The indictment alleged Melvin committed endangerment involving a substantial risk of imminent death against C.S. and each of her two sons. *See* § 13-1201(A). And as discussed above, this charge required the state to establish an *actual* substantial risk of imminent death. *Doss*, 192 Ariz. 408, ¶ 7, 966 P.2d at 1015. Without the facts supporting his convictions for drive-by shooting and discharging a firearm at a residential structure—specifically, Melvin firing the gun at the house one time from his car—there would not be enough evidence to show that C.S. had actually been placed at substantial risk of imminent death at any point during the incident. Thus, all three crimes arose out of a single "act" under § 13-116, and consecutive sentences are not permitted. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211; *accord State v. Lee*, 185 Ariz. 549, 560, 917 P.2d 692, 703 (1996) ("[A]fter eliminating the evidence necessary to support the armed robbery charge, the remaining evidence is insufficient to support the charge of automobile theft, so those two sentences must be served concurrently.").

¶33 The imposition of a consecutive sentence for endangerment constituted fundamental error. We therefore modify Melvin's sentence for endangerment and order that it be served

concurrently with his sentences for drive-by shooting and discharging a firearm at a residential structure.

Duplicitous Charge

¶34 Although neither Melvin nor the state raises the issue on appeal, during our review of the record we discovered an anomaly in count two of the indictment. It states, "On or about the 2nd day of December, 2012, Melvin Elem and Larry Alexander Elem recklessly endangered [C.S.], [C.S.'s younger son], [C.S.'s older son] with a substantial risk of imminent death, in violation of A.R.S. § 13-1201." The absence of a coordinating conjunction among the victims' names arguably creates an ambiguity about whether the state was required to prove that Melvin endangered one, two, or all three victims. It constitutes a duplicitous charge because Melvin did not receive notice of which victim was involved, the ambiguity presented a threat of a non-unanimous verdict, and it made impossible a pleading of double jeopardy against a future prosecution. *See State v. Petrak*, 198 Ariz. 260, ¶ 23, 8 P.3d 1174, 1180-81 (App. 2000).

¶35 "Although we do not search the record for fundamental error, we will not ignore it when we find it." *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). Because a duplicitous indictment can be fundamental, prejudicial error, *see, e.g., State v. Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d 900, 908 (App. 2009), we consider whether any error in count two was both fundamental and prejudicial to Melvin, *id.* ¶ 8. The record shows it was not. The verdict form for count two resolves any possible ambiguity. The form read, "We, the Jury . . . do find the defendant, Melvin Elem, _____ of the offense of Endangerment, Risk Of Imminent Death of [C.S.], [C.S.'s younger son], *and* [C.S.'s older son] as alleged in Count Two of the Indictment" (Emphasis added.). The foreperson wrote "Guilty" in the blank. The verdict form also contained an interrogatory that said: "We, the Jury, do find the offense was committed, beyond a reasonable doubt, against

___ [C.S.'s younger son]; *and/or*

___ [C.S.'s older son]; *and/or*

___ [C.S.]."

The foreperson checked all three blanks. Thus, there is no doubt that the jury was actually unanimous that Melvin was guilty of endangerment as to all three individuals listed in Count Two. Any arguable duplicity in the indictment was not prejudicial as to Melvin. *See id.* ¶ 17 (duplicitous indictment can be cured "when the basis for the jury's verdict is clear").

Disposition

¶36 We affirm Melvin's convictions. We modify Melvin's sentence for endangerment as discussed above, and otherwise affirm the sentences as imposed.