IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

TERRY JOHN PARKER,
Appellant.

No. 2 CA-CR 2014-0186
Filed June 22, 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NOT FOR PUBLICATION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 Gila County
No. S0400CR201000178
The Honorable Edward L. Dawson, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 Terry Parker appeals his convictions and sentences for one count of attempted aggravated interference with judicial proceedings, one count of aggravated interference with judicial proceedings, and one count of aggravated harassment, all domestic violence offenses. He argues the trial court erred by allowing the state to amend the indictment during trial and by denying his motion for judgment of acquittal. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Parker's convictions and sentences. *See State v. Welch*, 236 Ariz. 308, ¶ 2, 340 P.3d 387, 389 (App. 2014). In early 2009, Parker was on probation and, as a condition of probation, had been ordered to have no contact with his ex-wife, D.P. On May 13, 2009, D.P. obtained an order of protection against Parker that required him to have no contact with D.P. "whatsoever" and warned that if he disobeyed, he would be "subject to arrest and prosecution."

¶3 On July 1, 2009, D.P. called the Payson Police Department to report that Parker had violated the order of protection. After police officer Brandon Buckner verified the validity of the order of protection, he went to D.P.'s residence, checked her caller identification system, and learned she had received a telephone call from a local restaurant. Buckner then went to the restaurant and saw Parker sitting in the patio area. After the bartender told Buckner that Parker had used the telephone, Buckner told Parker he knew he had made a telephone call and told him there was a recording of the call to D.P., which was false. Parker

replied, "So," and Buckner placed him under arrest for violating the order of protection.

¶4 On August 4, 2009, when Parker was in jail for the July 1 incident, he tried to arrange for a note to be passed to D.P. Buckner obtained the note from the jail; it was addressed to D.P. and included her name, address, telephone number, and a map to her residence. The note asked, "Can [Parker] park his car in your backyard?"

¶5 Parker was charged with five domestic violence offenses: aggravated interference with judicial proceedings stemming from events alleged to have occurred between May 5 and May 10, 2009 (prior to D.P.'s application for an order of protection), aggravated harassment and aggravated interference with judicial proceedings arising from the July 1 telephone call, and attempted aggravated interference with judicial proceedings and attempted aggravated harassment in connection with the August 4 note. The court granted Parker's motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on the attempted aggravated harassment count related to the August 4 note.

¶6 Parker was found not guilty of the charge arising from the May events but was found guilty of the remaining three counts. He was sentenced to concurrent terms of imprisonment, the longest of which is six years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12–120.21(A)(1), 13-4031, and 13-4033(A)(1).

Amending the Indictment

¶7 Parker argues the trial court erred by allowing the state to amend the indictment during trial. We review for an abuse of discretion a court's decision to permit amendment of an indictment. *State v. Johnson*, 198 Ariz. 245, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶8 Parker's charges for aggravated interference with judicial proceedings were enhanced pursuant to A.R.S. § 13-3601.02 because he had two or more prior domestic-violence-related convictions. Subsection (A) of that statute provides that "[a] person is guilty of aggravated domestic violence if the person within a

period of eighty-four months commits a third or subsequent violation of a domestic violence offense. . . ." Both the indictment and the Notice of Allegation of Aggravating Factors indicated Parker had three historical prior felony convictions dated April 9, 2004, from crimes committed[1] on November 14, 2002, January 22, 2003, and April 16, 2003, as well as other convictions from 1994 through 2001.[2]

¶9 The indictment, however, used language from an older version of the statute that stated erroneously that the relevant period for prior convictions was sixty months, rather than eighty-four months. *See* 2000 Ariz. Sess. Laws, ch. 361, § 6. Using the correct eighty-four-month time period would permit Parker's charges to be aggravated based on offenses committed after July 1, 2002, whereas the use of a sixty-month period would permit aggravation only for offenses committed after July 1, 2004. Based on the commission dates of Parker's prior convictions, enhancement was permissible only if an eighty-four month period applied.

¶10 On the second day of trial, Buckner testified he had charged Parker with aggravated domestic violence based on a printout of Parker's "criminal history" provided to him by a dispatcher. Buckner stated he believed the relevant time period was sixty months prior to the offenses in the current case. The state moved to admit certified copies of Parker's convictions and Parker objected, noting that all but one of the prior offenses listed in the exhibits were committed outside of the sixty-month period. Parker

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[1] Although the indictment and notice list the dates of conviction for each offense, the statute permitting enhancement based on prior convictions states that "[t]he dates of the commission of the offenses are the determining factor in applying the eighty-four month provision." § 13-3601.02(D).

[2] The state also alleged that Parker had been convicted of aggravated harassment in April 2009, but the exhibit related to this conviction was not admitted into evidence. This omission does not matter because two or more of Parker's convictions were based on conduct falling within the applicable eighty-four-month period.

then moved to dismiss the charges, asserting the indictment was defective because several of his prior criminal charges were outside the sixty-month period.

¶11 The state moved to amend the indictment, stating it contained a "clerical error" because the law had been changed to permit sentence enhancement based on convictions committed in the prior eighty-four, rather than sixty months. The state asserted the error was neither prejudicial nor substantive because Parker was "on notice of what offenses he was charged with," as well as the number of the statute that permitted sentence enhancement for prior convictions. Parker objected, arguing the state's motion was untimely.

¶12 The trial court granted the state's motion to amend, concluding it was not "a notice issue" because Parker "had notice that the State was seeking to enhance the punishment because of his priors." The court observed that the law had been changed "years before this charge came up," and "[t]echnically, everyone is presumed to know the law." The court stated that amending the indictment "doesn't affect the underlying charges," which "would remain the same with or without the allegation of aggravating offenses," and "doesn't change any operative facts that [Parker] must defend or prove." The court therefore determined the amendment was "technical only." Accordingly, the jury was instructed it must find Parker had committed two or more domestic violence offenses within the eighty-four months prior to the events for which he was on trial.

¶13 On appeal, Parker argues the amendment was "not simply a technicality and prejudiced [him]" in his "preparation for trial and his decision to take or reject a plea" agreement. He maintains that the motion was untimely, and that the trial court was required to disallow the amendment, dismiss the indictment, or remove the aggravated aspect of the charges. We disagree.

¶14 Rule 13.5(b), Ariz. R. Crim. P., permits an indictment to be "amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment." A defect in an indictment is formal or technical when its amendment

does not change the nature of the offense or otherwise prejudice the defendant. *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). Rule 13.5(b), however, does not authorize an amendment that alters the elements of the charged offense. *State v. Freeney*, 223 Ariz. 110, ¶¶ 17, 20, 219 P.3d 1039, 1042 (2009). "An amendment changes the nature of the offense charged if it 'propose[s] a change in factual allegations or a change in the legal description of the elements of the offense.'" *State v. Fimbres*, 222 Ariz. 293, ¶ 38, 213 P.3d 1020, 1030 (App. 2009), *quoting State v. Sanders*, 205 Ariz. 208, ¶ 25, 68 P.3d 434, 441 (App. 2003) (alteration in *Fimbres*).

¶15 We agree with the trial court that the indictment was amended to correct a technical defect. Although the indictment stated incorrectly that the period for establishing prior convictions was sixty months prior to the offenses charged, it correctly cited the enhancement statute, A.R.S. § 13-3601.02, which was amended in 2007 to provide an eighty-four-month period. *See* § 13-3601.02(A); 2007 Ariz. Sess. Laws, ch. 58, § 1 (replacing "sixty" with "eighty-four" months). The indictment as originally written misstated the time period for establishing prior convictions, a technical defect which the amended indictment operated to correct; it did not alter the elements of the charged offense or affect any fact that either Parker or the state was required to prove. *See, e.g., State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996) (error as to date of offense technical defect); *State v. Olea*, 182 Ariz. 485, 490, 897 P.2d 1371, 1376 (App. 1995) (deletion of drug quantity allegation technical amendment); *State v. Delgado*, 174 Ariz. 252, 254-55, 848 P.2d 337, 339-40 (App. 1993) (permitting amendment to indictment at close of evidence to reflect correct mens rea for charged offense).

¶16 Additionally, Parker has failed to demonstrate he was prejudiced by the amendment. Parker had notice since 2009 that the state intended to use his prior convictions to enhance the charges against him. From the time of his initial indictment, Parker was on notice of all of the prior convictions that ultimately were used to enhance his charges, and he had ample opportunity to determine whether those offenses fell within the time frame described by § 13-3601.02. Additionally, Parker's indictment in CR 2009-390—which later was merged with the indictment in the current case—

correctly stated that one of Parker's charges was aggravated because he "had two or more convictions of Domestic Violence within the [prec]eding 84 months" at the time he contacted D.P.

¶17 We see nothing in the record that indicates Parker's trial strategy related to the time period for his prior convictions. Although Parker asserts that he "no doubt would have taken a plea agreement had he prepared for a seven year time frame for enhancement," this statement is not supported by the record. Parker proceeded to trial after rejecting three plea offers by the state and participating in two settlement conferences; yet at trial, he presented no evidence or argument regarding his prior convictions aside from his mid-trial objection, which he made only after Buckner referred to a sixty-month time period. Parker did not challenge the validity of his prior convictions, nor did he seek to clarify the time period for such convictions.

¶18 Parker has provided no evidence or support for his contention that the time period relating to his prior convictions influenced his decisions regarding a plea agreement or trial strategy, and his bald statement is insufficient to demonstrate prejudice. *See Johnson*, 198 Ariz. 245, ¶ 8, 8 P.3d at 1162 ("The defendant bears the burden of showing that he or she has suffered actual prejudice from an amendment."); *State v. Hamilton*, 177 Ariz. 403, 410 & n.6, 868 P.2d 986, 993 & n.6 (App. 1993) (defendant must demonstrate actual—not theoretical—prejudice resulting from amendment to indictment). The trial court did not err by allowing the state to amend the indictment to reflect the correct language of the enhancement statute, and we see no actual prejudice to Parker resulting from the amendment.

Judgment of Acquittal

¶19 Parker next argues the trial court erred by denying his Rule 20, Ariz. R. Crim. P., motion for judgment of acquittal because there was insufficient evidence to support his convictions. We review de novo a trial court's denial of a motion for a judgment of acquittal, "viewing the evidence in a light most favorable to sustaining the verdict." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). In so doing, we "resolve all inferences against the

defendant." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004).

¶20 On the third day of trial, Parker moved for a judgment of acquittal on all charges. The trial court granted Parker's motion as to the attempted aggravated harassment charge in count three, stating no evidence presented at trial established the intent element of the charge, but denied his motion as to the other four counts. As noted above, Parker subsequently was convicted of aggravated harassment and aggravated interference with judicial proceedings based on the July 1 telephone call and attempted aggravated interference with judicial proceedings based on the August 4 note.

¶21 On appeal, Parker maintains there was "[n]o evidence or testimony . . . presented that evidenced harassment or attempted harassment took place" because D.P. did not "testify she felt harassed, or would have felt harassed" by receiving a telephone call from Parker. Thus, he claims, his conviction for aggravated harassment was based on "speculation," rather than proof.[3]

¶22 A Rule 20 motion for judgment of acquittal must be granted by the superior court when no substantial evidence warrants a conviction. Ariz. R. Crim. P. 20(a); *Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477. "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.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). If reasonable people "could differ on the inferences to

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[3] Parker makes no argument regarding his convictions for interfering with judicial proceedings. We therefore do not address his general contention that they were supported by insufficient evidence, and review only his conviction for aggravated harassment. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised," and insufficient argument constitutes abandonment and waiver of that claim).

be drawn from the evidence, the motion for judgment of acquittal must be denied." *State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003).

¶23 To prove aggravated harassment, the state was required to show that Parker, "with intent to harass or with knowledge" he was harassing D.P., contacted, communicated with, or caused a communication with D.P. "by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses." A.R.S. § 13-2921(A)(1). "Harassment" is defined as "conduct that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person." § 13-2921(E). Such contact constitutes aggravated harassment if either a valid "order of protection or an injunction against harassment against the person and in favor of the victim of harassment" was in place or if Parker previously had been convicted of a domestic violence offense at the time of the harassment. A.R.S. § 13-2921.01(A)(1), (2).

¶24 Ample evidence supported Parker's conviction. It is undisputed that a valid order of protection was in place that prohibited Parker from contacting D.P. The purpose of the order of protection sought by D.P. in May 2009 against Parker was to prevent him from contacting her. Evidence presented at trial established that D.P. had reported that Parker had violated the order of protection by contacting her via telephone on July 1, and that Parker had used the telephone at the restaurant from which the call had been made. And when confronted by Buckner, who told Parker he had evidence that Parker made the call, Parker responded "So," which the jury, like Buckner, could construe as Parker's admission to having made the call.

¶25 Moreover, at a hearing in August 2009, Parker admitted to calling D.P. on July 1. The transcript of that hearing was admitted at Parker's trial and, at Parker's request, the portion of it in which Parker admitted to making the July 1 telephone call was read to the jury. Parker also admitted to making the telephone call in a letter to his probation officer, written in July 2009.

¶26 This evidence provides substantial proof upon which a trier of fact could find Parker guilty of aggravated harassment. It would permit a reasonable person to conclude that Parker intentionally contacted D.P. via telephone. *See* § 13-2921(A)(1). Similarly, a reasonable person could infer that because D.P. sought an order of protection from the court to prevent unwanted contact from Parker, she would have felt "seriously alarm[ed], annoy[ed] or harasse[d]" by such contact. *See* § 13-2921(E). And the fact that D.P. contacted law enforcement after receiving the telephone call would permit a reasonable person to believe she did, in fact, feel seriously alarmed, annoyed, or harassed by the call. *See id.* Further, it is undisputed that Parker's contact with D.P. occurred while a valid order of protection was in place and that Parker previously had been convicted of a domestic violence offense at the time he made the telephone call. *See* § 13-2921.01(A)(1), (2). The trial court did not err by denying Parker's motion for judgment of acquittal. *See* Ariz. R. Crim. P. 20(a); *Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477.

Disposition

¶27 For the foregoing reasons, Parker's convictions and sentences are affirmed.