IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALAN ORTIZ-PADILLA,
Appellant.

No. 2 CA-CR 2014-0188
Filed May 28, 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NOT FOR PUBLICATION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 Santa Cruz County
No. S1200CR201300026
The Honorable James A. Soto, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Law Offices of Charles A. Thomas, P.L.C., Nogales
By Charles A. Thomas
Counsel for Appellant

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Judge Vásquez and Judge Brammer[1] concurred.

H O W A R D, Judge:

¶1 Following a jury trial, appellant Alan Ortiz-Padilla was convicted of aggravated assault with a deadly weapon and misconduct involving weapons. On appeal, he argues the trial court erred by allowing the state to impeach a defense witness using summaries of incorrectly translated prior statements and failing to declare a mistrial sua sponte thereafter, and by denying his motion for a judgment of acquittal and his motion for new trial.[2] For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the jury's verdicts." *State v. Tucker*, 231 Ariz. 125, ¶ 2, 290 P.3d 1248, 1253 (App. 2012). Ortiz-Padilla and his friend, Andy Garcia, confronted S.P. in front of S.P.'s home about a dump truck containing drugs they believed to be located on S.P.'s property.

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[1]The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

[2] Ortiz-Padilla also contends the jury's verdict on the aggravated assault charge "was against the weight of the evidence." But he does not cite any legal authority to support this argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). He therefore has waived review of this argument. *See State v. Pesqueira*, 235 Ariz. 470, n.1, 333 P.3d 797, 802 n.1 (App. 2014).

Claiming to be an agent with the Drug Enforcement Administration, Garcia demanded to search the property. When S.P. refused, the pair entered an apartment across the street, which S.P. knew to be occupied by the sister-in-law of L.P., his brother.

¶3 S.P. called L.P., and L.P. drove to the apartment, where he encountered Ortiz-Padilla and Garcia outside. Ortiz-Padilla threatened to kill L.P. if L.P. called the police, ordering Garcia to bring him a gun from inside the apartment. After Garcia retrieved the gun, L.P. got into his truck and began to call the police, at which point Ortiz-Padilla pointed the gun at L.P.'s head and said he was "going to kill him."

¶4 Ortiz-Padilla was charged with and convicted of the counts described above. The trial court sentenced him to an aggravated term of fifteen years in prison for the aggravated assault count, and a concurrent twelve-year, presumptive term for the weapons misconduct count. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Impeachment of Defense Witness

¶5 Ortiz-Padilla first argues the trial court erred by overruling his objection to the state using a summary of an incomplete translation of a recorded jail conversation to impeach one of the witnesses. The translation incorrectly suggested he and the witness had a plan to harm Garcia, who testified on behalf of the state. But he does not cite any legal authority—namely, relevant evidentiary rules and case law interpreting those rules—to support his claim. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). Thus, he has waived review of this claim. *See State v. Pesqueira*, 235 Ariz. 470, n.1, 333 P.3d 797, 802 n.1 (App. 2014).

¶6 Ortiz-Padilla next argues the trial court erred by failing to declare a mistrial sua sponte following the state's impeachment using the summary of the incorrect translation. He concedes that he did not ask for a mistrial on these grounds below, and he therefore

has forfeited review of this claim for all but fundamental error.[3] *See State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006); *State v. Laird*, 186 Ariz. 203, 207, 920 P.2d 769, 773 (1996) ("*Sua sponte* mistrials can raise double jeopardy issues. If a party wants a mistrial, it ordinarily must ask for one.") (citation omitted). Ortiz-Padilla does not argue fundamental error on appeal and thereby has waived review of this claim entirely. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶7 Moreover, he did not provide this court the transcript of the status conference at which the parties discussed with the trial court the correct translation of the jail call and how to remedy any error that may have occurred due to the state's use of an incorrect translation.[4] *See State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990) (appellant controls contents of record on appeal and must submit transcripts necessary for review of issues); *see also* Ariz. R. Crim. P. 31.8(b)(2), (4) (transcripts of status conferences not included in record unless designated for inclusion by party). We presume the missing transcript supports the trial court's decision on whether any error occurred and how to remedy any such error. *See State v. Brown*, 188 Ariz. 358, 359, 936 P.2d 181, 182 (App. 1997).

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[3]Defense counsel advised Ortiz-Padilla to request a mistrial, but he refused to do so.

[4]Ultimately, the state submitted a certified translation of the jail call that showed the translation used during the impeachment of Ortiz-Padilla's witness was incorrect. Consequently, the trial court read a stipulation entered into by the parties that instructed the jury to rely on the correct, certified translation when considering the jail call discussed during the state's examination of the witness. To the extent Ortiz-Padilla argues this instruction was inadequate to cure any prejudice to his case, "[w]e presume that the jurors followed the court's instructions" and relied on the correct translation rather than the translation used during examination of the witness. *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006).

Motion for Judgment of Acquittal

¶8 Ortiz-Padilla also argues the trial court erred by denying his motion for a judgment of acquittal on the aggravated assault count. But he does not challenge the sufficiency of the evidence supporting the conviction. *See* Ariz. R. Crim. P. 20(a); *State v. West*, 226 Ariz. 559, ¶ 19, 250 P.3d 1188, 1192 (2011) (appellate court "review[s] de novo whether there is substantial evidence to support a conviction, applying the same standard governing trial court rulings under Rule 20"). Rather, he contends the court erred by allowing the state to amend the charging document to remove S.P. as a victim. "We review for an abuse of discretion a court's decision to permit the amendment of an indictment." *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 16, 312 P.3d 123, 128 (App. 2013).

¶9 The state initiated the case by filing an information that alleged Ortiz-Padilla "committed aggravated assault . . . using a deadly weapon . . . , to wit: a handgun, on [S.P.] and [L.P.]." At the conclusion of the state's case-in-chief, Ortiz-Padilla moved the court for a judgment of acquittal on this count because the count listed both S.P. and L.P. as victims and the state had failed to present sufficient evidence that he had threatened S.P. with the gun or placed S.P. "in reasonable apprehension of imminent physical injury." A.R.S. § 13-1203(A)(2); *see* A.R.S. § 13-1204(A). The state conceded it had not produced sufficient evidence S.P. was a victim of the assault and moved to amend the information to strike the allegation concerning S.P. Over Ortiz-Padilla's objection, the trial court granted the motion to amend the information and denied the Rule 20 motion as to the amended count. Ortiz-Padilla later renewed his Rule 20 motion, which the court again denied.

¶10 A charging document may be amended to conform to the evidence at trial so long as it does not change the nature of the offense, such as by altering the elements of the charged offense, or otherwise prejudice the defendant. *Buccheri-Bianca*, 233 Ariz. 324, ¶ 17, 312 P.3d at 128. Ortiz-Padilla concedes the amendment did not change the nature of the aggravated assault count but contends the amendment prejudiced his case because, until that point, S.P. had been treated as a victim with the right to refuse a pretrial interview. *See* Ariz. Const. art. II, § 2.1(A)(1)(5) (right to refuse interview

request by defendant); A.R.S. § 13-4433(A) (same); Ariz. R. Crim. P. 39(b)(11) (same).

¶11 But Ortiz-Padilla does not explain adequately how the lack of a pretrial interview was prejudice that resulted from the trial court's decision to allow the amendment to the indictment. *See Buccheri-Bianca*, 233 Ariz. 324, ¶ 17, 312 P.3d at 128; *see also State v. Inzunza*, 234 Ariz. 78, ¶ 28, 316 P.3d 1266, 1274 (App. 2014) ("On appeal, an appellant always carries the burden of demonstrating an error that entitles him to relief."). S.P.'s status as a victim throughout the case, not the court's decision to allow the amendment, caused the lack of the interview. Ortiz-Padilla briefly contends the state's decision to include S.P. as a victim in the information was not in "good faith" and speculates that its intent "was to deny the defense a pre-trial interview of a critical witness." But he does not cite any relevant authority and does not explain why the state did not have probable cause to believe S.P. was a victim at the time it filed the information. *See* A.R.S. §§ 13-4401(6), (19), 13-4402(A). Neither does he cite any evidence in the record to support his speculation as to the state's motives. Further, he does not analyze Rules 15.3 and 39, Ariz. R. Crim. P., to demonstrate when, if ever, he could have compelled an interview or deposition of S.P. but for the amendment to the indictment. Thus, he has waived the issue for lack of sufficient argument. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶12 Furthermore, his claim that the lack of a pretrial interview hindered his ability to cross-examine S.P. regarding S.P.'s influence on the testimony of other witnesses is unavailing. He does not explain what he would have discovered in a pretrial interview to expose S.P.'s influence on others' testimony. And the record shows that Ortiz-Padilla was able to examine witnesses effectively concerning this alleged influence. For example, he called one of S.P.'s sisters-in-law to testify for the sole purpose of showing that S.P. drafted her written statement to the police about the incident. And he cross-examined S.P. about drafting the statement. He also asked L.P. whether L.P. had discussed testimony with S.P. and if S.P. had instructed L.P. on how to testify regarding certain facts.

Consequently, his claim that the lack of a pretrial interview harmed his defense is not supported by the record.[5]

¶13 In sum, Ortiz-Padilla has not demonstrated that he suffered prejudice as a result of the amendment to the information, and we conclude the trial court did not abuse its discretion in granting the state's motion to amend the information to conform to the evidence adduced at trial. *See Buccheri-Bianca*, 233 Ariz. 324, ¶¶ 16-17, 312 P.3d at 128. Further, we find the court did not err in refusing to grant the motion for a judgment of acquittal because substantial evidence supported a conviction on the amended aggravated assault count. *See West*, 226 Ariz. 559, ¶ 19, 250 P.3d at 1192.

¶14 Ortiz-Padilla also appears to contend the aggravated assault count in the state's original information was duplicitous. To the extent he makes this claim, he has waived review of the issue entirely because he failed to object to the information properly below and does not argue fundamental error on appeal. *See State v. Anderson*, 210 Ariz. 327, ¶¶ 13-18, 111 P.3d 369, 377-78 (2005) (pursuant to Rules 13.5(e) and 16.1(b), Ariz. R. Crim. P., defendant waives issue of duplicitous indictment if he does not raise issue in

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[5]To the extent Ortiz-Padilla argues the denial of an interview hindered his cross-examination of S.P. concerning whether he pointed at and threatened L.P. while in handcuffs in the back of a police car after his arrest, the record demonstrates that he effectively exposed any weaknesses in S.P.'s testimony concerning this fact. And he does not explain how a pretrial interview would have assisted his cross-examination on this fact. Moreover, the concern he raises that L.P. may have conformed his testimony to match S.P.'s after having observed S.P.'s testimony during trial is a complaint about L.P.'s status as a victim, which he does not challenge, and not a complaint about S.P.'s status as a victim. *See* Ariz. Const. art. II, § 2.1(A)(1)(3) (right to be present at all criminal proceedings where defendant has right to be present); A.R.S. § 13-4420 (same); Ariz. R. Crim. P. 39(b)(4) (same), 9.3(a) (victim excluded from rule allowing exclusion of prospective witnesses during testimony of others).

motion filed at least twenty days before trial); *Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d at 140.

Motion for New Trial

¶15 Ortiz-Padilla further argues the state violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the suspension of a police officer who testified on behalf of the state. He first raised this issue in a post-trial memorandum filed in support of his motion for new trial, in which he claimed to have learned of the purported *Brady* violation more than a month after the jury had rendered its verdicts. Therefore he appeals from the trial court's order denying his motion for new trial.

¶16 Seven days after the jury had rendered its verdicts, Ortiz-Padilla filed his Motion for New Trial/Motion to Toll Time for Briefing. He did not file a memorandum of points and authorities with his motion and claimed, without argument, that the trial court should grant a new trial because "the verdict [was] contrary to the law or the weight of the evidence, [he] did not receive a fair and impartial trial, and for any other permissible reason stated in Rule 24.1[, Ariz. R. Crim. P.,] which may be suggested after a review of the trial transcripts." He also asked the court for leave "to supplement his motion with a memorandum of points and authorities after such time as the trial transcripts are received by the parties."

¶17 The trial court granted Ortiz-Padilla leave to file a "supplement" to his motion for new trial within ten days of receipt of the trial transcripts. He did not file this "supplement" containing a memorandum of points and authorities until more than two months after the jury had rendered its verdicts. After a hearing on the matter, the court denied his motion.

¶18 "A motion for a new trial shall be made no later than 10 days after the verdict has been rendered." Ariz. R. Crim. P. 24.1(b). If a defendant files a motion for new trial after this ten-day limit, the trial court has no jurisdiction to hear the motion and the motion has no effect. *State v. Wagstaff*, 161 Ariz. 66, 70, 775 P.2d 1130, 1134 (App. 1988); *see also State v. Hill*, 85 Ariz. 49, 53, 330 P.2d 1088, 1090 (1958)

(criminal rules of procedure with regard to motions for new trial "must be strictly complied with"). And "[l]abeling untimely motions as supplemental does not enable a party to avoid the time restrictions imposed by procedural rules—especially those rules, such as [Rule 24.1(b)], that confer jurisdiction on the trial court." *State v. Ring*, 200 Ariz. 267, n.4, 25 P.3d 1139, 1149 n.4 (2001), *rev'd on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002). Nor does the court have the authority to extend the time for filing a motion for new trial. *See Hill*, 85 Ariz. at 53-54, 330 P.2d at 1090-91 (time limit on motion for new trial "mandatory and must be obeyed by the courts as well as by the parties"); *cf. Lopez-Hudson v. Schneider*, 188 Ariz. 407, 409, 937 P.2d 329, 331 (App. 1996) (courts lack authority under Arizona Rules of Civil Procedure to extend time for filing motion for new trial).

¶19 Moreover, motions that are filed within time limits imposed by the rule, but that fail to comply with other basic filing requirements, do not toll filing deadlines. *See Butler Prods. Co. v. Roush*, 145 Ariz. 32, 34, 699 P.2d 906, 908 (App. 1984).[6] In *Butler Products Co.*, the defendants filed a motion for new trial within the time for filing prescribed by the rules, but the motion did not state the grounds for the request or include a supporting memorandum as required by Rule 59(c), Ariz. R. Civ. P., and former Rule IV(a) of the Uniform Rules of Practice of the Superior Court.[7] *Id.* at 33, 699 P.2d at 907. The defendants filed a supporting memorandum almost two weeks later but not within the time for filing. *Id.* This court held that, despite the subsequent supporting memorandum, the initial motion "did not operate to extend the time limits within which to file the motion for new trial" because it did not comply

[6]Although *Butler Products Co.* is a civil case, we treat deadlines for filing a motion for new trial in criminal and civil cases identically. *See Hill*, 85 Ariz. at 52-53, 330 P.2d at 1090 (finding "no valid reason why" time for filing motion for new trial would be jurisdictional in civil cases but not in criminal cases).

[7]Rule IV(a) of the Uniform Rules of Practice of the Superior Court has been incorporated into Rule 7.1, Ariz. R. Civ. P. *See* Ariz. R. Civ. P. 7.1 bar committee note.

with the other filing requirements set out in the rules. *Id.* at 34, 699 P.2d at 908.

¶20 Rule 35.1, Ariz. R. Crim. P., states that "all motions . . . shall be accompanied by a brief memorandum stating the specific factual grounds [of the relief requested] and indicating the precise legal points, statutes, and authorities relied upon." Ortiz-Padilla's Motion for New Trial/Motion to Toll Time for Briefing was not accompanied by a supporting memorandum as required by Rule 35.1, and thereby did not qualify as a proper motion filed within ten days after the jury had rendered its verdicts. *See Butler Prods. Co.*, 145 Ariz. at 34, 699 P.2d at 908. And his supporting memorandum filed more than two months after the jury had rendered its verdicts did not cure his deficient filing made within the ten-day time limit. *See Ring*, 200 Ariz. 267, n.4, 25 P.3d at 1149 n.4; *Butler Prods. Co.*, 145 Ariz. at 34, 699 P.2d at 908.

¶21 Thus, the trial court did not have jurisdiction to hear the motion for new trial, and his motion had no effect. *See Wagstaff*, 161 Ariz. at 70, 775 P.2d at 1134. And the extension granted by the court allowing Ortiz-Padilla to file his supporting memorandum outside of the ten-day time limit did not cure this jurisdictional defect. *See Hill*, 85 Ariz. at 53-54, 330 P.2d at 1090-91. Thus, we do not consider the merits of the motion.[8] *See Wagstaff*, 161 Ariz. at 70-71, 775 P.2d at 1134-35.

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[8]We note, however, that Ortiz-Padilla filed his supporting memorandum detailing his *Brady* claim within sixty days after the entry of judgment and sentence and potentially could have filed this memorandum as a motion to vacate the judgment. *See* Ariz. R. Crim. P. 24.2(a). But even if we were to treat this supporting memorandum as a Rule 24.2 motion, Ortiz-Padilla was required to file another notice of appeal after the trial court ruled on the motion, which he did not do. *See* Ariz. R. Crim. P. 24.2(d). And we do not have jurisdiction over appeals from an order denying a Rule 24.2 motion when the defendant fails to file a notice of appeal within twenty days after the order on the motion. *State v. Wynn*, 114 Ariz. 561, 563, 562 P.2d 734, 735 (App. 1977); *see also* Ariz. R. Crim. P. 24.2(d).

¶22 Even though Ortiz-Padilla's motion for new trial had no effect, this court may still review the *Brady* claim for fundamental error. *See State v. Larin*, 233 Ariz. 202, ¶ 14, 310 P.3d 990, 996 (App. 2013) (failure to raise issue timely at trial forfeits review of claim for all but fundamental error). But he does not argue fundamental error on appeal and thereby has waived review of the claim entirely. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

Disposition

¶23 For the foregoing reasons, we affirm Ortiz-Padilla's convictions and sentences.