IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID ANTHONY IBARRA,
Appellant.

No. 2 CA-CR 2014-0296
Filed April 8, 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NOT FOR PUBLICATION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. CR20134015001
The Honorable Scott Rash, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By David A. Sullivan, Assistant Attorney General, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Judge:

¶1 After a jury trial, David Ibarra was convicted of aggravated assault, assault, and criminal damage, all designated as domestic-violence offenses. The trial court sentenced him to a slightly aggravated eleven-year prison term, followed by concurrent two-year terms of probation. On appeal, he argues the court erred by denying his motion for a mistrial after a witness improperly testified about a prior act of domestic violence. He also challenges his probationary term for assault, arguing his conviction was based on a potentially non-unanimous jury verdict. For the following reasons, we vacate Ibarra's conviction and probationary term for assault and remand the case for further proceedings on that offense, but we otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Ibarra's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On an afternoon in June 2013, Ibarra was at home with his then wife, V.R., and the two began arguing. V.R. left for her mother's house, and when she returned to their home a few hours later to get something for her daughter, the arguing resumed. Ibarra threw orange soda at V.R., and she went to get a change of clothes before leaving again. He followed her to the bedroom, where V.R. started packing a suitcase. Ibarra pushed her against the dresser—breaking the mirror—and grabbed V.R.'s neck. V.R. could not breathe, and they struggled to the bed. V.R.

eventually fell to the floor, at which point Ibarra let go of her neck and told her she was "going to die today."

¶3 As V.R. attempted to leave, Ibarra pushed her through a sliding glass door, causing both V.R. and the door to fall to the ground outside. As V.R. was lying on the ground, Ibarra poured bleach on her, burning her eyes and irritating her stomach. Ibarra also poured bleach on the clothes in her suitcase. V.R. ran fully dressed into the shower to rinse off. She then pretended to call her mother with her cell phone, which was wet and no longer working. Ibarra eventually left, and V.R. later called the police.

¶4 A grand jury indicted Ibarra for kidnapping, aggravated assault based on his grabbing V.R.'s neck and impeding her breathing or circulation, aggravated assault involving a deadly weapon or dangerous instrument for pouring bleach on her, and criminal damage, all domestic-violence offenses. The jury was unable to reach a verdict on the kidnapping charge but convicted Ibarra of the first aggravated-assault charge, the lesser-included offense of assault for the second aggravated-assault charge, and criminal damage.[1] The trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motion for a Mistrial

¶5 Ibarra argues the trial court erred by denying his motion for a mistrial based on V.R.'s testimony about prior domestic abuse. "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial [is] granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). We review the denial of a motion for a mistrial for an abuse

[1]In exchange for Ibarra's waiver of his right to a jury trial on the aggravating factors for sentencing, the state agreed to dismiss the kidnapping charge with prejudice.

of discretion. *State v. Marshall*, 197 Ariz. 496, ¶ 10, 4 P.3d 1039, 1043 (App. 2000).

¶6 In her interview with police, V.R. stated Ibarra previously had choked her and threatened to stab her. She said he did so during an argument triggered by his drug use. V.R. also mentioned another incident in which Ibarra "pushed [her] up against the kitchen sink" and "made [her] fall to . . . the ground." Before trial, the prosecutor gave notice of his intent to use "[p]rior unreported instances of domestic violence between [Ibarra] and [V.R.]," as proof of motive or absence of mistake pursuant to Rule 404(b), Ariz. R. Evid. At trial, however, the court precluded the evidence, finding that the prior instances were not "similar enough in nature" and that the testimony was "highly prejudicial," under Rule 403, Ariz. R. Evid., "based upon [V.R.]'s speculation of whether . . . [s]he thought he was on drugs."

¶7 During direct examination, the prosecutor asked V.R. to review and describe several photographs. While discussing state's exhibit two, a photograph showing bruising on V.R.'s neck, V.R. stated, "That wasn't from that day." The prosecutor then clarified that V.R. "already had those bruises on [her] neck." Moving on to state's exhibit three, which was an enlarged photograph of the same bruising, the following exchange occurred between the prosecutor and V.R.:

> Q . . . So how did you get these marks on your neck?
>
> A They're from David.
>
> Q Okay. And what I'm asking you, did you get those marks on your neck from David in the bedroom during what you just testified about with his hands on your neck . . . from the dresser to the bed?
>
> A No.

Q Okay. You got those some other time?

A Prior, yes.

Q Okay. But is this how your neck looked on June 29th?

A Yes.

Q Okay. And you remember—you've already testified to talking to Detective Thomson that night?

A Yes.

Q Did you ever tell Detective Thomson that night that the marks on your neck right there were from David earlier that day?

A Those are marks from David, but they're not from him choking me.

Q Okay. So they're from another time?

A Yes.

Q So you don't believe that you ever told Detective Thomson that you got those marks from the same day?

A Not those ones, no.

¶8 Defense counsel later moved for a mistrial based on the "implication that . . . Ibarra inflicted some injuries to [V.R.'s] neck . . . on some prior occasion." He recognized that "the State was [not] intending to elicit the testimony that it received" but nonetheless thought the evidence "severely impact[ed] the ability of . . . Ibarra to

receive a fair trial." The trial court denied the motion, instead ruling that defense counsel could "clear it up on cross-examination."

¶9 In determining whether to grant a mistrial based on witness testimony, "the trial court should consider: (1) whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993). Under the second factor, "we examine whether the trial judge abused his discretion by determining that, under the circumstances of the case, the jury was not so influenced by the remarks that [the] defendant was denied a fair trial." *State v. Bailey*, 160 Ariz. 277, 280, 772 P.2d 1130, 1133 (1989), *citing State v. Hallman*, 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983).

¶10 As to the first factor, Ibarra argues "the jurors should not have been presented with evidence of alleged other acts" because "the trial court found that it was inadmissible under Rule[s] 403 and 404." The state concedes that the first factor is satisfied because the court found the evidence inadmissible. But, even assuming the first factor is met, we agree with the state that the court did not abuse its discretion by denying the motion for a mistrial based on the second factor.

¶11 Addressing the second factor, Ibarra contends the jurors were influenced by the testimony because "the trial court did not decide to give an instruction to ignore the evidence" but rather determined that "cross examination into the actual cause of the preexisting bruises would remedy the error." He maintains that cross-examination about V.R.'s bruising only would have made "the prejudice greater." But Ibarra did not request a curative instruction or ask the court to strike the testimony. *Cf. State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981) (finding no error in denial of mistrial where defendant did not move to strike testimony or request curative instruction). Rather, he only moved for a mistrial, which is the most drastic remedy available. *See Adamson*, 136 Ariz. at 262, 665 P.2d at 984.

¶12 Ibarra also asserts the evidence against him was not overwhelming, suggesting "the jurors were likely to have been influenced by the testimony." But the attention given to V.R.'s remarks was minimal. *Cf. Stuard*, 176 Ariz. at 601-02, 863 P.2d at 893-94 (mistrial not warranted by improper remark made at trial's end without further discussion before jury). The prosecutor limited his line of questioning to clarify V.R.'s testimony and then promptly moved on to other photographs, which showed marks on V.R.'s neck from the charged offense. Defense counsel also moved for a mistrial after the jury had left the courtroom, which avoided bringing any additional attention to the issue. And the only further mention of V.R.'s remarks came from defense counsel in closing argument, when he said: "Now, [V.R.] testified yesterday . . . that her recollection or belief was that those marks . . . occurred sometime before" and "she is saying that any marks that you saw in the photograph o[f] her neck didn't have anything to do with what went on between her and [Ibarra] in that bedroom that . . . afternoon."

¶13 "[T]he trial court is in the best position to view the error and determine any effects it may have had on the jury." *Hallman*, 137 Ariz. at 37, 668 P.2d at 880. Based on the foregoing, we cannot say the court abused its discretion by denying Ibarra's motion for a mistrial. *See Marshall*, 197 Ariz. 496, ¶ 10, 4 P.3d at 1043.

Non-Unanimous Verdict

¶14 Ibarra also contends the trial court erred by imposing a two-year term of probation for assault because the jury reached a potentially non-unanimous verdict on that offense. He acknowledges that he failed to raise this issue below and has therefore forfeited it for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Nevertheless, a potentially non-unanimous jury verdict and illegal term of probation constitute such error. *State v. Delgado*, 232 Ariz. 182, ¶ 19, 303 P.3d 76, 82 (App. 2013); *State v. Sanchez*, 191 Ariz. 418, 419, 956 P.2d 1240, 1241 (App. 1997).

¶15 Assault can be committed by:

> 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
>
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
>
> 3. Knowingly touching another person with the intent to injure, insult or provoke such person.

A.R.S. § 13-1203(A). The offense is classified as a class-one, class-two, or class-three misdemeanor depending on how it is committed. *See* § 13-1203(B).

¶16 Ibarra was indicted for aggravated assault involving a deadly weapon or dangerous instrument, *see* A.R.S. § 13-1204(A)(2), but upon his request, the trial court instructed the jury on the lesser-included offense of assault. The jury instructions included all three forms of assault under § 13-1203(A). In closing, the prosecutor argued, "You can find them all in the evidence presented to you in this case." However, the court neither informed the jurors that they had to agree unanimously on which form of assault Ibarra committed nor provided an interrogatory so specifying. And, the jurors convicted Ibarra of assault without indicating they had all agreed on a single form.

¶17 Ibarra asserts "the likelihood that the jury decision was not unanimous" constitutes fundamental error. And, pointing to the different classifications of assault, *see* § 13-1203(B), he maintains the trial court erred by not sentencing him based on the lowest possible offense, a class-three misdemeanor, which carries a maximum one-year term of probation, *see* A.R.S. § 13-902(A)(7). He asks that we "correct his sentence." The state, however, argues "the appropriate remedy is to vacate the offending conviction and remand the case to the trial court for further proceedings" because "the possibility

exists the jurors convicted [Ibarra] of misdemeanor assault without unanimously agreeing on which type he committed." The state reasons that if the conviction is vacated, the sentencing error alleged by Ibarra is moot.

¶18 We are not bound by a confession of error, *State v. Stewart*, 3 Ariz. App. 178, 180, 412 P.2d 860, 862 (1966), but we nonetheless agree with Ibarra and the state that the jury may have reached a non-unanimous verdict. Section 13-1203(A) provides for three separate and distinct offenses, not merely different methods of committing the same offense. *In re Jeremiah T.*, 212 Ariz. 30, ¶ 8, 126 P.3d 177, 180 (App. 2006); *State v. Sanders*, 205 Ariz. 208, ¶ 33, 68 P.3d 434, 442 (App. 2003). As such, the jury needed to agree unanimously on which offense Ibarra committed. *See Delgado*, 232 Ariz. 182, ¶ 20, 303 P.3d at 82; *see also State v. Paredes-Solano*, 223 Ariz. 284, ¶¶ 16-17, 222 P.3d 900, 906 (App. 2009). The record does not affirmatively show that happened here. Ibarra has therefore demonstrated fundamental, prejudicial error. *See Delgado*, 232 Ariz. 182, ¶ 19, 303 P.3d at 82.[2]

¶19 Furthermore, we agree with the state that vacating Ibarra's conviction and probationary term for assault is the proper remedy. *See State v. Sisneros,* 137 Ariz. 323, 326, 670 P.2d 721, 724

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[2]In *Delgado*, the defendant asked us to reverse his assault conviction as "duplicitous because the jury instruction that explained the lesser-included offense did not adequately identify the charged conduct." 232 Ariz. 182, ¶ 25, 303 P.3d at 83. We concluded the defendant invited the error because he had requested the assault instruction. *Id.* ¶ 26. Ibarra similarly requested the assault instruction, but we decline to apply the invited-error doctrine here based on the state's confession of error. *See State v. Diaz*, 168 Ariz. 363, 366, 813 P.2d 728, 731 (1991) (considering whether it is equitable to apply invited error); *State v. Smith*, 101 Ariz. 407, 409, 420 P.2d 278, 280 (1966) ("extreme caution must be exercised" when applying invited error). Notably, in *Delgado*, the parties did not argue, and we did not address, the issue of sentencing error. *See Delgado*, 232 Ariz. 182, ¶¶ 25-36, 303 P.3d at 83.

(1983) (reversing assault conviction where verdict did not indicate variety of assault found by jury); *see also Paredes-Solano*, 223 Ariz. 284, ¶¶ 22, 28, 222 P.3d at 908-09 (vacating sexual exploitation conviction because of non-unanimous jury verdict). We thus need not address Ibarra's sentencing-error claim.

Disposition

¶20 For the foregoing reasons, we vacate Ibarra's conviction and probationary term for assault and remand the case for further proceedings on that offense. In all other respects, we affirm.