IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEVON MCDUFFIE,
Appellant.

No. 2 CA-CR 2014-0346
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NOT FOR PUBLICATION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. CR20130569002
The Honorable Scott Rash, Judge

AFFIRMED IN PART; VACATED IN PART

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Jevon McDuffie was convicted of participation in a riot, aggravated assault, and dangerous or deadly assault by a prisoner, the latter two offenses involving a dangerous instrument. The trial court sentenced him to mitigated, concurrent prison terms, the longest of which were 10.5 years. On appeal, McDuffie argues that the statute defining the offense of participation in a riot is unconstitutionally vague and that his conviction for the offense was not supported by sufficient evidence. He also challenges his convictions for aggravated assault and dangerous or deadly assault by a prisoner based on multiplicity and duplicity. Lastly, McDuffie maintains the state presented insufficient evidence that the mop handle he used constitutes a dangerous instrument. For the reasons stated below, we vacate McDuffie's conviction and sentence for aggravated assault but otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining McDuffie's convictions. *See State v. Brown*, 233 Ariz. 153, ¶ 2, 310 P.3d 29, 32 (App. 2013). In September 2012, McDuffie was an inmate in the custody of the Department of Corrections at the Santa Rita Unit in Pima County. Late one afternoon, a riot involving approximately fifty inmates broke out at the Unit. Corrections officers Mario Figueroa and Ernesto Romero locked down the area where they were working and then reported to the yard where the riot had originated.

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

¶3 Figueroa ran to assist J.B., an inmate who had been injured and was lying on the ground. As Figueroa attempted to move J.B. to safety, a group of several inmates approached. Among those inmates was McDuffie, who was carrying a mop. McDuffie then attacked Figueroa by swinging the mop handle and striking Figueroa in the back several times. As other officers ran to assist Figueroa, the inmates scattered, and Figueroa dragged J.B. to a safe location.

¶4 After the riot ended, Romero took Figueroa to a hospital. Figueroa had bruises on his back and reported general soreness, but he was released from the hospital within a few hours.

¶5 A grand jury indicted McDuffie for participation in a riot, aggravated assault, and assault with a dangerous instrument or deadly weapon by a prisoner. The indictment alleged that both assault charges involved the use of a "deadly weapon or dangerous instrument, to wit: mop handle." At trial, however, the court instructed the jury to consider only if the mop handle was a "dangerous instrument" and did not instruct on the term "deadly weapon." The jury found McDuffie guilty of all three offenses, and 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).

Statute Unconstitutionally Vague

¶6 McDuffie contends that the statute defining the offense of participation in a riot is unconstitutionally vague. He concedes that he failed to raise this argument in the trial court. Accordingly, he has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Bolton*, 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995) (fundamental-error review applies to constitutional issues). Under this standard, a defendant must show: (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice. *Henderson,* 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶7 Section 13-1207(A), A.R.S., provides that "[a] person, while in the custody of the state department of corrections or a

county or city jail, . . . who participates in a riot is guilty of a class 2 felony."[2] When reviewing a statute for vagueness, we strongly presume that it is constitutional. *State v. Kaiser*, 204 Ariz. 514, ¶ 8, 65 P.3d 463, 466 (App. 2003). The party challenging the statute bears the burden of overcoming that presumption. *State v. Bonnewell*, 196 Ariz. 592, ¶ 5, 2 P.3d 682, 684 (App. 1999).

¶8 "A statute is unconstitutionally vague if it fails to provide 'person[s] of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *State v. Poshka*, 210 Ariz. 218, ¶ 5, 109 P.3d 113, 115 (App. 2005), *quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (alteration in *Poshka*). But this requirement "cannot be so extended as to impose an impossible burden on the drafters of legislation." *State v. Starsky*, 106 Ariz. 329, 331, 475 P.2d 943, 945 (1970). Thus, notice of what is prohibited need not be "'perfect,'" nor is "'absolute precision of language'" necessary. *State v. McDermott*, 208 Ariz. 332, ¶ 13, 93 P.3d 532, 536 (App. 2004), *quoting Kaiser*, 204 Ariz. 514, ¶ 8, 65 P.3d at 466.

¶9 McDuffie maintains that § 13-1207(A) is unconstitutionally vague because it does not include a definition of "participates." He asserts that "participates in a riot" under § 13-1207(A) generally "can be understood to mean 'to take part in a riot,'" but he argues the phrase "gives no clue to what type of part one must play to qualify as a 'participant.'" He questions what level of participation is necessary for a violation of the statute, citing, for example, accomplice liability, solicitation, and facilitation.

¶10 A statute that fails to explicitly define a term is not necessarily vague. *McDermott*, 208 Ariz. 332, ¶ 13, 93 P.3d at 536. As McDuffie acknowledges, when a term is not statutorily defined, we apply its common, ordinary meaning. *See State v. Takacs*, 169 Ariz.

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[2]The statute also provides that a person "who commits assault on another person with the intent to incite to riot" is guilty of a class-two felony. § 13-1207(A). However, McDuffie was not expressly charged under this portion of the statute. *See State v. Manzanedo*, 210 Ariz. 292, ¶ 7, 110 P.3d 1026, 1028 (App. 2005) (§ 13-1207 creates single offense that can be committed alternate ways).

392, 397, 819 P.2d 978, 983 (App. 1991). "Participate" commonly means "[t]o be active or involved in something; take part." *The American Heritage Dictionary* 1285 (5th ed. 2011). With that definition in mind, § 13-1207(A) "affords adequate notice of the type of conduct that is proscribed"—it prohibits a prison or jail inmate from being involved in or taking part in a riot. *Starsky*, 106 Ariz. at 331, 475 P.2d at 945. Because the legislature did not distinguish between different levels of participation—accomplice liability, solicitation, and facilitation—neither do we. *See State v. Ritch*, 160 Ariz. 495, 497, 774 P.2d 234, 236 (App. 1989) ("Courts will not read into a statute something which is not within the manifest intent of the legislature as reflected by the statute itself.").

¶11 McDuffie additionally contends that § 13-1207(A) is unconstitutionally vague because "riot" has a "fairly precise definition in the law" but "there is no reason to believe that an ordinary juror would understand that word to carry that legal meaning."[3] McDuffie points to A.R.S. § 13-2903(A), which provides: "A person commits riot if, with two or more other persons acting together, such person recklessly uses force or violence or threatens to use force or violence, if such threat is accompanied by immediate power of execution, which disturbs the public peace."

¶12 McDuffie is correct that §§ 13-1207(A) and 13-2903(A) "must be read in conjunction," *State v. Manzanedo*, 210 Ariz. 292, ¶ 12, 110 P.3d 1026, 1029 (App. 2005), and the definition of "riot" as contained in § 13-2903(A) is "fairly precise." This definition, however, does not render § 13-1207(A) unconstitutionally vague. It does quite the opposite by explicitly providing the meaning of "riot." *See McDermott*, 208 Ariz. 332, ¶¶ 13-14, 93 P.3d at 536.

[3]McDuffie also maintains that the instructions "gave the jury no clue what a 'riot' is" and, consequently, the jurors were "left to guess." But although the trial court did not instruct the jury on the meaning of "riot," the parties did not dispute that a riot occurred. Thus, the jury did not need a definition of the term. *Cf. State v. Agnew*, 132 Ariz. 567, 575, 647 P.2d 1165, 1173 (App. 1982) (no fundamental error when instruction omits necessary element of offenses if element not in dispute).

Moreover, as McDuffie recognizes, "riot" also has a common, ordinary meaning. *See Takacs*, 169 Ariz. at 397, 819 P.2d at 983. It commonly means "[a] violent disturbance of the public peace by three or more persons assembled for a common purpose." *The American Heritage Dictionary* 1513. That common meaning is similar to the language of § 13-2903(A) in that both require the involvement of three or more persons disturbing the public peace. *Cf. Peterson v. Sundt*, 67 Ariz. 312, 319-20, 195 P.2d 158, 163 (1948) (statute not void for vagueness where it employs words with technical or special meaning that are well enough known to enable general understanding). Thus, considering the meaning of "riot," § 13-1207(A) "affords adequate notice of the type of conduct that is proscribed." *Starsky*, 106 Ariz. at 331, 475 P.2d at 945.

¶13 In sum, McDuffie has not sustained his burden of showing fundamental, prejudicial error. *See Henderson,* 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Simply put, a person of ordinary intelligence would understand the meaning of "participates in a riot" in § 13-1207(A). *See Poshka*, 210 Ariz. 218, ¶ 5, 109 P.3d at 115.

Sufficiency of the Evidence

¶14 McDuffie also argues, even if § 13-1207 is not unconstitutionally vague, his conviction for participation in a riot must be vacated because the state presented insufficient evidence of the offense. "The sufficiency of the evidence is a question of law we review de novo." *State v. Snider*, 233 Ariz. 243, ¶ 4, 311 P.3d 656, 658 (App. 2013). "'[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.'" *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). We will reverse only if no substantial evidence supports the conviction. *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007). "Substantial evidence is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869.

¶15 Here, there was undisputed evidence that a riot occurred at the Santa Rita Unit in September 2012. The corrections officers' testimony collectively established that, during the riot, McDuffie repeatedly swung the handle at Figueroa as he was attempting to assist J.B., an injured inmate. This is substantial evidence that McDuffie participated in a riot. *See Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d at 695.

¶16 McDuffie nevertheless asserts that, if he "was the only inmate carrying an object that could be used as a weapon," it "indicates that he was acting independent of . . . others in that group." *See* § 13-2903(A) (requiring defendant to act with "two or more other persons"). However, we agree with the state that, if McDuffie was the only one with a weapon, the most reasonable inference is that he was "the ringleader." In addition, Romero testified that McDuffie was with "more than five" inmates and that the others were "throwing their hands" while McDuffie was hitting Figueroa with the mop handle.

¶17 McDuffie also contends that "there was no evidence that [his] actions disturbed the public peace." *See id.* Citing *State v. Cutright*, 196 Ariz. 567, ¶ 19, 2 P.3d 657 (App. 1999), he argues that because Figueroa "had already been involved in quelling the riot and protecting [J.B.] from further harm," he "was far from at peace himself." However, McDuffie's reliance on *Cutright* is misplaced. There, we were discussing the element of "'disturb[ing] the peace or quiet of a neighborhood, family, or person'" for the offense of disorderly conduct. *Cutright*, 196 Ariz. 567, ¶¶ 15, 19, 2 P.3d at 661, *quoting* A.R.S. § 13-2904(A). By contrast, § 13-2903(A) involves disturbing "the public peace." And, "the public peace" consists of more than Figueroa. *See* A.R.S. § 13-2901(2) ("'Public' means affecting or likely to affect a substantial group of persons."). In conclusion, there is sufficient evidence supporting McDuffie's conviction for participation in a riot in violation of § 13-1207(A). *See Snider*, 233 Ariz. 243, ¶ 4, 311 P.3d at 658.

Multiplicity

¶18 McDuffie also contends that his convictions for aggravated assault and assault with a dangerous instrument or

deadly weapon by a prisoner are multiplicitous and therefore violate the prohibition against double jeopardy. "Whether charges are multiplicitous is a matter of law, which we review de novo."[4] *State v. Burns*, 237 Ariz. 1, ¶ 83, 344 P.3d 303, 324 (2015).

¶19 "Multiplicity occurs when an indictment charges a single offense in multiple counts." *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App. 2001). The principal danger with multiplicity is that it "raises the potential for multiple punishments, which implicates double jeopardy." *Id.*; *see also* U.S. Const. amend. V; Ariz. Const. art. II, § 10. When convictions occur on multiplicitous charges, the appropriate remedy is to vacate the lesser conviction and its corresponding sentence. *See Powers*, 200 Ariz. 123, ¶ 16, 23 P.3d at 672; *State v. Jones*, 185 Ariz. 403, 407-08, 916 P.2d 1119, 1123-24 (App. 1995).

¶20 In determining whether charges are multiplicitous, we apply the test announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004). Pursuant to that test, "[o]ffenses are not the same, and therefore not multiplicitous, if each requires proof of a fact that the other does not." *Id.* In making this determination, "we look to the elements of the offenses and not to the particular facts that will be used to prove them." *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 773 (App. 2008). Lesser-included and greater offenses are the same under the *Blockburger* test. *Merlina*, 208 Ariz. 1, n.3, 90 P.3d at 205 n.3, *citing Brown v. Ohio*, 432 U.S. 161, 166 n.6 (1977).

¶21 A person commits dangerous or deadly assault by a prisoner if, "while in the custody of the state department of corrections, . . . [he or she] commits an assault involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." A.R.S. § 13-1206. And, a person commits aggravated assault if he or she commits an assault as proscribed by

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[4]McDuffie suggests he failed to raise this issue below and it is therefore subject to fundamental-error review. However, as the state points out, McDuffie raised this issue in a pretrial motion to dismiss, which the trial court denied.

A.R.S. § 13-1203(A), while using "a deadly weapon or dangerous instrument." A.R.S. § 13-1204(A)(2). Pursuant to § 13-1203(A), a person commits assault 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.

See also State v. Garcia, 141 Ariz. 97, 102, 685 P.2d 734, 739 (1984) (applying § 13-1203(A)(2) to dangerous or deadly assault by prisoner).

¶22 McDuffie asserts that these two offenses "required proof of the identical facts, except" assault with a dangerous instrument or deadly weapon by a prisoner also required proof that he was in the custody of the Department of Corrections. He therefore reasons that aggravated assault is a lesser-included offense of assault with a dangerous instrument or deadly weapon by a prisoner. Accordingly, he maintains that his aggravated-assault conviction must be vacated. We agree.

¶23 In *State v. Tims*, 143 Ariz. 196, 198-99, 693 P.2d 333, 335-36 (1985), our supreme court described aggravated assault involving a dangerous instrument as a lesser-included offense of assault by a prisoner involving a dangerous instrument or deadly weapon. It characterized the elements of assault with a dangerous instrument or deadly weapon by a prisoner as: "(1) a person in the custody of the Department of Corrections, (2) commission of an assault, and (3) use of a deadly or dangerous instrument." *Id.* at 198, 693 P.2d at 335. The court then identified the elements of aggravated assault as: "(1) commission of an assault, and (2) use of a deadly or dangerous instrument." *Id.* at 199, 693 P.2d at 336. And, the court explained,

"The extra element distinguishing the lesser included offense from the greater is the custody status of the defendant." *Id.*; *see also State v. Martinez*, 196 Ariz. 451, ¶ 42, 999 P.2d 795, 806 (2000) ("A.R.S. § 13-1206 is simply aggravated assault for prisoners.").

¶24 The state nevertheless argues that "both the crimes of aggravated assault with a dangerous instrument and dangerous or deadly assault by a prisoner involve an underlying assault" and "the three subsections of the assault statute describe three different crimes." It suggests that the three types of assault require proof of different facts. The state thus reasons that "a person could commit aggravated assault with a dangerous instrument without also committing dangerous or deadly assault by a prisoner if the underlying assaults were different."

¶25 The *Blockburger* test necessarily requires us to examine the elements of the offenses as charged. *See Merlina*, 208 Ariz. 1, ¶ 12, 90 P.3d at 205 ("Charges are multiplicitous if they charge a single offense in multiple counts."); *see also State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d 94, 97 (App. 1998) (describing test for lesser-included offense as "whether the charging document describes the lesser offense even though it does not always make up a constituent part of the greater offense"). The indictment here did not specify how the underlying assault was committed with regard to either charge. Rather, it alleged generally that McDuffie "assaulted Mario Figueroa." This general reference to an assault is consistent with the elements as identified in *Tims*. And, based on those elements, we agree that aggravated assault with a dangerous instrument is a lesser-included offense of dangerous or deadly assault by a prisoner.

¶26 Accordingly, we conclude McDuffie's charges for aggravated assault and assault with a dangerous instrument or deadly weapon by a prisoner are multiplicitous. *See Merlina*, 208 Ariz. 1, ¶ 12, 90 P.3d at 205. We therefore vacate his conviction and sentence for aggravated assault. *See Powers*, 200 Ariz. 123, ¶ 16, 23 P.3d at 672; *Jones*, 185 Ariz. at 407-08, 916 P.2d at 1123-24.

Duplicity

¶27 McDuffie also contends that his conviction for assault with a dangerous instrument or deadly weapon by a prisoner must be vacated because it "resulted from a duplicitous indictment and duplicitous charge[]."[5] He maintains that "there was a real risk of a non-unanimous verdict." McDuffie concedes that he failed to raise this issue below. Consequently, he has forfeited review for all but fundamental, prejudicial error. *See Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Nevertheless, a violation of a defendant's right to a unanimous jury verdict constitutes such error. *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d 900, 908 (App. 2009).

¶28 A duplicitous indictment alleges multiple offenses within a single count. *State v. Butler*, 230 Ariz. 465, ¶ 13, 286 P.3d 1074, 1079 (App. 2012). By contrast, a duplicitous charge occurs "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). Thus, a duplicitous indictment is based on the face of the indictment, while a duplicitous charge arises from "the evidence presented to prove a count of the indictment." *Id.* ¶ 13. Both a duplicitous indictment and a duplicitous charge can "create the 'hazard of a non-unanimous jury verdict.'" *Id.* ¶ 12, *quoting State v. Davis,* 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003).

¶29 A defendant must raise an issue with a duplicitous indictment before trial to allow the state to remedy the problem by filing a new indictment alleging multiple counts. *State v. Anderson*, 210 Ariz. 327, ¶¶ 16-17, 111 P.3d 369, 377-78 (2005). A duplicitous charge, however, need not be resolved before trial. *See Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d at 847. Instead, "the trial court is normally obliged to take one of two remedial measures to insure that the defendant receives a unanimous jury verdict": (1) require the state to elect which of the alleged acts constitutes the crime or (2) instruct

[5]McDuffie also makes the same argument with respect to his conviction for aggravated assault. However, because we are vacating that conviction, we do not address this argument.

the jury that they must agree unanimously on the act that constitutes the crime. *Id.* But there is an exception: It is not error for the court to fail to take such measures when the multiple criminal acts are part of a "single criminal transaction." *Id.* ¶ 15.

¶30 McDuffie points out that assault under § 13-1203(A) can be committed three different ways and that this court has determined those three ways constitute different offenses. *See In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App. 2006) ("[T]he three subsections of § 13–1203(A) are . . . different crimes."). He seems to suggest that his indictment was duplicitous because the state did not allege which subsection of § 13-1203(A) applied to the charge of dangerous or deadly assault by a prisoner. He also maintains that the charge was duplicitous because the trial court instructed the jury that the underlying assault could be committed by intentionally or knowingly causing a physical injury to another person, § 13-1203(A)(1), or knowingly touching another person with the intent to injure, insult, or provoke, § 13-1203(A)(3). He claims the court should have given an "instruction that the jury had to be unanimous as to which method of assault [he] committed."

¶31 We find *State v. Waller*, 235 Ariz. 479, 333 P.3d 806 (App. 2014), instructive. There, the defendant was charged with one count of aggravated assault involving a deadly weapon or dangerous instrument under § 13-1204(A)(2). *Id.* ¶¶ 28-29. The state argued at trial that the defendant "could be found guilty of either the second or the third types of assault" in § 13-1203(A). *Id.* ¶ 30. The trial court instructed the jury that it did not need to agree unanimously on the way the underlying assault was committed and refused the defendant's request for a special verdict form. *Id.*

¶32 On appeal, the defendant argued "the trial court failed to properly instruct the jury that it was required to reach a unanimous verdict on the underlying assault." *Id.* ¶ 28. We addressed the issue as both a duplicitous indictment and a duplicitous charge. *Id.* ¶¶ 28-36. We first concluded the indictment was not duplicitous because it "referred to only one criminal act, a single aggravated assault against an individual victim." *Id.* ¶ 32. We nonetheless acknowledged that "[w]hether the charge

implicated more than one subsection of the assault statute . . . depends on the evidence and theories presented at trial." *Id.*

¶33 Given the state's argument that two subsections of the assault statute applied, we next concluded the charge was duplicitous and "the trial court erred . . . by not requiring a unanimous verdict on the underlying assault." *Id.* ¶¶ 30, 34. But we pointed out that "not every error requires reversal" and determined that the defendant's conviction did not need to be reversed because he suffered "no prejudice from the duplicitous charging." *Id.* ¶ 34. We reasoned, based on the evidence presented at trial, "any juror who believed [the defendant] . . . committ[ed] assault by touching under § 13-1203(A)(3), logically must have found [the defendant] caused . . . 'reasonable apprehension of imminent physical injury,' pursuant to § 13-1203(A)(2)." *Id.* ¶¶ 35-36.

¶34 Similarly, here, McDuffie's indictment was not duplicitous. It charged a single offense in a single count: dangerous or deadly assault by a prisoner in violation of § 13-1206. Specifically, the indictment alleged that McDuffie, "while in custody, assaulted Mario Figueroa, involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, to wit: mop handle."

¶35 With respect to the duplicitous charge issue, however, McDuffie is correct the jury was instructed that the underlying assault could be committed in two ways under § 13-1203(A)(1) or (3), which *Waller*, 235 Ariz. 479, ¶ 34, 333 P.3d at 816, deemed an error. However, McDuffie has not sustained his burden of showing error occurred in this case. *See Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. McDuffie has failed to address the exception that it is not error for the trial court to fail to take remedial measures requiring unanimity when the multiple acts are part of a single criminal transaction. *See Klokic*, 219 Ariz. 241, ¶ 15, 196 P.3d at 847; *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 297-98, 896 P.2d at 837-38 (failure to sufficiently argue claim on appeal constitutes waiver).

¶36 Moreover, McDuffie has failed to demonstrate prejudice. *See Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. As

discussed above, Romero testified that he saw McDuffie "attack" Figueroa by "swinging" the mop handle at his back. Another corrections officer confirmed that he saw McDuffie "run up to Figueroa and swing the [mop] handle and hit him." As the state points out, McDuffie's defenses were third-party culpability and mere presence. McDuffie did not dispute that Figueroa was injured. These facts amply support a finding that McDuffie "[k]nowingly touch[ed Figueroa] with the intent to injure, insult or provoke." § 13-1203(A)(3). And, it is logical that any juror who believed it was McDuffie who had struck Figueroa, committing assault under § 13-1203(A)(3), also must have found that McDuffie had caused Figueroa's physical injury, committing assault pursuant to § 13-1203(A)(1). *Cf. Waller*, 235 Ariz. 479, ¶ 36, 333 P.3d at 817.

Evidence of Dangerous Instrument

¶37 McDuffie last argues the state presented insufficient evidence that the mop handle was a dangerous instrument. He therefore asserts that his conviction for dangerous or deadly assault by a prisoner is not supported by the record.[6] Although McDuffie moved for a judgment of acquittal at trial pursuant to Rule 20, Ariz. R. Crim. P., he did not make this particular argument. *See State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) (objection on one ground does not preserve issue on different ground). Therefore, he has forfeited review for all but fundamental, prejudicial error. *See Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *see also State v. Robles*, 213 Ariz. 268, ¶¶ 11-12, 141 P.3d 748, 752 (App. 2006) (reviewing sufficiency-of-evidence claim for fundamental error). Nonetheless, a conviction based on insufficient evidence constitutes such error. *State v. Stroud,* 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005).

¶38 A dangerous instrument is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious

[6] McDuffie again makes the same argument as to his aggravated-assault conviction. As before, however, we need not address it.

physical injury." A.R.S. § 13-105(12). "[I]f an item is not inherently dangerous as a matter of law, it is up to the jury to determine whether it became a dangerous instrument based on how a defendant used it." *State v. Gustafson*, 233 Ariz. 236, ¶ 9, 311 P.3d 258, 262 (App. 2013); *see also State v. Schaffer*, 202 Ariz. 592, ¶ 9, 48 P.3d 1202, 1205 (App. 2002).

¶39 McDuffie argues that, because Figueroa reported only "bruises and soreness" after being struck, the mop handle was not "capable of causing death or serious physical injury" pursuant to § 13-105(12). But McDuffie's argument misses the mark. As the state points out, "the fact that Figueroa only sustained minor injuries is merely fortuitous." How McDuffie used the mop handle is the defining characteristic of a dangerous instrument. *See Gustafson*, 233 Ariz. 236, ¶ 9, 311 P.3d at 262; *see also* § 13-105(12).

¶40 As discussed above, Romero testified that McDuffie swung the mop handle "fast" and "hard" at Figueroa. Figueroa further explained that he was "struck in the back" multiple times. As a result of the incident, Figueroa underwent physical therapy for a month and a half. Moreover, J.B. testified that he had scars on his body where he had been hit with a mop handle during the riot. This is substantial evidence showing that the mop handle as used by McDuffie was "capable of causing death or serious physical injury." § 13-105(12); *see Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d at 695.

¶41 Relying on *State v. Williams*, 132 Ariz. 153, 157, 644 P.2d 889, 893 (1982), and *In re Pima County Juvenile Delinquency Action No. 97036-02*, 164 Ariz. 306, 312, 792 P.2d 769, 775 (App. 1990), McDuffie nevertheless asserts the state failed to present evidence from medical experts about "the degree of physical harm and risk of death" posed by the mop handle. Although the experts in those two cases testified about the threats posed by the dangerous instruments used there, such evidence was not necessary here. The jurors could determine whether the mop handle—a common item with which most people are familiar—was capable of causing death or serious physical injury based on how McDuffie used it. *Cf. Rourk v. State*, 170 Ariz. 6, 14, 821 P.2d 273, 281 (App. 1991) (relationship between drinking and automobile accidents within jury's common knowledge; expert testimony not necessary). We conclude the state presented sufficient

evidence that the mop handle was a dangerous instrument. *See Snider*, 233 Ariz. 243, ¶ 4, 311 P.3d at 658.

Disposition

¶42 For the reasons stated above, we vacate McDuffie's conviction and sentence for aggravated assault but otherwise affirm.