IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JIMMY LYNN ODOM,
Appellant.

No. 2 CA-CR 2015-0130
Filed April 26, 2016

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NOT FOR PUBLICATION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. CR20132151001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 After a jury trial, Jimmy Odom was convicted of various crimes related to a prison escape attempt and sentenced to concurrent terms, the longest of which was 15.75 years' imprisonment. He argues the trial court erred by denying his motion for a judgment of acquittal for insufficient evidence on two counts of bringing contraband into prison. He also contends the charge of dangerous or deadly assault by a prisoner was prejudicially duplicitous. We agree the evidence was not sufficient to prove Odom brought contraband into the prison and thus vacate those counts, but we otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Payne*, 233 Ariz. 484, n.1, 314 P.3d 1239, 1251 n.1 (2013). At all relevant times, Odom was an inmate in an Arizona Department of Corrections (DOC) prison. In October 2012, C.H., an employee of a private contractor that supplies the prison's commissary, was making a delivery in the prison yard. After C.H. got back into his delivery truck, Odom opened the driver's door of the truck and held a prison-made knife, known as a "shank," against C.H.'s ribs. He told C.H. to "give him the fucking keys" and that "he wasn't fucking around." C.H. testified he felt threatened by the shank against his ribs, because he knew stabbings on the yard were not uncommon. Odom pulled C.H. out of the truck and a scuffle ensued. Odom and C.H. traded blows, and Odom tried to stab C.H. "several times." Odom somehow managed to get the keys during the scuffle, and he got in the truck and drove toward the interior prison fence in an attempt to ram it. The interior

fence stopped the truck, and Odom was soon apprehended by DOC officers, never having made it past the exterior prison fence. The whole incident lasted about two minutes.

¶3 A DOC officer searched Odom's person after he was detained and found a "hotwire kit" consisting of wire and homemade tools in an eyeglasses case. Odom admitted he had planned to use the items to hotwire a motorcycle if he made it past the fences. Odom testified he had made the shank himself in prison, and a corrections officer's testimony indicated Odom had an opportunity to collect the items in the hotwire kit from around the prison or from his work assignments within the prison. Odom admitted both the hotwire kit and the shank were prison contraband.

¶4 Odom was charged with dangerous or deadly assault by a prisoner, armed robbery, theft of means of transportation, first-degree escape, criminal damage, and two counts of promoting prison contraband (one for the shank and one for the hotwire kit) pursuant to A.R.S. § 13-2505(A)(1). At trial, Odom admitted the acts described above, arguing only that his actions were justified by duress or the need to escape from a prison gang that had threatened him. The jury found him guilty as charged, except that instead of theft of means of transportation the jury convicted him of the lesser-included offense of unlawful use of means of transportation. He was sentenced as described above and timely appealed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Motion for Judgment of Acquittal

¶5 Odom argues the trial court erred by denying his motion for a judgment of acquittal as to counts six and seven of the indictment, the prison contraband counts. *See* Ariz. R. Crim. P. 20(a). "We review the trial court's denial of a Rule 20 motion de novo." *State v. Parker*, 231 Ariz. 391, ¶ 69, 296 P.3d 54, 70 (2013).

¶6 Counts six and seven alleged Odom "knowingly took contraband . . . into a correctional facility . . . in violation of A.R.S. § 13-2505(A)(1)." Similarly, the preliminary jury instructions

provided that both counts "require[] proof that the defendant knowingly . . . took contraband into a correctional facility or the grounds of such facility." Odom's Rule 20 motion, brought after he rested, was brief and generic, arguing simply "as to all the counts there is not substantial evidence to allow the jury to take the case and deliberate on their own." The trial court denied the motion on all counts without elaboration.

¶7 Odom's opening brief contends the trial court should have granted the Rule 20 motion as to counts six and seven. He argues, "Since [Odom] was already in prison, and the State presented no evidence that [he] had been released at any time since his sentencing [for a prior offense] in 2004, it was impossible for him to 'tak[e] contraband *into* a correctional facility.'" We regard the state's failure to respond to this argument in its answering brief as a confession of error. *See, e.g.*, *State v. Pena*, 209 Ariz. 503, ¶ 17, 104 P.3d 873, 877 (App. 2005) (failure to respond to argument that no evidence supported emotional harm aggravating factor treated as confession of error). The state presented no evidence that Odom brought contraband "into" a correctional facility as required by § 13-2505(A)(1), only that he made or possessed contraband while he was confined in a correctional facility.[1]

¶8 The state appears to argue that subsequent events at trial cured the error. During jury deliberations, the jury submitted this written question: "Can you define further for the jurors the following: '*took* contraband *into* a correctional facility[?]' Is 'creating' the same as 'taking into'[?]" The prosecutor suggested the court answer the question by instructing the jury with the language of § 13-2505(A)(3). Defense counsel did not object to this approach, and so, quoting that paragraph, the court replied to the jury, "You are instructed that the law prohibits 'knowingly making, obtaining or possessing contraband while being confined in a correctional

[1] Although § 13-2505(A)(3) prohibits "knowingly making, obtaining or possessing contraband while being confined in a correctional facility," the indictment did not allege a violation of that subsection.

facility.'" The jury subsequently found Odom guilty on counts six and seven. This change to the jury instructions did not cure the absence of evidence; rather, it permitted the jury to convict on counts alleging a violation of § 13-2505(A)(1) upon finding the elements of § 13-2505(A)(3).[2] It was error to deny Odom's Rule 20 motion as to the counts of promoting prison contraband in violation of § 13-2505(A)(1). Accordingly, we vacate Odom's convictions and sentences on counts six and seven. Odom also contends double jeopardy bars retrial on counts six and seven. The state does not respond to the double jeopardy issue, limiting its argument to whether error occurred. We agree that double jeopardy applies. *See, e.g.*, *State v. Moya*, 129 Ariz. 64, 67 n.2, 628 P.2d 947, 950 n.2 (1981) (double jeopardy clause bars retrial once reviewing court finds evidence legally insufficient to support guilty verdict).

Duplicity

¶9 Odom also argues count one of the indictment, alleging dangerous or deadly assault by a prisoner, was duplicitous. Because he did not object on this basis below, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Fundamental error review places the burden on Odom to establish that fundamental error occurred and caused him prejudice. *Id.*

¶10 Our cases differentiate between a duplicitous indictment (which on its face charges multiple offenses in a single count) from a duplicitous charge (a count referring to a single offense or criminal act which the prosecutor attempts to prove with evidence of multiple criminal acts). *See, e.g.*, *State v. Paredes-Solano*, 223 Ariz. 284, ¶¶ 4-5, 222 P.3d 900, 903 (App. 2009); *State v. Klokic*, 219 Ariz. 241, ¶¶ 10-12, 196 P.3d 844, 846-47 (App. 2008). Depending

[2]However, we do not accept Odom's characterization of the additional instruction as amending the indictment. The judgment states that Odom's convictions on counts six and seven were pursuant to § 13-2505(A)(1) as originally charged, not pursuant to § 13-2505(A)(3). No amendment occurred.

on the facts, however, either can "potentially present[] the same problems," including inadequate notice of the charge to be defended, the danger of a non-unanimous jury verdict, and the inability to plead prior jeopardy with precision in a later prosecution. *Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847.

¶11 Count one alleged: "On or about the 17th day of October, 2012, Jimmy Odom, while in custody, assaulted [C.H.], involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, to wit: shank, in violation of A.R.S. § 13-1206."

¶12 We first consider Odom's argument that he faced a duplicitous indictment. He correctly observes that the three different types of assault under A.R.S. § 13-1203(A)(1)-(3) are different crimes, not mere variants of a single unified offense. *See, e.g.*, *In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App. 2006). However, the indictment did not charge Odom with, for example, dangerous or deadly assault by a prisoner "in violation of A.R.S. §§ 13-1206 and 13-1203(A)(1), (2), or (3)." Instead, the indictment alleged only a single offense of "assault[ing] [C.H.] . . . in violation of A.R.S. § 13-1206," leaving the statutory basis for the underlying "assault[]" unspecified.

¶13 The indictment in this case is analogous to the one in *State v. Waller*, which alleged Waller "'assaulted [J.C.] with a deadly weapon or dangerous instrument . . . in violation of A.R.S. [] § 13-1204(A)(2),'" but did not specify the underlying statutory variety of assault. 235 Ariz. 479, ¶¶ 29-32 & n.9, 333 P.3d 806, 815-16 & n.9 (App. 2014). This court held that indictment was not duplicitous on its face, because the count in question "did not allege two distinct offenses; it described a single offense, assault with a deadly weapon, without specifying how it was committed or its particular elements." *Id.* ¶ 32. "Whether the charge implicated more than one subsection of the assault statute [could not] be determined by analysis of the indictment alone, but rather depend[ed] on the evidence and theories presented at trial." *Id.* The same is true here. Because the indictment does not on its face charge multiple crimes in

a single count, it is not duplicitous.[3] *Compare id.* ¶¶ 29-32, *with State v. Thompson*, 138 Ariz. 341, 346, 674 P.2d 895, 900 (App. 1983) (indictment duplicitous on its face where single count alleged separate offenses of DUI or DUI with blood alcohol concentration of .10, raising same jury unanimity problems as hypothetical count alleging "grand theft *or* burglary"), *and Paredes-Solano*, 223 Ariz. 284, ¶¶ 5, 16, 222 P.3d at 903, 906 (indictment duplicitous on its face where single count accused defendant of "possessing, . . . photographing, [or] developing" images of child sexual exploitation; "possessing" image is separate offense from "photographing" or "developing" image).

¶14 Although the indictment was not duplicitous, Odom argues, and the state concedes, that count one was a duplicitous charge because the state introduced evidence of multiple acts which could constitute the single "assault[]" mentioned therein. *See Waller*, 235 Ariz. 479, ¶ 33, 333 P.3d at 816. In order to safeguard Odom's constitutional right to a unanimous jury verdict pursuant to Article II, § 23 of the Arizona Constitution, the court could have (1) required the state to elect the act which it alleged constituted the underlying assault crime, or (2) instructed the jury that they needed to be unanimous as to the specific act constituting the crime. *Waller*, 235 Ariz. 479, ¶¶ 33-34, 333 P.3d at 816. Neither remedy was implemented in this case to cure the duplicitous charge, and the resulting risk of a non-unanimous jury verdict constitutes error. *See id.*

[3]Odom's related argument, that count one did not provide him with sufficiently clear notice of the charge to be defended because it did not specify which paragraph of § 13-1203(A) the underlying assault was based on, is waived for failure to timely raise it below. *Waller*, 235 Ariz. 479, n.9, 333 P.3d at 816 n.9 (timely pretrial motion for more definite statement under Ariz. R. Crim. P. 13.2(a) and 16.1(b) is proper way to challenge indictment's failure to specify variety of underlying assault; failure to raise issue below waived claim on appeal).

¶15 The state also argues Odom has failed to show prejudice. *See id.* ¶ 34 (reversal not required where duplicitous charge not prejudicial). We agree. First, the duplicitous charge did not deprive Odom of notice of the charge to be defended. "[I]n drafting an indictment, the State may choose to charge as one count separate criminal acts that occurred during the course of a single criminal undertaking even if those acts might otherwise provide a basis for charging multiple criminal violations." *Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d at 847. Count one plainly accused Odom of dangerous or deadly assault by a prisoner in violation of § 13-1206, even though it did not state the statutory basis for the underlying assault. *Accord Waller*, 235 Ariz. 479, ¶ 32 & n.9, 333 P.3d at 816 & n.9. "Defendant could not possibly have construed the indictment to allege some other offense," nor was he "in doubt as to the specifics of the acts to which the indictment related"—acts he admitted at trial. *State v. Schroeder*, 167 Ariz. 47, 52, 804 P.2d 776, 781 (App. 1990).

¶16 Second, the specific acts described in the indictment related to Odom's October 2012 attack on C.H. were admitted into evidence at trial, and he can never again be prosecuted for those incidents. Therefore, Odom was not prejudiced on double jeopardy grounds. *Id.*

¶17 Finally, Odom has failed to show prejudice from the possibility of a non-unanimous jury verdict. Odom specifically admitted at trial that he assaulted C.H. by "holding [a] shank on [him]" in order to "threaten" him and "scare him." C.H. testified he was in fact scared that Odom was going to stab him with the shank. This uncontradicted evidence establishes an assault in violation of § 13-1203(A)(2)—"[i]ntentionally placing another person in reasonable apprehension of imminent physical injury." And Odom offered only affirmative defenses, which the jury rejected as evidenced by its findings of guilt. Even if the trial court had provided a special verdict form requiring the jury to agree on the statutory basis for the assault underlying the violation of § 13-1206, no reasonable juror, having rejected Odom's affirmative defenses, could have failed to find he assaulted C.H. in violation of § 13-1203(A)(2). *See Waller*, 235 Ariz. 479, ¶¶ 35-36, 333 P.3d at 816-17.

Therefore, the duplicitous charge did not result in a prejudicial denial of his right to a unanimous jury verdict. *Id.* ¶ 36; *accord Payne*, 233 Ariz. 484, ¶¶ 80, 90, 314 P.3d at 1262, 1264.

Disposition

¶18 We vacate Odom's convictions and sentences on counts six and seven, and affirm his other convictions and sentences.