IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL DWIGHT PRICE,
Appellant.

No. 2 CA-CR 2015-0348
Filed August 3, 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NOT FOR PUBLICATION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. CR20132255003
The Honorable Javier Chon-Lopez, Judge

AFFIRMED IN PART AS MODIFIED;
VACATED IN PART

COUNSEL

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

Dean Brault, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Michael Price was convicted of conspiracy to commit armed robbery, conspiracy to commit aggravated robbery, and weapons misconduct. The trial court imposed concurrent terms of imprisonment, the longest of which is twelve years. On appeal, Price contends that, because the underlying offense was based on a fictitious scenario created by a police officer, it was error to convict him of conspiracy to commit a nonexistent offense. And he argues that, in any event, one of his conspiracy convictions must be vacated because both were part of the same agreement. Lastly, he maintains the state presented insufficient evidence to support those same two convictions. For the reasons stated below, we vacate in part, modify in part, and otherwise affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Price's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). In January 2013, while working undercover, Tucson Police Department officer Derek Quezada purchased methamphetamine from Joseph Beck. The two met again four

[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.

months later when Beck was looking for someone to "front him marijuana." Quezada said he was not interested but proposed a fictional scenario of taking sixty pounds of the drug as part of a home invasion. According to Quezada's cover story, he was going to deliver marijuana to some buyers with whom he had "some problems," but Beck could steal it during the delivery and they could split the profit after reselling it. Quezada told Beck he would need to provide "a crew." Beck was "very excited," said "he had done this kind of work in the past," and "knew people who would be able to help."

¶3 About two weeks later, when Quezada and Beck met again to discuss the plan, Beck stated that he "had a crew." However, Quezada told Beck that he wanted to meet anyone who would be involved because they "need[ed] to see [his] face." On May 21, when the men met again, Beck brought Rosendo Espinoza. At that meeting, Quezada provided Beck and Espinoza with a vehicle to use during the home invasion later that day.

¶4 Approximately two hours later, Quezada contacted Beck and told him to meet him at a parking lot in central Tucson. Beck arrived in his vehicle with Price in the front passenger seat. When Quezada questioned Beck about Price, Beck explained that they "didn't know how many people would be in [the house]" and "he felt like they needed more backup." Quezada asked Beck if Price knew "what's up," and Beck said Price was "ready to go." Beck then called Price over and told him, referring to Quezada, "see this guy, he don't get hurt; all right?" Price responded affirmatively.

¶5 After Espinoza arrived in the vehicle that Quezada had provided earlier, they all got in their respective vehicles to leave for the house. But before they drove out of the parking lot, officers stopped them and arrested Beck, Espinoza, and Price. During a search of Beck's vehicle, officers found a backpack on the front passenger floorboard containing Price's identification card and a sawed-off shotgun.

¶6 A grand jury indicted Price for conspiracy to commit armed robbery; conspiracy to commit aggravated robbery; conspiracy to commit aggravated assault; conspiracy to commit

kidnapping; and weapons misconduct for manufacturing, possessing, transporting, selling, or transferring a prohibited weapon.[2] After pleading guilty, Beck testified at Price's trial. The jury found Price guilty of conspiracy to commit armed robbery, conspiracy to commit aggravated robbery, and weapons misconduct but acquitted him of the remaining two offenses. The 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).

Double Jeopardy

¶7 Price maintains that his two conspiracy convictions—to commit armed robbery and aggravated robbery—violate the prohibition against double jeopardy because "he can only be found guilty of one conspiracy." Price acknowledges that, because he failed to raise this argument below, 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). Nevertheless, a violation of double jeopardy constitutes fundamental error. *State v. Cooney*, 233 Ariz. 335, ¶ 11, 312 P.3d 134, 138-39 (App. 2013).

¶8 "The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008); *see* U.S. Const. amend. V; Ariz. Const. art. II, § 10. Pursuant to A.R.S. § 13-1003(C), "A person who conspires to commit a number of offenses is guilty of only one conspiracy if the multiple offenses are the object of the same agreement or relationship and the degree of the conspiracy shall be determined by the most serious offense conspired to."

¶9 Price argues that his two conspiracy convictions arose from "the same occasion . . . under the same circumstances and with a single objective." Citing § 13-1003(C), he therefore contends that

[2] Price also was indicted for a second count of weapons misconduct for possession of a deadly weapon by a prohibited possessor, but that charge was severed for trial.

this court "must set aside" his conviction for Count Two, "conspiracy to commit aggravated robbery, which is the less serious of the two convictions." The state concedes error, which we agree occurred. *See* A.R.S. §§ 13-1003(D) ("[C]onspiracy is an offense of the same class as the most serious offense which is the object of or result of the conspiracy."), 13-1903(B) (aggravated robbery is class three felony), 13-1904(B) (armed robbery is class two felony); *cf. State v. Medina*, 172 Ariz. 287, 289, 836 P.2d 997, 999 (App. 1992) (setting aside second conspiracy conviction based on "single conspiracy").

¶10 However, the state asks us to "merge the conspiracy offenses and modify [Price's] conviction for Count [One] to reflect a conviction for conspiracy to commit armed robbery and aggravated robbery." Price does not challenge the state's request. We have found authority supporting this remedy. *See State v. Vasquez*, 792 A.2d 1183, 1190 (Conn. App. Ct. 2001) (remanding case to trial court to merge two conspiracy convictions and vacate one sentence); *see also Merlina v. Jejna*, 208 Ariz. 1, n.4, 90 P.3d 202, 205 n.4 (App. 2004) ("The principal danger in multiplicity—that the defendant will be given multiple sentences for the same offense—can be remedied at any time by merging the convictions and permitting only a single sentence."), *quoting United States v. Reed*, 639 F.2d 896, 904 n.6 (2d Cir. 1981). Accordingly, we merge Price's two conspiracy convictions into one conviction for conspiracy to commit armed robbery and aggravated robbery in violation of §§ 13-1003, 13-1903, and 13-1904, and we vacate his sentence for Count Two, conspiracy to commit aggravated robbery.[3] *See* § 13-1003(C).

Nonexistent Offense

¶11 Price contends that his conviction for conspiracy to commit armed robbery and aggravated robbery is "insufficient as a matter of law because the conspiracy involved a nonexistent offense." Because "[t]he undercover officers invented the entire fictitious scenario," he reasons "there was no underlying offense." Although Price "submit[ted] a Rule 20[, Ariz. R. Crim. P.,] on the

[3]Having merged the two offenses in one conviction, we will hereafter refer to the conspiracy conviction in the singular.

five counts," he did not make this particular argument. *Cf. State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground."). Therefore, Price has forfeited review of his "nonexistent offense" argument for all but fundamental, prejudicial error. *See State v. Rhome*, 235 Ariz. 459, ¶ 4, 333 P.3d 786, 787 (App. 2014); *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. And because he has not argued the error was fundamental, and we find no such error occurred, he has waived review of this issue. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶12 Even if Price had not waived review of this issue, we disagree with his argument. The "impossibility of completing the crime because the facts were not as the defendant believed is not a defense" to conspiracy. *United States v. Williams*, 553 U.S. 285, 300 (2008); *see also* 16 Am. Jur. 2d *Conspiracy* § 26 (2016) ("[I]mpossibility of performance of the intended object of the conspiracy is not a defense to a charge of conspiracy."). Conspiracy can be committed "completely merely through communication and agreement." *State v. Tucker*, 231 Ariz. 125, ¶ 34, 290 P.3d 1248, 1263 (App. 2012); *see also* § 13-1003(A) (defining conspiracy; overt act in furtherance of offense not required if object of conspiracy was commission of felony upon the person of another). Indeed, "[t]he focus of the crime of conspiracy is the unlawful agreement itself." *State v. Denman*, 186 Ariz. 390, 392, 923 P.2d 856, 858 (App. 1996).

¶13 Price nevertheless argues that this case does not involve an "impossible" offense, but instead one that is "entirely nonexistent." This is a distinction without a difference. Several courts, including this one, have upheld convictions based on "sting operations involving fictional drug stash house robberies." *State v. Williamson*, 236 Ariz. 550, ¶ 15, 343 P.3d 1, 8 (App. 2015) (collecting cases). Price has therefore failed to show fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Sufficiency of the Evidence

¶14 Last, Price maintains the trial court erred in denying his motion for a judgment of acquittal pursuant to Rule 20 because the state presented insufficient evidence to support his conviction for

conspiracy to commit armed robbery and aggravated robbery. We review de novo the sufficiency of the evidence. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). "[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." *Id.* ¶ 16, *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. Rivera*, 226 Ariz. 325, ¶ 3, 247 P.3d 560, 562 (App. 2011). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*, *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996).

¶15 Pursuant to § 13-1003(A),

> A person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense, except that an overt act shall not be required if the object of the conspiracy was to commit any felony upon the person of another . . . .

Simple robbery occurs when a person, "in the course of taking any property of another from his person or immediate presence and against his will, . . . threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." A.R.S. § 13-1902(A). An offense is elevated to armed robbery if, in the course of committing a robbery, the person or an accomplice is "armed with a deadly weapon or a simulated deadly weapon." § 13-1904(A). And it becomes aggravated robbery if, in the course of committing a robbery, the person "is aided by one or more accomplices actually present." § 13-1903(A).

¶16 Price maintains that "the evidence was factually insufficient to support his conviction[] because there was no evidence that he agreed to participate in the home invasion." Price points out that Quezada and Beck "never mentioned [him] in any conversation and [he] never appeared until the final meeting." And he asserts he did not participate in the conversation at that meeting but instead spent most of the time on his cell phone.

¶17 But Price ignores significant evidence supporting his conviction for conspiracy to commit armed robbery and aggravated robbery. *See Rivera*, 226 Ariz. 325, ¶ 3, 247 P.3d at 562. Beck testified that he contacted Price on the way to the final meeting because he thought they "could use some extra help" with the home invasion. Beck sent Price a text message that said, "I have an opportunity for something good, wanting some help, let me know." Price responded, "[O]kay." The two then met at Price's apartment, where Beck explained he needed "some help" with a "home invasion" and "there was a good opportunity to make some money." Price again said, "[O]kay." Price then got in Beck's car carrying a backpack containing a sawed-off shotgun.

¶18 During the final meeting with Quezada, Beck told Price to make sure Quezada did not get hurt during the home invasion. Price "shook his head as if he underst[ood] and . . . said okay." Quezada testified that, as he and Beck discussed the plan, Price was standing nearby. Although Quezada acknowledged that Price "didn't say much," he explained that Price "listened." Quezada also said he saw Price conducting counter-surveillance while they waited in the parking lot for Espinoza.

¶19 Price additionally maintains, "Beck's testimony that he called Price at the last minute to assist in the robbery was not credible." But the jury, not this court, determines witness credibility. *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38, 312 P.3d 123, 133 (App. 2013). Price essentially is asking us on appeal to reweigh the evidence—something we will not do. *See State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). The trial court did not err in denying Price's motion for a judgment of acquittal. *See West*, 226 Ariz. 559, ¶ 15, 250 P.3d at 1191.

Disposition

¶20 For the reasons stated above, we merge Price's two conspiracy convictions into one conviction for conspiracy to commit armed robbery and aggravated robbery in violation of §§ 13-1003, 13-1903, and 13-1904. We vacate Price's sentence for Count Two, conspiracy to commit aggravated robbery. We otherwise affirm.