IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RAFAEL TERAN,
Appellant.

No. 2 CA-CR 2018-0172
Filed November 2, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Greenlee County
No. CR201700069
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Acting Section Chief Counsel
By Brian R. Coffman, Assistant Attorney General, Phoenix
Counsel for Appellee

The Stavris Law Firm PLLC, Scottsdale
By Alison Stavris
Counsel for Appellant

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Rafael Teran appeals from his convictions following a jury trial for conspiracy to transport a narcotic drug for sale, transporting a narcotic drug for sale, and misconduct involving weapons. The trial court imposed concurrent terms of imprisonment, the longest of which is ten years. On appeal, Teran contends that the court erred in allowing the jury to return "mutually exclusive" verdicts and in denying his motion to vacate the judgment based on newly discovered evidence. We affirm.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to upholding the jury's verdict." *State v. Mangum*, 214 Ariz. 165, ¶ 3 (App. 2007). In August 2017, Greenlee County Sheriff's Deputy Eric Ellison spotted a semi-truck without a front or rear license plate. He also noticed a red SUV driving in front of the semi-truck, which he believed to be a "heat car"—a car meant to distract law enforcement from another vehicle carrying contraband. Ellison believed that the semi-truck was the "drug vehicle," thus he then radioed in the probable cause—the absence of a license plate—for Sheriff Tim Sumner, who was driving nearby, to stop the semi-truck. Ellison then got behind the SUV, at which time it "took off." Ellison activated his lights and initiated a traffic stop. The passenger of the SUV admitted to having marijuana on his person, and Ellison then arrested him. Ellison searched the car and found a revolver and a wallet in the center console. The wallet had an identification card for Rafael Teran. Ellison then arrested the driver of the SUV for weapons misconduct.

¶3 Further down the road, Sumner stopped the semi-truck. Sumner asked the driver, Jose Herrera, for his license. Teran was also in the semi-truck. Sumner asked Herrera whether he had guns or drugs in the vehicle. Herrera admitted that he had a gun, that he knew he was not supposed to have a gun in a commercial vehicle, and that he was a prohibited possessor. Sumner found the gun, Ellison joined Sumner at the semi-truck, and another deputy arrested Herrera. Ellison searched the

semi-truck, and found boxes of drugs—later identified as 102 pounds of cocaine. Sumner then arrested Teran.

¶4 A jury found Teran guilty of conspiracy to transport a narcotic drug for sale, transporting a narcotic drug for sale, possession of a narcotic drug for sale, and misconduct involving weapons. It further found the state had proved the aggravating circumstance of the presence of an accomplice for three of the offenses, but had not proved that the defendant had used, threatened to use, or possessed a deadly weapon during the offenses. The trial court sentenced Teran as described above. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1), (3).

Analysis

Mutually Exclusive Verdicts

¶5 On appeal, Teran argues that the verdicts finding him guilty of misconduct involving weapons and finding a deadly weapon aggravator unproven were mutually exclusive and thus the trial court erred in "failing to make inquir[i]es in to the jury's mutually exclusive verdicts." He claims that the proper course would have been for the court to question the jury and, potentially, to declare a mistrial.

¶6 Because Teran did not object below to the verdicts as inconsistent, we review only for fundamental error. *State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). In such a review, if trial error exists, we must determine, based on the totality of the circumstances, whether it was fundamental. *Id.* ¶ 21. "A defendant establishes fundamental error by showing that the error (1) went to the foundation of the case, (2) took from the defendant a right essential to his defense, *or* (3) was so egregious that he could not possibly have received a fair trial." *Id.* "If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice . . . ." *Id.* If no error is found, we need go no further. *See id.*

¶7 Generally, inconsistencies do not render verdicts invalid. *State v. Hansen*, 237 Ariz. 61, ¶ 22 (App. 2015). Verdicts are mutually exclusive "when a jury returns verdicts of guilt on separate offenses but the 'verdict on one count logically excludes a finding of guilt on the other.'" *Id.* n.6 (quoting *United States v. Maury*, 695 F.3d 227, 263 (3d Cir. 2012)). No Arizona court has thus far addressed a case of "mutually exclusive" verdicts; nor have we adopted a doctrine prohibiting such verdicts. *See id.*

But, contrary to Teran's argument, this case does not present an issue of mutually exclusive verdicts, and thus, we need not resolve this question.

¶8 As the state correctly notes, the jury's verdict on weapons misconduct may have been based on accomplice liability. *See* A.R.S. § 13-301(2) (defining accomplice as a person who "with the intent to promote or facilitate the commission of an offense" aids or attempts to aid another person in committing an offense); A.R.S. § 13-303(A)(3) (providing criminal accountability when person is an accomplice in commission of an offense). Indeed, the jury found that the state had proven an accomplice was present during the commission of the weapons misconduct offense. In contrast, accomplice liability was not available to the jury in finding the existence of the deadly weapon aggravator. *See* A.R.S. § 13-701(D)(2) (providing deadly weapon aggravating circumstance when defendant used, threatened to use, or possessed deadly weapon during commission of crime). Section 13-303(A)(3) imposes accomplice liability upon a defendant for offenses; however, there is no statutorily provided accomplice liability for sentencing aggravators. Thus, the jury's verdict that Teran was guilty of weapons misconduct but its finding that the presence of the deadly weapon aggravator was "unproven" are not mutually exclusive findings. We, therefore, do not find error, fundamental or otherwise.

Motion to Vacate

¶9 On appeal, Teran contends that the trial court erred when it denied his motion to vacate the judgment of conviction due to newly discovered evidence.[1] We review the denial of a motion to vacate a judgment for abuse of discretion. *State v. Parker*, 231 Ariz. 391, ¶ 78 (2013).

¶10 Before trial, Teran moved to continue trial because, among other reasons, he claimed he had "learned that a potential[ly] exculpatory witness [would] not be available for the trial of the instant matter." The state believed that the witness was one of the three co-defendants whose case had not yet been resolved, or even set for trial, Jose Herrera. It urged that a delay until after Herrera's unknown trial date would result in "going

[1]The state argued in its opening brief that we lack jurisdiction to consider this argument because Teran never filed a notice of appeal from the trial court's order denying his motion to vacate judgment. Teran, however, then sought and was permitted to file a delayed notice of appeal of that motion, which he timely filed, and which the state did not thereafter contest. *See* Ariz. R. Crim. P. 31.2(a)(3). We, thus, have jurisdiction pursuant to A.R.S. § 13-4033(A)(3).

around in circles and getting nowhere." The trial court vacated Teran's trial date. At a later status conference, Teran expressly sought to postpone his trial date until Herrera's case was complete "in order for Mr. Herrera to testify on behalf of [Teran]." The court set a new date for trial but "allow[ed] the parties additional time to research the matter" and scheduled another conference. At that conference, Teran's counsel updated the court on the progress of Herrera's case and again asked for a continuance. The state objected, and the court affirmed the trial date.

¶11 Ultimately, Teran's counsel did not subpoena Herrera as a witness for Teran's trial or disclose him as a witness. On the third day of trial, Teran informed the court that Herrera wanted to accept an expired plea offer that had been extended months before, and that Herrera then intended to testify on behalf of Teran. Because of this, Teran claimed that the state was "in control of exculpatory evidence" and asked the court to either order the state to prepare a plea agreement for Herrera, grant a continuance so Teran could file a special action, or order a mistrial if Teran was ultimately denied access to this "vital exculpatory witness." The court denied Teran's motion, raising concerns about whether it was within its power to order another defendant's plea offer to be reinstated, but its primary reason was, it explained, that "nobody knows what Mr. Herrera will testify to, or whether he will actually testify."

¶12 After sentencing, Teran moved to vacate the judgment pursuant to Rule 24.2, Ariz. R. Crim. P., based on the "newly discovered evidence" that Herrera would now testify that Teran did not know about the cocaine in the semi-truck. Teran claimed that the content of Herrera's testimony was not previously "discoverable nor available." The trial court held an evidentiary hearing, and Herrera testified that he did not tell Teran there were drugs in the semi-truck and that Teran also did not know about the presence of the gun. Herrera also testified that he had been untruthful during his plea hearing when he said that Teran was an accomplice to the drug trafficking. Herrera further alleged that the state had withdrawn its plea offer when he offered to testify on behalf of Teran. He explained that he was also following the advice of his attorney in not testifying on behalf of Teran.

¶13 The trial court denied Teran's motion, finding that Teran was "aware of the substance of Mr. Herrera's testimony prior to trial" and "based upon the advice of his attorney, [Herrera] voluntarily chose not to testify at [Teran's] trial." Thus, although Herrera's testimony was "newly available," it was not "newly-discovered" as required under Rule 24.2(a)(2), Ariz. R. Crim. P. The court further found that Herrera's testimony was self-serving, "internally contradictory and substantially nonsensical" and "[n]o

reasonable juror could find his testimony convincing." Thus, the court concluded his testimony would not have changed the verdict. On appeal, Teran again claims that Herrera's testimony was "newly discovered evidence." We do not agree.

¶14 Rule 24.2(a)(2), Ariz. R. Crim. P., requires the trial court to vacate a judgment if it finds that "newly discovered material facts exist satisfying the standards in Rule 32.1(e)." Rule 32.1(e), Ariz. R. Crim. P., provides:

> Newly discovered material facts exist if:
>
> (1) the facts were discovered after the trial or sentencing;
>
> (2) the defendant exercised due diligence in discovering these facts; and
>
> (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment . . . .

In addition, it must be shown that such facts "probably would have changed the judgment or sentence." *Id.* Evidence is not newly discovered when, as is the case here, a co-defendant voluntarily chose not to testify and later comes forward to offer exculpatory testimony. *See State v. Dunlap*, 187 Ariz. 441, 466 (App. 1996). Moreover, we defer to the trial court's evaluation of the value of Herrera's testimony. *See id.* ("A motion for new trial is properly denied if the testimony of a proffered witness does not appear reliable or credible to the trial court."); *State v. Hughes*, 13 Ariz. App. 391, 393 (1970) (We "must defer to the trial court's evaluation of the witness's credibility as only it was able to view him."). The court did not abuse its discretion when it denied Teran's motion to vacate the judgment.

Disposition

¶15 For the foregoing reasons, we affirm Teran's convictions and sentences.