

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

TONY FELIX ALVAREZ,
Appellant.

No. 2 CA-CR 2020-0048
Filed April 2, 2021

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NOT FOR PUBLICATION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 Pima County
No. CR20182444001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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and

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MEMORANDUM DECISION

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

BREARCLIFFE, Judge:

¶1 Tony Alvarez was convicted after a jury trial of aggravated assault causing temporary but substantial disfigurement, a dangerous offense, and aggravated assault. The trial court sentenced him to concurrent prison terms: a five-year term for aggravated assault causing disfigurement as a dangerous offense, and a 2.5-year term for aggravated assault. Alvarez argues on appeal that the trial court erred in denying his motion for a judgment of acquittal made under Rule 20, Ariz. R. Crim. P., and by sentencing him as a dangerous offender for aggravated assault causing disfigurement under count one. The state concedes error, albeit on a different basis, and requests that the sentence for count one be vacated and the matter remanded for resentencing. We otherwise affirm Alvarez's convictions and sentences but, given the state's concession and failure to make any argument in support of the sentence for count one, we vacate the jury's finding of dangerousness. We consequently vacate Alvarez's sentence for aggravated assault causing temporary but substantial disfigurement under count one and remand the case to the trial court for resentencing on that count.

¶2 In May 2018, Alvarez choked his live-in girlfriend during an argument and, while doing so, also burned her face and arm with a "torch lighter" Alvarez used to smoke methamphetamine. When she was unable to breathe, he stopped choking her but produced a handgun and threatened to shoot her. He was arrested and charged with two counts of aggravated assault causing serious physical injury, one count of aggravated assault with a deadly weapon or dangerous instrument based on his use of the lighter, and one count of aggravated assault by impeding the victim's breathing. The state also alleged the two aggravated assaults causing serious physical injury were dangerous offenses based on his use of the lighter as a deadly weapon or dangerous instrument. The state later amended those allegations, however, to base its allegation of assault with a deadly weapon or dangerous instrument on Alvarez threatening the victim

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with a gun. It similarly amended its allegation of dangerousness to allege the gun, not the lighter, was a deadly weapon or dangerous instrument.

¶3 As noted above, Alvarez was convicted of one count of aggravated assault causing temporary but substantial disfigurement as a lesser-included offense of aggravated assault causing serious physical injury, and aggravated assault for obstructing the victim's airway. The trial court instructed the jury regarding dangerous offenses and provided a verdict form directing the jury that it could find the assaults Alvarez had committed with the lighter to be dangerous offenses. The jury then found his conviction of aggravated assault causing temporary but substantial disfigurement was a dangerous offense. The jury acquitted him of the remaining offenses. The court sentenced Alvarez as described above. This appeal followed.

¶4 Alvarez first contends the trial court erred by denying his Rule 20, Ariz. R. Crim. P., motion for a judgment of acquittal, in which he argued the state had not proven the victim's injuries were serious. We agree with the state that this issue is moot because he was acquitted of those assault charges. *See State v. Peltz*, 242 Ariz. 23, ¶ 9 (App. 2017). Alvarez contends the issue is not moot because the purported lack of evidence supporting serious physical injury would similarly preclude a finding of dangerousness. Because, as we explain below, we accept the state's concession of error regarding that finding, we need not address this argument.

¶5 Alvarez next argues the trial court erred by permitting the jury to consider whether his conviction of assault causing disfigurement was a dangerous offense,¹ chiefly because the jury was not given the statutory definition of a "dangerous instrument." *See* A.R.S. §§ 13-105(13) (dangerous offense involves "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person"); 13-704 (providing enhanced sentences for dangerous offenses). As stated above, the state concedes error as to count one, but only because it withdrew its allegation that Alvarez's assaults committed with the lighter were "dangerous." The

¹Alvarez did not object below to the instruction inviting the jury to find his use of the lighter was dangerous. We therefore review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). An illegal sentence constitutes such error. *State v. Cox*, 201 Ariz. 464, ¶ 13 (App. 2002).

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state otherwise makes no argument in support of the dangerousness finding or resulting sentence, and we accept the state's confession of error. See *State v. Purcell*, 199 Ariz. 319, ¶ 35 (App. 2001) (accepting state's concession that trial court erred in imposing sentence for dangerous offense when "the State did not allege that the offense was dangerous, and the jury never made the required finding of dangerousness."); see also *State v. Waggoner*, 144 Ariz. 237, 238-39 (1985) ("due process and orderly procedure" require defendant to "know the extent of potential punishment he faces" before trial). Thus, we need not further address this argument.

¶6 We otherwise affirm Alvarez's convictions, but vacate the jury's finding of dangerousness as to count one. We consequently vacate the sentence imposed for Alvarez's conviction of aggravated assault causing temporary but substantial disfigurement under count one and remand the case to the trial court for resentencing on that count.