IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JACKY LEE DAVIS,
Appellant.

No. 2 CA-CR 2021-0040
Filed April 21, 2022

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NOT FOR PUBLICATION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. CR20192136001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Following a jury trial, Jacky Davis was convicted of aggravated assault with a deadly weapon or dangerous instrument, and the trial court sentenced him to a presumptive prison term of 11.25 years. On appeal, Davis argues the state presented evidence of three types of assault without specifying which one it was trying to prove and the trial court did not give jury instructions to address the issue, creating the risk of a non-unanimous jury verdict and causing fundamental error. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015). Late one evening in May 2019, K.D. was in his vehicle waiting in line at a restaurant drive-through when Davis walked up, reached through the window, grabbed K.D. by his shirt, and punched him in the face. When K.D. responded by punching Davis, Davis swung at him multiple times with a "weapon," cutting K.D.'s finger and wrist and slicing through his sweater and shirt in his chest area. At some point during the altercation after K.D. had yelled for help, his co-workers jumped out of their vehicle, which was in the drive-through directly in front of K.D.'s vehicle, and chased after Davis. Davis eventually tripped over a curb, allowing one of K.D.'s co-workers to catch up to him and hold him at gunpoint. As K.D. approached Davis with his own knife, one of his co-workers pushed him away, saying, "it is not worth it." Officers responded, and Davis was ultimately arrested. K.D. later drove to a hospital, where he received seven stitches on his finger and one on his wrist.

¶3 A grand jury indicted Davis for one count of kidnapping and one count of aggravated assault with a deadly weapon or dangerous

instrument.[1] At trial, the jury was unable to reach a verdict on the kidnapping charge but found Davis guilty of aggravated assault.[2] In the aggravation phase, the jury found that Davis had "used, threatened to use, or possessed a deadly weapon or dangerous instrument during the commission" of the assault, that K.D. had "suffered physical harm as a result of [Davis] committing" the assault, and that the offense had been "committed while [Davis] was on parole following a conviction of a felony offense" before May 2019. Davis was sentenced as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶4 Davis argues the trial court erred by not requiring the state to elect which type of simple assault[3] he had committed. He also contends the lack of a jury instruction requiring unanimity on the type of assault created the risk of a non-unanimous jury verdict. Davis acknowledges that we review for fundamental, prejudicial error because this issue was not raised at trial. *See State v. Turner*, 251 Ariz. 217, ¶ 19 (App. 2021) (when claim not raised below, "we will only review that claim on appeal for fundamental, prejudicial error").

¶5 The three types of assault under A.R.S. § 13-1203 "are distinct offenses with different elements" and "not merely different manners of committing the same offense." The trial court must therefore eliminate the risk of a non-unanimous verdict by requiring the state to identify for the jury which offense it is trying to prove or by instructing the jury that it must unanimously agree on the specific offense. *State v. Waller*, 235 Ariz. 479, ¶¶ 29, 33 (App. 2014). The failure to do so constitutes fundamental error. *Id.* ¶¶ 33-34; *see State v. Davis*, 206 Ariz. 377, ¶ 64 (2003) (violation of right to unanimous jury verdict in criminal cases is fundamental error).

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[1]An additional count for possession of a narcotic drug was severed from the other charges.

[2]During a post-trial status conference, the trial court dismissed the kidnapping and possession of narcotics charges upon motion of the state.

[3]While Davis was charged with aggravated assault under A.R.S. § 13-1204(A)(2), simple assault under A.R.S. § 13-1203 is one of the elements of aggravated assault.

¶6 Because the trial court did not require the state to elect which type of assault it intended to prove and did not instruct the jury that it must unanimously agree on which type of assault was committed, Davis has established fundamental error.[4] However, Davis must also establish prejudice to be entitled to a new trial. *See State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). Establishing prejudice for duplicative charging "requires a showing that without the error, a reasonable jury could have plausibly and intelligently returned a different verdict." *Id.* ¶¶ 29, 31; *see Waller*, 235 Ariz. 479, ¶ 36. Such a determination requires an examination of the entire record that includes the arguments and all the evidence presented to the jury. *Escalante*, 245 Ariz. 135, ¶ 31.

¶7 Davis argues the facts in this case were contested and, as a result, not all the jurors may have agreed on which type of assault the state had proved. To prove aggravated assault under the facts of this case, the state needed to establish that the defendant committed an assault under § 13-1203 with a "deadly weapon or dangerous instrument." A.R.S. § 13-1204(A)(2). Here, the jury found the offense to be "of a dangerous nature involving the use of a deadly weapon or dangerous instrument" after finding Davis guilty of aggravated assault. Thus, there is no issue of unanimity regarding the existence of a deadly weapon or dangerous instrument in the commission of the offense. But as noted above, aggravated assault also requires proof of a simple assault under § 13-1203(A), which may be committed in one of three ways:

> 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.

¶8 Regarding the first and third types of assault, Davis argues there was contradictory evidence about whether he had touched K.D. and contends that K.D.'s injuries could have been self-inflicted. To support this

[4] In its answering brief, the state does not argue a lack of error, instead, arguing that any error was harmless and not prejudicial to Davis.

argument, Davis relies on his testimony that "he did not have the knife blade out." He also contends there was no evidence of blood detected on his knife, or blood in K.D.'s vehicle, and the presence of K.D.'s DNA on Davis's knife could be explained by cross-contamination in a police officer's handling of Davis's and K.D.'s knives. Davis suggests this evidence could lead some jurors to conclude that K.D. had cut himself with his own knife when his co-workers "were struggling with him to prevent him from attacking [Davis]." As to the second type of assault, Davis maintains the fact that K.D.'s co-workers had a difficult time restraining K.D. from "stabbing" Davis could lead the jury to believe K.D. was not in apprehension of physical injury and that K.D.'s anger may have led him to "embellish" what Davis had actually done.

¶9 But our review is not limited to the evidence Davis claims supports his position. *See Escalante*, 245 Ariz. 135, ¶ 31. Even if properly instructed to unanimously agree on the type of assault committed, no reasonable jury would have acquitted Davis of any of the three types of assault under § 13-1203(A) based on the record and evidence below.

¶10 As to the first and third types of assault, K.D.'s injuries included a cut to his middle finger on his right hand that required seven stitches and a cut to his left wrist that required one stitch. The cuts to K.D.'s hands were severe enough that he was bleeding from the moment of the attack inside his vehicle until after Davis was caught when K.D. had to remove his shirt and use it to stop the bleeding. In addition to these cuts, K.D. also had two gashes in his sweater and shirt over his chest area. One of K.D.'s co-workers testified that he had seen K.D. bleeding from the hand while they were chasing Davis, before the struggle had occurred. K.D. testified that he had not grabbed his knife until after Davis attacked him in his vehicle and he noticed he was bleeding.

¶11 During cross-examination, Davis was shown surveillance video of him running through the restaurant with K.D. and his co-workers in pursuit. He claimed the object in his hand was not a knife but a lighter. Davis also testified that he had never removed his knife from his pocket and that it had come out when he fell to the ground. However, he acknowledged that his knife was found on the ground with both of its blades out and conceded that they would not come out on their own if dropped. Additionally, when he was questioned by officers at the scene, Davis told them, "when I fell, the knife went out of my hand." On this record, no reasonable jury could have found that Davis had not caused the injuries or that K.D.'s injuries were self-inflicted.

¶12 Davis nevertheless argues that the jury's finding of aggravating factors does not eliminate the risk of a non-unanimous verdict. He maintains that although the aggravating factors found by the jury are similar to assault under § 13-1203(A)(1) and (A)(3), the different forms of assault require the jury to find a mental state, whereas the aggravating factors do not. We disagree. The jury found Davis guilty of aggravated assault which, like the three types of simple assault, requires an intentional, knowing, or reckless state of mind. §§ 13-1204, 13-1203(A). The jury thus also found that Davis had intentionally, knowingly, or recklessly caused physical injury to K.D. or knowingly touched K.D. with the intent to injure, insult, or provoke him. As a result, not only could no reasonable jury acquit Davis of assault, but it is clear the jury unanimously agreed Davis had intentionally, knowingly, or recklessly caused physical injury to K.D. when he cut him multiple times with his knife.

¶13 Davis points out that testing on his knife for K.D.'s blood was negative. And he maintains that although K.D.'s DNA was found on his knife, a police officer handled both knives without changing one of his gloves and this could have led to cross-contamination. But the state's criminalist testified that the presence of blood on a knife that actually "drew blood" depends on the manner and "amount of time the knife was in contact" with the victim, "[i]f the knife blade touched anything else," and if "it had been removed or wiped." Even with the lack of blood and even assuming there was no DNA on Davis's knife, a reasonable jury would have found him guilty of assault under § 13-1203(A)(1) and (A)(3), given all the other evidence and the extent of K.D.'s injuries. *Cf. State v. Gill*, 248 Ariz. 274, ¶ 10 (App. 2020) ("[A] lack of fingerprints or DNA is hardly determinative, as a conviction 'may rest solely' on circumstantial evidence." (quoting *State v. Nash*, 143 Ariz. 392, 404 (1985))).

¶14 As to assault under § 13-1203(A)(2), K.D. testified that as Davis approached, he spoke in an aggressive manner. K.D. stated that when Davis punched him in the face, it only "grazed" him because he had "moved back" in his car. When interviewed on scene, Davis told a police officer that K.D. and his co-workers' vehicles matched vehicles he believed were involved in the kidnapping of a five-year-old girl earlier that evening.[5] Davis also told officers, "I snatched the door open and I had the knife in my

[5]At trial however, Davis testified the kidnapped girl was between fifteen to seventeen years old.

hand," but denied trying to stab K.D. and said he was trying to find out where the "baby" was. At trial, Davis said he did try to open K.D.'s vehicle door but was unsuccessful. When confronted with his statement to police that he had his knife in his hand when he confronted K.D., Davis testified that he meant "my hand was on top of my knife that was clipped to my pants." K.D.'s co-workers both heard K.D. yelling and saw Davis struggling with K.D. through his vehicle's open window. And one of the co-workers heard K.D. say Davis "was trying to stab him." We conclude that any reasonable jury would have found Davis guilty of assaulting K.D. by intentionally placing him in reasonable apprehension of imminent physical injury under § 13-1203(A)(2). Thus, Davis has failed to establish the error here was prejudicial.

Disposition

¶15 For the foregoing reasons, we affirm Davis's conviction and sentence.