NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EDGAR TRAVIS CROSS, Appellant.	)	2 CA-CR 2008-0316 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR 20070625

Honorable Robert Duber II, Judge

AFFIRMED IN PART AS MODIFIED
VACATED IN PART AND REMANDED

Terry Goddard, Arizona Attorney General
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H O W A R D, Presiding Judge.

¶1 After a jury trial, Edgar Cross was convicted of attempted second-degree murder, second-degree burglary, theft, weapons misconduct, and two counts of aggravated assault. The trial court sentenced him to a combination of concurrent and consecutive sentences totaling 29.75 years' imprisonment. On appeal, Cross claims the state presented insufficient evidence to support his convictions. He also claims the trial court erred in imposing consecutive sentences for certain of the convictions. This court sua sponte ordered supplemental briefing to address whether the trial court fundamentally erred when instructing the jury on attempted second-degree murder. Because we conclude fundamental, prejudicial error did arise from the improper jury instruction, we vacate the conviction for attempted second-degree murder and remand the attempted murder charge to the trial court.[1] We also modify the sentencing minute entry to reflect a correction explained below, but otherwise affirm the remainder of Cross's convictions and sentences.

Facts

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Victim M. suspected Cross and his girlfriend of stealing a gun from M.'s friend J. When confronted about it, Cross returned the gun to J. Cross then said to M., "I've got some guys that's going to take care of you." The next day, M. was inside J.'s trailer home, talking with J. and J.'s girlfriend

[1]Cross was indicted for attempted first-degree murder but convicted of attempted second-degree murder as a lesser-included offense.

L. about what Cross had done the previous day. Cross suddenly burst through the door and attacked M., hitting him and attempting to "knee [him] in the head." When M. managed to get outside, he retrieved a shotgun from his truck, pointed it at the door of the trailer, and called out to Cross that there was "only one way out of the trailer."

¶3 While still inside, Cross grabbed a gun that belonged to J. He opened the door of the trailer, pointed J.'s gun at M., and then pulled back out of sight behind the door. M. returned his shotgun to his truck, got in, and started to back the truck away from the trailer. Cross then went outside. He did not appear to be holding the gun but, after M. got out of his truck to face Cross, Cross then pulled the gun out again and pointed it at M. M. got back into his truck and continued backing it down the street. Cross followed him on foot. He fired two shots towards the ground as he was disengaging a safety device on the gun and then fired three shots towards the truck, hitting the front bumper once. Cross was arrested a few days later. The gun he had taken from J. was never located. When Cross committed the charged offenses, he had multiple prior felony convictions.

Jury Instruction

¶4 This court sua sponte ordered supplemental briefing on whether the jury instruction on attempted second-degree murder constituted fundamental, prejudicial error. Because Cross did not raise this issue below, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his

defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both fundamental error and resulting prejudice. *Id.* ¶ 20. To show prejudice, the defendant must show that a reasonable jury could have reached a different result absent the alleged error in the jury instruction. *See id.* ¶¶ 26-27.

¶5 "The offense of attempted second-degree murder requires proof that the defendant intended or knew that his conduct would cause death." *State v. Ontiveros*, 206 Ariz. 539, ¶ 14, 81 P.3d 330, 333 (App. 2003). Attempted second-degree murder may not be based on reckless conduct, nor may it be "based on knowing merely that one's conduct will cause serious physical injury." *Id.*; *see also State v. Curry*, 187 Ariz. 623, 627, 931 P.2d 1133, 1137 (App. 1996) ("no offense of attempted reckless second degree murder" in Arizona). Giving an instruction that allows the jury to find a defendant guilty of attempted second-degree murder based on conduct that is merely reckless or only on knowledge that the conduct will cause serious physical injury allows the jury to find a defendant guilty of a nonexistent offense and constitutes fundamental error. *See Ontiveros*, 206 Ariz. 539, ¶¶ 14, 19, 81 P.3d at 333, 334; *Curry*, 187 Ariz. at 627-28, 931 P.2d at 1137-38.

¶6 Here, the jury was instructed as follows:

> The crime of attempted second degree murder requires proof that the defendant, without premeditation:
>
> 1. Intentionally committed any act that was a step in a course of conduct that the defendant planned would end or believed would end in the

commission of the crime of second degree murder; and

2. The defendant engaged in conduct intended to cause the death of [M.]; or

3. The defendant, knowing that his conduct would cause death *or serious physical injury*, engaged in conduct which if successful, would have caused the death of [M.]; or

4. Under circumstances manifesting extreme indifference to human life, the defendant *recklessly engaged in conduct* which created a grave risk of death and which would have caused the death of [M.].

(Italicized emphasis added.) Part four of the instruction allowed the jury to find Cross guilty of attempted second-degree murder based only on reckless conduct that created a grave risk of death. And, although part three is confusingly worded, it suggests the jury could have found Cross guilty if it found only that he had known his conduct would cause serious physical injury. Therefore, the instruction constitutes fundamental error. *See Ontiveros*, 206 Ariz. 539, ¶¶ 14, 17, 81 P.3d at 333; *Curry*, 187 Ariz. at 627-28, 931 P.2d at 1137-38.

¶7 The state acknowledges the instruction is erroneous but argues that Cross cannot show prejudice. The state contends the evidence clearly shows Cross intended to kill M. and no reasonable jury could have reached a different result even without the error in the instructions. The state emphasizes evidence that Cross had said "I'm going to kill you" just as M. left the trailer. But other evidence indicates that, when Cross initially entered the trailer and assaulted M., it was because he had heard M. loudly saying he would beat up

Cross for having stolen J.'s gun the day before. And, after the altercation inside the trailer, the evidence suggests Cross did not grab J.'s gun or go outside until M. had retrieved his own gun from his truck and had shouted to Cross that he was armed and to come out of the trailer. Additionally, although Cross was firing at M.'s truck from a relatively short distance, he did not hit M. or even the passenger compartment of the truck.

¶8 Further, the prosecutor emphasized parts three and four of the instruction during closing argument by pointing out to the jury that it could find Cross guilty of second-degree murder if it found that he had only intended to cause serious physical injury or if it found his behavior was merely reckless. The prosecutor stated:

> So . . . then to find second degree murder, you only have to find one of the three.
>
> The first one is, the defendant engaged in conduct intending to cause the death of [M.].
>
> . . . .
>
> But if you're not convince[d] there, you can go to the next; the defendant, knowing his conduct would cause the death or physical injury of another.
>
> Do you go back and say, well, maybe he's trying to maim him and shoot his arm off. He didn't want to kill him.
>
> You come to that conclusion, that's number three, the defendant knowing his conduct would cause death or physical injury, engaged in conduct which, if successful, caused the death of [M.].
>
> . . . .

> Number four, if you don't go with the first two there or two or three, under circumstances manifesting extreme indifference to human life—shooting at a truck backing out on a public residential street—the defendant re[ck]lessly engaged in conduct which created a grave risk of death or which would have caused the death of [M.].
>
> If being shot at while you[']r[e] backing down a public residential street doesn't create a grave risk of death, what does?

¶9 After reviewing the evidence and considering the potential impact of the prosecutor's argument, we conclude that a reasonable jury could have reached a different result absent the error in the jury instruction. *See Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. The jury could have found Cross's conduct was merely reckless or that he knew only that his conduct would cause serious physical injury. Because Cross may thus have been convicted of a nonexistent offense, the fundamental error in the jury instruction was prejudicial. *See Ontiveros*, 206 Ariz. 539, ¶¶ 17, 19, 81 P.3d at 333, 334; *Curry*, 187 Ariz. at 627-28, 931 P.2d at 1137-38. Accordingly, we reverse the conviction for attempted second-degree murder and remand for a new trial on the attempted murder charge. *See Ontiveros*, 206 Ariz. 539, ¶ 20, 81 P.3d at 334.

Sufficiency of the Evidence

¶10 Cross contends the trial court also erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. Although he provides a recitation of the parties' arguments below regarding his Rule 20 motion, he fails to provide a sufficient argument on appeal about why the trial court erred in denying the motion. He has therefore

waived review of this issue. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Rubio*, 219 Ariz. 177, ¶ 14, 195 P.3d 214, 218 (App. 2008); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). Moreover, even if the claim were not waived, the state presented substantial evidence—as summarized both above and in Cross's opening brief—to support the convictions for second-degree burglary, theft, weapons misconduct, and both counts of aggravated assault.[2] *See Rubio*, 219 Ariz. 177, ¶ 15, 195 P.3d at 218; *see also State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005) (reversal only if no substantial evidence). Therefore, the trial court did not err in denying Cross's Rule 20 motion for judgment of acquittal.

Sentencing

¶11 Cross next asserts the trial court erred in imposing consecutive sentences for some of his convictions. Again, he recites the parties' arguments to the trial court, which involved challenges to consecutive sentences for multiple offenses. But, on appeal, Cross focuses almost entirely on his claim that his sentence on the weapons misconduct conviction should not be consecutive to his sentence for attempted second-degree murder. Any claim of error regarding the other consecutive sentences is waived for insufficient argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Rubio*, 219 Ariz. 177, ¶ 14, 195 P.3d at 218; *see also State v. Bolton*, 182 Ariz. at 298, 896 P.2d at 838. And, because we are vacating Cross's

[2]Because we are vacating the attempted murder conviction on other grounds, we do not address the sufficiency of the evidence to support this conviction.

conviction for attempted second-degree murder, we do not address his argument that it was impermissible to order that his sentences run consecutively for weapons misconduct and attempted second-degree murder.

Sentencing Minute Entry

¶12 We observe, sua sponte, that the sentencing minute entry reflects a conviction for burglary in the first degree, a class two felony. *See* A.R.S. § 13-1508(B) (class two felony when burglary of a residential structure). But the jury returned a verdict finding Cross guilty of burglary in the second degree, a class three felony, *see* A.R.S. § 13-1507(B), which is a lesser-included offense of the charged offense of first-degree burglary. And, at the sentencing hearing, the trial court orally pronounced the conviction correctly as burglary in the second degree. *See State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999) (oral pronouncement of sentence controls when different than written minute entry). Additionally, the sentence actually imposed, 11.25 years, is the correct presumptive term for second-degree burglary committed with two prior felony convictions as found by the trial court.[3] We therefore modify the sentencing minute entry to correctly reflect a conviction for burglary in the second degree, a class three felony. *See State v. Jonas*, 164 Ariz. 242, n.1, 792 P.2d 705, 708 n.1 (1990).

[3]*See* former A.R.S. § 13-604(D), now renumbered as A.R.S. § 13-703(C) and (J); 2008 Ariz. Sess. Laws, ch. 301, § 28.

Conclusion

¶13 In light of the foregoing, we vacate the conviction for attempted second-degree murder and remand the attempted murder charge to the trial court for a new trial. We affirm Cross's other convictions and we affirm his sentences as modified by the aforementioned clerical correction to the sentencing minute entry.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge