

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,)	2 CA-CR 2008-0337
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DAVID RICARDO TORRES,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074891

Honorable John S. Leonardo, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 A jury found appellant David Torres guilty of aggravated assault causing serious physical injury. The trial court sentenced him to a mitigated, 4.5-year prison term. On appeal, Torres argues there was insufficient evidence to sustain his conviction and the court erred in allowing the jury to consider an undisclosed theory of accomplice liability. He also contends the court erred by precluding the testimony of one witness and limiting the testimony of another, when their testimony would have supported his self-defense assertion. For the reasons discussed below, we affirm the conviction and sentence.

Facts and Procedural History

¶2 “We view the evidence presented in the light most favorable to sustaining the conviction[.]” *State v. Fornof*, 218 Ariz. 74, ¶ 2, 179 P.3d 954, 955 (App. 2008). On November 5, 2007, the victim, Arturo R., and his wife Veronica were driving away from their place of business when they stopped in front of the house of Torres’s brother. Torres and his friend, Gustavo Zuniga, were standing in the driveway. Arturo got out of his vehicle to confront Torres about a prior incident between Torres and Arturo’s teenage son. Torres and Zuniga then began assaulting Arturo. Zuniga kicked Arturo’s leg and stomped on him. Among other injuries, Arturo sustained a broken leg that required the surgical placement of a permanent metal rod and four screws to repair it. Torres was charged with aggravated assault resulting in serious physical injury.

¶3 After the close of the evidence, Torres moved for a judgment of acquittal. The trial court denied the motion, and the jury found Torres guilty of aggravated assault. Torres filed this timely appeal.

Discussion

Notice of Accomplice Liability

¶4 Torres claims the trial court erred by denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. Specifically, he contends error resulted from the state's failure to give him notice that it would pursue an accomplice theory of liability. Absent that theory, he contends, there was insufficient evidence to convict him. But Torres made no such argument at trial and did not object when the state requested a jury instruction on accomplice liability. Failure to object to an alleged error at trial forfeits the right to appellate relief on that ground except in those "rare cases" that involve fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). "To establish fundamental error, [the defendant] must show that the error complained of goes to the foundation of his case; takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* ¶ 24. Whether we characterize the hybrid claim presented here as a challenge to the sufficiency of the evidence or a challenge to what Torres characterizes as an improper constructive amendment of the indictment, the trial court committed no error, fundamental or otherwise.

¶5 We first reject Torres's threshold contention that the state must place a defendant on notice, through its charging document, if it intends to proceed in whole or part on a theory of accomplice liability. We have repeatedly explained that "no requirement [exists] that the indictment charge [a defendant] as an accomplice in order to permit a jury

instruction to that effect.” *State v. McInelly*, 146 Ariz. 161, 162-63, 704 P.2d 291, 292-93 (App. 1985). As Arizona law makes clear, a defendant is accountable for a completed criminal offense whether he committed the offense alone or instead assisted or incited another to commit the offense. *See* A.R.S. § 13-303; *McInelly*, 146 Ariz. at 162-63, 704 P.2d at 292-93 (defendant charged as principal but jury instructed based on accomplice liability).

¶6 Thus, under Arizona law, the indictment alone placed Torres on notice that he could be convicted based either on his own actions against Arturo or on those of Zuniga that Torres caused or aided. *See State v. Cruz*, 218 Ariz. 149, ¶ 94, 181 P.3d 196, 212 (2008) (no requirement defendant receive notice of how state will prove responsibility for alleged offense); *see also State v. Tison*, 129 Ariz. 526, 537, 633 P.2d 335, 346 (1981) (conspiracy instruction not improper although defendant not indicted for conspiracy). The trial court did not err in instructing the jury on accomplice liability and allowing the state to seek a conviction on that basis.

Sufficiency of the Evidence

¶7 Torres argues the state presented insufficient evidence that he was liable for aggravated assault as an accomplice and contends the trial court should have granted a judgment of acquittal on that basis. A judgment of acquittal is appropriate only when there is “no substantial evidence to warrant a conviction.” *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting* Ariz. R. Crim. P. 20(a). Substantial evidence, which may be either direct or circumstantial, is such proof that “reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a reasonable

doubt.” *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980); *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). In assessing whether substantial evidence exists, we view the evidence in the light most favorable to the prosecution. *See Mathers*, 165 Ariz. at 66, 796 P.2d at 868.

¶8 “A person commits assault by . . . [i]ntentionally, knowingly or recklessly causing any physical injury to another person.” A.R.S. § 13-1203(A)(1). An assault is aggravated if the person uses “force that causes . . . temporary but substantial loss or impairment of any body organ or part.” A.R.S. § 13-1204(A)(3). A person will be criminally liable for aggravated assault based on the conduct of another “[i]f causing a particular result is an element of [the] offense” and “[t]he person aids . . . another person in planning or engaging in the conduct causing such result.” A.R.S. § 13-303(B)(2).

¶9 Here, the state presented ample evidence from which a reasonable jury could find Torres guilty beyond a reasonable doubt. Arturo and Veronica both testified that Torres had initiated the fight, with Zuniga joining in, and both attackers had then hit, kicked, and battered Arturo. A jury reasonably could conclude from such testimony that Torres and Zuniga had both assaulted Arturo and that each had aided the other, making Torres criminally liable for all of Arturo’s injuries, including any caused by Zuniga. *See State v. Williams*, 111 Ariz. 175, 177-78, 526 P.2d 714, 716-17 (1974) (uncorroborated testimony of victim can support conviction unless no reasonable person would believe testimony). And the evidence also established that the attack had broken Arturo’s leg and thus had caused substantial but temporary impairment of a body part.

¶10 Torres argues that Arturo endured two separate assaults in a short time period, one by Torres, and one by Zuniga, and claims it was the latter that ultimately caused Arturo’s broken leg. But Arturo and Veronica testified that Torres and Zuniga were involved in the fight simultaneously. And Zuniga testified that he had not become involved in the fight physically but had only stopped Veronica from hitting Torres. Zuniga’s denial of responsibility for the broken leg supplied evidence from which the jury could conclude that Torres himself had delivered the blows that caused Arturo’s injuries. That different inferences could be drawn from the witnesses’ conflicting testimony about the fight and who directly caused Arturo’s injuries does not assist Torres. *See State v. Walker*, 181 Ariz. 475, 479, 891 P.2d 942, 946 (App. 1995) (evidence not insufficient solely because contradicted or impeached). Thus, the trial court did not err in denying Torres’s Rule 20 motion for judgment of acquittal.

Witness Preclusion

¶11 Torres argues the trial court abused its discretion by precluding the proposed testimony of Francisco Orona and limiting the testimony of Ana Alvarez. Neither Orona nor Alvarez witnessed the assault. Rather, Torres offered their testimony to show that Arturo previously had engaged in aggressive behavior toward him in order to support Torres’s claim of self-defense.

¶12 Torres argues that “[t]he combination of [the two witness] preclusions materially prejudiced the defense because the jury was deprived of valuable information regarding Arturo R[.]’s character.” Arizona does not recognize the doctrine of cumulative

error except in claims of prosecutorial misconduct. *See State v. Hughes*, 193 Ariz. 72, ¶ 25, 969 P.2d 1184, 1190-91 (1998); *State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996). However, we will assess each preclusion claim separately to determine if there was error and prejudice arising from either.

¶13 Before trial, the court ordered all interviews completed and motions filed no later than July 24, 2008, but the defense did not disclose its final witness, Orona, until August 18, 2008. Torres claims Orona's testimony was vital to establish Arturo's aggressive character in support of Torres's claim of self-defense. The court nonetheless granted the state's motion to preclude Orona from testifying based on untimely disclosure.

¶14 A party who fails to comply with discovery rules and a court's discovery orders is subject to sanctions. *See Ariz. R. Crim. P. 15.7(a)*. A trial court has broad discretion in determining when and how to sanction a party. *State v. Meza*, 203 Ariz. 50, ¶ 19, 50 P.3d 407, 412 (App. 2002); *State v. Delgado*, 174 Ariz. 252, 256, 848 P.2d 337, 341 (App. 1993). Sanctions shall be just under the circumstances, and may include: (1) granting a continuance; (2) holding a witness, party, or counsel in contempt; (3) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and (4) declaring a mistrial if necessary to uphold justice. *Ariz. R. Crim. P. 15.7(a)*. A trial court's order imposing a sanction is reviewed only for an abuse of discretion. *State v. Fisher*, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984).

¶15 When determining whether to preclude a witness, a trial court must consider the importance of the witness to the proponent's case, the extent to which an opposing party

would be “surprised and prejudiced by the witness’[s] testimony,” whether the discovery violation occurred due to bad faith, “and any other relevant circumstances.” *State v. Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979); *accord Fisher*, 141 Ariz. at 246, 686 P.2d at 769. Here, Torres was on notice of Orona’s existence as a potential witness for six months before trial but failed to disclose or subpoena Orona until about a week before the trial started, far beyond the discovery deadline set by the court. Torres offered no reasonable justification for his untimely disclosure. Orona would not have testified about the incident in question but about separate instances when Orona had seen Arturo make threatening hand gestures while driving by Torres’s brother’s house. Moreover, the state argued it was surprised by Orona’s proposed testimony and the court reasonably could conclude his disclosure as a witness hampered the state’s ability to investigate Orona’s background. *See State v. Talley*, 112 Ariz. 268, 270, 540 P.2d 1249, 1251 (1975) (witness preclusion proper when last-minute disclosure of proposed witness left prosecution effectively unable to rebut proposed testimony).

¶16 Torres claims the trial court nonetheless abused its discretion by failing to order less stringent sanctions. Although a court must inquire whether a less stringent sanction would suffice before imposing a sanction that restricts evidence at trial or affects the merits of the case, there is no requirement that it impose the lesser sanction. *Meza*, 203 Ariz. 50, ¶ 37, 50 P.3d at 415; *Smith*, 140 Ariz. at 358-59, 681 P.2d at 1377-78; *see Nesmith v. Superior Court*, 164 Ariz. 70, 72, 790 P.2d 768, 770 (App. 1990) (court can impose most extreme sanction if it considered less severe sanctions and remedy just). Torres has not

shown the court failed to consider less severe sanctions, and we presume the court knows and follows the law. *See State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996). For the foregoing reasons, we conclude the court did not abuse its discretion in precluding Orona's testimony.

¶17 Torres also contends the trial court erred in precluding defense witness Ana Alvarez from testifying that Arturo had followed her in his truck. Torres proffered that testimony to impeach Arturo's statement that he had never followed Torres. However, Alvarez's testimony, which related only to Arturo's behavior toward Alvarez, would not have impeached Arturo's testimony that he had not followed Torres. Now on appeal, for the first time, Torres argues he offered Alvarez's testimony to demonstrate Arturo's aggressive character. Nor did Torres object on that basis to the court's ruling that limited Alvarez's testimony. *See State v. Hamblin*, 217 Ariz. 481, n.2, 176 P.3d 49, 51 n.2 (App. 2008) (argument made for first time on appeal forfeited absent fundamental error). When a defendant fails to object to a court's ruling, he waives his objection and may not pursue the issue absent fundamental error. *See Walker*, 181 Ariz. at 481, 891 P.2d at 948 (failure to raise specific objection to evidentiary ruling limits appellate court to fundamental error review). Because Torres does not argue on appeal the error was fundamental, and because we, in any event, find none, the issue is waived. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (fundamental error argument waived on appeal when not argued); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it).

¶18

We affirm Torres's conviction and sentence.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge