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SEP 20 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSE ARMANDO VIRGEN, Appellant.	)	2 CA-CR 2009-0381 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20081252

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
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Attorneys for Appellee

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K E L L Y, Judge.

¶1 Appellant Jose Virgen was convicted after a jury trial of attempted first-degree burglary and attempted aggravated assault. On appeal, he maintains the trial court erred in denying his motion for a new trial, instructing the jury, allowing the state to amend the indictment, and denying his request for a change of counsel. Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In the early morning hours of March 23, 2008, R. heard a car pull into his driveway and a noise at the gate to his backyard. He looked out a sliding glass door and saw a man he subsequently identified as Virgen, who pointed a shotgun at R.'s face. R. "ducked down," moved into the kitchen, and called 9-1-1. R. saw Virgen get into the passenger side of a car that had been idling in the driveway.

¶3 About an hour later, a Tucson police officer noticed a car stuck on a curb and stopped to help. Virgen, along with two others, was standing beside the car. As the officer spoke to Virgen and the others, he saw "what appeared to be a sawed-off shotgun . . . in the vehicle in plain view." The officer secured the weapon, which was unloaded, and detained Virgen. Meanwhile, officers had arrived at R.'s home in response to the 9-1-1 call. One of the officers took R. to where Virgen and the others were being detained, and R. identified Virgen as the man who had been in his yard.

¶4 Virgen initially was charged with burglary, aggravated assault with a deadly weapon or dangerous instrument, and three additional counts that were dismissed

before trial upon motion by the state. The state resubmitted the case to the grand jury, which returned a new indictment. A jury subsequently found Virgen guilty of attempted first-degree burglary and attempted aggravated assault with a deadly weapon or dangerous instrument, as charged in the second indictment. The trial court sentenced Virgen to presumptive, concurrent prison terms totaling ten years. This appeal followed.

Discussion

I. Motion for a new trial

¶5 Virgen first contends the trial court abused its discretion in denying his motion for a new trial. He maintains the evidence presented at trial was insufficient to support his convictions and the "case should be remanded for dismissal with prejudice." "The decision whether to grant a new trial is within the sound discretion of the trial court and we will not disturb its ruling absent an abuse of this discretion." *State v. Jeffrey*, 203 Ariz. 111, ¶ 17, 50 P.3d 861, 865 (App. 2002) (citations omitted).

¶6 As he did below, in both a motion to dismiss and motion for a new trial, Virgen maintains that, because the weapon he used in the offense was permanently inoperable,[1] the evidence presented at trial was insufficient to sustain his convictions. He argues that the charges of first-degree burglary and aggravated assault required the use of a deadly weapon in their commission and that because his weapon was inoperable, it fell outside the statutory definition of a deadly weapon. *See* A.R.S. § 13-105(15) (defining deadly weapon as "anything designed for lethal use, including a firearm"); § 13-105(17)

[1]The parties stipulated that "the gun in this case . . . was in permanently inoperable condition."

(defining firearm and providing definition "does not include a firearm in permanently inoperable condition"). Consequently, he contended, there was insufficient evidence that he had committed the charged offenses.

¶7 As the state points out, however, Virgen was not convicted of the completed offenses of burglary and aggravated assault, but rather of an attempt to commit both of those crimes. "A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person . . . [i]ntentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be . . . ." A.R.S. § 13-1001(A)(1). Thus, as the trial court concluded in its ruling on Virgen's motion for a new trial, "If [Virgen] believed the shotgun was not permanently inoperable, then he could be found guilty of Attempted First Degree Burglary and Attempted Aggravated Assault even though the shotgun was in fact inoperable."

¶8 Virgen asserts, however, that "there is simply no evidence that [he] believed the weapon to be anything other than permanently inoperable" and that no one could have thought the shotgun was operable because it was missing its bolt. But, although Virgen testified at trial that he had known the gun was inoperable, he also admitted he "d[id]n't know anything about shotguns" and had only recently received the gun used in the offense, which he claimed a friend had left in his bag a day earlier. Additionally, a witness who had been with Virgen from 3:00 a.m. until the time of the incident was asked if Virgen had been "drinking before or during the time with [her], and approximately how much." She testified in response that there had been "an 18 or 24

pack of beer" in the car in which she, Virgen, and a passenger had been riding, and that it was empty "by the time the incident happened." Furthermore, while he was detained at the side of the road, Virgen had asked one of the officers whether he was in trouble "because of a BB gun that was found."

¶9 In sum, based on the evidence that Virgen was not knowledgeable about guns, he had been drinking a significant amount of beer, and he had referred to the gun as a BB gun, the jury could reasonably have inferred he had not known the gun was inoperable, despite his testimony to the contrary. *See State v. Gay*, 108 Ariz. 515, 517, 502 P.2d 1334, 1336 (1972) ("Conflicts in the evidence are for the jury to resolve, and after they have been resolved by a verdict we will not upset them if there is substantial evidence in support of the conviction."); *see also State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004) ("'If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'"), *quoting State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996). "A new trial . . . is required only if 'the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime.'" *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996), *quoting State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). Viewing the evidence "in the light most favorable to sustaining the verdict" and "resolv[ing] all inferences against [the] defendant" as we must, we cannot say the evidence here was insufficient to support Virgen's convictions. *Id.*

II. Jury instructions

¶10 Virgen next argues the jury instruction defining attempt was an improper comment on the evidence. But Virgen did not object to the instruction until he filed a supplemental motion for a new trial.[2] Failure to object to an instruction "before the jury retires to consider its verdict" constitutes a waiver of that objection; the defendant forfeits the right to seek relief for all but fundamental, prejudicial error. Ariz. R. Crim. P. 21.3; *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Virgen concedes the error here was not fundamental. He is therefore not entitled to relief.

III. Amendment of indictment

¶11 Virgen also alleges that "[t]he trial court erred in allowing the state to amend a charge on the day of trial." As noted above, the first indictment had charged Virgen with first-degree burglary of a residential structure. Under A.R.S. §§ 13-1506(A)(1) and 13-1508(A), a person commits first-degree burglary by "[e]ntering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or any felony therein," while knowingly possessing a deadly weapon or dangerous instrument. In the second indictment, that charge was reduced to attempted first-degree burglary and alleged that

[2]We note that, after defense counsel approved the jury instructions and forms of verdict, Virgen stated: "I personally don't agree with them." When the court asked what he did not agree with, he stated, "It will be a matter of appeal." The trial court stated that a record had been made. But, Virgen concedes on appeal that this particular objection was not made until his motion for a new trial and, therefore, was not preserved by his vague statement. *See State v. Pierce*, 170 Ariz. 527, 529, 826 P.2d 1153, 1155 (App. 1991) ("Our courts have consistently held that in order to preserve an objection to jury instruction, the party must make a specific objection stating the matter to which he objects and grounds for the objection.").

Virgen had entered a "non-residential structure or fenced commercial yard belonging to" the victim.

¶12 On the first day of trial, the state moved to amend the indictment to charge that the attempted burglary was of a "residential yard." Defense counsel objected to the amendment, arguing "the nature of the offense is fundamentally changed." The trial court allowed the amendment. Virgen again objected to the court's ruling in his motion for a new trial, arguing that allowing the amendment so close to trial "made it impossible for defendant to defend the case properly and denied him a fair trial." We review the trial court's decision for an abuse of discretion. *See State v. Johnson*, 198 Ariz. 245, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶13 A trial is limited to the specific charge or charges stated in the grand jury indictment, but Rule 13.5(b), Ariz. R. Crim. P., allows a charge to be amended "to correct mistakes of fact or remedy formal or technical defects." "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). "Arizona courts have been liberal in allowing amendments, providing that the amendment does not lead to a charge of a different crime." *State v. Williams*, 108 Ariz. 382, 387, 499 P.2d 97, 102 (1972). A charged crime is different "[w]hen the elements of one offense materially differ from those of another—even if the two are defined in subsections of the same statute." *State v. Freeney*, 223 Ariz. 110, ¶ 16, 219 P.3d 1039, 1042 (2009).

¶14 We need not decide, however, whether the amendment's characterization of the premises changed the nature of the charge in this case because Virgen has waived this argument on appeal by failing to properly develop it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop an argument results in waiver). And even if not waived, any alleged error by the trial court in permitting the amendment would be harmless. *See Freeney*, 223 Ariz. 110, ¶ 26, 219 P.3d at 1043 (harmless error standard applies where defendant objected to Rule 13.5 error below). Under the harmless error standard, the state must show that the error was harmless beyond a reasonable doubt. *Id.*

¶15 In this case, the state has met its burden. Defense counsel conceded below that she had read the police reports and that Virgen had received notice of the charges. The amendment did not change the date of the offense, the victim, the location of the victim's property, or Virgen's alleged conduct in committing the offense. And, the second indictment specifically cited § 13-1506, which includes burglary of a residential yard, in the attempted first-degree burglary charge.[3] Nothing in the record suggests the amendment caused Virgen to change his trial strategy or otherwise affected his ability to prepare a defense. Virgen's counsel knew that the original indictment had alleged the property was a residential structure, and the prosecutor reported she had discussed with defense counsel whether Virgen had actually touched the back door in the fenced

[3]We also note that, although Virgen contends "[t]here was absolutely no evidence adduced by either the State or the defense that this yard was fenced and enclosed," as required to prove burglary of a residential yard, *see* A.R.S. § 13-1501(5), such evidence was produced at trial. R. was asked if his yard was "fenced in," and he answered, "It's blocked in, it's a block wall."

residential yard. Virgen's defense remained focused on whether the firearm was operable—and he did not request a continuance or recess. *See Freeney*, 223 Ariz. 110, ¶ 28, 219 P.3d at 1044 (finding harmless error where defendant never suggested amendment affected litigation strategy, trial preparation, examination of witnesses, or argument and did not request continuance or recess). Therefore, we conclude any error in permitting the amendment was harmless beyond a reasonable doubt.

V. Motion to replace counsel

¶16 Finally, Virgen maintains the trial court should have granted his motion to replace trial counsel. He argues his relationship with counsel was "completely dysfunctional" and he therefore "did not receive effective representation."[4] After Virgen reported having conflicts with his first appointed counsel, the trial court granted Virgen's motion for new counsel and appointed Janet Altschuler to represent him. Shortly thereafter, Virgen again requested new counsel, telling the court, inter alia, that Altschuler was "not fit to represent [him]" and that he did not trust her. The court denied the motion. Altschuler later moved to withdraw as Virgen's attorney because he had filed a State Bar complaint against her. After a hearing, the court denied her motion as well.

¶17 Virgen again moved for new counsel several months later, stating that "a genuine irreconcilable conflict exist[s] between me and my attorney. There[] is a total

[4]To the extent Virgen impliedly raises a claim of ineffective assistance of counsel, we note that such a claim may only be raised in a proceeding pursuant to Rule 32, Ariz. R. Crim. P., and we will not address it on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

breakdown in communication between me and my attorney." After oral argument, the court denied this motion as well. "A trial court's decision to deny the request for new counsel will not be disturbed absent an abuse of discretion." *State v. Cromwell*, 211 Ariz. 181, ¶ 27, 119 P.3d 448, 453 (2005).

¶18 "A criminal defendant has a Sixth Amendment right to representation by competent counsel. A defendant is not, however, entitled to counsel of choice or to a meaningful relationship with his or her attorney." *Id.* (citations omitted). And, "when considering a motion to substitute attorneys, a judge must evaluate several factors designed to balance the rights and interests of a defendant with judicial economy." *State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998). Among these factors are

> whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

Id., *quoting State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). Although Virgen argues, as he did below, that his relationship with Altschuler was "completely dysfunctional," he does not address any of the other factors the trial court was bound to consider.

¶19 Instead, Virgen focuses solely on his contention that his relationship with Altschuler was irreconcilably broken. He complains that Altschuler "attempted to force him into accepting a plea agreement." He further contends she made "disparaging comments" about him and that he ultimately filed a State Bar complaint against her. But,

we cannot say that on the record before us[5] that these complaints demonstrate anything more than "'disagreement over appropriate defense strategies'" or "'feelings of not getting along so well together.'" *Cromwell*, 211 Ariz. 181, ¶ 37, 119 P.3d at 455, *quoting State v. Henry*, 189 Ariz. 542, 547, 944 P.2d 57, 62 (1997), and *State v. Bible*, 175 Ariz. 549, 591, 858 P.2d 1152, 1194 (1993). Such "friction" between an attorney and client is insufficient to require new representation. *Moody*, 192 Ariz. 505, ¶ 12, 968 P.2d at 580. And, it was not until Altschuler filed a motion for a new trial that the trial court became concerned that Virgen's relationship with Altschuler was affecting the quality of his representation. Nothing in the record suggests the problems between Virgen and Altschuler were more than "friction" up until the point she filed a motion that the court found perfunctory and suggestive of less-than-competent representation. And, because defendant filed numerous pro se motions while he was represented by counsel, including multiple motions to dismiss, a motion for a new judge, a motion for a new trial, and a motion to vacate the judgment, it seems likely Virgen would have had similar problems getting along with new counsel. Therefore, we cannot conclude the court abused its discretion in denying Virgen's request for new counsel until that point.

[5]As the state points out, the transcript of the hearing on Altschuler's motion to withdraw has not been made part of the record on appeal. Nor has the transcript of an August 2008 status conference at which Virgen's request for new counsel was discussed. We therefore must presume these missing portions of the record also support the trial court's ruling. *See State v. Geeslin*, 223 Ariz. 553, ¶ 5, 225 P.3d 1129, 1130 (2010).

Disposition

¶20 Virgen's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge