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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THE STATE OF ARIZONA, Appellee, v. BRENT ALLEN MULVANEY, Appellant.	2 CA-CR 2009-0039 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800107

Honorable James L. Conlogue, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Brent Mulvaney appeals his convictions and sentences for aggravated assault, unlawful imprisonment, and first-degree burglary. He argues the trial court erred in imposing consecutive sentences for aggravated assault and first-degree burglary, and that enhancement of his burglary sentence based on the jury's finding it was a dangerous offense violated his double jeopardy rights. He also contends there was insufficient evidence to support the aggravated assault conviction, and the jury instructions and verdict form for aggravated assault were defective. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Mulvaney's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In February 2008, Mulvaney and three others went to E.'s home to collect a drug debt from him. E. lived with C. and her three children. At least two of Mulvaney's companions were armed—Mark Aurigemma had a police baton and Luis Ortega carried a baseball bat. After the group forced its way into the house, Aurigemma and Ortega beat E. with their weapons while Mulvaney watched. C. also was struck in the face, resulting in the loss of her right eye. The third companion took several valuables from the home.

¶3 Mulvaney and his companions were charged with a total of fifteen felony counts: attempted murder of C., first-degree burglary, four counts of kidnapping, three counts of aggravated assault of E. with a deadly weapon, two counts of aggravated assault of C. with a deadly weapon, aggravated assault of C. causing serious physical

injury, aggravated assault of C. causing "a fracture of any body part," armed robbery, and aggravated robbery. After a nine-day trial, the jury found Mulvaney guilty of first-degree burglary, aggravated assault of E. with a deadly weapon—a police baton, and unlawful imprisonment of E., a lesser-included offense of kidnapping.[1] The trial court sentenced Mulvaney to presumptive, consecutive prison terms for burglary and aggravated assault, totaling eighteen years, and a presumptive prison term of 2.25 years for unlawful imprisonment to be served concurrently with the sentence imposed for aggravated assault. This appeal followed.

Discussion

Consecutive Sentences

¶4 Mulvaney first contends the trial court improperly imposed consecutive sentences for first-degree burglary and aggravated assault, arguing those charges were based on a single act. Section 13-116, A.R.S., prohibits the imposition of consecutive sentences for offenses arising out of a single "act or omission." *See also State v. Stock*, 220 Ariz. 507, ¶ 11, 207 P.3d 760, 762 (App. 2009) (court may not impose consecutive sentences if defendant's conduct constituted single act). "We review *de novo* a trial court's decision to impose consecutive sentences in accordance with A.R.S § 13-116." *State v. Urquidez*¸ 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

[1]The trial court granted Mulvaney's motion for a judgment of acquittal on three counts of aggravated assault. The jury acquitted Mulvaney of the remaining counts.

¶5 To determine whether offenses arise out of a single act, we must first decide which is the "ultimate charge," that is "the essence of the factual nexus," *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989), or "primary object of the episode." *State v. Alexander*, 175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993). The ultimate charge is usually the most serious of the charged offenses. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. If, after subtracting the evidence necessary to support the elements of the ultimate charge, sufficient evidence remains to satisfy the elements of the secondary charge, the offenses likely arise out of multiple acts and consecutive sentences are permissible. *Id*. Assuming sufficient evidence exists, we then consider whether (1) it is factually possible for the defendant to have committed the ultimate charge without also committing the secondary charge, or (2) the secondary charge "caused the victim to suffer a risk of harm different from or additional to that in the ultimate crime." *Id*.; *see also Alexander*, 75 Ariz. at 537, 858 P.2d at 682; *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993).

¶6 The evidence established Mulvaney's primary objective was to collect a drug debt E. owed him either by intimidating E. or taking his property, not necessarily to assault E. or C. In addition, as a class two felony, the first-degree burglary charge is a more serious offense than aggravated assault, which is a class three felony. *See* A.R.S.

§§ 13-1508(B), 13-1204(B). Thus, for purposes of § 13-116, first-degree burglary is the ultimate charge here.[2]

¶7 Next, under the "identical elements" test, we subtract the evidence necessary to support the elements of the ultimate charge, first-degree burglary, and determine whether sufficient evidence remains to support the secondary charge, aggravated assault. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211; *State v. Tinghitella*, 108 Ariz. 1, 3-4, 491 P.2d 834, 836-37 (1971). A person commits first-degree burglary if that person or an accomplice "enter[s] or remain[s] unlawfully in or on a residential structure with the intent to commit any theft or any felony therein," A.R.S. § 13-1507(A), while "knowingly possess[ing] explosives, a deadly weapon or a dangerous instrument." A.R.S. § 13-1508(A). Mulvaney was also convicted of aggravated assault, in violation of A.R.S. §§ 13-1203(A)(1) and 13-1204(A)(2). A person commits aggravated assault by "[i]ntentionally, knowingly or recklessly causing any physical injury to another person," § 13-1203(A)(1), if the assailant "uses a deadly weapon or dangerous instrument." § 13-1204(A)(2). Although the elements of these charges are distinct, "our analysis under § 13-116 focuses 'on the facts of the transaction' to determine if the defendant

[2]Relying on *State v. Brown*, 215 Ariz. 243, 159 P.3d 533 (App.), *depublished by State v. Brown*, 217 Ariz. 320, 173 P.3d 1021 (2007), Mulvaney argues aggravated assault was the ultimate charge. Our supreme court, however, ordered *Brown* depublished, therefore it has no precedential value, which Mulvaney has failed to mention. *See* Ariz. R. Sup. Ct. 111(c), (g); *see also State v. Rodriguez*, 198 Ariz. 139, n.5, 7 P.3d 148, 151 n.5 (App. 2000). *Brown* does not support his position in any event. *See Brown*, 215 Ariz. 243, ¶ 8, 159 P.3d at 555 (concluding facts established aggravated assault essence of factual nexus because defendant entered residence to commit assault).

committed a single act." *State v. Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d 1150, 1155 (App. 2002), *quoting Gordon*, 161 Ariz. at 313 n.5, 778 P.2d at 1209 n.5.

¶8 In support of Mulvaney's first-degree burglary conviction, the evidence showed Mulvaney, Aurigemma, who was carrying a police baton, and Ortega, who was carrying a baseball bat, entered C.'s trailer without permission, intending to collect the drug debt, possibly through intimidation or theft of E. or C.'s property. *See* A.R.S. §§ 13-1508 (first-degree burglary), 13-1507 (burglary), 13-1802 (theft), 13-1902 (robbery), 13-1204 (aggravated assault). In support of the aggravated assault of E., the evidence established Aurigemma intentionally hit E. with the baton and caused him physical injury. *See* §§ 13-1203(A)(1), 13-1204(A)(2). Thus, sufficient evidence remained to support the aggravated assault conviction after subtracting the evidence necessary to support the first-degree burglary conviction, favoring the conclusion that the charges arose from multiple acts, rendering consecutive sentences permissible.[3]

[3]Contrary to Mulvaney's assertion, even if aggravated assault were the ultimate charge, sufficient evidence would remain to support the first-degree burglary conviction after subtracting the evidence necessary to support the aggravated assault charge. As already noted, the evidence supporting the aggravated assault charge established that Aurigemma intentionally hit E. with the baton causing him physical injury. Accordingly, after subtracting this evidence, there would be no remaining evidence to establish in support of first-degree burglary that Mulvaney's accomplice, Aurigemma, knowingly possessed a dangerous instrument or deadly weapon. However, the evidence further established that Mulvaney's other accomplice, Ortega, carried a baseball bat, and that Mulvaney and Ortega entered C.'s trailer without permission intending to collect the drug debt. This remaining evidence would support the first-degree burglary conviction. Because the "identical elements" test is satisfied, this analysis supports the conclusion the charges arose under multiple acts, thus permitting multiple punishments.

¶9 Next we determine whether it factually was impossible for Mulvaney to have committed the ultimate offense without also committing the secondary offense. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. First-degree burglary requires the "intent to commit any theft or any felony." §§ 13-1507(A), 13-1508(A). Because the felony Mulvaney intended to commit for the purpose of first-degree burglary was not necessarily aggravated assault, it factually was possible for him to commit first-degree burglary without also committing aggravated assault. *See State v. Williams*, 182 Ariz. 548, 561, 898 P.2d 497, 510 (App. 1995) (reasoning factual impossibility does not exist where criminal objective for residential burglary is crime different than one committed while in residence), *citing State v. Runningeagle*, 176 Ariz. 59, 67, 859 P.2d 168, 177 (1993).[4] Mulvaney forcibly entered C.'s residence to collect a drug debt from E. either by intimidating E. or taking his property. He did not necessarily intend to assault E. at the

[4]Notably, had Mulvaney entered C.'s residence intending to assault E., aggravated assault would have been the ultimate charge. *See Alexander*, 175 Ariz. at 537, 858 P.2d at 682 (ultimate charge is "primary object of the episode"). As the ultimate charge, it would have been factually impossible for Mulvaney to commit the aggravated assault without also committing the first-degree burglary because Aurigemma assaulted E. in C.'s residence. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (concluding factually impossible to commit ultimate charge of sexual assault without committing residential burglary because victim inside residence); *Alexander*, 175 Ariz. at 537-38, 858 P.2d at 682-83 (concluding factually impossible to commit ultimate charge of aggravated robbery without committing residential burglary because victim inside residence). However, because we conclude first-degree burglary was the ultimate charge here, those cases in which the ultimate charges were the crimes of violence inside the residences are inapposite. Moreover, even if aggravated assault had been the ultimate charge, consecutive sentences still would have been permissible under § 13-116 because the secondary charge "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime." *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

time he entered the residence, thus he could have committed the burglary without also committing aggravated assault.

¶10 Although the above considerations indicate the charges arose from multiple acts permitting the imposition of consecutive prison terms, we further consider whether the secondary charge "caused the victim to suffer a risk of harm different from or additional to that in the ultimate crime." *Gordon*, 161 Ariz. at 314-15, 778 P.2d at 1210-11. Although we need not make this final determination under *Gordon* when both the identical elements and factual impossibility tests show the charges arise from multiple acts, that test is, in any event, satisfied here. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211; *Alexander*, 75 Ariz. at 537, 858 P.2d at 682; *Boldrey*, 176 Ariz. at 382-83, 861 P.2d at 667-68. The aggravated assault caused E. to suffer a risk of physical harm different than the risk of harm inherent in Mulvaney's commission of first-degree burglary. *See State v. Cornish*, 192 Ariz. 533, ¶ 20, 968 P.2d 606, 611 (App. 1998) ("The harm done by an unwanted intrusion into the sanctity of the home presents a risk to property and is separately cognizable, and separately punishable, from the harm inflicted in a violent attack inside the home which presents a risk to life."), *citing Runningeagle*, 176 Ariz. at 67, 859 P.2d at 177. We therefore find no error in the trial court's imposition of consecutive sentences for first-degree burglary and aggravated assault.

Sentence Enhancement for First-Degree Burglary

¶11 Mulvaney next contends the trial court violated his Fifth Amendment and Arizona constitutional rights when it improperly enhanced his sentence based on the use

of a deadly weapon or dangerous instrument because possession of the same deadly weapon or dangerous instrument is an element of first-degree burglary. *See* A.R.S. §§ 13-1508, 13-105(13), 13-704(A).[5] Because Mulvaney did not raise this alleged sentencing error in the trial court, he has forfeited the right to seek relief for all but fundamental error. *State v. Molina*, 211 Ariz. 130, ¶ 15, 118 P.3d 1094, 1098 (App. 2005); *see also 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.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 699 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. "Imposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶12 The Fifth Amendment prohibits Congress from permitting any person to be "twice put in jeopardy of life or limb," and is enforceable against the states through the due process clause of the Fourteenth Amendment. *See State v. Bly*, 127 Ariz. 370, 371,

[5]Significant portions of the Arizona criminal sentencing code have been renumbered effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

621 P.2d 279, 280 (1980), *citing Benton v. Maryland*, 395 U.S. 784, 787 (1969). The Arizona Constitution also provides that no person shall be "twice put in jeopardy for the same offense." Ariz. Const. art. 2 § 10. Mulvaney's argument rests on the proposition that double jeopardy principles preclude the enhancement of a defendant's sentence when the factor relied on to enhance the sentence is also an element of the underlying offense. This argument is without merit. As the state points out, precedent plainly refutes Mulvaney's contention.

¶13 Our supreme court in *Bly* found no Fifth Amendment double jeopardy principle violated when a defendant's sentence is enhanced by an element of the underlying offense. *See Bly*, 127 Ariz. at 371, 621 P.2d at 280. Specifically, the court found no error in the trial court's enhancement of the defendant's sentence based on the use of a deadly weapon, or the court's finding that the use of a deadly weapon was an aggravating circumstance, even though the armed robbery conviction was based on the defendant's use of the same weapon. *Id.* at 372-73, 621 P.2d at 281-82; *see also* A.R.S. § 13-1904(A)(2) (use of deadly weapon element of armed robbery). Citing *Bly*, this court similarly has found no error when a trial court enhances a defendant's sentence for first-degree burglary based on the use of a deadly weapon. *State v. Rybolt*, 133 Ariz. 276, 281, 650 P.2d 1258, 1263 (App. 1982), *overruled on other grounds by State v. Diaz*, 142 Ariz. 119, 688 P.2d 1011 (1984).[6] Accordingly, we find no error, fundamental or

[6]Mulvaney mischaracterizes *Bly* by arguing that *Bly* did not involve a sentencing enhancement factor also an element of the underlying offense. He also fails to

otherwise, in the trial court's enhancement of Mulvaney's sentence for first-degree burglary.[7]

Sufficiency of the Evidence: Aggravated Assault

¶14 Mulvaney next argues there was insufficient evidence to support his conviction for aggravated assault. We construe the evidence in the light most favorable to sustaining the verdict when considering a claim of insufficiency of the evidence. *State v. Jensen*, 217 Ariz. 345, ¶ 5, 173 P.3d 1046, 1049 (App. 2008). We do not reweigh the evidence. *See State v. Barger*, 167 Ariz. 563, 568, 810 P.2d 191, 196 (App. 1990). A verdict will be overturned on appeal only if it appears clearly "that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶15 There was no evidence Mulvaney struck E. with the police baton. Thus, his conviction plainly was based on accomplice liability, stemming from Aurigemma's assault of E. A person is liable as an accomplice if, with "intent to promote or facilitate the commission of an offense," the person "[s]olicits or commands another person to

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acknowledge, much less attempt to distinguish, our holding in *Rybolt*. Although Mulvaney raises state constitutional grounds for his claim, he does not argue that the Arizona Constitution's prohibition against double punishment provides broader rights than its federal counterpart. Accordingly, we do not discuss it separately. *See In re Leopoldo L.*, 209 Ariz. 249, n.1, 99 P.3d 578, 581 n.1 (App. 2004).

[7]We note in passing that there may be a distinction between "use" of a deadly weapon, a sentencing enhancer, and "possession" of a deadly weapon, an element of first-degree burglary. If a meaningful distinction exists, no double jeopardy issue arises. If no meaningful distinction exists, as *Rybolt* implicitly suggests, then *Bly* controls. Because neither party raises this issue, we decline to discuss it further.

commit the offense," "[a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense," or "[p]rovides the means or opportunity to another person to commit the offense." A.R.S. § 13-301; *see also* A.R.S. § 13-303. Mulvaney asserts he did not "solicit[] or command[] the use of a baton," in the assault of E., aid in planning that assault, nor provide the means or opportunity for E.'s beating. We disagree. Aurigemma testified Mulvaney solicited him to help collect the debt from E. because when Mulvaney previously had tried to collect the debt, E. had become violent. Thus, the jury readily could conclude that Mulvaney had solicited Aurigemma's aid to overpower E. in order to facilitate the collection of the debt, thus providing the means and opportunity for Aurigemma to assault E. Based on the record before us, there was more than sufficient evidence to support the conviction.

Verdict Form and Jury Instruction: Aggravated Assault

¶16 Although he raises these arguments in the context of his argument the evidence was insufficient to support his aggravated assault conviction, Mulvaney contends the jury was instructed improperly and the verdict form for aggravated assault was faulty because it did not require the jury to find whether he had acted as an accomplice. He raised neither argument in the trial court and therefore has forfeited his right to seek relief on appeal for all but fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶17 Mulvaney asserts the verdict form for the burglary count, unlike the verdict form for the aggravated assault count, allowed the jury to make a specific finding of

accomplice liability. The record does not support his claim. The only mention of an accomplice on the verdict form for the burglary count was a notation that the jury could find him guilty of first-degree burglary if he "or an accomplice possessed a deadly weapon or dangerous instrument, to wit: a baseball bat and police baton." Mulvaney cites no authority, and we find none, suggesting a verdict form must permit a jury to find a defendant was liable specifically as an accomplice.

¶18 Second, Mulvaney contends it was necessary for the trial court to instruct the jury that "'it is the intent of one charged as an accomplice, rather than the intent of the main actor, that controls the accomplice's criminal responsibility,'" and that it was required to find, for each specific offense, that he "'intended to aid or aided another in planning or committing'" the offense. *See State v. Wall*, 212 Ariz. 1, ¶ 20, 126 P.3d 148, 152 (2006) ("[I]t is the intent of the one charged as an accomplice, rather than the intent of the main actor, that controls the accomplice's criminal responsibility."); *State v. Phillips*, 202 Ariz. 427, ¶ 37, 46 P.3d 1048, 1057 (2002) (holding § 13-303(A)(3) "imposes criminal accountability on an accomplice defendant only for those offenses the defendant intended to aid or aided another in planning or committing").

¶19 But the instruction the trial court gave the jury mirrored the language of § 13-301. It stated that, in order to find Mulvaney guilty based on accomplice liability, the jury must find he intended "to promote or facilitate the commission of an offense" by "[s]olicit[ing] or command[ing] another person to commit the offense" or "[a]id[ing], counsel[ing], agree[ing] to aid or attempt[ing] to aid another person in planning or

committing the offense" or "[p]rovid[ing] [the] means or opportunity to another person to commit[] the offense." This instruction adequately informed the jury that, in order to find Mulvaney guilty of assault based on accomplice liability, it was required to determine he intended to act as accomplice to that crime. There was no error, fundamental or otherwise. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608 (to obtain relief under fundamental error review, appellant "must first prove error").

Disposition

¶20 For the foregoing reasons, we affirm Mulvaney's convictions and sentences.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge