No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LALAKO JONATHAN JOSE,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DAVID J. EUCHNER
Counsel of Record
Pima County Public Defender's Office
33 N. Stone, 21st Floor
Tucson, Arizona 85701
Telephone: (520) 724-6800
David.Euchner@pima.gov
Attorney for Petitioner

INDEX TO APPENDIX

Exhibit 1: Decision of Arizona Court of Appeals (not published)

Exhibit 2: Order of Arizona Supreme Court Denying Discretionary Review

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LALAKO JONATHAN JOSE,
Appellant.

No. 2 CA-CR 2023-0224
Filed May 10, 2024

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NOT FOR PUBLICATION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. CR20221408001
The Honorable Scott McDonald, Judge

AFFIRMED

COUNSEL

Kristin K. Mayes, Arizona Attorney General
Alice M. Jones, Deputy Solicitor General/Section Chief of Criminal Appeals
By Jacob R. Lines, Assistant Attorney General, Tucson
Counsel for Appellee

Megan Page, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Gard concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Lalako Jose was convicted of aggravated assault of a peace officer, and the trial court sentenced him to the minimum prison term of four years. On appeal, Jose contends the court erred by instructing the jury on a different type of assault than was charged in the indictment, empaneling an eight-person jury, and imposing a time payment fee. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In April 2022, law enforcement officers arrested Jose on an unrelated offense. While the officers were placing an uncooperative Jose into a patrol vehicle and attempting to secure the seatbelt, Jose told one of the officers to "stop touching him" then "slammed his head into" the officer's head, stating, "[G]et the fuck off me."

¶3 Jose was charged with aggravated assault of a peace officer and was convicted and sentenced as described above. Jose appealed, and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

I. Amended Indictment

¶4 Jose contends that he was convicted of an uncharged offense, violating his constitutional right to be informed of the charges against him and constituting either structural or fundamental, prejudicial error. This occurred, he claims, because the trial court instructed the jury on assault under a subsection different than the one he was charged with in the indictment. The indictment alleged that Jose had committed aggravated assault on a peace officer "resulting in physical injury" under A.R.S.

§ 13-1203(A)(1).[1] Six days before trial, the state filed its proposed jury instructions, defining the assault underlying the aggravated assault charge as "knowingly touching another person with the intent to injur[e], insult, or provoke such person" under § 13-1203(A)(3). When settling final jury instructions, the court asked the state to confirm that it was proposing an instruction for assault under subsection (A)(3) and not (A)(1). The state responded "[t]hat is correct," and, when asked, Jose did not object. Accordingly, the court's final jury instruction included § 13-1203(A)(3)'s language.

¶5 Jose argues on appeal that he lacked notice of the offense for which he was convicted as required by the Sixth Amendment, constituting structural error. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." *See also* Ariz. Const. art. II, § 24 ("In criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against him, to have a copy thereof . . . .").

¶6 Relying on *State v. Sanders*, 205 Ariz. 208 (App. 2003), *abrogated on other grounds by State v. Freeney*, 223 Ariz. 110 (2009), Jose maintains the evidence presented to the grand jury and the offense as charged in the indictment required the state to prove he injured the officer. In *Sanders*, the defendant was charged with aggravated assault of a peace officer by knowingly touching the officer with the intent to injure, insult, or provoke him in violation of § 13-1203(A)(3). 205 Ariz. 208, ¶ 5. During the trial, the state successfully moved to amend the assault charge under Rule 13.5(b), Ariz. R. Crim. P., to allege the defendant intentionally placed the officer in reasonable apprehension of imminent physical injury in violation of § 13-1203(A)(2) to conform to the evidence elicited during the state's case-in-chief. 205 Ariz. 208, ¶¶ 9-10. On appeal, this court held that "an amendment proposed mid-trial that changes the nature of the original charge deprives an accused of the type of notice and opportunity to prepare a defense contemplated by the Sixth Amendment and is therefore not permitted by Rule 13.5(b)." 205 Ariz. 208, ¶ 1. We characterized this type

[1]Although the indictment does not cite the assault statute, the parties agree its reference to "physical injury" is a reference to § 13-1203(A)(1), which states a person commits assault by "[i]ntentionally, knowingly or recklessly causing any physical injury to another person."

of Rule 13.5(b) violation as "prejudicial per se." 205 Ariz. 208, ¶¶ 20-24, 49-50 & 50.

¶7 Our supreme court rejected that characterization. In *Freeney*, the court stated that "[c]ontrary to *Sanders*, . . . a violation of Rule 13.5(b) is neither prejudicial per se nor structural error." 223 Ariz. 110, ¶¶ 21-26 & 26. Jose maintains that *Freeney* "seemingly agree[d] with the fact that a Sixth Amendment violation occurred in *Sanders*" and that it "overruled *Sanders* only on the point that a rule-based change of the offense constitutes structural error." To be sure, if Jose received constitutionally insufficient notice of the charge as amended, it would require us to vacate his conviction and sentence. *See id.* ¶¶ 26, 29-30 ("For Sixth Amendment purposes, when a defendant does not receive constitutionally adequate notice of the charges against him, he is necessarily and actually prejudiced.").

¶8 "[T]he touchstone of the Sixth Amendment notice requirement is whether the defendant had actual notice of the charge, from either the indictment or other sources." *Id.* ¶ 29. Indeed, we noted in *Sanders* that the Sixth Amendment's notice requirement "does not bar any change at all to an original charge" as long as the amendment's "substance or timing" does not "undermine or defeat the interest in a fair trial that the [Sixth] Amendment is designed to protect." *Id.* ¶ 17. A violation occurs when a defendant receives "insufficient notice and is therefore actually prejudiced by a new or amended charge." *Freeney*, 223 Ariz. 110, ¶ 29.

¶9 Viewed in its entirety, the record in this case reflects Jose was given sufficient notice that the state was alleging and seeking to prove that he intended to provoke or insult the officer, despite his argument to the contrary. In fact, Jose concedes the state provided him notice of its intent to pursue assault under § 13-1203(A)(3) when it filed its requested jury instructions before the start of trial. This alone could satisfy the Sixth Amendment's notice requirement. *See Freeney*, 223 Ariz. 110, ¶ 29. And as noted above, Jose stated that he did not object to the change when the trial court asked during the settling of jury instructions. Moreover, during opening statements and closing arguments, the state and Jose informed the jury of the state's burden to prove Jose had the "intent to injure, insult, or provoke" the officer. Similarly, Jose moved for judgment of acquittal under Rule 20, Ariz. R. Crim. P., arguing that the state could not prove the charged crime, in part, because there was no "evidence to show that there was intent to injure, insult, or provoke" the officer. Because the state's requested jury instructions provided Jose with "constitutionally adequate notice" of the modification, demonstrated by his arguments at trial, we cannot say he was

deprived of his Sixth Amendment right to notice. *See Freeney*, 223 Ariz. 110, ¶¶ 26, 29.

¶10 We next turn to whether the trial court's final jury instructions violated Rule 13.5(b). Because Jose did not object to the jury instruction, our review is limited to fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶¶ 12-13 (2018); *see also Freeney*, 223 Ariz. 110, ¶ 26 (violation of Rule 13.5(b) is not structural error). Under this standard, Jose must show error and, if it exists, that the error is fundamental. *See Escalante*, 245 Ariz. 135, ¶ 21. "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial." *Id.* Additionally, the defendant must make a separate showing of prejudice if alleging error under the first two prongs. *Id.*

¶11 Under Rule 13.5(b), a "grand jury indictment limits the trial to the specific charge" stated therein and it can "be amended only to correct mistakes of fact or remedy formal or technical defects" unless the defendant consents to the amendment. An indictment is constructively amended when a trial court allows the state to "prove its case in a fashion that creates a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *Sanders*, 205 Ariz. 208, ¶ 81 (Hall, J., dissenting) (quoting *United States v. Apodaca*, 843 F.2d 421, 428 (10th Cir. 1988)). An amendment that changes the nature of the charged offense without the defendant's consent violates Rule 13.5(b). *See Freeney*, 223 Ariz. 110, ¶ 31. Because the three types of assault defined under § 13-1203(A) "are distinct offenses with different elements, not merely different manners of committing the same offense," *State v. Waller*, 235 Ariz. 479, ¶ 29 (App. 2014), the court's final instruction altered the nature of the crime charged, *see Freeney*, 223 Ariz. 110, ¶ 17, thereby constructively amending the indictment, *see Sanders*, 205 Ariz. 208, ¶ 81 (Hall, J., dissenting). Consequently, whether the jury instruction's constructive amendment of the indictment violated Rule 13.5(b) hinges on whether Jose consented to the amendment.

¶12 Jose did not object to the instruction amending the charge and his opening and closing arguments related to assault solely as defined under § 13-1203(A)(3). Thus, this is not a situation where Jose was forced to make the best of an adverse ruling because he did not challenge the state's proposed instruction in the first instance. But even assuming a Rule 13.5(b) violation, Jose cannot demonstrate prejudice. He contends the

amendment was prejudicial because it deprived him of the "right to defend against the charge that was brought" in the indictment and that his Rule 20 motion "surely would have been granted" because the state "simply could not prove [the officer's] injury." At trial, Jose's defense focused on the voluntariness of his actions, which he does not suggest would have changed if the state were seeking to prove assault as defined under § 13-1203(A)(1). Likewise, whether the trial court would have granted a judgment of acquittal for aggravated assault "resulting in physical injury" does not amount to prejudice when Jose had notice six days before trial that the state was alleging and intending to prove assault under § 13-1203(A)(3). *See State v. Bruce*, 125 Ariz. 421, 423 (1980) (rejecting defendant's prejudice argument when the record shows defendant "had notice of the discrepancies . . . well before trial"). This is particularly true when his Rule 20 argument did not mention any other basis for the jury to find assault as a predicate for aggravated assault on the officer. *See Freeney*, 223 Ariz. 110, ¶ 28 (finding no prejudice when amendment did not affect defendant's "litigation strategy, trial preparation, examination of witnesses, or argument"). We therefore conclude that even if Jose had not consented to the amendment, thereby resulting in a violation of Rule 13.5(b), he has not shown any resulting prejudice.

II. Twelve-Person Jury

¶13 Jose argues the trial court erred by permitting his case to be tried to an eight-person jury, thus violating the Sixth Amendment of the United States Constitution. Because Jose did not raise this claim in the trial court, we review only for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12. The "[i]mproper denial of a twelve-person jury" constitutes "fundamental error that may provide a basis for relief even if not raised in the trial court." *State v. Kuck*, 212 Ariz. 232, ¶ 8 (App. 2006).

¶14 The Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. Applied to the states through the Fourteenth Amendment, the Sixth Amendment does not require a twelve-person jury panel. *See Williams v. Florida*, 399 U.S. 78, 86 (1970) ("hold[ing] that the 12-man panel is not a necessary ingredient of 'trial by jury'"); *see also State v. Soliz*, 223 Ariz. 116, 118, ¶¶ 6-7 & 7 (2009) (recognizing United States Supreme Court's holding in *Williams* and explaining that under Arizona law, legislature has "reserved the twelve-person jury only for the most serious offenses," as measured "by the potential sentence upon conviction"); A.R.S. § 21-102(A), (B) (providing for twelve-person jury in criminal cases "in which a sentence

of death or imprisonment for thirty years or more is authorized by law" and eight-person jury in "any other criminal case").

¶15 Jose acknowledges the holding in *Williams* but argues it has been implicitly overruled by *Ramos v. Louisiana*, 590 U.S. ___, ___, 140 S. Ct. 1390, 1397 (2020), which holds that the Sixth Amendment right to a jury trial in criminal cases includes the right to a unanimous verdict. He maintains he was entitled to a twelve-person jury "regardless of the maximum sentence . . . imposed" because "*Ramos* has fatally wounded the reasoning of *Williams*." Jose also acknowledges, however, that we "cannot assume that the U.S. Supreme Court has implicitly altered its interpretation of the Sixth Amendment concerning the size of the jury." *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). Jose nevertheless contends the amendment to Arizona's constitution in 1972, permitting fewer than twelve jurors in criminal cases where the maximum permitted sentence is less than thirty years, was "*Williams*-inspired," and the court's reasoning in *Williams* was undermined by *Ramos*. *See* Ariz. Const. art. II, § 23.

¶16 As Jose acknowledges, we do not have the authority to modify or disregard the rulings of our supreme court. *See State v. Smyer*s, 207 Ariz. 314, n.4 (2004). We also decline his invitation to "take the opportunity to criticize that precedent and invite higher courts to overrule *Williams* and *Soliz*."

¶17 Here, the maximum possible sentence that Jose faced was less than thirty years. *See* A.R.S. § 13-1204(A)(8)(a), (G) (classification of offense); A.R.S. § 13-703(C), (J) (sentencing range). He therefore was not entitled to a twelve-person jury and, consequently, cannot show the trial court erred, fundamentally or otherwise.

III. Time Payment Fee

¶18 Jose argues the trial court erred by imposing a $20 time payment fee when he was not ordered to pay fines or restitution. Section 12-116(A), A.R.S., requires the court to impose a $20 time payment fee "on each person who pays a court ordered penalty, fine or sanction on a time payment basis." Because he did not object below our review is limited to fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also State v. McDonagh*, 232 Ariz. 247, ¶ 7 (App. 2013).

¶19 Here, in addition to the time payment fee, the trial court assessed attorney fees against Jose, imposed an indigent administrative assessment fee, a probation assessment, a crime penalty assessment, a victim rights enforcement fund fee, and a victim rights assessment. Relying on *State v. Connolly*, 216 Ariz. 132 (App. 2007), Jose contends the assessments imposed by the court were not "indicative of a penalty, fine, or sanction" and nothing in the record "suggests the trial court intended them to be considered as a sanction." However, we held in *State v. Dustin*, 247 Ariz. 389, ¶¶ 9-11 (App. 2019), that a probation assessment imposed on a defendant is considered a fine that allows for the imposition of a time payment fee. We therefore must reject Jose's argument.

¶20 Jose nonetheless maintains that we should not follow *Dustin* because it "was wrongly decided." "Stare decisis . . . requires special justification to depart from existing precedent," *State v. Olague*, 240 Ariz. 475, ¶ 23 (App. 2016), and Jose has not presented any such justification here. We therefore reject his invitation to reconsider *Dustin* in this case.

Disposition

¶21 We affirm Jose's conviction and sentence.

Supreme Court

STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

December 16, 2024

RE: STATE OF ARIZONA v LALAKO JONATHAN JOSE
Arizona Supreme Court No. CR-24-0136-PR
Court of Appeals, Division Two No. 2 CA-CR 23-0224
Pima County Superior Court No. CR20221408001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 13, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review to Arizona Supreme Court = DENIED.

Tracie K. Lindeman, Clerk

TO:
Alice Jones
Jacob R Lines
David J Euchner
Beth C Beckmann
lg