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COURT OF APPEALS
DIVISION TWO

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.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0148
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
CESAR MONTES,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054089

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By John F. Palumbo and David J. Euchner

Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Cesar Montes was convicted of one count of second-degree murder and two counts of aggravated assault with a deadly weapon. The trial court sentenced him to a combination of consecutive and concurrent presumptive prison terms totaling 23.5 years. On appeal, Montes argues the trial court erred in instructing the jury on self defense and in imposing consecutive sentences for his second-degree murder and aggravated assault convictions.¹ For the following reasons, we affirm Montes’s convictions and sentences.

Facts

¶2 “We view the facts in the light most favorable to sustaining the convictions.”² *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Montes was driving to a party and passed a group of men on foot. When Montes spoke to them, they became upset and approached the car. One man, B., subsequently attempted to open the car door, and Montes shot through the driver side window and killed him. Montes then continued to shoot, wounding two of B.’s companions.

¹In his original opening brief, Montes also disputed the trial court’s restitution order. This court subsequently revested jurisdiction in the superior court to allow it to clarify its restitution award. The superior court did so, and Montes then withdrew his argument contesting the amount of restitution awarded. We therefore do not consider it.

²The statement of facts in Montes’s opening brief is approximately twenty-two pages long, listing the testimony of various witnesses seriatim. We remind counsel that the statement of facts need only include facts “relevant to the issues presented for review,” *see* Ariz. R. Crim. P. 31.13(c), and need not contain superfluous and repetitive material.

¶3 Montes was charged with one count of first-degree murder, two counts of attempted first-degree murder, and two counts of aggravated assault with a deadly weapon. At trial, Montes claimed he had not intended to kill B. and instead shot him in self defense. The jury rejected Montes’s claim of self defense and found him guilty of second-degree murder and both counts of aggravated assault. This appeal followed.

Jury Instruction

¶4 Relying on *State v. Grannis*, 183 Ariz. 52, 900 P.2d 1 (1995), Montes first argues the self-defense instruction to the jury was erroneous. Although Montes initially objected to the instruction, the court subsequently modified the instruction and Montes did not object to this modification. In fact, Montes’s attorney agreed with the trial court that the modified instruction “sound[ed] fine” and took “care of the issues . . . [he had] brought up earlier” with regard to his previous objection to the initial self-defense instruction. These statements constitute acceptance of the trial court’s ultimate jury instruction.³

¶5 Because Montes did not object to the ultimate, modified jury instruction, we review it for fundamental error only.⁴ *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d

³Montes suggests a different interpretation of this exchange, but we need not resolve this dispute because he did not object to the amended instruction under either interpretation.

⁴In his reply brief, Montes asserts that his initial objection to the jury instructions was preserved because he did not “expressly” waive it. He is appealing the ultimate rather than the original instructions, however, and was required to object to them at the time they were given to preserve his objection for appeal. *See State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986) (“failure to object to an instruction . . . at the time it is given waives any error, absent fundamental error”). Montes also contends, however, that the original objection was preserved because “the trial court did not inform [him] of its modification to the instruction until immediately prior to the reading of the instructions, giving defense counsel

601, 607 (2005). Fundamental error is error that “goes to the foundation of [the] case” and such that the defendant could not have received a fair trial. *Id.* ¶ 24. To prevail under this standard, Montes must show error, that the error was fundamental and that it caused him prejudice. *See id.* ¶ 26. To demonstrate prejudice, Montes must show that a reasonable jury could have reached a different result absent the alleged error in the jury instruction. *See id.* ¶¶ 26-27.

¶6 Montes contends that the trial court’s instructions on self defense constituted fundamental error because they may have permitted the jury to conclude that “deadly physical force can be used only in response to *actual* deadly physical force, and that non-deadly physical force may be used in response to *actual or apparent* non-deadly physical force.” In *Grannis*, our supreme court noted that pursuant to A.R.S. §§ 13-404 and 13-405, “*apparent* deadly force can be met with deadly force, so long as defendant’s belief as to apparent deadly force is a reasonable one.” 183 Ariz. at 60, 900 P.2d at 9 (emphasis in *Grannis*). The court found that the trial court had erred in giving a self-defense instruction that included language stating “[a] defendant may only use deadly physical force in self-defense to protect himself from another’s use or attempted use of deadly physical force”

little time to determine whether the modification cured the error in the instruction.” Parties are often required to object to evidence or instructions without significant time to reflect. And Montes’s attorney clearly had time to consider the effect of the modified instruction, based on the fact that he explicitly agreed that the modified instruction “[took] care of the issues.” We presume Montes’s attorney would not have made this statement if he did not believe it to be true.

because the instruction “suggested . . . that only actual deadly force could justify defendant’s deadly force.” *Id.* at 61, 900 P.2d at 10 (emphasis omitted).

¶7 Here, the jury was instructed as follows:

A person is justified in using or threatening physical force in self-defense if the following two conditions existed:

1. A reasonable person would have believed that physical force was immediately necessary to protect against another’s use or attempted use of unlawful physical force; and
2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person.

However, a person may use deadly force in self-defense only to protect against another’s use or threatened use of deadly physical force, and the defendant used deadly force that would have appeared reasonably necessary in the defendant’s situation.

Self-defense justifies the use or threat of physical force only while the apparent danger continues. The right to use physical force in self-defense ends when the apparent danger ends.

(Emphasis added.) Comparing his case to *Grannis*, Montes emphasizes that the jury instruction contained “only one sentence concerning self-defense by deadly physical force” and argues that this sentence improperly suggested that only actual deadly force, instead of apparent deadly force, could justify the use of deadly force in self defense. He also suggests that a portion of the instructions was unclear and could be interpreted as pertaining to the amount of deadly force used.

¶8 Even if the trial court’s jury instructions were technically erroneous under *Grannis*, Montes must still show that any error was fundamental and prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. “Fundamental error review involves a fact-intensive inquiry, and the showing required to establish prejudice therefore differs from case to case.” *Id.* ¶ 26. Additionally, attorneys’ closing arguments can clarify unclear jury instructions. *State v. Cruz*, 189 Ariz. 29, 35, 938 P.2d 78, 84 (App. 1996).

¶9 First, the instruction given explicitly permitted the use of deadly force against threatened deadly force. And in a fundamental error review, Montes has the burden of showing that the difference between threatened and apparent deadly force is fundamental and prejudiced him under the facts of this case. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. He has not articulated clearly what apparent deadly force existed that would not be included in threatened deadly force and has therefore failed to sustain his burden.

¶10 Second, during closing statements, defense counsel stated that Montes had shot the victims in response to a “perceive[d] . . . danger” that they might use deadly force. *Black’s Law Dictionary*, 1172 (8th ed. 2004) defines “perception” as including an “actor’s erroneous but reasonable belief in the existence of nonexistent circumstances.” The dictionary similarly defines “apparent” as “[O]stensible; seeming.” *Id.* at 105. Defense counsel also told the jury during closing that “actual danger is not necessary” for a defendant to be justified in using deadly physical force. Similarly, he stated that Montes was entitled to use deadly force in self defense if “a reasonable person would have believed that if they didn’t take action, they could be seriously physically injured.”

¶11 These statements all clarified for the jury that Montes was permitted to use deadly force in self defense, *see Cruz*, 189 Ariz. at 35, 938 P.2d at 84, if such force was in response to either actual *or* reasonably apparent deadly physical force. *See Grannis*, 183 Ariz. at 61, 900 P.2d at 10. These clarifications also prevent Montes from being able to demonstrate that he was prejudiced by any error that may have existed in the self-defense jury instructions. *See State v. Snodgrass*, 121 Ariz. 409, 411-12, 590 P.2d 948, 950-51 (App. 1979) (evidence and counsel’s closing arguments can cure any prejudice in defective jury instructions).

¶12 The case Montes cites in support of his argument does not merit a different conclusion. In *State v. King*, 158 Ariz. 419, 420-21, 763 P.2d 239, 240-41 (1988), the defendant was charged with first-degree murder and raised an insanity defense which required that he prove his insanity by clear and convincing evidence. Our supreme court held that the trial court’s jury instructions defining clear and convincing evidence were erroneous because the jury could have interpreted the instructions to require too high a burden of proof. *King*, 158 Ariz. at 423-24, 763 P.2d at 243-44. And because the jury instructions might have confused the jury on the defendant’s burden of proof, the court also found them to be fundamental error. *Id.* at 426, 763 P.2d at 246.

¶13 Unlike the burden of proof in *King*, however, Montes has not explained the fundamental nature of the difference between threatened and apparent deadly force. And any confusion inherent in the jury instruction given in this case was cured by defense counsel’s explicit statements during closing arguments. *See Cruz*, 189 Ariz. at 35, 938 P.2d at 84

(closing arguments can clarify and cure unclear jury instructions). *King* is therefore inapposite. *See Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608 (fundamental error review fact-intensive inquiry and showing necessary to establish prejudice varies from case to case). In light of the record, any error in Montes’s jury instructions on self defense was not prejudicial, and Montes has therefore failed to meet his burden in a fundamental error review.

Sentencing

¶14 Montes next contends the trial court erred in ordering that his concurrent sentences for aggravated assault be served consecutively to his sentence for second-degree murder. Relying on *State v. Garza*, 192 Ariz. 171, 962 P.2d 898 (1998), and *State v. Fillmore*, 187 Ariz. 174, 927 P.2d 1303 (App. 1996), Montes argues that although his sentences were valid “per se,” the trial court’s comments during sentencing illustrated an impermissibly “rigid, mechanical and inflexible sentencing policy in which the court fails to exercise its discretion, thereby abusing it.” But Montes failed to raise this issue below and has therefore forfeited all but fundamental error review. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. As we have explained above, the defendant, and not the state, has the “burden of persuasion in fundamental error review.” *Id.* And Montes does not argue, nor have we independently found, that any error in the trial court’s comments was fundamental.⁵

⁵In a footnote at the end of the argument section on this issue, Montes recognizes that he failed to object to this issue below but claims that his sentences were nevertheless “illegal” and therefore fundamental error “for the reasons stated above.” But Montes does not explain “above” why the sentences could have been illegal; in fact, in his reply brief, he concedes that his sentences were valid “per se.” Moreover, the section of his opening brief that Montes claims explains why the trial court’s sentence was fundamental error specifically states that the proper standard of review for this issue is an abuse of discretion. Montes’s

See State v. Fernandez, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it). Therefore, he has not sustained his burden in a fundamental error analysis, and we need not address this argument further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued).

Conclusion

¶15 Based on the foregoing, we affirm Montes’s convictions and the sentences imposed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge

opening brief then subsequently addresses why his sentences might have been an abuse of the trial court’s discretion, not why they might have been fundamental error. Pursuant to the dictates of *State v. Moreno-Medrano*, 218 Ariz. 349, 185 P.3d 135 (App. 2008), this footnote does not satisfy Montes’s burden of arguing or demonstrating fundamental error.