ARIZONA CASES DIGEST

148 Arizona Cases Digest May 20, 2025

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TABLE OF CASES REPORTED

Doe v. Lenzner Med. Servs., LLC, *148 Arizona Cases Digest 4* (CA 2, 5/5/25) **4**
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IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

Jane DOE I, Jane DOE II, and John DOE, By and Through Conservator, Fleming and Curti, PLC,
Plaintiffs/Appellants,
v.
LENZNER MEDICAL SERVICES, LLC, an Arizona Limited Liability Company; and DR. John Herrod and Sherrie Farnsworth Herrod, Individually and as a Jointly Married Couple,
***Defendants/Appellees*.**

No. 2 CA-CV 2024-0030
Filed May 5, 2025

Appeal from the Superior Court in Cochise County
No. S0200CV202000599
The Honorable Timothy B. Dickerson, Judge
AFFIRMED

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OPINION
Judge Vásquez authored the opinion of the Court, in which Judge Sklar concurred, Judge Vásquez specially concurred, and Presiding Judge Eckerstrom dissented.

This opinion is subject to revision before publication in the Pacific Reporter.

VÁSQUEZ, Judge:
¶1 Jane Doe I, Jane Doe II, and John Doe (collectively, "the Does") appeal the superior court's grant of summary judgment in favor of Dr. John Herrod, Sherrie Farnsworth Herrod, and Lenzner Medical Services, LLC (collectively, "the Medical Defendants").[1] Because the Does have not shown the court erred in concluding that the Medical Defendants had no duty to report child abuse under Arizona's mandatory reporting statute, we affirm.

Factual and Procedural Background
¶2 We view the facts in the light most favorable to the Does, the party opposing summary judgment, and draw all reasonable inferences arising from the evidence in their favor. *See Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2 (App. 2009). The undisputed relevant and material facts are as follows:
¶3 Paul and Leizza Adams were members of the Church of Jesus Christ of Latter-Day Saints ("LDS Church"). The Adamses joined the Bisbee Ward of the LDS Church in 2009. Between 2006 and 2015, Paul and Leizza had six children, three of whom are the Does in this action.
¶4 Dr. John Herrod is a licensed internal medicine physician. He formed Lenzner Medical around 2008 and maintained the practice until his retirement in 2019. Herrod is also a member of the LDS Church, and, from 2004 to 2012, he served as the lay bishop of the LDS Church's Bisbee Ward. While serving as bishop, Herrod continued practicing medicine.
¶5 Dr. Herrod began treating Leizza as a patient sometime after the Adamses moved to Bisbee in 2009, and he remained her primary physician through at least 2018. Paul was also a patient of Lenzner Medical, having been treated on at least a few occasions by a nurse practitioner who worked at the clinic. Dr. Herrod occasionally provided medical treatment to the Does.[2]
¶6 In November 2011, Paul confessed to Herrod, in Herrod's capacity as bishop, that he had sexually abused Jane Doe I. Herrod had Leizza join them and instructed Paul to repeat his confession to her. Herrod began counseling both Paul and Leizza, recommending either Paul turn himself in or Leizza report Paul to the authorities. Given his religious vow of confidentiality, Herrod did not report Paul's abuse to the authorities. When Herrod's term as bishop ended less than a year later,[3] he continued as the family's doctor.
¶7 Paul continued to sexually abuse Jane Doe I, Jane Doe II, and John Doe until he was arrested by federal authorities in February 2017. In May 2017, a grand jury indicted Paul on multiple counts of felony child sexual abuse and exploitation. Seven months later, Paul committed suicide in his prison cell. Leizza pled guilty to two counts of child abuse, and, in August 2018, she was sentenced to 2.5 years in prison, followed by four years' probation.
¶8 The Does filed this civil action in November 2020,[4] and, in their first amended complaint, they asserted the following claims against the Medical Defendants: (1) negligence; (2) intentional infliction of emotional distress; (3) negligent infliction of emotional distress; (4) breach of fiduciary duty; (5) medical malpractice/medical negligence; (6) ratification; and (7) civil conspiracy. They additionally asserted a negligent hiring, retention, and supervision claim against Lenzner Medical, and sought punitive damages.[5] Herrod is a defendant in

two capacities— as one of the Medical Defendants for his role as a doctor, and as one of the other church defendants in his clergy capacity. This appeal concerns only Herrod's capacity as a Medical Defendant.

¶9 In May 2022, the Medical Defendants moved for summary judgment. In December 2023, after briefing and oral argument, the superior court issued its under advisement ruling, granting summary judgment in favor of the Medical Defendants and dismissing all claims with prejudice. The court entered a final judgment pursuant to Rule 54(c), Ariz. R. Civ. P., and this appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶10 The Does argue on appeal, as they did below, that the superior court erred in granting summary judgment in favor of the Medical Defendants because, under A.R.S. § 13-3620, Dr. Herrod had "an independent duty to report" the abuse committed against them by their father, Paul, and the neglect committed by their mother, Leizza. We review a grant of summary judgment de novo. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292 (App. 1994). To prevail on a motion for summary judgment, the moving party must show "that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Although we view the evidence and reasonable inferences in favor of the nonmoving party, summary judgment should be granted when the facts produced in response to a summary judgment motion have "so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309-10 & 309 (1990); *see* Ariz. R. Civ. P. 56(e) (adverse party's response must "set forth specific facts showing a genuine issue for trial").

¶11 The Medical Defendants' motion for summary judgment addressed the Does' medical malpractice claims, which are primarily directed at Dr. Herrod. "In all negligence actions, including medical malpractice, 'the plaintiff must prove the existence of a duty, a breach of that duty, causation, and damages.'" *Windhurst v. Ariz. Dep't of Corr.*, 256 Ariz. 186, ¶ 14 (2023) (quoting *Seisinger v. Siebel*, 220 Ariz. 85, ¶ 32 (2009)). Thus, as a threshold matter, the Does "bear[] the burden of proving the existence of a duty." *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, ¶ 2 (2018). The existence of a duty is a question of law that we review de novo. *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 11 (App. 2009).

¶12 Dr. Herrod was a practicing physician before and after he learned of the abuse and neglect. He also served as a lay bishop for the LDS church and, in that capacity, was a "member of the clergy" during the relevant period. *See* A.R.S. § 13-3620(A)(2). Both physicians and clergy are identified as persons to whom the mandatory reporting statute applies. § 13-3620(A)(1), (2). Arizona's mandatory reporting statute, § 13-3620(A), provides, in part, as follows:

> Any person who reasonably believes that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect that appears to have been inflicted on the minor by other than accidental means . . . shall immediately report or cause reports to be made of this information to a peace officer . . . . For the purposes of this subsection, "person" means:
>
> (1) Any physician . . . who develops the reasonable belief in the course of treating a patient.
>
> (2) Any . . . member of the clergy.

¶13 In this case, the parties agree that § 13-3620(A)(1) governs the duty that Dr. Herrod had to report the abuse and neglect of the Does in his capacity as a physician. Indeed, at the hearing on the Medical Defendants' motion for summary judgment, the Does stated that "the fundamental basis of the duty" to report arises from the statute. And in their opening brief, they state that "if Dr. Herrod had a duty to report under A.R.S. § 13-3620, then the failure to do so breached the applicable standard of care owed to the children."

¶14 But the parties disagree about whether that duty is impacted by Herrod's statutory duty to report as a member of the clergy and the scope of his duty to report as a physician. There are two distinct reporting limitations under the statute that apply to Herrod in his dual role as a clergy member and physician. *See* § 13-3620(A), (1). First, the statute provides a reporting exception for clergy who learn of child abuse or neglect in the context of a confession or confidential communication, while serving in that capacity. § 13-3620(A). Second, the statute provides that a physician is obligated to report only if he develops a reasonable belief of child abuse or neglect "in the course of treating a patient." § 13-3620(A)(1).

¶15 Much of the argument in the superior court focused on the interplay between the statutory provisions for clergy and physicians. Both below and on appeal, the parties refer to Herrod as wearing "two hats" in his dual role as clergy and doctor. The Medical Defendants argue that the "single spiritual confessional communication by [Paul] Adams in November 2011 to *Bishop* Herrod" was privileged and cannot be used to hold Dr. Herrod liable for failing to "subsequently report the abuse as a physician pursuant to A.R.S. § 13-3620(A)(1)." The Does in contrast, contend that Herrod "could not dismiss abuse and neglect simply because he wore two metaphorical hats as a medical doctor and as a lay bishop." The superior court concluded that Paul's confession and the subsequent counseling sessions Herrod held with Paul and Leizza were privileged and confidential and were therefore

exempted from Herrod's reporting duty as a member of the clergy, under the express terms of the statute. *See* § 13-3620(A). The issue of Herrod's duty to report as a clergy member is the subject of a different appeal pending in this court, and we do not discuss it here. Instead, we turn to Herrod's duty as a physician.

¶16 As a general matter, "There is no common law duty to control the conduct of a third person so as to prevent harm from befalling another." *Collette v. Tolleson Unified Sch. Dist., No. 214*, 203 Ariz. 359, ¶ 13 (App. 2002); *see also Dinsmoor v. City of Phoenix*, 251 Ariz. 370, ¶ 15 (2021) ("People do not generally have a duty to protect others from harm."). Under Arizona law, however, certain "special relationships" can create a duty in regard to "the actions of another." *Gipson v. Kasey*, 214 Ariz. 141, ¶¶ 18-19 (2007). These relationships may be "recognized by the common law" or may be "created by public policy," which is primarily drawn from statutes. *Quiroz*, 243 Ariz. 560, ¶ 2.

¶17 On appeal, the Does expressly distinguish "[t]he duty to report under the Arizona mandatory reporting statute" from the common law "affirmative duty to protect arising from other 'special relationships.'" They expressly assert that the duty in this case is limited to Herrod's "duty to report under A.R.S. § 13-3620," and "not that he had a duty to investigate, intervene, and stop the abuse," as discussed by our supreme court in Dinsmoor. The Does nevertheless suggest that the duty under the reporting statute required Herrod to report what he knew about the abuse solely because he treated Leizza and the children, regardless of where or how he learned of it.

¶18 According to the Does, the duty to report under § 13-3620(A) and Dr. Herrod's failure to do so "establishes medical malpractice under A.R.S. § 12-563." To support this position, the Does rely on the opinion of their medical expert, Dr. Berg. The Does contend "Dr. Berg[] stated that, based on a clear medical and ethical standard of care, Dr. Herrod had a duty to report the abuse of the children and the neglect by their mother." They cite an American Medical Association (AMA) ethical opinion to support the expert's opinion, and they argue Herrod's failure to report "breached the applicable standard of care owed to the children."

¶19 But as the superior court correctly concluded, and as our supreme court has explained, Arizona courts will not base the existence of a duty on "the medical profession's ethical standards because such a notion conflates the existence of a duty with the standard of care." *Stanley v. McCarver*, 208 Ariz. 219, ¶ 17 (2004). "The existence of a duty of care is a distinct issue from whether the standard of care has been met in a particular case." *Boisson v. Ariz. Bd. of Regents*, 236 Ariz. 619, ¶ 5 (App. 2015) (quoting *Gipson*, 214 Ariz. 141, ¶ 10). And whether a duty exists is a question of law for the court to decide, not experts. *Badia v. City of Casa Grande*, 195 Ariz. 349, ¶ 17 (App. 1999). Notably, at the hearing on the Medical Defendants' motion for summary judgment, the Does acknowledged that the "AMA ethics opinion is evidence of the standard of care."

¶20 "In Arizona, our primary source for identifying a duty based on public policy is our state statutes." *Quiroz*, 243 Ariz. 560, ¶ 18. This is because "[t]he declaration of 'public policy' is primarily a legislative function." *Ray v. Tucson Med. Ctr.*, 72 Ariz. 22, 35 (1951). In this case, as the Does concede, any duty Dr. Herrod had to report the abuse of the Does is governed by § 13-3620(A)(1). That statute defines both the duty to report and its scope. *See Gipson*, 214 Ariz. 141, ¶¶ 24-29 (statute can both create and limit legal duty); *Alhambra Sch. Dist. v. Superior Court*, 165 Ariz. 38, 42 (1990) ("[A] duty of care may also be created by statute."). Under the express language of the statute, Dr. Herrod had a duty to report only if he developed a reasonable belief of child abuse or neglect "in the course of treating a patient." § 13-3620(A)(1).

¶21 The Does "agree that the language relating to 'in the course of treating a patient' applies to Dr. Herrod." They argue, however, that Herrod "could not dismiss abuse and neglect simply because he wore two metaphorical hats as a medical doctor and as a lay bishop." They further assert, quoting a case decided by the Colorado Court of Appeals, that the duty to report "applies irrespective of the circumstances in which the reporter learns of or suspects abuse or neglect." *Heotis v. Colo. State Bd. of Educ.*, 457 P.3d 691, ¶ 35 (Colo. App. 2019). That case does not support the Does' argument. In *Heotis*, the court noted that the statute in question did not "limit the reporting duty only to child abuse or neglect that the teacher learned about" in her employment. *Id.* ¶ 36. The court noted that, if the duty to report was meant to be limited, the Colorado legislature could have included "limiting language, such as 'during his or her professional duties,'" as it had in regard to commercial film processors. *Id.* That is exactly what our legislature has done by limiting the scope of a physician's duty to report abuse or neglect to that knowledge developed "in the course of treating a patient." § 13-3620(A)(1).

¶22 The Does nevertheless maintain that "[t]he 'two hat' theory is contrary to public policy" because it "encourages deliberate ignorance on the part of a physician and acts as a disincentive to be inquisitive with patients." We have recognized the "strong policy reasons for requiring professionals who work with children to report instances of suspected child abuse." *L.A.R. v. Ludwig*, 170 Ariz. 24, 27 (App. 1991). But the scope of Herrod's duty under the statute, as we have stated, is limited to circumstances in which a doctor "develops the reasonable belief [that a minor is or has been the victim of . . . abuse] in the course of treating a patient." § 13-3620(A)(1). Like the superior court, we must therefore consider "case-specific facts in

the duty inquiry" involving the doctor-patient special relationship to determine "*when* and *where* the alleged risk of harm arose—within or outside the scope of the special relationship." *Perez v. Circle K Convenience Stores, Inc.*, ___ Ariz. ___, ¶ 15, 564 P.3d 623, 628 (2025). "[A] duty based on special relationships . . . applies only to risks that arise within the scope of the relationship, and the scope of such relationships is [generally] bounded by geography and time." *Id.* ¶ 12, 564 P.3d at 628 (first alteration added, second alteration in *Perez*) (quoting *Dinsmoor*, 251 Ariz. 370, ¶ 15).

¶23 We agree with the Does that "reasonable [belief]" as used in the reporting statute is a low standard, which may be met "if there are any facts from which one could reasonably conclude that a child had been abused." *L.A.R.*, 170 Ariz. at 27. But in this case, there is no question that Dr. Herrod was aware that Jane Doe I had been abused. Instead, the issue is whether he had received such information "in the course of treating a patient." *See* § 13-3620(A)(1). As we explain, the Does failed to present evidence demonstrating the existence of a genuine dispute as to that fact. *See State v. Mecham*, 173 Ariz. 474, 478 (App. 1992).

¶24 In its ruling on the motion for summary judgment, the superior court determined, "There is no evidence that Herrod had reason to suspect child abuse based on any information he gained from providing treatment to" the Does and their parents after the confession. Indeed, during argument on the motion in the superior court, the Does conceded that "there was no further discussion about abuse" with Herrod as a doctor. They argued instead that Herrod could not be allowed to "put out of his mind that his child patient was being abused while he was that patient's doctor."

¶25 Likewise, on appeal, the Does argue that Herrod "harbored a 'reasonable belief' of abuse or neglect." Therefore, they maintain, he "could not dismiss abuse and neglect simply because" he was both a doctor and a lay bishop. Allowing him to do so violates the duty and standard of care that they contend are created by § 13-3620(A)(1). To support this argument, they rely on *L.A. v. New Jersey Division of Youth & Family Services*, 89 A.3d 553, 556 (2014), a New Jersey case that has no application here. In that case, a child was treated in an emergency room after ingesting cologne. *Id.* at 555. The issue was whether the emergency room physician, who did not report the matter, had "reasonable cause . . . to believe that child abuse ha[d] occurred," creating an obligation to report under New Jersey's reporting statute. *Id.* at 556. First, the New Jersey and Arizona statutes are different. *Compare* N.J. STAT. ANN. § 9:6-8.10 (West 2019), *with* § 13-3620(A)(1). The New Jersey statute does not base a physician's duty to report on a reasonable belief of child abuse or neglect developed "in the course of treating a patient." § 13-3620(A)(1); *see* § 9:6-8.10. Second, unlike in this case, the physician treated the child for the very incident that allegedly amounted to abuse. *L.A.*, 89 A.3d at 566. As we have explained, Arizona's statute requires reporting by a physician only when he or she develops knowledge of abuse in the course of treatment. Outside of the duty created by that special relationship rooted in statute, Herrod owed no duty to prevent harm by another, in this case the children's father.

¶26 The Does, however, also contend there were "non-privileged" conversations between Herrod and Leizza about different or ongoing instances of child sexual abuse, separate from the act that was disclosed during Paul's confession. Because the Does bear the burden of proof at trial, in opposing summary judgment, they were required to present admissible evidence creating genuine issues of material fact as to each element of their claim. *See Martin v. Schroeder*, 209 Ariz. 531, ¶ 12 (App. 2005). Many of the Does' claims, as we explain below, are conclusory and not supported with citations to the record. *See* Ariz. R. Civ. App. P. 13(a)(7) (argument section of opening brief must contain "appropriate references to the portions of the record on which the appellant relies"); *see also Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, ¶ 42 (App. 2015) (non-movants' conclusory statements, "unsupported by any documentary evidence," were speculative); *Florez v. Sargeant*, 185 Ariz. 521, 526 (1996) (self-serving assertions lacking factual support are insufficient to defeat summary judgment).

¶27 Further, where the Does do provide record citations, there is no evidence to support their claim that Dr. Herrod received "non-privileged" information from Leizza during the course of treating a patient. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 14 (App. 2000) ("When the party moving for summary judgment makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to show that an issue exists."). Significantly, at oral argument on the motion for summary judgment below, the superior court questioned the Does about whether Dr. Herrod had learned of abuse apart from the initial confession. The court stated that "as far as the doctor visits, whether they were at the house, or whether they were in the clinic, I don't see anything in there where some new information came to him that should have . . . created a reasonable suspicion of child abuse." The Does responded: "[I]n terms of what was said in the doctor's office, there was no further discussion about abuse."

¶28 Despite this concession in the superior court, the Does nevertheless assert that Dr. Herrod "learned of the neglect and abuse from Leizza Adams, the wife of the perpetrator . . . which was not covered by the priest-penitent confession privilege." To support this claim, the Does rely on a transcript of a recorded interview at Herrod's home

in 2018, between Herrod and a federal law enforcement agent, after Paul's arrest and subsequent suicide. The Does do not refer to any specific statements made during the interview that even remotely relate to their claim. In any event, the substance of the interview appears to relate largely to the clergy-penitent confession and the subsequent counseling sessions in Herrod's capacity as a bishop, not about information he may have received as a physician during the course of treating a patient. The statements therefore do not constitute evidence that raises a genuine issue of fact. *See* Ariz. R. Civ. P. 56(c); *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 196 (App. 1991).

¶29 The Does also allege that "Bishop Herrod spoke to Leizza Adams several times encouraging her to turn Paul in to the police." They assert, "As a result, it is clear that Dr. Herrod had knowledge of sex abuse outside of the confession of Paul Adams." For support, they cite portions of Herrod's deposition testimony concerning his conversations with Paul and Leizza about "turning themselves in."[6] But again, those conversations relate to the original confession and counseling, which are the subject of a different appeal. The Does also refer to Herrod's comment that he had "discussed [Jane Doe I's] well-being" with Leizza, but he did not "remember exactly what [they] discussed." This statement contains no mention of child sexual abuse or neglect and does not support a reasonable inference that Herrod had received information of abuse or neglect in his role as a doctor. In sum, the statements are conclusory allegations that do not "set forth specific facts showing a genuine issue for trial." Ariz. R. Civ. P. 56(e); *see Mecham*, 173 Ariz. at 478 ("A party cannot rely solely on unsupported contentions that a dispute exists to create a factual issue that would defeat summary judgment.").

¶30 In their reply brief, the Does "agree that the language [in § 13-3620(A)(1),] relating to 'in the course of treating a patient' applies to Dr. Herrod." But they contend that "he discovered the inability of Leizza Adams to protect her children as her medical doctor in the course of treating her as a patient." They essentially argue that Leizza neglected the children by not reporting Paul's sexual abuse, and Herrod was aware of her failure to do so. Therefore, they maintain Herrod had "learned more than enough as a physician that Leizza Adams was guilty of child abuse and neglect."[7] But again, this argument is flawed because it relies on the information Herrod learned from Paul's confession. In the absence of Paul's confession to the act of sexual abuse against Jane Doe I in 2011, Herrod would have no reason to believe Leizza needed to protect her children from anything.

¶31 Moreover, the Does' argument that "Dr. Herrod knew, as Leizza's physician, that Leizza Adams was incapable of protecting her children from her predatory husband" is based solely on their contention that Herrod believed she "suffered from Battered Woman Syndrome." This claim is based on a comment Herrod made during his recorded interview with the federal agent in 2018, after Paul's arrest and subsequent suicide. And aside from this comment, the Does do not point to any evidence in the record that Herrod had diagnosed Leizza with Battered Woman Syndrome, or that he was even qualified to do so, around the time Herrod had learned of the abuse.

¶32 Ultimately, the Does have not identified any evidence that Dr. Herrod learned about child abuse or neglect of the Does in his capacity as a physician, much less in the course of treating a patient. As the Medical Defendants point out, Jane Doe I and John Doe never stated that they had discussed their father's sexual abuse with Herrod. Both stated that they recall visiting Herrod's office, and Jane Doe I remembers Herrod coming to their house when they were sick. But neither statement amounts to evidence that would give rise to a reasonable belief of abuse. Several of Herrod's employees from Lenzner Medical stated they remembered the family being patients of the clinic, but none of the employees indicated there were any signs of child abuse. Herrod testified that he did not receive any information from Paul, Leizza, the Does, or anyone else that would have given him reason to believe abuse was occurring, in his professional capacity as a doctor, "in the course of treating a patient." *See* § 13-3620(A)(1).

The Dissent

¶33 Our dissenting colleague misstates the majority's position regarding the existence of a duty. Like the superior court, we accept as a given that Dr. Herrod treated the entire family, so that is not the open question the dissent makes it out to be. As such, there is also no question that there was a doctor-patient relationship between Herrod and the Does—a special relationship that gave rise to a general duty of care in the treatment of the children owed by Herrod. But the dissent raises issues that the Does neither argued below nor on appeal. Specifically, the Does do not argue that Herrod owed a separate common law duty based on the special relationship between physicians and patients. To the contrary, they argue "Dr. Herrod failed to 'report' under A.R.S. §13-3620(A)" and that that failure breached the standard of care. Consequently, the record in this case is devoid of any argument that Herrod breached a separate duty arising under common law or the medical malpractice statutes, and it is not for this court to address an argument the parties have not raised.[8] *See* Ariz. R. Civ. App. P. 13(a) (appellant's brief must contain statement of issues for review with contentions concerning each issue presented, supporting legal authority, appropriate references to record, and reasons for each contention); *Calnimptewa v. Flagstaff Police Dep't*, 200 Ariz. 567, ¶ 24 (App. 2001) (appellate opinions should not be read "as authority for matters [that are not] specifically presented and discussed");

Childress Buick Co. v. *O'Connell*, 198 Ariz. 454, ¶ 29 (App. 2000) (declining to decide appeals on issues parties "did not present and may well have intentionally decided not to present" is a "wise policy of judicial restraint").

¶34 Our dissenting colleague seems to suggest that a physician's duty to report suspected child abuse is synonymous with a physician's duty to "marshal information in their possession, pertinent to the patient's health, to protect them from that risk of harm." Again, this is an argument not raised by the Does, either below or on appeal. Indeed, they specifically assert that Dr. Herrod did not have a "duty to investigate, intervene, and stop the abuse." To be sure, a physician's duty to protect his or her patient's health remains largely grounded in common law. *See, e.g.*, *Roebuck v. Mayo Clinic*, 256 Ariz. 161, ¶ 18 (App. 2023) (recognizing cause of action for medical malpractice to be fundamental right and thereby protected against abrogation by Ariz. Const., art. 18, § 6 because it has "origins in the common law"). However, even were we to accept that the duty might encompass obligations to report suspected child abuse to the authorities, that reporting obligation is governed by the conditions set forth in § 13-3620. Neither the parties nor the dissent cite to any cases establishing a common law duty to report child abuse, and we likewise are aware of none. Thus, we disagree that our interpretation of § 13-3620 introduces "a limitation at odds with our civil statutes and common law."

¶35 We therefore also disagree with the dissent that the duty of care arising from the doctor-patient relationship, as a special relationship under the common law, is "the sole criteria for determining duty" and that the superior court thus erred in granting summary judgment. Our supreme court has clarified that duties arising from a special relationship only apply to risks "within the scope of the relationship," which is "bounded by geography and time." *Dinsmoor*, 251 Ariz. 370, ¶¶ 17-18 (quoting *Boisson*, 236 Ariz. 619, ¶ 10, and then *Monroe v. Basis Sch., Inc.*, 234 Ariz. 155, ¶ 6 (App. 2014)). The Does themselves acknowledge this rule and attempt to distinguish it, as noted above.

¶36 In *Perez*, our supreme court explained that "[t]he purpose in examining case-specific facts in the duty inquiry involving a special relationship is determining *when* and *where* the alleged risk of harm arose— within or outside the scope of the special relationship." ___ Ariz. ___, ¶ 15, 564 P.3d at 628. The reporting statute expressly defines the when and where of the circumstances triggering a physician's duty to report. It specifies that the duty exists only when he or she "develops the reasonable belief in the course of treating a patient." § 13-3620(A)(1). The facts cited by the majority therefore have direct bearing on the existence and scope of Dr. Herrod's duty to report, not on whether he breached the standard of care, as the dissent maintains.[9] *See Perez*, ___ Ariz ___, ¶ 20, 564 P.3d at 630 ("[S]ometimes certain antecedent facts must be considered in determining whether a duty exists—for instance, whether a statute applies to a circumstance to give rise to a duty . . . ."); *see also Gipson*, 214 Ariz. 141, ¶ 10 (duty is defined as legal obligation requiring defendant to conform to certain standard of conduct to protect others from unreasonable risk of harm while standard of care is defined as what defendant must do to satisfy duty).

¶37 Notably, the scope of a physician's duty to report under § 13-3620(A)(1), is consistent with Arizona's medical malpractice statutes, upon which the Does have based their related claims. Under A.R.S. § 12-561(2), a medical malpractice action is "an action for injury or death against a licensed health care provider based upon such provider's alleged negligence, misconduct, errors or omissions, or breach of contract *in the rendering of health care*." (Emphasis added.) Although Dr. Herrod was the family's doctor, the Does offered no evidence that he had received any information or observed anything in the course of treating a patient that would lead to a reasonable belief that the Does were victims of abuse or neglect. Specifically, there is no evidence that Herrod received any information about abuse or neglect at his medical office or at any other location at which he may have rendered healthcare. As we previously noted, the Does conceded this point and any duty to report the information he received in his capacity as bishop is the subject of a separate appeal.

¶38 The superior court correctly concluded that the only evidence presented by the Does may have established a standard of care, but it did not establish a duty to report, which as we explained above, is a question of law. We therefore agree with our dissenting colleague that the Does' expert opinion and ethical opinion of the AMA may have established a standard of care. The dissent acknowledges that Dr. Herrod's knowledge of abuse was gained "outside of the clinical setting" and therefore not "in the course of treating a patient." But our colleague incorrectly states this does not limit when a physician's duty to report arises. The statute defines a physician's reporting duty. And because we conclude no duty exists in this case—again, solely as it relates to a physician's reporting of child abuse—we need not decide other issues like standard of care. *See Beck v. Mountain States Tel. & Tel. Co.*, 153 Ariz. 426, 429 (App. 1987).

¶39 Last, we disagree with the dissent's position that § 13-3620 is a criminal statute that "describes only what steps physicians 'must do or must not do,' in the context of child abuse, to avoid criminal penalties."[10] None of the reported cases addressing § 13-3620 involve criminal prosecutions for the failure to report, and most importantly, those involving physicians and others covered by § 13-3620(A)(1) all treat the obligation to report as a question of duty and not as one of the standard of care. *See Avitia v. Crisis Preparation & Recovery*

Inc., 256 Ariz. 198 (2023) (addressing mental health professionals' statutory duty to report); *State v. Zeitner*, 246 Ariz. 161, ¶ 21 (2019) (noting instances where the legislature has mandated duty to disclose information otherwise protected by physician-patient privilege); *Johnson v. O'Connor*, 235 Ariz. 85, ¶ 29 (App. 2014) (psychologist-client privilege not applicable where mandatory reporting statute requires disclosure); *Ramsey v. Yavapai Fam. Advoc. Ctr.*, 225 Ariz. 132 (App. 2010) (discussing mental health and medical providers' mandatory duty to report); *Waters v. O'Connor*, 209 Ariz. 380, n.8 (App. 2004) (footnote discussing scope of clergy duty to disclose); *State v. Herrera*, 203 Ariz. 131, ¶¶ 9-17 (App. 2002) (addressing marital privilege in prosecution for abuse); *State v. Wilson*, 200 Ariz. 390, n.1 (App. 2001) (discussing statutory exceptions to physician-patient privilege); *State v. Escobar-Mendez*, 195 Ariz. 194, ¶¶ 16-17 (App. 1999) (whether duty to report under statute makes physician an agent of the state); *In re Timothy C.*, 194 Ariz. 159, ¶ 3 (App. 1998) (noting psychologist had duty to report evaluation of child for "sexual disorder" under statute); *State v. Superior Court*, 183 Ariz. 462 (App. 1995) (medical records relating to physician's treatment of alleged abuser not protected by privilege under statute); *Benton v. Superior Court*, 182 Ariz. 466, 469 (App. 1994) (statute cited in general discussion of physician's duty to disclose certain information); *Blazek v. Superior Court*, 177 Ariz. 535, 538-39 (App. 1994) (statute listed as example of exception to marital communication privilege); *L.A.R.*, 170 Ariz. 24 (counselor's reporting of abuse); *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24 (App. 1988) (whether statute creates testimonial privilege for clergy independent of penitent's consent); *Samaritan Health Servs. v. City of Glendale*, 148 Ariz. 394, 397 (App. 1986) (collecting statutes regarding physicians' and others' duty to report); *State v. Salzman*, 139 Ariz. 521 (App. 1984) (addressing scope of marital privilege against testifying in prosecution for child molestation); *State v. Riffle*, 131 Ariz. 65, 66 (App. 1981) (noting hospital staff's reporting of suspected child abuse under statute).

¶40 In sum, to survive a motion for summary judgment, a plaintiff must produce admissible evidence from which a reasonable jury could find in his favor on each element. *See Orme Sch.*, 166 Ariz. at 309-10. This includes the existence of a duty. *Avitia*, 256 Ariz. 198, ¶ 26 ("The plaintiff bears the burden to establish that a duty exists."). Because the Does failed to show a genuine dispute as to whether Dr. Herrod had developed a reasonable belief of sexual abuse or neglect in his capacity as a physician that would have triggered his duty to report, the superior court did not err in granting summary judgment. *See Orme Sch.*, 166 Ariz. at 309-10.

Disposition

¶41 For the foregoing reasons, we affirm the superior court's grant of summary judgment in favor of the Medical Defendants on all claims.

VÁSQUEZ, Judge, specially concurring:

¶42 As the majority points out, the Does have not argued, either in the superior court or on appeal, that there is a separate common law duty to report or that the medical malpractice statutes establish one. Indeed, they have expressly stated that the duty to report at the center of this case is entirely governed by § 13-3620. It is therefore inappropriate for us to speculate about any common law duty, much less whether such a duty would supersede the statutory duty. Under the guise of a waiver analysis, the dissent nevertheless does exactly that. I write separately to address our dissenting colleague's position.

¶43 Even assuming the Does had established the existence of a common law duty to report, any such duty must give way to the statutory duty to the extent the two differ. *See* A.R.S. § 1-201 (common law governs court decisions only to the extent it is consistent with the laws of this state); *see Quiroz*, 243 Ariz. 560, ¶ 2 ("In the absence of such legislative guidance, duty may be based on the common law."). Under § 13-3620, the legislature has adopted a duty to report abuse, physical injury, and neglect of children committed by third-parties for persons, including physicians, who hold certain positions. The statute expressly codifies a "duty to report," *id.*, not a standard of care as the dissent maintains.[11] The duty applies to any of the covered persons "who reasonably believe[] that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect that appears to have been inflicted on the minor by other than accidental means." *Id.* And contrary to our dissenting colleague's view, even assuming there were some evidence of a broader common law duty to report, the statute expressly provides that a physician's duty arises when a reasonable belief is developed "in the course of treating a patient." *Id.* The statute governs. *See* § 1-201; *Garibay v. Johnson*, ___ Ariz. ___, ¶ 19, 565 P.3d 236, 242 (2025) (recognizing that "statutes may abrogate or limit the common law" and that "common law rules only apply when legislative guidance is lacking"). If this were not the case and some broader common law duty controlled, there would be no need for the statute.

¶44 The dissent's reliance on *Avitia* is misplaced. As a preliminary matter, *Avitia* addressed both the common law and statute because both were raised in that case and the court concluded the statute did not apply. 256 Ariz. 198, ¶¶ 19, 25 . It explained, *"[W]e need not resolve whether a duty ever arises* under § 13-3620(A) for a non-treating mental health professional to report harm to third parties because the statute's plain language clearly forecloses such a

duty here." *Id*. ¶ 22. Quoting the statute, the court reasoned that it "creates a duty only when a person subject to the statute 'reasonably believes that a minor *is or has been* the victim' of injury, abuse, or neglect that 'appears to *have been* inflicted on the minor.'" *Id.* "That language is present and past tense, meaning that the belief pertains to existing or past circumstances, not speculation regarding the future." *Id*.

¶45 Then, in addressing the common law duty and public policy, *Avitia* overruled two cases: *Hamman v. County of Maricopa*, 161 Ariz. 58 (1989), which found the existence of a common law duty based on foreseeability, and *Little v. All Phoenix South Community Mental Health Center*, 186 Ariz. 97 (App. 1996), which held that A.R.S. § 36-517.02 "unconstitutionally abrogates the common law cause of action established in *Hamman*." Our supreme court expressly stated, "[B]ecause we overrule *Hamman*, *Little*'s conclusion that '§ 36-517.02 unconstitutionally abrogates the common law cause of action established in *Hamman*' is no longer viable." *Avitia*, 256 Ariz. 198, ¶ 38 (internal citation omitted).

¶46 The court noted that "Article 18, section 6 of the Arizona Constitution only protects common law rights in existence at the time the Constitution was adopted or that are based on those rights." *Id.* The court stated that *Hamman* "exercised the policy choice" to reject one standard as too narrow and to instead adopt one based on foreseeability. *Id.* ¶ 39. It further noted that "*Little* then erroneously divested the legislature of its constitutional authority to modify this judicially proclaimed public policy, and we therefore overrule it as well." *Id.*

¶47 The court pointed out that the parties "did not brief whether § 36-517.02 would be restored if this Court overturned *Little*." *Id.* ¶ 41. But it noted that the statute and common law liability were "consistent." *Id*. In this case, if the Does had argued the common law duty, to the extent one existed, and statutory duty were consistent, we would be left with the result reached by the majority because Dr. Herrod did not receive information about abuse or neglect "in the course of treating a patient." § 13-3620(A)(1); *see* § 12-561 (establishing duty in medical malpractice actions requires plaintiff to allege physician was negligent "in the rendering of health care"). However, in addressing the hypothetical situation in which a statute and common law are not consistent, the court in *Avitia* stated: "Beyond statutory duties, a common law duty may be found in parts of the Restatement, which we 'generally follow . . . unless it conflicts with Arizona law.'" 256 Ariz. 198, ¶ 43 (quoting *Quiroz*, 243 Ariz. 560, ¶ 41). Thus, the court indicated how any inconsistency between the statute and common law should be resolved. It is for the legislature to define public policy—so where the common law is inconsistent with a statute in regard to a special relationship created on the basis of such policy, the common law must give way. *See Seisinger*, 220 Ariz. 85, ¶¶ 27-28 & 28 ("[W]hen a substantive statute conflicts with the common law, the statute prevails under a separation of powers analysis."); *see also Zambrano v. M & RC II LLC*, 254 Ariz. 53, ¶ 43 (2022) (courts "exercise great restraint in declaring public policy in the absence of legislative guidance" (quoting C*al-Am Props. Inc. v. Edais Eng'g Inc.*, 253 Ariz. 78, ¶ 17 (2022)).

¶48 I recognize our supreme court has held that "if the common law is to be changed or abrogated by statute, the legislature must do so expressly or by necessary implication." *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, ¶ 12 (2004). In this case, the Does have not argued a separate common law duty to report, so we are left to speculate about any discrepancy. But when a statute and common law define a duty differently, the "necessary implication" is that the legislature has chosen a public policy direction. And when faced with such an inconsistency, our obligation is to defer to the legislature's enactment since it is authorized to set public policy. *See Seisinger*, 220 Ariz. 85, ¶¶ 27-28. This is so even when the statute does not expressly state that it supersedes the common law. Indeed, § 36-517.02, discussed in *Avitia*, does not expressly state that it abrogates the common law. Yet our supreme court said, "*Little* then erroneously divested the legislature of its constitutional authority to modify this judicially proclaimed public policy, and we therefore overrule it as well." *Avitia*, 256 Ariz. 198, ¶ 39. The court also expressly cited § 1-201 which broadly and unequivocally states that "[t]he common law only so far as it is consistent with . . . and not inconsistent with . . . the laws of this state, is adopted." *Id.* ¶ 38. A showing of consistency or inconsistency with a statute is all that is required for the common law to stand or fall.

¶49 In sum, the court in *Avitia* evaluated duty under both the common law and statute because both were argued. I believe the dissent's position is not found in any statute and would essentially divest the legislature of its constitutional authority to both determine the duty to report child abuse and its scope.

ECKERSTROM, Presiding Judge, dissenting:

¶50 In negligence cases, Arizona courts determine whether a defendant owes a duty to a plaintiff by assessing the nature of the relationship between the parties. *See Quiroz*, 243 Ariz. 560, ¶ 14. Specifically, our supreme court has explained that a duty of care is based on "recognized common law special relationships or relationships created by public policy." *Id.*

¶51 In Arizona, it is settled, both by statute and under the common law, that healthcare providers owe a duty of care to their own patients. A.R.S. §§ 12-561 to 12-573 (acknowledging duty by setting forth comprehensive statutory scheme for litigation of medical malpractice actions raised by patients

against their healthcare providers); *see, e.g.*, *Hafner v. Beck*, 185 Ariz. 389, 391 (App. 1996) (common law duty created by physician-patient relationship where physician provides treatment to patient); *Stanley*, 208 Ariz. 219, ¶¶ 10-11, 13 (implicitly acknowledging that "traditional doctor-patient relationship" would create duty); *see also* § 13-3620(A) (creating statutory obligation for physicians to report child abuse and therefore signaling special relationship created by public policy).

¶52 Here, the Does presented declarations and testimony that Dr. Herrod acted as their physician during the time frame of their abuse. Although disputed by Herrod, the superior court found, and the majority does not dispute, that these declarations created a genuine issue of material fact on that question. Because physicians owe a duty of care to their patients, recognized in both Arizona statute and common law, and the Does have proffered evidence showing that such a relationship existed, the superior court erred in granting summary judgment on the ground that the Does had failed to establish this element.[12]

¶53 The majority nonetheless affirms the superior court's judgment, asserting that the language of § 13-3620(A)(1) narrows the scope of a physician's traditional duty of care. Based on that statute, my colleagues specifically conclude that physicians owe no civil duty, in the context of child abuse, to marshal information acquired outside of the clinical setting in protecting their patient's health. But, to the extent § 13-3620(A), a criminal statute, pertains to a physician's civil liability in tort, I cannot agree that its terms address the question of duty.

¶54 Our supreme court has pointedly stated, "The existence of a duty of care is a distinct issue from whether the standard of care has been met in a particular case." *Gipson*, 214 Ariz. 141, ¶ 10. In elaborating on that difference, that court has characterized the standard-of-care question as one determining "[w]hat the defendant must do or must not do . . . to satisfy the duty." *Perez*, ___ Ariz. ___, ¶ 18, 564 P.3d at 629 (quoting *Coburn v. City of Tucson*, 143 Ariz. 50, 52 (1984) (quoting with approval standard of care definition from W. Prosser & W. Keeton, *The Law of Torts* § 53, at 356 (5th ed. 1984))).

¶55 To the extent Dr. Herrod acted as the Does' physician, he undertook a duty of care for their health. In calibrating the species of information requiring Herrod to report, § 13-3620(A) addresses what Herrod "must do or must not do" to satisfy the traditional relationship between physician and patient—a standard-of-care question as our courts have consistently defined it. *Perez*, ___ Ariz. ___, ¶ 18, 564 P.3d at 629. Thus, when contesting whether Herrod should have conveyed his knowledge of the Does' abuse to law enforcement, the parties dispute not whether Herrod had a threshold duty to protect the Does' health, but what that duty entails.

¶56 Nor does the statute's criteria for a physician's criminal liability sound as a "scope" of duty question. *Id.* When resolving whether a particular injury falls within the scope of a special relationship, we must assess "whether the risk of harm" that is "alleged to have injured the plaintiff arose within that relationship." *Id.* ¶¶ 20-21. Under traditional understandings of the physician-patient relationship, Dr. Herrod undertook to protect the Does from risks of harm to their health. The Does allege grievous injuries to their health that they assert Herrod could have prevented. And, assuming the facts in the light most favorable to the Does, those injuries could have been mitigated or prevented by Herrod during the time he treated them. Thus, both the nature of the injuries suffered, and the timing of when they occurred, fell squarely within the scope of Herrod's duty.

¶57 The physician-patient relationship also creates a presumption that physicians will marshal information in their possession, pertinent to a patient's health, to protect the patient from that risk of harm. *See, e.g.*, *Stanley*, 208 Ariz. 219, ¶ 13. (radiologist had affirmative duty to disclose x-ray information pertinent to patient's health even in absence of direct contractual relationship with patient).[13] Once Paul confessed to Dr. Herrod that he had been sexually abusing his eldest daughter, Herrod possessed information, pertinent to her health, that he failed to marshal to protect her health, as well as that of her siblings.[14] Thus, the very gravamen of the negligence claim here stands at the core of a physician's traditional duty to a patient.

¶58 The superior court also overlooked that § 13-3620 does not purport to limit the common law duty of physicians to care for their patient's health. That provision describes only what steps physicians "must do or must not do," in the context of child abuse, to avoid criminal penalties. *Perez*, ___ Ariz. ___, ¶ 18, 564 P.3d at 629. No text in § 13-3620 describes the underlying nature of the relationship between a physician and patient—the sole criteria for determining duty. To the contrary, the operative provisions imply that physicians owe a threshold duty sufficiently robust to justify criminal sanctions for their dereliction.

¶59 But, even assuming that § 13-3620, a criminal statute, can be characterized as relevant to this civil action, it must be applied in the context of §§ 12-561 and 12-563. These provisions articulate the civil standards for duty and standard of care pertaining to medical malpractice actions. Section 12-561 defines a cognizable medical malpractice action as one that asserts a physician has been negligent "in the rendering of health care"—a clause which defines a physician's duty of care broadly. Under § 12-563, a healthcare provider breaches that duty by "fail[ing] to exercise that degree of care, skill and learning expected of a reasonable, prudent healthcare provider in the profession or class to which he

belongs within the state acting in the same or similar circumstances." § 12-563(1).[15] Neither provision relieves physicians of civil liability when they fail to marshal crucial information at their disposal to prevent harm to their patients' health.[16]

¶60 Thus, § 13-3620(A) could only be construed as limiting a physician's scope of duty if its terms can be understood to qualify or override those civil statutes in the context of the reporting of child abuse. When we seek guidance from two statutes that address the same subject matter, we must harmonize them. *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, ¶ 11 (2001). Here, we may readily do so by acknowledging the difference between statutes imposing criminal and civil liability. Generally, the former are reserved for discouraging and punishing more acute misconduct. *See State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, ¶ 108 (App. 2010) (explaining legislature's general intent to articulate marked difference between criminal recklessness and civil negligence as basis for criminal prosecutions beyond civil liability); *Prosise v. Kottke*, 249 Ariz. 75, ¶ 25 (App. 2020) (addressing severity of conduct necessary to distinguish "between civil and criminal conduct"). For this reason, criminal statutes, to the extent pertinent to civil negligence cases, are generally understood as setting forth only minimum standards of conduct that, when violated, may constitute negligence per se. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 16 (2010) ("An actor's compliance with a pertinent statute . . . does not preclude a finding that the actor is negligent . . . for failing to adopt precautions in addition to those mandated by the statute."); *see also* Restatement (Second) of Torts § 288C cmt. a (1965) (applying same principle to criminal statutes as setting forth only minimum standard of care); *see, e.g.*, *Barret v. Lucky Seven Saloon, Inc.*, 96 P.3d 386, 393 (Wash. 2004) (criminal statutes may establish "minimum standards of conduct"); *Brannigan v. Raybuck*, 136 Ariz. 513, 517 (1983) (violation of criminal statutes may constitute negligence per se).

¶61 The text of § 13-3620 supports such an application. Its language imposes criminal liability on those physicians who fail to report abuse evident "in the course of treat[ment]." *See* § 13-3620(A), (O). But no language therein relieves physicians of civil liability when they fail to report such information acquired outside of clinical settings. *AAA Cab Serv., Inc. v. Indus. Comm'n*, 213 Ariz. 342, ¶ 6 (App. 2006) ("This court cannot write a term into the statute that the legislature did not include."). And, far from expressly modifying the standards for civil liability articulated in § 12-561 and § 12-563, § 13-3620 does not refer to those statutes at all. This court should be reluctant to infer a limitation on a physician's civil duty to his patients—a limitation at odds with our civil statutes and common law— from a criminal statute that fails to expressly address those standards at all.[17]

¶62 Further, the majority reasoning implies that the same statute that *expressly extends* criminal liability to a physician who fails to report child abuse evident in the course of treatment—may be read to *impliedly limit* a physician's civil liability for a species of the same conduct. In so doing, the majority's holding defies the statute's purpose: to broadly protect children by motivating caregivers to report abuse to law enforcement. *See L.A.R.*, 170 Ariz. 24, 27 (finding § 13-3620(A) evinces a public policy of "encouraging people to report child abuse"). The majority's holding instead reduces the circumstances under which a physician must act to protect children and it shields physicians from even civil liability when they arguably violate their own profession's standards for reporting such abuse. While I am skeptical the legislature would have intended such a result, I am certain the plain language of the statute does not justify it.

¶63 Lastly, the majority asserts that the reported cases addressing § 13-3620 "all treat the obligation to report as a duty and not as a standard of care." But, of the cases it cites for that proposition, only *Avitia* addresses any duty question under § 13-3620(A).[18] 256 Ariz. 198, ¶¶ 16-24. That case does not resolve whether the statute's language—confining criminal liability for physicians to information acquired "in the course of treat[ment]"—conjures a "scope of a special relationship" or a standard-of-care question. *Id.* ¶ 21 (declining to reach question of whether statute "pertains" to defendant under "course of treat[ment]" clause); *Perez*, ___ Ariz. ___, ¶ 20, 564 P.3d at 630. To be sure, the court freely uses the word "duty" synonymously with "obligation" in determining the applicability of the statute to defendants. *Avitia*, 256 Ariz. 198, ¶ 24 ("Section 13-3620(A) imposes important duties to report abuse and neglect of children . . . ."). But, it never clarifies or addresses whether those obligations should be characterized as defining the scope of any special relationship as distinguished from describing standards of conduct. *Id.* ¶ 22 (flagging, but not resolving, authentic special relationship question of whether, under statute, "non-treating mental health professional" has duty to report harm to third parties). Notably, after determining that the mental-health provider triggered no potential civil liability under the statute, the court proceeded to address whether that provider possessed a common law duty to a third party to report abuse. In so doing, the court implicitly acknowledged that § 13-3620, a criminal statute, would not set the lone standard for either duty or care for a civil case.

¶64 For the above reasons, I would conclude that § 13-3620(A) establishes, at most, a minimum standard for physicians in reporting child abuse to law enforcement. To the extent it does so, the statute describes a minimum standard of care—rather than any limitation on a physician's threshold duty to care for their patient's health. In finding otherwise, and in

rendering judgment against the Does on that basis, I would conclude the superior court erred.

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1 Dr. John Herrod was the founder and sole managing member of Lenzner Medical. Dr. Herrod's wife, Sherrie Farnsworth Herrod, is a named defendant for community property liability purposes, but she is otherwise not involved in the case.

2 The parties dispute whether Dr. Herrod was the Does' doctor, but, for purposes of the motion for summary judgment, the superior court "assum[ed] that Herrod provided medical treatment to Jane Doe I and her siblings on some occasions between the years of 2010 and February 2017." We do the same.

3 Under LDS Church doctrine, members are "called" to serve as laybishops for a fixed period of time and are "released" once their term is over.

4 Fleming and Curti, PLC brought this action as conservator for and on behalf of the Does who were minors at the time of filing.

5 The Does initially sued the LDS Church, the Medical Defendants, and various individual defendants in the same action. It appears that for the purposes of litigation below, the claims were later separated for each group of defendants. Although the complaint in our record lists all named defendants, this appeal is concerned only with the claims against the Medical Defendants.

6 Herrod was deposed on two occasions by the Does, each for a different purpose. The first deposition was taken in Herrod's personal capacity, for the claims asserted against him as a bishop of the LDS Church. In the second deposition, Herrod testified as the designated Rule 30(b)(6), Ariz. R. Civ. P., witness for Lenzner Medical, in relation to the Does' medical malpractice claims.

7 The record does not support this argument. During his deposition, Herrod was asked "what [he] did to assist Jane Doe I" after "learning that [she] had been abused by Paul Adams," and the following dialogue ensued:

Plaintiff's Counsel: How did you protect the children from further acts?

Herrod: I spoke with Leizza on many occasions, and she told me that the— that no further acts were occurring. We had agreed that he should be gone from the house as much as possible. And to my recollection, he took a job in Tucson. He was never to be home alone with the children. And I think that she communicated with the children frequently to make sure no—that the child, excuse me, Jane Doe I, that no further acts occurred.

This testimony supports Herrod's argument that he did not learn about any child abuse or neglect from Leizza, while he was treating her as a patient or otherwise.

8 And for this reason, we cannot address which duty would govern, one existing under the common law, if any, or the statutory duty.

9 To clarify, such inquiries that may fall under the standard of care would be, for example, whether the information received during the course of treating a patient amounts to a "reasonable belief" of child abuse; whether the actions taken by the physician were sufficient to constitute "report[ing] or caus[ing] reports to be made"; or whether the timing of the reporting amounted to being "immediate[]." In other words, what the physician "must do, or must not do . . . to satisfy the duty" to report child abuse. *See Gipson*, 214 Ariz. 141, ¶ 10 (quoting *Coburn v. City of Tucson*, 143 Ariz. 50, 52 (1984)).

10 A criminal statute, despite being "silent on the issue of civil liability," can establish a civil duty if it is "designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred." *Gipson*, 214 Ariz. 141, ¶¶ 26-27.

11 Although "headings to sections . . . do not constitute part of the law," "where an ambiguity exists the title may be used to aid in the interpretation of the statute," *State v. Barnett*, 142 Ariz. 592, 597 (1984). The Does do not argue, nor do we think that is ambiguous. Nevertheless, the heading clearly describes, consistent with the statute itself, the existence of a duty and not a standard of care. *See State v. Eagle*, 196 Ariz. 188, ¶ 7 (2000).

12 The majority asserts that the issue was not squarely raised by the Does on appeal. But, to the extent the Does waived the precise arguments that would have triggered the correct analysis of duty in this case, waiver is a prudential doctrine. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, n.9 (2005). We should be reluctant to apply it when, as here, doing so would require us to reach a legally incorrect result and thereby mislead future trial courts and litigants encountering similar questions under § 13-3620(A).

And, although not the central thrust of their arguments on appeal, the Does have squarely challenged the propriety of the grant of summary judgment by arguing, in their opening brief, that common-law professional standards of care should prevail: "The Plaintiffs' expert, Dr. Berg, stated that, based on a clear medical and ethical standard of care, Dr. Herrod had a duty to report the abuse of the children and the neglect by their mother." Similarly, before the superior court, the Does challenged the Medical Defendants' motion for summary judgment by emphasizing, in the very first sentence of their opposition, that "Dr. John Herrod [had] treated Paul Adams . . . and the Adams children at Defendant Lenzner Medical Services," such that "Dr. Herrod and Lenzner owed Plaintiffs a duty of care."

Finally, the majority's contention that the Does have expressly eschewed analysis under traditional duty analysis takes the Does' argument out of context. Instead, the Does merely seek to distinguish the analysis of duty under § 13-3620(A) from *Dinsmoor*, 251 Ariz. 370. Indeed, they proceed to

argue that duty under that statute should be analyzed under *Gipson* and *Quiroz*—both cases which focus on assessing duty through the traditional lenses of special relationships arising from both the common law and statutes.

13 The Does also assert a species of this argument in their opening brief, emphasizing that Dr. Herrod could not ignore information at his disposal in caring for his patients.

14 In this case, the Medical Defendants assert that the application of the priest-penitent privilege should substantially limit the evidence that the Does can marshal to support their cause of action. How the superior court resolves the contours of that privilege should be the central question driving whether the Does have sufficient facts to present to a jury. But it is a separate question from whether the Does have established a threshold duty of care.

15 To establish such a breach here, the Does have proffered both the expert opinion of a qualified physician, Dr. Richard Berg, and an ethical opinion from the AMA. Those opinions respectively assert and support that Dr. Herrod fell below his professional standard of care when he failed to consider information, secured outside the clinical setting, in caring for his patients. Thus, to the extent Herrod acquired non-privileged information, outside of the clinical setting, that would alert a reasonable person that the Does were being abused, that proffer would create a genuine dispute as to whether Herrod fell below the standard of care as our legislature has defined it for medical malpractice actions. *See* § 12-563(1).

16 My colleagues construe the phrase "in the rendering of health care" as a narrow duty provision, addressing exclusively the interaction with a patient in a clinical setting. § 12-561 But, our supreme court has implicitly held that a physicians duty—part of the "rendering of health care"— includes marshalling information, once acquired, to the patient's benefit, even when a physician has never met the patient. *Stanley*, 208 Ariz. 219, ¶ 13.

17 The concurring opinion correctly asserts that the scope of common law duty may be readily narrowed by statute—even when such statutes do not expressly articulate an intent to do so. *See Avitia*, 256 Ariz. 198, ¶ 39 (holding that § 36-517.02 overrides common law). But we do not address that presentation here. The civil duty of physicians to patients is found not only in our settled common law, but also in our civil statutes enacted by the legislature itself. *See* §§ 12-561, 12-563 (codifying physicians' scope of civil liability for negligence actions).

18 *Zeitner*, 246 Ariz. 161, ¶ 21, and *Johnson*, 235 Ariz. 85, ¶ 29, address § 13-3620 only insofar as they discuss exceptions to privilege. In *Ramsey*, 225 Ariz. 132, ¶ 12, this court considered whether a mental health counselor owed a duty of care to a third-party alleged sexual abuser. But it addressed that question exclusively under the common law and never referenced the text of § 13-3620 in doing so. *Id.* ¶¶ 17-28, 31-37 (addressing § 13-3620 only in the context of immunity).

Cite as
148 Arizona Cases Digest 16

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

David Lee PRUITT,
Plaintiff/Appellant,
v.
STATE OF ARIZONA, et al.,
Defendants/Appellees.

No. 1 CA-CV 24-0418
FILED 05-06-2025

Appeal from the Superior Court in Maricopa County
No. CV2021-053278
The Honorable Michael D. Gordon, Judge
AFFIRMED

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OPINION

Judge Samuel A. Thumma delivered the opinion of the Court, in which Presiding Judge Kent E. Cattani and Judge Angela K. Paton joined.

This opinion is subject to revision before publication in the Pacific Reporter.

THUMMA, Judge:

¶1 Plaintiff David Lee Pruitt appeals from the grant of summary judgment for defendant State of Arizona (State) and the denial of his motion for new trial. Pruitt challenges the conclusion that the State is his statutory employer, arguing that the only contractual relationship is between the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR) and Pegasus Research Group d/b/a Televerde (Televerde). Because Pruitt has shown no error, the rulings are affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Televerde contracts with ADCRR to employ inmates to work at Televerde's call centers. Pruitt, a civilian, was employed by Televerde to supervise inmates working in the call center at the Perryville State Prison Complex. While escorting inmates from one building to another, Pruitt stepped in a pothole, fell and was injured.

¶3 Pruitt filed for and received workers' compensation benefits from Televerde for his injuries. Pruitt then filed this tort case against the State and ADCRR, claiming negligence, premises liability and negligent hiring, entrustment and training.

¶4 The State, after conducting discovery, moved for summary judgment arguing Pruitt was a statutory employee under Arizona Revised Statutes (A.R.S.) section 23-902 (2025),[1] making the State immune from Pruitt's tort claims. The State also argued that ADCRR is a non-jural entity, which cannot be sued. After full briefing, the superior court granted the State's motion. After Pruitt unsuccessfully moved to reconsider, the court entered a final judgment resolving all of the parties' claims.

¶5 Pruitt then filed a motion for new trial under Arizona Rule of Civil Procedure 59. He argued for the first time that, because "the State and [ADCRR] are distinct legal entities," the State could not be Pruitt's statutory employer considering "the only contract of employment regarding Pruitt was the contract between [ADCRR] and Televerde." The State responded that (1) Pruitt waived this argument by failing to raise it before entry of final judgment and (2) because ADCRR is an arm of the State, the court properly granted the State summary judgment. In reply, Pruitt argued waiver did not apply because "if there was no employment contract between the State and Televerde—and there was not," then the superior court lacked subject-matter jurisdiction to declare the State was a statutory employer.

¶6 In denying the motion for new trial, the court affirmed the State "is the party who entered the contract at issue and therefore could [be] (and was) [Pruitt's] statutory employer." Pruitt timely appealed from both the final judgment and the denial of his new trial motion. This court has appellate jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1-2).

DISCUSSION

I. The Superior Court Did Not Err in Granting the State's Motion for Summary Judgment.

¶7 Pruitt's core argument asserts that the State is not, and could never have been, his statutory employer, meaning the entry of summary judgment was error. "The court shall grant summary judgment if the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Whether the State was Pruitt's statutory employer at the time of his injury is a mixed question of law and fact subject to de novo review. See Mitchell v. Gamble, 207 Ariz. 364, 367 ¶ 7 (App. 2004) (citing cases). The court views "the evidence and reasonable inferences in the light most favorable to the party opposing the motion" for summary judgment. *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003).

A. By Statute, ADCRR Is the State.

¶8 Pruitt argues "the State and [ADCRR] are distinct legal entities" and "the contract under which Pruitt was employed was exclusively a contract between [ADCRR] and Televerde," thus making it impossible for the State to be Pruitt's statutory employer. Pruitt also argues he did not waive the issue by failing to raise it until the motion for new trial because, if there was no employment contract between the State and Televerde, then the superior court would have had no subject-matter jurisdiction "to declare that the State was a 'statutory employer' of Televerde (and, hence, of Pruitt)."

¶9 Setting aside issues of waiver, Pruitt's argument is unavailing. By statute, "'State' means this state and any state agency, board, commission, or department." A.R.S. § 12-820(8). ADCRR is a department of the State. Pruitt also concedes that ADCRR is a non-jural entity that cannot be sued. And by statute, "[a]ny and all causes of action that may arise out of tort caused by the director, prison officers or employees of [ADCRR], within the scope of their legal duty, shall run only against the state." A.R.S. § 31-201.01(F).

¶10 Given these statutory provisions, Pruitt points to the language of the contract signed by ADCRR and Televerde, arguing it is exclusively between those two entities and does not include the State. Not so. The first page of the contract expressly uses "State of Arizona" in the heading, adding that "[r]eferences to State shall mean the State of Arizona." The contract, in turn, specifies various rights and obligations of the State and Televerde, including cancellation provisions, audit of records, e-verification of employee records and indemnification and workers compensation. Pruitt admits the employer in this instance was ADCRR, which is an arm of the State. Because ADCRR is an arm of the State, the court did not err in concluding that, for purposes of Pruitt's tort claims here, ADCRR is the State.

B. Pruitt Has Not Shown the Superior Court Erred in Concluding ADCRR Is Pruitt's Statutory Employer.

¶11 Pruitt argues the State was never his statutory employer and therefore had no right to use the statutory employer doctrine as an immunity defense. An entity seeking to show it is a statutory employer must show two things: (1) retention of supervision or control over the work procured to be done by a contractor and (2) the work entrusted to the subcontractor must be a "part or process in the trade or business" of the employer against whom the third-party tort action is asserted. *Young v. Env't Air Prods., Inc.*, 136 Ariz. 158, 161 (1983) (citing authority).

1. ADCRR Retained Supervision or Control Over the Work Procured by Televerde.

¶12 To determine whether an employer is a statutory employer of an independent contractor's employee, the court considers the control exercised by the employer over the contractor, not the employee. *Young*, 136 Ariz. at 163. Pruitt claims that "reasonable jurors could have concluded and inferred from the facts that [ADCRR] had no relevant supervision or control over the for-profit call center trade or business that Televerde was contracted to provide." But an entity hiring a contractor exercises supervision or control over the contractor if the hiring entity retains "the right to control or supervise the methods of obtaining a specific result." *Hunt Bldg. Corp. v. Indus. Comm'n*, 148 Ariz. 102, 105 (1986) (citation omitted).

¶13 In making this determination, the court considers the totality of the circumstances, including the following factors:

> [T]he duration of the employment; the method of payment; who furnishes necessary equipment; the right to hire and fire; who bears responsibility for work[ers'] compensation insurance; the extent to which the employer may exercise control over the details of the work[] and whether the work was performed in the usual and regular course of the employer's business.

Home Ins. Co. v. Indus. Comm'n, 123 Ariz. 348, 350 (1979) (citations omitted).

¶14 *Wagner v. State* applied these factors in a similar context, affirming summary judgment for the State. 242 Ariz. 95 (App. 2017). In *Wagner*, a clinical social worker, who worked for a contractor that provided healthcare services at state-owned prisons under a contract with ADCRR, slipped, fell and injured herself at a prison. *Id*. at 96 ¶ 2. The contract between the contractor and ADCRR required ADCRR to maintain facilities and fixtures for health services. *Id.* at 97 ¶ 10. Additionally, ADCRR retained the authority to approve the contractor's hires, the contractor was required to have workers' compensation insurance and ADCRR had the authority to monitor "any correspondence, records, reports, or other written and/or electronic materials" dealing with the contract. *Id*. at 97–98 ¶ 10. Looking to the substance of the contract and recognizing that the court should strictly construe the statute "when loss of the worker's common law rights is the object for which the statute is invoked," *Wagner* affirmed the grant of summary judgment for the State. *Id*. at 96 ¶ 1, 96 ¶ 7 (citing *Young*, 136 Ariz. at 163). The court held the employee was a statutory employee of the State because the State retained the right to control or supervise the contractor's work and because the services constituted a part or process in the usual and regular course of the State's business. *Id*. at 96 ¶ 1.

¶15 Here, ADCRR and Televerde entered into a contract where Televerde agreed to pay ADCRR for the right to operate a call center in the prison. Televerde then provided work opportunities to ADCRR inmates to assist in their rehabilitation. ADCRR screened and approved the hires after

performing a background check before allowing them access to the call center or to supervise inmates. Televerde's employees were subject to annual background checks to maintain access to the prison facilities. The contract with ADCRR required Televerde to provide workers' compensation insurance, and Televerde did so. Indeed, Pruitt received workers' compensation benefits before filing this suit. ADCRR provided the land, the building and the infrastructure for the call center, while Televerde provided the necessary business equipment. Televerde provided supervisors "knowledgeable in the types of work tasks to be accomplished and the correct way to complete each task," and who "supervise[d] inmate work production." The contract limited the type of equipment that could be used in the call center, and ADCRR required Televerde's staff to monitor and record all phone calls made by inmates to ensure the calls were pertinent to the inmates' work. The contract also required Televerde to comply with ADCRR's "procedures in recording inmate work hours and rendering all payments." These contract provisions show the same type of control over the work by ADCRR as in *Wagner*, if not more.

¶16 Pruitt repeatedly states that "[t]here are genuine disputes on the 'statutory employee' totality-of-the-circumstances supervision-and-control factors" that can only be resolved by a jury. But the State does not dispute the facts Pruitt asserted, and even accepting them as true, Pruitt is not entitled to relief.

¶17 In arguing summary judgment was improper, Pruitt relies on *Livingston v. Citizen's Utils., Inc.*, 107 Ariz. 62 (1971), including a subsequent appeal in that case, *Citizen's Utils., Inc. v. Livingston*, 21 Ariz. App. 48 (1973). *Livingston*, however, is distinguishable. In *Livingston*, there was no written contract governing the relationship between the employer and the claimed statutory employer, with the court stating:

> Where there is [] no express agreement as to the right of the employer to control the manner of doing the work by an alleged employee, the existence or non-existence of this right must be determined by reasonable inferences drawn from the surrounding circumstances and this is normally a question of fact for the jury.

107 Ariz. at 65.[2] But here, the relationship between ADCRR and Televerde is governed by an express written contract. The control exercised by the State over Televerde, which is the dispositive consideration, *see Young*, 136 Ariz. at 163, is defined in that written contract. "The construction of a contract is a question of law when the terms are plain and unambiguous." *Smith v. Melson, Inc.*, 135 Ariz. 119, 121 (1983) (citations omitted). Pruitt concedes the terms of the contract between ADCRR and Televerde are plain and unambiguous. Accordingly, the court did not err in concluding that there is no genuine issue as to any material fact and that the State is entitled to judgment as a matter of law. *See Avila v. Northrup King Co.*, 179 Ariz. 497, 505 (App. 1994) (citing cases).

¶18 Pruitt argues "[s]tatutory immunity cannot apply in favor of the State where it is not subject to any liability for paying any workers' compensation benefits" because Televerde was the party that provided the workers' compensation insurance. But that expense was presumably accounted for as part of the negotiated contract between Televerde and ADCRR. And in any event, Pruitt's argument is contrary to *Wagner*, where the court concluded the State was a statutory employer and immune from suit even where the third party contractor provided the workers' compensation insurance. 242 Ariz. at 98 ¶¶ 11–13. On this record, and given the similarities with *Wagner*, the superior court did not err in concluding the State retained supervision or control over the work procured to be done by Televerde.

2. The Work Entrusted to Televerde Was a "Part or Process in the Trade or Business" of ADCRR.

¶19 Pruitt argues reasonable jurors could have concluded "Televerde's call-center trade or business was not—in any realistic or meaningful way—'part or process' in [ADCRR]'s unique and distinctly different prison-correctional trade or business." He argues "no reasonable juror would ever infer that the 'particular work activity' of operating a call center is in any way regular, ordinary, or routine in [ADCRR's] operations or is something that [ADCRR] employees would do 'regularly.'" Pruitt also attempts to distinguish *Wagner* by arguing that, "unlike the provision of healthcare services to inmates in *Wagner*, it is not a part or process of [ADCRR's] business to operate a for-profit call-center operation."

¶20 Pruitt's argument is unavailing. Like in *Wagner*, ADCRR has a statutory duty to "[m]aintain and administer all institutions and programs within the department, including prisons . . . and such other facilities and programs as may be required and established for the custody, control, correction, treatment and rehabilitation of all adult offenders who are committed to the department." A.R.S. § 41-1604(A)(2). By statute, the ADCRR director may lease prison property in connection with the Correctional Industries Program "to a private corporation for the purpose of establishing and operating . . . [a] commercial enterprise deemed by the director to provide employment opportunities for inmates in meaningful jobs for wages." A.R.S. § 41-1623(D). Thus, the work entrusted to Televerde was a "part or process in the trade or business" undertaken by ADCRR to provide rehabilitation services.

3. Pre-*Wagner* Case Law, as Well as Cases Applying *Wagner*, Support the Grant of Summary Judgment Here.

¶21 Despite Pruitt's effort to portray *Wagner* as an outlier, cases before *Wagner* and applying *Wagner* support the grant of summary judgment. *Karandbir Sandhu v. State*, decided two weeks before *Wagner*, involved an employee of the same contractor as in *Wagner* that provided healthcare services to ADCRR. *See* No. 1 CA-CV 16-0095, 2017 WL 1278982, at *1 ¶ 2 (Ariz. App. Apr. 6, 2017) (mem. decision). The employee filed a negligence claim against the State after an inmate assaulted him. *Id*. at *1 ¶¶ 2–3. The court affirmed the grant of summary judgment for the State, concluding that "through the parties' detailed contract," ADCRR "retained control over [the contractor's] provision of health and dental services inside [ADCRR] facilities." *Id*. at *2 ¶ 9. *Karandbir Sandhu* supports the superior court's grant of summary judgment here.

¶22 More recently, *Fox v. Arizona* involved an employee of a contractor providing healthcare services to ADCRR who filed tort claims against the State after being sexually assaulted at a prison. CV-21-01089-PHX-MTL, 2023 WL 4315221, at *1 (D. Ariz. July 3, 2023). The State moved to dismiss the case under the workers' compensation statute. *Id*. Applying *Wagner*, the United States District Court concluded "the contract between [the contractor] and [ADCRR] controls their relationship" and weighed the *Home Insurance* factors to conclude the employee was a statutory employee of ADCRR. *Id*. at *4, *8. *Fox*, again in the prison context, applied *Wagner* in a way supporting the superior court's grant of summary judgment here.

¶23 Because both *Young* inquiries are satisfied, the superior court did not err in concluding that Pruitt was a statutory employee of the State at the time of his injury. Accordingly, the court properly entered summary judgment for the State.

II. The Superior Court Properly Denied Pruitt's Motion for New Trial.

¶24 Pruitt argues the superior court erred in denying his Rule 59 motion for new trial. A superior court has considerable discretion in deciding a motion for new trial. *See, e.g., City of Glendale v. Bradshaw*, 114 Ariz. 236, 238 (1977). This court will not reverse a ruling on a motion for new trial "absent a clear abuse of discretion." *Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53 (App. 1994) (citing cases).

¶25 Pruitt claims the superior court erred in denying his motion for new trial because the judgment and orders related to it were based on the conclusion that the State was Pruitt's statutory employer, which he argues was an abuse of discretion depriving Pruitt of a fair trial, Ariz. R. Civ. P. 59(a)(1)(A), resulted from errors of law, Ariz. R. Civ. P. 59(a)(1)(F), lacked evidentiary support, Ariz. R. Civ. P. 59(a)(1)(H) and was contrary to law, Ariz. R. Civ. P. 59(a)(1)(H). As noted above, however, the superior court properly concluded the State was Pruitt's statutory employer. Similarly, the superior court's finding did not result from an error of law, was not contrary to the law and did not lack evidentiary support. For these reasons, Pruitt has shown no error in the superior court denying his motion for new trial.

ATTORNEYS' FEES ON APPEAL

¶26 Pruitt requests attorneys' fees and costs incurred on appeal pursuant to ARCAP 21(a) and A.R.S. §§ 12-341 and 342. Because Pruitt is not the successful party, his request is denied.

CONCLUSION

¶27 The grant of summary judgment and the denial of Pruitt's motion for new trial are affirmed.

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1 Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

2 Given this distinction, Pruitt's reliance on "the decision-making process" in the *Livingston* trial after remand is not relevant here. Moreover, in the second *Livingston* appeal, the court vacated a $113,000 verdict for plaintiff, finding her claim failed on grounds not at issue here. *See* 21 Ariz. App. at 53–54.

Cite as
148 Arizona Cases Digest 20

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

Dennis RABER,
Petitioner/Appellee,
v.

Karyl Lynne WAGNER, FKA
Karyl Lynne RABER,
Respondent/Appellant.

No. 2 CA-CV 2024-0301
Filed May 8, 2025

Appeal from the Superior Court in Maricopa County
No. FC2024070932
The Honorable Casey Newcomb,
Judge Pro Tempore
VACATED AND REMANDED

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Law Offices of Kimberly A. Eckert, Tempe
By Kimberly A. Eckert
Counsel for Respondent/Appellant

OPINION
Presiding Judge Eckerstrom authored the opinion of the Court, in which Judge Vásquez and Judge Sklar concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

ECKERSTROM, Presiding Judge:
¶1 Karyl Wagner appeals from the trial court's order affirming an order of protection obtained against her by Dennis Raber. We vacate the order's firearm restriction and remand the case for the court to modify the order consistent with this opinion.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. Michaelson v. Garr, 234 Ariz. 542, n.1 (App. 2014). The parties were previously married and share a child who was a minor at the time of the events underlying this appeal. In July 2024, Raber filed a petition seeking an order of protection against Wagner. He alleged that starting in March 2024, Wagner had undertaken a "campaign to attack [his] reputation and [his] character as well as trying to get [him] fired at [his] work." He listed a series of instances in which Wagner had allegedly sent electronic messages to a range of individuals, including Raber's friends and his employer, accusing him of various acts of misconduct.

¶3 On July 9, 2024, the trial court entered an ex parte order of protection requiring that Wagner have no contact with Raber other than through a particular co-parenting messaging tool and prohibiting her from going to or near Raber's residence or workplace. It further found that Wagner "pose[d] a credible threat to the physical safety of" Raber and, pursuant to A.R.S. § 13-3602(G)(4), ordered that Wagner could not possess firearms and was required to surrender any firearms to designated locations within twenty-four hours of receiving service of the order.

¶4 Wagner requested a hearing to contest the order of protection. On July 26, the trial court held an evidentiary hearing at which both parties testified and two of Raber's proffered exhibits were admitted into evidence. At the conclusion of the hearing, the court orally pronounced that it would affirm the order of protection "with the modification that the workplace is a protected place only to Mr. Raber." It further clarified that this modification meant Wagner could "facilitate whatever contact" she needed with Arizona Public Service (APS)—also her former employer—"as it relates to whatever benefits and retirement" funds she had, but that she should have "no contact with APS related to Mr. Raber at all, unless it has to do specifically with the benefit."

¶5 The same day, the trial court issued an order of protection in which it checked the box stating, "The protective order listed above [issued July 9, 2024] remains in effect." On the new order, the court did not check the box indicating an intent to modify the July 9 order.

¶6 In a minute entry issued after the evidentiary hearing, the trial court found by a preponderance of the evidence that Wagner "may commit an act of domestic violence or has committed an act of domestic violence within the last year," that good cause existed to affirm the July 9 order of protection, and that the original order would "remain in full force and effect." The minute entry also ordered that Wagner "may have contact with Arizona Public Service (APS) only as it relates to former employment and/or retirement benefits" and that none of her "communication with APS shall reference" Raber.

¶7 This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(b).[1] *See also* Ariz. R. Protective Order P. 42(a)(2) (orders of protection affirmed or modified "after a hearing at which both parties had an opportunity to appear" appealable).

Discussion

¶8 Wagner contends the evidence presented at the evidentiary hearing was insufficient to support the trial court's affirmance of the order of protection. In particular, she challenges the order's provisions revoking her right to possess firearms and restricting her from contacting or visiting APS. Underlying

these arguments is Wagner's contention that the order affirming the order of protection is inconsistent with the court's oral pronouncements during the evidentiary hearing.

¶9 We review injunctions, including those affirming orders of protection,for an abuse of discretion. *See Mahar v. Acuna*, 230 Ariz. 530, ¶ 14 (App. 2012). We will affirm unless the record "is devoid of competent evidence to support the decision." *Id.* (quoting *Hurd v. Hurd*, 223 Ariz. 48, ¶ 19 (App. 2009)).

¶10 After a contested hearing, "[f]or a protective order to remain in effect as originally issued or as modified at a hearing, the plaintiff must prove the case by a preponderance of the evidence." Ariz. R. Protective Order P. 38(g)(3). At the conclusion of such hearing, the court must "state the basis for continuing, modifying, or revoking the protective order." Ariz. R. Protective Order P. 38(g)(4).

I. Sufficiency of Evidence to Support Protective Order

¶11 Wagner first argues the evidence presented at the hearing was insufficient to support the trial court's finding that she had engaged in harassing behavior. Orders of protection "may be granted to prevent a person from engaging in acts of domestic violence" and are generally governed by § 13-3602. Ariz. R. Protective Order P. 4(a). Acts of domestic violence include, as relevant here, harassment and use of electronic communications to harass. *See* A.R.S. §§ 13-2916(A)(3), 13-2921(A)(1), 13-3601(A)(1), (2). A person commits harassment if she "knowingly and repeatedly commits an act or acts that harass another person" or if, "in a manner that harasses," she knowingly "[c]ontacts or causes a communication with another person by . . . electronic . . . means." § 13-2921(A)(1). Harassment by use of an electronic communication also occurs when a person "disturb[s] by repeated . . . unwanted or unsolicited electronic communications the peace, quiet or right of privacy of the person at the place where the communications were received." § 13-2916(A)(3).

¶12 At the hearing, Raber presented both testimonial and documentary evidence that Wagner had repeatedly sent texts and emails to his relatives, work colleagues, and other contacts. Several of those exhorted the recipients to communicate with or engage directly with Raber on Wagner's behalf. For example, Raber testified that in April of 2024, Wagner had contacted a family friend and stated that "she was going to call the cops" on Raber if he did not contact Wagner by that evening. He also presented evidence that, in March and June of 2024, Wagner had sent text messages to Raber's relatives requesting that they "check on him" and urging them to report what Raber had been saying about her. Wagner also sought to communicate with Raber through his workplace contacts. In June 2024, she sent an email suggesting Raber's colleagues "knock some sense into" him, requesting that Raber's former boss serve as a mediator in the parties' dispute regarding issues involving their minor child, and generally suggesting that Raber's colleagues should "speak to" him about his parenting decisions. Raber testified that these communications had "invad[ed] [his] privacy" and that he wished to "[l]ive [his] life in peace and move on." Together, this evidence supports the trial court's finding that Wagner had harassed Raber by disturbing his peace and privacy through repeated, unwanted electronic communications. *See* §§ 13-3601(A)(1), (2), 13-2916(A)(3), 13-2921(A)(1).[2]

¶13 In so holding, we take no issue with our previous decisions that have vacated protective orders on the ground that a defendant's communications were directed toward third parties rather than directly at the victims. *See, e.g.*, *LaFaro v. Cahill*, 203 Ariz. 482, ¶¶ 2, 11-13, 24 (App. 2002) (analyzing A.R.S. § 12-1809); *Wineberg v. Buonsante*, No. 2 CA-CV 2024-0090, ¶¶ 1, 6-9, 11, 17-21 (Ariz. App. Oct. 15, 2024) (mem. decision) (analyzing § 13-2921(E)). Although those cases each found specific communications with third parties insufficient to support a charge of harassment, neither held that such communications could never constitute harassment. *See LaFaro*, 203 Ariz. 482, n.3 ("Our conclusion is based on the facts of this case. We are not suggesting that a third-party conversation could never constitute 'directed at' harassment pursuant to A.R.S. § 12-1809."). Notably, § 13-2921 expressly contemplates that harassment can occur through communications to third parties when that communication, as here, is designed to trigger actions directed at the victim. *See* § 13-2921(A)(4) (harassment when person makes false report to "law enforcement, credit or social service agency" against another), (A)(5) (harassment to interfere with delivery of utility to another person). Here, the record supports a determination that Wagner, through her communications with third parties including Raber's relatives and work colleagues, sought to initiate direct actions toward, and communications with, Raber. *See* § 13-2921(A)(1). Finally, the email to APS disturbed Raber's "peace, quiet or right of privacy" at his workplace, a "place where the communications were received." § 13-2916(A)(3).

II. Firearms Restriction

¶14 Upon entering an order of protection, a court may "prohibit the defendant from possessing or purchasing a firearm for the duration of the order." § 13-3602(G)(4). However, such prohibition is contingent on the court finding "that the defendant is a credible threat to the physical safety of the plaintiff" or other individuals designated by the protective order. *Id.* Any court "orders concerning firearms should be based on a court's assessment of credible threats of physical harm by the specific person whose rights would be affected by the order." *Mahar*, 230 Ariz. 530, ¶ 20. Additionally, to grant such an order, the court "must ask the plaintiff

about the defendant's use of or access to firearms to determine whether the defendant poses a credible threat to the physical safety of" people protected by the order. Ariz. R. Protective Order P. 23(i)(1).

¶15 The record contains no evidence to support the trial court's firearms prohibition. *See Mahar*, 230 Ariz. 530, ¶ 14. Nothing in the transcript suggests that Raber alleged, or that the court found, that Wagner posed any threat to Raber's physical safety. Instead, Raber's testimony was limited to allegations that Wagner had invaded his privacy, attacked his character by accusing him of being a bad person and a bad father, and generally attempted to ruin his reputation at his workplace and prevent him from being happy in his life. He ended his testimony with the comment that he wanted to "be left alone" and "to live [his] life in peace and move on." Although, as we address above, this evidence supports the court's finding that Wagner had engaged in harassment, it does not support a finding that Wagner was a threat to Raber's physical safety. Further, the record does not reflect that the court made any inquiry as to Wagner's possession or use of weapons or firearms. *See* Ariz. R. Protective Order P. 23(i)(1). Therefore, the court abused its discretion in affirming the original July 9 protective order's prohibition against Wagner's possession of firearms.[3]

III. Contact with APS

¶16 Wagner also argues the July 26 order of protection is inconsistent with the trial court's oral pronouncements and its minute entry issued after the evidentiary hearing, potentially resulting in an overly broad restriction of her free speech rights. We agree that these rulings conflict to some extent with regard to Wagner's communications with APS. In particular, the original July 9 order of protection directed Wagner to "not go to or near" APS, Raber's place of employment. In its oral pronouncement at the conclusion of the hearing, the court stated on the record that it intended to "affirm the order of protection with the modification that the workplace is a protected place only to Mr. Raber." As noted above, the court's minute entry similarly clarified that Wagner could contact APS only in relation to her own prior employment or retirement benefits and that she could not reference Raber in any such communication. However, in the July 26 order of protection, the court did not check the box to indicate that it intended to modify the original order of protection.

¶17 Thus, the July 26 order of protection conflicts with the trial court's oral pronouncement and its minute entry because that order does not indicate that it modifies the July 9 order by narrowing the scope of prohibited communications between Wagner and APS. Considering this record, we conclude the oral pronouncement and minute entry together indicate the court intended to modify the order of protection, and the July 26 order should have so indicated. *Compare State v. Ovante*, 231 Ariz. 180, ¶ 38 (2013) (when oral pronouncement of sentence conflicts with written minute entry, oral pronouncement controls), *with Flynn v. Cornoyer-Hedrick Architects & Planners, Inc.*, 160 Ariz. 187, 193 (App. 1988) ("Where there is a conflict between a minute entry and the judgment, the terms of the judgment will control."). Therefore, to effect clarity for the parties and consistency with the record, on remand the court's order of protection shall reflect that it modifies the July 9 order.[4]

¶18 Further, to the extent the trial court's order may be interpreted as restricting Wagner from communicating with any APS employee about any matter other than her own employment benefits, such interpretation constitutes an unconstitutionally broad restriction on Wagner's free speech rights. Although harassing speech is not a form of constitutionally protected communication, *see State v. Brown*, 207 Ariz. 231, ¶ 8 (App. 2004), the court's order appears to restrict more communications than authorized by statute. *See* § 13-3602(G) (listing remedies that may be included in order of protection). On remand, the order of protection should be narrowly tailored to preclude only communications with APS employees that are substantively directed at Raber and that fall within the purview of our harassment statutes. *See* §§ 13-2916(E)(3), 13-2921(E).

IV. Costs and Attorney Fees

¶19 Wagner requests her costs and attorney fees on appeal. Because she has partially prevailed on appeal, Wagner is entitled to her costs, subject to her compliance with Rule 21(b), Ariz. R. Civ. App. P. *See* A.R.S. § 12-341. However, because Wagner cites no authority to support an award of attorney fees other than Rule 21, we deny that request. *See Zambrano v. M & RC II LLC*, 254 Ariz. 53, ¶ 49 (2022); *see also* Ariz. R. Civ. App. P. 21(a)(2).

Disposition

¶20 For the foregoing reasons, we vacate the order as to the firearms provision. We remand to the trial court so it may enter a new order consistent with this opinion.

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1 *See also Moreno v. Beltran*, 250 Ariz. 379, ¶ 11 (App. 2020) (orders of protection appealable under § 12-2101(A)(5)(b) "without regard to whether it involves a firearms prohibition" and without certification of finality under Ariz. R. Fam. Law P. 78).

2 Although Wagner complains that "the record is not clear as to what the trial court actually considered," we conclude the court's finding was amply supported by the admitted evidence alone.

3 Notwithstanding our reasoning vacating the state firearms prohibition, we note that Wagner may still be subject to federal firearms restrictions. *See, e.g.*, 18 U.S.C. § 922(g)(8).

4 We disagree with Wagner's contention that the trial court's narrow language proscribing her from contacting APS about Raber overbroadly prohibits

her "from contacting a friend [who works at APS] for lunch" or from otherwise socializing with APS employees outside the boundaries of the workplace. As the court clearly articulated at the evidentiary hearing, and as Wagner apparently understood at that time, the order prohibits Wagner from communicating about Raber with APS employees in their professional capacities, not from continuing her unrelated personal contacts with those employees.

Cite as
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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

Michael S. VOHLAND,
Plaintiff/Appellant,
v.
Maricopa COUNTY, et al.,
***Defendants/Appellees*.**

No. 1 CA-CV 24-0432
FILED 05-08-2025

Appeal from the Superior Court in Maricopa County
No. CV2022-012466
The Honorable James Knapp, Judge
AFFIRMED

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OPINION
Vice Chief Judge Randall M. Howe delivered the Opinion of the Court, in which Presiding Judge Cynthia J. Bailey and Judge Andrew M. Jacobs joined.

This opinion is subject to revision before publication in the Pacific Reporter.

HOWE, Judge:
¶1 Michael Vohland challenges the constitutionality of Section 2.1.2 of the Maricopa County Justice Courts Bench Policy. He argues the policy violates Article 6, Section 31(A) of the Arizona Constitution by disqualifying applicants without a juris doctor ("law") degree for appointment as a justice of the peace pro tempore. We disagree and hold that, even assuming the Arizona Constitution prohibits disqualification of applicants without a law degree, the policy does not so disqualify. We thus affirm the superior court's grant of summary judgment finding the policy constitutional.

FACTS AND PROCEDURAL BACKGROUND

¶2 Vohland is not admitted to practice law and does not have a law degree. He applied to be a pro tem Justice of the Peace for the Maricopa County Justice Court system. Previously, he had served as a pro tem magistrate for the Nogales Municipal Court.

¶3 The Maricopa County Justice Courts impose several qualifications upon pro tem applicants. First,

"[a]ll new applicants shall attach a signed letter of reference from a sitting Justice of the Peace recommending their appointment." Maricopa Cnty. Just. Cts. Bench Policy 2.1. Additionally, "one or more of the following qualifications shall be met": the applicant is (A) "[a] formerly elected or appointed Justice of the Peace"; (B) "[a] present or former City Magistrate"; (C) "[a]n individual holding a J.D. degree from an accredited law school"; or (D) "[a] non-attorney Pro Tem, who has been appointed previously as a Pro Tem." Maricopa Cnty. Just. Cts. Bench Policy 2.1–2.1.2.1 (emphasis added).

¶4 The Maricopa County Justice Courts rejected Vohland's application. Initially, the courts told Vohland that he was ineligible for appointment because he both did not hold a law degree and did not submit a letter of recommendation from a sitting justice. However, in a subsequent email the courts informed Vohland that although his service as a former magistrate exempted him from the law degree requirement, he could not be considered without a letter of recommendation.

¶5 Vohland sought declaratory relief in the superior court against the Maricopa County Justices of the Peace alleging that his application was denied because he lacked a law degree and that Section 2.1.2 of the Bench Policy violates Article 6, Section 31(A) of the Arizona Constitution. Section 31(A) allows for the "appointment of members of the bar" to work as pro tems in the "courts inferior to the Supreme Court." Ariz. Const. art. 6, § 31(A). But it continues that "justices of the peace pro tempore shall have the same qualifications as justices of the peace." *Id.* Vohland argued the Bench Policy violated Section 31(A) because Arizona law does not require a justice of the peace to hold a law degree and the "shall have the same qualifications" language was "intended to prevent a Justice of the Peace from using membership in the Arizona bar as criteria for appointment of Pro Tems." Vohland, however, did not challenge the letter of recommendation requirement.

¶6 The Justices of the Peace moved for summary judgment, arguing Vohland lacked standing to challenge Section 31(A) because his application was denied for lack of a letter of recommendation and not for lack of a law degree. In response, Vohland argued that no sitting justice would give him a letter of recommendation because he did not hold a law degree. The court denied the motion, finding a genuine dispute of material fact whether Vohland was unable to obtain a letter of recommendation because he lacked a law degree.

¶7 The Justices of the Peace moved for summary judgment a second time, arguing Vohland's facial challenge failed because Section 31(A) was "intended to create the baseline for appointment and was not intended to prevent a Justice of the Peace from requiring additional qualifications." They also argued that holding a law degree is not "the sole option for qualification," and therefore the Bench Policy does not impose an additional qualification not required of justices of the peace. Although the court disagreed that the Bench Policy's non-law degree qualification options meaningfully enabled appointment of applicants without a law degree, the court granted the motion. It found that Section 31(A) allows an elected justice of the peace to "choose what criteria it will employ in deciding who to appoint as a Pro Tem in their court [including] whether or not the applicant must be a member of the bar." Thus, the court found the Bench Policy constitutional.

¶8 Vohland timely appealed, and we have jurisdiction. Ariz. Const. art. 6, § 9; A.R.S. § 12-2101(A)(1).

DISCUSSION

¶9 Vohland argues that the superior court erred by granting Defendants summary judgment because Section 2.1.2 of the Bench Policy violates Section 31(A) by requiring that pro tem applicants "hold a law degree." He contends that because Section 31(A) states that "justices of the peace pro tempore shall have the same qualifications as justices of the peace" and because justices of the peace are not required to hold a law degree, Section 2.1.2 is facially unconstitutional. As in his complaint, Vohland does not on appeal challenge the letter of recommendation requirement. The Justices of the Peace respond that (1) Section 2.1.2 does not require that applicants hold a law degree, and (2) Section 31(A) does not prevent the justices from imposing additional qualifications beyond those required of the Justices of the Peace.

¶10 "We review the superior court's grant of summary judgment *de novo*, affirming if there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law." *Quinn v. Cardenas*, 256 Ariz. 77, 83 ¶ 19 (App. 2023). "We will affirm summary judgment if it is correct for any reason supported by the record." *KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 236 Ariz. 326, 329 ¶ 14 (App. 2014). "A facial constitutional challenge requires an inquiry into whether the law itself is unconstitutional, not into whether the application of the law violates a particular individual's rights." *Hernandez v. Lynch*, 216 Ariz. 469, 472 ¶ 8 (App. 2007).

¶11 "In interpreting constitutional and statutory provisions, we give words 'their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended.'" *Fann v. State*, 251 Ariz. 425, 434 ¶ 25 (2021) (quoting *Ariz. ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539, 541 ¶ 7 (2018)); *accord* A.R.S. § 1-213. Accordingly, "[w]e interpret statutory language in view of the entire text, [and] consider[] the context." *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019); *see also Adams v. Comm'n on App. Ct. Appointments*, 227 Ariz. 128, 135 ¶ 34 (2011) ("[I]t is a 'fundamental principle of statutory construction

(and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993))). "We also avoid interpreting a statute in a way that renders portions superfluous." *Fann*, 251 Ariz. at 434 ¶ 25. If the statute's plain language is unambiguous, this Court "must give effect to that language without employing other rules of statutory construction." *Parsons v. Ariz. Dep't of Health Servs.*, 242 Ariz. 320, 323 ¶ 11 (App. 2017).

I. The Bench Policy Does Not Require Pro Tem Applicants to Hold a Law Degree.

¶12 Vohland's interpretation of Section 2.1.2 of the Bench Policy would require us to read it in isolation. If Section 2.1.2 were the only qualification *and* only means of qualifying to be a pro tem, then the Bench Policy would bar the appointment of applicants without a law degree. But we do not read statutory text in isolation. *See Nicaise*, 245 Ariz. at 568 ¶ 11.

¶13 Read in context of the larger Bench Policy, Section 2.1.2 does not require a pro tem applicant to hold a law degree. Section 2.1 states that "*one* or more of the *following* qualifications shall be met." (Emphasis added.) Although holding a law degree is *one* means of qualification, the Bench Policy provides *three other* means of qualifying, none of which require the applicant to hold a law degree. *See* Maricopa Cnty. Just. Cts. Bench Policy 2.1–2.1.2.1. In fact, when the Maricopa County Administrative Pro Tem reviewed Vohland's application, "she realized he was eligible for appointment because of his prior experience as a City Magistrate." *See* Maricopa Cnty. Just. Cts. Bench Policy 2.1.1. Thus, Vohland's application was not denied because he did not hold a law degree. In a facial challenge to a regulation or policy's constitutionality, the plaintiff must show "no circumstances exist under which the regulation would be valid." *Hernandez v. Lynch*, 216 Ariz. 469, 472 ¶ 8 (App. 2007). But here, such "circumstance" exists because a person without a law degree may still be eligible to serve under the Bench Policy by holding other qualifications, as Vohland himself did. Accordingly, even assuming that the Arizona Constitution prohibits a law degree requirement, Section 2.1.2 of the Bench Policy is not facially unconstitutional.

¶14 Because we hold that Section 2.1.2 is not facially unconstitutional, we do not decide whether Section 31(A) prohibits a law degree requirement for appointment as a justice of the peace pro tempore.

II. Costs.

¶15 Because Vohland is not successful on appeal, we decline his request for costs. *See* ARCAP 21.

CONCLUSION

¶16 We affirm.

Cite as
148 Arizona Cases Digest 25

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

The STATE of Arizona,
Appellee,
v.
Jesus Ismael RODRIGUEZ,
Appellant.

No. 2 CA-CR 2023-0205
Filed May 13, 2025

Appeal from the Superior Court in Pima County
No. CR20210489001
The Honorable Brenden J. Griffin, Judge
AFFIRMED

COUNSEL

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OPINION

Judge Vásquez authored the opinion of the Court, in which Judge Sklar concurred and Presiding Judge Eckerstrom concurred in part and dissented in part.

This opinion is subject to revision before publication in the Pacific Reporter.

VÁSQUEZ, Judge:

¶1 Jesus Rodriguez appeals his convictions and sentences for first-degree felony murder, aggravated assault with a deadly weapon, criminal damage, unlawful flight from a pursuing law enforcement vehicle, and two counts of driving under the influence of an intoxicant (DUI). On appeal, Rodriguez argues the trial court erred by (1) improperly giving a flight instruction to the jury; (2) giving a jury instruction that incorrectly stated the law on an essential element of the unlawful flight offense; (3) denying his motion for a judgment of acquittal on the felony murder, unlawful flight, and criminal damage charges; and (4) admitting his involuntary statement at trial over his objection. Rodriguez also contends his life sentence for the felony murder conviction is cruel and unusual, in violation of the United States and Arizona Constitutions. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all

reasonable inferences against Rodriguez. See State v. Fierro, 254 Ariz. 35, ¶ 2 (2022). Just after midnight on February 21, 2021, a Pima County Sheriff's Deputy was on patrol driving in a marked police vehicle when he saw Rodriguez speeding in the opposite direction. The deputy made a U-turn at the next intersection and "had to accelerate significantly to catch up." Rodriguez stopped at the next two red lights, but each time the light turned green, he "continued on at a high rate of speed again," and the deputy could not "catch up." The deputy confirmed that at this point he did not "have [his] red and blue lights and siren on" because he was not close enough to make a traffic stop. However, the deputy radioed for a police airplane that he knew was overhead to assist with surveillance.

¶3 A few moments later, Rodriguez turned into an apartment complex, andthe deputy followed. As Rodriguez drove into the complex, he slowed to thirty-five to forty miles per hour, which enabled the deputy to close the distance. When the deputy was "a vehicle distance behind [Rodriguez]," he "turned on [his] red and blue lights" to make sure Rodriguez "knew [he] was trying to stop him." Rodriguez then significantly slowed to "approximately five to ten miles per hour," but did not pull over. The deputy next employed "a couple siren bursts," but when Rodriguez still did not pull over, the deputy "activate[d his] sirens continuously." Rodriguez then merged closer to the curb lane and eventually came to a stop. The deputy stopped his vehicle, stepped out, and "yell[ed] to [Rodriguez] to turn off the car."[1]

¶4 Rodriguez drove away and made a high-speed, right-hand turn onto the adjacent street. For safety reasons, the deputy transitioned from "active pursuit" to "active surveillance" and watched from a distance as Rodriguez continued speeding toward the next intersection. Rodriguez ran the red light and collided with a Chevrolet Malibu that had entered the intersection across Rodriguez's path. The collision killed the Malibu's driver, R.C., and seriously injured the passenger, M.C. The deputy reactivated his emergency lights when he arrived at the intersection and "placed [Rodriguez] in handcuffs."

¶5 Rodriguez was transported to the hospital for his injuries from the accident. While there, a DUI investigation officer conducted two sobriety tests that indicated Rodriguez was impaired. The officer arrested Rodriguez for DUI and obtained a search warrant to collect samples of his blood. During the second blood draw, Rodriguez told the officer "I'm drunk, I ran away from you guys and crashed into that car and I hurt somebody—I killed somebody." Rodriguez's blood alcohol concentration (BAC) was determined to have been .187 about ninety minutes after the accident.

¶6 After a three-day jury trial, Rodriguez was convicted as described above, and the trial court sentenced him to concurrent and consecutive sentences, the longest of which is life in prison with the possibility of release after twenty-five years, followed by a 7.5-year prison term, and time served for his misdemeanor counts. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

I. Admission of Involuntary Statement

¶7 Rodriguez argues the trial court erred by admitting evidence of his involuntary statements to police over his objection at trial. We review issues of statutory interpretation and constitutional law de novo. *State v. Wein*, 242 Ariz. 372, ¶ 7 (App. 2017). Because Rodriguez objected to the introduction of his statements on voluntariness grounds below, our review is for harmless error.[2] *State v. Soliz*, 223 Ariz. 116, ¶ 10 (2009).

¶8 During the DUI officer's testimony at trial, the state moved to admit a video clip of the officer's body worn camera with footage taken at the hospital during Rodriguez's second blood draw. Rodriguez objected, arguing at the subsequent bench conference that the "essence of the clip" was Rodriguez's statement "I'm drunk, I ran from you guys, I killed somebody." He asserted that he had "questions about the voluntariness" of the statement and believed it was "incomplete or taken out of context." The state countered that it was "something that [Rodriguez] volunteer[ed] without being asked a question at all," and given that a "prerequisite for voluntariness is some sort of state action," they were "past the voluntariness inquiry." As to the "completeness theory," the state said it was focusing on a "relatively short" clip of the full video to avoid the "portions of the footage where . . . [Rodriguez was] reacting kind of violently" and saying "stuff the jury shouldn't hear." The state also noted that if Rodriguez wanted to play additional footage from the video, he was entitled to do so.

¶9 The trial court overruled Rodriguez's objection, adding "if there was any sort of voluntariness type objection for the [c]ourt to decide, that need[ed] to come well-before trial." The court also noted that Rodriguez's other concerns went "to the weight of the evidence," and as to the "contextual argument, [Rodriguez could] put it in whatever context he want[ed] when he present[ed] his case." The video clip was then admitted and played for the jury.[3]

A.Voluntariness Inquiry

¶10 "To be admissible, a statement must be voluntary, not obtained by coercion or improper inducement." *State v. Ellison*, 213 Ariz. 116, ¶ 30 (2006). A confession is presumed to be involuntary, and it is the state's burden to prove by a preponderance of the evidence that a defendant's statement was freely and voluntarily given. *State v. Byrd*, 160 Ariz. 282, 283 (App. 1988). However, in the absence of "both coercive police behavior and a causal relation between the coercive behavior and

the defendant's overborne will," the voluntariness of a confession will not be questioned. *State v. Boggs*, 218 Ariz. 325, ¶ 44 (2008). And "[w]hen an officer testifies that the confession was obtained without promises, threats[,] or coercion," then "a prima facie case for admissibility is established." *Byrd*, 160 Ariz. at 283. We look to the totality of the circumstances surrounding a confession to determine whether a defendant's will has been overborne. *State v. Blakely*, 204 Ariz. 429, ¶ 27 (2003).

¶11 On appeal, Rodriguez asserts his confession was involuntary on multiple grounds. For all but his argument related to *Miranda* warnings, we address each contention in turn.[4] First, Rodriguez argues his admission at the hospital was a "post-arrest statement that was made in direct[] response to [the DUI officer] informing him that he fled from police and killed someone," which was "reasonably likely to elicit an incriminating response under the circumstances." The record indicates otherwise.

¶12 The DUI officer assigned to Rodriguez's case testified that "right after the first blood draw," he remembered "telling . . . Rodriguez that he had killed someone" and that "he ran from the police." Rodriguez did not make the inculpatory statements until roughly "an hour later," immediately "after the second blood draw." The officer confirmed that prior to the statements being made, he had not "ask[ed Rodriguez] a question"; rather, the officer characterized the statements as "unprompted utterances" that Rodriguez had "just blurted out." The body-worn video confirms the officer's testimony. It shows that Rodriguez initiated the exchange, which undercuts a finding of involuntariness. *See Byrd*, 160 Ariz. at 283; *cf. State v. Noleen*, 142 Ariz. 101, 108 (1984) (where defendant initiated interview from which statements were taken and admitted at trial, statements were voluntary and any attempt to challenge voluntariness of those statements "would have been futile"). Thus, we are unpersuaded by Rodriguez's argument that his statements were a "direct[] response" to any information provided by the officer or that the officer in any way "coerc[ed]" or encouraged a confession. *See Boggs*, 218 Ariz. 325, ¶ 44.

¶13 Next, while Rodriguez seems to concede he was not subjected to any "express questioning" by law enforcement at the hospital, he argues that by telling him he "'ran' from a deputy and killed someone," the officer's words and actions were "reasonably likely to elicit an incriminating response" and were therefore the "functional equivalent of interrogation." Rodriguez relies on *State v. Londo*, 215 Ariz. 72, ¶ 6 (App. 2006), and *State v. Emery*, 131 Ariz. 493, 498 (1982), to support this argument, but neither case applies. The primary focus in both *Londo* and *Emery* was on *Miranda* rights, which are not at issue here. *Londo*, 215 Ariz. 72, ¶¶ 6-11 (inculpatory statement admissible under "private safety exception" to *Miranda*); *Emery*, 131 Ariz. at 496-502 (clear violation of *Miranda* rights when interrogation continued after defendant requested counsel and officers engaged in "impermissible conduct" by threatening defendant with "gas chamber" and "death penalty" to induce confession).

¶14 Rodriguez next asserts his statement was involuntary because "it was uttered when [he] was extremely distraught and emotional after learning he had killed someone." In the absence of threats, intimidation, deception, or "physical or psychological pressures exerted by the police," *State v. Tucker*, 157 Ariz. 433, 445 (1988), the fact that Rodriguez was "extremely distraught and emotional" has no bearing on the admissibility of his statements. *See id.* at 446 (question of voluntariness must focus on police conduct, not solely defendant's mental state). Rodriguez does not point to anything in the record to show that the officer threatened, intimidated, deceived, or exerted any "pressures" on him at any point during their hospital encounter. *Id.* at 445. By failing to demonstrate that his statements were "the product of coercive police tactics," Rodriguez's argument is unavailing. *Id.*

¶15 Finally, Rodriguez asserts his statement was involuntary because he "had just been in a serious accident and had sustained injuries to his head and was in significant pain." While potentially relevant to whether he was "susceptible to coercive police conduct," the fact that Rodriguez may have been ill or injured at the time he confessed "does not by itself render the confession involuntary." *See Londo*, 215 Ariz. 72, ¶ 13. Similarly, intoxication will not result in a finding of involuntariness unless the defendant was "so intoxicated that he could not understand the meaning of his statements," rendering them "so unreliable that they must be excluded." *Tucker*, 157 Ariz. at 446. There is nothing in the record that shows Rodriguez was unable to "reason, comprehend, or resist" when he confessed. *See id.* Rather, the hour delay between each of Rodriguez's interactions with the officer undermines a finding of coercion and indicates he had time to reflect and thus to more fully understand both the gravity of his situation and the meaning of his statements. *See id.*

¶16 *Again, because Rodriguez has failed to demonstrate coercive police tactics of any kind, and because the record is devoid of evidence showing that Rodriguez's "will [was] overborne," see Blakely*, 204 Ariz. 429, ¶ 27, the trial court did not err by considering his statements voluntary and admitting them at trial over Rodriguez's objection, *see Tucker*, 157 Ariz. at 446.

B. Right to a *Sua Sponte* Voluntariness Hearing

¶17 Rodriguez nevertheless contends he was entitled to a "sua sponte voluntariness hearing" at the time his objection was made. He argues the trial

court's failure to hold such a hearing violated his due process rights. "A defendant 'objecting to the admission of a confession' has a constitutional right grounded in the Fourteenth Amendment's Due Process Clause 'to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined.'" *State v. Bush*, 244 Ariz. 575, ¶ 54 (2018) (quoting *Jackson v. Denno*, 378 U.S. 368, 380 (1964)). However, due process does not require a voluntariness hearing "absent some objection by the defendant to the admission of his confession," and typically a defendant must "object to the use of his confession prior to trial unless the opportunity to do so did not exist, or the defendant was unaware of the grounds for the motion, or the court, in its discretion, chooses to entertain the motion at trial." *State v. Alvarado*, 121 Ariz. 485, 487 (1979).

¶18 Rodriguez concedes he did not file a motion to suppress his statements or request a voluntariness hearing prior to trial, and he does not argue that his failure to do so was based on evidence that "was not then known" or that "could not have been known" if he exercised "reasonable diligence" to discover it.[5] Ariz. R. Crim. P. 16.1(c); *see Bush*, 244 Ariz. 575, ¶ 51. Nevertheless, citing to A.R.S. § 13-3988 and *Bush*, 244 Ariz. 575, ¶ 54, Rodriguez maintains he "sufficiently objected to and challenged the admissibility of his statement[s] at trial such that he triggered his constitutional right to a voluntariness hearing." We disagree.

¶19 In *Bush*, our supreme court stated "[§] 13-3988(A) provides that, before a 'confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any *issue* as to voluntariness,'" and therefore, "consistent with *Wainwright* and *Alvarado*, a trial court must address the issue of voluntariness if a defendant raises it." 244 Ariz. 575, ¶ 62 (emphasis added in *Bush*) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977) and *Alvarado*, 121 Ariz. 485). Here, we agree that Rodriguez's objection during trial constituted a "contemporaneous challenge" to the admission of his statements. *Id.* ¶ 54 (quoting *Wainwright*, 433 U.S at 86). However, we do not interpret *Bush*'s holding to mean that Rodriguez was thus "constitutional[ly]" entitled to a *sua sponte* voluntariness hearing under the circumstances. *Id.* ¶ 62; *see Alvarado*, 121 Ariz. at 487 (right to voluntariness hearing does not necessarily extend to all stages of criminal proceedings).

¶20 While *Bush* established that a trial court must "address the issue of voluntariness," it did not hold that a trial court must conduct a "*sua sponte* hearing." 244 Ariz. 575, ¶ 62; *see Alvarado*, 121 Ariz. at 488 (if motion is untimely or not filed, whether to "entertain a motion for a voluntariness hearing at trial" is left to exclusive discretion of trial court). Here, the court adequately addressed the voluntariness issue by holding a bench conference during which both Rodriguez and the state had an opportunity to be heard. By overruling Rodriguez's objection, the court implicitly determined that his statements were voluntary, and "absent a showing of clear and manifest error," we will not upset a court's determination of voluntariness on review. *Alvarado*, 121 Ariz. at 488.

¶21 In sum, Rodriguez was neither constitutionally nor statutorily entitled to a *sua sponte* voluntariness hearing. The trial court adequately addressed the issue of voluntariness, and, finding none, it did not err by admitting his statements at trial. *See Bush*, 244 Ariz. 575, ¶ 62; *Alvarado*, 121 Ariz. at 488.

II. Flight Instruction

¶22 Rodriguez argues that because he was charged with unlawful flight and felony murder, "both of which contain elements pertaining to flight," the trial court's decision to give a flight instruction was reversible error. He maintains the instruction risked confusing the jury about which elements they were required to find in order to return a guilty verdict for each offense and "may have relieved the [s]tate of its burden of proving [the] specific elements of those offenses" beyond a reasonable doubt.[6] We review a trial court's decision to give a jury instruction for an abuse of discretion. *State v. Martinez*, 218 Ariz. 421, ¶ 49 (2008).

¶23 Rodriguez objected to the flight instruction at trial, which would typically preserve the issue for harmless error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). Under that standard, the state has the burden to establish "beyond a reasonable doubt that the error did not contribute to or affect the verdict." *Id.*[7] However, in *State v. Foster*, ___Ariz. ___, ¶ 57, 559 P.3d 1139, 1153 (App. 2024), this court held that a defendant's failure to request a limiting instruction warranted denying relief on his claim that the flight instruction was improper. In that case, the flight instruction also applied to other charges and the defendant did not request an instruction limiting it to those charges and not for the leaving-the-scene charge. *Id.* In this case, the unlawful flight instruction did not apply only to the unlawful flight and felony murder charges—notably it also applied to the DUI counts. *See State v. Salazar*, 173 Ariz. 399, 409 (1992) (flight instruction proper where defendant's actions reveal consciousness of guilt). Because Rodriguez did not request a limiting instruction, he has forfeited review for all but fundamental, prejudicial error. *See Foster*, ___ Ariz. ___, ¶ 57, 559 P.3d at 1153; *State v. Bolivar*, 250 Ariz. 213, ¶ 14 (App. 2020) (applying fundamental error review when party fails to propose or request limiting instruction at trial).

¶24 A flight instruction may be given if there is evidence of flight after an offense is committed "from which jurors can infer a defendant's consciousness of guilt." *State v. Solis*, 236 Ariz. 285, ¶ 7 (App. 2014). Such an instruction is appropriate if there is evidence supporting a

reasonable inference that: (1) "the flight or attempted flight was open, such as the result of an immediate pursuit," or (2) "the accused utilized the element of concealment or attempted concealment." *State v. Smith*, 113 Ariz. 298, 300 (1976). Stated differently, in determining whether to give the instruction, the trial court must "be able to reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *State v. Speers*, 209 Ariz. 125, ¶ 28 (App. 2004) (quoting *State v. Weible*, 142 Ariz. 113, 116 (1984)). To satisfy the "consciousness of guilt" requirement, "[i]t is not necessary to show that law enforcement officers were pursuing the defendant at the time." *State v. Wilson*, 185 Ariz. 254, 257 (App. 1995). Merely "leav[ing] the scene" of a crime is insufficient to support a flight instruction; instead, the inquiry focuses on whether the defendant "voluntarily withdrew himself 'in order to avoid arrest or detention.'" *State v. Salazar*, 112 Ariz. 355, 356-57 (1975) (quoting *State v. Rodgers*, 103 Ariz. 393, 395 (1968)).

¶25 Rodriguez argues, as he did below, the flight instruction "risked confusing the jury" because "to laypeople, flight[and] unlawful flight . . . may sound like the same thing." He also maintains that the language in the flight instruction so closely "tracked critical evidence at trial" that it "further exacerbated the risk that the jury may have believed it could convict Rodriguez of unlawful flight and felony murder so long as it was satisfied that he had 'run[] away.'"[8] We are not persuaded by either of these arguments.

¶26 The trial court provided the following flight instruction, pursuant to Revised Arizona Jury Instructions (RAJI) Standard Criminal 9 (5th ed. 2019):

> In determining whether the [s]tate has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding, or concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reasons for running away, hiding, or concealing evidence. Running away, hiding, or concealing evidence after a crime has been committed does not, by itself, prove guilt.

And the court gave the following instruction on the unlawful flight charge:

> The crime of unlawful flight from a pursuing law enforcement officer requires proof of the following two things: One, the defendant, who was driving a motor vehicle, willfully fled from or attempted to elude a pursuing official law enforcement vehicle; and two, the law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle.[9]

¶27 First, the flight instruction does not contain the same language or involve the same elements as those of unlawful flight and felony murder. *See* A.R.S. §§ 28-622.01 (unlawful flight), 13-1105(A)(2) (felony murder).[10] We therefore do not agree that the flight instruction "risked confusing the jury with respect to the elements it needed to find" in order to determine "that Rodriguez '*wil[l]fully fled*' a pursuing officer and caused a death during the course of . . . that offense."

¶28 Further, the type of elusive or furtive conduct that justifies a flight instruction does not necessarily involve the "wil[l]ful[] flee[ing] or attempt[ing] to elude a pursuing official law enforcement vehicle" necessary to establish the crime of unlawful flight. § 28-622.01; *compare* RAJI Stand. Crim. 9 (flight instruction), *with* § 28-622.01 (unlawful flight). Notably, evidence of a defendant's actual or attempted "running away" or "concealment" does not necessarily include an element of "pursuit." *Wilson*, 185 Ariz. at 257.

¶29 Lastly, a jury instruction is not improper simply because it includes the same language used by witnesses testifying at trial or the same words as other jury instructions given by the court. And where the instructions accurately state the law, *see State v. Rix*, 256 Ariz. 125, ¶¶ 43-44 (App. 2023), similar language is not a reason to assume juror confusion, *cf. State v. Riley*, 248 Ariz. 154, ¶ 88 (2020) (court does not speculate that jurors were misled or confused by instructions).

¶30 We also disagree with Rodriguez's claim that the flight instruction may have unconstitutionally "relieved the [s]tate of its burden of proving [the] specific elements" of the offense of unlawful flight.[11] "In assessing the constitutionality of jury instructions dealing with presumptions, 'we must first determine if the presumption is mandatory or permissive.'" *State v. Abdi*, 226 Ariz. 361, ¶ 9 (App. 2011) (quoting *State v. Lopez*, 134 Ariz. 469, 472 (App. 1982)). "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *State v. Peraza*, 239 Ariz. 140, ¶ 28 (App. 2016) (quoting *Francis v. Franklin*, 471 U.S. 307, 314 (1985)). In contrast, "a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *Foster*, ___ Ariz. ___, ¶ 62, 559 P.3d at 1154, (quoting *Peraza*, 239 Ariz. 140, ¶ 29). And while "[m]andatory presumptions represent an impermissible burden shift when 'they relieve the State of the burden of persuasion on an element of an offense,'" *Peraza*, 239 Ariz. 140, ¶ 28 (quoting *Francis*, 471 U.S. at 314), "the use of a permissive presumption is constitutional if there is a rational connection between the predicate and presumed facts," *State v. Platt*, 130 Ariz. 570, 574 (App. 1981).

¶31 Here, the flight instruction provided that "[i]n determining whether the [s]tate has proved the

defendant guilty beyond a reasonable doubt," the jury "*may* consider any evidence of the defendant's running away, hiding, or concealing evidence" together with the rest of the evidence in the case. RAJI Stand. Crim. 9 (emphasis added). The trial court also expressly instructed the jury that evidence of flight or concealment, without more, does not establish guilt. *Id.*; *see Foster*, ___ Ariz. ___, ¶ 63, 559 P.3d at 1154. As noted above, the flight instruction applied to the DUI counts and provided context for Rodriguez's conduct. The instruction "*permitted* but did not *require*," *Foster*, ___ Ariz. ___, ¶ 63, 559 P.3d at 1154, the jury to consider Rodriguez's failure to stop as evidence that he had a "consciousness of guilt" for driving under the influence, *Solis*, 236 Ariz. 285, ¶ 7. Specifically, it allowed the jury to determine whether, by continuing to drive away from the deputy, Rodriguez was attempting to "voluntarily withdr[a]w himself 'in order to avoid arrest or detention'" for the DUI offenses. *Salazar*, 112 Ariz. at 357 (quoting *Rodgers*, 103 Ariz. at 395). Despite Rodriguez's argument to the contrary, the instruction served that purpose even though he acknowledged while testifying that he had committed DUI. The jury was still required to reach a verdict on the DUI charge, and the instruction assisted it in doing so.

¶32 In addition, Rodriguez argues that a flight instruction on DUI was improper because DUI is a strict-liability offense. Because a flight instruction is relevant only to consciousness of guilt, he reasons, it has no relevance to crimes that lack a mental-state element. Whatever the merits of this argument, we deem it waived because Rodriguez raised it for the first time in his reply brief. *See State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013). Applying waiver is especially appropriate in light of the limited scope of our fundamental error review.

¶33 Nevertheless, because Rodriguez's actions invited "some suspicion of guilt," the trial court did not abuse its discretion by giving the flight instruction. *State v. Parker*, 231 Ariz. 391, ¶ 48 (2013) (quoting *State v. Thornton*, 187 Ariz. 325, 334 (1996)). There was no error, fundamental or otherwise. *See State v. Murray*, 250 Ariz. 543, ¶ 14 (2021) (first step of fundamental error review is "determining whether trial error exists." (quoting *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018))).

III. Unlawful Flight Instruction

¶34 Rodriguez argues the trial court committed fundamental error by misstating the law in its unlawful flight instruction. He contends the instruction did not include a requirement that the officer use his siren "as reasonably necessary." We review de novo whether a jury instruction correctly states the law and consider the instructions as a whole to determine whether the jury received the information necessary to reach a legally correct decision. *State v. Ewer*, 254 Ariz. 326, ¶ 10 (2023). Because Rodriguez failed to object to the unlawful flight instruction below, he has forfeited review all but for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19.

¶35 Arizona's unlawful flight statute, § 28-622.01, provides in relevant part:

> A driver of a motor vehicle who wil[l]fully flees or attempts to elude a pursuing official law enforcement vehicle is guilty of a class 5 felony if the law enforcement vehicle is . . . 1. Being operated in the manner described in [A.R.S.] § 28-624, subsection C and is appropriately marked to show that it is an official law enforcement vehicle.

¶36 As we articulated in *State v. Martinez*, 230 Ariz. 382, ¶ 8 (App. 2012), "the essential elements of the crime of unlawful flight are: (1) the defendant, who was driving a motor vehicle, willfully fled or attempted to elude a pursuing law enforcement vehicle, and (2) the law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle." We have also determined that the plain language of "§ 28-624(C), to which § 28-622.01 refers, requires the driver of an authorized emergency vehicle to use a siren or other audible signal only 'as reasonably necessary.'" *In re Joel*, 200 Ariz. 512, ¶ 5 (App. 2001); *see Simkins v. Pulley*, 116 Ariz. 487, 491 (App. 1997) ("[T]he language of [§ 28-624(C)] sets forth the parameters of the duty 'as may be reasonably necessary.'").

¶37 Relying on *In re Joel*, Rodriguez argues the proper interpretation of § 28-624(C) mandates the use of sirens "as reasonably necessary" as an essential element of the offense of unlawful flight. And while he concedes "the *Martinez* court correctly determined that 'activation of emergency lights is not an essential element' of unlawful flight," he insists *Martinez* relied on a "misinterpretation of *In re Joel*" when it "erroneously concluded that the use of sirens is also not an element of the offense." He further contends "the *Martinez* court ignored § 28-622.01's reference to [§] 28-624(C) and rendered the entire provision of the statute meaningless." We disagree. In *Martinez*, we expressly "d[id] not reach the issue of whether unlawful flight requires proof that an officer used sirens 'as reasonably necessary'" because the issue "was not presented to the trial court and ha[d] not been addressed by the parties on appeal." 230 Ariz. 382, n.3. In that case, we addressed only the use of emergency lights.[12] *See id.*

¶38 Rodriguez also misinterprets In re Joel. Contrary to his argument, we did not hold that the use of a siren is an essential element of the offense of unlawful flight. Rather, we concluded "[i]t is clear from the plain language of § 28-624(C) that drivers of authorized emergency vehicles—and, by extension, law enforcement officers under § 28-622.01— must *only* use a siren or other audible warning 'as reasonably necessary.'" 200 Ariz. 512, ¶ 7 (emphasis added). And because the pursuing deputy in *In re Joel* testified that it was unnecessary to activate his siren under the circumstances, we

concluded the state had "established the requisite elements of the offense under §§ 28-622.01 and 28-624(C)" based only on the deputy's activation of his emergency lights. *Id.* ¶ 8.

¶39 In any event, we need not resolve whether the use of a siren "only 'as reasonably necessary,'" *In re Joel*, 200 Ariz. 512, ¶ 5, amounts to an element of the offense. Our review for fundamental error also requires Rodriguez to demonstrate prejudice. *See Escalante*, 245 Ariz. 135, ¶¶ 18, 21. To prove prejudice, Rodriguez must show that a reasonable, properly instructed jury "could have reached a different result." *State v. James*, 231 Ariz. 490, ¶ 15 (App. 2013). Here, the state established that the deputy activated his siren—first in a series of "bursts" and then "continuously"— to the extent he deemed reasonably necessary under the circumstances. *See In re Joel*, 200 Ariz. 512, ¶ 7. On the record presented, Rodriguez has failed to show resulting prejudice.

IV. Denial of Motion Under Rule 20, Ariz. R. Crim. P.

¶40 Rodriguez argues the trial court erred in denying his motion for a judgment of acquittal as to the felony murder, unlawful flight, and criminal damage charges.[13] We review a court's ruling on a Rule 20 motion de novo. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). We will not reverse unless there is "a complete absence of probative facts to support a conviction." *State v. Mathers*, 165 Ariz. 64, 66 (1990). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). If reasonable people "may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *State v. Tison*, 129 Ariz. 546, 553 (1981) (quoting *State v. Bearden*, 99 Ariz. 1, 4 (1965)).

A. Criminal Damage

¶41 Rodriguez argues the state "presented no evidence regarding the value of the Malibu or the cost of damage other than establishing that it was 'totaled.'" He therefore contends his conviction for criminal damage was "not supported by substantial evidence and must be vacated." A person commits criminal damage by "[r]ecklessly defacing or damaging property of another person." A.R.S. § 13-1602(A)(1). Rodriguez's criminal damage conviction was designated a class five felony because the jury determined that the total amount of damage was "$2,000 or more but less than $10,000." *See* § 13-1602(B)(3). The state bears the burden of establishing the amount of damages and demonstrating the method used to calculate the amount. *State v. Brockell*, 187 Ariz. 226, 229 (App. 1996). If a defendant disputes the state's method, he or she can present evidence of what the defense deems a more accurate calculation, and the jury can decide which is the more reasonable method under the circumstances when determining the appropriate amount of damages. *Id.*

¶42 In denying Rodriguez's Rule 20 motion on the criminal damage count, the trial court stated that "with the jury's common understanding of vehicles [and] what they cost, given the dollar amounts involved here," the evidence was sufficient. The court concluded that "how high up the jury can go" with the value determination was "well within the[] province of their common understanding." Rodriguez acknowledges that "no particular method of calculation is required to determine value" and "the jury is entitled to rely on its commonsense knowledge" when making determinations about damages. *See Brockell*, 187 Ariz. at 229. Nevertheless, he maintains the state was required to "at least present *some* evidence from which the jury could conclude that the loss was greater than $2,000, which it failed to do."

¶43 Our supreme court has determined that "specific testimony of value is not always necessary if value may be inferred from other evidence, and the item is not so unique as to require expert valuation testimony." *State v. Spears*, 184 Ariz. 277, 290 (1996). In *Spears*, the court noted that the only valuation for the victim's stolen 1984 Dodge Rampage truck came from Spears, who had informed his girlfriend and police officers that he had paid $3,000 for the truck. *Id.* But the court stated that given the circumstances of how Spears possessed the truck, "he was not qualified as the owner of the truck to give an opinion as to its value." *Id.* The court also noted there was testimony that the truck was in good condition and it "was operable because [the] defendant drove it until the time of his arrest." *Id.* The court concluded that "[b]ecause the truck in this case was not unique, we find that the state offered sufficient evidence at trial from which the jury could infer that the truck was worth between $750 and $1,500." *Id.*

¶44 In this case, the state presented evidence that R.C. was driving the Malibu just before the collision. It was therefore operable. Additionally, the state presented testimony that the Malibu was a total loss, and the trial court admitted photographs of the vehicle into evidence. From the photos, the jury could infer the condition of the vehicle prior to the collision. During closing arguments, the state acknowledged that the owner of the Malibu "wasn't able to provide a value" and that the jury needed to be "firmly convinced" that the value "falls within the bookends of that $2,000 to $10,000" in order to find Rodriguez guilty of criminal damage as a class five felony. The prosecutor further stated that "the evidence has proven, even in spite of a specific value [not] being given," that "the manner in which" the Malibu was totaled, while it "may not be $10,000," it was "at least $2,000."

¶45 Viewed in the light most favorable to sustaining the jury's verdict, as we are required to

do, *see State v. Arredondo*, 155 Ariz. 314, 316 (1987), the photographic evidence and the testimony that the vehicle was "totaled" were sufficient to support the jury's finding that the damage was at least $2,000 but less than $10,000. Moreover, the criminal damage verdict form included three different ranges for "the total amount of damage caused" and the jury was instructed to "check only one." The ranges, listed in descending order, were: "$2,000 or more but less than $10,000"; "$1,000 or more but less than $2,000"; or "$250 or more but less than $1,000." Given the inherent imprecision that is represented by a "range," a specific dollar figure was not required to support Rodriguez's criminal damage charge. *See Brockell*, 187 Ariz. at 228 ("while there are generally accepted rules for calculating damage amounts, none of the rules guarantees a precise, formulaic application by the trier of fact," and the measure of damages chosen is one court deems most tailored to case). Here, the jury was given a broad range of potential valuations for the vehicle from $250 to $9,999. It determined the damage to the Malibu was at least $2,000, and we will not disturb that finding by reweighing the evidence. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013). The trial court therefore did not err in denying Rodriguez's Rule 20 motion as to the criminal damage count. *See Mathers*, 165 Ariz. at 66.

B. Unlawful Flight

¶46 Rodriguez argues there was insufficient evidence to sustain his unlawful flight conviction because the state failed "to prove (1) he was aware of the deputy's presence, (2) that his failure to stop was willful, and (3) that the deputy was 'in pursuit.'"[14] We disagree.

¶47 As previously noted, a person commits unlawful flight if, while driving a motor vehicle, the person "wil[l]fully flees or attempts to elude a pursuing official law enforcement vehicle" and the law enforcement vehicle is appropriately marked to show that it is a law enforcement vehicle. § 28-622.01; *see Martinez*, 230 Ariz. 382, ¶ 8. While not always required, the activation of emergency lights or the use of an audible siren may provide circumstantial evidence that a defendant was "'willfully' fleeing." *Martinez*, 230 Ariz. 382, ¶ 7; *see In re Joel*, 200 Ariz. 512, ¶¶ 7-8; *State v. Fiihr*, 221 Ariz. 135, ¶ 11 (App. 2008) ("[D]epending on the circumstance, use of a siren or other audible signal may not be necessary when pursuing a fleeing motor vehicle."). Additionally, any refusal to stop on command of an officer who is in an official police vehicle "violates the felony flight statute . . . even if that pursuit does not attain excessive speeds or involve reckless driving." *State v. Fogarty*, 178 Ariz. 170, 171 (App. 1993).

¶48 Citing *Fogarty* and *Fiihr*, Rodriguez acknowledges that "Arizona courts have found evidence sufficient to sustain a conviction for unlawful flight even in the absence of evidence associated with a stereotypical pursuit or flight." *See Fogarty*, 178 Ariz. 170; *Fiihr*, 221 Ariz. 135. He attempts to distinguish his situation from *Fiihr* and *Fogarty* by arguing that "those cases have also involved overwhelming evidence establishing the defendant knew he was being pursued," whereas in his case, he contends "substantial evidence was presented that suggested Rodriguez was unaware of the deputy."

¶49 To support this claim, Rodriguez contends that the deputy "testified that it did not appear that Rodriguez was aware of his presence behind him on [the surface streets], or that his reckless driving behavior was an attempt to elude [the deputy]." He further claims that "[e]ven after the deputy activated his lights, from his testimony, it appears he still had doubts as to whether Rodriguez was aware that he was attempting to stop him." But these arguments overlook the context in which the statements were made and ultimately request that we reweigh the evidence, which we will not do. *See Buccheri-Bianca*, 233 Ariz. 324, ¶ 38.

¶50 The state submitted as an exhibit the video of aerial surveillance footage from the airplane that had captured the majority of the deputy's encounter with Rodriguez in the apartment complex parking lot. On cross-examination, Rodriguez admitted he was the one "on the video" driving through the parking lot with the deputy "immediately behind [him] with . . . red and blue lights on" for "at least [fifty] seconds." He also confirmed that he had "slowed down, . . . pulled over to the right, and . . . stopped just long enough for the deputy to get out of his car and put his foot on the ground" before Rodriguez sped off. Additionally, Rodriguez admitted that he had been "concerned about driving home that evening" and that, after nearly rear-ending another car on his way back to the apartment complex, he had "realized [he] was maybe a little too drunk to drive."

¶51 On cross-examination at trial, the deputy confirmed that after Rodriguez "t[ook] off" from the attempted traffic stop at the apartment complex, he "immediately deactivated [his] overhead lights," transitioned from "active pursuit" to "active surveillance," and began observing Rodriguez "from a significant distance." When he was asked if it was "fair to say [he was] not pursuing the vehicle anymore," the deputy responded "[t]hat is not correct," explaining that even though he "was not physically pursuing" Rodriguez, "the Sheriff's Department was still pursuing th[e] vehicle" via the surveillance airplane.

¶52 Rodriguez agrees the deputy's testimony about his driving behavior moments before the attempted stop was "evidence that arguably suggested Rodriguez may have been aware that the deputy was attempting to stop him," but he maintains "that evidence was undercut by Rodriguez's testimony, which provided an explanation for that behavior." Indeed, although he

did "not disput[e] what[was] in the video," Rodriguez testified that he "had no idea that there was a deputy in a Chevy Tahoe immediately behind [him th]at night" and insisted he never "s[aw the deputy's] red and blue lights on" nor "hear[d] his siren" because he "had the music real loud" in his car at the time. Rodriguez explained that in slowing down and pulling over to the right, he "w[as]n't stopping for [the deputy]"; rather, he was "stopping because [he] was looking for [his] phone and realized it was in [his] car somewhere." He also claimed that he "took off quickly" after coming to a complete stop because he was "frustrated" and once he "realized that [his] phone was in the car somewhere," he "just wanted to . . . go back home."

¶53 However, this alternative explanation for Rodriguez's conduct does not undermine the sufficiency of the evidence. *See State v. Landrigan*, 176 Ariz. 1, 4 (1993) (that reasonable minds could differ on inferences to be drawn does not render evidence insubstantial). Conflicting testimony creates a question of fact that is to be decided by the jury, *id.*, whose province we will not invade by reweighing evidence on appeal, *Buccheri-Bianca*, 233 Ariz. 324, ¶¶ 38-39. Viewed in the light most favorable to sustaining Rodriguez's convictions, the evidence presented was sufficient for a reasonable juror to conclude that Rodriguez was aware of the deputy's presence, and that his failure to stop was willful. *See Mathers*, 165 Ariz. at 66.

C. Felony Murder

¶54 Rodriguez posits that even if we determine there was sufficient evidence to support his unlawful flight conviction, his conviction for felony murder is "insufficient on other grounds" because "it is clear in this case that R.C.'s death was not caused in the course of an unlawful flight from a pursuing officer." He argues that "even assuming the deputy's encounter with Rodriguez initially amounted to a pursuit," that pursuit "ended when the deputy turned off his lights and sirens and transitioned to surveillance mode." A death occurs in the course or furtherance of an underlying felony if it "resulted from an action taken to facilitate the accomplishment of the felony." *State v. Burns*, 237 Ariz. 1, ¶ 77 (2015) (quoting *State v. Jones*, 188 Ariz. 388, 397 (1997)). A close temporal relationship between the acts facilitating the underlying felony and the victim's death supports the finding of a valid predicate felony for a first-degree murder charge. *See Jones*, 188 Ariz. at 397-98. "Whether a death is 'in furtherance' of an underlying felony is ordinarily a question to be determined by the trier-of-fact." *State v. Herrera*, 174 Ariz. 387, 394 (1993).

¶55 As a preliminary matter, Rodriguez does not cite to, and we are not aware of, any controlling caselaw that supports his claim that a pursuit "ends" when a police officer deactivates his lights, his siren, or both. In *Fogarty*, we held that an officer is not required to continue the pursuit if he deems it unnecessary or a risk to public safety. *See* 178 Ariz. at 171-72. The officer in *Fogarty* expressly "gave up the chase" at the city limits, and the defendant "was later arrested at his home." *Id.* at 171. And although the defendant was "stopping at stop lights and otherwise obeying the traffic laws," we held that his "refusal to stop on command" of an officer who was driving a police car "violate[d] the felony flight statute because of the potential for personal danger inherent in vehicular pursuit." *Id.* Here, as in *Fogarty*, the deputy testified that while he could have "put the pedal to the metal and chased after [Rodriguez]," he made the "decision to essentially let [the vehicle] go, [and] let the plane deal with it" because "there was no reason to put the public in danger."

¶56 The fact that the deputy transitioned to "active surveillance" immediately prior to the collision did not sever the causal connection between R.C.'s death and Rodriguez's predicate felony of unlawful flight. *See State v. Richmond*, 112 Ariz. 228, 232 (1975). Under Arizona's felony murder rule, "there is no requirement that the killing occur, while committing or while engaged in the felony, or that the killing be a part of the felony other than that the few acts be a part of one continuous transaction." *Id.* (quoting *People v. Stamp*, 82 Cal. Rptr. 598, 602 (Ct. App. 1969)). Here, the "felony and the murder were part of the same series of events," and thus there was a "sufficient link" between Rodriguez's unlawful flight and R.C.'s death to uphold a felony-murder conviction. *Id.*

¶57 In sum, "pursuit" for the purposes of unlawful flight does not require evidence that officers were "chasing" the defendant with lights and sirens activated at the exact moment the defendant causes the death of another person. *See Fogarty*, 178 Ariz. at 171-72; *Fiihr*, 221 Ariz. 135, ¶ 11. The state presented sufficient evidence for a reasonable jury to conclude that by driving from the attempted traffic stop, Rodriguez "wil[l]fully fle[d]" from a "pursuing official law enforcement vehicle," § 28-622.01, and in the course and furtherance of that flight, Rodriguez killed R.C., *see* § 13-1105(A)(2); *Mathers*, 165 Ariz. at 66. The short span of time between Rodriguez's flight from the attempted traffic stop and the fatal collision further supports the jury's determination that R.C.'s death occurred in the course of the unlawful flight. *See Jones*, 188 Ariz. at 397-98. The trial court did not err in denying Rodriguez's Rule 20 motion on the felony murder count. *See Mathers*, 165 Ariz. at 66.

V. Propriety of Life Sentence for Felony Murder

¶58 Rodriguez argues that the imposition of a life sentence for his felony murder conviction is "cruel and unusual in violation of the United States and Arizona constitutions."[15] We review de novo whether a defendant's sentence complies with the Eighth Amendment. *State v. Jerald*, 257 Ariz. 342, ¶ 23 (App. 2024). Rodriguez preserved the issue by objecting below, so our review is for harmless error. *See Henderson*, 210 Ariz. 561, ¶ 18.

¶59 The Eighth Amendment's prohibition against "cruel and unusual punishments" protects individuals from being subjected to excessive sanctions and ensures that punishment for a crime is "graduated and proportioned to the offense." *State v. Berger*, 212 Ariz. 473, ¶ 8 (2006) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). There is no requirement for strict proportionality between crime and sentence. *Id.* ¶ 13. Rather, the provision forbids extreme sentences that are "grossly disproportionate," and only in "'exceedingly rare' cases will a sentence to a term of years violate the Eighth Amendment." *Id.* ¶¶ 10, 17 (quoting *Ewing v. California*, 538 U.S. 11, 22-23 (2003)).

¶60 Rodriguez argues § 13-1105 is "cruel and unusual insofar as it requires a mandatory life sentence for felony murder based on unlawful flight" because Arizona's unlawful flight statute "covers a broad range of conduct" that "is not limited to high-speed chases," but "also includes the mere refusal to stop for a pursuing officer."[16] However, in Arizona, a sentence imposed under the felony murder statute is not unconstitutional simply by virtue of the type of felony on which it is predicated. *Cf. State v. Celaya*, 135 Ariz. 248, 254 (1983) (no "strained application" of felony murder rule where defendant was found guilty of felony robbery). Moreover, "[i]n comparing the gravity of the offense to the harshness of the penalty," we afford substantial deference to the legislature's judgment, and a sentence does not violate the Eighth Amendment if the legislature has a reasonable basis for believing the sentencing scheme furthers penological goals and reflects a rational legislative intent. *Berger*, 212 Ariz. 473, ¶¶ 13, 17.

¶61 While Rodriguez concedes his "offense was undoubtedly serious and warrants substantial punishment," he maintains his conduct does not "warrant a life sentence" because he "did not intentionally cause the collision or R.C.'s death." However, in *State v. McLoughlin*, 139 Ariz. 481, 485-86 (1984), our supreme court squarely addressed and rejected this argument:

> [T]he *mens rea* necessary to satisfy the premeditation element of [felony] first-degree murder is supplied by the specific intent required for the [relevant underlying] felony. We reject [the] claim that this is unconstitutional. It is not unconstitutional for the Arizona legislature to mandate that an individual who causes the death of another while seeking to accomplish one of several enumerated felonies . . . be subject to the same criminal charges and punishment as a person who causes the death of another person with premeditation.

¶62 "We are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *Myers v. Reeb*, 190 Ariz. 341, 342 (App. 1997) (quoting *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378 (App. 1993)). Here, Rodriguez was found guilty of unlawful flight, which is one of the enumerated predicate felonies for felony murder. *See* § 13-1105(A)(2). The imposition of a first-degree murder sentence thus does not violate Rodriguez's constitutional rights. *See* A.R.S. §§ 13-752(A); 13-1105(B); § 28-622.01(A)(1); *see also State v. Moore*, 218 Ariz. 534, ¶ 8 (App. 2008).

¶63 Rodriguez also argues his life sentence is cruel and unusual because "offenders who commit crimes similar to [his] are more frequently charged and convicted of second-degree murder or manslaughter, even in cases involving flight."[17] However, it is only once "an inference of gross disproportionality" is found that we will in engage in a comparison between "the sentences the state imposes on other crimes and the sentences other states impose for the same crime." *Berger*, 212 Ariz. 473, ¶ 12. Because we find no such threshold showing here, no further inquiry is required. Moreover, choosing which offense to charge rests within the duty and discretion of the prosecutor, and we generally will not disturb that decision on review. *See State v. Gooch*, 139 Ariz. 365, 365 (1984); *State v. Murphy*, 113 Ariz. 416, 418 (1976) (courts have no power to interfere with prosecutor's exercise of discretion unless prosecutor is "acting illegally or in excess of his powers"). There was no error in the imposition of Rodriguez's life sentence, constitutional or otherwise.

Disposition

¶64 For the foregoing reasons, we affirm Rodriguez's convictions and sentences.

ECKERSTROM, Presiding Judge, concurring in part and dissenting in part:

¶65 In a criminal damage case, the state has the burden of establishing the amount of damage and the method of calculating that amount. *State v. Brockell*, 187 Ariz. 226, 229 (App. 1996). And, to survive a judgment of acquittal on the amount of damage, the state must present substantial evidence to prove the value of that loss. *See* Ariz. R. Crim. P. 20(a)(1). Substantial evidence is "such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *Parker*, 231 Ariz. 391, ¶ 70.

¶66 Here, the state presented evidence that the car had been "totaled." This would allow the jury to reasonably conclude that the amount of damage would be the fair market value of the car before the collision. But the state presented no testimony whatsoever about that value, much less any "method" of calculating it. And, although "specific testimony of value is not always necessary if value may be inferred from other evidence," *Spears*, 184 Ariz. at 290, the state presented little evidence from which the jury could make such inferences. The combination of testimony and photographs demonstrated only that the car was an operable

Chevrolet Malibu that appeared to have interior upholstery in good condition.[18] In my view, such sparse evidence falls short of anything this court should characterize as substantial. In essence, the state asked the jury to conclude, beyond a reasonable doubt, that all operable Chevrolet Malibus with good upholstery must be worth at least $2,000.

¶67 Although the make and model of the car and the condition of its upholstery are relevant to its value, the state failed to present any evidence addressing a host of other important factors. How old was the car? How many miles had it been driven during its life? What was the mechanical condition of its engine before the collision? Did the car have a clean or salvage title? In the absence of a collision, would it have needed expensive repairs in the near future? The jury was left to wholly speculate on all of these basic questions, each potentially pivotal in determining a vehicle's value.

¶68 Our supreme court has insisted that evidence of an item's value be more substantial to sustain a criminal conviction. In determining the value of stolen items in a theft case, the court found testimony that a wedding band was "pure gold" insufficient to support that its market value was over $60. *State v. Rushing*, 156 Ariz. 1, 4 (1988); *see also State v. Grannis*, 183 Ariz. 52, 57 n.1 (1995) (circumstantial evidence that victim visited ATM to withdraw $200 was insufficient evidence to show total contents of stolen wallet worth over $1,500). The court so found although the state had presented arguably the most important piece of information in determining the ring's value. The state's presentation here failed to clear even that bar, as it presented no substantial evidence of the vehicle's age, mileage, or overall mechanical condition.

¶69 The majority finds support for its contrary conclusion in *Spears*, 184 Ariz. at 290 (holding state offered sufficient evidence to infer value of truck). There, however, the state offered more than mere evidence of the vehicle's operability and condition of its upholstery. It presented the model year of the truck, testimony from a person familiar with the truck that it was in "good condition," and the defendant's own valuation of the truck as being worth approximately $3,000. *Id.* Those additional facts— which included the age of the vehicle and a knowledgeable opinion that implicitly included an assessment of its mechanical condition—provided reasonable bases for inferences not available to the jury in the instant case.

¶70 For the foregoing reasons, I would hold that the state presented insufficient evidence of damage to support a verdict of guilt as to the criminal damage count. I concur with the well-reasoned majority opinion in all other respects.

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1 When a police vehicle is put into park, the emergency lights remain on but the siren automatically deactivates so the officer can speak without having to "yell over a siren."

2 The state contends Rodriguez "concede[d]" that his failure to "move to suppress his confession or request a voluntariness hearing below" means his claims should be "reviewed only for fundamental, prejudicial error." *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). This misinterprets Rodriguez's argument. Citing to *State v. Tison*, 129 Ariz. 526, 535 (1981), Rodriguez admits that his failure to raise the issue of voluntariness prior to trial means "he has waived his ability [on appeal] to challenge the absence of *Miranda* warnings," but he otherwise argues the issue was "adequately preserved" for appellate review because he both "objected to the introduction [of] his statement at trial" and "presented evidence and argument that his confession was involuntary." *See State v. Bush*, 244 Ariz. 575, ¶ 54 (2018). Rodriguez did not waive his voluntariness argument on appeal.

3 The video clip contained the following exchange:

> Rodriguez: I'm drunk.
> Officer: What's that?
> Rodriguez: I ran away from you guys. And I crashed into that car.
> Officer: Yep. Rodriguez: And I hurt somebody, I killed somebody.
> Officer: You did.

4 Rodriguez additionally argues that his confession was a "post-arrest, custodial statement that was extracted after Rodriguez had requested a lawyer and without the benefit of *Miranda* warnings." However, voluntariness and *Miranda* warning violations are two distinct inquiries. *State v. Rivera*, 152 Ariz. 507, 512 (1987). And, as previously noted, by failing to move to suppress his statements prior to trial, Rodriguez has waived the ability to challenge the absence of *Miranda* warnings on review. *See Tison*, 129 Ariz. at 535. Therefore, to the extent Rodriguez raises a *Miranda*-related claim, we do not address it. *See State v. West*, 238 Ariz. 482, ¶ 49 (App. 2015) (failure to properly address or preserve argument constitutes waiver of appellate review).

5 At the bench conference following Rodriguez's objection, the state argued it had "disclosed all of the evidence in this case early and often," and it had provided Rodriguez with notice of the full hospital video "years" before trial. This necessarily includes the inculpatory statements Rodriguez made in the "isolated [twenty-five] second portion" of the video that was shown to the jury at trial. The ample opportunity Rodriguez had to timely file a motion to suppress or request a voluntariness hearing supports the trial court's comment that "if there was any sort of voluntariness type objection for the [c]ourt to decide, that need[ed] to come well-before trial."

6 Rodriguez generally asserts that a flight instruction is inappropriate in any case where "a defendant is charged with a crime that involves flight or concealment as an element of the offense."

However, he relies almost exclusively on out-of-state cases to support this claim. *See Graves v. Commonwealth*, 780 S.E.2d 904, 908 (Va. Ct. App. 2016); *State v. Girard*, 578 P.2d 415, 417-18 (Or. Ct. App. 1978); *State v. Fast Horse*, 490 N.W.2d 496 (S.D. 1992). We are not bound by the decisions of courts in other states, *State v. Solis*, 236 Ariz. 242, ¶ 14 (App. 2014), and because Arizona caselaw addresses this issue, we need not look to other jurisdictions for guidance.

7 The state argues that even if the flight instruction were improper, "the error was harmless" because there was overwhelming evidence that Rodriguez had committed the crime of unlawful flight and the instruction could not have affected the jury's verdict. But because Rodriguez has forfeited all but fundamental error review, we do not address the state's harmless error argument.

8 Specifically, Rodriguez's argument is based on the flight instruction's reference to "running away" in relation to evidence that he "ran away from [law enforcement]" and the "several references" made throughout trial "to the fact that Rodriguez 'ran' a red light."

9 The court also instructed the jury on the definition of "[k]nowingly" pursuant to A.R.S. § 13-105(10)(b):

Knowingly means that a defendant acted with awareness of the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct is forbidden by law. It is no defense that the defendant was not aware of the existence of conduct or circumstances solely because of voluntary intoxication.

10 With regard to felony murder, the trial court instructed the jury: "The crime of first-degree felony murder requires proof that, one, the defendant committed unlawful flight from a pursuing law enforcement vehicle; and two, in the course of and in furtherance of that offense or immediate flight from that offense, the defendant caused the death of any person."

11 Rodriguez's murder conviction was based on the jury finding him guilty of unlawful flight. Because felony murder "requires no specific mental state other than what is required for the commission" of the felony upon which it is predicated, § 13-1105(B), we address Rodriguez's claim regarding the risk of confusion from the flight instruction only as it relates to the elements of unlawful flight.

12 Relying on *In re Joel*, we stated that "[w]hile operating emergency lights may provide circumstantial evidence that a defendant was 'willfully' fleeing from an official law enforcement vehicle, activation of emergency lights is not an essential element of the crime of unlawful flight." *Martinez*, 230 Ariz. 382, ¶ 7. We then clarified that § 28-622.01 does not require proof that a pursuing law enforcement vehicle was being operated with emergency lights. *Id*. We noted that any statement to the contrary in *State v. Nelson*, 146 Ariz. 246, 249 (App. 1985) is "dicta, and overlooks 'the exception in § 28-624(C) for police vehicles vis-a-vis the emergency lights requirement.'" *Martinez*, 230 Ariz. 382, ¶ 7 (quoting *State v. Fiihr*, 221 Ariz. 135, n.2 (App. 2008)); *see also In re Joel*, 200 Ariz. 512, ¶ 5.

13 In his opening brief, Rodriguez claims he "moved for judgment of acquittal on all counts" at trial. But when arguing the motion to the trial court, Rodriguez focused on the unlawful flight, the first-degree felony murder, and the criminal damage charges, contending there was insufficient evidence for those counts to go to the jury. Rodriguez noted "generally regarding . . . the DUIs and the aggravated assault," that the state had not "met its burden there either," but he did not provide any meaningful argument on those charges. Most importantly, Rodriguez concedes in his opening brief that "[a]t trial, [he] admitted he drove under the influence, caused a fatal collision, and was thus responsible for causing R.C.'s death and M.C.'s injuries." Given Rodriguez's failure to develop sufficient argument on appeal and his concession at trial of guilt on the DUI and aggravated assault charges, we affirm those convictions and sentences despite Rodriguez's claim that he moved for acquittal "on all charges." *See* Ariz. R. Civ. App. P. 13(a)(7); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009).

14 When the deputy arrived at the intersection after the accident, Rodriguez was "climbing out of the driver[-side] window" of his vehicle, but he quickly "fell to the ground" and was "in and out of consciousness." The state did not allege that Rodriguez fled or attempted to flee from the scene of the collision; the unlawful flight charge pertained only to Rodriguez fleeing from the deputy after the attempted traffic stop in the apartment complex parking lot.

15 Rodriguez also argues that his life sentence violates article II, § 15 of the Arizona Constitution, the state corollary to the Eighth Amendment of the United States Constitution. Because the state provision is identical to and provides no greater protection than its federal counterpart, we address both claims in our Eighth Amendment analysis. *See State v. Davis*, 206 Ariz. 377, ¶ 12 (2003).

16 Rodriguez claims Arizona law offers "no sentencing discretion for felony murder" because "courts have no choice but to impose a mandatory life sentence without the possibility of release for [twenty-five] years." This is an inaccurate representation of Arizona's sentencing statute, which provides that if a "defendant is convicted of first-degree murder pursuant to § 13-1105[(A)(2)]," the court has the discretion "to impose a sentence of life or natural life." A.R.S. § 13-752(A). Rodriguez was sentenced to the lesser of the two options—a sentence of life with the possibility of release after twenty-five years. Thus, the trial court both recognized and exercised the sentencing discretion

available given Rodriguez's conviction.

17 To support this contention, Rodriguez cites two unpublished memorandum decisions, which are not binding on this court and do not persuade us to reach a different conclusion. *See* Ariz. R. Sup. Ct. 111(c)(1)(C) ("Memorandum decisions of Arizona state courts are not precedential and such a decision may be cited only for persuasive value . . . .").

18 I cannot agree with my colleagues that the overall condition of the car can be reasonably inferred from the post-collision photos. Those photos show paint discolorations around the wheel well on the non-collision side of the vehicle and the absence of a hubcap on the collision side. The state leaves the jury to speculate about whether these blemishes were caused by the accident or were pre-existing. Most importantly here, the photographs in evidence shed no light on the pre-collision mechanical condition of the engine. Nor do they show the mileage on the car's odometer.

Cite as
148 Arizona Cases Digest 37

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE of Arizona,
Appellee,
v.
Anthony B. HENDRICKS,
Appellant.

No. 1 CA-CR 24-0232
FILED 05-13-2025

Appeal from the Superior Court in Maricopa County
No. CR2022-114663-001
The Honorable Suzanne Marie Nicholls, Judge
AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael T. O'Toole, *Counsel for Appellee*
Maricopa County Legal Defender's Office, Phoenix, By Cynthia D. Beck
Counsel for Appellant

OPINION

Vice Chief Judge Randall M. Howe delivered the Opinion of the Court, in which Presiding Judge Brian Y. Furuya and Chief Judge David B. Gass joined.

This opinion is subject to revision before publication in the Pacific Reporter.

HOWE, Judge:

¶1 Anthony Hendricks appeals from his conviction and sentence for misconduct involving weapons. He argues that the superior court erred by not instructing the jury on a necessity defense. See A.R.S. § 13-417.

¶2 At trial, Hendricks requested "Defense of Premises" and "Crime Prevention" instructions, *see* A.R.S. §§ 13-407, 13-411, but did not specifically request a necessity defense instruction. We now clarify that a request for one justification defense instruction does not preserve a challenge relating to a different justification defense on appeal, which we therefore review for fundamental error. We affirm because the court need not sua sponte instruct the jury on a justification defense that has not been requested. *State v. Brown*, ___ Ariz. ___, ___ ¶ 30, 556 P.3d 776, 782 (App. 2024).

FACTS AND PROCEDURAL BACKGROUND

¶3 We view the facts "in the light most favorable to upholding the jury's verdicts, resolving all reasonable inferences against the defendant." *State v. Duncan*, 257 Ariz. 360, 366 ¶ 2 (App. 2024).

¶4 On the night of April 23, 2022, Hendricks and another man were loudly arguing outside the ground floor of an apartment complex in Phoenix. A gun was fired, striking the other man in the leg. The man then ran up a set of stairs.

¶5 Hendricks, who was holding a gun, walked over to his apartment on the ground floor, banging on its window and screaming at its occupants to let him inside. After the occupants would not open the door, Hendricks broke the window. Hendricks handed the gun to someone in the apartment through the window.

¶6 Police arriving in response to a shots-fired call searched Hendricks, finding three bullets in a pocket. Police later patted down Hendricks's teenage stepson, finding a gun in his waistband. Hendricks's DNA was found on both the gun and its magazine.

¶7 The State charged Hendricks, who was a prohibited possessor of firearms, with misconduct involving weapons. Hendricks initially noticed several defenses, *see* Ariz. R. Crim. P. 15.2(b), but did not include justification. Before trial, Hendricks filed a supplemental notice including justification defenses generally without specifying the type. *See* A.R.S. §§ 13-401–421.

¶8 The State moved in limine to preclude any justification defense. At pretrial argument on the motion, Hendricks argued he wished specifically to raise a "defense of community." The court granted the motion, finding justification is not statutorily permitted for misconduct involving weapons charges. Before voir dire, Hendricks stated circumstances might arise permitting "justification and necessity" defenses. But the court treated his statement as simply noting he would move for reconsideration of the court's ruling if the evidence developed at trial so warranted.

¶9 At the close of evidence, Hendricks moved for reconsideration of the ruling and requested "additional instructions regarding justification on those different points" as "indicated in the e-mails prior to the hearing today." In those emails, Hendricks made "a record on my requesting a (Statutory) justification instruction for 'Defense of Premises', and 'Crime Prevention'." Hendricks conceded that he understood the law did not permit a justification defense for misconduct involving weapons, but he argued that "it would be in the interest of justice were the law to start to allow justification and necessity defenses in a misconduct involving weapons case." The court denied the motion, finding persuasive the reasoning of a depublished case that justification defenses are not permitted for misconduct involving weapons charges.

¶10 At trial, a witness from the apartment adjacent to Hendricks's testified that he (1) heard Hendricks arguing with the victim, (2) heard a gunshot, (3) saw the victim run upstairs, and (4) saw Hendricks bang on his window, break it, and hand a gun to an occupant inside. Hendricks testified that the argument was between the victim and his stepson and that he took possession of the gun only after the shot was fired. He further testified that he told police he possessed the gun to protect his teenage stepson from trouble.

¶11 A jury convicted Hendricks of misconduct involving weapons, and he timely appealed. We have jurisdiction. Ariz. Const. art. 6, § 9; A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A).

DISCUSSION

¶12 Hendricks argues that the trial court abused its discretion by not providing a necessity instruction under A.R.S. § 13-417(A). Our standard of review depends on whether Hendricks requested a necessity instruction at trial, thereby preserving the challenge, which we now address.

I. Preservation on Appeal of Necessity Defense Challenge.

¶13 The State contends that although "Hendricks argued that 'justification and necessity defenses' should be available in a weapons misconduct case as a general principle," he never specifically requested a necessity instruction. Thus, it argues fundamental error review applies. Hendricks responds that he preserved the issue because "[c]ounsel repeated that 'necessity justification' should apply in the circumstances of this case and later argued that it would be in the interest of justice to permit an instruction on 'justification and necessity' in a misconduct involving weapons case."

¶14 On appeal, to preserve a challenge to the omission of a justification defense instruction, the defendant must specifically request that instruction at trial because justification instructions are a choice of core trial strategy. *See Brown*, 556 P.3d at 782 ¶ 28 ("[W]hat justification defenses (if any) a criminal defendant may wish to press fairly is a question of trial strategy."). "Currently, there are nearly 20 justification defenses addressing a wide variety of circumstances." *Id.* at 782 ¶ 27; *see* A.R.S. §§ 13-401–21. These defenses describe "conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct." A.R.S. § 13-205(A). Thus, "an affirmative defense is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt." *State v. Farley*, 199 Ariz. 542, 544 ¶ 11 (App. 2001).

¶15 In other words, by requesting a justification defense instruction, the defendant argues that even if he committed the alleged act, he is not criminally liable because he was justified in committing the act. *See Patterson v. New York*, 432 U.S. 197, 206–07 (1977) (An affirmative defense "does not serve to negative any facts of the crime which the State is to prove in order to convict . . . ."). But a defendant cannot simply claim his conduct was justified without more; the law distinguishes each defense from one another, *see* A.R.S. §§ 13-401–21; Ariz. R. Crim. P. 15.2(b)(1), and conduct justified under one defense may not be justified under another.

Thus, the defendant must explain how his conduct was justified under the specific claimed justification defense. "'For all we know, defendant might have objected had the trial court done what the appeals court now says it was required to do' (sua sponte provide a justification instruction)." *Brown*, 556 P.3d at 782 ¶ 28 (quoting *State v. Gendron*, 168 Ariz. 153, 154 (1991)).

¶16 Without a specific request from counsel, the court need not "determine which of these disparate justification defenses ha[s] to be included in final jury instructions." *Id.* at 782 ¶ 27. If the defendant could preserve a challenge to the omission of all justification defense instructions by raising any justification defense at trial, in effect we would allow the defendant to invite trial error and profit from it on appeal. *See State v. Lucero*, 223 Ariz. 129, 135 ¶ 17 (App. 2009). Thus, raising one justification defense does not preserve a challenge relating to a different justification defense on appeal. *See Brown*, 556 P.3d at 782 ¶ 30 ("Trial courts have no duty to instruct the jury on justification defenses that have not been requested."); *State v. Vassell*, 238 Ariz. 281, 290 ¶ 40 (App. 2015) (Eckerstrom, J., specially concurring) (Defendant's request for a "'justification instruction' attempted to foist upon the trial court the dual tasks of selecting among the various justification statutes in chapter 4 of title 13 and drafting an accurate jury instruction."); Ariz. R. Crim. P. 15.2(b)(1) (requiring pretrial disclosure of "all defenses the defendant intends to assert at trial" and distinguishing between different defenses, including justification defenses).

¶17 During the three discussions about justification defenses, Hendricks never requested a necessity instruction. When the court first heard oral argument on the State's motion in limine, Hendricks stated only that "defense of community" was relevant to the misconduct involving weapons charge. Then, when counsel made a record before voir dire on "justification and necessity" defenses, he confirmed he was not challenging the court's ruling at that time because "this may or may not be one of those circumstances" where the defense is allowed. Instead, he would move for reconsideration "when and if it [became] appropriate."

¶18 When that time came, Hendricks specifically requested justification instructions as "indicated in the e-mails prior to the hearing today." And in those emails, Hendricks requested only "Defense of Premises" and "Crime Prevention" instructions. Significantly, the emails make no mention of necessity. Thus, these requests do not preserve a challenge to the court's omission of a necessity defense instruction.

II. Fundamental Error.

¶19 Because Hendricks did not request a necessity instruction at trial, we review the superior court's omission of a necessity instruction for fundamental error. Ariz. R. Crim. P. 21.3(b); *State v. Escalante*, 245 Ariz. 135, 142 ¶ 1 (2018). Hendricks has the burden to establish that the error (1) occurred, (2) was fundamental, and (3) caused him prejudice. *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citing cases).

¶20 Hendricks argues that the court committed fundamental error by not sua sponte giving a necessity instruction. But in support, Hendricks cites an opinion by this Court that the Arizona Supreme Court vacated during the course of this appeal. *See State v. Jones*, 559 P.3d 1112, 1114 (Ariz. App. 2024) (holding that the superior court erred by not sua sponte instructing the jury on a justification defense), *review granted, opinion vacated*, No. CR-24-0286-PR, 2025 WL 711118 (Ariz. Mar. 5, 2025). In vacating *Jones*, the supreme court remanded for reconsideration in light of this Court's opinion in *Brown*. *Jones*, No. CR-24-0286-PR. In *Brown*, this Court held that "[t]rial courts have no duty to instruct the jury on justification defenses that have not been requested." 556 P.3d at 782 ¶ 30. Thus, because the court did not have a duty to sua sponte instruct the jury on a necessity defense, the court did not err.

CONCLUSION

¶21 We affirm.

Cite as
148 Arizona Cases Digest 40

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

The STATE of Arizona,
Respondent,
v.
David Nickolas DELICH,
***Petitioner*.**

No. 2 CA-CR 2024-0224-PR
Filed May 14, 2025

Petition for Review from the Superior Court in Pima County
No. CR20082239001
The Honorable Danielle J.K. Constant, Judge
REVIEW GRANTED; RELIEF DENIED

COUNSEL
Laura Conover, Pima County Attorney
By J. William Brammer, Jr. and James W. Rappaport, Deputy County Attorneys, Tucson
Counsel for Respondent
Megan Page, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson, *Counsel for Petitioner*

OPINION
Presiding Judge Eckerstrom authored the opinion of the Court, in which Judge Vásquez and Judge Sklar concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

ECKERSTROM, Presiding Judge:
¶1 David Delich seeks review of the superior court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that decision absent an abuse of discretion, see State v. Hagerty, 255 Ariz. 112, ¶ 1 (App. 2023), which Delich has not demonstrated here.
¶2 In 2012, Delich pled guilty except insane (GEI) to seven counts of aggravated assault with a deadly weapon and two counts of discharging a firearm at a residential structure. *See* A.R.S. § 13-502(A) ("A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong."). He also pled guilty to first-degree murder and an additional count of aggravated assault with a deadly weapon. For the GEI counts, the superior court placed Delich under the supervision of the Psychiatric Security Review Board for an aggregate term of 91.5 years. For Delich's remaining convictions, the court imposed concurrent prison terms, including a life term for first-degree murder without release eligibility for twenty-five years.
¶3 In 2024, Delich sought post-conviction relief for the first time. He argued, under Rule 33.1(h), that his non-GEI convictions should be "modified to GEI adjudications" because no reasonable jury could have found him guilty beyond a reasonable doubt and instead would have found him GEI. He additionally asserted that the twelve-year delay in seeking relief did not bar his claim, because counsel had only recently determined that his "novel[]" claim was viable under Rule 33.1(h).
¶4 The superior court summarily dismissed Delich's petition. It first determined the claim was untimely because Delich and his counsel understood at the time of the 2012 change-of-plea hearing "the possible legal issues with Delich accepting a plea to both guilty and guilty-except-insane from the same indictment." The court concluded that the twelve-year delay was thus unreasonable. The court also rejected Delich's claim on the merits, noting the state was required to prove his guilt beyond a reasonable doubt whether the ultimate verdict was guilty or GEI and that either verdict imposed "criminal culpability." Thus, the court concluded, the claim "does not fall under the auspices of Rule 33.1(h)." This petition for review followed.
¶5 We first address Delich's argument on review that he timely sought relief under Rule 33.1(h). Rule 33.4(b)(3)(B) requires that a claim under Rule 33.1(h) must be filed "within a reasonable time after discovering the basis for the claim." In Delich's view, any reasonable jury would have found him GEI instead of guilty if his case had proceeded to trial. Therefore, notwithstanding that he pled guilty—rather than GEI—to the underlying offenses, he contends that he qualifies for relief. *See* Ariz. R. Crim. P. 33.1(h) (providing potential remedy when petitioner presents facts demonstrating "no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt" had those facts been presented). He relies primarily on *State v. Reed*, 252 Ariz. 236 (App. 2021), and *State v. Solano*, 257 Ariz. 10 (App. 2024), in asserting that he raised this claim within a reasonable time. Neither case aids his argument.
¶6 In *Reed*, the defendant pled guilty to attempted reckless child abuse—an offense that does not exist under Arizona law. 252 Ariz. 236, ¶¶ 8-9. But he did not contest his conviction on that basis until years later, in his second post-conviction proceeding. *Id.* ¶ 4. We nonetheless determined Reed had brought his claims under Rule 33.1(c) and (h) within a reasonable time under Rule 33.4(b)(3)(B). *Id.* ¶ 15. We noted that when evaluating whether a defendant's delay in bringing a claim was reasonable, courts should consider

several factors, including "the consequences of a failure to address the merits of the claim and the prejudice to the State or victim." *Id.* ¶ 14. Because his conviction and sentence were illegal and the state asserted no prejudice, we concluded the delay was reasonable under the circumstances. *Id.* ¶ 14. We held that, "when a defendant pleads guilty to an offense not cognizable under Arizona law, an illegal-sentence claim under Rule 33.1(c) or actual-innocence claim under Rule 33.1(h) is not time-barred if there is no evidence presented beyond the mere passage of time to suggest unreasonable delay." *Id.* ¶ 15.

¶7 But, although Delich characterizes his claim as falling within Rule 33.1(h), it is not a claim of actual innocence. Delich has not identified any defect in the factual basis for his plea nor otherwise suggested his conviction is improper. And the prejudice to the state is apparent—it would lose the benefit of a bargained-for plea agreement based, in part, on Delich's voluntary decision to forgo a GEI defense to avoid facing the death penalty. In any event, *Reed* does not address the question presented here— the meaning of "the basis for the claim" under Rule 33.4(b)(3)(B).

¶8 In *Solano*, the defendant asserted a claim under Rule 32.1(f) that his failure to timely appeal was not his fault. 257 Ariz. 10, ¶ 3. The trial court rejected the claim, concluding the three-year delay in bringing the claim was unreasonable. It so found notwithstanding Solano's explanation that he was unaware the appeal had not been filed because the COVID-19 pandemic had prevented him from communicating with those from whom he eventually learned that he should have heard the status of his appeal by that time. *Id.* ¶¶ 5, 12. We granted relief on review, noting that Rule 32.4(a)(3)(B) did not require Solano to "discover his claim within a reasonable time" but instead to raise it within a reasonable time of discovery. *Id.* ¶¶ 11, 14.

¶9 But, like our decision in *Reed*, our decision in *Solano* does not depend on an assessment of whether the defendant was aware of the basis for the claim at a previous time—the trial court found credible Solano's testimony that he was unaware his appeal had not been filed. *Id.* ¶ 12. Nor does it address whether Rule 32.4(a)(3)(B) hinges on when a defendant knew the legal and factual underpinnings of a claim—or instead when the defendant concluded the claim could be raised in a post-conviction proceeding. Here, where the petitioner delayed twelve years in raising his claim, the passage of time becomes a more pivotal factor in assessing reasonableness of any delay. Accordingly, the time window within which Delich could have reasonably discovered the basis for his claim must be central to our analysis.

¶10 Delich insists that the point from which we evaluate his reasonableness is the point at which he determined he could raise the GEI defense under Rule 33.1(h). Otherwise, he argues, we are incorrectly interpreting the "basis of the claim" to mean the facts underlying the claim. We interpret the Arizona Rules of Criminal Procedure de novo. *State ex rel. Thomas v. Newell*, 221 Ariz. 112, ¶ 7 (App. 2009). We look first to the plain language of the rule because that is "the best and most reliable index of [the rule's] meaning." *State v. Hansen*, 215 Ariz. 287, ¶ 7 (2007) (quoting *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 8 (2007)). And "we will give effect to each word, phrase and clause included by the supreme court." *Ariz. Dep't of Revenue v. Superior Court*, 189 Ariz. 49, 52 (App. 1997).

¶11 Delich's argument cuts both ways. Had the supreme court intended "basis of the claim" to simply mean the claim itself, it presumably would have said so. In other words, Delich's interpretation removes the words "basis of" from the rule—a result we are not permitted to reach. *See id.* To give that phrase meaning, we must conclude it means the factual and legal underpinnings of the post-conviction claim, not the recent understanding that those factual and legal underpinnings might support a post-conviction claim.[1]

¶12 Delich does not assert that he only recently came to understand a GEI affirmative defense was available. Nor can he assert that he only recently came to understand that the factual basis he provided for the guilty pleas might run counter to evidence in his possession supporting a GEI verdict at trial. Indeed, the record shows counsel understood that the evidence supported a GEI defense, that there was contrary evidence, and that there were implications stemming from pleading to GEI on some offenses and guilty to others. In a brief supporting the plea agreement, Delich asserted that a trial court may lawfully accept a guilty plea to offenses that are premised on inconsistent factual bases, specifically the consistency between pleading GEI to some offenses he committed during the shootings and police chase, but guilty to others. And, at the change-of-plea hearing, Delich's counsel observed that Delich's mental state may have changed during the course of his offenses and that he had made statements suggesting he knew the wrongfulness of at least some of his conduct. Counsel further noted that, given the risk a jury could reject Delich's GEI defense, it was "in [Delich's] best interests to enter those pleas." Thus, the legal question presented by Delich's Rule 33.1(h) claim—whether any reasonable jury could reject his GEI defense—was a key consideration at the time of his pleas.

¶13 Further, Delich's counsel conceded at oral argument that the same legal claim could have been fashioned either as a challenge to the factual basis for the plea or an ineffective assistance of counsel claim pursuant to Rule 33.1(a) (providing potential remedy for pleas secured "in violation of the United States or Arizona Constitutions"). Such claims are

subject to more stringent timeliness requirements. *See* Ariz. R. Crim. P. 33.4(b)(3)(A) (requiring defendant to file a notice of claim under Rule 33.1(a) within ninety days of oral pronouncement of sentence); Ariz. R. Crim. P. 33.7(a)(1) (requiring filing within sixty days of the appointment of post-conviction counsel). In essence, Delich has conceded that he delayed filing the instant petition twelve years beyond the expiration of an opportunity to file a species of the same claim pursuant to Rule 33.1(a). *See* Ariz. R. Crim. P. 33.4(b)(3)(A), 33.7(a)(1). Given the state's and victims' interest in finality that energize all of the timeliness requirements set forth in Rule 33, Delich's failure to pursue the gravamen of his claim at the first available opportunity must also be considered a factor in assessing the reasonableness of his delay in now filing his petition pursuant to Rule 33.1(h).

¶14 In sum, Delich was aware of both the factual and legal bases for his current claim at the very moment he entered the plea he now challenges. Nonetheless, he has failed to raise that claim for twelve years, a delay which insults the state's and victims' interest in finality. And, by raising his claim under Rule 33.1(h), he has side-stepped more stringent deadlines for such arguments he had an opportunity to raise within months of his sentencing. Accordingly, we cannot say the superior court erred in concluding Delich did not raise his claim within a reasonable time. We therefore need not address the underlying merits of that claim.

¶15 We grant review but deny relief.

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1 Delich suggests this interpretation cannot be correct because it would bar claims based on a significant change in the law under Rule 33.1(g) because a defendant might have knowledge of underlying facts before the law changed. But a defendant could not know the legal underpinnings of a claim under Rule 33.1(g) until the law changed. Additionally, for the first time at oral argument, Delich proposed that we must weigh the reasonableness of his delay in bringing the claim against the heavy burden he faces in obtaining relief even if we deemed the claim timely. We see no connection between these distinct questions. A delay is not rendered more reasonable because the defendant is less likely to prevail on the underlying claim.

Cite as
148 Arizona Cases Digest 42

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE of Arizona,
Appellee,
v.
Edwardo SERRATO, III,
Appellant.

No. CR-24-0264-PR
Filed May 14, 2025

Appeal from the Superior Court in Mohave County
The Honorable Billy K. Sipe, Judge Pro Tempore
No. S8015CR201800630
REVERSED AND REMANDED

Opinion of the Court of Appeals, Division One
557 P.3d 795 (App. 2024)
VACATED

COUNSEL:

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VICE CHIEF JUSTICE LOPEZ authored the Opinion of the Court, in which CHIEF JUSTICE TIMMER, JUSTICES BOLICK, BEENE, MONTGOMERY, KING, and BERCH (Retired)* joined.

This opinion is subject to revision before publication in the Pacific Reporter.

VICE CHIEF JUSTICE LOPEZ, Opinion of the Court:

¶1 We consider whether an arsonist's lone presence at the time of the crime is sufficient to support a conviction for arson of an "occupied structure" under A.R.S. § 13-1704. An "occupied structure" is one "in which one or more human beings either is or is likely to be present or so near as to be in equivalent danger at the time the fire or explosion occurs." A.R.S. § 13-1701(2). The dispositive issue is whether, in committing arson of an "occupied structure," an arsonist qualifies as a "human being" under § 13-1701(2).

¶2 We hold that, in context, the meaning of "occupied structure" in §§ 13-1701(2) and -1704 unambiguously excludes arsonists. An alternative

interpretation would render A.R.S. § 13-1703 nearly superfluous and undermine the tiered arson statutory scheme. Accordingly, we interpret "occupied structure" in §§ 13-1701(2) and -1704 to mean a structure in which one or more human beings—other than the arsonist—are present, likely to be present, or so near as to be in equivalent danger at the time of the fire or explosion.

BACKGROUND

¶3 On Christmas night in 2007, firefighters in Kingman, Arizona extinguished a fire engulfing a pickup truck. Investigators smelled gasoline fumes and discovered a residue of unusual flammable liquids and remnants of a gas can on the driver's seat. Based on the evidence, investigators confirmed that someone had intentionally set the fire inside the truck.

¶4 Officers traced the truck's registration to Anna Hammond, who lived about a mile from the fire. When police entered her home, they found her and her dog lying on the floor in a pool of blood. The dog was dead, and Hammond later died from her injuries. The kitchen stove was on, gas fumes filled the home, and someone had tried to start a fire on the kitchen table. Hammond's jewelry, gun, coins, and cash were also missing.

¶5 A grand jury indicted Edward Serrato III for these crimes. After a seven-day trial in 2023, a jury convicted him of second degree murder, first degree burglary, arson of an occupied structure (the vehicle), theft of means of transportation, and attempted arson of an occupied structure (the house). The court imposed consecutive sentences for each of these charges, totaling 135 years—35 of which stemmed from the vehicle arson conviction.

¶6 Serrato appealed his convictions and resulting sentences. The court of appeals, on its own motion, ordered supplemental briefing on the vehicle arson conviction. The catalyst was the prosecutor's claim during closing arguments that "[Serrato] himself was obviously present when he set the truck on fire, so his presence alone makes the truck an occupied structure, even if no one was inside the vehicle."

¶7 The court of appeals issued a memorandum decision affirming Serrato's convictions and sentences for second degree murder, first degree burglary, theft of means of transportation, and attempted arson of an occupied structure (the house). *See State v. Serrato* ("*Serrato II*"), No. 1 CA-CR 23-0384, 2024 WL 4216167, at *1 ¶ 1 (Ariz. App. Sept. 17, 2024) (mem. decision). The court also issued an opinion on the vehicle arson conviction acknowledging that there was no evidence that anyone besides the defendant was in or near the truck when the fire started. *State v. Serrato* ("*Serrato I*"), 557 P.3d 795, 796 ¶ 7 (Ariz. App. 2024). Nevertheless, the court held that Serrato's presence alone satisfied the occupancy requirement under § 13-1704 and affirmed his conviction and sentence. *See id.* at 796 ¶ 7, 797 ¶ 12.

¶8 Serrato petitioned this Court for review. We granted review to address an issue of first impression and statewide importance that is likely to recur: whether an arsonist's presence alone is sufficient to support a conviction of arson of an occupied structure under § 13-1704. We have jurisdiction under article 6, section 5(3), of the Arizona Constitution and A.R.S. § 12-120.24.

DISCUSSION

¶9 Whether an arsonist's lone presence is sufficient to support a conviction under § 13-1704 involves statutory interpretation, a matter we review de novo. *See Planned Parenthood Ariz., Inc. v. Mayes*, 257 Ariz. 137, 142 ¶ 13 (2024). When interpreting statutes, this Court starts with the text. *Franklin v. CSAA Gen. Ins. Co.*, 255 Ariz. 409, 411 ¶ 8 (2023). "We interpret statutory language in view of the entire text, considering the context and related statutes on the same subject." *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019). If a statute's text is clear and unambiguous, it controls unless it results in an absurdity or a constitutional violation. *4QTKIDZ, LLC v. HNT Holdings, LLC*, 253 Ariz. 382, 385 ¶ 5 (2022). However, "[i]f the statutory language is ambiguous—if 'it can be reasonably read in two ways'—we may use alternative methods of statutory construction, including examining the rule's historical background, its spirit and purpose, and the effects and consequences of competing interpretations." *Planned Parenthood Ariz.*, 257 Ariz. at 142 ¶ 17 (quoting *State v. Salazar-Mercado*, 234 Ariz. 590, 592 ¶ 5 (2014)).

I.

¶10 Section 13-1704(A), which establishes arson of an occupied structure, provides that "[a] person commits arson of an occupied structure by knowingly and unlawfully damaging an occupied structure by knowingly causing a fire or explosion." As a class 2 felony, arson of an occupied structure is the most severe arson offense. *Compare* § 13-1704(B), *with* A.R.S. § 13-1702(B) (reckless burning: class 1 misdemeanor) *and* § 13-1703(B) (arson of unoccupied structure: class 4 felony; arson of property: class 1 misdemeanor or class 4 or 5 felony depending on the property's value).

¶11 Hammond's truck constitutes a structure because § 13-1701(4) defines "structure" as including "any building, object, *vehicle*, watercraft, aircraft or place with sides and a floor, used for lodging, business, transportation, recreation or storage." (Emphasis added.) But the pertinent and closer question is whether Hammond's truck constitutes an "*occupied* structure" under § 13-1701(2). (Emphasis added.)

¶12 An "occupied structure" is a structure "in which one or more human beings either is or is likely to be present or so near as to be in equivalent danger at the time the fire or explosion occurs." § 13-1701(2). Under § 13-1701(2), we must consider Hammond's truck an "occupied structure" if (1) a human being was inside the truck, (2) a human

being was likely to be inside the truck, or (3) a human being was so near the truck as to be in equivalent danger. Whether Serrato, as the arsonist, qualifies as a "human being" for purposes of the occupancy requirement depends on the statute's contextual plain meaning.

II.

¶13 Section 13-1701 does not define "human being." Because the legislature adopted § 13-1701 in 1977, contemporary dictionary definitions control. *See Garibay v. Johnson*, 565 P.3d 236, 243 ¶ 24 (Ariz. 2025) ("Absent a statutory definition, we may consider dictionaries and written publications to discern the word's common meaning and usage, respectively, at the time the legislature enacted the statute."). Those definitions confirm that "human being" encompasses all people. *See Human Being*, The American Heritage Dictionary of the English Language (1969) ("A member of the genus Homo, and especially of the species Homo sapiens"); *Human Being*, Ballentine's Law Dictionary (1969) ("A person, male or female.").

¶14 In line with these definitions, the court of appeals determined that the "occupied structure" definition under § 13-1701(2) was "unambiguous" because "[b]y its plain language, 'one or more human beings' encompasses all human beings—including the defendant." *Serrato I*, 557 P.3d at 796 ¶ 10 (quoting § 13-1701(2)). Accordingly, the court upheld Serrato's conviction because "[a] defendant's presence alone is sufficient to sustain a conviction for arson of an occupied structure" under § 13-1704. *Id.* at 797 ¶ 12.

¶15 But the court of appeals conflated textualism with literalism. Literalism, also known as strict constructionism, involves "a narrow, crabbed reading of a text." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 355–56 (2012). Textualism, on the other hand, "does not limit one to the hyperliteral meaning of each word in the text." *Id.* at 356. We do not interpret a statute's plain text hyper literally to determine whether it is unambiguous. *See In re Drummond*, 257 Ariz. 15, 18 ¶ 5 (2024); *see also Niz-Chavez v. Garland*, 593 U.S. 155, 168–69 (2021) (noting that "when interpreting this or any statute, we do not aim for 'literal' interpretations," instead, "textual and contextual clues persuade us of [a] statute's ordinary meaning").

¶16 Rather, Arizona courts analyze whether the "statute's plain language is unambiguous *in context*." *Drummond*, 257 Ariz. at 18 ¶ 5 (emphasis added). "In context" means reading statutes as a cohesive whole so that "no word or provision is rendered superfluous." *In re Riggins*, 257 Ariz. 28, 31 ¶ 12 (2024). Indeed, "one of the more important [statutory construction] rules is that effect shall, if possible, be given to every part of a statute." *Town of Florence v. Webb*, 40 Ariz. 60, 64 (1932). The court of appeals overlooked several contextual clues that inform the meaning of "human being" in § 13-1701(2).

A.

¶17 Section 13-1704 targets "[a] person" who knowingly damages "an occupied structure," signaling a distinction between the actor (the arsonist) and the object of the offense (a structure occupied by others). While the legislature used "person" to refer to the arsonist, it used "human being" in § 13-1701(2)'s definition of "occupied structure," indicating that the legislature did not intend for the arsonist to be the "human being" referenced in § 13-1701(2). This actor-object structure mirrors other title 13 statutes that distinguish the defendant from "human beings" potentially at risk. For example, A.R.S. § 13-3102(A)(9) prohibits a person from "[d]ischarging a firearm at an occupied structure," and A.R.S. § 13-3101(6) defines "occupied structure" as one where "one or more human beings" are present or in equivalent danger. In these statutes, the term "human beings" refers to third parties—not the shooter—at risk of harm. So too here. While § 13-1701(2) defines "occupied structure" as including "human beings," it does not nullify the actor-object distinction in § 13-1704. Instead, § 13-1704 presumes a structure occupied by others, not merely the actor setting it ablaze.

¶18 The definition of "occupied structure" further supports this reading. Section 13-1701(2) defines "occupied structure" as including "any dwelling house, whether occupied, *unoccupied or vacant*." (Emphasis added.) Because the arsonist is almost always present, if the arsonist's presence alone was enough to satisfy the statute, the term "vacant" would be insignificant. *See State v. Deddens*, 112 Ariz. 425, 429 (1975) (noting that we avoid rendering statutory language "superfluous, void, contradictory or *insignificant*" (emphasis added)). "[W]hen possible, we interpret statutes to give meaning to every word." *State v. Gates*, 243 Ariz. 451, 454 ¶ 13 (2018) (quoting *State v. Pitts*, 178 Ariz. 405, 407 (1994)). We decline to construe § 13-1701(2) in a way that would render the term "vacant" mere surplusage. *See Deddens*, 112 Ariz. at 429; *see also Mussi v. Hobbs*, 255 Ariz. 395, 398 ¶ 13 (2023) (stating that courts give meaning to every word in statutes to avoid rendering any part inert or trivial). Rather, the inclusion of "vacant" confirms that the statute anticipates scenarios where no one—arsonist or victim—is present. This language suggests that occupancy requires the presence or likely presence of others, not the arsonist.

B.

¶19 The court of appeals also ignored the context of the broader arson statutory scheme. Courts read statutes in harmony to avoid leaving any provision "superfluous, void, contradictory or insignificant." *Deddens*, 112 Ariz. at 429; *see also City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949) (noting that we give meaning to "[e]ach word, phrase, and sentence . . .

so that no part will be void, inert, redundant, or trivial"). We are also guided by A.R.S. § 13-104, which instructs us to interpret statutes to "promote justice and effect the objects of the law," and A.R.S. § 13-101, which requires us to distinguish between serious and minor offenses and to ensure proportionality.

¶20 Arizona's criminal code defines three tiers of arson. The least severe offense, reckless burning, is a class 1 misdemeanor and applies when someone "recklessly" causes a fire or explosion that damages an "occupied structure, a structure, wildland or property." § 13-1702. The next tier, arson of a structure or property, a class 4 felony depending on property value, occurs when a person damages "a structure or property by knowingly causing a fire or explosion." § 13-1703. The most severe offense, arson of an occupied structure, is a class 2 felony and applies when a defendant "knowingly" causes a fire or explosion to an "occupied structure." § 13-1704. The primary difference between the crimes delineated in §§ 13-1703 and -1704 is the "occupied" requirement.

¶21 Serrato argues that, under the court of appeals' reasoning, nearly every instance of arson involving a structure would automatically fall under § 13-1704 since the arsonist's presence alone would satisfy the statutory definition of "occupied." We agree. Under that reading, § 13-1703 would retain only modest remaining application. To be sure, § 13-1703 would still cover arson of property that is not a structure. But, as for arson to structures, § 13-1703 would conceivably only apply to remote arsonists—those who start a fire while at a safe distance from the structure.

¶22 Perhaps even this assessment overstates § 13-1703's residual application under the court of appeals' interpretation. Under § 13-1701(2), an "occupied structure" also includes a structure where a human being is "likely to be present." So, even if a remote arsonist is not physically present or near enough to be in equivalent danger, a court could deem the arsonist "likely to be present" at the time of ignition because setting a remote incendiary device may result in a premature ignition. Thus, the court of appeals' interpretation does not merely broaden § 13-1704—it effectively displaces § 13-1703 as a viable, independent offense concerning arson of structures.

¶23 This outcome is at odds with the legislature's tiered approach, which assigns greater penalties to arson offenses that create heightened risks to innocent human life. *See* § 13-101(4) (providing that the public policy of this State is "[t]o differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties for each"). Indeed, while arson of a "structure" is a class 4 felony, arson of an occupied structure is a class 2 felony, with the latter resulting in harsher sentencing. *Compare* § 13-1703(B), *with* § 13-1704(B). And, as Serrato argues, arson of an "occupied structure" is a more serious offense because of the inherent danger to property *and* persons. In *State v. Gatliff*, 209 Ariz. 362, 366 ¶ 18 (App. 2004), the court of appeals held that arson of an occupied structure justifies a "greater term of imprisonment" precisely because it involves the risk of serious injury to a person inside. As such, we decline to strip § 13-1703, a separate crime, of its meaning and vitality without express instruction from the legislature.

¶24 We rejected a similarly problematic interpretation in *City of Mesa v. Killingsworth*, 96 Ariz. 290, 294–95 (1964), where reading "fuel" to include all liquids used in motor vehicles would have rendered another tax provision on motor vehicle fuel meaningless. There, this Court reasoned that "if by A.R.S. § 28-126 the legislature meant to include all liquids used in motor vehicles on highways other than kerosene, then the language used in A.R.S. § 28-1551, taxing liquids used in internal combustible engines to propel motor vehicles on highways, is surplusage" and "meaningless." *Id.* at 294 ("If it were intended that all liquids were to be taxed under § 28-126, then there are no liquids to be taxed under § 28-1551.").

¶25 Just as we concluded in *Killingsworth* that the legislature could not have intended to enact a provision with no operative effect, the same principle applies here. Reading "human beings" in § 13-1701(2) as including the arsonist significantly circumscribes the lesser offense of arson of a structure under § 13-1703. And we presume the legislature did not intend to do a "futile thing" by including a provision that largely serves no purpose regarding arson of structures. *See Killingsworth*, 96 Ariz. at 294–95; *see also In re M.N.*, 563 P.3d 136, 142 ¶ 30 (Ariz. 2025) (interpreting two statutes to avoid creating "multiple requirements" rendering one of the statute's provisions "superfluous").

¶26 Our decision in *State v. Ewer*, 254 Ariz. 326, 329 (2023), also buttresses our contextual statutory analysis. In *Ewer*, the question was whether "the reference to 'person' in [A.R.S.] § 13-404(A) is necessarily limited to a defendant, as reflected in Arizona's self-defense jury instruction," or whether it could also include the victim. *Id.* ¶ 12. To resolve that question, we considered "the context of § 13-404(A) and related statutes on the same subject to properly discern the statutory definition." *Id.* ¶ 13. Upon considering "the related justification statutes . . . for context," we held that "person" reflects a focus on the defendant as "an individual accused of a crime and subject to criminal prosecution." *Id.* at 330 ¶ 14.

¶27 Similarly, here, analyzing the term "human beings" in § 13-1701(2) in context with the related arson statutes "provides the framework to decide this issue." *See id.* ¶ 17. The focus of the term is on persons other than the arsonist. We accordingly hold that the meaning of "occupied structure" in §§ 13-1701(2) and -1704 is unambiguous when read *in*

pari materia with § 13-1703. Although an arsonist is a human being as that term is commonly defined and understood, the arsonist does not fall within the meaning of "one or more human beings" in § 13-1701(2).

C.

¶28 The court of appeals did not consider whether its literal interpretation of §§ 13-1701(2) and -1704 yielded an absurd result. *See Serrato I*, 557 P.3d at 796–97 ¶¶ 9–11. Serrato argues that the "court of appeals' overly strict construction of singular words divorced from statutory context in the arson statutes leads to absurd results." The State counters that the court of appeals' holding does not result in absurdity because it is not irrational for the legislature to protect all life, including the lives of arsonists.

¶29 Because we agree with Serrato that the statutory text unambiguously excludes arsonists from the meaning of "occupied structure" in §§ 13-1701(2) and -1704, we need not decide whether the court of appeals' interpretation violates the absurdity doctrine. *See Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992) (noting that the absurdity doctrine applies only if application of the plain meaning of the statute is "so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion" (alteration in original) (quoting *Bussanich v. Douglas*, 152 Ariz. 447, 450 (App. 1986))).

D.

¶30 The State and the court of appeals also invoke § 13-1701's pre-enactment history to bolster their interpretation. *Serrato I*, 557 P.3d at 797 ¶ 11. On January 17, 1977, the House Committee on the Judiciary originally introduced a version of § 13-1701 that defined "occupied structure" as one in which "one or more human beings, *other than a participant in the crime, unless such participant is the owner or occupant of the structure*, either is or is likely to be present or so near as to be in equivalent danger at the time the fire or explosion occurs." H.B. 2054, 33d Leg., 1st Reg. Sess. (as introduced by House Comm. on Judiciary, Jan. 17, 1977) (emphasis added). This version made clear that the arsonist's presence alone did not make a structure "occupied" unless they also owned or lived in it.

¶31 But, on March 3, 1977, the House amended the definition of "occupied structure" as it is defined today. *See* H.B. 2054, 33d Leg., 1st Reg. Sess. (as amended by House Comm. on Judiciary, Mar. 3, 1977). The court of appeals reads this omission as an invitation to include arsonists in the term "human beings." *See Serrato I*, 557 P.3d at 797 ¶ 11. But that conclusion relies on unenacted statutory language—a notoriously "unsure and unreliable guide" to statutory meaning. *City of Flagstaff v. Mangum*, 164 Ariz. 395, 401 (1990); *cf.* Scalia & Garner, *supra* ¶ 15, at 256 ("Statutory history—the statutes repealed or amended by the [enacted] statute under consideration"—"form[s] part of the context of the statute."). In any event, the statute's history is unhelpful where, as here, the statute is unambiguous in context. *See Ewer*, 254 Ariz. at 331 ¶ 20 ("We do not consider legislative history when the correct legal interpretation can be determined from the plain statutory text and the context of related statutes.").

¶32 Even if we were to consider the pre-enactment evolution of the statutory language, it would not compel the State's desired outcome. At most, this record is ambiguous. The reason for the legislature's change is unclear, and nothing in the amended language compels the court of appeals' interpretation. It is just as plausible that the revision aimed to simplify the text rather than expand its scope. We decline to speculate about the meaning of language the legislature chose not to enact. *See State v. Prentiss*, 163 Ariz. 81, 85 (1989) (discussing separation of powers and noting that "courts as an institution are not involved in the wisdom of the legislation"); *see also* Scalia & Garner, *supra* ¶ 15, at 388–89 ("Rather than resolving uncertainty, legislative history normally induces it. Predicting when it will be entirely ignored, on the one hand, or considered dispositive, on the other, is—not to put too fine a point on it—a crapshoot.").

E.

¶33 Finally, Serrato and Amicus invoke the rule of lenity. But "absent ambiguity, the rule of lenity does not apply." *State v. Fink*, 256 Ariz. 387, 389 ¶ 9 (App. 2023); *see also State v. Pena*, 140 Ariz. 545, 549–50 (App. 1983) (noting that "where the statute itself is susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant"), *aff'd*, 140 Ariz. 544 (1984); Scalia & Garner, *supra* ¶ 15, at 299 (noting that the rule of lenity applies only if "after all the legitimate tools of interpretation have been applied, 'a reasonable doubt persists'"). Because §§ 13-1701(2) and -1704 are unambiguous in context, this Court need not apply this "construction principle of last resort." *See State v. Bon*, 236 Ariz. 249, 253 ¶ 13 (App. 2014).

CONCLUSION

¶34 We interpret "occupied structure" in §§ 13-1701(2) and -1704 to mean a structure in which one or more human beings—other than the arsonist—are present, likely to be present, or so near as to be in equivalent danger at the time of the fire or explosion. *See Ewer*, 254 Ariz. at 330 ¶¶ 14–17 (harmonizing statutory language by interpreting "person" in the justification statutes to refer to criminal defendants rather than victims based on contextual clues). Our interpretation reflects the contextual meaning and operation of "occupied structure" in §§ 13-1701(2) and -1704, harmonizes §§ 13-1703 and -1704, and preserves the legislature's tiered arson punishment scheme.

¶35 We therefore vacate the court of appeals' opinion,[1] vacate Serrato's conviction and resulting sentence for arson of an occupied structure under §

13-1704, and remand the case to the trial court for further proceedings.

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* Justice Maria Elena Cruz is recused from this matter. Pursuant to article 6, section 3 of the Arizona Constitution, Justice Rebecca White Berch (Ret.) of the Arizona Supreme Court was designated to sit in this matter.

1 Our decision does not affect the court of appeals' separate memorandum decision on Serrato's other convictions and sentences, *Serrato II*, 2024 WL 4216167.

Cite as
148 Arizona Cases Digest 47

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

Briana HERNANDEZ,
Plaintiff/Appellee,
v.
Luis Arturo LOARCA,
Defendant/Appellant.

No. 2 CA-CV 2024-0245-FC
Filed May 15, 2025

Appeal from the Superior Court in Maricopa County
No. FC2024051159
The Honorable John R. Doody, Judge Pro Tempore
VACATED

COUNSEL
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OPINION
Judge Sklar authored the opinion of the Court, in which Presiding Judge Eckerstrom and Judge Vásquez concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

SKLAR, Judge:
¶1 A court shall issue an order of protection upon finding "reasonable cause to believe" that "the defendant has committed an act of domestic violence" within specified time limits or may do so in the future. A.R.S. § 13-3602(E). "Domestic violence" includes several crimes, among which is harassment under A.R.S. § 13-2921. See A.R.S. § 13-3601(A). Here, we address whether a plaintiff was entitled to an order of protection when the defendant engaged in an assertedly harassing e-mail conversation with a third party rather than the plaintiff.
¶2 Luis Loarca sent the e-mail to the employer of Briana Hernandez. The trial court concluded that the e-mail conversation constituted harassment, so it continued Hernandez's order of protection against Loarca. This was error. The e-mail conversation was not "directed at" Hernandez as required by Section 13-2921(E). Therefore, it did not render Hernandez a victim of domestic violence. Nor did it form a basis for concluding that Loarca might harass Hernandez in the future. We therefore vacate the order of protection.

BACKGROUND

¶3 "We view the evidence in the light most favorable to upholding the trial court's ruling." *Mahar v. Acuna*, 230 Ariz. 530, ¶ 2 (App. 2012). Loarca and Hernandez share a ten-year-old daughter, M.L. Hernandez sought and obtained an ex parte order of protection against Loarca in May 2024, claiming that he was harassing her and negatively affecting her career as an employee at M.L.'s school.

¶4 Loarca requested a contested hearing. There, Hernandez described two instances of Loarca's behavior. Each involved a communication to employees at the school that M.L. attended, where Hernandez also worked. The trial court found that "complaints being made to the school in this case regarding [Hernandez] amounted . . . to harassment." It therefore continued the order of protection. Loarca appealed.

ORDER OF PROTECTION

¶5 We review a trial court's decision to continue an order of protection for an abuse of discretion. *Michaelson v. Garr*, 234 Ariz. 542, ¶ 5 (App. 2014). A court abuses its discretion when it "makes an error of law in reaching a discretionary conclusion or 'when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.'" *Id.* (quoting *Mahar*, 230 Ariz. 530, ¶ 14).

I. Standard for orders of protection based on harassment

¶6 A trial court "shall issue an order of protection" if it finds reasonable cause to believe that "[t]he defendant may commit an act of domestic violence" or "[t]he defendant has committed an act of domestic violence within the past year" or, where good cause exists, a longer period. § 13-3602(E). The statutory definition of "domestic violence" requires: (1) the defendant and victim to have a qualifying relationship; and (2) the defendant to have committed one of an enumerated set of crimes against the victim. § 13-3601(A). Among the qualifying relationships is "[t]he victim and the defendant have a child in common," § 13-3601(A)(2), as is the case here.

¶7 Harassment is one of the enumerated crimes. *See* §§ 13-2921, 13-3601(A). A defendant commits harassment by either "knowingly and repeatedly commit[ting] an act or acts that harass another person," or knowingly engaging in any one of several acts in a harassing manner. § 13-2921(A). Such acts include "[c]ontact[ing] or caus[ing] a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means." § 13-2921(A)(1). For an act to "harass" another person, that conduct must be "directed at a specific person." § 13-2921(E). It must also be conduct that "would cause a reasonable person to be seriously alarmed, annoyed, humiliated or mentally distressed and [that] in fact seriously alarms, annoys, humiliates or mentally distresses the person." *Id.*

¶8 A court errs as a matter of law in continuing an order of protection not based on an enumerated offense. *Savord v. Morton*, 235 Ariz. 256, ¶ 11 (App. 2014). This is because "the issuance of an order of protection is a very serious matter" that "carries with it an array of 'collateral legal and reputational consequences' that last beyond the order's expiration." *Id.* (quoting *Cardoso v. Soldo*, 230 Ariz. 614, ¶ 14 (App. 2012)). These consequences can include interference with a parent's access to children, as well as restriction of a defendant's firearm rights and employment opportunities, including in the military. *See Savord*, 235 Ariz. 256, ¶ 5 (order at issue restricted defendant's contact with his child); 18 U.S.C. § 922(g)(8) (restricting firearms access from defendants under contested order of protection); Dep't of Def., Instruction 1304.26, Qualification Standards for Enlistment, Appointment, and Induction 11, 15-16 (2018) (noting contested order of protection under 18 U.S.C. § 922(g)(8) is "major misconduct offense" requiring enlistment waiver).

II. Whether the evidence supports a determination of harassment

¶9 As a preliminary matter, the exhibits that the trial court relied upon in finding that Loarca had committed harassment are not part of our record. The court never admitted them into evidence. Nevertheless, it appears the court considered their content in continuing the order of protection. This was inappropriate. A court may not consider or base its decision on materials that are not admitted into evidence or otherwise part of the court record. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 26 (App. 1998).

¶10 This is so even though the record shows that the parties exchanged exhibits before the hearing, and they both relied on them during the hearing. "Absent agreement of the parties, portions of the record not admitted in evidence at trial had no evidentiary value unless they were the proper subject of judicial notice." *Gersten v. Gersten*, 223 Ariz. 99, ¶ 10 (App. 2009). In addition, materials that are not offered or admitted into evidence are not transmitted to this court for appellate review. Ariz. R. Civ. App. P. 11(a).

¶11 In this case, however, the parties described the exhibits during their testimony, so we base our review on those descriptions. The parties broadly discussed two communications. The first occurred at a parent-teacher conference between Loarca and M.L.'s teacher, "Ms. Sherrill." During that conference, Loarca told Ms. Sherrill that Hernandez "despi[sed] her" and "did not think that she was a good teacher." This created tension for Hernandez because she also worked at the school. In the second communication, the e-mail conversation, Loarca reported Hernandez to the principal for helping M.L. plagiarize a school assignment. The trial court appeared to conclude that only the e-mail conversation constituted harassment.

¶12 We agree that the communication at the parent-teacher conference was not harassment. But neither was the e-mail conversation. Hernandez testified that she "did not know anything about the communication directly to my supervisor." No other evidence suggests that Loarca "directed" his conduct to Hernandez—an essential requirement for obtaining an order of protection on the basis of harassment. This is because Section 13-3601(A)(2) requires that the "victim" and the defendant have a qualifying relationship, such as sharing a child. A person cannot be a victim of harassment unless the alleged harassment is "directed at" that person and thus harasses that person as required by Section 13-2921(E). Hernandez has not explained, and we cannot discern, how Loarca's e-mail satisfies that standard.

¶13 In its explanation for continuing the order of protection, the trial court never addressed how Loarca's e-mail conversation with the principal could be "directed at" Hernandez. The court instead focused on other elements of the harassment statute, including the extent to which Hernandez felt "alarmed, annoyed or harassed." It also focused on Loarca's motivation for sending the e-mail, which is not relevant. *See* § 13-2921 (requiring that harassment be "knowingly and repeatedly" committed); *State v. Holle*, 240 Ariz. 300, ¶ 33 (2016) (noting defendant's subjective motive differs from statutory element of "knowingly"). Hernandez's answering brief likewise does not explain how Loarca's conduct was "directed at" her.

¶14 We draw a distinction between Loarca's behavior and that of the defendant in this court's recent case, *Raber v. Wagner*, No. 2 CA-CV 2024-0301, 2025 WL 1337330 (Ariz. App. May 8, 2025). In *Raber*, we concluded that the defendant had harassed the plaintiff through intermediaries. *Id.* ¶ 12. That defendant requested that third parties urge the plaintiff to return the defendant's phone call and suggested that third parties "knock some sense" into the plaintiff. *Id.* The defendant also threatened in communications with third parties that she would call the police if the plaintiff failed to call her back. *Id.*

¶15 In *Raber*, the defendant's conduct was "directed at" the plaintiff, even though she communicated with third parties, because it "sought to initiate direct actions toward, and communications with" the plaintiff. *Id.* ¶ 13. Here, by contrast, Loarca did not request that the principal direct any communication or conduct at Hernandez on his behalf. Even if Loarca's conduct was intended to damage Hernandez's reputation or employment, his actions were still not "directed at" Hernandez because they lacked the purposes described by *Raber*.

¶16 In support of our conclusion that Loarca's e-mail conversation was not directed at Hernandez, we rely on *LaFaro v. Cahill*, 203 Ariz. 482, ¶ 13 (App. 2002), which reaches a similar conclusion in the context of an injunction against harassment. This is significant because the statute governing injunctions against harassment, A.R.S. § 12-1809, defines harassment in materially the same manner as Section 13-2921(E). *Compare* § 12-1809(T)(1)(a) (defining "harassment" as "[a] series of acts over any period of time that is *directed at a specific person* and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person and serves no legitimate purpose" (emphasis added)), *with* § 13-2921(E) (defining "harass" as "conduct that is *directed at a specific person* and that would cause a reasonable person to be seriously alarmed, annoyed, humiliated or mentally distressed and the conduct in fact seriously alarms, annoys, humiliates or mentally distresses the person" (emphasis added)).

¶17 The plaintiff in *LaFaro* sought an injunction against harassment in part because he had overheard the defendant refer to him using pejorative terms during a conversation with another person. 203 Ariz. 482, ¶¶ 4-5, 11-13. This court concluded that the conversation was not "'directed at' the specific person complaining of harassment." *Id.* ¶ 13 (quoting § 12-1809(T)(1)(a)). Although the defendant was talking about the plaintiff, "his comments were 'directed at' [the third party], not [the plaintiff]." *Id.*

¶18 We find *LaFaro*'s analysis persuasive. In fact, Hernandez's harassment claim is even more attenuated than the *LaFaro* plaintiff's because Hernandez did not hear or otherwise receive any emails from Loarca. She learned of the conversation after the fact, and not because Loarca had directed that it be conveyed to her. Thus, the evidence does not support the trial court's finding that Loarca engaged in harassment that satisfied the statutory definition of domestic violence. Nor does the record contain any indication that Loarca might commit harassment in the future. Thus, the trial court abused its discretion when it continued the order of protection. *Savord*, 235 Ariz. 256, ¶ 11 ("[G]ranting an order of protection when the allegations fail to include a statutorily enumerated offense constitutes error by the court.").

¶19 Because we vacate that order, we need not address Loarca's argument that some of its provisions improperly modified the legal decision-making orders issued by the family court. Nor need we address Loarca's argument that the order violated his First Amendment rights.

DISPOSITION

¶20 For the foregoing reasons, we vacate the order of protection. Loarca did not request an award of fees. As the prevailing party, however, he is entitled to taxable costs on appeal upon his compliance with Arizona Rule of Civil Appellate Procedure 21(b).

SUPREME COURT OF ARIZONA

In the Matter of	)	Arizona Supreme Court
	)	No. R-25-0010
RULE 19.1, RULES OF CRIMINAL PROCEDURE	)	
	)	**FILED 05/08/2025**

ORDER

On May 8, 2025, retired Superior Court Judge Ronald Reinstein filed a comment on this rule petition, along with a Motion to Permit Late Filing. Having considered the motion,

IT IS ORDERED granting the Motion to Permit Late Filing.

IT IS FURTHER ORDERED that the petitioner's deadline for filing a reply to comments to this rule petition is extended from June 2, 2025, to June 9, 2025.

DATED this 8th day of May, 2025.

/s/
ANN A. SCOTT TIMMER
Chief Justice