IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 08/21/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

STATE OF ARIZONA,	)	1 CA-CR 10-0900
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DAVID ASSI,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005419-001 DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Thomas Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

The Nolan Law Firm, PLLC — Mesa
by Cari McConeghy Nolan
Attorneys for Appellant

O R O Z C O, Judge

¶1 Defendant, David Assi, appeals from his convictions and sentences for attempted second degree murder, aggravated assault, drive-by-shooting, assisting a criminal street gang, and minor in possession of a firearm. Defendant contends the trial court: (1) committed fundamental error when it admitted MySpace information; (2) abused its discretion in excluding certain evidence; (3) committed fundamental error in admitting evidence that he called the victim's girlfriend after the shooting; (4) abused its discretion in denying his motion for new trial based on juror misconduct; and (5) committed fundamental error when it sentenced him to an aggravated term on the attempted murder charge. Lastly, Defendant contends the State committed prosecutorial misconduct. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On August 20, 2009, Juan H.[2] drove to his girlfriend Shaunnah's house in an area of Phoenix known as "The Square." A Phoenix street gang, Mexican Brown Pride (MBP), claimed control of The Square, but a rival street gang, Playboy Surenos (PBS),

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

[2] We use the first initial of the victim's last name to protect his privacy. *State v. Maldonado*, 206 Ariz. 339, 341 n.1, ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

was also "around The Square." Juan was "jumped into" MBP when he was sixteen but quit the gang in October 2008.

¶3 As Juan was driving to Shaunnah's house, he passed a Nissan going in the opposite direction with a driver and three passengers. Juan recognized Jessie Favela, whom he knew as "Lil Grande" and as a member of PBS, sitting in the front passenger seat. Juan and Jessie had gone to school together. Juan also recognized a second PBS member, whom he knew from a MySpace page as "Flaco." Juan recalled that Flaco was on the driver's side of the Nissan and was either "driving or behind the driver."

¶4 Juan arrived at Shaunnah's house and called to tell her that he was outside waiting. When he looked up, Juan saw a shotgun pointed at him from the driver's side of a brownish vehicle, but he was unable to tell who held the shotgun. Multiple bullets struck Juan in his face, neck and chest. Juan opened his vehicle door and threw himself to the ground in order to protect himself. He survived but was left completely blind in his left eye and could only see shapes with his right eye. Tina S., a neighbor who looked outside upon hearing shots observed an "older 80's Nissan" with something that "looked like a luggage rack" on the back trunk.

¶5 Phoenix Police officers investigating the crime scene found seven .45-caliber shell casings and noted the victim's car showed damage "consistent with bird shot from a shotgun."

Shaunnah testified that she heard several gunshots and that "some of [the gunshots] sounded louder than the others." Her mother also testified that some of the gunshots were sounded dimmer and faster and not as loud as others.

¶6 Several hours after the shooting, as Shaunnah was being interviewed by Phoenix Police Gang Unit Detective Schultz, she received a call on her cell phone from a restricted number. She put the call on speaker so Schultz could hear it. The caller, a male, identified himself as "Flaco" and asked if Shaunnah wanted to "kick it." The caller's voice sounded "[s]arcastic," and there was "laughing and other background noise[.]" Shaunnah asked Flaco how he got her number because "she had never spoken to him on the phone before," but he would not say. The telephone call upset Shaunnah, and she terminated the call.

¶7 Based on information from the victim and Shaunnah, Phoenix Gang Unit Detective Maldonado located Defendant's MySpace page where Defendant identified himself as "Flaco" from PBS. Defendant also posted several photographs depicting .45-caliber Glock handguns with captions such as "My 45 Glock I'm Always Rockin" and "My Glocks!"

¶8 On September 4, a Phoenix Gang Unit Detective stopped Defendant while driving a Nissan car with a spoiler on the trunk and a blue bandana, PBS gang paraphernalia, hanging from the

rear view mirror. The vehicle was registered in Defendant's name.

¶9 Based on police investigations, the State charged Defendant and Albert Gerardo Delgado as co-Defendant/accomplices with attempted second degree murder, a Class 2 dangerous felony (Count 1); two counts of aggravated assault, each a Class 2 dangerous felony (Count 2: shotgun; Count 3: handgun); drive-by shooting, a Class 2 dangerous felony (Count 4); and assisting a criminal street gang, a Class 3 felony (Count 5). The State also separately charged Defendant with minor in possession of a firearm, a Class 6 felony (Count 6).

¶10 Defendant and Delgado were tried together. The jury found Defendant guilty as charged. Defendant was sentenced to an aggravated term of 20 years in prison as to Count 1, a presumptive term of 12.5 years as to Count 2, presumptive terms of 15.5 years each as to Counts 3 through 5, and a presumptive prison term of 4 years as to Count 6, with all sentences to be served concurrently.

¶11 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010) and 13-4033.A.1 (2010).[3]

[3] Absent material revision after the date of an alleged offense, we cite a statute's current version.

DISCUSSION

Admission of MySpace Information

¶12 Defendant maintains the trial court erred when it admitted "MySpace evidence" at trial, including: (1) Juan's testimony that he recognized Flaco as one of the passengers of the Nissan from a photograph on a MySpace page; (2) Detective Maldonado's testimony regarding Defendant's MySpace page; and (3) exhibits consisting of photographs of Defendant taken from his MySpace page.

¶13 Defendant acknowledges that he did not object to the admission of the evidence at trial and that we need only review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id*. (citation omitted). The burden of showing fundamental error lies with the defendant, who must prove "both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20, 115 P.3d at 607.

¶14 Before we engage in fundamental error review, however, we will first consider whether the trial court committed error in the first instance. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). For reasons stated below, we find the

trial court committed no error in admitting the MySpace evidence.

¶15 Juan testified that, in addition to Favela, he recognized a second occupant of the Nissan as a PBS member known as "Flaco" from a MySpace page. Juan related the nicknames to Detective Maldonado who testified that he used the nicknames to ascertain the identities of the Nissan occupants. Shaunnah also told Detective Maldonado that she had seen persons with those nicknames on MySpace. With this information, Maldonado found a photograph on MySpace of Favela and a person, identified as Flaco, "throwing up gang signs."

¶16 The State offered photographs from the MySpace page as Exhibits, and Maldonado testified that the photographs showed "Flaco," who Maldonado identified in court as Defendant.

¶17 Defendant objected only to the admission of Exhibits 113-002, -016, -019 and -021 because they either depicted guns or showed Defendant posing with guns. Because none of the guns in the photographs were identified as the weapons used in this case, Defendant argued that the photographs were highly prejudicial. The State agreed to withdraw Exhibit 19, a photograph of three rifles, and the trial court admitted Exhibits 002, 016, and 021 over Defendant's objections.

Un-objected-to Photographs

¶18 On appeal, Defendant argues the trial court committed fundamental error when it admitted the MySpace photographs to which Defendant did not object (the un-objected-to MySpace photographs). Defendant maintains the evidence was inadmissible because the State failed to lay a proper foundation that he was the subject of the un-objected-to MySpace photographs. A photograph is supported by a proper foundation if the proponent offers sufficient evidence to support a finding that the photograph is what the proponent purports it to be. Ariz. R. Evid. 901(a); *State v. Damper*, 223 Ariz. 572, 576, ¶ 18, 225 P.3d 1148, 1152 (App. 2010). The trial court need not "determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that the evidence is authentic." *Damper*, 223 Ariz. at 576, ¶ 18, 225 P.3d at 1152 (citation omitted).

¶19 Here, the State presented sufficient evidence at trial from which the jury could reasonably conclude Defendant was the subject of the MySpace page associated with the username profile "Flaco." Defendant was known to gang unit officers as Flaco and as a member of PBS. Defendant was the only documented PBS member in police gang records who went by the nickname "Flaco," and two other gang members who were in the Nissan at the time of the shooting, Favela and Orlando Sagaste-Lopez, testified that Defendant was a member of PBS and went by the nickname Flaco.

When Defendant was arrested, he admitted to being a member of PBS and that his nickname was Flaco. Defendant's father also testified that Defendant had a MySpace page and he had seen the photographs in Exhibits 20, 21, and 22 on Defendant's MySpace page. This evidence was sufficient for the jury to reasonably find that Defendant was the subject of the un-objected-to MySpace photographs taken from the MySpace page associated with the username profile "Flaco," as the State purported the photographs to be. *See id*. at 577, ¶ 18, 225 P.3d at 1153; *see also* Ariz. R. Evid. 901(b)(1) (witness testimony satisfies the foundation requirement when the testimony establishes the photograph is what it is claimed to be).

¶20 Defendant also claims the State failed to present sufficient foundational evidence to support the admittance of the MySpace information because "no witness or evidence . . . established that the MySpace page attributed to Flaco was actually put up by Defendant. Defendant's argument is misplaced, however, because it goes to the weight to be given to the evidence, not its admissibility. The State introduced the MySpace information for identification purposes, and as previously discussed, the State laid a sufficient foundation for that purpose. *See, e.g., State v. Amaya-Ruiz*, 166 Ariz. 152, 169, 800 P.2d 1260, 1277 (1990) ("Even if identification is not

positive, this fact goes to the weight of the evidence, not its admissibility." (citation omitted)).

¶21 Defendant further argues the MySpace evidence was hearsay and violated his Sixth Amendment confrontation right because he was not permitted to confront the person who actually posted it. First, because the MySpace information was introduced for identification purposes, and not to prove the truth of any statements or assertions made therein, the information does not fall within the definition of hearsay. Ariz. R. Evid. 801(c)(1)-(2). Second, Confrontation Clause violations apply only to statements that are "testimonial" in nature, meaning declarations or affirmations that were made for the purpose of establishing or proving some fact. *Damper*, 223 Ariz. at 575, ¶ 10, 225 P.3d at 1151 (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). Here the postings on Defendant's MySpace page were clearly not intended to establish facts for a trial or court proceeding, and thus, no Sixth Amendment consideration was implicated by the admission of the evidence. *See id*.

¶22 Finally, Defendant argues the un-objected-to MySpace photographs represented "unfairly prejudicial prior bad act evidence" that was improperly admitted to show he "was a bad guy" and thus violated Arizona Rule Evidence 404(b). Rule 404(b) prohibits the use of evidence of other crimes, wrongs or

acts to prove the character of a person in order to show the person acted in conformity therewith on a particular occasion. However, Rule 404(b) does permit the admission of such evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In this case, the un-objected-to MySpace photographs were properly admitted to establish Defendant's identity as one of the shooters and his membership in a criminal street gang. Their admission therefore did not violate Rule 404(b).

¶23 For these reasons, Defendant has failed to establish the trial court committed any error, let alone fundamental error, when it admitted the un-objected-to MySpace photographs.

Objected-to Photos

¶24 As noted above, Defendant objected to the admission of three photographs the State introduced as Exhibits 2, 16, and 21 (the objected-to photographs). One photograph, labeled "Lil Graxde[4] – My Photos," shows Defendant and Lil Grande with the caption, "Me and Flako[5] Still Throwixg Up Buxxys."[6] The other

[4] Detective Maldonado explained that Favela replaced "n"s with "x"s because he was a "south side gang member" and was "not allowed to use the N's within [his] name[] because it is a sign of disrespect to the north siders [sic]."

[5] The nickname "Flaco" is spelled with different variations throughout the record. We use the spelling "Flaco" in our discussion for clarity and ease of reference.

photographs were of Glock handguns. Both of these photos were labeled "Flako – My Photos." One of the photos bears the caption "My 45 Glock Im Allways Rockinx Ax Extexded Rouxd Clip 32 Rouxds Bitch!" The other photo bears the caption "My Glocks!"

¶25 Defendant argues the trial court abused its discretion both in admitting the objected-to MySpace photographs[7] and in denying his motion for new trial because the photographs were other act evidence that was unfairly prejudicial. He also argues the photographs were "completely irrelevant to any issue in the case" because there was no showing the guns in the photographs were actually involved in the shooting.

¶26 We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990). We also review a trial court's denial of a motion for new trial for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, 10, ¶ 15, 66 P.3d 50, 53 (2003).

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[6] A hand-sign representing a "bunny" is a gang sign for the Playboy Surenos.

[7] Insofar as Defendant also raises foundational arguments regarding the objected-to MySpace photographs for the first time on appeal, we find, as with the un-objected-to MySpace photographs, that the State provided sufficient foundation that the exhibits accurately represent what the State purported them to be. *See Damper*, 223 Ariz. at 576, ¶ 18, 225 P.3d at 1152.

¶27 Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable. Ariz. R. Evid. 401. Even relevant evidence is excludable, however, if the trial court determines its probative value is "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403.

¶28 At trial, Favela and Sagaste-Lopez testified that Defendant's co-defendant, Delgado, fired the shotgun at Juan and that Defendant fired multiple shots at Juan with either a "Ruger" or a ".45." Police found .45-caliber shell casings at the crime scene and noted at least four bullet holes and several spent bullets in Juan's vehicle. Police never located either weapon. The photographs were relevant to establish that Defendant had access to .45-caliber handguns, particularly in light of the fact that the actual weapons were never found.

¶29 Furthermore, as previously stated, evidence of other crimes, wrongs or acts is admissible to prove such matters as opportunity, motive, intent, plan, identity and means. Ariz. R. Evid. 404(b). Contrary to Defendant's argument, the photographs were properly presented as evidence that Defendant possessed the

means to commit the shooting and the record indicates the State did not use them for any improper 404(b) purpose.

¶30 Defendant maintains the gun evidence should have been excluded because it was "certainly not harmless." Defendant misstates the relevant admissibility standard, however, because any evidence that is relevant and material to the State's case will generally be harmful to the defendant but relevant evidence is excluded only when it is unfairly prejudicial. *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). Evidence is "unfairly prejudicial" if it has an undue tendency to invite the jury to reach a decision based on an improper consideration such as emotion, sympathy or horror. *Id*.

¶31 In our view, the evidence here at issue was not unfairly prejudicial. *See id*. Moreover, because the evidence was relevant to opportunity and means, the trial court did not abuse its discretion in determining that its probative value was not substantially outweighed by the danger of unfair prejudice or misleading the jury. For these reasons, we cannot say the trial court erred in admitting the objected-to MySpace photographs. It therefore also did not err in denying the motion for new trial.

Prosecutorial Misconduct

¶32 Defendant next contends the "prosecutor committed repeated acts of misconduct throughout trial and into closing

argument sufficient to require reversal." Defendant cites four specific instances of misconduct: the prosecutor's questions (1) to Juan and (2) to a neighbor who testified at trial; and the prosecutor's closing argument regarding (3) the photographs of a handgun and (4) Juan's identification of Defendant. Defendant acknowledges that he did not raise the prosecutorial misconduct objections at trial and has therefore forfeited his right to relief on this issue unless he can "establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶33 Remarks made by a prosecutor in a criminal case warrant reversal: (1) if the remarks called attention to matters the jurors would not be justified in considering; and (2) if the probability exists that the jurors, under the circumstances of the case, were influenced by the remarks. *State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). Prosecutorial misconduct is "not merely the result of legal error, negligence, mistake, or insignificant impropriety" but occurs only when the behavior amounts to intentional conduct that the prosecutor pursues for "any improper purpose with indifference to a significant resulting danger of mistrial." *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (citation omitted). Any improper comments must also be "so

serious that they affected the defendant's right to a fair trial." *State v. Newell*, 212 Ariz. 389, 403, ¶ 67, 132 P.3d 833, 847 (2006) (citation omitted). In other words, "[t]he defendant must show that the offending statements, in the context of the entire proceeding, so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id*. at 402, ¶ 60, 132 P.3d at 846 (citation and internal quotation marks omitted).

Questioning of Witnesses

¶34 At trial, Juan testified that he saw a shotgun immediately before he was shot. He stated the shotgun was coming from the "back" of the driver's side of the vehicle, but he did not know who held the shotgun or how many people were in the vehicle. He also testified that he remembered seeing Flaco on the driver's side of the vehicle, "either driving or behind the driver."

¶35 The prosecutor asked Juan if he remembered talking to an officer at the hospital and "telling the officer that Flaco pointed the shotgun at you and shot you?" Juan replied that he did not remember making such statements to the officer. On redirect, the prosecutor asked Juan if "today" he was saying that he did not remember who had the shotgun, to which Juan replied, "Correct." She then asked again if he remembered

telling the police that he "saw Flaco with the shotgun," and he again stated that he did not remember doing so.

¶36 Defendant argues that the prosecutor's questions about Juan's statements to police were improper because the prosecutor never linked her question with any testimony from the police indicating that Juan had ever made any statement to them about seeing Defendant with the shotgun.

¶37 Whether or not the prosecutor's questions were based on Juan's prior comments to the police, we do not find the questions to be so egregious that they constituted misconduct or deprived Defendant of a fair trial. Since it was clear that the State's case was focused on the fact that Defendant used a .45 caliber handgun, we fail to see how an inference that the victim might have earlier misidentified Defendant as the shooter of the shotgun would have unduly prejudiced Defendant.

¶38 Defendant also contends the prosecutor committed misconduct when she questioned Juan's neighbor, Maria. On direct, Maria testified she looked out her door when she heard shots and saw "a gray car" parked next to Juan's vehicle. When asked to describe the car, Maria stated that she did not remember and she did not "know about cars." The prosecutor then asked her if she "remember[ed] telling the officer that it was a Nissan[.]" Maria replied that she "didn't say it was a Nissan"

but "just said it was a gray car" and "didn't say what kind of car it was."

¶39 Defendant maintains it was misconduct for the prosecutor to ask Maria if she previously told an officer that the vehicle involved in the shooting was a Nissan because the prosecutor did not link this statement to any testimony from police.

¶40 While questioning witnesses and making arguments, an attorney may not make insinuations that are not supported by the evidence. *State v. Hughes*, 193 Ariz. 72, 85, ¶ 59, 969 P.2d 1184, 1197 (1998). However, Defendant does not point to any evidence in the record that could support his argument that the prosecutor's question was intentional misconduct. *Aguilar*, 217 Ariz. at 238-39, ¶ 11, 172 P.3d at 426-27. Furthermore, even if we assume the question was error, any such error was not so egregious that Defendant was prejudiced in light of the other evidence at trial identifying the shooter's car as a Nissan, the same make as that of defendant. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

Closing Argument

¶41 Prosecutors are afforded "wide latitude" in presenting their closing arguments to a jury. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). "This is because closing arguments are not evidentiary in nature; at such

arguments[,] counsel are permitted to comment on the evidence already introduced and to argue reasonable inferences therefrom." *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970).

¶42 Defendant maintains that the prosecutor committed misconduct when she argued the photographs of guns were "physical evidence" that Defendant had access to the "type of guns at issue in this case." Defendant points out that the prosecutor's argument conflicts with her previous representations to the trial court that: (1) in one photograph, "the guns could not even be seen"; and (2) that the photographs were not being offered for the purpose of arguing access. Defendant mischaracterizes the prosecutor's statements and closing arguments.

¶43 In arguing for admission of the objected-to MySpace photographs, the prosecutor represented that the gun in one photograph of Defendant and Favela was barely noticeable. She also stated that the photograph would be offered "for the fact that [Defendant and Favela were] throwing up [gang] signs and to show the relationship between the two" as well as to show Defendant's nickname.[8] In direct contradiction to Defendant's

[8] The photograph was admitted during Detective Maldonado's testimony and the detective only discussed his observation that defendant and Favela were "throwing up gang signs." The fact

claim on appeal, however, the prosecutor specifically argued that the two gun photographs were being offered to show Defendant had access to "the type of weapon that was used in this case[,] [s]pecifically a .45 caliber handgun."

¶44 During her closing argument, the prosecutor referred to the photographs as part of the "physical evidence" (as compared to testimony) that the jury could consider. She referred to the gun photographs only in general and only to argue that they showed that Defendant "had access to a .45 caliber handgun . . . the type of weapons that were used . . . [and also] confirmed by the physical evidence at the scene." Both of the prosecutor's arguments, including the inferences she invited the jury to draw from the photographs, were appropriate because they were supported by the evidence and consistent with the State's purposes for introducing them. *See Gonzales*, 105 Ariz. at 437, 466 P.2d at 391. Contrary to Defendant's contention, there is no indication in the record the prosecutor argued the photographs showed Defendant had a predisposition to commit the crime.

¶45 According to Defendant, the prosecutor also committed misconduct when she: (1) asserted in closing argument that Juan "identified Flaco[,] who[m] 'he knew from MySpace,'" as having

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that one of the individuals was pointing a gun was not mentioned.

shot him, which Defendant contends is "an absolutely false statement"; and (2) asserted in rebuttal "that Juan had specifically identified Flaco as having shot him and having been in the driver's seat of the car when Juan never made any such identification."

¶46 Again, we disagree with Defendant's characterization of the prosecutor's arguments. The portion of the closing argument to which Defendant points indicates that the prosecutor reminded the jury that Juan "talked about there being four people" in the Nissan, and therefore, the issue was whether Delgado and Defendant were the shooters. She pointed out that Juan "only knew two of them," Favela and "Flaco, who[m] he saw driving." She then stated: "[Juan] talked to detectives about how he knew [Flaco]; that he knew him from MySpace and that he knew that he was a member of Playboy Surenos." This argument is consistent with the trial evidence and did not suggest that Juan identified Defendant as "the shooter."

¶47 We also disagree that the prosecutor's arguments indicated that Juan "knew" that "Flaco" was David Assi at the time of the shooting. The prosecutor did not use the MySpace page information to establish that Juan "knew" Defendant or to improperly bolster the victim's identification of Defendant. It was clear from the evidence at trial that Juan did not know at the time of the shooting that Defendant - i.e., David Assi - was

the person known as "Flaco" from the MySpace page or that Defendant, as opposed to "Flaco," was one of the shooters. The prosecutor's argument simply reiterated that Juan identified one of the occupants of the car as a member of PBS known to Juan by the nickname "Flaco" from a MySpace page and police then used the MySpace page to identify "Flaco" as Defendant, David Assi.

¶48 Nor did the prosecutor argue that Juan identified Defendant as his "shooter" in her rebuttal argument. Defendant points to a portion of rebuttal wherein the prosecutor stated: "Juan . . . said that day that Flaco was there; Flaco was the driver; and he said Jesse Favela was there." This argument was consistent with Juan's testimony and did not improperly imply Juan identified Defendant as the shooter.

¶49 As the State concedes, the prosecutor's statement that Juan identified Flaco as the driver of the Nissan was not directly supported by Juan's testimony or any other evidence at trial. The record shows the prosecutor actually made this statement twice, once during closing argument and again in rebuttal argument. We agree these statements might constitute unsupported argument because Juan actually testified only that Flaco was on the driver's side of the Nissan and was either "driving or behind the driver."

¶50 However, our review of the prosecutor's closing arguments, as a whole, convinces us that the misstatements are

more likely the result of "inadvertence" or "mistake" by the prosecutor in dealing with the inferences to be drawn from the testimony of numerous witnesses rather than any intentional conduct to purposefully mislead the jury by misstating the evidence. *See Aguilar*, 217 Ariz. at 238-39, ¶ 11, 172 P.3d at 426-27.

¶51 Furthermore, the trial court instructed jurors that they were to determine the facts from the evidence introduced at trial, which consisted of "the testimony of witnesses and the exhibits produced in court." Jurors were also instructed that the lawyers' questions to a witness or statements in their opening statements and closing arguments were not evidence. Our supreme court has held that, in the absence of evidence suggesting otherwise, we must presume the jurors followed these instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶52 In any event, Defendant fails to explain any significance in the difference between referring to him as the driver or as the occupant behind the driver's seat. In light of the other testimony at trial identifying Defendant as the driver of the Nissan, we do not believe the prosecutor's misstatements were so serious or egregious that they may be said to have affected the jury's verdicts or deprived Defendant of a fair trial. *Newell*, 212 Ariz. at 403, ¶ 67, 132 P.3d at 847.

Defendant has therefore failed to prove prejudice. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶53 Accordingly, we find the prosecutor's questioning of the victim and Maria and the prosecutor's closing arguments, insofar as they were supported by the evidence, were appropriate and did not amount to misconduct. *Hansen*, 156 Ariz. at 297, 751 P.2d at 957. Insofar as the prosecutor's closing arguments were misstatements of the evidence, they were not so serious or so numerous that they may be said to have "so infected the trial with unfairness as to make the resulting convictions a denial of due process." *Newell*, 212 Ariz. at 402, ¶ 60, 132 P.3d at 846 (citations omitted). Based on the record before us, we do not find defendant has borne his burden of proving prejudicial fundamental error. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

Exclusion of Evidence

¶54 Defendant argues the trial court erred when it precluded him from presenting evidence critical to his defense. Specifically, he claims the trial court abused its discretion when it precluded him from presenting evidence of the following: (1) the victim had thrown a cup of soda on Favela (Lil Grande) in the recent past (the Soda Incident); (2) a July 4 shooting between PBS and MBP members; (3) an unrelated shooting in California at which Sagaste-Lopez was present; and (4) a letter

written by co-defendant Delgado while in pretrial custody proclaiming Defendant's innocence in the crimes. Defendant also maintains the trial court abused its discretion when it denied his motion for new trial based on the exclusion of this evidence.

¶55 "[A]bsent a clear abuse of discretion[,] this court will not second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997) (citation and internal quotation marks omitted). We also review a trial court's denial of a motion for new trial for an abuse of discretion. *Rutledge*, 205 Ariz. at 10, ¶ 15, 66 P.3d at 53.

The Soda Incident and the Shootings

¶56 The trial court excluded the evidence of the Soda Incident and the shootings based on a lack of relevance. The court also noted the jury had already been presented with sufficient evidence of "bad blood" between the victim and members of PBS to call into question the truthfulness of testimony at trial. On appeal, defendant maintains that the preclusion of the evidence prevented him from mounting a third-party defense by showing that, because of the prior events, Favela and Sagaste-Lopez also had motives for shooting Juan and for lying under oath about what really happened that night.

¶57 In determining whether evidence supporting a third-party culpability defense is relevant, the trial court should focus on the effect the evidence has upon the culpability of the defendant. *State v. Dann*, 205 Ariz. 557, 568, ¶ 33, 74 P.3d 231, 242 (2003). Even where the evidence "tend[s] to create a reasonable doubt as to a defendant's guilt," the court may exclude the evidence if it finds "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id*. (citations and internal quotation marks omitted). Furthermore, as regards a third-party defense, "[a] defendant is not entitled to raise unfounded suspicions or to simply throw strands of speculation on the wall and see if any of them will stick." *State v. Bigger*, 227 Ariz. 196, 208, ¶ 42, 254 P.3d 1142, 1154 (App. 2011) (citation and internal quotation marks omitted).

¶58 Our review of the record reveals the trial court correctly noted an abundance of evidence presented at trial supporting the general proposition that other occupants of the Nissan, who were members of PBS, had motive to shoot at Juan. The credibility of Favela and Sagaste-Lopez was also impeached at trial when Defendant exposed that, despite being in the Nissan at the time of the shooting, they had "not been charged"

and were granted "use immunity" for their testimony. Defendant thus exposed facts supporting an argument that the witnesses had a motive to lie.

¶59 In addition, Favela testified about his "personal problems" with Juan, the "bad blood" between them, and his intent to "smash" Juan or "beat him up" when they approached Juan's car on the day of the shooting. Given the evidence about the "bad blood" between the PBS and MPB gang members, the court could have properly concluded the evidence of the Soda Incident was needlessly cumulative, would have been confusing to the jury and irrelevant to whether Defendant was guilty.

¶60 Based on the record before us, we cannot say the trial court abused its discretion in excluding evidence of the Soda Incident and the prior gang-related shootings.

The Exculpatory Letter

¶61 Before trial, the State sought to exclude the admission of a letter allegedly written by co-defendant Delgado while he was in pre-trial custody. In the letter, Delgado allegedly stated that: (1) Delgado and "three other friends" shot the victim and planned to say Defendant did it if they got caught; (2) Defendant had nothing to do with the shooting and never called Shaunnah afterwards; and (3) Delgado decided to tell the truth because he did not want Defendant "to go to prison for something he didn't do."

¶62 At a hearing on the State's motion to exclude, the prosecutor informed the court that it was her understanding that the letter had been given to Defendant's prior counsel by Defendant. Defendant told his attorney that Delgado gave him the letter while the two were in jail. Defendant's trial counsel did not dispute the prosecutor's assertion, but stated that either Defendant or Delgado could testify to "the circumstances under which Mr. Delgado wrote and gave [Defendant] the letter" because Defendant "was present when it happened." Delgado took no position on the motion. The trial court deferred ruling on the State's motion to determine whether Defendant could lay a foundation for the admission of the letter.

¶63 On the final day of trial, after Delgado's attorney indicated that Delgado was not going to testify, the court asked Defendant's counsel if he intended to introduce the letter. The trial court noted that a prong of the hearsay exception was met by the unavailability of declarant Delgado but stated that "unless something drastically different happen[ed]," the letter was still inadmissible because there was "no corroborating evidence." Defendant's counsel indicated that was "fair enough." Thereafter Defendant's father and two of the father's friends, Thaban and Naseer, testified to present an alibi defense for Defendant for the day of the shooting. Based on our

review of the record, the letter was never brought up again until Defendant filed the motion for new trial.

¶64 On appeal, Defendant argues the trial court abused its discretion when it precluded the letter based on lack of corroboration because sufficient corroboration was provided by the alibi witnesses.

¶65 The rule governing the "statement against interest" exception to the hearsay rule provides that a statement is admissible if: (1) the declarant is unavailable; (2) the statement tends to expose the declarant to criminal liability; and (3) the statement "is supported by corroborating circumstances that *clearly indicate* its trustworthiness." Ariz. R. Evid. 804(b)(3) (emphasis added). Our supreme court has interpreted Rule 804(b)(3) to mean that statements against interest are admissible only if "there is some external evidence of reliability." *State v. Garza*, 216 Ariz. 56, 66 n.9, ¶ 41, 163 P.3d 1006, 1016 n.9 (2007). The primary purpose of the corroboration requirement is "to prevent criminal suspects from fabricating hearsay admissions to the crime by others." *State v. Machado*, 226 Ariz. 281, 285, ¶ 23, 246 P.3d 632, 636 (2011).

¶66 Contrary to Defendant's contention, there was no external evidence that clearly indicated the trustworthiness of the statements in Delgado's letter. *See* Ariz. R. Evid. 804(b)(3); *Garza*, 216 Ariz. at 66 n.9, ¶ 41, 163 P.3d at 1016

n.9. Although the letter was clearly against Delgado's interest, we question its trustworthiness because it was written while Defendant and Delgado, two fellow members of the same street gang, were in each other's presence. We also find the origin and authenticity of the letter to be suspicious.

¶67 Nor can Defendant's alibi evidence be viewed as external evidence that clearly established the trustworthiness of the letter. At most, the alibi testimony was merely consistent with the contents of the letter, but it did not independently validate the authenticity of the letter or its account of the shooting. In addition, the State successfully impeached the credibility of alibi witness by arguing that Defendant's father and his friends could not be viewed as disinterested parties with regard to Defendant and the ultimate outcome of the trial.

¶68 For the foregoing reasons, we find the trial court did not abuse its discretion in excluding the evidence of the letter or in denying Defendant's motion for new trial. *See Spreitz*, 190 Ariz. at 146, 945 P.2d at 1277; *Rutledge*, 205 Ariz. at 10, ¶ 15, 66 P.3d at 53.

Admission of Evidence of the Telephone Call to Shaunnah

¶69 Shaunnah and Detective Schultz each testified about the telephone call Shaunnah received a few hours after the shooting from a person identifying himself as "Flaco." On

appeal, Defendant contends it was reversible error for the trial court to admit the testimony because the evidence: (1) was hearsay; (2) was presented through Shaunnah, making the evidence double hearsay; (3) deprived him of his right to confront witnesses against him, in violation of the Confrontation Clause of the Sixth Amendment; and (4) was impermissible Rule 404(b) "other act evidence," admitted to show that he acted in conformity with prior bad acts.

¶70 Defendant concedes he failed to object to this evidence at trial and our analysis is limited to fundamental error review. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

Hearsay

¶71 A defendant's own statements offered against the defendant are not hearsay. Ariz. R. Evid. 801(d)(2)(A). "In order to prove an admission or declaration it is necessary to show that the statement is relevant and material to the issues of the case and that the statement was, in fact, made by the declarant." *State v. Schad*, 129 Ariz. 557, 570, 633 P.2d 366, 379 (1981).

¶72 In this case, the State presented sufficient evidence to support a finding that Defendant was the person who made the call. *See State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981) (noting that substantial evidence may be comprised

of both circumstantial and direct evidence and "[a] conviction may be sustained on circumstantial evidence alone").[9] The evidence established: (1) Flaco was Defendant's PBS nickname, a fact which he admitted to police; (2) Defendant was the only PBS member with the nickname Flaco; (3) Juan saw a person, whom he knew as Flaco from a MySpace page, in the Nissan shortly before being shot; and (4) only a few hours after the shooting, a person identifying himself as "Flaco" called Shaunnah and asked if she wanted to "kick it." Because this evidence reasonably supports the inference that Defendant was the caller identified as "Flaco," the telephone statements were properly considered party admissions, which are by definition not hearsay. *See* Ariz. R. Evid. 801(d)(2)(A).

Confrontation Clause

¶73 Regarding the Confrontation Clause, Defendant had the opportunity to cross examine Shaunnah and Schultz about whether they could be sure that Defendant, and not some other person using Defendant's gang nickname, was the person who made the call. Because the only relevant issues at trial were whether the call was made and whether Defendant could be identified as

[9] "[D]irect and circumstantial evidence have equal probative worth." *State v. Pettit*, 194 Ariz 192, 197, ¶ 23, 979 P.2d 5, 10 (App. 1998) (citation omitted); *see also State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (App. 1991) (stating that "criminal convictions may rest solely on circumstantial evidence" and such evidence "has no less probative force than direct evidence" (citations omitted)).

the caller, Defendant was able to confront the only witnesses who testified about the relevant issues. Defendant's Confrontation Clause rights were not implicated as to the caller because the State did not raise any issue regarding the truth or accuracy of the statements made by the caller. *See State v. Canez,* 202 Ariz. 133, 153, ¶ 62, 42 P.3d 564, 584 (2002) (the right of cross-examination under the Confrontation Clause may be reasonably limited to prevent "interrogation that is repetitive or only marginally relevant." (citation omitted)); *State v. Munguia,* 137 Ariz. 69, 71, 668 P.2d 912, 914 (App. 1983) (the Confrontation Clause does not confer the right to impeach a witness concerning issues not relevant at trial).

Rule 404(b)

¶74 Defendant next argues admission of the telephone call violated Rule 404(b) because it was used by the State to improperly argue that he "was a bad person" who "would go above and beyond just shooting the victim" by making a "sarcastic" follow-up call to the victim's girlfriend. Contrary to Defendant's argument, the evidence that Shaunnah received a call from someone identifying himself as "Flaco" was relevant to Defendant's identity and to proving that an individual identified as Flaco was an occupant of the Nissan at the time Juan was shot. We find no support for Defendant's contention that the evidence was used for the improper 404(b) purpose of

showing "his history as a bad gang member whose character clearly established his need for punishment."

¶75 Accordingly, Defendant has not shown any error, let alone fundamental error, in the admission of the telephone call. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

Juror Misconduct

¶76 At trial, Defendant presented an alibi defense through the testimony of his father, Louie, and two friends of the family, Thaban and Naseer. On direct examination by Defendant, all three witnesses were identified as Iraqi nationals and émigrés.

¶77 The shooting occurred at approximately 6:20 p.m. on August 20. Louie testified he remembered the day of the shooting vividly because it was two days before Ramadan, which he described as a "celebration for the Muslamic community" and a "big" holiday for him and his family. Louie maintained that he spent the day with Defendant and described shopping at a supermarket in the late afternoon where the pair encountered Thaban and exchanged pleasantries. The two returned home between 5:00 and 5:30 p.m. because they were expecting Naseer and his family for dinner at 6:00 p.m. Louie testified that Naseer and his family ate dinner with Louie's family around 7:30 p.m. but Defendant did not join them because he had previously played with a dog and touching a dog and eating was not done in

their culture. Because it was the first time Naseer had dined with them, Louie feared Naseer might find it offensive for Defendant to dine with them in those circumstances. Therefore, Defendant's mother brought him food in his room. Defendant came out to say goodbye at 9:00 p.m. when Naseer and his family left and did not leave the house after that.

¶78 At the conclusion of redirect, a juror submitted two questions for Louie, one of which asked: "When Mr. Assi was sworn in was his oath to Allah or to God?" In discussing the question with trial counsel out of the jury's presence, the trial court stated: "It was a standard jury oath, but I don't know." Nevertheless, the trial court noted that "everybody" agreed the question was not appropriate, and the court did not pose the question to Louie.

¶79 After the jury rendered its verdicts, Defendant filed a motion for new trial in which he argued, among other things, that the question indicated that a juror committed misconduct because he considered evidence not before the jury and considered Louie's religion when determining his veracity. The trial court denied the motion.

¶80 On appeal, Defendant argues the trial court abused its discretion when it denied his motion. Defendant maintains the question indicated that "at least one of the jurors was considering improper facts and circumstances in evaluating the

testimony and the case." Defendant contends the juror improperly considered Louie's "religious beliefs in analyzing his testimony."

¶81 We review a trial court's ruling on a motion for new trial for an abuse of discretion. *Rutledge*, 205 Ariz. at 10, ¶ 15, 66 P.3d at 53. Furthermore, "motions for new trial are disfavored and should be granted with great caution." *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988) (citation omitted). Therefore, this court will not disturb a trial court's denial of a motion for mistrial unless there affirmatively appears to be an abuse of the trial court's broad discretion. *State v. Jeffers*, 135 Ariz. 404, 426, 661 P.2d 1105, 1127 (1983).

¶82 Rule 24.1.c(3)(i) of the Arizona Rules of Criminal Procedure provides a trial court may grant a new trial if a juror committed misconduct by receiving evidence not properly admitted during trial. "[T]he rule applies only when a jury receives information from an outside source during the course of the trial or during deliberations." *State v. McLoughlin*, 133 Ariz. 458, 461 n.2, 652 P.2d 531, 534 n.2 (1982). Furthermore, defendant "bore the initial burden of proving that the juror received and considered extrinsic evidence." *State v. Hall*, 204 Ariz. 442, 448, ¶ 17, 65 P.3d 90, 96 (2003).

¶83 As an initial matter we note this jury did not receive any information from an outside source during the course of the trial or jury deliberations. The record indicates that any information regarding Louie's religious beliefs was introduced by Defendant during direct examination. Also, while a juror may have *sought* information not in evidence via the question, the trial court did not answer the question. Therefore, Defendant has not shown the jurors received any extrinsic evidence. *See McLoughlin*, 133 Ariz. at 461 n.2, 652 P.2d at 534 n.2; *Hall*, 204 Ariz. at 448, ¶ 17, 65 P.3d at 96.

¶84 The evidence of Louie's religion arose during Louie's explanation of why the events of August 20 remained in his memory. His religion was never used or referenced by the State as a basis for impeaching Louie's credibility at trial. However, the jury could consider the evidence in weighing Louie's explanation about why he remembered the events of that day. *See State v. Towery*, 186 Ariz. 168, 178, 920 P.2d 290, 300 (1996) ("witness's religious beliefs admissible if offered for some legitimate purpose other than attacking witness credibility"). If Defendant was concerned in light of the juror's question, he should have asked the trial court to give the jury a limiting instruction concerning the information about Louie's religion. *See State v. Nordstrom*, 200 Ariz. 229, 247, ¶ 51, 25 P.3d 717, 735 (2001) (trial court does not err in failing

to give limiting instruction where counsel does not properly request one) *abrogated on other grounds by State v. Ferrero,* 229 Ariz. 239, 243, ¶ 20, 274 P.3d 509, 513 (2012); *see also State v. Miles,* 211 Ariz. 475, 483, ¶ 31, 123 P.3d 669, 677 (App. 2005).

¶85 Based on the record before us, we cannot say the trial court erred in its reaction to the question. *See State v. Miller*, 178 Ariz. 555, 557, 875 P.2d 788, 790 (1994) (When there is a danger that the integrity of the jury has been compromised by contamination from outside influences, "the court's response should be commensurate with the severity of the threat posed." (citations and internal quotation marks omitted)). Here, the court agreed the question should not be answered and properly instructed the jurors that they were only to consider evidence introduced in the courtroom, meaning "testimony of witnesses and the exhibits produced in court." It also instructed the jury that it was not to "guess about any fact."

¶86 With regard to jury questions, the court specifically instructed the jury that: (1) the court would apply the same legal standards to the jury's questions as it did to the questions asked by lawyers; (2) if the rules permitted the question and an answer was available, the answer would be given; (3) the jury should attach no significance to the court's failure to ask a question; and (4) if a particular question was

not asked, the jury should "not guess why or what the answer might have been." As previously noted, jurors are generally presumed to follow their instructions. *Newell*, 212 Ariz. at 403, ¶ 68, 132 P.3d at 847.

¶87 Pointing to *State v. Davolt*, 207 Ariz. 191, 207-08, ¶¶ 55-56, 84 P.3d 456, 472-73 (2004), Defendant argues a new trial is warranted where prejudice can be presumed from juror misconduct or bias.[10] In *Davolt*, however, our supreme court held that "bare allegations of juror misconduct are insufficient to trigger the trial court's duty to investigate the matter further." *Id.* at 208, ¶ 57, 84 P.3d at 473. Similarly, in this case, we find Defendant has failed to present evidence of juror misconduct or bias. When the question was first submitted, the court discussed the question with defense counsel and apprised counsel of the subject matter and nature of the question. At that time, Defendant could have: (1) made an objection to the juror's possible bias or misconduct; (2) challenged the juror for cause; (3) asked the court to interview the juror; or (4) later subpoenaed the juror. Defendant did none of these things and offers nothing more than mere speculation that the jury improperly considered evidence regarding Louie's religion.

[10] Defendant also cites *Kelley v. Abdo,* 209 Ariz. 521, 105 P.3d 167 (App. 2005) to support his position. However, *Abdo* has been depublished and has no precedential value. *See* Ariz. R. Sup. Ct. 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

Because Defendant has failed to provide any evidence of misconduct or bias, we find no error. *See id.*; *Miller*, 178 Ariz. at 557, 875 P.2d at 790; *State v. Trostle,* 191 Ariz. 4, 13–14, 951 P.2d 869, 878–79 (1997) (stating that we will not presume prejudice where none appears affirmatively in the record).

¶88 Furthermore, we cannot say the trial court abused its discretion in denying Defendant's motion for new trial based on the record before us. "Juror misconduct warrants a new trial only if the defense shows actual prejudice or if *prejudice may be fairly presumed from the facts."* *Davolt*, 207 Ariz. at 208, ¶ 58, 84 P.3d at 473 (citation and internal quotation marks omitted). "Once the defendant shows that the jury has received and considered extrinsic evidence, prejudice must be presumed and a new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict." *Id.* (citation and internal quotation marks omitted).

¶89 As already discussed, however, Defendant failed to show that the jury received or considered extrinsic evidence. Accordingly, he is not entitled to a presumption of prejudice. *See id.* ¶ 59 ("Prejudice cannot be presumed without the requisite showing that the jury received and considered extrinsic evidence on the issues."). Also because Defendant provides no positive evidence of misconduct or bias and fails to affirmatively demonstrate actual prejudice, we cannot say the

trial court abused its discretion in denying his motion for new trial. *See id.*

Illegal Aggravated Sentence

¶90 The trial court sentenced Defendant to an aggravated twenty-year prison term for attempted second degree murder (Count 1). Defendant argues the court erred in so doing because: (1) the court double counted two aggravating circumstances - "the use of a deadly weapon" and the infliction of "physical, emotional or financial harm";[11] and (2) there was insufficient evidence to support the jury's finding that the crime involved lying in wait for a victim or ambush of a victim. According to Defendant, because it is unclear whether the court would have imposed an aggravated sentence absent the consideration of these improper factors, we should reverse and remand for resentencing. We disagree with Defendant's characterization of the trial court's actions.

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[11] To the extent Defendant also argues the court should not have considered the "use of a deadly weapon" or the infliction of "physical, emotional or financial harm" because they were not alleged by the State, we reject that argument. Where sufficient evidence supports the finding of one statutorily enumerated aggravator, the court does not err in considering other aggravating factors or in imposing an aggravated sentence based on other factors. *See* A.R.S. § 13–701.F (Supp. 2011) ("If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances."); *State v. Schmidt,* 220 Ariz. 563, 566, ¶ 11, 208 P.3d 214, 217 (2009) (the court must find one statutorily enumerated factor to impose an aggravated sentence, but thereafter, the court may consider additional aggravators).

¶91 Defendant acknowledges that he did not raise these objections to the trial court and our review is limited to fundamental error review. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Under these circumstances, it rests with Defendant to prove both that fundamental error occurred and that the error in his case prejudiced him. *Id*. at ¶ 20, 115 P.3d at 607. However, a trial court's imposition of an illegal sentence constitutes fundamental error. *State v. Zinsmeyer*, 222 Ariz. 612, 623, ¶ 26, 218 P.3d 1069, 1080 (App. 2009).

Double Counting

¶92 The jury found six aggravating factors as to Count 1: (1) the offense involved the infliction or threatened infliction of serious physical injury; (2) the offense involved an accomplice; (3) the offense involved the use, threatened use or possession of a deadly weapon during the commission of the crime; (4) the offense caused the victim physical, emotional or financial harm; (5) the offense involved lying in wait for a victim or ambushing a victim during the commission of a felony; (6) the offense involved a victim under the age of eighteen.

¶93 At sentencing, defense counsel argued several mitigating factors, including Defendant's age and background, that he had complied with court orders during previous contacts with the criminal justice system, and he pursued his education while in jail pending sentencing. The weight to be given any

factor asserted in mitigation rests "within the sound discretion of the sentencing judge." *Towery,* 186 Ariz. at 189, 920 P.2d at 311. The record indicates the trial court considered the mitigating factors but determined the aggravating factors, as found by the jury, outweighed the mitigating factors presented by Defendant and the court therefore found an aggravated sentence was appropriate.

¶94 Defendant argues the trial court improperly double counted the infliction of physical injury because it considered the infliction of "serious physical injury" and the infliction of "physical, emotional or financial harm" as separate aggravators. *Cf. State v. Chappell*, 225 Ariz. 229, 241, ¶ 48, 236 P.3d 1176, 1188 (2010) (A single fact or circumstance "may be used to establish two aggravating factors so long as that fact is not weighed twice in balancing aggravating and mitigating circumstances." (citations and internal quotation marks omitted)). However, the infliction of "serious physical injury" and the infliction of "physical, emotional or financial harm" are separate aggravators pursuant to A.R.S. § 13-701.D.1 and D.9. Furthermore, § 13-701.D.9 is written in the disjunctive, so that the infliction of physical *or* emotional *or* financial harm can constitute an aggravating circumstance. Accordingly, the infliction of "serious physical injury" and the

infliction of "emotional or financial harm" can be separate aggravators for the same offense pursuant to § 13-701.D.

¶95 Here, the jury found both the "infliction of serious physical injury" and the "infliction of physical, emotional or financial harm" as separate aggravating circumstances, but the court explicitly stated that it only considered the emotional harm to Juan and the infliction of serious physical injury as separate aggravating circumstances. There is no indication in the record that the court improperly double counted Juan's physical or emotional injuries. We therefore find the court properly considered and used the jury's findings when imposing the sentence. *See State v. Styers*, 177 Ariz. 104, 116, 865 P.2d 765, 777 (1993) (judges are presumed to know and apply the law in making decisions).

¶96 Nor did the trial court double count the use of a gun as both an element of a dangerous offense and as an aggravating factor. The use of the weapon was properly used to enhance the sentencing range for Count 1 to the range for a dangerous offense. *See* A.R.S. §§ 13-105.13 (Supp. 2011) and 13-704 (Supp. 2011). Contrary to Defendant's argument, there is no indication in the record that the court considered the use of a weapon as an "aggravating" factor during sentencing. Accordingly, we cannot say the court erred on this basis. *Id.*; *see also State v. Munninger,* 213 Ariz. 393, 397, ¶¶ 12–13, 142 P.3d 701, 705

(App. 2006) (the finding of an improperly double-counted aggravator does not require reversal where the court properly considered other aggravating factors and there is no indication the court considered the improper factor).

Laying in Wait

¶97 Defendant next contends the State presented insufficient evidence to support the jury's finding that the crime involved "lying in wait for the victim or ambushing the victim" pursuant to A.R.S. § 13-701.D.17. Even if we assume for the purpose of argument that he is correct, Defendant cannot establish prejudice on this basis. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. The finding of a single aggravator is sufficient to subject a defendant to the aggravated range of sentences, and the trial court properly considered four other aggravating circumstances in addition to the aggravator at issue here. *See* A.R.S. § 13-701.C; *State v. Martinez,* 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005). Furthermore, there is nothing in the record to indicate the court would have imposed a lesser sentence without considering "lying in wait for the victim or ambushing the victim" as an aggravator. Defendant cannot demonstrate prejudice merely by speculating that he would have received a lesser sentence if the improper aggravator had not been considered. *See Munninger*, 213 Ariz. at 397, ¶ 14, 142 P.3d at 705; *see also State v. Glassel,* 211 Ariz. 33, 57 n.17, ¶

101, 116 P.3d 1193, 1217 n.17 (2005) (noting a defendant is not entitled to appellate relief for use of improper aggravating factors where issue not raised in trial court).

¶98 Defendant has failed to prove that the trial court committed any error, let alone fundamental error, in sentencing Defendant to an aggravated sentence for attempted second degree murder. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Under the circumstances, we find no reason to vacate Defendant's sentence or remand for resentencing.

CONCLUSION

¶99 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PHILIP HALL, Judge

/S/
_____
JOHN C. GEMMILL, Judge