DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0687
	)	1 CA-CR 10-0693
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT D
	)	
MICHAEL DAVID SEBBA,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-174832-001SE and CR2009-030400-001SE

The Honorable Rosa Mroz, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

Law Offices of Michael P. Denea, PLC — Phoenix
by Michael P. Denea
Attorney for Appellant

PER CURIAM

¶1 Michael David Sebba was convicted of one count of stalking and one count of aggravated harassment, both class five

felonies, and duly sentenced. On appeal, he argues that: (1) the trial court erred by refusing his requested jury instructions and special verdict form; (2) the court erred by refusing to preclude irrelevant evidence; and (3) there was insufficient evidence to support the verdicts. For the reasons that follow, we find no reversible error and affirm his convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Sebba was indicted for stalking the victim on December 1, 2008, by engaging in conduct that resulted in the victim fearing for her safety or the safety of her family, in violation of Arizona Revised Statutes ("A.R.S.") section 13-2923(A)(1) (West 2011).[1] Subsequently, he was indicted for aggravated harassment after he communicated with the victim or caused a communication to be made to her in February 2009 despite the fact that he was under an existing injunction against harassment which precluded him from having any communication with the victim, in violation of A.R.S. §§ 13-2921.01(A)(1) and (C) (West 2011) and 13-2921(A)(1) (West 2011). The parties agreed to consolidate the cases for trial.

¶3 At trial, the jury heard that the victim and her family and Sebba and his family lived in the same Tempe

[1] Unless indicated otherwise, we cite to the current version of a statute if it has not undergone a material change since the criminal offense occurred.

neighborhood without problems until 2002.[2] The families, however, disagreed over the city's plans to install playground equipment in their neighborhood. The relationship between Sebba and the victim deteriorated after the victim testified against Sebba in court, disputing his version of an earlier incident. The victim sought and received an injunction against harassment in 2004.

¶4 The victim and her family subsequently sold their home, moved to another neighborhood, and moved their children to another school to attempt to escape further conflict with Sebba, especially because he had secured an injunction against harassment against the victim's husband. Despite the move, Sebba continued to harass the victim in her new neighborhood and she obtained additional harassment injunctions against him in 2005, 2006, and 2007.

¶5 Sebba, however, did not honor the injunctions and was convicted of violating one in January 2006, and another one in June 2007 after sending a letter to the children's school principal detailing his dispute with the victim's family, including an incident that prompted him to sue the eleven-year-old daughter for allegedly trying to run him over with her

[2] We are required to review the trial facts in a light most favorable to sustaining the convictions. *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

bicycle.[3] The 2007 injunction expired before the victim served Sebba with the 2008 injunction.

¶6 On December 1, 2008, Sebba went to the building where the victim worked, ostensibly to visit a temporary employment agency. He, however, failed to sign in as a visitor, called for an elevator and when the elevator doors opened, the victim was inside. He stepped into the elevator before the victim could exit. She, however, quickly got out, called her office to lock the business's doors because she was afraid that Sebba was going to hurt her husband or their employees, asked security to search the building for Sebba, and called the police. After Sebba returned to the lobby, he was asked by a security guard to leave the building because of the victim's restraining order. Sebba looked at the victim and her husband over the security guard's shoulder "kind of in a threatening manner," and said, "Oh, I'll be back." Later that day, police served Sebba with the 2008 injunction against harassment, which ordered him to stay away from the victim's workplace, or from contacting her or her family directly or indirectly through third parties.[4]

[3] Sebba's lawsuit against the eleven-year-old girl also sought punitive damages and that she be imprisoned for two years. The superior court had dismissed other lawsuits Sebba had filed against the victim's husband and the couple.

[4] There is no indication in the record that Sebba challenged the 2008 injunction against harassment.

¶7 Some two and one-half months later, Sebba called a security guard, the site manager, and the property manager at the building where the victim worked. He asked the security guard for the names and numbers of the property managers; asked the site manager if this was the correct number to call to lease space in the building; complained to the property manager about the handling of his December 2008 encounter with the victim and her husband, and indicated he might sue the victim and possibly others. Because the victim had asked that building employees report any contact with Sebba, the site manager and property manager reported their contacts with Sebba to her, and the security manager thought he had informed her of the contact. The property manager, moreover, testified that she would have contacted the victim as a matter of routine, even if no one had suggested it. The victim testified that she believed that Sebba was harassing her through these calls.

¶8 The jury convicted Sebba of stalking and aggravated harassment, and found that he had previously violated at least one injunction against harassment. The jury found that the offenses caused physical, emotional, or financial harm to the victim as an aggravating circumstance, and that Sebba was on pretrial release for the stalking offense at the time he engaged in the aggravated harassment. Sebba was sentenced to an aggravated term of two years for his stalking conviction, to be

consecutively followed by a four-year term for the aggravated harassment conviction. Sebba filed a timely notice of appeal and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (West 2011), 13-4031 (West 2011), and 13-4033(A)(1) (West 2011).

DISCUSSION

A. Requested Jury Instructions on Third Party Communication

¶9 Sebba first argues that the trial court abused its discretion by refusing to give his requested jury instructions on the aggravated harassment charge because it would support his defense that his calls to building employees did not constitute harassment. "A party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Shumway,* 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983) (citations omitted). However, "[w]hen a jury is properly instructed on the applicable law, the trial court is not required to provide additional instructions that do nothing more than reiterate or enlarge the instructions in [the] defendant's language." *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992) (citation omitted). Moreover, a court "does not err in refusing to give a jury instruction that is an incorrect statement of the law, does not fit the facts of the particular case, or is adequately covered by the other instructions."

State v. Hussain, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997) (citation omitted).

¶10 We review the denial of a jury instruction for abuse of discretion. *State v. Wall,* 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006) (citation omitted). We review de novo whether a jury instruction accurately states the law. *State v. Johnson*, 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006) (citation omitted). "We will not reverse a conviction based on the trial court's ruling on a jury instruction unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Rutledge*, 197 Ariz. 389, 393, ¶ 15, 4 P.3d 444, 448 (App. 2000) (quoting *State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995)) (internal quotation marks omitted).

¶11 Sebba argues that the court abused its discretion in refusing to give the following instructions:

> The law requires the course of conduct or communication be directed at a specific person. It is not enough if the person learns from a third party about the conduct or communication later or even witnesses it or overhears it when it is made if the conduct or communication is initially directed at a third party.
>
> If you find the conduct or communication has been directed at a third party and not to the complainant, you must find the Defendant not guilty.

and

> To find the Defendant guilty, you must find that the Defendant intentionally or knowingly communicated or caused a communication with the complainant by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses.
>
> You have heard allegations that the Defendant may have attempted to communicate with the complainants through one or more third parties.
>
> If the communication is with a third party, you must consider whether the Defendant intentionally or knowingly directed that third party to communicate with the complainants on Defendant's behalf. If you find that the communication has been received by a third party, and that the Defendant did not knowingly or intentionally direct the third party to communicate with the complainants on his behalf, by whatever means set forth above, you must find the Defendant not guilty.

¶12 The trial court denied Sebba's requested instructions after finding that the standard aggravated harassment instruction adequately tracked the elements of the crime found in the aggravated harassment statute. As a result, the court instructed the jury as follows:

> The crime "Aggravated Harassment" requires proof that the Defendant, **with intent to** harass **or with knowledge** that he is harassing another person:
>
> 1. Anonymously or otherwise communicated or caused communication with another person by verbal, . . . telephonic or written means in a manner that harassed; ***and***

> 2. The harassment was done after a court had issued an injunction against harassment against the defendant and in favor of the victim of harassment and the injunction against harassment had been served and was still valid; ***and***
>
> 3. The victim of the injunction against harassment was the same person alleged to have been harassed in this case.
>
> "Harassment" means conduct 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.

See A.R.S. §§ 13-2921(A)(1) and (E) and 13-2921.01(A)(1); Rev. Ariz. Jury Instr. ("RAJI") Stand. Crim. 29.21.01 (3d ed. 2008).

¶13 The trial court did not abuse its discretion by refusing to give Sebba's proposed instructions. Portions of the requested instructions were included in the standard instruction, and the court did not need to instruct the jury using Sebba's words. *See Salazar*, 173 Ariz. at 409, 844 P.2d at 576 (citation omitted). Other portions of the requested instructions, however, were not included or covered in the standard instruction because they misstated the law. Specifically, the criminal aggravated harassment statute, unlike Sebba's requested instruction, does not direct an acquittal if the "communication is initially directed at a third party" or if "the defendant did not knowingly or intentionally direct the

third party to communicate with the complainants on his behalf." *See* A.R.S. § 13-2921.

¶14 Sebba's reliance on our holding in *LaFaro v. Cahill*, 203 Ariz. 482, 56 P.3d 56 (App. 2002), is misplaced. In *LaFaro*, we found that the lower court had abused its discretion when it granted a civil injunction against harassment based on a communication to a third party that was overheard by the victim. *Id.* at 485-86, ¶¶ 10-13, 56 P.3d at 59-60. There, A.J. LaFaro, chairman of Citizens to Recall Neil Giuliano ("CRG"), had petitioned the court for an injunction against Dennis Cahill, a member of the Tempe City Council, alleging Cahill had harassed LaFaro and other CRG members by calling LaFaro "a bigot, fascist, homophobe, and Nazi." *Id. at* 484, ¶¶ 3-4, 56 P.3d at 58. The petition alleged that the first incident of harassment occurred in front of the Tempe Public Library on October 29, 2000, while LaFaro collected signatures to support the recall campaign, *id.* at 484, ¶ 4, 56 P.3d at 58, and overhead Cahill denounce CRG to a woman who was walking away from the CRG petition table. *Id.* at 486, ¶ 13, 56 P.3d at 60.

¶15 We found that the conduct did not satisfy the statutory definition of harassment in A.R.S § 12-1809(R) (West 2011), because the act was not "directed at" LaFaro, but rather at the woman who was conversing with Cahill. *Id.* at 486, ¶ 13, 56 P.3d at 60. We noted that the finding was "based on the

facts of th[e] case" and did not "suggest[] that a third-party conversation could never constitute 'directed at' harassment pursuant to A.R.S. § 12-1809." *Id.* at 486 n.3, ¶ 13, 56 P.3d at 60 n.3.

¶16 Sebba's proposed instructions stated that the jury had to acquit him unless he explicitly directed the third party to pass on his communication to the victim. That was not our holding in *LaFaro.* Moreover, no instruction can direct a jury to acquit a person; the jury must evaluate all the evidence and determine if the State met its burden of proof on each element of each charge.

¶17 The governing statute, A.R.S. § 13-2921, moreover, does not require that the alleged harasser must have explicitly directed a third party to convey his communication to the victim to prove that the communication was "directed at" the victim. The statute simply prohibits "caus[ing] a communication" with the victim, "directed at" the victim, knowing he is harassing, intending to harass, or in a manner that harasses. *See* A.R.S. § 13-2921(A)(1). The jury had to determine whether Sebba intended to harass the victim, or knew that he was harassing the victim, by causing harassing communications with, and directed at, the victim, based on the direct and circumstantial evidence, and any reasonable inferences therefrom. The instructions Sebba requested would have misled the jury about the statutory

requirements for criminal harassment and the evidence required to prove it. Consequently, the trial court did not abuse its discretion by refusing the give the requested instruction.

¶18 Sebba also argues for the first time on appeal that interpreting A.R.S. § 13-2921 without the limitations imposed by his proposed instructions might lead to unconstitutionally criminalizing libel and defamatory statements. The argument is waived because it was not raised below; we will review the issue only for fundamental error. *State v. Pandeli*, 215 Ariz. 514, 521, ¶ 7, 161 P.3d 557, 564 (2007) (citation omitted). On fundamental error review, Sebba has the burden to show error, that the error was fundamental, and that he was prejudiced thereby. *See State v. Henderson,* 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). The gravamen of the offense of criminal harassment, and Sebba's conduct giving rise to the offense in this case, is not defamation, but rather the fact that the communication was made with the intent to harass or knowledge that he was harassing, and that it "would cause a reasonable person to be seriously alarmed, annoyed or harassed," and in fact did so. *See* A.R.S. §§ 13-2921(A)(1) and (E); *see generally State v. Brown*, 207 Ariz. 231, 85 P.3d 109 (App. 2004). Because we can address any alleged future misuse of the statute on a case-by-case basis, *Brown*, 207 Ariz. at 238, ¶ 21, 85 P.3d at 116 (citations omitted), Sebba has failed to persuade us that

the trial court erred by refusing the proposed jury instruction or that there was any resulting prejudice.

¶19 Sebba also raises additional arguments in his reply brief that interpreting A.R.S. § 13-2921(A)(1) to criminalize communications with a third party not specifically named in the underlying injunction would render the statute unconstitutionally overbroad and vague as applied and an invalid prior restraint on free speech. Because the arguments were not raised in his opening brief, they are waived. *State v. Guytan*, 192 Ariz. 514, 520, ¶ 15, 968 P.2d 587, 593 (App. 1998) (citation omitted) (appellant waives issues not raised in opening brief).[5]

B. Sufficiency of the Evidence

¶20 Sebba next argues that the trial court erred by denying his motions for judgments of acquittal on the two offenses. We review de novo the trial court's denial of a Rule 20 motion. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted). A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is more than a mere scintilla and is such proof that

[5] Sebba's First Amendment arguments were addressed in *Brown* when we held that the criminal harassment statute "regulates neither constitutionally protected speech nor expressive conduct, and, thus, does not implicate the First Amendment." 207 Ariz. at 236, ¶ 14, 85 P.3d at 114.

'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers,* 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). In reviewing the sufficiency of the evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against the defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). A conviction "may rest solely on circumstantial proof." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985) (citation omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted) (internal quotation marks omitted).

1. Count One: Stalking

¶21 A person commits the offense of "stalking" by "intentionally or knowingly engag[ing] in a course of conduct that is directed toward another person" that would "cause a reasonable person to fear for the person's safety or the safety of that person's immediate family member and that person in fact fears for their safety or the safety of that person's immediate family member." A.R.S. § 13-2923(A)(1). "Course of conduct,"

for purposes of section 13-2923, "means maintaining visual or physical proximity to a specific person or directing verbal, written or other threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short, but does not include constitutionally protected activity." A.R.S. § 13-2923(C)(1).

¶22 Sebba argues that the evidence demonstrated that a series of unforeseeable intervening events caused him to encounter the victim at the building where she worked on December 1, 2008, and that the evidence failed to demonstrate that he knowingly or intentionally stalked the victim. Specifically, he argues that had the security guard traveling in an elevator with the victim from the underground parking garage to the lobby not pushed the button to get out at the lobby level, and had the victim not remained in the lobby blocking his subsequent exit from the building, Sebba might never have encountered the victim. We find no merit in the argument. As he acknowledged, "[a]n intervening event is a superseding cause constituting a legal excuse only if unforeseeable and, with benefit of hindsight, abnormal or extraordinary." *State v. Paxson*, 203 Ariz. 38, 40, ¶ 11, 49 P.3d 310, 312 (App. 2002) (citation omitted).[6] It was not unforeseeable that Sebba would

[6] Sebba relies on the instruction in *State v. Cocio*, 147 Ariz. 277, 278-79, 709 P.2d 1336, 1339-40 (1985), which is

encounter the victim in the building where she worked, a prohibited site on the previous injunctions against harassment. *See id.* The evidence, moreover, demonstrated that not only did Sebba go to the building in which the victim worked, but that he entered the elevator in which she was the sole occupant. Later, after being ordered by the security guard to leave, he looked directly at the victim and said, "Oh, I'll be back." The evidence was more than sufficient to demonstrate that he knowingly or intentionally engaged in a course of conduct directed toward the victim that would cause a reasonable person to fear for her safety or the safety of a family member, and that she did so in this case, as necessary to convict him of stalking. *See* A.R.S. § 13-2923 (A)(1) and (C)(1).

2. Count Two: Aggravated Harassment

¶23 A person commits the offense of harassment when, "with intent to harass or with knowledge that the person is harassing another person," he "communicates or causes a communication with another person . . . in a manner that harasses." A.R.S. § 13-2921(A)(1). The statute defines "harassment" as "conduct that is directed at a specific person and that would cause a

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inapplicable. There, our supreme court stated that in order for the unlawful act of another person to be a *defense* to the criminal liability of the defendant, it must be the "sole cause of death." *Id.* The instruction has no applicability outside of its limited facts. *Id.* at 280-81, 709 P.2d at 1339-40.

reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person." A.R.S. § 13-2921(E). A person engages in aggravated harassment if he commits harassment against a victim who has served him with an injunction against harassment. A.R.S. § 13-2921.01(A)(1). A second violation of an injunction against harassment elevates the offense to a class five felony. A.R.S. §§ 13-2921.01(A)(1) and (C).

¶24 Sebba argues that the State failed to prove that he had engaged in conduct "directed at" the victim, because the State offered evidence only of his communications with "unrelated third parties not named in the injunction." Specifically, he argues that the evidence of his contact with the security guard, site manager, and property manager in February 2009 failed to constitute harassment "directed at" the victim.

¶25 Under the peculiar facts of this case, we disagree, and find that the evidence was sufficient to demonstrate that Sebba intended to harass the victim by "caus[ing] a communication" with, and "directed at," the victim in making these calls to the building managers and security guard. The 2008 injunction prohibited Sebba from going near the victim's workplace and from contacting her directly or indirectly through third parties. Two months after showing up at the victim's

workplace and threatening, “Oh, I’ll be back,” he called the building security guard and asked for the names and numbers of the property managers and called the building site manager and asked if this was the correct number to call to lease space in the building. He also called the property manager, argued that the building was a public building that anyone could enter, and indicated that he intended to sue the victim over the earlier incident. The victim considered Sebba’s appearance at her workplace an escalation of the previous harassment. The evidence would allow a reasonable jury to infer that Sebba intended to harass the victim by making the calls to the building employees and indicating that he wanted to lease space in the building and intended to sue the victim for the earlier incident because he believed he had a right to enter the public building at any time. We find that the evidence was sufficient to withstand a Rule 20 motion regarding the criminal harassment charge.

C. Evidentiary Ruling: Letter to the Principal

¶26 Sebba next argues that the trial court abused its discretion by admitting evidence of a letter he had sent on June 29, 2007, to the principal at the school attended by the victim’s eleven-year-old daughter, which outlined his allegations against the victim and her family. He argues that the evidence was not relevant because it was not “directed at”

the victim, should have been excluded "in light of *LaFaro,*" and violated his First Amendment rights by imposing a prior restraint on speech and criminalizing slander. He also argues that the ruling was "inherently contradictory" to an earlier ruling precluding admission of "hundreds of letters" Sebba wrote to city and county officials "about the injustices he was enduring at the hands of the [victim's family]," some of which were attached as copies to the principal's letter.

¶27 "We review evidentiary rulings for an abuse of discretion." *State v. Andriano*, 215 Ariz. 497, 502, ¶ 17, 161 P.3d 540, 545 (2007) (citation omitted). Here, the letter was relevant to show not only the lengths Sebba had gone to harass the victim's family, but also to prove the State's allegation that Sebba had committed a second violation of an injunction, as necessary to elevate the aggravated harassment offense to a class five felony. *See* A.R.S §§ 13-2921.01(A)(1) and (C). Although he stipulated that he had twice been convicted of violating prior injunctions — for showing up in the victim's new neighborhood in January 2006, and for writing the letter to the principal in June 2007 — he denied that the latter conduct actually constituted a violation. The letter, as a result, was relevant to prove that he had, in fact, violated the injunction. It was also relevant to show that Sebba knew he was harassing the victim and intended to harass her. The court carefully

weighed the relevance of the letter, as well as the "hundreds" of other letters sent by Sebba to other city employees addressing his dispute with the victim, and concluded that only the letter to the principal was relevant because "when you write something to a child's principal detailing events that are — negatively reflect on the parent, it is a form of harassment." Accordingly, the court did not abuse its discretion when it admitted the letter.

¶28 Moreover, *LaFaro* does not support Sebba's argument that any evidence of his third-party contact has to be precluded. *LaFaro* did not preclude evidence of third-party contact to establish the requisite *mens rea* for criminal harassment. 203 Ariz. at 486 n.3, ¶ 13, 56 P.3d at 60 n.3. As a result, there is no merit to Sebba's argument that the letter was not, as a matter of law, "directed at" the victim and it was "mere chance" that she learned of it.

¶29 Nor do we find any merit to his argument, raised for the first time on appeal, that, to the extent that the admission of the letter turned on whether Sebba's accusations in the letter were true or false, it constituted a prior restraint on his free speech and criminalized slander. Although the trial court remarked that "[w]hether it's true or not is something to be proven by you," the ruling relied on the relevance of the letter to show Sebba's intent or knowledge that he was harassing

the victim, not the truth or falsity of the allegations in the letter. Consequently, the admission of the letter was not error.

D. Special Verdict Form

¶30 Sebba argues that the trial court abused its discretion in denying his request for a special verdict form on the aggravated harassment charge. He argues that his proposed form would have demonstrated which two prior injunction violations the State had proven beyond a reasonable doubt. The proposed form, however, provided that if the jury found Sebba guilty of aggravated harassment, it had to determine if the State had proved beyond a reasonable doubt that he had "committed at least one prior violation of the injunction against harassment issued in favor of the same victim." *See* A.R.S. §§ 13-2921.01(A)(1) and (C).

¶31 Although Sebba submitted the proposed verdict form, the parties had stipulated that Sebba had been convicted of two prior violations of an injunction: the first for coming to the victim's house in January 2006, and the second for sending the letter to the principal in January 2007. Consequently, the proposed form was unnecessary even though he denied that he had violated the injunction by sending the letter to the principal.

¶32 Although the issue had been raised, the proposed verdict forms were not part of the record on appeal and Sebba

did not argue that his proposed verdict forms were necessary, or why they were necessary. Moreover, Sebba did not object to the verdict form that was presented to the jury, which did not seek a special finding on which of the two prior injunction violations the jury found proved beyond a reasonable doubt.

¶33 Sebba now argues for the first time that the trial court's failure to submit a special verdict form providing for designation of which of the two violations the jury found proved was reversible error because his letter to the principal was not, as a matter of law, "directed at" the victim, and thus did not constitute harassment for purposes of A.R.S. § 13-2921. Because he failed to object to the verdict form below, we review only for fundamental error. *Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (citation omitted). As a result, Sebba has the burden to demonstrate that the court's failure to require a special finding by the jury was fundamental error that caused him prejudice. *Id.* at ¶ 20, 115 P.3d at 607 (citations omitted).

¶34 Special verdicts are the exception, rather than the rule, in Arizona. *See* Ariz. R. Crim. P. 23.2(a); *but see State v. Smith,* 160 Ariz. 507, 513, 774 P.3d 811, 817 (1989) (recommending alternate jury forms to designate whether the jury found defendant guilty of felony murder or premeditated murder, in part for purposes of determining whether to impose the death

penalty). Although a defendant is entitled to a unanimous verdict on whether he committed the charged offense, he is not entitled to a unanimous verdict on the manner in which he committed it. *State v. Herrera,* 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993) (citations omitted) (holding that defendant was not denied unanimous verdict by kidnapping instruction on alternate manners of committing the offense). Here, to prove a class five felony, the State had to demonstrate that Sebba violated a prior injunction against harassment. *See* A.R.S. § 13-2921.01(C). The jury unanimously found that he had violated a prior injunction, as had been stipulated. The jury's failure to state which prior order had been violated, however, did not deprive him of a unanimous verdict. *See Herrera,* 176 Ariz. at 16, 859 P.2d at 126.

¶35 Sebba argues that a special verdict was required because *LaFaro* provides that third-party contact is not illegal in Arizona, and therefore he did not engage in harassment by writing the letter to the principal. For the reasons outlined above, we find no merit in Sebba's argument that third-party contact can never constitute criminal harassment. The jury could reasonably have found that Sebba had engaged in harassment by writing the letter to the principal; after all, he had been convicted of violating the injunction against harassment for the incident. Accordingly, Sebba's argument — based on cases that

suggest a conviction must be reversed when a general verdict is supportable on one ground but not the other – fails.

¶36 Sebba also misplaces his reliance on *State v. Mangum*, 214 Ariz. 165, 168, ¶ 9, 150 P.2d 252, 255 (App. 2007), for the proposition that "[b]ecause Mr. Sebba vigorously attacked the validity of the testimony and the letter, the State had to prove the predicate violation was 'constitutionally valid' if it was to be used as an element of the crime." In *Mangum*, the court only noted that it is a general rule that when a prior conviction is an element of the offense, and a defendant presents credible evidence to overcome the presumption of regularity, the State must establish that the prior conviction was constitutionally obtained. *Id.* (quoting *State v. McCann*, 200 Ariz. 27, 31, ¶ 15, 21 P.3d 845, 849 (2001)). In this case, Sebba's prior conviction was not an element of the offense; rather, the State was required to prove only that he had previously engaged in aggravated harassment by showing that he had violated a prior injunction against harassment. *See* A.R.S. § 13-2921.01(C).

¶37 Moreover, Sebba did not challenge the constitutionality of his conviction of the prior violation of an injunction against harassing the victim; he stipulated that he had been convicted of the offense. As a result, we find no error – much less fundamental, prejudicial error – by the

failure to provide a special verdict form designating which of the two prior incidents of aggravated harassment the jury found had been proven.

E. Jury Instruction: Emotional Harm as An Aggravating Circumstance

¶38 Sebba finally argues that the trial court abused its discretion by failing to instruct the jury, as requested, that it could find emotional or financial harm to the victim and her family as an aggravating circumstance only if it found that the harm was in excess of what a victim would suffer simply from the offense itself. We review de novo "whether a particular aggravating factor used by the court is an element of the offense and whether the court properly can use such a factor in aggravation." *State v. Tschilar,* 200 Ariz. 427, 435, ¶ 32, 27 P.3d 331, 339 (App. 2001) (citation omitted). Because Sebba withdrew his request for this instruction, we review for fundamental error only. *Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶39 Sebba has failed to persuade us that the court erred, much less fundamentally erred to his prejudice, in failing to give the requested instruction. Neither the governing statute, A.R.S. § 13-701(D)(9) (West 2011), nor case law required the jury to find that the emotional or financial harm suffered by the victim was more than that which "presumptively would flow

from the offense . . . under normal circumstances." Moreover, *State v. Germain*, 150 Ariz. 287, 723 P.2d 105 (App. 1986), is inapplicable. In *Germain*, the court only found that the defendant's reckless conduct could not be used as an aggravating circumstance in sentencing him for reckless manslaughter unless the recklessness rose beyond that which was necessary to establish the element of the offense, because recklessness was not listed in A.R.S. § 13-702(D) (West 2011) as an aggravating factor, and recklessness was an element of the offense. *Germain*, 150 Ariz. at 290-91, 723 P.2d at 108-09. Here, emotional and financial harm are identified in the governing statute as aggravating factors, *see* A.R.S. § 13-701(D)(9), and neither is an element of stalking or aggravated harassment. *See* A.R.S. §§ 13-2923, 13-2921, 13-2921.01. Accordingly, we find no error, much less fundamental error, in the court's refusal to give the proposed jury instruction that was withdrawn.

CONCLUSION

¶40 For the foregoing reasons, we affirm the convictions and sentences.

/s/	/s/	/s/
MAURICE PORTLEY Judge	JON W. THOMPSON Presiding Judge	JOHN C. GEMMILL Judge