IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LORETTO KYLE ALEGRIA,
Appellant.

No. 2 CA-CR 2013-0567
Filed March 9, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20092397001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Rebecca A. McLean and
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Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 A jury convicted Loretto Alegria of first-degree murder, sexual conduct with a minor under age fifteen, and kidnapping a minor under age fifteen. The trial court sentenced him to consecutive terms, the longest of which is natural life. Alegria claims the court erred in rulings that (1) found him competent to stand trial, (2) sustained hearsay objections to his girlfriend's testimony about his statements before the crimes, (3) excluded testimony from his former special education teacher about his mental condition years before the murder, and (4) precluded use of jail visitation videos to cross-examine the state's insanity expert. We conclude the court did not abuse its discretion in its rulings or, if it did, the error was harmless. Thus, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Abdi*, 236 Ariz. 609, n.1, 343 P.3d 921, 922 n.1 (App. 2015). In June 2009, seven-year-old R.A. went to the family home of 19-year-old Alegria and his nine-year-old brother, E.A. She wanted to play with E.A., but only Alegria was home. Alegria brought R.A. inside the house, sexually assaulted her, and beat and stabbed her to death. He hid R.A.'s body in a nearby wash. Alegria also hid bloodied clothing and towels in a nearby abandoned house. When his father returned home, Alegria was washing bedsheets and cleaning the house with bleach.

¶3 Alegria was charged as detailed above, and the state filed its notice of intent to seek the death penalty. The court initially ruled him incompetent to stand trial, but found him competent after he participated in a restoration to competency program. Six months before trial, he asserted an insanity defense. The jury found him guilty on all counts, but rejected the state's request for a capital sentence. He timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Competency to Stand Trial

¶4 Alegria contends the trial court erred in finding him restored to competency, arguing he continued to display symptoms that were present when he was found to be incompetent. He maintains the state failed to rebut the presumption of continuing incompetency that arose from the court's earlier finding. We will not disturb a trial court's competency determination absent an abuse of discretion, nor will we reweigh the evidence. *State v. Lewis*, 236 Ariz. 336, ¶ 8, 340 P.3d 415, 419 (App. 2014). We consider only whether "'reasonable evidence supports the trial court's finding that the defendant was competent, considering the facts in the light most favorable to sustaining the trial court's findings.'" *Id.*, *quoting State v. Glassel*, 211 Ariz. 33, ¶ 27, 116 P.3d 1193, 1204 (2005).

¶5 When, "as a result of a mental illness, defect, or disability, [a] person is unable to understand the proceedings against him or her or to assist in his or her own defense," that person is incompetent to stand trial. Ariz. R. Crim. P. 11.1. The court shall order competency restoration treatment for a defendant found to be incompetent, absent "clear and convincing evidence that [the] defendant will not regain competency within 15 months." Ariz. R. Crim. P. 11.5(b)(3). "[An] initial determination of incompetence raises a rebuttable presumption of continued incompetence." *Lewis*, 236 Ariz. 336, ¶ 10, 340 P.3d at 419-20. However, "evidence demonstrating the defendant is competent" will remove that presumption entirely, leaving the court free to determine the defendant's competence "'exactly as if no presumption had ever been operative.'" *Id.* ¶ 14, *quoting Sheehan v. Pima Cty.*, 135 Ariz. 235, 238, 660 P.2d 486, 489 (App. 1982).

¶6 In April 2012, the trial court found Alegria incompetent and referred him to the Pima County Restoration to Competency Program (RTC). At a hearing in February 2013, the state presented the testimony of Dr. Sloan King, a psychologist from the RTC program. Based on her observations of Alegria during his nine months in the program and her review of his mental health records, King opined Alegria was competent to stand trial. She testified there was "no question" that he could understand the nature and object of the proceedings, including "the role of the Court . . . what the trial is, the role of the jury, the judge, his attorneys, [and] the prosecutors." She also opined he was rationally able to assist his attorneys in preparing his defense.

¶7 Dr. King's expert opinion that Alegria's competency had been restored was based in part on her observation of him during the RTC program and was sufficient to remove the presumption of continuing incompetency, leaving the court free to weigh the evidence of competency just as though such presumption had never existed. *See id.* ¶ 14; *cf. id.* ¶¶ 16-24. King's testimony also constitutes reasonable evidence supporting the court's competency finding. *See id.* ¶ 8. We decline Alegria's invitation to reweigh the evidence. *See id.* The court did not abuse its discretion in finding Alegria competent to stand trial.

¶8 Alegria also argues the trial court erred by denying his October 2013 motion for a new competency evaluation primarily based on the conclusion of his insanity expert that Alegria was suffering from severe mental illness. A court must order a competency evaluation if it determines "reasonable grounds" for such an examination exist. Ariz. R. Crim. P. 11.3(a); *see also State v. Amaya-Ruiz*, 166 Ariz. 152, 162, 800 P.2d 1260, 1270 (1990) ("Reasonable grounds exist when 'there is sufficient evidence to indicate that the defendant is not able to understand the nature of the proceeding against him and to assist in his defense.'"), *quoting State v. Borbon*, 146 Ariz. 392, 395, 706 P.2d 718, 721 (1985). The trial court has broad discretion to determine whether reasonable grounds exist for a competency examination, and we will reverse its ruling only if it manifestly abused that discretion. *Amaya-Ruiz*, 166 Ariz. at 162, 800 P.2d at 1270.

¶9 "The fact that a defendant suffers from a mental illness, defect, or disability is not, by itself," sufficient evidence to trigger a competency inquiry. *See Lewis*, 236 Ariz. 336, ¶ 9, 340 P.3d at 419, *citing* A.R.S. § 13-4501(2). Rather, such illness, defect, or disability must render the defendant "*unable* to understand the nature and object of the proceeding or to assist in the . . . defense." § 13-4051(2) (emphasis added); *accord Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) (competency inquiry focuses on defendant's "*ability* to understand the proceedings," not whether he in fact does understand).

¶10 Alegria attached the report of Dr. Pablo Stewart to his motion for a new competency evaluation. Stewart described Alegria as a "profoundly psychotic individual who is suffering from Schizophrenia or Schizoaffective Disorder" and has "significant impairments in his cognitive functioning." However, Stewart did not opine that Alegria's mental illness prevented him from understanding the proceedings or assisting his attorneys. In another attached report, Dr. Denis Keyes suggested Alegria "may be somewhat confused . . . with the entire criminal justice proceedings against him," but Keyes did not opine Alegria was unable to understand those proceedings or assist counsel due to a mental illness, disability, or defect.

¶11 Defense counsel also had argued in their motion that, based on their observations and attorney-client interactions, Alegria was "unable to rationally assist counsel in his defense." In finding to the contrary, the trial court observed "there is a difference . . . between being unwilling and being unable." Dr. King testified at length about Alegria's decision-making process, both as it affected his legal options (e.g., whether to accept a plea bargain) and everyday life (e.g., purchases at the commissary and daily grooming). She found that his decision-making ability was fact-based and unaffected by his mental condition. Finally, King explained how Alegria's antisocial personality traits might affect his willingness to cooperate with others. We conclude there was reasonable evidence to support the court's ruling that Alegria's failure to cooperate with counsel was the result of unwillingness, not inability. Absent any showing that Alegria's mental illness

prevented him from understanding the proceedings or aiding in his defense, the court did not abuse its discretion in declining to order a Rule 11 examination.

Hearsay Rulings

¶12 Alegria argues the trial court erroneously precluded testimony from his former girlfriend, Y.F., about statements he made to her. He argues the court's rulings wrongfully prevented Y.F. from offering lay witness opinion on the issue of his sanity.[1] "We review a trial court's evidentiary rulings . . . for an abuse of discretion." *State v. McGill*, 213 Ariz. 147, ¶ 40, 140 P.3d 930, 939 (2006). An error of law is an abuse of discretion. *See State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004).

¶13 Alegria first contends the trial court erred in sustaining the state's hearsay objection to the following question:

> Did [Alegria] tell you [in the months before the crime]—did he tell you, say the words to you that he couldn't get out of bed and didn't want to do anything, just slept all day, it was so bad that he felt he just couldn't handle it? Did [he] tell you that?

Alegria argues, as he did below, that Y.F.'s response to the question would have been relevant to his state of mind and thus would fall within an exception to the hearsay rule pursuant to Rule 803(3), Ariz. R. Evid. We disagree.

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[1]On appeal, Alegria also suggests the rulings violated due process, citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Because he did not raise this argument, he has forfeited it as to all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Because he does not argue any error was fundamental, he has waived the argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008).

¶14 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless an exception applies. Ariz. R. Evid. 801(c), 802. A statement of the declarant's then-existing condition, including his mental feeling, is one such exception, but it is not so broad as to encompass "a statement of memory or belief to prove the fact remembered or believed." Ariz. R. Evid. 803(3). Here, defense counsel had attempted to elicit not what Y.F. had observed, nor what Alegria reported feeling at a particular moment, but rather what Alegria had told Y.F. concerning his past actions or mental state—his memories that at some point in the past, he had not been able to get out of bed and had slept all day. Furthermore, the defense offered these statements for their truth. The court did not abuse its discretion in determining the question called for hearsay not within the Rule 803(3) state-of-mind exception.

¶15 In a related claim, Alegria contends the trial court erroneously precluded Y.F.'s proposed testimony that he had told her there were demons in his room. Alegria offered his statements through Y.F. as "relevant to the insanity question." The state asserted a hearsay objection to the proposed questions and the court sustained the objection without elaboration.

¶16 We agree with Alegria that it was error to preclude this testimony because it is not hearsay. The defense did not seek to introduce Alegria's statement to prove there actually *were* demons in his room, but rather, to prove he believed there were, which is relevant to the issue of his mental health.[2] *See* Ariz. R.

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[2] That being said, we do not accept Alegria's appellate characterization of the trial court's ruling as preventing Y.F. from offering lay witness opinion about Alegria's sanity. At the sidebar conference, defense counsel clearly stated, "I am not asking for [Y.F.] to offer an opinion that [Alegria] is insane," and in fact he never asked her to provide such an opinion. The narrow question before the trial court was whether Y.F. should have been permitted to testify that Alegria had told her he saw demons in his room, not whether she should have been allowed to opine that he was or was

Evid. 801(c)(2) (statement hearsay only if offered to prove truth of matter asserted). Inasmuch as the trial court excluded the statement as hearsay, it made an error of law, which is an abuse of discretion.

¶17 However, we will not reverse Alegria's conviction if the error was harmless. *See State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008) (applying harmless error review to evidentiary error preserved below); *State v. Bible*, 175 Ariz. 549, 588, 600, 858 P.2d 1152, 1191, 1203 (1993) (error harmless if beyond reasonable doubt it did not contribute to or affect verdict). The court permitted Y.F. to testify at length about her perceptions of Alegria's mental health and symptoms of mental illness in the months before the crime. She testified that Alegria was "depressed," "hopeless," and "suicidal," and that she worried he would kill himself. Her own struggle with depression was "one of the main things" that attracted her to him, she said, because she felt they had that in common. She testified that he "had OCD" and had rituals where he needed to touch things, like a DVD player or a shower knob, a certain number of times, and that he sometimes kept his urine in plastic bottles in his bedroom. She said she wanted to help him find counseling or mental health services.

¶18 The jury also heard testimony from Dr. Stewart "that at the time of the crime [Alegria] did not know that his criminal act was wrong" because at that time he suffered from schizophrenia or schizoaffective disorder. Stewart's opinion relied on statements from Alegria's family that he was experiencing hallucinations, such as carrying on conversations with non-existent people and hearing voices others could not hear. Stewart also relied on observations of family members that Alegria frequently mumbled, slept at odd hours, shaved off all of his body hair, stored his urine in bottles, and exhibited other strange behaviors. In light of extensive evidence regarding Alegria's symptoms of mental illness before the offense and his mental state during the offense, additional evidence that he had told Y.F. he thought demons were in his room was cumulative

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not legally insane within the meaning of A.R.S. § 13-502(A) at the time of the offense.

and would not have affected the verdict. *See State v. Dunlap*, 187 Ariz. 441, 456-57, 930 P.2d 518, 533-34 (App. 1996) (erroneous exclusion of cumulative evidence did not require reversal); *see also State v. Wallen*, 114 Ariz. 355, 357-58, 560 P.2d 1262, 1264-65 (App. 1977). The error was harmless.

Testimony of Special Education Teacher

¶19 Alegria next argues the trial court erred by precluding the testimony of his onetime special education teacher, T.S., during the guilt phase of the trial.[3] In a conference outside of the jury's presence, Alegria requested a preliminary ruling from the court about the admissibility of the teacher's proposed testimony because counsel wanted to avoid having her "come all the way from Ajo and then not be able to testify." The court noted that, despite the state's objections, Dr. Stewart could testify about whether he "read or reviewed or relied" on T.S.'s observations as a basis for his insanity opinion. As to the teacher's direct testimony, however, the court concluded:

> But for her to come in and talk about what she believed to be depression or cognitive issues with Mr. Alegria some years, a number of years before the actual incident in which [R.A.] died I think is too remote and not sufficiently connected or relevant to the insanity defense.

We review evidentiary rulings for an abuse of discretion.[4] *McGill*, 213 Ariz. 147, ¶ 40, 140 P.3d at 939.

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[3]T.S. did testify during the mitigation phase, however.

[4]Alegria argues on appeal that the court's ruling violated his state and federal "constitutional right[s] to due process and compulsory process, and to present a meaningful defense and call witnesses in his defense." He did not object on any of these bases below, and accordingly, has waived these arguments except as to fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. And because he does not argue fundamental error, he has

¶20 As an initial matter, the state argues Alegria's offer of proof was not sufficiently detailed to preserve the issue on appeal. *See generally* Ariz. R. Evid. 103(a)(2). Defense counsel told the trial court that T.S. had been Alegria's special education teacher once in summer school and then again when he was about sixteen years old. According to counsel, she would testify that based on her experiences with him in the classroom, he had been extremely depressed, hopeless, helpless, underperforming academically, unable to sustain an effort, distracted, lacking in judgment, and possibly suicidal.

¶21 Counsel did not explain with great particularity the foundation for T.S.'s opinions, such as whether they flowed from classroom observation, conversations with Alegria, testing, or other sources. Alegria's opening brief discusses T.S.'s testimony during the mitigation phase to fill in some of this detail, in what the state calls an improper "post-hoc offer of proof." We agree with the state that T.S.'s testimony during the mitigation phase cannot substitute for a complete offer of proof during the earlier guilt phase. One central purpose of Rule 103 is "to permit the trial court to intelligently rule on the [evidentiary issue] and avoid error." *State v. Granados*, 235 Ariz. 321, ¶ 19, 332 P.3d 68, 73-74 (App. 2014). It can only do so with a proper offer of proof during trial. Nevertheless, although counsel's recitation did not contain every detail of the proffered testimony, we conclude Alegria's offer of proof during the guilt phase was sufficient to inform the court of the "substance" of the testimony and to preserve the issue for appeal. Ariz. R. Evid. 103(a)(2).

¶22 Alegria first argues T.S.'s testimony was relevant and corroborated Dr. Stewart's testimony regarding the longstanding nature of Alegria's mental illness. Stewart testified that his opinion was based, in part, on his interview with T.S. In his reply brief,[5]

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waived the issues entirely. *See Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d at 140.

[5]In his opening brief, Alegria cites only "*State v. Fletcher*, 132 Ariz. 571, 574, 694 P.2d 1185, 1188 (1985)," in support of his

Alegria relies on *State v. Bay*, 150 Ariz. 112, 116, 722 P.2d 280, 284 (1986), for the proposition that lay testimony proffered by a defendant, standing alone and without an expert opinion, is admissible to show insanity. In *Bay*, the defendant sought to introduce his history of mental illness and prior hospitalizations for the disorder, apparently using testimony from family members. *Id.* at 283-84, 722 P.2d at 115-16. The trial court precluded the evidence because the defendant did not intend to call an expert to support his insanity defense. *Id.* In reversing the conviction, our supreme court noted a long history of permitting lay testimony with proper foundation on the issue of insanity. *Id.* at 284, 722 P.2d at 116. It reasoned that the absence of an expert might make defendant's burden difficult, but because the jury was not required to accept expert testimony over its lay counterpart, it could render a verdict using only lay testimony. *Id.* We conclude to the extent that the trial court's ruling could be construed as precluding the lay testimony as irrelevant, the court erred in its ruling. *Id.* Observations about Alegria's mental state three years before the murder could tend to prove a chronic disorder and therefore might provide context regarding his condition on the day of the murder. *See id.*

¶23 We next address Alegria's contention that the trial court erred in implicitly relying on Rule 403 to preclude T.S.'s testimony. The state maintains the evidence was properly excluded under that rule, because T.S.'s testimony would have been cumulative to that

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argument that T.S.'s testimony was erroneously excluded. We assume this citation was a clerical error, because neither parallel citation points to a case called "*State v. Fletcher*." The Arizona Reports citation pertains to *State v. Agnew*, which involves the use of a guilty plea for impeachment, and the Pacific Reporter citation directs the reader to *State v. Fuller*, which relates to a court's order for deposition testimony. It was not until the reply brief that relevant authority was provided. Although this might be regarded as impermissibly raising an argument for the first time in a reply brief, *see, e.g.*, *State v. Cohen*, 191 Ariz. 471, ¶ 13, 957 P.2d 1014, 1017 (App. 1998), in our discretion we address the merits of his argument, *see State v. Lopez*, 217 Ariz. 433, n.4, 175 P.3d 682, 687 n.4 (App. 2008).

offered by Dr. Stewart, whose opinion relied on the teacher's observations of Alegria. Although neither the parties nor the trial court expressly cited Rule 403, we agree the court's ruling encompassed factors that could have required exclusion of otherwise relevant evidence. *See* 1 Joseph M. Livermore et al., *Arizona Practice: Law of Evidence* § 403 (4th ed. 2008).

¶24 "Irrelevant evidence is not admissible," Ariz. R. Evid. 402, and the court may exclude relevant evidence if its probative value is substantially outweighed by the danger of "confusing the issues," "wasting time" or "needlessly presenting cumulative evidence," Ariz. R. Evid. 403; *see also* Ariz. R. Evid. 703 (limiting disclosure of otherwise-inadmissible facts relied on by expert). More specifically, it is not an abuse of discretion for the court to limit disclosure of the facts relied upon by defendant's insanity expert. *Cf. State v. Hudson*, 152 Ariz. 121, 124, 730 P.2d 830, 833 (1986) (defendant's history, while helpful to experts, not necessary for jury to reach decision as to whether defendant knew difference between right and wrong at time he committed crimes). Additionally, the state did not contest the accuracy of T.S.'s observations or Dr. Stewart's reliance on them. Therefore, the trial court reasonably could have concluded that whatever marginal probative value T.S.'s testimony might have had to corroborate Stewart's testimony, it was substantially outweighed by the danger of wasting time or needlessly presenting cumulative evidence. *See* Ariz. R. Evid. 403.

¶25 Even assuming for the sake of argument that the court erred by excluding T.S.'s testimony, any error was harmless. *See Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d at 385; *see also State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005) (harmless error standard). The jury heard expert testimony from both sides on the issue of whether Alegria was insane at the time of the offense, including the opinion of Dr. Stewart, which was based in part on his interview with T.S. The jury also heard lay witnesses such as Y.F. describe the mental health symptoms Alegria exhibited. Beyond a reasonable doubt, T.S.'s testimony would not have changed the

jury's verdict.[6] *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607; *Dunlap*, 187 Ariz. at 456-57, 930 P.2d at 533-34.

Scope of Cross-Examination of State's Insanity Expert

¶26 Alegria contends the trial court improperly limited the scope of his cross-examination of Dr. James Sullivan, the state's insanity expert, in violation of his "constitutional rights . . . to present evidence and confront the witnesses against [him]." We review the court's evidentiary rulings for an abuse of discretion, *see State v. Oliver*, 158 Ariz. 22, 32, 760 P.2d 1071, 1081 (1988), but we review constitutional issues de novo, *State v. Nordstrom*, 230 Ariz. 110, ¶ 17, 280 P.3d 1244, 1249 (2012).

¶27 A defendant enjoys Sixth Amendment rights to confront witnesses and present a defense theory. U.S. Const. amend. VI, XIV; *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 11, 312 P.3d 123, 127 (App. 2013). Yet trial courts have "'wide latitude'" under the Confrontation Clause to reasonably limit cross-examination to avoid "'interrogation that is repetitive or only marginally relevant.'" *State v. Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d 564, 584 (2002), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see State v. Lehr*, 201 Ariz. 509, ¶ 30, 38 P.3d 1172, 1181 (2002). If a trial court merely excludes irrelevant evidence, no Sixth Amendment violation has occurred. *See Oliver*, 158 Ariz. at 30, 760 P.2d at 1079; *Buccheri-Bianca*, 233 Ariz. 324, ¶ 11, 312 P.3d at 127; *see also* Ariz. R. Evid. 402.

¶28 Alegria's insanity defense required him to prove by clear and convincing evidence that, at the time of the offenses, he suffered from a mental disease or defect so severe that he did not know his criminal acts were wrong. *See* A.R.S. § 13-502(A), (C). In Alegria's case-in-chief, Dr. Stewart testified that Alegria suffered from schizophrenia or schizoaffective disorder so severe that he did not know his criminal acts were wrong when he committed them.

[6] Alegria's argument that T.S.'s testimony was so crucial that it could have resulted in a different verdict is further undercut by the defense's decision not to explore Stewart's interview with T.S. more robustly when asking him about the foundation for his opinion.

Dr. Sullivan, the state's expert, testified that he had been unable to reach an opinion as to whether Alegria suffered from a mental disease or defect because Alegria had refused to complete various tests Sullivan had planned to administer. However, Sullivan did opine that Alegria knew his criminal acts were wrong when he committed them. He said he based this opinion in part on the fact that, during the interview, Alegria had told him, "I molested and I killed that little kid. I did it. I was conscious of it. . . . It was me making a decision. I proceeded to carry it out. When I was carrying it out I knew it was wrong." He also focused on Alegria's having stated during the interview, "I have little to no remorse"; Sullivan testified that "people who authentically were not aware at the time" that their criminal acts were wrong "are filled with remorse" when they later discover what they have done. He further emphasized that Alegria had tried to clean up the crime scene and hide evidence, which he concluded showed consciousness of guilt. "[T]he only reason that people try to avoid detection," Sullivan reasoned, "is because they know it's wrong."

¶29 Alegria argued to the trial court that he had lied to Dr. Sullivan because he wanted the jury to impose the capital sentence, which he considered a means of suicide, and that Sullivan had naively taken his words at face value. To further this theory, he sought to cross-examine Sullivan by playing video clips of various jail visits he had with family members or Y.F. before Sullivan had conducted his interview. The clips showed him making statements to the effect that he was suicidal, wanted the death penalty, was "'trying to get'" to death row, and would "'do what [he had] to do'" to get there, such as misbehaving in front of the judge in order to "'make [his] charges worse.'" The trial court denied his request to play the clips for the jurors, but it stated it would permit "full cross-examination," including use of the transcripts from jail visits. Later, however, when defense counsel attempted to cross-examine Sullivan with specific jail visit transcripts, the court sustained the state's objections, finding the proffered portions of the particular transcripts were beyond the scope of the state's direct examination of Sullivan.

¶30 Alegria's first theory of error is that the trial court abused its discretion in precluding cross-examination of Dr. Sullivan using Exhibits DH or DI.[7] He maintains such cross-examination would have been relevant to show he had experienced remorse soon after the offenses, even though he told Dr. Sullivan he felt little to no remorse. We agree with Alegria that certain of his statements in Exhibits DH and DI were relevant on the issue of remorse,[8] and it was error to exclude those statements on relevancy grounds.

¶31 However, we will affirm the trial court's ruling if legally correct for any reason. *See State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012). Although the remorse evidence in Exhibits DH and DI was relevant, its exclusion was not legally incorrect, because it would have been repetitive. *See Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d at 584. Without any objection from the state, the defense cross-examined Sullivan with other evidence of Alegria's remorse, most notably a suicide note he had written just three or four days after the murder in which he said he was sorry four times. Additionally, defense counsel's closing argument manifestly establishes that Alegria was adequately permitted to argue remorse, notwithstanding any limitation on cross-examination. *See id.* ¶ 64 (no confrontation clause violation where defendant "was permitted to elicit facts necessary to support his theory" and present his defense). Counsel's closing claimed the suicide note showed that Alegria experienced remorse just days after the crime once he had

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[7]Alegria had particular jail visit video clips and corresponding transcripts marked as Exhibits DH and DI, respectively, to facilitate appellate review.

[8]For example, during a January 2010 jail visit, Alegria said:

> I can't, can't believe I did that. I don't believe it. I love kids, you know, I would never, I, I never thought I would hurt anybody. . . . I can't, it was a little girl. I took everything away from her and it's, it's not right. . . . and I'm sorry, sorry, I don't know why I did it, I'm just sorry.

realized what he had done, thus placing him squarely within Sullivan's own description of the traits of insane or psychotic individuals. The trial court's reasonable limitation to prevent further, repetitive cross-examination regarding remorse did not hamstring the defense's argument and was not reversible error. *See id.* ¶¶ 62-64.

¶32 Alegria also maintains the trial court erroneously excluded cross-examination related to Exhibits DH and DI because such cross-examination would have been relevant to show he had lied when he told Sullivan that he knew his criminal acts were wrong. But nothing in Exhibits DH or DI tends to show that Alegria did not know his criminal acts were wrong at the time of the offenses.[9] For the most part, the exhibits contain Alegria's statements regarding his mental illness, suicidality over the years, and frustration and annoyance with the criminal process. The court did not abuse its considerable discretion in ruling that nothing in the exhibits was relevant for the purpose for which Alegria proposed to use it, i.e., to shore up the no-knowledge-of-wrongfulness prong of his insanity defense. *Cf. Oliver*, 158 Ariz. at 30-32, 760 P.2d at 1079-81 (preclusion of cross-examination of victims regarding their prior sexual histories not abuse of discretion where evidence not relevant under any of defendant's four proposed theories).

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[9]To the contrary, Exhibit DI contains a partial transcript from a March 2, 2013 jail visit in which the following exchange occurs:

> Q: So, Kyle, I don't think you knew what you were doing [when you killed R.A.]. Right? You didn't know what you were doing.
>
> A: Yeah, I did.
>
> Q: You didn't.
>
> A: Knew what I was doin' and I done it anyway.

¶33 We are not persuaded by Alegria's reliance on *Lehr*, 201 Ariz. 509, ¶¶ 23, 34-43, 38 P.3d at 1179-80, 1181-83. In that case, a trial court had precluded cross-examination of the state's DNA expert about the laboratory's methodology. *Id.* ¶ 23. Concluding the court's ruling had "improperly insulated the state's evidence from critique," *id.* ¶ 29, our supreme court reversed those convictions that had been based almost exclusively on DNA evidence, *id.* ¶¶ 32-43. Here, the trial court's cross-examination limitations did not prevent Alegria from developing the theory that he was just telling Sullivan what he thought he needed to tell him in order to receive the death penalty as a form of suicide. The jury heard other testimony that paved the way for that argument. *Cf. Cañez*, 202 Ariz. 133, ¶ 64, 42 P.3d at 584-85 (restriction on cross-examination did not prevent defense from eliciting facts necessary to support case theory). For instance, during Alegria's case-in-chief, Dr. Stewart testified that Alegria kept reiterating "I want to be on death row" and that his "only concern [was] getting on death row." Stewart further testified Alegria had told him he planned "to tell the jury that he's not crazy," admit "knowledge of wrongfulness," and testify that he assaulted and killed R.A. because "he's a sexual pervert," all in order to get the death penalty. Cross-examination of Sullivan with Exhibits DH or DI would have been at best cumulative to this testimony—testimony this jury apparently did not find compelling in any event. *See Dunlap*, 187 Ariz. at 456-57, 930 P.2d at 533-34 (even erroneous exclusion of evidence not reversible where excluded evidence merely cumulative).

¶34 Nor is Alegria's reliance on *State v. Burns*, 237 Ariz. 1, ¶¶ 101-02, 104, 344 P.3d 303, 327 (2015), persuasive. The supreme court in that case ruled that the trial court did not abuse its discretion by *declining* to limit the state's cross-examination of the defendant's prison expert. *Id.* But the fact that the court did not abuse its discretion by *not* limiting the scope of cross-examination does not necessarily imply that a contrary ruling would have been an abuse of discretion. *See State v. Wassenaar*, 215 Ariz. 565, ¶ 11, 161 P.3d 608, 613 (App. 2007) (finding abuse of discretion only if ruling "'manifestly unreasonable, exercised on untenable grounds or for untenable reasons'"), *quoting State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992). Despite some factual similarities, the

present case presents a decision procedurally inverse from the one the court faced in *Burns*. *Burns* has little instructive value about whether a particular limitation imposed on cross-examination was an abuse of discretion.

Denial of Surrebuttal

¶35 Finally, Alegria argues the trial court erred by not permitting him to play the contents of Exhibit DH as surrebuttal evidence to rebut Sullivan's testimony.[10] Although Exhibit DH was not admitted in evidence, numerous other jail visit videos, including multiple videos containing some of the same clips found on Exhibit DH, were admitted and available to the jury during its deliberations.[11]

¶36 The "'line between direct and rebuttal evidence is hazy and hard to determine and the trial court must have reasonable discretion in fixing the line. The trial court's determination will not be disturbed unless manifest abuse has prejudiced the complaining party.'" *State v. Young*, 116 Ariz. 385, 387, 569 P.2d 815, 817 (1977), *quoting Jansen v. Lichwa*, 13 Ariz. App. 168, 171, 474 P.2d 1020, 1023 (1970); *see also State v. Talmadge*, 196 Ariz. 436, ¶ 18, 999 P.2d 192, 196

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[10] It is not entirely clear from the record which particular video clips Alegria hoped to play as surrebuttal, because he never proffered specific clips for that purpose. However, defense counsel's request for surrebuttal, viewed in context, appears to have been proposed as an alternative to cross-examining Sullivan using Exhibits DH or DI. Thus, we assume Alegria sought to have all of Exhibit DH admitted and played for the jury as his surrebuttal.

[11] To the extent Alegria contends the court erred in not admitting a video clip from a particular jail visit, the error is waived, absent a specific objection below, for all but fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08; *State v. Garcia*, 133 Ariz. 522, 525-26, 652 P.2d 1045, 1048-49 (1982) (evidentiary objection waived by failure to assert it). Because he does not argue fundamental error occurred, he has waived such argument entirely. *Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d at 140.

(2000) ("'[o]nly in rare cases'" is denial of surrebuttal error), *quoting State v. Steelman*, 120 Ariz. 301, 319, 585 P.2d 1213, 1231 (1978).

¶37 Alegria relies on *State v. Delgado*, 174 Ariz. 252, 260, 848 P.2d 337, 345 (App. 1993), but that case is distinguishable. In *Delgado*, we held that preclusion of an insanity expert vital to the defense—as a sanction for late disclosure of the witness and in lieu of granting a brief continuance—violated the Sixth Amendment under the circumstances. *Id.* at 340-45, 848 P.2d at 255-60. Here, in contrast, the trial court did not preclude any relevant testimony, vital or otherwise—it only precluded the defendant from having certain jail visit video clips admitted and played for the jury during surrebuttal. The court told Alegria, "these matters . . . were best put to [Stewart] when you were putting on your case[-in-chief] regarding insanity" instead of offered as surrebuttal. Alegria has not shown the court manifestly abused its discretion in fixing the line between chief and rebuttal evidence. *See Deyoe v. Clark Equip. Co.*, 134 Ariz. 281, 284, 655 P.2d 1333, 1336 (App. 1982) (party has no right to offer rebuttal evidence which was proper and admissible in case-in-chief, even if it tends to contradict opponent's evidence).

¶38 Even assuming the trial court erred in precluding Alegria from playing jail visit video clips after the state rested, the jury heard ample other evidence of Alegria's remorse and of his supposed suicidal motive to lie to Sullivan. The videos would have been cumulative, and any error would not have been prejudicial. *See Jansen*, 13 Ariz. App. at 171, 474 P.2d at 1023 (prejudice required for preclusion of rebuttal evidence to be reversible); *cf. Talmadge*, 196 Ariz. 436, ¶ 19, 999 P.2d at 196 (cumulative evidence generally inadmissible when proffered as surrebuttal).

¶39 In the above analysis, we identified specific evidence precluded by the trial court that should have been admitted. In each instance, we concluded that the erroneous preclusion of the evidence was harmless because the defense presented ample other evidence addressing the same factual question. In so finding, we do not suggest that multiple sources of evidence must always be deemed cumulative and their erroneous preclusion harmless. On disputed factual questions, jurors must assess the weight not merely

the existence of evidence to render their verdicts. We merely conclude on the specific record before us, in the context of the disputes emphasized by the parties' respective arguments, that the multiple errors here were ultimately harmless.

Disposition

¶40 For the reasons stated above, we affirm Alegria's convictions and sentences.