IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GENARO URBINA JR.,
Appellant.

No. 2 CA-CR 2016-0022
Filed June 20, 2017

Appeal from the Superior Court in Pima County
No. CR20153212001
The Honorable Deborah Bernini, Judge

AFFIRMED AS CORRECTED;
REVERSED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Miller concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Genaro Urbina was found guilty of three counts of child abuse and felony murder arising from the death of a three-month-old baby in his care. On appeal, he challenges his convictions and sentences, arguing the trial court erred in admitting, as well as excluding, certain evidence at trial, and alleges there was insufficient evidence to support his convictions. For the reasons that follow, we affirm his convictions and sentences for two counts of child abuse, reverse his conviction for child abuse based on failure to seek medical attention, and affirm his felony murder conviction and sentence as corrected.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Dann*, 205 Ariz. 557, n.1, 74 P.3d 231, 236 n.1 (2003). On the morning of May 13, 2013, Urbina woke his girlfriend, Candyce Ramirez, to inform her that the infant they were babysitting was "not waking up." Candyce took the limp baby, I.G., called 9-1-1, and told Urbina to call Candyce's mother, the infant's legal custodian. Urbina went to Candyce's mother's apartment to inform her "what was going on," and Candyce performed CPR[1] on I.G. while on the phone with 9-1-1 dispatch.

¶3 At the hospital, I.G. was diagnosed with old and new bilateral subdural hematomas and an anoxic brain injury, both consistent with trauma to the head. He also had preretinal and subretinal hemorrhages, and retinoschisis of the eyes, with trauma

[1]Cardiopulmonary resuscitation.

the "most likely explanation" of the injuries. An ophthalmologist testified the eye injuries could have been caused by shaking, and a radiologist opined that I.G.'s brain injuries were consistent with trauma "induced [by] rapid acceleration, deceleration." A pediatric hospitalist testified that I.G. had rib fractures of various ages "related to squeezing," and upon consideration of all the injuries, provided a "differential diagnosis" that "someone had hurt [I.G.] and that he had been shaken." After three days in the hospital, I.G.'s life support was removed and he was pronounced dead.

¶4 Police detectives interviewed Urbina the day I.G. was taken to the hospital, and he initially claimed he did not remember the baby being at Candyce's house the previous evening. After being informed this was inconsistent with what Candyce had already told police, Urbina changed his story several times, ultimately describing an incident early that morning in which I.G. "threw his head back" and hit the corner of the wall. Urbina indicated he attempted to revive the baby by squeezing and shaking him.

¶5 Detectives interviewed Urbina again two days later, and he again described I.G. "bump[ing] his head" when Urbina had gotten up to change him. Following the second interview, Urbina was arrested and charged with three counts of child abuse and first-degree murder. A jury found him guilty on all charges after an eight-day trial, and the trial court sentenced him to life in prison.[2]

¶6 On appeal, Urbina argues the trial court erred in denying his motion to suppress the two police interviews, in admitting video evidence from his second interview, in sustaining an objection by the state and thereby prohibiting an answer "essential" to his defense theory, and in allowing medical experts to testify that I.G. died from "child abuse." He also raises a sufficiency of the evidence claim, and

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[2]The sentencing minute entry states that Urbina was sentenced "for a term of LIFE, with the possibility of parole after 35 years." But parole was eliminated for offenses committed after January 1, 1994. 1993 Ariz. Sess. Laws, ch. 255, §§ 86, 88. We correct the sentencing minute entry to reflect Urbina's eligibility for release, not parole, after thirty-five years. *See* A.R.S. §§ 13-1105(A)(2), (D) and 13-751(A)(3).

argues that fundamental error occurred when the prosecutor suggested to the jury that "punishment for felony murder would be less serious than for premeditated murder." We have jurisdiction over Urbina's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motion to Suppress

¶7 Before trial, Urbina sought to suppress statements made during police interviews, arguing he was "subjected to [a] day-long incommunicado detention" that "deprived [him] of his freedom of action in a number of significant ways." He asserted his "multiple statements and ultimate[] 'confession' were obtained through the strategic exploitation of [an] illegal day-long constitutionally unreasonable . . . detention," and as such must be suppressed as "fruit" of an improper de facto arrest. The state countered that Urbina "was not in custody before" he was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and argued the facts were "indicative of an ongoing investigation" and "not tantamount to custodial investigation" requiring warnings pursuant to *Miranda*.

¶8 After a suppression hearing, the trial court found "there was not a detention of such length that it resulted in [an] unconstitutional deprivation of [Urbina]'s rights." The court noted the objective nature of the appropriate test, and concluded "[Urbina]'s freedom of movement was [not] so restricted . . . that he was in custody." We review the denial of a motion to suppress for an abuse of discretion, considering only the evidence presented at the suppression hearing and viewing that evidence in the light most favorable to upholding the trial court's ruling. *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 306-07 (App. 2000). Legal conclusions, including whether an illegal arrest occurred, are subject to our de novo review. *State v. Blackmore*, 186 Ariz. 630, 632, 925 P.2d 1347, 1349 (1996).

¶9 At the suppression hearing, Tucson Police Department (TPD) Officer Juan Rodriguez testified that he and TPD Sergeant Peter Cross went to Candyce's mother's apartment, I.G.'s primary residence, at about 9:30 in the morning to "secure possibly a second crime scene" because of the apparently varying ages of I.G.'s injuries

and not knowing where he had been injured. Sergeant Cross's report reflects they found Urbina at the apartment, he invited them in, and they informed him it needed to be "treated like a crime scene," which required him to wait outside until they completed their work.[3] If he instead wished to remain on the couch inside, the officers would need to first check it for weapons. Officer Rodriguez testified "[he] was there to secure the crime scene" and was not under the impression he was to "detain" anyone who was at the apartment. Urbina consented to a check of the couch, where he remained for the next several hours, napping, watching television, and chatting with Officer Rodriguez about sports. Although Urbina was asked to place his cell phone on the table,[4] he was not told he could not make calls or had to stay in the apartment, and he at no point asked to use his phone or leave.

¶10 Sometime after noon, Officer Rodriguez learned that detectives planned to come to the apartment to speak with Urbina. When Urbina inquired about the status of the investigation, Rodriguez informed him that he would have to "stick around." After detectives arrived about thirty minutes later, Urbina told them he and Candyce often babysat I.G., but said he did not remember I.G. being at their house the previous night. As the conversation continued, however, he admitted he remembered getting up to put a bottle in I.G.'s bassinet, and again changed his story, saying he remembered changing I.G.'s diaper at some point in the middle of the night. The detectives then left the room for a few minutes, during which Candyce entered and spoke with Urbina. Urbina was then advised of his rights, he consented to further questioning, and he made inculpatory statements, including the implausible assertion that I.G. accidentally hit his head on the corner of the wall and became unresponsive. He further admitted he had shaken the child in an

[3]At the suppression hearing, the parties agreed the trial court could also consider "the essential facts as laid out in the various motions," including the transcripts and police reports attached to the parties' filings. Therefore, we too consider those materials.

[4]Officer Rodriguez testified he had secured Urbina's phone in case it contained any evidence, such as text messages, relating to I.G.'s injuries.

effort to revive him and squeezed the baby until it "felt like something broke."

De Facto Arrest

¶11 On appeal, Urbina renews his argument that "[a]ll of his statements flowing from []his illegal *de facto* arrest should have been suppressed." Determining whether an arrest has occurred requires an objective evaluation of the surrounding circumstances, and depends on factors such as the extent to which a person's freedom of movement is curtailed, the degree and manner of force used, and whether there was a display of official authority such that a reasonable person would not feel free to leave. *State v. Snyder*, 240 Ariz. 551, ¶¶ 10-11, 382 P.3d 109, 113 (App. 2016). An arrest is effectuated when a reasonable person would reasonably believe he was being arrested, and turns on neither a defendant's nor an officer's subjective beliefs.[5] *Id.* ¶ 10; *State v. Winegar*, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985).

¶12 In essence, Urbina argues that because he chose to remain inside the residence with the officers securing the scene, he was subject to a de facto arrest. In support, he relies on *State v. Boteo-Flores*, in which our supreme court concluded a thirty- to forty-minute handcuffed detention exceeded the permissible scope of an investigatory stop and became an arrest. 230 Ariz. 105, ¶¶ 16, 21, 280 P.3d 1239, 1242-43 (2012). But that case is distinguishable. Police had detained Boteo-Flores because they suspected he was acting as a lookout for an individual who drove away in a stolen vehicle, *id.* ¶ 13, not because he chose to remain at a potential crime scene that officers sought to secure. *Boteo-Flores* thus concerned an investigative stop prolonged to the extent it became a de facto arrest, *id.* ¶ 21, whereas Urbina's decision to remain in the apartment was not a "seizure"

[5]Before Detective Rodriguez resumed questioning Urbina, he stated he had to read him his rights pursuant to *Miranda* "[p]rimarily 'cause you've been sitting here with an officer all day long, and they haven't let you leave the house. It's not that you're under arrest, okay? It's just basically 'cause they restricted you to the house. Okay, and not let you just leave."

under the Fourth Amendment. Furthermore, Boteo-Flores was handcuffed until the arrival of a particular detective thirty to forty minutes later, *id.* ¶¶ 16-17, whereas Urbina was neither handcuffed nor physically restrained in any way on the couch, *see State v. Rowland*, 172 Ariz. 182, 184, 836 P.2d 395, 397 (App. 1992) ("[C]ourts have repeatedly found that handcuffing a suspect is an indicia of arrest.").

¶13 On these facts, we cannot conclude a reasonable person in Urbina's position would have thought himself arrested simply because his movements were restricted as he voluntarily remained at a potential crime scene. *See Snyder*, 240 Ariz. 551, ¶ 10, 382 P.3d at 113. And we reject his contention he was held "incommunicado" at the apartment, as there is no evidence the police would have prevented him from contacting someone had he wanted to. Again, Urbina was offered the option of remaining in the apartment with the officers while they ensured the potential crime scene was not disturbed, or going outside and waiting until a search warrant had been executed. Urbina's decision to remain inside was not tantamount to an arrest, and the trial court did not err in denying his motion to suppress on this basis.[6]

***Miranda* Violation**

¶14 Urbina alternatively argues his statements should have been suppressed because he was subjected to custodial interrogation before being read the *Miranda* warnings. We have previously described "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Kennedy*, 116 Ariz. 566, 568-69, 570 P.2d 508, 510-11 (App. 1977). Like the test for arrest, whether a defendant is in custody for *Miranda* purposes is an objective assessment that requires consideration of the factual circumstances surrounding the incident.

[6] We do not address whether Urbina was "arrested" when Officer Rodriguez told him he was going to have to "stick around," because Urbina did not raise that argument and it is therefore waived. *See State v. Moody*, 208 Ariz. 424, n.11, 94 P.3d 1119, 1154 n.11 (2004); *State v. Fernandez*, 216 Ariz. 545, n.2, 169 P.3d 641, 643 n.2 (App. 2007).

State v. Zamora, 220 Ariz. 63, ¶ 10, 202 P.3d 528, 533 (App. 2009). And, although all of Urbina's inculpatory statements were made after he was read his rights, post-*Miranda* statements are not necessarily admissible, absent dissipation of any taint arising from pre-*Miranda* coercion or involuntariness. *Id.* ¶ 15.

¶15 As previously discussed, although Urbina may not have been entirely free to ignore police presence while he remained in the apartment, he nevertheless was not arrested because he voluntarily remained at the potential crime scene as the officers secured it. For the same reason, Urbina was not in custody while he sat on the couch and watched T.V. with Officer Rodriguez. Several hours after officers arrived to secure the potential crime scene, however, Urbina was told he would have to "stick around" because detectives were on their way to speak with him.[7] At that point, what was merely Urbina's decision to remain at a secured potential crime scene became an investigative detention from which no reasonable person would have felt free to simply walk away. *See State v. Maciel*, 240 Ariz. 46, ¶ 15, 375 P.3d 938, 942 (2016). However, the protections afforded by *Miranda* rights attach when a defendant is subject to a custodial interrogation, *Zamora*, 220 Ariz. 63, ¶ 10, 202 P.3d at 532-33, not when he is subject to a mere investigative detention, *Maciel*, 240 Ariz. 46, ¶ 12, 375 P.3d at 941. Curtailment of movement is but one aspect of a *Miranda* custody determination. *See Howes v. Fields*, 565 U.S. 499, 509 (2012) (noting Supreme Court's refusal to accord "talismanic power" to freedom-of-movement inquiry); *see also Maryland v. Shatzer*, 559 U.S. 98, 113 (2010) (observing the "temporary and relatively nonthreatening detention" involved in an investigative detention does not constitute *Miranda* custody).

¶16 As our supreme court has noted, an individual is not in custody for *Miranda* purposes unless the curtailment of movement is accompanied by "an environment presenting 'inherently coercive

[7]The record is unclear as to exactly how much time elapsed from Urbina being told he would have to "stick around" until the beginning of his interview with detectives. As discussed in more detail below, a detention of, at most, a couple of hours was not unreasonable under the circumstances.

pressures' that threaten to subjugate the individual to the examiner's will." *Maciel*, 240 Ariz. 46, ¶ 16, 375 P.3d at 942, *quoting Howes*, 565 U.S. at 509. *Maciel* involved the questioning of an individual outside a burglarized abandoned building. *Id.* ¶¶ 2-5. Noting a lack of coercion given the familiarity of the surroundings, the exposure to public view, and the reasonable and efficient investigation that ensued, the court concluded that, although the defendant's freedom of movement was significantly curtailed, he was not in "*Miranda* custody" absent the coercive pressures inherent in custodial interrogation. *Id.* ¶¶ 17-19, 21, 29.

¶17 The interview with Urbina similarly lacks the "'inherently coercive pressures' comparable to the station house questioning in *Miranda*." *Id.* ¶ 29. Detectives questioned Urbina in the living room of the apartment where he had been voluntarily present most of the day. He was not handcuffed, he had not been arrested, and he was not threatened or subjected to any other coercive tactic by police. In fact, Officer Rodriguez testified he and Urbina had earlier talked "a lot" about sports and children and had "established a good rapport."

¶18 Nor did the length of the detention trigger the need for *Miranda* warnings. Urbina was required to wait, at most, a couple of hours from the time he was told he needed to stay until his interview with detectives began. Urbina answered general questions for about fifty minutes before being read his rights, and was then questioned for an additional twenty-five minutes. An unreasonably prolonged investigatory detention can trigger *Miranda*'s protections, although courts have refused to announce a rigid timeline for determining when that occurs. *Id.* ¶ 19. Instead, "common sense" and "ordinary human experience" govern, as does the diligence exercised by police to quickly confirm or dispel their suspicions. *Id.*, *quoting United States v. Sharpe*, 470 U.S. 675, 685 (1985).

¶19 The detectives here did not unreasonably delay their investigation. They were presented with an infant who displayed life-threatening injuries of different ages, had spent significant time in at least two different locations, and was cared for by at least four different adults. Under these circumstances, we cannot conclude a couple-hour detention was unreasonable. Once the interview began,

Urbina was subjected only to a fifty-five minute period of questioning before being read his rights, during which he continually revised what he told detectives, to the point that he was informed "[g]etting the truth out of you has been like pulling teeth here tonight." Moreover, Urbina repeatedly recounted what generally happened when he woke up with the baby, despite ongoing attempts by police to focus on what had happened the previous night. Accordingly, the length of the pre-*Miranda* investigation is, at least in part, attributable to Urbina's failure to be truthful and direct with the detectives. As our supreme court has stated, "The ultimate question is whether the police engaged in unreasonable delay during the investigation to gain an advantage over the subject, thereby increasing the likelihood of self-incrimination." *Id.* ¶ 20. Under the facts presented here, we cannot conclude they did; we therefore cannot say the trial court erred in denying Urbina's suppression motion.

Interview Video

¶20 A month before trial, Urbina filed a motion in limine to preclude the state under Rule 403, Ariz. R. Evid., from introducing video footage of his second police interview in which he demonstrated how I.G. purportedly had hit his head. During his first interview, Urbina had at one point said I.G. "threw his head back and, boom, he hit the wall—the corner" while Urbina was carrying him. During the second interview, the police asked Urbina to use a doll to demonstrate how I.G. hit his head because "that way [they could] visualize it." The investigators provided a doll, which Urbina held with one hand under the back and another under the head. To show how I.G. hit his head, Urbina removed his hand from under the doll's head and hit the head on the edge of the table twice.

¶21 In his motion in limine, Urbina objected to the video footage, and especially the sound accompanying the doll's head hitting the table, because "the state cannot show that the experiment was conducted under substantially similar conditions to those prevailing during the occurrence in controversy, and the resulting implication is far more prejudicial than probative." At a pretrial hearing, the trial court directed the state to remove the portions of the video footage where the doll's head hit the table and the accompanying sound. The state edited the video in accordance with

the court's ruling, and it was admitted into evidence at trial subject to Urbina's earlier objection. On appeal, Urbina argues the edited video was inaccurate and unfairly prejudicial.

¶22 Rule 403 allows courts to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." When reviewing a claim evidence was unfairly prejudicial, we "view[] the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998), *quoting State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989). Trial courts have "broad discretion in deciding the admissibility" of evidence under Rule 403, *id.*, and we review such rulings for an abuse of that discretion. *State v. King*, 226 Ariz. 253, ¶ 7, 245 P.3d 938, 941 (App. 2011).

¶23 Urbina characterizes the video of him hitting the doll's head on the table as a "reenactment," and argues the trial court erred in admitting it because he "was only a reluctant participant" and the interview room and table were different from Candyce's house and wall. The evidence, however, was admitted as a demonstration performed by Urbina himself, not a reenactment. In *King*, we upheld the trial court's admission of video footage of an eyewitness kicking a chair to show the force with which the defendant kicked the victim, concluding the video was a "demonstration" rather than a " 'replicat[ion]' of the actual assault." 226 Ariz. 253, ¶¶ 8, 10, 245 P.3d at 942. As explained in *Volz v. Coleman Co.*, 155 Ariz. 563, 565, 748 P.2d 1187, 1189 (App. 1986), *reversed in part on other grounds by Volz v. Coleman Co.*, 155 Ariz. 567, 748 P.2d 1191 (1987), a "replication" must be performed in conditions "substantially match[ing] the circumstances surrounding th[e] event," whereas a "demonstration" is "appropriately admitted if it fairly illustrates a disputed trait or characteristic." Here, the court took reasonable measures to reduce the risk of unfair prejudice, *see King*, 226 Ariz. 253, ¶ 12, 245 P.3d at 942, and we cannot say the redacted video's probative value was substantially outweighed by a danger of unfair prejudice, Ariz. R. Evid. 403.

Sufficiency of the Evidence

¶24 Urbina next argues there was insufficient evidence to support his convictions for felony murder and child abuse based on his failure to seek medical attention. When reviewing sufficiency of the evidence claims, "we view the facts in the light most favorable to sustaining the jury verdict and resolve all inferences against [the appellant]." *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). The evidence presented at trial was sufficient if there was "[s]ubstantial evidence . . . that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *Id.*, *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997).

¶25 Urbina was charged with and convicted of two counts of child abuse "likely to produce death or serious physical injury" under A.R.S. § 13-3623(A)(1), one for I.G.'s "acute brain bleeding and/or acute brain injury" and the other for "failure to seek medical attention." Urbina does not challenge the sufficiency of the evidence for the first of these charges, but argues there was insufficient evidence his failure to seek medical attention caused I.G.'s death, and, as a result, his felony murder conviction must also be reversed because it could have been based in part on his conviction for failure to seek medical attention.

Failure to Seek Medical Attention

¶26 Count Three of the indictment charged Urbina with intentionally or knowingly causing physical injury for his "failure to seek medical attention." Child abuse based on that ground requires the state to prove that delay in seeking medical care increased the child's risk of harm. *See State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995) (child abuse for failure to seek medical care upheld where "there was testimony that K.F. would have had a better chance of survival if she had been brought to the hospital sooner"); *see also State v. Mahaney*, 193 Ariz. 566, n.4, 975 P.2d 156, 159 n.4 (App. 1999) (sufficient evidence of endangerment under A.R.S. § 13-3623 based on "ample medical testimony indicating that the sudden discontinuance of L.S.'s anti-seizure medications exposed her to a high possibility of reseizing, which could have caused serious and permanent injury"); *cf. State v. Bennett*, 213 Ariz. 562, ¶ 23, 146 P.3d

63, 68 (2006) (felony murder for failure to seek medical attention requires "evidence showing that [victim]'s death would not have happened without [defendant]'s delay in seeking medical attention") (internal quotation omitted).

¶27 In this case, the state's only evidence supporting child abuse for failure to seek medical attention was Urbina's statements during his two police interviews. In the first, Urbina said I.G. hit his head around 2:00 a.m. and "didn't open his eyes," and Urbina "tried to make sure he was okay" and then "just put him back to sleep." In the second interview, Urbina largely repeated his previous account, saying I.G. hit his head around 1:00 or 2:00 a.m., went "limp," and "didn't open his eyes," and then Urbina put him back in his crib until the morning when I.G. was found unresponsive.

¶28 Five of the state's medical expert witnesses testified I.G.'s brain injuries were consistent with non-accidental, as opposed to accidental, trauma. None of these witnesses nor any others, however, testified I.G.'s injuries would have been less severe or I.G. would have survived had he been brought to the hospital sooner.

¶29 The state argues "[r]easonable jurors could infer from th[e] evidence that Appellant's failure to seek medical attention for I.G. . . . caused I.G.'s death." But the jury was not entitled to make that inference. Although "[a] conviction 'may rest solely on circumstantial proof,'" *State v. Garcia*, 227 Ariz. 377, ¶ 9, 258 P.3d 195, 197 (App. 2011), *quoting State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985), "mere '[s]peculation concerning possibilities is an insufficient basis' to sustain a conviction," *id.*, *quoting State v. Mathers*, 165 Ariz. 64, 71, 796 P.2d 866, 873 (1990). None of the state's expert witnesses testified I.G.'s prognosis would have been any better had he received medical attention earlier. Thus, the only way for the jury to reach that conclusion was through speculation, which is not "[s]ubstantial evidence . . . that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt,'" *Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 914, *quoting Hughes*, 189 Ariz. at 73, 938 P.2d at 468. Because there was insufficient evidence Urbina's inaction harmed I.G., his conviction for Count Three must be reversed.

Felony Murder

¶30 Criminal defendants have a constitutional right to unanimous jury verdicts under article II, § 23 of the Arizona Constitution. However, a defendant charged with two predicate felonies and felony murder under A.R.S. § 13-1105(A)(2) is not "entitled to a unanimous verdict on the precise manner in which the crime is committed." *State v. Lopez*, 163 Ariz. 108, 111-12, 786 P.2d 959, 962-63 (1990). Urbina argues reversal of one underlying basis for his felony murder charge requires reversal of his conviction, citing two cases reversing murder convictions because the state failed to prove an underlying felony. *See State v. Lopez*, 158 Ariz. 258, 266, 762 P.2d 545, 553 (1988) (felony murder conviction reversed where "jury's verdict may have been based, in whole or in part," on impermissible felony murder theory); *State v. Detrich*, 178 Ariz. 380, 384, 873 P.2d 1302, 1306 (1994) (reversing first-degree murder conviction "[b]ecause the jury may have used [an erroneous kidnapping conviction] as a predicate felony for felony murder"). The present case is, however, distinguishable from both.

¶31 In both *Lopez* and *Detrich*, the reviewing court could not say with certainty that the murder convictions were unanimously based on proper predicate felonies. In *Lopez*, there was insufficient evidence to support the sole predicate felony and as a result the defendant's felony murder conviction also could not stand. 158 Ariz. at 264, 762 P.2d at 551. In *Detrich*, the trial court erred in failing to give an instruction on kidnapping's lesser included offense of unlawful imprisonment, requiring reversal because "the jury might . . . have acquitted [the defendant] of kidnapping if it had been given the option of convicting him of the lesser included offense, unlawful imprisonment." 178 Ariz. at 383, 873 P.2d at 1305. Because it could not be determined whether the jury convicted the defendant of premeditated murder or felony murder based on the wrongful predicate felony conviction, the defendant's murder conviction also required reversal. *Id.* at 383-84, 873 P.2d at 1305-06.

¶32 Here, however, we can say with certainty that the jury unanimously convicted Urbina of felony murder based on the "acute brain bleeding and/or acute brain injury" alleged in Count One. Under A.R.S. § 13-1105(A)(2), a defendant commits felony murder by

committing child abuse under § 13-3623(A)(1) and "in the course of and in furtherance of the offense . . . caus[ing] the death of any person." Section 13-203(A), A.R.S., provides that "[c]onduct is the cause of a result when . . . [b]ut for the conduct the result in question would not have occurred" and "[t]he relationship between the conduct and result satisfies any additional causal requirements imposed by the statute." The issue is whether a juror, having convicted Urbina on Count One, could have found that it was only Count Three's "failure to seek medical attention" that caused I.G.'s death. The two child abuse charges arose out of the same incident occurring "[o]n or about the 13th day of May, 2013," and the failure to seek medical attention charge rested on Urbina's statements that he put I.G. back in his crib after I.G. suffered a head injury. The relationship of the two counts plus the evidence at trial make clear that the jury's conviction on Count Three was based on the injuries identified in Count One, which the jury unanimously found Urbina had caused.

¶33 Although it cannot be said no juror could have found Urbina's failure to seek medical attention a cause of I.G.'s death, Count One was still necessarily a but for cause of I.G.'s death. Stated differently, Urbina's failure to seek medical care after injuring I.G. could not be a superseding cause of the child's death. "In criminal cases, 'an event is superseding only if unforeseeable and, with benefit of hindsight, abnormal or extraordinary.'" *State v. Pesqueira*, 235 Ariz. 470, ¶ 23, 333 P.3d 797, 804 (App. 2014), *quoting State v. Bass*, 198 Ariz. 571, ¶ 13, 12 P.3d 796, 801 (2000); *see State v. Slover*, 220 Ariz. 239, ¶ 11, 204 P.3d 1088, 1093 (App. 2009) (superseding cause does not exist "if the original actor's [conduct] creates the very risk of harm that causes the injury"), *quoting Young v. Envtl. Air Prods., Inc.*, 136 Ariz. 206, 212, 665 P.2d 88, 94 (App. 1982).

¶34 In *Slover*, the defendant's truck drove off the highway and into a creek at the bottom of an embankment. 220 Ariz. 236, ¶ 2, 204 P.3d at 1091. Slover's passenger was found dead, submerged in the creek, and Slover argued he could not be convicted of homicide because "the victim could have crawled out of the truck and gotten in the water by himself and then been unable to remove himself due to his intoxication." *Id.* ¶¶ 2, 10. We rejected Slover's argument because

his "conduct of driving while intoxicated was the very reason the victim had ended up near or in a creek, intoxicated, with head injuries." *Id.* ¶ 14.

¶35 Thus, as in *Slover*, Urbina's failure to seek medical attention for I.G. after he inflicted I.G.'s head injury was not a superseding cause of the child's death. As evident from the verdict on Count One, the jury concluded it was the head injury Urbina caused that created any risk of harm potentially arising from Urbina's subsequent failure to seek medical attention. Accordingly, even if some jurors thought I.G.'s death resulted from Urbina's failure to seek medical attention, all of the jurors necessarily found that the head injury I.G. suffered at Urbina's hand was the ultimate cause of I.G.'s death.

Non-Responsive Witness Testimony

¶36 Urbina next argues the trial court abused its discretion in striking a portion of the sole defense witness's testimony in response to a juror question asking, "[I]f this was not a case of child abuse how do you explain the older fractured ribs and wrist fractures?" The witness responded that there is "a worldwide epidemic of vitamin D deficiency" causing weak bones, and that "wrist fractures are now being equated with a subtle form of rickets." He then went on to say, "it's due to the fact that people are beginning to question the science behind the so-called shaken baby syndrome and other manifestations of what is described as child abuse." The court sustained the state's objection and struck as unresponsive the last part of the witness's answer. Urbina did not challenge that ruling below.

¶37 On appeal, Urbina argues the trial court's decision to strike the latter portion of the witness's testimony was error and deprived him of his constitutional right to present a defense. Having failed to raise the issue during trial, Urbina has forfeited all but fundamental error. *State v. Abdi*, 226 Ariz. 361, ¶ 26, 248 P.3d 209, 215 (App. 2011) (waived claim that trial court's exclusion of certain witness testimony violated "right to present a complete defense" reviewed for fundamental error).

¶38 The trial court was well within its discretion to preclude the contested part of the witness's testimony as unresponsive. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) (trial court has "considerable discretion" to determine relevance and admissibility of evidence). Urbina's witness answered the juror question by stating that I.G.'s fractured ribs and wrists could have resulted from vitamin D deficiency and rickets. But the witness then went beyond the question by interjecting a collateral theory on shaken baby syndrome generally.[8] Striking this portion of the testimony was not error, let alone fundamental error.

State's Closing Argument

¶39 Urbina next contends the state committed prosecutorial misconduct during closing arguments by making two statements contrasting felony murder with premeditated murder. In the first of these statements, the prosecutor stated, in the context of explaining what "knowingly" means:

> First and foremost this is not a premeditated murder case. There is a higher form of murder. It's tried in courtrooms here in this building. It's not being tried here. This is not the more serious form of murder. It's felony murder. It's not—the issue is not whether defendant intended to kill [I.G.]. That is not necessary to prove this case.

In the second statement, made during the state's rebuttal argument, the prosecutor said that, like the detectives who had interviewed Urbina, the state was not arguing Urbina was a "monster[] who would premeditatively . . . kill a child." Rather,

> This isn't about premeditated murder. It's not about the more serious form of murder.

[8]Earlier in the witness's testimony, the court had sustained the state's objection to the witness discussing his "objections about the shaken baby diagnosis generally," concluding it was "really inappropriate," and Urbina has not challenged that ruling on appeal.

> And if you're being asked subtly in that, well, this runs against human nature, if you're being asked subtly to bring sympathy or prejudice into the jury room[,] reject that invitation. This isn't about guessing at what the punishment might be for somebody for this form of murder or the more serious form of murder. Set aside all that and decide based on this set of facts.

¶40 Urbina acknowledges he is raising this argument for the first time on appeal and our review is therefore again limited to fundamental error. *See State v. Moody*, 208 Ariz. 424, ¶ 153, 94 P.3d 1119, 1155 (2004) ("Failure to object to a comment in closing argument waives that argument on appeal, and we therefore review it only for fundamental error."). He also concedes that fundamental error must be "error of such magnitude that the defendant could not possibly have received a fair trial." *See State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶41 Significantly, "[a]ttorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments." *Moody*, 208 Ariz. 424, ¶ 154, 94 P.3d at 1155, *quoting State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). Contrary to Urbina's argument on appeal, and unlike the cases on which he relies, the prosecutor in this case did not "misinform[] the jury that the consequences of the verdict [were] minimal." *See State v. Woodward*, 21 Ariz. App. 133, 134-35, 516 P.2d 589, 590-91 (1973) (granting new trial where prosecutor made two statements suggesting trial court agreed with state as to defendant's guilt plus another indicating court would issue fair sentence upon guilty verdict). Both times here that the prosecutor compared felony murder to premeditated murder during closing argument, he did so in the context of saying that the state was not required to prove Urbina intended to kill I.G.

¶42 Moreover, even if the prosecutor strayed into improper territory by following the second premeditated-murder comparison with a reference to the jury's duty not to consider the potential punishment when determining Urbina's guilt or innocence, it was a single, isolated statement within an eight-day trial and cannot be said

to be "error of such magnitude that the defendant could not possibly have received a fair trial." *Hunter*, 142 Ariz. at 90, 688 P.2d at 982; *see State v. Stone*, 151 Ariz. 455, 459, 728 P.2d 674, 678 (App. 1986) (prosecutor's improper statements were "merely isolated references and not significant in relation to the trial proceedings in their entirety").

Expert Witness Testimony

¶43 Urbina's final argument is that fundamental error occurred when some of the state's expert witnesses testified I.G.'s injuries were consistent with "child abuse." The pediatric radiologist who examined I.G. at the hospital related to the jury that rib fractures are "something that we very closely look for [as] signs of child abuse because they're highly associated with child abuse." Regarding I.G.'s rib fractures, she testified, "[T]hese are basically the most kind of suspicious or suggestive findings for child abuse. And especially in [I.G.'s] case he had rib fractures of different ages." Also, "[I.G.] had a right posterior rib fracture. And those are the ones that are more—more worrisome for child abuse. Those are the ones that we typically associate with child abuse." She further testified I.G.'s wrist fractures "are the things that we see with child abuse" and "are associated with child abuse." When asked whether a three-month-old could fracture his wrists through some other mechanism, she responded, "This kind of a fracture would be indicating of child abuse. There's no other reason why I would expect to see this kind of fracture in a three month old."

¶44 During the juror question stage of the pediatric radiologist's testimony, the doctor was asked, "[A]re broken bones or fractures prone to any infant even in the absence of child abuse?" She replied, "Not these fractures." Then during redirect examination, she explained, "These fractures are associated with child abuse. That's what any pediatric radiologist would interpret them as. And any baby is not going to have these fractures by accident, not through handling normally. These are specific fractures that we see with child abuse." The witness further stated, "This pattern of the location of the fractures, the fact that there are fractures of different ages, which means that there's more than one episode of trauma, that's what makes these, you know, child abuse."

¶45 I.G.'s pediatrician likewise testified the autopsy results "were quite compatible with a child abuse situation in [his] opinion." And the forensic pathologist who performed the autopsy on I.G. stated, "[A]ll these injuries put together fit into what we generally term as child abuse syndrome" and "the cause of death I ascribed due to child abuse syndrome."

¶46 The essence of Urbina's argument is that the witnesses' use of the term "child abuse" misled the jury to believe the witnesses were testifying as experts to Urbina's state of mind relevant to the ultimate issue in the case rather than the medical understanding of I.G.'s injuries. In support of this argument, Urbina points to the jurors' question for the defense expert witness, "[I]f this was not a case of child abuse how do you explain the older fractured ribs and wrist fractures?" Although Rule 704(a), Ariz. R. Evid., permits expert witness testimony "embrac[ing] an ultimate issue," Urbina argues the witnesses' testimony here fell within Rule 704(b)'s exception prohibiting expert testimony "stat[ing] an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged."

¶47 It is well established that expert witnesses in child abuse cases are permitted to testify a child's injuries resulted from child abuse. As we stated in *State v. Moyer*, 151 Ariz. 253, 255, 727 P.2d 31, 33 (App. 1986), child abuse syndrome "is not an opinion by a doctor as to whether any particular person has done anything, but rather simply indicates that a child of tender years found with a certain type of injury has not suffered those injuries by accidental means, but rather is the victim of child abuse." *See also State v. Hernandez*, 167 Ariz. 236, 239, 805 P.2d 1057, 1060 (App. 1990) ("The courts which have considered the issue have consistently upheld the admission of battered child syndrome testimony."); *State v. Poehnelt*, 150 Ariz. 136, 150, 722 P.2d 304, 318 (App. 1985) (same).[9]

[9]Urbina criticizes the state's citation to *Poehnelt*, *Hernandez*, and *Moyer* on the basis that these cases relied on the version of Rule 704 in effect at the time, which did not include the 2012 addition of 704(b)'s exception to expert witness testimony regarding the defendant having a mental state constituting an element of the crime. The

¶48 Urbina relies on a Colorado case, *People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011), to suggest "the distinction between medical and legal child abuse" must be pointed out to prevent error when experts testify a child's injuries resulted from child abuse. The *Rector* court, however, in declining to find "plain error," noted the expert witness "did not testify as to the primary issue" of whether it was the defendant who had committed the child abuse. *Id.* The experts in this case similarly did not testify Urbina was the person who injured I.G. Accordingly, we find no error, let alone fundamental error, in the experts' testimony that I.G.'s injuries resulted from "child abuse."

Disposition

¶49 For all of the foregoing reasons, Urbina's convictions are affirmed with regard to Counts One, Two, and Four. His sentences for Counts One and Two are also affirmed, and his sentence for Count Four is affirmed as corrected. Urbina's conviction with regard to Count Three is reversed.

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comment to the 2012 amendment, however, states, "Subsection (b) has been added to conform to Federal Rule of Evidence 704, which was amended in 1984 to add comparable language. The new language in the Arizona rule is considered to be consistent with current Arizona law."