NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,
v.
LINDA DARLENE GILES,
Appellant.

2 CA-CR 2010-0059
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20070126

Honorable Christopher C. Browning, Judge

AFFIRMED IN PART;
VACATED AND REMANDED IN PART

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson — Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
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K E L L Y, Judge.

¶1 Linda Giles appeals her convictions and sentences for theft from a vulnerable adult and vulnerable adult abuse. Giles argues: 1) the trial court erred in denying her *Batson* challenge; 2) the prosecutor committed misconduct in closing argument; 3) the jury instructions were improper; 4) her right to a unanimous verdict was violated; 5) the evidence was insufficient to sustain her convictions; 6) the state provided insufficient notice of potential aggravating factors; and 7) the court erred in determining the amount of restitution awarded. We agree the trial court erred in its order of restitution but otherwise reject Giles's arguments and affirm her convictions and sentences.

Background

¶2 "We view the facts and reasonable inferences therefrom in the light most favorable to sustaining the verdicts." *State v. Herrera*, 203 Ariz. 131, ¶ 2, 51 P.3d 353, 355 (App. 2002). The victim, C., and his wife Mary moved to Tucson from New York in the early 1980s. The two invested in real estate and over the years accumulated numerous properties including a hair salon, which Mary operated. Mary managed a significant portion of the investments and C. was described as "very dependent" on her.

¶3 In November 2003, Mary died following a prolonged illness. Later that year C., who was over eighty years old at the time, executed a will in which he left his estate to his wife's friend, Margaret O'Connell. O'Connell had helped C. with various business-related tasks following Mary's death and had encouraged him to visit a doctor, after which he was diagnosed with cancer as well as other health problems that affected his vision and hearing.

¶4 Giles, who is approximately thirty years younger than C., first met C. while he lived in New York. Approximately two years after Mary's death, Giles contacted C., told him she had no place to live, and asked to stay with him in Tucson. According to O'Connell, C. became isolated from her after Giles arrived.

¶5 Giles then began to take control of C.'s property and finances. C. drafted a codicil to his will leaving Giles several properties as well as a certificate of deposit in the amount of $20,000. After Giles and C. met with two attorneys, both of whom refused to change the 2003 will due to their concerns of undue influence by Giles, a third attorney prepared a new will that left C.'s entire estate to Giles. The attorney also prepared deeds that gave Giles joint tenancy ownership with right of survivorship for sixteen of C.'s properties. Additionally, Giles met with a banker and opened a number of accounts with proceeds from the sales of some of C.'s properties. When the accounts were opened, Giles and C. held joint ownership, but C.'s name was later removed from several accounts leaving Giles as the sole owner.

¶6 In November 2006, after Giles had obtained control over C.'s assets, she tried to break down C.'s bedroom door with a hammer after he had locked it. She then ran C. over with his vehicle in the driveway of his home, killing him. In a separate action, Giles was charged with and convicted of manslaughter for C.'s death. *State v. Giles*, No. 2 CA-CR 2009-0159 (memorandum decision filed Feb. 12, 2010).

¶7 Giles was charged in a separate indictment with one count of theft from a vulnerable adult and one count of vulnerable adult abuse. The jury found her guilty of both counts and found two aggravating factors—that the crimes were committed for

pecuniary gain and that the victim was over sixty-five years old. The trial court imposed concurrent prison sentences of 18.5 years on the theft count and 1.75 years on the abuse charge. The court ordered Giles to pay $540,000 in restitution for attorney fees incurred in undoing the changes made to C.'s accounts and property. This appeal followed.

Discussion

I. Peremptory strike

¶8 Giles challenges the prosecutor's peremptory strike of the only African American on the prospective jury panel. She argues the strike was racially motivated as "the prosecutor's cited reasons and lack of questioning of the juror show that his reasons for striking her were not plausible." We disagree.

¶9 The Equal Protection Clause of the Fourteenth Amendment prevents peremptory strikes of prospective jurors based upon race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). There are three steps involved in a *Batson* challenge:

> (1) the party challenging the strikes must make a prima facie showing of discrimination; (2) the striking party must provide a race-neutral reason for the strike; and (3) if a race-neutral explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful racial discrimination.

State v. Roque, 213 Ariz. 193, ¶ 13, 141 P.3d 368, 378 (2006), *quoting State v. Cañez*, 202 Ariz. 133, ¶ 28, 42 P.3d 564, 578 (2002). When reviewing the court's ruling on a *Batson* challenge, we defer to its factual findings, but we review de novo the court's application of the law. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001).

We will not reverse a trial court's ruling on a *Batson* challenge unless it is clearly erroneous. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844-45 (2006).

¶10 The first step of *Batson* was satisfied when the trial court asked the prosecutor for an explanation for the strike. *See id.* ¶ 54. As to the second step, the prosecutor provided several race-neutral reasons. The prosecutor noted that in the biographical data form filled out by the prospective juror, she had listed an address as her present occupation and in the occupation field had listed only the number five. The prosecutor also mentioned that the juror provided an illegible response under the section of the form dealing with prior law enforcement experience. The prosecutor explained that this had indicated a "lack of attention to detail" and formed the basis for his strike. Following the prosecutor's explanation, the court denied Giles's challenge, finding "the [s]tate ha[d] articulated a race-neutral basis for [the strike.]"

¶11 Giles appears to argue that the trial court erred by not asking defense counsel for a response to the state's proffered racially neutral explanation before ruling on the issue. But, she cites no authority suggesting a trial court is required to permit the defendant to respond to the state's racially neutral explanation and, as outlined above, the trial court followed the proper *Batson* procedure and analysis in making its ruling.

¶12 Giles also argues that, because the prosecutor did not ask follow-up questions during voir dire in response to the prospective juror's answers on the form, the reasons given for the strike were not plausible. But Giles did not seek to have the juror's biographical data form preserved for appellate review. As the appellant, Giles was obligated to "mak[e] certain the record on appeal contains all transcripts or other

documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Because this form was not provided in the record we presume it supported the trial court's ruling. *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

¶13 We conclude the court acted within its discretion in implicitly finding that the state had provided a race-neutral explanation for the strike and in determining that Giles had not met her burden of showing the strike to be racially motivated. Accordingly, Giles has not sustained her burden of demonstrating that the trial court's ruling was clearly erroneous. *See Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d at 844-45.

II. Prosecutorial misconduct

¶14 Giles next argues two statements made by the prosecutor during closing argument amounted to misconduct. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998).

¶15 At the beginning of closing argument, the prosecutor told the jury:

> Ladies and gentlemen, I can't thank you enough for the attention you have paid to this, the questions you have asked, the notes you have taken. You're a group of nine people who a week ago plus were total strangers to each other. Now you're about to make a decision together. One of the magic parts of our justice system.
>
> Never know if it's going to work.

Giles contends the prosecutor's argument, "impl[ied] that [the jury system] would only work if it produced the result [the prosecutor] desired[,]" and therefore "prevented the jury from independently evaluating her case." Giles did not object to the statement below. We therefore review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶16 As the state points out, and Giles agrees, following the statement "[n]ever know if it's going to work," the prosecutor appears to have shown the jury a picture of the house C. lived in. As such, the prosecutor may have made this statement in the context of using audio visual equipment to present the picture to the jury. This explanation is also supported by the position of the contested statement in a new paragraph in the transcript, suggesting the remark did not immediately follow from the proceeding reference to the justice system. Likewise, the lack of objection at trial also suggests the statement was not made in the context Giles now argues.

¶17 It thus appears from the record that the context within which the prosecutor's comment occurred does not support Giles's argument. While Giles maintains this statement may nevertheless have been interpreted as referring to "the

prosecutor's belief about the jury[,]" she cites nothing further from the record to support her supposition. Giles bears the burden of establishing that error occurred, that the error was fundamental, and that the error prejudiced her. *Id.* ¶¶ 22-24. She has not met this burden and we therefore decline to grant relief as to this statement.

¶18 Giles next objects to a comment made by the prosecutor about an expert witness, Dr. Bennett Blum, who had testified during the trial. The prosecutor stated, "[t]hen you have Dr. Blum, and I hope you enjoyed Dr. Blum because you certainly learned an awful lot about elder abuse, financial exploitation, and vulnerabilities from an international expert . . . who happens to live in Tucson." A discussion of Blum's testimony followed.

¶19 Giles asserts that by stating the jury learned a lot from an "eminent" expert, the prosecutor impermissibly vouched for the witness and in doing so committed misconduct. "[T]he trial court is in the best position to determine the effect of a prosecutor's comments on the jury. . . ." *Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d at 846. Here, the court was not given an opportunity to rule on the issue, as Giles concedes she raised no objection to the challenged statement at trial. Accordingly, we again limit our review to fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶20 "There are 'two forms of impermissible prosecutorial vouching: (1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" *State v. King*, 180 Ariz. 268, 276-77, 883 P.2d 1024, 1032-33 (1994), *quoting State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989) (alteration in

King). The first type of vouching consists of "'personal assurances of a witness's veracity[.] The second type . . . involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record.'" *Id.* at 277, 883 P.2d at 1033, *quoting United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980).

¶21 Neither form of impermissible vouching is present in the prosecutor's argument. While the prosecutor remarked that the jury "learned an awful lot" from an "international expert" these statements do not rise to the level of a personal assurance of Blum's veracity. *Cf. Vincent*, 159 Ariz. at 423, 768 P.2d at 155 (prosecutor engaged in impermissible vouching by arguing "the State wouldn't have put [the witness] on the . . . stand if [it] didn't believe every word out of his mouth"). Likewise, the prosecutor did not bolster the witness's credibility by referring to matters outside the record; Blum's testimony supports the inference that he was an international expert. Accordingly, we find no error as to the statement, much less fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

III. Jury instructions

¶22 Giles asserts the trial court erred in giving "instructions that were a comment on [the] evidence." "We review for abuse of discretion whether the trial court erred in giving or refusing to give requested jury instructions." *State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d 662, 665 (2005). We review de novo whether the instructions it gave correctly state the law. *See State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997).

¶23 The trial court instructed the jury that, "[f]ailure to complain does not necessarily mean that a person is not vulnerable. An individual is not required to act to protect himself by complaining about abuse, neglect or exploitation. Failure to complain does not mean that a person is able to protect himself." It also instructed the jury that "[e]xploitation may occur with the full participation of the victim." After Giles objected to these instructions as an improper comment on the evidence, the court stated it had a similar concern, but because the instructions were based on language from *Davis v. Zlatos*, 211 Ariz. 519, ¶¶ 29-30, 123 P.3d 1156, 1163 (App. 2005), it was inclined to give them over Giles's objection.[1]

¶24 In *Zlatos*, this court addressed whether an eighty-six-year-old woman in failing health was a vulnerable adult in a civil action under Arizona's Adult Protective Services Act, A.R.S. §§ 46-451 through 46-457 (the "APSA"). 211 Ariz. 519, ¶¶ 30-31, 123 P.3d at 1163-64. The trial court had concluded the victim was not a vulnerable adult because she "had frequent opportunities to raise concerns with others . . . but did not do so." *Id*. ¶ 15. After considering the intent and policy behind the APSA, this court rejected the trial court's rationale and concluded that "[f]ailing to complain is not persuasive evidence that a person is not vulnerable. Just because an individual does not act to protect herself by complaining about abuse, neglect or exploitation does not mean that person is able to protect herself." *Zlatos*, 211 Ariz. 519, ¶ 29, 123 P.3d at 1163. "Exploitation may occur with the full participation of the victim, but it is no less

[1]Although the trial court modified the language of the instructions following Giles's objection, Giles did not withdraw it.

exploitation." *Id.* ¶ 30. After concluding that the victim's "silence does not control whether she was a 'vulnerable adult' under the statute," we held that "the trial court's finding that [the victim] had the opportunity to object cannot support the conclusion that she was able to protect herself." *Id.*

¶25 Giles contends the instructions were improper as they "told the jury how to evaluate [the] evidence, and that the evidence may not be important." The Arizona Constitution forbids judges from commenting on the evidence at trial. Ariz. Const. art. VI, § 27; *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388. Jury instructions constitute a comment on the evidence in violation of article VI, § 27 when they express "'an opinion as to what the evidence proves,' in a way that interferes 'with the jury's independent evaluation of that evidence.'" *State v. Dann*, 205 Ariz. 557, ¶ 50, 74 P.3d 231, 245 (2003), *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998). "Although the practice is discouraged, a trial court may employ language from an appellate opinion when drafting a jury instruction if the instruction accurately states the law." *State v. Fierro*, 220 Ariz. 337, n.2, 206 P.3d 786, 788 n.2 (App. 2008). Here, although the trial court's instructions closely tracked and accurately reflected our statements in *Zlatos*, we cannot approve the practice of using language from a civil case to instruct the jury in a criminal trial when the result may be to emphasize the logical limitations of potential factual inferences asserted by one party. We think the latter is a task more appropriately left to opposing counsel in summation. Assuming *arguendo* that Giles is correct and the challenged instructions amounted to an improper comment on the evidence, we examine the trial court's instructions as a whole to determine whether they

interfered with the jury's independent consideration of the evidence. *See State v. Wallen*, 114 Ariz. 355, 359, 560 P.2d 1262, 1266 (App. 1977).

¶26 First, we note the trial court correctly instructed the jury on the elements of each offense. It also correctly instructed the jury that it "must find the facts from the evidence," and that it "must not be concerned with any opinion that you feel I have about the facts. You are the sole judges of what happened." We presume the jury followed these instructions. *State v. Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d 91, 103 (2007). Moreover, the state did not refer to the contested instructions to bolster its position during closing argument. In fact, neither counsel's argument mentioned the challenged instructions or directly addressed either C.'s failure to complain or his participation in the exploitation.

¶27 Viewing the instructions as a whole, and taking into account that the defense was not focused on C.'s failure to complain or his participation in the exploitation, we cannot say the instructions misled the jury or interfered with its independent evaluation of the evidence. *Dann*, 205 Ariz. 557, ¶ 50, 74 P.3d at 245. Therefore, even assuming the challenged instructions constituted a comment on the evidence, any error was harmless. *See id.* ¶ 18 ("Erroneous jury instructions are subject to a harmless error analysis."); *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (error "is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict").

IV. Unanimous jury verdict

¶28 Giles next claims her "right to a unanimous jury verdict was violated" because "there were many different events which could be considered . . . theft from . . . or abuse of a vulnerable adult."[2] Giles argues this resulted in a duplicitous charge.

¶29 A duplicitous charge occurs "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). A duplicitous charge presents the danger of a nonunanimous jury verdict. *See id.* Giles acknowledges she failed to raise this argument below. Therefore, she has forfeited the right to seek relief for all but fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶30 A defendant has the right to a unanimous jury verdict in a criminal case, *see* Ariz. Const. art. II, § 23, and "[a] violation of that right constitutes fundamental error," *State v. Davis*, 206 Ariz. 377, ¶ 64, 79 P.3d 64, 77 (2003). A defendant establishes prejudice by demonstrating that the jury may have reached a nonunanimous verdict. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d 900, 907-08 (App. 2009).

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[2]Although Giles argues in her opening brief that her right to a unanimous verdict was violated as to the abuse of a vulnerable adult charge, in her reply brief she withdraws this argument conceding "[t]he state is correct that a pattern of abuse must be shown for a conviction for vulnerable adult abuse." *See* A.R.S. § 13-3623(F)(3) ("'[e]motional abuse' means a pattern of ridiculing or demeaning a vulnerable adult"). We therefore need not address this argument.

¶31 Count one of the indictment alleged that during the time period of August 1 to November 22, 2006, Giles "knowingly took control . . . of assets or property with a value of over $100,000 belonging to [C.]" Giles contends the indictment was not specific and that the jurors could have found the evidence proved different events. Giles points to the fact that the state introduced evidence that she had obtained joint tenancy to C.'s real estate as well as testimony that she had acquired money from C.'s bank accounts and prevailed upon C. to have his will changed in her favor. Giles concludes that because "[t]he indictment . . . was not specific about the actual events charged" and the state introduced multiple acts that could meet the statute "there was the possibility that the verdict was not unanimous."

¶32 When multiple criminal acts are introduced to prove a single charge, a trial court normally should require "the state to elect the act which it alleges constitutes the crime, or instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty." *Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d at 847. "This is because . . . it is possible for the jury to unanimously agree that the defendant committed the offense charged without unanimously agreeing as to which of the alleged criminal acts the defendant committed to complete the offense." *Id.* ¶ 32. Here, Giles did not object below and the trial court was not given the opportunity to determine whether corrective action was required.

¶33 Election is not required, however, if "all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction." *Id.* ¶ 15. As such, the rule requiring remedial measures does not apply if "a series of acts form part of

one and the same transaction, and as a whole constitute but one and the same offense." *Id.* ¶ 17, *quoting State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96, 101 (1968); *see also Davis*, 206 Ariz. 377, ¶ 65, 79 P.3d at 77 (noting that a conviction can be upheld when the series of events form a single transaction). "[M]ultiple acts may be considered part of the same criminal transaction 'when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them.'" *Klokic*, 219 Ariz. 241, ¶ 18, 196 P.3d at 848, *quoting People v. Stankewitz*, 793 P.2d 23, 41 (Cal. 1990).

¶34 The state properly charged Giles's actions under a single count of theft from a vulnerable adult as the acts amounted to a single criminal transaction. Giles acted to deprive C. of his assets. In doing so, she took control of his bank accounts and real property and convinced C. to change his will in her favor. While multiple instances of Giles's conduct were introduced, including her removal of C.'s name from jointly held accounts and acquisition of joint title to sixteen of his properties, these actions all took place during the relatively short time period between August 1 and November 22, 2006.

¶35 Moreover, Giles undertook this course of conduct for the purpose of acquiring C.'s assets and "a continuing scheme or course of conduct may properly be alleged in a single count." *State v. Ramsey*, 211 Ariz. 529, ¶ 12, 124 P.3d 756, 761 (App. 2005). Giles did not dispute the occurrence of the specific acts alleged, but rather presented the defense that the elements of theft from a vulnerable adult were not met, that C. loved her and wanted to give her the property, and that the state was "trying to intrude" on his wishes. *See Klokic*, 219 Ariz. 241, ¶ 18, 196 P.3d at 848.

¶36 Because Giles offered the same defense to the alleged acts and because the acts were part of a continuing course of conduct, there was no reason for the jury to distinguish among them.[3] *Id.* Accordingly, we conclude the acts were part of the same criminal transaction. The trial court did not err in failing to provide a curative instruction.

V. Sufficiency of the evidence

¶37 At the conclusion of the defense case, Giles moved for a judgment of acquittal on both counts, pursuant to Rule 20, Ariz. R. Crim. P. As grounds, Giles claimed there was insufficient evidence: 1) that she was in a position of trust and confidence in relation to C.; 2) that C. was vulnerable; and 3) that there was a pattern of ongoing abuse.[4] The trial court denied the Rule 20 motion. On appeal, Giles again challenges the sufficiency of the evidence as to these elements.

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[3]Giles cites other acts that she asserts the jury may have relied on in finding her guilty of theft, including evidence that she convinced C. to hire her friend, who had no training or equipment, to perform work on C.'s properties, and evidence that she exercised control over the hair salon owned by C. "by having it closed." However, we note that Giles also argues that the salon closure occurred outside the timeline charged in the indictment. And, Giles claims elsewhere in her brief that C.'s employment of her friend to perform work on the properties "did not constitute a taking." In any event, we conclude these acts were consistent with the "continuing scheme or course of conduct" undertaken by Giles and thus did not need to be separately charged in the indictment. *Ramsey*, 211 Ariz. 529, ¶ 12, 124 P.3d at 761.

[4]Although Giles states she raises her ongoing abuse argument for the first time on appeal, she arguably raised this issue below in her Rule 20 motion. But we need not determine whether Giles preserved this issue for appeal; insufficient evidence of a conviction is fundamental error. *State v. Fimbres*, 222 Ariz. 293, n.1, 213 P.3d 1020, 1024 n.1 (App. 2009).

¶38 We review a trial court's denial of a motion for judgment of acquittal for an abuse of discretion. *State v. Latham*, 223 Ariz. 70, ¶ 9, 219 P.3d 280, 282 (App. 2009). A judgment of acquittal is appropriate only when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). Substantial evidence "is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *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). When reasonable minds could differ as to the inferences that may be drawn from the evidence, the evidence is substantial, and the case must be submitted to the jury. *See State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). The sufficiency of the evidence is "tested against the statutorily required elements of the offense." *State v. Pena*, 209 Ariz. 503, ¶ 8, 104 P.3d 873, 875 (App. 2005). We view the evidence in the light most favorable to sustaining the verdicts. *See State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). For the reasons below, we conclude the evidence presented at trial was sufficient to support Giles's convictions for theft from a vulnerable adult and vulnerable adult abuse.

A. Position of trust and confidence

¶39 Giles challenges the sufficiency of the evidence that she was in a position of trust and confidence with respect to C. for the purposes of her conviction for theft from a vulnerable adult. Section 13-1802(B), A.R.S., provides,

> A person commits theft if, without lawful authority, the person knowingly takes control, title, use or management of a vulnerable adult's property while acting in a position of

> trust and confidence and with the intent to deprive the vulnerable adult of the property. Proof that a person took control, title, use or management of a vulnerable adult's property without adequate consideration to the vulnerable adult may give rise to an inference that the person intended to deprive the vulnerable adult of the property.

For the purposes of § 13-1802, a person is in a position of trust and confidence if they are inter alia:

> (a) A person who has assumed a duty to provide care to the vulnerable adult.
>
> (b) A joint tenant or a tenant in common with a vulnerable adult.
>
> (c) A person who is in a fiduciary relationship with a vulnerable adult including a de facto guardian or de facto conservator.

A.R.S. § 46-456(I)(4); *see also* § 13-1802(K)(4). Contrary to Giles's claim, the evidence at trial was sufficient to establish she had been in a position of trust and confidence.

¶40 The state presented sufficient evidence to establish that Giles had assumed a duty to provide care for C. and thus met the requirements of § 46-456(I)(4)(a). Attorney Marc Montijo prepared a power of attorney "regarding [C.'s] personal care" that gave Giles "pervasive authority" over C.'s health care in the event he became incapacitated. Additionally, throughout the trial witnesses testified that Giles had acted as a caretaker to C. Ivan Tuchten, a friend of Giles, described a conversation with C. in which C. had told him he wanted to help Giles because she "like[d] to . . . take care of people . . . like she did with him." Andrew Chasteen, a Bank of America employee who had assisted Giles and C. with their accounts, testified he had held conversations with

Giles "about what [C.] need[ed] and how [Giles] [was] taking care of [C.]" He also mentioned that C. had told him Giles "always went with him to doctor[] appointments." Giles's granddaughter, Kiley, testified that Giles's relationship with C. was "caretaker like" and that "[s]he would take care of him." A physician's assistant who had treated C. testified that Giles had taken care of C. by making sure he got to appointments and providing assistance. Finally, in her manslaughter trial, Giles explained that she had taken C. for medical treatment and would be traveling with him to New York for health-related tests.

¶41 Moreover, substantial evidence supported a finding that Giles was a joint tenant with C. *See* § 46-456(I)(4)(b). Montijo testified that he had prepared and recorded sixteen deeds transferring real estate, previously owned solely by C., into joint tenancy with Giles. In addition to taking joint title to C.'s properties, Giles became joint owner of several bank accounts with C. Chasteen testified he had helped Giles and C. open numerous joint accounts which were funded by the sale of C.'s properties. He also testified that, between August and October 2006, Giles had obtained access to approximately $392,000 belonging to C., "basically half of the wealth that [C.] had at that time." Additionally, after C. was removed as owner of several of the joint accounts, Giles had obtained sole control over approximately $121,800 previously held by C. We conclude this evidence was sufficient to establish that Giles was in a position of trust and confidence with C. as defined by § 46-456(I)(4)(b) and (c).

¶42 Thus, the state presented sufficient evidence that Giles "knowingly [took] control . . . of [C.]'s property while acting in a position of trust and confidence." § 13-

1802(B). By later taking sole control of a significant portion of C.'s funds, she acted with "intent to deprive [C.] of the property." § 13-1802(B). The trial court did not abuse its discretion in denying Giles's Rule 20 motion as to these elements. *See Mathers*, 165 Ariz. at 67, 796 P.2d at 869.

B. Vulnerable adult

¶43 Giles contends the evidence was insufficient to establish that C. was a vulnerable adult. An individual is a vulnerable adult if he is "unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment." A.R.S. §§ 46-451(A)(9), 13-1802(K)(6).

¶44 The state introduced evidence of C.'s impairment through Giles's own testimony from her manslaughter trial, which was read to the jury. Giles described C.'s health issues as including "macular degeneration," which left him with "absolutely no night vision whatsoever" making it difficult for him to read, ears that were "extremely scarred . . .[,] lymphoma, three tumors in his stomach, and . . . emphysema."

¶45 The state also presented expert testimony from Dr. Blum, who concluded C. was a vulnerable adult. He based his conclusion in part on C.'s medical issues, including the fact that C. "had a couple different types of cancer that he knew about, [that] . . . had spread despite treatment." He also noted that C. had suffered "problems with his vision" that left him with limited ability to read and drive, as well as hearing loss that Blum testified often leads to "isolat[ion] from other people." Blum found that C. had a low testosterone level that "in men[,] affects . . . how quickly the brain works in a number of ways." Additionally, Blum noted that C. had "documented . . . anxiety," and

"renal insufficiency" that could ultimately impact C.'s control over his emotions and mental functions through a build-up of toxins. Finally, Blum took into account nonmedical issues, including C.'s age, the recent loss of his long-term spouse, and C.'s intimate relationship with Giles.

¶46 Giles concedes the state presented evidence that C. had suffered from mental and physical impairments, but argues they were not sufficient to "prevent [C.] from protecting himself." In an attempt to "demonstrate[] what impairment means," Giles cites *In re Estate of Newman*, 219 Ariz. 260, 196 P.3d 863 (App. 2008), and *Zlatos*. Both cases involved victims who suffered from pronounced impairment and incapacitation. *See Estate of Newman*, 219 Ariz. 260, ¶ 33, 196 P.3d at 873 (holding victim was an "incapacitated or vulnerable adult," court noted she was unable to be left alone and needed constant care); *Zlatos*, 211 Ariz. 519, ¶¶ 25-26, 123 P.3d at 525 (court found vulnerable adult victim "unable to walk" and "entirely dependent on [her caretakers]"). Giles argues C. was not a vulnerable adult as "he was . . . someone who could . . . be left alone . . . [and] [t]here was no evidence that [he] could not dress or feed himself."

¶47 While Giles is correct that the impairments described in *Zlatos* and *Estate of Newman* were sufficient to support a finding of vulnerability, she does not explain why this would preclude a similar finding on the facts presented here. As Blum noted in his testimony, incapacity and vulnerability are two "vastly different" things. The state was not required to present evidence that C. was incapacitated, nor was it required to produce

evidence of impairment equal to that in *Zlatos* or *Estate of Newman*.[5] The jury was instructed that impairment "means deterioration, injurious lessening, or weakening" and that "advanced age may itself cause impairment." We assume the jury followed this instruction in reaching its verdicts. *Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d at 103.

¶48 Finally, Giles claims that "[b]ecause Dr. Blum's definition of vulnerability was different from the statutory definition, his testimony [did] not support a finding of vulnerability." But, while Blum discussed factors outside the legal definition of "vulnerable adult," he also testified extensively as to his reasoning in concluding that C. was vulnerable. The jury was instructed on the definition of "vulnerable adult" by the court and could accord Blum's testimony whatever weight it wished in determining whether the legal definition was met. And again we assume the jury followed this instruction. *Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d at 103.

¶49 Based on the record before us, we conclude that the state presented substantial evidence that C. was "unable to protect himself from abuse, neglect or exploitation" because of physical and mental impairment. *See* § 46-451(A)(9). This evidence was sufficient to establish that C. was a vulnerable adult.

C. Pattern of ongoing abuse

¶50 Giles next argues the evidence at trial was insufficient to establish that she had subjected C. to emotional abuse, as required to sustain her conviction of vulnerable adult abuse. Pursuant to A.R.S. § 13-3623(D), "[a] person . . . having the care or custody

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[5] Giles concedes that the "state did not argue that [C.] was incapacitated" and the final jury instructions defined "vulnerable adult" only in terms of impairment.

of a vulnerable adult, who intentionally or knowingly subjects . . . the vulnerable adult . . . to emotional abuse," is guilty of vulnerable adult abuse. Section 13-3623(F)(3) defines emotional abuse as "a pattern of ridiculing or demeaning a vulnerable adult, making derogatory remarks to a vulnerable adult, verbally harassing a vulnerable adult or threatening to inflict physical or emotional harm on a vulnerable adult." Giles claims she had an "argumentative relationship" with C. rather than an emotionally abusive one, and that C. "gave as good as he got in their arguments." But, as discussed below, the state presented extensive evidence of Giles's pattern of abusive behavior toward C.

¶51 Giles sixteen-year-old granddaughter, Kiley, visited Giles and C. in Tucson in July 2006. Kiley testified that during her visit, Giles spoke to C. in a "degrading" manner, told him he "[ate] like a slob" and "yell[ed] at him about the way he [drove]." These types of comments occurred continually throughout her visit. At one point, Giles told Kiley "she was sorry that [Kiley] had to witness what was going on, but one day everything . . . would be [Giles's]."

¶52 Kiley described an occasion on which Giles and C. took her to eat at a local restaurant. Kiley testified that Giles "was drinking a lot," and acting in a manner that "[e]mbarrassed" C. Kiley left the restaurant and waited in the car. While Kiley was in the car, Giles approached with two men. Giles "bang[ed] on the window" and told Kiley "we are going home with these guys." C., who Kiley noted could not drive at night, tried to prevent Giles from leaving with the men. In the argument that followed, Giles punched C. in the face. The police arrived and, when questioned, C. denied that Giles had hit him. Kiley drove C. home.

¶53 Later that evening, Pima County Sheriff's Deputy Sean Gallagher visited C.'s residence to follow up with him. Gallagher testified that while he had been at the residence, C. had received multiple phone calls from Giles. At one point, Gallagher spoke with Giles on the phone. During this conversation, Giles threatened to "get [C. and Kiley] . . . 32 to 34 years in the federal penitentiary," and called C. "bad names." After spending three days with Giles and C., Kiley cut short her visit. Before leaving, she warned C. that "[Giles] is going to take you for everything."

¶54 The state also presented testimony from attorney Thomas Tilton, who had prepared a will for C. in 2003. Tilton described C. as "[s]trong willed," but added that between 2003 and 2006 C.'s "physical health began to deteriorate." In 2006, Tilton met with Giles and C. to modify C.'s will. Tilton noted that C. had been "different" on this occasion and that Giles had been "very much in charge of what was going to happen." Tilton described the meeting as chaotic, with Giles "screaming at [C.]" Giles insisted that "[C.] wanted to change his will and make [her] the sole beneficiary." When Tilton suggested that C. speak with him alone about the proposed change, Giles interrupted and said "no, this is what he wants." Tilton eventually ended the meeting, stating "I'm not going to take directions from her." After the meeting, Tilton spoke with C. on the phone. During the call, Giles screamed, "you tell him to have those papers prepared . . . . You tell him what we want."

¶55 Andrew Ford, a real estate agent who worked with C., likewise testified that Giles had created "chaos" in his relationship with C. Giles left several voicemail messages on Ford's telephone in which she could be heard speaking with C. Giles never

addressed Ford in the messages and Ford believed they were left inadvertently. The state played these recordings, as well as an additional telephone conversation Ford had recorded, for the jury. In one of the messages C. can be heard telling Giles "[h]it me again." After a profanity-laden exchange, the message ends with Giles telling C. "I can take any [expletive] thing I want." Based on the above, we conclude the state presented substantial evidence of a pattern of abuse from which the jury could find that Giles subjected C. to emotional abuse. § 13-3623. Accordingly, the trial court did not abuse its discretion in denying the Rule 20 motion. *See Latham*, 223 Ariz. 70, ¶ 9, 219 P.3d at 282. For the same reason, the jury's verdicts were supported by substantial evidence.

VI. Notice of aggravating factors

¶56 Giles asserts she "did not receive adequate notice of [the] aggravating factors" the state intended to prove at sentencing. She did not raise this issue in the trial court and therefore is precluded from appellate relief unless she demonstrates fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. We find no error.

¶57 The state filed a notice of aggravating circumstances with the indictment. The notice cited the current version of A.R.S. § 13-702(C), which governs the use of aggravating factors at sentencing, and listed twenty-one aggravators "which the [s]tate may present for a jury determination." As Giles notes, the list largely tracks the aggravating factors provided in former A.R.S. § 13-702(C). *See* 2008 Ariz. Sess. Laws, ch. 301, § 24. Giles acknowledges this notice was filed, but argues that it was

insufficient as the state "did not allege specific aggravating factors" but instead "list[ed] all possible" aggravators leaving her to "guess" which applied in her case.

¶58 Even assuming, without deciding, that Giles had established error, she has failed to show how she was prejudiced. We will not presume prejudice from lack of notice. *See State v. Fimbres*, 222 Ariz. 293, ¶¶ 36-37, 213 P.3d 1020, 1030 (App. 2009). Giles does not allege any specific way in which she was prejudiced and, given the overwhelming evidence of pecuniary gain as a motive, and no dispute that the victim was more than eighty years old, the record does not support her claim. We conclude Giles has not demonstrated that the court fundamentally erred, or that she suffered prejudice.

VII. Restitution

¶59 Last, Giles contends that "[t]he amount of restitution awarded was improper because some or all of the . . . attorney fees awarded were for consequential damages." We review the trial court's restitution order for an abuse of discretion. *State v. Slover*, 220 Ariz. 239, ¶ 4, 204 P.3d 1088, 1091 (App. 2009). "A trial court abuses its discretion if it misapplies the law or exercises its discretion based on incorrect legal principles." *Id*. "[W]e view the evidence bearing on a restitution claim in the light most favorable to sustaining the court's order." *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 412 (App. 2009).

¶60 Following C.'s death, Maria Kondonijakos, C.'s niece, and O'Connell retained attorneys Leigh Bernstein and William Walker to undo Giles's actions and restore C.'s original intent in the disposition of his property. Because neither Kondonijakos nor O'Connell had sufficient funds to pay counsel, they entered into a

contingent fee agreement. The terms of the agreement provided the attorneys would receive one-third of all amounts collected in addition to their costs and expenses. Bernstein testified that, due to the time constraints and issues in the case, her firm "dropped everything else" to work on it. Based on the value of the estate, the fees in the matter approximated $710,000. But the attorneys agreed to reduce this amount to $540,000, based in part on their obtaining a favorable result without going to trial.

¶61 The trial court found that, under the definition of victim provided in A.R.S. § 13-4401, both Kondonijakos and O'Connell were "victims of the criminal acts of Linda Giles" and that "[a]s such they [were] legally entitled to restitution." The court also addressed the issue of the proper amount of restitution. It found "that a contingent fee was not appropriate in this matter" as the case was not complex, C.'s estate had contained significant assets from which the attorneys could receive payment for their work, and "the vast majority of the work . . . was done in a period of less than ten days." Based in part on these considerations the court found that the $540,000 fee was unreasonable. But, the court also noted that the "fee was incurred in good faith by innocent victims of [Giles]'s criminal conduct." The court ordered Giles to pay the full $540,000 noting "the spirit, if not the letter, of Arizona's restitution statutes compel that this discrepancy be resolved in favor of the victims and against the criminal defendant." On appeal, Giles argues the amount of restitution imposed was improper as it was based in part on consequential damages. We agree.

¶62 A defendant who has been convicted of a crime shall be ordered "to make restitution to the person who is the victim of the crime . . . in the full amount of the

economic loss as determined by the court." A.R.S. § 13-603(C); *see also* A.R.S. § 13-804(B) (requiring consideration of "all losses caused by the criminal offense or offenses for which the defendant has been convicted"). To be recoverable as restitution, "(1) the loss must be economic, (2) the loss must be one that the victim would not have incurred but for the criminal conduct, and (3) the criminal conduct must directly cause the economic loss." *State v. Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d 1054, 1056 (App. 2004); *see also* A.R.S. § 13-105(16) (defining "economic loss" as "any loss incurred by a person as a result of the commission of an offense" including "lost interest, lost earnings and other losses that would not have been incurred but for the offense"). The underlying principle of "Arizona's statutory scheme requiring restitution in criminal cases" is to "restor[e] the victim to his economic status quo that existed before the crime occurred." *In re William L.*, 211 Ariz. 236, ¶ 11, 119 P.3d 1039, 1042 (App. 2005); *see also State v. Guilliams*, 208 Ariz. 48, ¶ 12, 90 P.3d 785, 789 (App. 2004) (purpose of restitution statutes "is to make victims whole").

¶63 Giles argues that O'Connell was not a victim, as defined by the Arizona Constitution and § 13-4401(19). *See* Ariz. Const. art. II, § 2.1(C). Giles contends that O'Connell is "not entitled to receive restitution for the half of the attorney[] fees she paid," because "only [the attorney fees] paid personally by Ms. Kondonijakos were actually paid by a victim." We need not reach the question of whether O'Connell meets the definition of "victim" as we agree with the state that she is entitled to restitution under A.R.S. § 13-804(E).

¶64 Section 13-804(E), provides that "[i]f a victim has received reimbursement for the victim's economic loss from an insurance company . . . or any other entity, the court shall order the defendant to pay the restitution to that entity." O'Connell incurred attorney fees in undoing the criminal actions of Giles. The fees paid by O'Connell were funds that Kondonijakos did not have to expend and, as such, functioned as "reimbursement for the victim's economic loss." § 13-804(E). Accordingly, the court did not err in determining that O'Connell is entitled to recover restitution for the percentage of the attorney fees she paid.

¶65 As Giles notes and the state concedes, a portion of the $540,000 in fees awarded was not incurred as a direct consequence of her crimes. Walker testified that third parties had made claims on some of C.'s properties. These claims required legal work to resolve and did not arise as a result of Giles's criminal actions. Bernstein testified about complications with the estate that resulted from C.'s "informal way of dealing with . . . property [and] . . . titling issues." She noted there were "bizarre claims coming in from all corners" that required work to resolve.

¶66 The expenses incurred by Bernstein and Walker in resolving third-party claims to C.'s properties were apparently included as part of the contingency fee assessed as restitution. As these were expenses the estate would have faced regardless of Giles's criminal activities, we cannot say her conduct directly caused the losses. *See Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d at 1056. Accordingly, we conclude the trial court erred in

assessing this portion of the contingency fee as restitution.[6] *See Slover*, 220 Ariz. 239, ¶ 4, 204 P.3d at 1091.

Disposition

¶67 For the foregoing reasons, we affirm Giles's convictions. We vacate the trial court's restitution order and remand the case for a redetermination of restitution. In all other regards we affirm the sentences imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

[6]We recognize that Giles also argues the award of restitution in the full amount of $540,000 was improper as the court specifically found the amount of fees to be unreasonable. Because we are remanding for further proceedings on the amount of restitution owed, we need not address the reasonableness of the award.