IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SOPHIA LEEANN RICHTER,
Appellant.

No. 2 CA-CR 2016-0141
Filed August 25, 2017

Appeal from the Superior Court in Pima County
No. CR20135144002
The Honorable Paul E. Tang, Judge

VACATED AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

OPINION

Presiding Judge Vásquez authored the opinion of the Court, in which Chief Judge Eckerstrom and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Sophia Richter was convicted of three counts each of kidnapping and child abuse. On appeal, she argues the trial court erred by preventing her from presenting a complete defense. She also challenges the sufficiency of the evidence to support her kidnapping convictions, asserting that those convictions merged into her child-abuse convictions. For the reasons stated below, we vacate Sophia's convictions and remand for a new trial.[2]

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Sophia's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). Early one morning in November 2013, twelve-year-old A.A. and thirteen-year-old B.A. fled from the home they shared with their mother and stepfather, Sophia and Fernando Richter. They ran to a nearby house, frantically shouting that their "stepfather [was] after them with a knife." Neighbors, who did not even know the girls lived with Sophia and Fernando, let them in and telephoned 9-1-1. According to the neighbors, the girls looked disheveled, their hair was matted, and they had body odor.

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]We use her first name to avoid confusion when her husband, Fernando Richter, is also discussed in portions of this opinion.

¶3 When police arrived, the girls reported climbing through a window after Fernando had broken down their bedroom door wielding a knife. Officers went to the home and found both parents inside. In addition, they found seventeen-year-old M.P., Sophia's oldest daughter, locked inside a bedroom. Officers discovered another bedroom, later determined to be the one that A.A. and B.A. shared, with two beds and "very [few] belongings"; the bottom half of the door had been kicked in, and the doorknob was damaged. Officers also observed bottles filled with urine throughout the house, video cameras and covered air-conditioning vents in the girls' rooms, a knife near the master bedroom, and a five-gallon bucket with a rancid-smelling pasta mix in the refrigerator.

¶4 According to the girls, Sophia and Fernando confined them to their bedrooms at all times—most recently, with M.P. in her own room and A.A. and B.A. sharing a room. As a result, the day of the incident was the first time M.P. had seen her sisters in more than a year. The girls had to ask permission to leave their bedroom, even to use the bathroom, by signaling to Sophia and Fernando by means of the cameras. The girls ate their meals, which mostly consisted of the pasta mix in the refrigerator, in their rooms; they each had one plate and one bowl, which they used for every meal and would either lick clean or wipe with a shirt or towel. Sophia and Fernando had taken the girls out of school several years before, and they never returned. The girls rarely brushed their teeth or bathed. They also described being spanked and hit with various objects.

¶5 A grand jury indicted Sophia and Fernando with three counts each of kidnapping and child abuse—one for each girl—alleged to have occurred between September 1, 2013, and November 26, 2013. Fernando was also charged with two counts of aggravated assault, one each for A.A. and B.A. The jury convicted Sophia as charged.[3] It also found two of the kidnapping convictions,

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[3]Fernando was also convicted as charged and was sentenced to a combination of concurrent and consecutive prison terms totaling fifty-eight years. This court affirmed his convictions and sentences on

those involving A.A. and B.A., dangerous crimes against children. For those two convictions, the trial court sentenced Sophia to consecutive, ten-year prison terms. For the remaining offenses, the court suspended the imposition of sentence and placed Sophia on concurrent terms of probation, the longest of which is three years, following her release from prison. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Complete Defense

¶6 Sophia argues the trial court violated her state and federal constitutional right to present a complete defense by restricting her trial testimony, as well as that of her proposed expert, and by precluding her duress defense. Generally, we review the decision to admit or exclude evidence for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006). However, we review legal and constitutional questions de novo. *State v. Harrod*, 218 Ariz. 268, ¶ 38, 183 P.3d 519, 530 (2008).

¶7 Before trial, Sophia gave notice that she intended to present a duress defense pursuant to A.R.S. § 13-412(A). Shortly thereafter, Fernando filed a motion to sever his case from Sophia's, arguing her proposed defense was antagonistic to his. In opposing Fernando's motion to sever, the state argued, in part, that Sophia's proposed duress defense was actually a "diminished capacity defense" because she was attempting to negate the mens rea of the offenses, which is prohibited by *State v. Mott*, 187 Ariz. 536, 540-41, 931 P.2d 1046, 1050-51 (1997). In addition, the state asserted that Sophia was "not entitled to a duress defense because the evidence does not in any manner support a claim that she was compelled to engage in the kidnapping and child abuse of the victims due to the threat or use of immediate physical force by [Fernando]," as required by § 13-412(A).

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appeal. *State v. Richter*, No. 2 CA-CR 2016-0112, ¶ 3 (Ariz. App. Jan. 24, 2017) (mem. decision).

¶8 In response, Sophia argued that *Mott* was inapplicable because she was "proffering a defense that she was a victim of Fernando's criminal acts," and not a defense of diminished capacity. She explained Dr. Gary Perrin would testify that she suffers from Post-Traumatic Stress Disorder (PTSD) based on "the many months, if not years, of abuse [she] suffered . . . at the hands of Fernando" and that she would produce photographs showing "numerous scars" from knife wounds inflicted by him. As to the state's argument about Sophia's inability to show Fernando had threatened or used immediate force, she asserted that she lived in a "constant state of fear, for herself and her children."

¶9 In an under-advisement ruling, the trial court first concluded that Perrin's proposed testimony was essentially that "Sophia [was] . . . a battered woman," which "amounts to psychological evidence as to diminished capacity—an approach that is expressly prohibited by *Mott*." The court then noted, "Sophia carries the burden of proving that she acted under duress by a preponderance of evidence when she committed [the offenses]" and that her "claim of duress . . . is unavailable through Perrin under *Mott*." Because "Sophia retain[ed] the Fifth Amendment constitutional right not to testify," the court reasoned that she had "thus far offered no evidence in support of" a duress defense. Lastly, the court concluded that, in light of the lack of evidence supporting Sophia's defense, Fernando was not entitled to a separate trial.

¶10 During trial, the state filed a motion in limine to preclude Sophia from presenting evidence, including photographs, that Fernando physically or emotionally abused her. The state argued that such evidence was impermissible battered-woman evidence and did not support a duress defense because Sophia could not establish immediacy. The court granted the state's motion, explaining, "I just don't know how any [evidence] concerning any nature of abuse that [Sophia] may have been subjected to by [Fernando] . . . would be understood any other way other than as a battered woman's syndrome defense, whether it's testified by diagnoses by an expert witness to that effect or not." The court also precluded Sophia's duress defense, reasoning that she could not show an immediate

threat because the dates for the alleged offenses spanned eighty-six days from September through November 2013.

¶11 Sophia repeats her arguments on appeal. She maintains the trial court erred in precluding her from presenting a duress defense because "[s]he was not trying to present a diminished capacity defense by negating a culpable mental state." She reasons that the court's characterization of her defense as diminished capacity "obscured the true relevance of the evidence." She further asserts that she "could have presented evidence of the immediacy of harm and actual threat." According to Sophia, "These errors deprived her of her state and federal constitutional rights to present a defense, due process, and a fair trial."

¶12 "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the [United States] Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), *quoting California v. Trombetta*, 467 U.S. 479, 485 (1984) (internal citations omitted); *accord State v. Abdi*, 226 Ariz. 361, ¶ 27, 248 P.3d 209, 215 (App. 2011). Our state constitution provides a similar protection. *See* Ariz. Const. art. II, §§ 4, 24. This fundamental right allows defendants to present their "version of the facts . . . so [the jury] may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). However, this right "is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *see also State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996) ("Although a defendant has a fundamental constitutional right to confront witnesses and present a defense, the right is limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance."), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

¶13 First, we address the trial court's decision to limit Sophia's and Perrin's testimony.[4] The court reasoned that the proposed testimony amounted to inadmissible diminished-capacity evidence under *Mott*. Our resolution of this issue requires a close examination of that case and the nature of a diminished-capacity defense.

¶14 In *Mott*, the defendant was convicted of first-degree murder and two counts of child abuse in connection with the death of her two-year-old daughter, Sheena. 187 Ariz. at 537-38, 931 P.2d at 1047-48. The defendant had left Sheena with her boyfriend, and, when the defendant returned, her boyfriend reported that Sheena had fallen off the toilet and hit her head. *Id.* at 538, 931 P.2d at 1048. Despite Sheena's fluttering eyes and unresponsiveness, the defendant waited approximately twelve hours before contacting a friend, who then called 9-1-1. *Id.* Sheena had suffered a brain hemorrhage and died days later. *Id.* Before trial, the defendant disclosed a defense that she "lacked the capacity to act due to the Battered Woman Syndrome." *Id.* at 539, 931 P.2d at 1049. She offered the testimony of Dr. Cheryl Karp to prove that she "was unable to form the requisite intent to have acted knowingly or intentionally." *Id.* The trial court found that "the testimony regarding the battered-woman syndrome was an attempt to establish a diminished capacity defense" and precluded it. *Id.*

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[4]As the state points out, the trial court did not outright preclude Sophia or Perrin from testifying. Although Sophia testified at trial, Perrin did not. The state therefore contends that Sophia's argument as to Perrin's testimony "fails for lack of a factual basis." *See* Ariz. R. Evid. 103(a)(2) (error may not be predicated on ruling excluding evidence unless substance of evidence shown by offer of proof or otherwise apparent from context). We acknowledge that the offer of proof as to Perrin's proposed testimony—specifically, his report—was minimal, but it was nonetheless sufficient, particularly in light of Sophia's proposed testimony and argument. Moreover, we agree with Sophia that, because the court had precluded what it perceived to be diminished-capacity evidence, there was no reason for Perrin to testify.

¶15 Our supreme court affirmed the trial court's decision to preclude Karp's testimony regarding battered-woman syndrome. *Id.* at 545, 931 P.2d at 1055. The court identified the defendant's purpose in offering Karp's testimony—"to demonstrate that [the] defendant was not capable of forming the requisite mental state of knowledge or intent"—and concluded that "the evidence of [the] defendant's history of being battered and of her limited intellectual ability was not offered as a defense to excuse her crimes but rather as evidence to negate the mens rea element of the crime." *Id.* at 540, 931 P.2d at 1050. The court described this defense as one of diminished capacity, which our legislature had "declined to adopt." *Id.* The court thus concluded, "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the mens rea element of a crime." *Id.* at 541, 931 P.2d at 1051.

¶16 Here, Sophia maintains she intended to present a duress defense. Pursuant to § 13-412(A):

> Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

"Duress envisions a third person compelling a person by the threat of immediate physical violence to commit a crime against another person or the property of another person." *State v. Lamar*, 144 Ariz. 490, 497, 698 P.2d 735, 742 (App. 1984). The rationale behind the defense is that "even though [the defendant] has done the act the crime requires and has the mental state which the crime requires, h[er] conduct which violates the literal language of the criminal law is justified because [s]he has thereby avoided a harm of greater magnitude." *State v. Jeffrey*, 203 Ariz. 111, ¶ 10, 50 P.3d 861, 864 (App. 2002), *quoting* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.3, at 614 (1986).

¶17 This case is thus readily distinguishable from *Mott* based on the defenses proffered. Unlike in *Mott*, where the defendant expressly offered Karp's testimony to demonstrate that her "mental incapacity negated specific intent," 187 Ariz. at 544, 931 P.2d at 1054, Sophia sought to introduce evidence, through Perrin's and her own testimony, to show that "she was compelled [by Fernando] to commit the charges against her by duress." Simply put, Sophia did not intend to negate the mens rea of the offenses; she sought to establish she was compelled to commit them by Fernando's threats and use of immediate physical force. Notably, it was the state that first characterized Sophia's defense as one of diminished capacity in opposing Fernando's motion to sever.

¶18 Sophia acknowledged that she had to admit she acted intentionally or knowingly as part of her duress defense. *See* A.R.S. §§ 13-1304(A), 13-3623(B)(1). As our supreme court explained in *Mott*, a diminished-capacity defense is "distinguishable" from a defense that "excuses, mitigates, or lessens a moral culpability due to [a defendant's] psychological impairment." 187 Ariz. at 540, 931 P.2d at 1050. And a duress defense does just that—it "seeks to excuse a defendant's criminal act rather than negate any element of it." *Jeffrey*, 203 Ariz. 111, ¶ 12, 50 P.3d at 864. We therefore disagree with the trial court's characterization of Sophia's defense—and consequently, Sophia's and Perrin's testimony in support of it—as a diminished-capacity defense.

¶19 As Sophia points out, evidence that is relevant for one purpose may be admissible, even though it is inadmissible for another purpose. *See State ex rel. Thomas v. Duncan*, 216 Ariz. 260, ¶ 11, 165 P.3d 238, 242 (App. 2007) ("The idea that a court may admit evidence for a legitimate purpose even though the evidence is inadmissible for another purpose is not foreign to the law of evidence."). For example, evidence of a person's character is not admissible for "the purpose of proving action in conformity therewith," but it is admissible for other purposes, such as proof of motive, opportunity, or intent. Ariz. R. Evid. 404(a), (b). Thus, even assuming some of Sophia's and Perrin's testimony could have been construed as diminished-capacity evidence, which would be inadmissible to "negate the mens rea element of a crime," *Mott*, 187 Ariz. at 541, 931 P.2d at 1051, it was

nevertheless admissible to show that she committed the charged offenses under duress, *see* § 13-412(A) (defining duress); *see also* Ariz. R. Evid. 401 (evidence is relevant if it has tendency to make fact more or less probable and is of consequence in determining action).

¶20 In addition, to the extent that Perrin's proposed testimony addressed mens rea, we agree with Sophia that it would be properly characterized as "observation evidence," which is not precluded by *Mott*.[5] *See Mott*, 187 Ariz. at 544, 931 P.2d at 1054 (evidence of character trait relating to lack of premeditation admissible because not intended to show defendant was incapable, by reason of diminished mental capacity, of premeditating or deliberating act). In *Clark v. Arizona*, the United States Supreme Court examined our supreme court's reasoning in *Mott* and concluded that the exclusion of diminished-capacity evidence on the issue of mens rea did not violate due process. 548 U.S. 735, 770-71 (2006). The Court identified three "categories of evidence with a potential bearing on mens rea." *Id.* at 757. The Court described "mental-disease evidence" and "capacity evidence" as "opinion testimony going to mental defect or disease, and its effect on the cognitive or moral capacities on which sanity depends." *Id.* at 758-60. The Court found that *Mott* properly precluded these two types of evidence. *Id.* at 760. However, the Court further determined that *Mott* also properly "imposed no restriction" on "observation evidence," which it described as "testimony from those who observed what [the defendant] did and heard what he said" and testimony from an expert witness "about [the defendant's] tendency to think in a certain way and his behavioral characteristics." *Id.* at 757, 760.

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[5] Sophia also argues that her proposed testimony was observation evidence. We do not address this argument, however, because we fail to see how, based on Sophia's offer of proof, her testimony could have constituted mens rea evidence under *Mott*—and thus the two types of inadmissible mens rea evidence described in *Clark*—given that she avowed she would acknowledge she acted intentionally or knowingly.

¶21 Here, Sophia explained that Perrin would testify about her PTSD, "virtual captivity," and "constant state of fear, for herself and her children." Such testimony would explain what was on Sophia's mind as she committed the alleged offenses. *See id.* at 757; *see also State v. Leteve*, 237 Ariz. 516, ¶ 24, 354 P.3d 393, 401 (2015) (observation evidence includes "general character trait for impulsivity"); *State v. Wright*, 214 Ariz. 540, ¶ 17, 155 P.3d 1064, 1069 (App. 2007) ("Admissible observation evidence bears on a defendant's state of mind at the time a crime was committed."). The testimony was therefore admissible under *Mott* and *Clark*.

¶22 Second, we address the trial court's decision to preclude Sophia's duress defense. The court reasoned that Sophia had the burden of proof by a preponderance of the evidence and could not establish a "threat or use of immediate physical force" because the alleged offenses spanned several months. § 13-412(A).

¶23 Although our criminal statutes do not provide a definition of "immediate" in this context, it generally means "[o]ccurring without delay; instant." *Immediate*, Black's Law Dictionary (10th ed. 2014); *see also State v. Lychwick*, 222 Ariz. 604, ¶ 9, 218 P.3d 1061, 1063 (App. 2009) ("To determine the plain meaning of a term in a statute, courts refer to established and widely used dictionaries."). Our case law explains that the threat of harm must be "present, imminent and impending." *State v. Jones*, 119 Ariz. 555, 558, 582 P.2d 645, 648 (App. 1978); *accord State v. Kinslow*, 165 Ariz. 503, 505, 799 P.2d 844, 846 (1990). For example, a taxicab driver faces an immediate threat of harm when forced by an armed passenger to drive to the scene of a crime. *Lamar*, 144 Ariz. at 497, 698 P.2d at 742.

¶24 *Kinslow* is instructive on the meaning of "immediate." There, after the defendant had escaped from prison, the governor issued an order that officers should "shoot to kill, if necessary" when apprehending the defendant. *Kinslow*, 165 Ariz. at 504, 799 P.2d at 845. After hiding out for three weeks, the defendant broke into several vehicles and houses, taking the family in the last house hostage. *Id.* at 504-05, 799 P.2d at 845-46. The defendant was ultimately detained after releasing the last family member. *Id.* at 505, 799 P.2d at 846. He sought to present a duress defense at trial;

however, the trial court precluded it, finding "no support in the law for the defense." *Id.* Our supreme court affirmed. *Id.* at 506, 799 P.2d at 847. It reasoned that the defendant had "presented no evidence to show that harm due to the 'shoot to kill' order was 'present, imminent and impending'" for several reasons. *Id.* at 505-06, 799 P.2d at 846-47. First, "[t]hree weeks had passed between [the] defendant's escape and [his] crimes." *Id.* at 506, 799 P.2d at 847. Second, the defendant was aware at least one other prisoner who had escaped was captured before him nonviolently and was alive, despite the "shoot to kill" order. *Id.* Third, the defendant himself encountered an officer who recognized the defendant but did not draw his weapon, and the defendant was able to elude capture. *Id.*[6]

¶25 Here, unlike in *Kinslow*, Sophia maintained that the threat of physical harm was "ongoing," despite the passage of multiple months over the course of the alleged offenses. Sophia maintained that "she was under immediate threat of physical harm to herself and/or her children" because "Fernando set the rules of the house, . . . which she was subject to," and she was abused, as evidenced by the photographs of her knife injuries, "if she in any way challenged his authority."[7]

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[6]The court in *Kinslow* also noted that "§ 13-412(B) makes the defense unavailable 'if the person intentionally, knowingly or recklessly placed himself in a situation in which it was probable that he would be subjected to duress.'" 165 Ariz. at 506, 799 P.2d at 847. The court explained that the defendant placed himself in the situation by escaping from prison, which also precluded his use of the duress defense. *Id.*

[7]To the extent the trial court suggested that Sophia had placed herself in this situation by marrying Fernando, we disagree. While the defendant in *Kinslow* placed himself in the situation based on his own conduct in escaping from prison, Sophia engaged in no such active conduct to create her alleged situation. On the contrary, it was Fernando's alleged abuse of Sophia, within their marriage, that placed her in the situation.

¶26 In addition, Sophia offered evidence to rebut the state's suggestion that the threat was not immediate because she could have escaped or otherwise alerted someone of their situation without injury to herself or her daughters. Sophia described her living situation, explaining that she was often "tied down and not allowed to leave a certain room or the residence." She asserted that, while she was occasionally "allowed out for brief periods of time" to go grocery shopping, Fernando's mother, who was "part of the controlling behavior," accompanied her. In addition, she avowed, "her phone was required to be on at all times in order that [Fernando] could hear what was going on."

¶27 Consistent with Sophia's "ongoing" threat theory, other courts have similarly found that, in these kinds of abuse cases, "long and lasting pressure may break down the defendant's resistance," thereby causing duress. Beth I.Z. Boland, *Battered Women Who Act under Duress*, 28 New Eng. L. Rev. 603, 626 n.86 (1994). For example, the New Mexico Supreme Court has determined that "a prolonged history of beatings and serious threats toward th[e] defendant," the last of which occurred two to three days before the crime, was sufficient for the jury to consider the duress defense. *Esquibel v. State*, 576 P.2d 1129, 1132 (N.M. 1978), *overruled on other grounds by State v. Wilson*, 867 P.2d 1175, 1177 (1994). We therefore conclude that this kind of pervasive and continuous threat of harm can be "present, imminent and impending." *Jones*, 119 Ariz. at 558, 582 P.2d at 648.

¶28 We next consider whether the trial court should have permitted Sophia to present her duress defense. Generally, before allowing evidence of a defense at trial, the court must determine whether there is a "legal basis" for the related instruction. *State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995); *cf. State v. Boccelli*, 105 Ariz. 495, 497, 467 P.2d 740, 742 (1970) ("Entrapment is a question for the jury unless there is no evidence to support the defense."). However, a defendant "is entitled to an instruction on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). The record need only contain "the slightest evidence" supporting the instruction. *State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983).

¶29 Here, although the issue may be close, Sophia's and Perrin's proposed testimony provided a legal basis for the duress defense. *Cf. State v. Belyeu*, 164 Ariz. 586, 590, 795 P.2d 229, 233 (App. 1990) (duress instruction not appropriate where defendant presented no evidence of imminent danger). The issue of whether the threat was immediate then became a question of fact for the jury. *See State v. Paxson*, 203 Ariz. 38, ¶ 18, 49 P.3d 310, 314 (App. 2002) ("It [is] for the fact-finder at trial, and not the trial court, to choose between the competing inferences."); *cf. State v. Toscano*, 378 A.2d 755, 765 (N.J. 1977) ("No longer will there be a preliminary judicial determination that the threats posed a danger of 'present, imminent and impending' harm to the defendant or to another. In charging the jury, however, the trial judge should advert to this factor of immediacy . . . ."); *Esquibel*, 576 P.2d at 1132-33 ("Under the circumstances of this case, the passage of two to three days between threat and escape does not suffice to remove the defense of duress from the consideration of the jury. What constitutes present, immediate and impending compulsion depends on the circumstances of each case.").

¶30 The state nevertheless argues that, because Sophia "did not admit to engaging in the proscribed conduct" when she ultimately testified at trial, "there was no basis for an instruction that what would otherwise have been wrongful conduct was justified." In response, Sophia contends the trial court's preclusion of the duress defense effectively prohibited "any other defense than a denial that the abuse and kidnapping occurred." However, the court initially determined before trial that Sophia could not present a duress defense—a decision it affirmed multiple times during trial prior to Sophia testifying. And we review the court's ruling based on the record as it existed at the time the court precluded the defense. *See State v. Herrera*, 232 Ariz. 536, ¶ 24, 307 P.3d 103, 113 (App. 2013) (this court's review limited to record before trial court); *see also GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (this court cannot consider evidence not part of record before trial court at time it entered decision at issue). Therefore, Sophia's

later testimony did not remedy the trial court's earlier erroneous decision.[8]

¶31 Last, contrary to the trial court's determination, Sophia did not bear the burden of proving that she acted under duress by a preponderance of the evidence.[9] Although "a defendant shall prove any affirmative defense raised by a preponderance of the evidence," A.R.S. § 13-205(A), justification defenses—like duress—are not affirmative defenses. *Id.*; *see also* A.R.S. § 13-103. "If evidence of justification . . . is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification." § 13-205(A); *see also State v. King*, 225 Ariz. 87, ¶ 6, 235 P.3d 240, 242 (2010).

¶32 Based on the foregoing, we conclude the trial court erred in characterizing and, thus, restricting Sophia's and Perrin's trial testimony as diminished-capacity evidence. *See Harrod*, 218 Ariz. 268, ¶ 38, 183 P.3d at 530. In addition, the court erred in precluding Sophia's duress defense. *See id.* Accordingly, we vacate Sophia's convictions and remand for a new trial. *See Paxson*, 203 Ariz. 38, ¶ 2, 49 P.3d at 311.

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[8]In addition, as Sophia points out, she did not waive her claim of error by testifying because she continued throughout trial to renew her objections to the court's rulings. *See Mott*, 187 Ariz. at 540, 931 P.2d at 1050 (although defendant withdrew battered-woman defense, she did not waive claim that trial court erred in precluding proffered testimony when she continued to argue that evidence was relevant).

[9]Although Sophia did not raise this argument until her reply brief, which would ordinarily cause us to deem it waived, *see State v. Brown*, 233 Ariz. 153, ¶ 28, 310 P.3d 29, 39 (App. 2013), we nonetheless address it because it further shows why the trial court erred in precluding the duress defense, *see State v. Lopez*, 217 Ariz. 433, n.4, 175 P.3d 682, 687 n.4 (App. 2008) (doctrine of waiver is discretionary).

Sufficiency of the Evidence

¶33 Sophia also challenges the sufficiency of the evidence to support her kidnapping convictions.[10] She argues that, because the jury was instructed on "the same elements" for kidnapping and child abuse, the kidnapping convictions "merge[d]" into the child-abuse convictions.[11] Although Sophia argued below that the state had presented insufficient evidence, she did not make this particular argument. She has therefore waived review for all but fundamental, prejudicial error. *See State v. Rhome*, 235 Ariz. 459, ¶ 4, 333 P.3d 786, 787 (App. 2014); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Nonetheless, a conviction based on

[10]Sophia raises two additional arguments on appeal. Because we are remanding for a new trial, we do not address them. We only address the sufficiency-of-the-evidence argument because, if meritorious, it would require us to reverse Sophia's convictions without a retrial. *See State v. Becerra*, 231 Ariz. 200, ¶ 18, 291 P.3d 994, 999 (App. 2013).

[11]Although Sophia asserts that the alleged error "resulted in a merger of the offenses," she fails to explain how the doctrine of merger applies in these circumstances. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief shall include appellant's contentions with citations to legal authority); *see also State v. West*, 238 Ariz. 482, ¶ 75, 362 P.3d 1049, 1068 (App. 2015) (failure to support claim on appeal constitutes waiver); *State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (argument raised in reply brief waived). It therefore appears Sophia does not actually suggest the doctrine applies here and simply used the term imprecisely. In any event, the merger doctrine only "applies to lesser-included offenses," and kidnapping is not a lesser-included offense of child abuse. *State v. Lopez*, 174 Ariz. 131, 142-43, 847 P.2d 1078, 1089-90 (1992); *accord Merger*, Black's Law Dictionary (10th ed. 2014) (in criminal law, merger is "[t]he absorption of a lesser included offense into a more serious offense when a person is charged with both crimes, so that the person is not subject to double jeopardy"); *see also* §§ 13-1304(A), 13-3623(B).

insufficient evidence constitutes such error. *State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005).

¶34 As relevant here:

> A person commits kidnapping by knowingly restraining another person with the intent to:
>
> . . . .
>
> 3. Inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony; or
>
> 4. Place the victim or a third person in reasonable apprehension of imminent physical injury to the victim or the third person . . . .

§ 13-1304(A). Child abuse occurs when a person, "[u]nder circumstances other than those likely to produce death or serious physical injury," (1) intentionally or knowingly "causes a child . . . to suffer physical injury or abuse," (2) "having the care or custody of a child," intentionally or knowingly "causes or permits the person or health of the child . . . to be injured," or (3) "having the care or custody of a child," intentionally or knowingly "causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is endangered." § 13-3623(B)(1). Abuse under that statute is defined as "the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to cause serious emotional damage." A.R.S. §§ 8-201(2), 13-3623(F)(1). It includes the "[u]nreasonable confinement of a child." § 8-201(2)(c).

¶35 Sophia argues that her kidnapping convictions were based upon her intent "to otherwise aid in the commission of a felony"—specifically, child abuse—under § 13-1304(A)(3). Pointing to the general definition of abuse under § 8-201(2)(c), she further insists that her child-abuse convictions were based upon her

"[u]nreasonable confinement of a child." Sophia acknowledges that "[t]here are obviously many forms of child abuse" but maintains that "[n]one of these circumstances applied to [her]." She then reasons that "the acts of restraint for the kidnapping and unreasonable confinement for the child abuse are the same" and that her kidnapping convictions therefore merged into her child-abuse convictions. We disagree with this argument for several reasons.

¶36 First, Sophia's kidnapping convictions were not necessarily based upon her intent "to otherwise aid in the commission of a felony." § 13-1304(A)(3). She was indicted for kidnapping under both § 13-1304(A)(3) and (4), which include situations where the defendant intends to not merely aid someone else's commission of an offense but also to directly "[i]nflict . . . physical injury" or to "[p]lace the victim or a third person in reasonable apprehension of imminent physical injury." *See State v. Bruni*, 129 Ariz. 312, 317, 630 P.2d 1044, 1049 (App. 1981) (kidnapping statute describes "one crime which may be committed in different ways"). The jury was similarly instructed that kidnapping could be committed in all three ways.[12] In closing, the prosecutor emphasized both "the commission of a felony" under § 13-1304(A)(3) and "reasonable apprehension of imminent physical injury" under § 13-1304(A)(4):

> We're talking about the second half of (b), which is otherwise aiding in the commission of a felony, that felony being child abuse. And then (c), the third on the list, placing the victim or a third person in reasonable fear of imminent physical injury to the victim or one of her sisters. That is what we're talking

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[12] The jury was also instructed that kidnapping could be committed with the intent "to hold the person for involuntary servitude." § 13-1304(A)(2). However, that subsection was not included in the indictment, and, as Sophia points out, the state acknowledged in closing argument that this subsection was "not what we're talking about here."

> about in this case. That is what the Richters did.

¶37 Sophia nevertheless argues that, although "kidnapping could be committed to inflict physical injury," under § 13-1304(A)(3), "this theory only applied to Fernando, who had been charged with two counts of aggravated assault." She points out that she was not charged with assault, as an accomplice or otherwise. But, as the state observes, § 13-1304(A)(3) only requires "restraint with the intent to inflict personal injury." Thus, it is immaterial whether a physical injury actually results. *Cf.* § 13-1304(B) (allowing downgrade of felony classification for kidnapping where victim voluntarily released without physical injury).

¶38 Second, Sophia's child-abuse convictions were not necessarily based upon her "[u]nreasonable confinement of a child." § 8-201(2)(c). Sophia places too much emphasis on the general definition of abuse under § 8-201(2), rather than the elements of child abuse as identified in § 13-3623(B). The latter statute, under which Sophia was indicted, provides multiple ways of committing child abuse. *See State v. West*, 238 Ariz. 482, ¶ 21, 362 P.3d 1049, 1057 (App. 2015). And only one of those ways involves "abuse," as it is defined in § 8-201(2)(c). *See* § 13-3623(B). For example, § 13-3623(B) also provides that child abuse occurs when a person who has the "care or custody of a child . . . causes or permits the person or health of the child . . . to be injured" or "causes or permits a child . . . to be placed in a situation where the person or health of the child is endangered." Abuse, and therefore unreasonable confinement, under § 8-201(2)(c) has a limited application to § 13-3623(B).

¶39 Third, viewing the record in the light most favorable to sustaining the jury's verdicts, *see State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009), we conclude the state presented sufficient evidence to support Sophia's kidnapping convictions, beyond that necessary for her child-abuse convictions, *see* A.R.S. §§ 13-1301(2), 13-1304(A)(3), (4); *cf. State v. Stough*, 137 Ariz. 121, 123, 669 P.2d 99, 101 (App. 1983) (kidnapping may be committed in any of ways enumerated in § 13-1304(A)). All three victims testified that Sophia actively controlled their confinement by, among other things,

granting their requests—often after a lengthy delay—to leave their bedrooms to use the bathroom, monitoring them while they used the bathroom, requiring A.A. and B.A. to march in place every morning until their "legs would get sore," forcing them to eat, even if they were not hungry, and yelling at them when they did not do as they were told. In addition, all three girls described various spankings, during which Sophia was present and sometimes participated; although the spankings occurred prior to the family's move to Tucson in 2013, they support the inference that Sophia intended to place the victims in "reasonable apprehension of imminent physical injury," even while in Tucson. § 13-1304(A)(4).

¶40 Specifically, B.A. testified, "[W]e weren't allowed to leave our room. I know that for sure . . . I just couldn't go out. . . . I never tried because I didn't want to get punished. I didn't want to get whupped. I didn't want to be yelled at." A.A. similarly testified that she was too "scared to leave." When asked why Fernando treated them the way he did, B.A. stated, "We weren't his kids. He said he is allowed to make the rules, the decisions, because we weren't his. So we had to follow his rules. And my mom, she agreed to that. She let him do what he wanted just because we weren't his." Accordingly, a reasonable jury could have found that Sophia committed the kidnapping offenses beyond a reasonable doubt. *See Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d at 688. Sophia therefore has not shown fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

Disposition

¶41 Because the trial court improperly precluded Sophia's duress defense, we vacate her convictions and remand for a new trial.