IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO BAEZ FUENTES,
Appellant.

No. 2 CA-CR 2018-0067
Filed October 28, 2019

Appeal from the Superior Court in Pima County
No. CR20040598
The Honorable Deborah Bernini, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Francisco Fuentes appeals his convictions and sentences for first-degree murder and aggravated assault. For the reasons that follow, we affirm the convictions and the sentences for aggravated assault but vacate the sentence for first-degree murder and remand for new sentencing.

Factual and Procedural History

¶2 "We view the evidence and all reasonable inferences in the light most favorable to sustaining the jury's verdicts." *State v. Holle*, 240 Ariz. 300, ¶ 2 (2016). One evening in February 2004, Fuentes was outside his residence with a man known as "Guero." A neighbor, J.P., stopped his truck outside Fuentes's home. Fuentes approached the truck carrying a gun.[1] He walked to the passenger side, where J.P.'s cousin was sitting. Fuentes angrily asked what business J.P. and his cousin had at Fuentes's residence. He then pulled J.P.'s cousin by the shirt and pointed the gun at him. After J.P. told Fuentes to calm down and threatened to call the police, Fuentes accused J.P. of being a "snitch," came around the truck, and hit J.P. in the face with the barrel of the gun hard enough to cause bleeding and contusions. J.P. became frightened and sped away, and Fuentes fired a shot at J.P.'s departing truck.

¶3 As he drove, J.P. phoned his older brother, A.P., to tell him Fuentes had hit him in the face with a gun. A.P. drove with three passengers to J.P.'s residence, where J.P. and his cousin were waiting outside. As A.P. approached, his headlights illuminated Fuentes standing at J.P.'s gate with Guero. Both Fuentes and Guero were holding guns.

¶4 Fuentes and Guero ran to a nearby mound of dirt and asphalt. When A.P. saw them running, he stopped the truck in the middle of the road and turned on his high-beam lights. His three passengers got out of the truck.

¶5 One of these passengers, D.P.—J.P. and A.P.'s brother, who knew Fuentes—approached the base of the mound to complain to Fuentes about what he had done to J.P. When D.P. was a foot or two away from him, Fuentes pointed his gun at D.P.'s chest. D.P. angrily asked Fuentes why he had hurt J.P. Fuentes then shot D.P. once, and D.P. collapsed. D.P. died at the scene from the bullet wound.

[1]The firearm Fuentes carried was a TEC-9 semiautomatic pistol.

¶6 After shooting D.P., Fuentes threatened other witnesses with his gun and fired additional shots. As Fuentes ran down from the mound with his gun pointed, he passed A.P. in the driver's seat of his truck, frightening him. A.P. drove his truck at Fuentes and nearly struck him, crashing into and knocking down the fence surrounding J.P.'s yard.

¶7 A grand jury charged Fuentes with first-degree murder for the death of D.P. and eight counts of aggravated assault with a deadly weapon, two of which related to the incidents outside Fuentes's home and the remainder of which related to the incidents outside J.P.'s home.

¶8 After an eight-day trial for which Fuentes failed to appear, the jury found him guilty of first-degree murder and five counts of aggravated assault with a firearm.[2] The jury also found the state had proven beyond a reasonable doubt that the murder and the aggravated assaults at J.P.'s property were committed in the presence of an accomplice. The trial court sentenced Fuentes to natural life for the first-degree murder and 7.5 years for each aggravated assault, with all sentences to run concurrently. This appeal followed.[3] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Motion to Suppress[4]

¶9 Based on a tip shortly after the incident regarding Guero's potential whereabouts, police visited a property in Marana that was registered in the name of Fuentes's son. A fence surrounded the property,

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[2] As to the other three counts of aggravated assault, one was dismissed with prejudice on the state's motion, and a judgment of acquittal was entered as to the other two.

[3] Fuentes seeks reversal of his convictions for first-degree murder and three counts of aggravated assault. He does not challenge his convictions or sentences for the two counts of aggravated assault stemming from the incidents outside his residence.

[4] In considering a trial court's ruling on a motion to suppress, we review only the evidence that was before the court at the time of the decision, viewing that evidence in the light most favorable to sustaining the court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007). Where, as here, no suppression hearing occurred, we draw our facts from the uncontested elements of the filings and other materials that were before the court at the time of its decision. *See State v. Mixton*, 247 Ariz. 212, ¶ 7 (App. 2019).

but police found the gate open when they arrived. They entered and approached a mobile home situated there.[5] They found its door open, called out to any potential occupants, received no response, and entered to perform what they termed a "security sweep." Once inside, police observed a baseball cap like the one Guero was known to wear, as well as a handgun that appeared to be consistent with one known to be owned by Fuentes.[6] The officers exited the mobile home, obtained a telephonic search warrant and, pursuant to that warrant, seized the cap and gun.

¶10 Before trial, Fuentes moved to suppress the evidence obtained from the mobile home. The trial court denied the motion on the ground that Fuentes did not have standing to challenge the search. On appeal, Fuentes contends: (a) he should have been permitted to challenge the search because he had a reasonable expectation of privacy in the residence; (b) the search was unconstitutional; and (c) the court's error in denying his motion to suppress was not harmless. We address each of these arguments in turn.

Legitimate Expectation of Privacy

¶11 The protections afforded by the United States and Arizona Constitutions against unlawful searches and seizures relate to personal rights that "can be invoked only by a defendant with a 'legitimate expectation of privacy in the invaded place.'" *State v. Peoples*, 240 Ariz. 244, ¶ 8 (2016) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)).[7] To be

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[5]The mobile home was still in two pieces, with both halves up on blocks, and did not have utilities connected. However, the police understood the mobile home to be "a residence," and the state has not argued otherwise. A dwelling need not be a traditional, completed dwelling to be protected from warrantless search. *See United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993) ("person can have an objectively reasonable expectation of privacy in a tent on private property" and even in one pitched legally on public land).

[6]This firearm was not the TEC-9 murder weapon, but a TEC-22 pistol with a malfunctioning magazine. The state's tool mark examiner testified at trial that this handgun had been used to fire one of the shell casings police discovered at the scene of D.P.'s murder.

[7] "Our courts have sometimes referred to this requirement as 'standing' for the sake of brevity," but we "must decide whether a defendant possessed a legitimate expectation of privacy applying Fourth

"legitimate," a defendant's expectation of privacy must be "one that society is prepared to recognize as reasonable." *Id.* (quoting *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990)). As our supreme court illustrated in *Peoples*, a person need not technically own property to have an expectation of privacy in it. *See id.* ¶¶ 18-24. Rather, we "must examine the totality of the circumstances" to determine whether a defendant's expectation of privacy "was in accord with social custom and reasonable." *Id.* ¶¶ 19, 22.

¶12 In this case, the trial court accepted as true Fuentes's avowal that he had: (a) purchased the property to secure rental income; (b) placed it in the name of his son, who was serving in the military and to whom he planned to offer it upon his return; (c) purchased the mobile home, placed it, too, in his son's name, and located it on the property; (d) collected rental income from the property; (e) worked on the mobile home shortly before his arrest, including painting it, repairing the roof, and acquiring a permit to install a septic tank; (f) periodically slept or napped in the mobile home when working on the property; (g) possessed the keys to the mobile home and left it locked; and (h) left personal property, including two bedrolls and beer, inside.

¶13 Under the totality of the circumstances, it was an abuse of discretion for the trial court to find that Fuentes "did not have a legitimate expectation of privacy in this particular place" based on these facts. *See id.* ¶ 7 (error of law constitutes abuse of discretion). Although Fuentes was no longer the record owner of the mobile home or the property on which it sat, the facts the trial court accepted as true demonstrate that Fuentes operated and asserted control over it in all respects. Not only had he previously collected rent payments and obtained a permit to conduct work to upgrade the residence; he also retained and exercised the rights to use it himself, left personal items there, and exercised unfettered authority to permit or exclude others from entering it. It was therefore "in accord with social custom and reasonable" for Fuentes to expect privacy in that residence. *Id.* ¶ 22; *see also State v. Main*, 159 Ariz. 96, 98 (App. 1988) (factors relevant to privacy expectation include prior use, legitimate presence, and ability to control or exclude others' use).

¶14 Our supreme court's reasoning in *Peoples* requires this conclusion. There, the court found that a defendant retained a reasonable expectation of privacy in the home of his next-door neighbor, where he

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Amendment principles rather than traditional standing principles." *Peoples*, 240 Ariz. 244, ¶ 8.

spent one night as a guest but left no personal belongings other than a cell phone. *Id.* ¶¶ 2, 17-25. In so holding, the court implicitly rejected the state's argument, similar to one offered here, that a defendant has no expectation of privacy in a searched residence because another person may have a greater expectation of privacy in it or because the defendant may have another primary residence. *Id.* In this case, the totality of the circumstances demonstrates that Fuentes, the person exerting all functional control over the mobile home, had significantly more reason to expect privacy in that residence than a temporary overnight guest.

Constitutionality of the Search

¶15 The state concedes that it lacked a warrant for its initial entry into the mobile home. It contends, however, that the search was nonetheless lawful as a "protective sweep" to ensure the safety of the officers. *See Maryland v. Buie*, 494 U.S. 325, 327 (1990). Fuentes counters that, because "there was no contemporaneous arrest in this case," the protective sweep exception to the warrant requirement does not apply. Although the trial court did not reject the motion to suppress on this basis, we must uphold the trial court's ruling on any legal ground supported by the record. *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7 (App. 2012). We therefore address the question.

¶16 Under both the United States and Arizona Constitutions, a warrant is generally required before police may search a residence. *State v. Ault*, 150 Ariz. 459, 463 (1986). Although the United States Supreme Court has identified exceptions to the warrant requirement, those exceptions "must be narrowly tailored to the circumstances that justify their creation." *See State v. Kempton*, 166 Ariz. 392, 396 (App. 1990) (citing *Florida v. Royer*, 460 U.S. 491, 499-500 (1983); *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *Terry v. Ohio*, 392 U.S. 1, 19, 25-26 (1968)).

¶17 The Supreme Court has never articulated a "protective sweep" exception to the warrant requirement in the absence of a contemporaneous arrest. Indeed, in *Buie*, the Court defined a protective sweep as "a quick and limited search of premises, *incident to an arrest* and conducted to protect the safety of police officers or others." 494 U.S. at 327 (emphasis added). Arizona jurisprudence has similarly assumed that any lawful protective sweep would occur incident to an arrest. *See State v. Manuel*, 229 Ariz. 1, ¶¶ 17, 20 (2011) (describing "*Buie* sweep" as "incident to an arrest in a home"); *State v. Fisher*, 226 Ariz. 563, ¶ 10 (2011) (acknowledging apparent arrest requirement and declining to address

whether *Buie* exception could be extended to situations "when a suspect is detained and questioned but not yet arrested outside of a residence").

¶18 Some federal circuits have permitted a "protective sweep" absent an arrest. *E.g.*, *United States v. Gould*, 364 F.3d 578, 584-93 (5th Cir. 2004); *United States v. Taylor*, 248 F.3d 506, 513-14 (6th Cir. 2001); *United States v. Garcia*, 997 F.2d 1273, 1282 (9th Cir. 1993); *United States v. Patrick*, 959 F.2d 991, 996-97 (D.C. Cir. 1992).[8] In each of those cases, however, officers conducted the sweep when they were lawfully inside the residence in question—often after consensual entry. *Gould*, 364 F.3d at 588-91; *Taylor*, 248 F.3d at 514; *Garcia*, 997 F.2d at 1282; *Patrick*, 959 F.2d at 996-97. But the state has presented no authority, and we can find none, indicating that a protective sweep of a home is permissible where, as here, the officers have not contemporaneously arrested a suspect and have no other lawful basis to enter the home. *See Ault*, 150 Ariz. at 464 ("burden is on the state when it seeks an exception to the warrant requirement").

¶19 Nor has the state attempted to argue that the officers in this case were justified in entering the mobile home under another exception to the warrant requirement such as hot pursuit or the presence of exigent circumstances. *See State v. Wilson*, 237 Ariz. 296, ¶¶ 8-10 (2015) (describing other exceptions). In essence, then, the state seeks broad authority to investigate a crime by entering any home which might harbor a dangerous person—even when its officers have ample time to secure a search warrant. But, if officers refrain from entering a home without legal cause, they will have much less occasion to encounter any safety concerns arising from those who might be inside. Thus, such an expansion of the protective sweep doctrine would largely untether it from its rationale to promote officer safety. As the United States Supreme Court has reminded us, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant,* 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

¶20 Because the officers entered the mobile home without a warrant and were not justified in doing so under any established exception

[8]Federal circuits are divided on this question. *See United States v. Freeman*, 479 F.3d 743, 750 (10th Cir. 2007); *United States v. Waldner*, 425 F.3d 514, 517 (8th Cir. 2005); *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000).

to the warrant requirement, the search was unconstitutional and the evidence seized as a result of that search should have been suppressed. *See Peoples*, 240 Ariz. 244, ¶ 9 ("The court must exclude from a criminal trial any evidence obtained in violation" of the warrant requirement "unless the good-faith exception to the exclusionary rule applies.").[9]

Harmlessness

¶21 "We assess a trial court's erroneous denial of a motion to suppress for harmless error." *State v. Davolt*, 207 Ariz. 191, ¶ 39 (2004). Under that standard, we may affirm only if we "can say beyond a reasonable doubt that the error did not contribute to the verdict" or sentence. *Id*.

¶22 Fuentes contends the error contributed to the verdict because, at trial, the state relied heavily on the challenged evidence to convince the jury "that Guero had been armed and had participated in some aspect of the shooting." But whether Guero was present and armed was not a significant issue in determining Fuentes's guilt on the underlying charges. Neither side made any argument that Guero, as opposed to Fuentes, shot D.P. or threatened the other victims with a gun. To the contrary, Fuentes maintained that he shot D.P. in self-defense in reaction to A.P.'s alleged attempt to ram him with his truck. Whether Guero was armed was irrelevant to that claim. Nor did Guero's presence as an armed ally to Fuentes directly bear on whether Fuentes premeditated the killing.[10]

¶23 Given the testimony from multiple eyewitnesses that Fuentes shot D.P. in the chest and threatened other victims with his gun, the erroneous admission of the evidence placing Guero armed at the scene did not meaningfully contribute to the jury's verdict that Fuentes murdered

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[9]The state's contention that the evidence was "otherwise admissible under the independent source doctrine" likewise fails. The officers relied on the fruits of the improper entry to the mobile home to secure the search warrant. The trial court granting the warrant specifically focused on the officers' observations of the baseball cap and the handgun within the residence as a basis to issue the warrant. *See State v. Gulbrandson*, 184 Ariz. 46, 58 (1995) (state must show "information gained from the illegal entry did not affect the officer's decision to seek the warrant or the [judge's] decision to grant it").

[10]As discussed below, there was sufficient evidence of Fuentes's premeditation to kill D.P. separate from any theory of transferred intent.

D.P. and assaulted others with a firearm. At best, the evidence seized from the mobile home was minor and cumulative on the issue of guilt.

¶24 However, that evidence was central to the jury's finding that Fuentes's crimes at J.P.'s residence, including the first-degree murder, were committed with the assistance of an accomplice. None of the numerous eyewitnesses to the incident testified that Guero had either discharged a gun to assist Fuentes or taken any other affirmative action as Fuentes discharged and brandished his weapon. But the state presented testimony that a shell casing discovered at the scene matched the gun found near Guero's hat in the mobile home. The state emphasized that testimony as "conclusive evidence" that Guero had acted as an accomplice. Although "the Sixth Amendment does not require that a jury find an aggravating circumstance before a natural life sentence can be imposed" for first-degree murder, *State v. Fell*, 210 Ariz. 554, ¶ 19 (2005), the trial court specified "the jury finding of presence of an accomplice" as a basis for imposing a natural life sentence. We are therefore unable to conclude that the evidence seized from the mobile home was harmless as to sentencing. Accordingly, we vacate Fuentes's sentence for first-degree murder and remand the case for new sentencing.

Shoeprint Evidence

¶25 As noted above, Fuentes contended that he shot D.P. in self-defense after A.P. first attempted to run him over with the truck and rammed into the fence. In support of this theory, Fuentes sought to establish that D.P. left a shoeprint on the other side of the downed fence, indicating, because of its placement, that he was shot after the fence was struck.

Exclusion of Evidence

¶26 Fuentes sought to elicit testimony from the state's crime scene technician that he had seen a shoeprint behind the downed fence that might have been consistent with D.P.'s shoes. The state objected. Although the trial court permitted Fuentes to elicit testimony that the technician had been instructed not to photograph a print he pointed out to detectives, the court precluded the technician from providing any opinion on whether the shoeprint he saw, but did not photograph, matched or reflected a similar pattern as the one he observed on D.P.'s shoes the night of his murder.

¶27 Fuentes contends the trial court erred in precluding him from asking the technician whether "the distinctive tread on [D.P.'s] shoes appeared to be similar to the tread seen in the footprint that [the technician]

had observed." "[W]e review a trial court's exclusion of evidence for an abuse of discretion." *State v. Bernstein*, 237 Ariz. 226, ¶ 9 (2015). Fuentes has not established such abuse here.

¶28 Lay witnesses may only provide opinion testimony "when it is 'rationally based on the perception of the witness.'"[11] *State v. Doerr*, 193 Ariz. 56, ¶ 26 (1998) (quoting Ariz. R. Evid. 701). "The question of whether a lay witness is qualified to testify as to any matter of opinion is a preliminary determination within the sound discretion of the trial court whose decision must be upheld unless shown to be clearly erroneous or an abuse of discretion." *Groener v. Briehl*, 135 Ariz. 395, 398 (App. 1983).

¶29 Here, the crime scene technician testified at a pretrial motions hearing. He mentioned having observed shoeprints that "might look similar to the ones that the deceased's shoes may have created," and the trial court asked in response: "And did you make that decision or did someone tell you that?" The technician replied: "[T]he detective at the time I believe said that they felt that it was—that the prints looked very similar to the shoes that the deceased [was] wearing . . . ." Based on the technician's testimony, the court concluded it was "absolutely clear from [the technician] that he was giving opinions based on what other people told him." This conclusion is supported by the record, and we must defer to it regardless, given the trial court's first-hand exposure to the witness. We therefore find no error in the court's preliminary determination that the technician was not qualified to provide the opinion testimony in question because it was not based on his own perceptions. *See Doerr*, 193 Ariz. 56, ¶ 26; Ariz. R. Evid. 701; *Groener*, 135 Ariz. at 398.

Willits Instruction

¶30 Fuentes also argues the trial court erred in denying his request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964), regarding the state's failure to photograph the shoeprint noticed by the crime scene technician. We review the denial of a *Willits* instruction for an abuse of discretion. *State v. Glissendorf*, 235 Ariz. 147, ¶ 7 (2014). We find no such abuse here.

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[11]The technician here had no expertise in shoe tread identification evidence and therefore qualifies as a lay witness for the purposes of this potential testimony. *See* Ariz. R. Evid. 702 (witness must be qualified by "knowledge, skill, experience, training, or education" to provide expert opinion).

¶31 "[W]hen the state loses or destroys evidence that would have been useful to the defense," a defendant is entitled to an "adverse-inference" *Willits* instruction. *Id.* Here, there is no contention that the state lost or destroyed evidence, only that a shoeprint pointed out by the crime scene technician should have been photographed. But the state "does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence," *State v. Rivera*, 152 Ariz. 507, 511 (1987), and "[a] *Willits* instruction is not given merely because a more exhaustive investigation could have been made," *State v. Murray*, 184 Ariz. 9, 33 (1995). *See also State v. Willcoxson*, 156 Ariz. 343, 346 (App. 1987) ("We do not believe that a failure to pursue every lead or gather every conceivable bit of physical evidence will require a *Willits* instruction.").

¶32 Moreover, "[t]he duty of police to preserve potentially exculpatory evidence arises when the evidence is 'obviously material.'" *State v. Tinajero*, 188 Ariz. 350, 355 (App. 1997) (quoting *State v. Perez*, 141 Ariz. 459, 463 (1984)). When they were collecting evidence at the murder scene, police correctly understood that D.P. had been present on his brother's property sometime before the shooting, such that any shoeprints he may have left would not necessarily be tied to the incident.[12] None of the witnesses police interviewed immediately after the murder indicated that Fuentes might have acted in self-defense. Even Fuentes himself had not yet made such a claim; to the contrary, he repeatedly told officers that he had been sleeping, had "no idea" what was going on, had no disagreement with anyone, and did not know anyone had died. Thus, Fuentes has not demonstrated why police would have had reason to photograph the shoeprint in question.

¶33 To the extent the state has failed to preserve "evidence that, though not obviously material, turns out to be material, it is up to the trial judge to determine if the state's failure to recognize its materiality was reasonable or not and to give a *Willits* instruction only where it finds the failure to have been unreasonable." *Perez*, 141 Ariz. at 464 n.5. Given the facts known to law enforcement officers at the time of their investigation of the crime scene, we see no error in the trial court's implicit finding that it was reasonable for the police to decide not to photograph the shoeprint.

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[12]Fuentes insists that D.P. appeared to be wearing "dressier shoes" that "appeared brand new" on the night of his murder and that he "had likely not been wearing them . . . when working with [J.P. at his residence] on the previous day." Such "[s]peculation will not suffice" to warrant a *Willits* instruction. *State v. Todd*, 244 Ariz. 374, ¶ 22 (App. 2018).

¶34 Finally, whether a *Willits* instruction is necessary in a particular case "depends on a judgment as to . . . how much better or more important the 'missing' evidence might have been than the evidence that was introduced." *Willcoxson*, 156 Ariz. at 346-47. Here, much of the crime scene had been "trampled" by witnesses, family members of the victims, and rescue personnel, with "shoe impression over shoe impression." As such, we defer to the trial court's judgment that the "missing" shoeprint evidence would have been of "questionable" evidentiary value.

¶35 For all these reasons, it was not an abuse of discretion for the trial court to deny Fuentes's request for a *Willits* instruction.

Sufficiency of the Evidence

¶36 Fuentes contends the evidence presented at trial was insufficient to support his conviction for first-degree murder. The "question of sufficiency of the evidence is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559, ¶ 15 (2011). We must decide whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). Reversal is appropriate only where there is "a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25 (1976)). We must "view the evidence in the light most favorable to sustaining the verdict, and we resolve all inferences against the defendant." *Davolt*, 207 Ariz. 191, ¶ 87.

¶37 Fuentes does not dispute that he shot and killed D.P. Rather, he argues the state "presented no evidence that [he] fired in a manner that indicated he intentionally or knowingly acted to cause D[.P.]'s death." We disagree. Four eyewitnesses testified that Fuentes stood on the mound and shot D.P. in the chest at close range. A fifth witness told police after the incident that Fuentes "just pulled out a gun and shot [D.P.], just like that, out of [nowhere]." Fuentes contends that only one witness testified to seeing Fuentes "raise the gun and fire it directly at D[.P.]'s chest,"[13] and that he was not credible. But "[t]he credibility of witnesses is an issue to be

[13]Fuentes argues that every other witness "indicated that they only saw the flash of the gun and heard the gunshot" before watching D.P. collapse. Whether these witnesses actually saw the gun itself is not material, as they clearly saw Fuentes shoot D.P.

resolved by the jury." *Soto-Fong*, 187 Ariz. at 200 (quoting *Scott*, 113 Ariz. at 425).

¶38 Fuentes also points to the scientific evidence presented at trial, arguing that it "clearly contradicted" the state's claim that Fuentes knowingly and intentionally fired a bullet into D.P.'s chest. In particular, Fuentes notes that D.P.'s gunshot wound and the bullet hole in his clothing were irregularly shaped, which the state's experts testified might have been caused by the tumbling of a bullet that been knocked off course by an intervening object. However, both of those experts also testified that faulty ammunition, a defect in the barrel of the gun, or a dirty barrel could also have caused the irregularities in question. We do not "reweigh the evidence" already considered by the jury, *State v. Jones*, 188 Ariz. 388, 394 (1997), and even if conflicts in the evidence exist, we "must resolve such conflicts in favor of sustaining the verdict," *State v. Salman*, 182 Ariz. 359, 361 (App. 1994).

Self-Defense Jury Instruction

¶39 Fuentes requested a self-defense jury instruction, and the trial court provided what the parties agree was a correct statement of the law delineated in the versions of A.R.S. §§ 13-404 and 13-405 in force at the time.[14] However, the trial court refused Fuentes's request for an instruction that a defendant has no duty to retreat before he may act in self-defense. Fuentes claims this denial was an abuse of discretion in light of the state's argument in summation that Fuentes "had an easy line of retreat [the] whole time."

¶40 We review the denial of a requested jury instruction for an abuse of discretion. *State v. Johnson*, 212 Ariz. 425, ¶ 15 (2006). "We will not reverse a conviction unless the instructions, taken as a whole, misled the jurors." *State v. Kuhs*, 223 Ariz. 376, ¶ 37 (2010).

¶41 In support of his argument that he was entitled to a jury instruction that retreat is not required before a defendant may engage in self-defense, Fuentes cites our supreme court's decision in *State v. Jackson*, 94 Ariz. 117, 121 (1963), which appears to require that such an instruction

[14]At the time of the trial in this case, those provisions of our criminal code did not discuss the lack of a duty to retreat. That provision, now codified at § 13-405(B), was not added to the code until 2010. *See* 2010 Ariz. Sess. Laws, ch. 327, § 1.

be given if requested by the defendant, at least in some instances.[15] However, the court provided further guidance on the issue in *State v. Jessen*, 130 Ariz. 1 (1981). There, as here, a defendant accused of first-degree murder requested an instruction that retreat was not required to claim self-defense. *Id.* at 8. Our supreme court held that a general instruction on the law of self-defense as stated in the statute—which "does not require retreat as a legal predicate to self-defense"—is sufficient. *Id.* at 9. The court also emphasized that trial courts must "exercise caution in not emphasizing a particular part of a case out of proportion to the whole," and that it is "not incumbent upon the court below to reiterate, enlarge or couch the law applicable in appellant's language where the jury was fully and correctly otherwise instructed." *Id.* (quoting *State v. Barker*, 94 Ariz. 383, 388 (1963)). As such, it was not an abuse of discretion for the trial court here to deny the specific retreat instruction Fuentes requested.

¶42 Furthermore, although retreat where possible is not required as a legal predicate to self-defense, "the fact that a possibility of retreat was known to the defendant and was not used" is one of the circumstances a jury may consider, alongside others, in order to determine "whether 'a reasonable person would believe that deadly physical force [was] immediately necessary.'" *Id.* (quoting A.R.S. § 13-405(A)(2)). Thus, Fuentes is incorrect that it was somehow "improper" for the prosecution to invite the jury to consider Fuentes's decision not to retreat when evaluating his claim of self-defense.

Transferred Intent

¶43 The state requested that the trial court instruct the jury on the doctrine of transferred intent, and the court did so by providing an instruction based on the language of A.R.S. § 13-203(B).[16] During rebuttal, the prosecution referred the jury to the instruction and argued that, if Fuentes formulated an intent to murder J.P. but shot D.P. instead, the intent

[15]In *Jackson*, the state argued to the jury that the "defendant, having gone home to a place of safety, waived his right of self-defense by returning to the clubroom" where he shot the victim to protect himself. 94 Ariz. at 120-21. Here, the state made no such explicit argument that Fuentes had waived his right to self-defense by failing to retreat.

[16]Again, the parties do not dispute that the challenged instruction correctly stated the law.

to kill J.P. could transfer to D.P., rendering his murder premeditated.[17] On appeal, Fuentes contends the trial court erred "by giving an instruction on transferred intent, where the state . . . argued an erroneous legal standard for transferred intent."

¶44 Because Fuentes did not object to either the transferred intent jury instruction or the prosecutor's related arguments at trial,[18] we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). Even assuming, *arguendo*, that it was improper for the prosecution to tell the jury that Fuentes's premeditation to kill J.P. could be transferred to D.P.,[19] Fuentes has failed to establish prejudice. *See State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018) (defendant's burden to establish both existence of fundamental error and resulting prejudice).

¶45 As noted above, Fuentes's theory of the case was that D.P.'s killing was "legally justified" as self-defense. That Fuentes did not object to the prosecutor's transferred intent argument at trial underscores that he

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[17] The state contends the prosecutor "appears to have simply misspoken" and was "speaking about the 'transfer' of premeditated intent in the colloquial sense." On review of the record, including the challenged statements themselves and the prosecutor's later admission that he "argued . . . the transferred intent statute in premeditation," we reject this contention.

[18] Fuentes moved for a new trial six days after the jury returned the guilty verdicts, arguing that his first-degree murder conviction should be set aside because it was improper for the jury to be presented with a transferred intent instruction the state argued could be applied to the premeditated murder count. After a hearing, the trial court denied the motion. Fuentes does not challenge that ruling on appeal.

[19] The doctrine of transferred intent may, under appropriate circumstances, be applied to establish the element of intentionally causing a particular result, such as death. *State v. Siner*, 205 Ariz. 301, ¶ 15 (App. 2003). However, as Fuentes correctly notes, under Arizona's transferred intent statute, "criminal intent 'follows the bullet' from anticipated to unanticipated victims," and "[i]ntent to murder is transferable to each unintended victim once there is an attempt to kill someone." *State v. Rodriguez-Gonzales*, 164 Ariz. 1, 2 (App. 1990); *see also State v. Johnson*, 205 Ariz. 413, ¶ 19 (App. 2003). This is not such a case: Fuentes did not shoot D.P. by mistake while trying to kill J.P.

did not believe the presence or absence of premeditation to kill D.P. was the central issue in this case.

¶46 Moreover, there is ample proof—separate and apart from the evidence highlighted by the prosecutor in his arguably improper transferred intent argument—that Fuentes shot D.P. with sufficient premeditation to elevate his crime to first-degree murder. In particular, witnesses testified that, after D.P. exited the truck, he approached the mound where Fuentes stood. Fuentes pointed a gun at D.P.'s chest. Once he reached the mound, D.P. did not move toward or attempt to strike Fuentes, but he asked Fuentes why he had hurt J.P. Then Fuentes, who was standing on higher ground than D.P., pulled the trigger and shot D.P. from close range in the chest. This evidence was sufficient to allow the jury to conclude that Fuentes's killing of D.P. was "more than just a snap decision made in the heat of passion"—but a premeditated murder. *State v. Thompson*, 204 Ariz. 471, ¶ 28 (2003); *see also State v. Dann*, 205 Ariz. 557, ¶ 16 (2003) ("[P]remeditation can occur as instantaneously as successive thoughts of the mind" so long as there is "proof, whether direct or circumstantial, of actual reflection." (quoting *Thompson*, 204 Ariz. 471, ¶ 20)).

Disposition

¶47 For the foregoing reasons, we affirm Fuentes's convictions and his sentences for aggravated assault but vacate his sentence for first-degree murder and remand for new sentencing.