IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JUAN RAMON SAHAGUN-LLAMAS,
Appellant.

No. 2 CA-CR 2017-0103
Filed January 13, 2020

Appeal from the Superior Court in Pima County
No. CR20020728
The Honorable Kenneth Lee, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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OPINION

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

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

¶1 Juan Sahagun-Llamas appeals from his convictions and sentences stemming from a shooting incident at a Tucson car wash in 2002. We affirm his two drug-related convictions and the concurrent five-year prison terms he is serving for them, which he has not challenged on appeal. However, for the reasons that follow, we vacate his convictions and sentences for aggravated assault, assault, and endangerment and remand for a new trial.

Factual and Procedural Background

¶2 "We review the facts in the light most favorable to sustaining the verdicts and resolve inferences against the defendant." *State v. Burns*, 237 Ariz. 1, ¶ 72 (2015). In early 2002, an acquaintance named "Chato" asked Sahagun-Llamas to hold a bag of drugs for safekeeping. Two days later, Chato instructed him to bring the drugs to a car wash, where he was to hand them to Chato's brother. Sahagun-Llamas removed the drugs from the bag, hid them in his vacuum cleaner, tucked a pistol in his waistband, picked up his friend R.C., and drove a brown vehicle to the car wash, where he parked in one of the stalls.

¶3 Shortly afterward, a "silver blue" vehicle parked in the adjoining stall. Four men exited the car, some of whom were armed. One of the men approached Sahagun-Llamas, identified himself as Chato's brother, and asked for the bag. The men then knocked Sahagun-Llamas and R.C. to the ground, punched them, and pistol whipped them, leaving Sahagun-Llamas with "[a] pretty good size" bleeding abrasion on the side of his face. One of the assailants drove away in the brown car. The others drove away in the "silver blue" vehicle. As they did so, Sahagun-Llamas fired three bullets from his handgun in their direction. He later claimed he did so in self-defense.

¶4 R.C. testified that, while he was still on the ground, he heard four or five gunshots but did not know where they came from. Two bystanders reported to police that, when they drove by the car wash, a silver-blue car with its back window shot out "bolted out" into the road shortly before its front-seat passenger stuck a rifle out the window and fired two shots.

¶5 A bullet entered the passenger-side windshield of a passing school bus carrying thirteen kindergarten and first-grade students. The bullet struck the bus driver in the elbow and grazed his chest before exiting

the open driver-side window. The state argued the bullet that hit the driver and endangered the students was one of the three bullets Sahagun-Llamas had fired. That bullet was never found.[1]

¶6 A grand jury charged Sahagun-Llamas with two counts of aggravated assault of the bus driver, one involving use of a deadly weapon and one involving serious physical injury, as well as thirteen counts of endangerment, one for each child on the school bus. In May 2003, at the conclusion of a seven-day trial, the jury found him guilty as charged except for count four—aggravated assault causing serious physical injury—convicting him of the lesser-included offense of simple assault. The trial court then issued a bench warrant for Sahagun-Llamas's arrest, because he had absconded partway through the trial.[2] He was apprehended over thirteen years later, in December 2016, and sentenced to concurrent, presumptive prison terms, the longest of which is 7.5 years.[3] We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Missing Transcript

¶7 On the fourth day of trial, Sahagun-Llamas called two witnesses: R.C., the only eyewitness who testified regarding the events at the car wash, and Richard Watkins, a ballistics expert. There is no transcript

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[1] Police concluded that the other two bullets fired by Sahagun-Llamas, which were also never located, hit: a building across the street from the car wash; and the back of the "silver blue" car, on which they found a bullet hole in the right window pillar in addition to the shattered window. They assumed the bullet that struck the pillar had also shattered the window, but a defense expert testified at trial that he did not believe the same bullet could have both shattered the rear window and penetrated the window pillar.

[2] Sahagun-Llamas absconded during a lunch recess midway through his testimony. He never returned to the stand. He later claimed he had been intimidated from providing further testimony by the same individuals who had assaulted him at the car wash.

[3] Sahagun-Llamas was also convicted of two counts of possession of a narcotic drug for sale, for which the trial court imposed two concurrent five-year prison terms. As indicated above, Sahagun-Llamas has not challenged those convictions or sentences on appeal.

of that day's testimony. The court reporter did not file her notes with the court before leaving the court's employ. In fact, she had stopped filing her notes in all cases six weeks before the date she served as court reporter in Sahagun-Llamas's trial.

¶8 Sahagun-Llamas did not learn the transcript was unavailable until June 2017, when the court reporter manager advised that no transcript could be produced because the court reporter had died in August 2007 and had left no notes from which to retroactively reproduce the transcript. Sahagun-Llamas then moved to vacate his convictions and sentences and remand for a new trial, arguing that the lack of the transcript violated his right to a complete record on appeal. In December 2017, we stayed the appeal and re-vested jurisdiction in the trial court "for the limited purpose of permitting the trial court and the parties to attempt to reconstruct the record of day four of the jury trial (April 25, 2003), pursuant to Rule 31.8(f), (g), Ariz. R. Crim. P."[4]

¶9 The parties and the judge who presided at the 2003 trial met several times to discuss their efforts to reconstruct the record. In February 2018, defense counsel advised the state that she "did not believe reconstruction of the record would be possible." The state disagreed and, in April 2018, filed a proposed "Narrative Statement of the Reconstructed Record," together with supporting exhibits, to serve as a substitute for the missing transcript. Sahagun-Llamas objected to the state's narrative as "an inaccurate and incomplete account of the actual testimony presented to the jury" on day four of the trial, one he "strongly believes is grossly inadequate for the purposes of his appeal." However, at a hearing on the matter, the trial court approved the narrative, finding "that the record that has been submitted by the State is the most complete and most accurate record that can be constructed under the circumstances"—"the best that can be done given the information that is available to the Court."

Adequacy of the Reconstructed Record

¶10 On appeal, Sahagun-Llamas argues that "the trial court's duty was to determine whether the current record, with or without the State's Narrative Statement, *accurately* documents what happened on the fourth day of [his] trial." The state counters that the court "acted within its discretion when it approved of the narrative statement" under

[4] Rule 31.8 was renumbered effective January 1, 2018, with the provisions referenced in our December 2017 order becoming Rule 31.8(e), (f). *See* Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017).

Rule 31.8(e)(2)(E), which requires the court to consider a proposed narrative statement and any objections thereto and then "settle and approve" the statement.

¶11 In *State v. Schackart*, our supreme court indicated that the procedures set forth in Rule 31.8 require a trial court to take "all reasonable measures to ensure that the record provide[s] a complete account of [a] defendant's trial." 175 Ariz. 494, 498 (1993). There, the court held that the Arizona Constitution requires the record to be sufficient to "afford defendant a meaningful right of appeal." *Id.* at 498-99 (citing Ariz. Const. art. II, § 24). That right requires a record of "sufficient completeness" for the court to consider any issues potentially raised. *Id.* at 499 (quoting *State v. Moore*, 108 Ariz. 532, 534 (1972)). The *Schackart* court concluded that certain reconstructed trial transcripts satisfied this standard. *Id.* But those "satisfactory" reconstructions had been produced from court reporter notes, reviewed and corrected by one of the witnesses whose testimony they contained, and checked by the prosecutor for accuracy. *Id.* at 497, 499. In addition, the trial court had held a hearing to ascertain the integrity of the recreated transcripts, reviewed proposed corrections from defense counsel and the defendant himself, and "issued a detailed order setting out specific corrections" to the transcripts before certifying them as "a fair and accurate representation of what took place in the trial." *Id.* at 498-99. *See also State v. Navarre*, 132 Ariz. 480, 482, 484 (1982) (where transcript was unavailable for one day of four-day trial, court made "several minor additions" to prosecution's reconstruction of record for missing day before approving it as "correct and accurate"); *In re Navajo Cty. Mental Health No. MH 201600024*, 242 Ariz. 437, ¶ 8 (App. 2017) (when jurisdiction is re-vested in trial court for reconstruction of record, superior court "should then 'assist counsel to overcome the loss of the missing records'" (quoting *Rodriguez v. Williams*, 104 Ariz. 280, 283 (1969))).

¶12 In this case, the trial court acknowledged it could not serve as the active referee contemplated by the rule. As the court advised the parties, it had "no memory of what happened that day" and the notes it managed to locate were "not enlightening" because they "just not[ed] that those witnesses [i.e., R.C. and Watkins] appeared and testified, but no details beyond that." The court therefore conceded that "if the Court of Appeals is looking for me to help fill in the record, that's not going to happen."

¶13 Nor is the state's narrative the sort of reconstruction we contemplated when re-vesting jurisdiction to permit the trial court and the parties to attempt to reconstruct the record. In *Draper v. Washington*, the

United States Supreme Court held that an adequate appellate record could be supplied in the absence of a court reporter's transcript if the alternative "place[s] before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise," with potentially adequate substitutes including "[a] statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions." 372 U.S. 487, 495 (1963). The state's narrative here bears no resemblance to any of these efforts to create an analog to a transcript. Furthermore, the Arizona Supreme Court has indicated that state rules for reconstructing the record do not contemplate post-hoc preparation of records years after trial. *State v. Masters*, 108 Ariz. 189, 192 (1972). In particular, it observed that a reconstruction from memory six years after the trial "would probably not be of much aid to the appellate court in making its determination." *Id.*

¶14 Here, a whole day's proceedings that occurred over sixteen years ago, spanning four hours and including the heart of the defendant's evidentiary case, have been reduced to two and one-half pages, a large portion of which contains only a bulleted list of points copied directly from Watkins's two-page written report. The narrative does not provide either a topic-by-topic progression of the witnesses' testimony or independent memories of anyone who was present at the trial. It does not comprehensively recount or recall the important details of the testimony actually given. Nor does it record any evidentiary rulings that may have occurred in light of any objections that may have been made.

¶15 The prosecutor who tried the case, who has since retired from the practice of law, submitted an affidavit stating only that the state's narrative "accurately reflects the proceedings that occurred on April 25, 2003, to the best of [his] recollection," but providing no detail. Six questions asked by the jury on that day were preserved in the court's files, but the narrative only refers to one, and otherwise there is no record of whether the parties objected to any of the questions, whether the trial court presented any resulting questions to the witnesses, or, if so, how the witnesses responded. Finally, much of the state's narrative depends on assumptions about the content of the witness testimony based on the opening and closing arguments of counsel. As our courts routinely remind our trial juries, such arguments are not evidence and do not constitute a neutral recounting of witness testimony upon which our appellate courts would reasonably rely. *See* Rev. Ariz. Jury Instr. (RAJI) Prelim. Crim. 6.2, 24 (5th ed. 2019); RAJI Stand. Crim. 10.

¶16 We do not question the trial court's conclusion that the state's narrative provided "the best that can be done given the information that is available to the Court." However, it does not follow that the narrative provides "a complete account" of what occurred on the fourth day of Sahagun-Llamas's trial, *Schackart*, 175 Ariz. at 498, or that it is "adequate" for purposes of appeal, as the state claims. If the source material, including personal memories, does not exist for the parties and the trial court to arrive at a reconstruction of the record that will "provide the appellant a reasonable opportunity to pursue [his] appeal," *Navajo Cty. No. MH 201600024*, 242 Ariz. 437, ¶ 11, a new trial must occur.

¶17 Relying on *State v. Noble*, 113 Ariz. 99 (1976), the state argues that Sahagun-Llamas has not identified ways in which the narrative statement is inaccurate or incomplete. But in *Noble*, the defendant "pointed to nothing missing from the reconstructed record which prejudice[d] him or affect[ed] his appeal." *Id.* at 100. Here, by contrast, Sahagun-Llamas has explained that the state's narrative "lacks the details of [R.C.]'s and Watkins' testimony necessary to resolve the primary issue at trial, i.e., whether the State had met its burden to prove beyond a reasonable doubt that it was one of the bullets fired by [Sahagun-Llamas], and not his assailants, that struck [the bus driver]."

¶18 In particular, Sahagun-Llamas highlights that Watkins's report and notes are insufficient to determine how Watkins may have amplified, explained, or qualified the contents of his technically complex report under defense counsel's direction. Nor does the narrative reveal how the state's cross-examination may have either rebutted or reinforced those conclusions. In short, as Sahagun-Llamas has argued, the narrative fails to provide us with the details of Watkins's testimony, as well as R.C.'s testimony, a problem aggravated by the narrative's extensive reliance on the transcripts of the opening and closing statements. As Sahagun-Llamas has observed, the attorneys' concluding arguments reflect only "how the attorneys wanted the jury to interpret what [R.C. and Watkins] said," not what those witnesses actually said on the stand. Finally, as Sahagun-Llamas correctly points out, the missing transcript has prevented his appellate counsel—who was not involved in his case at the trial stage and is therefore fully reliant on the transcript—from identifying any

particular claims on appeal that might have stemmed from whatever occurred on day four of the trial.[5]

¶19 The state correctly notes that, in *Schackart*, our supreme court emphasized that a record on appeal need not be "perfect." 175 Ariz. at 499. But there, the "vast majority" of mistakes were only typographical, "[e]ven in those few places where the transcripts [were] garbled, the court's rulings and the positions of counsel [were] nonetheless clear," and there were "no significant omissions." *Id.* Here, the state's short narrative reads more as a general summary of the testimony rather than a careful reconstruction of the record. It is more analogous to the reconstructed record of sentencing that our supreme court rejected in *Schackart* as "clearly inadequate" because it lacked a transcription of "much of that proceeding—most notably defendant's statement on his own behalf and a statement by defense counsel." *Id.*

¶20 Sahagun-Llamas has established a "colorable need" for a complete record of the testimony of the two witnesses he called on day four of his trial, and the burden is therefore on the state to show that its narrative is an alternative that "will suffice for an effective appeal." *Mayer v. City of Chicago*, 404 U.S. 189, 195 (1971). The state has not sustained this burden given the key factual issue in this case. A new trial is therefore required. *See In re Jorge D.*, 202 Ariz. 277, ¶ 26 (App. 2002) (if defendant demonstrates on appeal that specific prejudice has occurred due to lack of trial transcript, reviewing court may contemplate reversal).

¶21 The partial dissent correctly observes that the defense case, presented on the fourth day of trial, focused on the factual question of whose gun fired the shot that struck the bus driver and endangered the passengers. It suggests that, because the jury heard all the evidence and reached a verdict of guilt based upon it, Sahagun-Llamas could raise no plausible appellate argument addressing that factual question. Specifically, the dissent asserts that any sufficiency of evidence claim raised on appeal must fail because the state's case-in-chief provided substantial evidence from which a jury could conclude Sahagun-Llamas fired the shot in question.

[5]The dissent overlooks this when it emphasizes that Sahagun-Llamas has raised no specific arguments arising from the fourth day of trial other than a sufficiency of evidence claim.

¶22 This analysis overlooks that, in the absence of any transcript of the defense case, Sahagun-Llamas has been deprived of any appellate opportunity to challenge adverse evidentiary rulings that may have occurred during the presentation of the defense case. Without a reconstructed transcript, counsel has no record of what portions of the ballistics expert's testimony were admitted, much less the trial court's resolution of any objections to testimony raised by either party. Such rulings, turning on questions of evidentiary law, frequently form the basis of appellate claims. They can affect the proper scope of summation and the reliability of a jury's conclusion on a factual question.

¶23 Nor is the defense case irrelevant to an appellate claim challenging the sufficiency of the evidence. When addressing such a claim, we must assess all evidence presented in the light most favorable to the state. *See State v. West*, 226 Ariz. 559, ¶ 16 (2011). But neither the trial court nor this court may disregard the defendant's evidentiary presentation in addressing a sufficiency claim. This is because the defense case can place the state's evidence in context. Such context might affect the weight of the inculpatory evidence—a factor relevant to a sufficiency assessment. *See id.* ("substantial evidence" is evidence of sufficient weight "to support a conclusion of defendant's guilt beyond a reasonable doubt" (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990))). Indeed, our rules of criminal procedure specify that a judge may grant a judgment of acquittal "[a]fter the close of evidence on either side" and even after the verdict. Ariz. R. Crim. P. 20(a)(1), (b). These provisions would make little sense if the defense case could have no conceivable impact in assessing a sufficiency claim. And, our supreme court has expressly rejected the dissent's suggestion that a jury's verdict of guilt resolves any appellate dispute over such claims. *West*, 226 Ariz. 559, ¶ 17 ("jury finding of guilt" does not "cure the erroneous denial of an acquittal motion" (quoting *Mathers*, 165 Ariz. at 67)).

Relevance of Defendant's Conduct

¶24 On appeal, as below, the state insists that Sahagun-Llamas "is at fault for the state of the record" for two reasons. First, the state claims that if Sahagun-Llamas "had not absconded mid-trial" but had "lawfully appeared for these proceedings and filed a timely notice of appeal, the transcript at issue would have been generated almost immediately—and certainly before August 2007 when the court reporter passed away." Second, the state argues that, when he fled, Sahagun-Llamas "assumed the risk that portions (or all) of the trial court record might become unavailable as a result of his unlawful flight," such that "he cannot complain that there

is not a verbatim record from his fourth day of trial." For the reasons that follow, these arguments fail.

¶25 The duty of preserving the record of a criminal case lies not with the defendant but with the court. *See* Ariz. R. Crim. P. 28.1(a) (clerk of court has duty to receive and maintain all court filings and evidence admitted in criminal cases).[6] With regard to court reporter notes in particular, the rule in effect at the time of Sahagun-Llamas's trial required the original notes in non-capital criminal cases to be "retained for a period of 25 years from the date sentence is imposed."[7] *See* Ariz. Sup. Ct. Order R-05-0007 (Sept. 27, 2005) (amending text of Rule 28.1(c)).[8] Criminal defendants are entitled to rely on the system that has been established to retain the records of their trials. And nothing in the record suggests that Sahagun-Llamas fled in the hope that the record of his trial would be destroyed in his absence.

¶26 Nor does the record support the state's argument that "the transcript at issue would have been generated almost immediately" had

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[6] This rule existed in essentially the same form at the time of Sahagun-Llamas's trial in April-May 2003. *See* Ariz. R. Crim. P. 28.1(a) (2003). Indeed, the substance of the rule has remained unchanged since its adoption in 1973.

[7] We note that, in many of the cases from other jurisdictions cited by the state, record retention rules were different, providing the public with notice that trial transcripts and records would only be retained for a certain number of years before being disposed. *E.g.*, *State v. Brenes*, 846 A.2d 1211, 1212 (N.H. 2004) (transcript impossible because tape recordings and notes had been destroyed pursuant to court rule allowing for destruction after ten years); *State v. Brown*, 866 P.2d 1172, 1173-74 (N.M. Ct. App. 1993) (records retention schedule required transcript and notes to be retained for five years, and clerk purged them after nine); *see also Bellows v. State*, 871 P.2d 340, 341 (Nev. 1994) (after storing transcripts for several years, clerk destroyed them "pursuant to the clerk's normal procedures").

[8] The current version of the rule requires court reporter notes to be retained under the retention and destruction schedule established by our supreme court, Rule 28.1(c), under which such notes from non-capital criminal cases "must be retained for 20 years from the date of sentencing or other order of the court, unless a transcript is prepared," Ariz. Code of Jud. Admin. § 3-402(D)(38)(a).

Sahagun-Llamas not fled. The state's argument assumes that the court reporter—who had ceased filing notes six weeks before Sahagun-Llamas's trial—nevertheless took adequate notes in the courtroom, preserved those notes somewhere, and could have prepared the transcript or provided the notes necessary for doing so had she been asked to do so before her death. The state has established none of these facts. It has not even provided the date of her departure from the court. Given that the record demonstrates she had abdicated her duties well before Sahagun-Llamas's trial, we have no basis to make such assumptions.[9]

¶27 The state correctly observes that the length of Sahagun-Llamas's fugitive status—over thirteen years—has hampered the court's ability to now reconstruct the missing record. If Sahagun-Llamas had not absconded and had therefore filed his notice of appeal closer in time to the trial, the comparatively fresh memories of the trial judge, attorneys, and others may have facilitated a reasonably accurate reconstruction of the record. It does not follow, however, that by absconding, Sahagun-Llamas forfeited his right to a full record on appeal by "assum[ing] the risk that portions (or all) of the trial court record might become unavailable."

¶28 In Arizona, criminal defendants have a constitutional "right to appeal in all cases." Ariz. Const. art. II, § 24; *see also State v. Bolding*, 227 Ariz. 82, ¶¶ 16-17 (App. 2011) (noting that, in other jurisdictions, right to appeal criminal conviction "is statutory rather than constitutional"). That constitutional right includes the right to a record that is sufficiently complete "to afford defendant a meaningful right of appeal." *Schackart*, 175

[9]This case is therefore distinguishable from those cited by the state in which a transcript would certainly have been available if the defendant had requested it shortly after the conclusion of the trial. *E.g.*, *Bellows*, 871 P.2d at 341 (transcripts retained for several years); *Brenes*, 846 A.2d at 1212 (tapes retained for ten years); *Brown*, 866 P.2d at 1174 ("The transcript was available for nine years after the trial and if Defendant had pursued an appeal instead of fleeing, there would have been no problem with the record."); *Commonwealth v. Johnson*, 764 A.2d 1094, 1098–99, ¶ 15 (Pa. Super. Ct. 2000) (stenographer's tapes did exist after trial but were lost in intervening decade; if defendant "had requested a transcript . . . after the conclusion of the trial, it would have been available"); *State v. Verikokides*, 925 P.2d 1255, 1255 & n.1 (Utah 1996) (court reporter took notes during 1987 trial and moved them to shed in 1990 for safekeeping before their disappearance).

Ariz. at 499 (citing Ariz. Const. art. II, § 24). The state argues, in essence, that Sahagun-Llamas waived these rights by absconding. This court has squarely held that the right to appeal may be deemed waived only if the waiver is knowing, voluntary, and intelligent. *Bolding*, 227 Ariz. 82, ¶ 18 (citing *State v. Wilson*, 174 Ariz. 564, 567 (App. 1993)). In *Bolding*, we addressed the enforceability of A.R.S. § 13-4033(C)—a statute that strips the right to appeal from a defendant who, like Sahagun-Llamas, delays sentencing for more than ninety days by absconding. 227 Ariz. 82, ¶¶ 1, 15-20. Observing that criminal defendants possess an express right to appeal under the Arizona Constitution, we held that § 13-4033(C) was enforceable only to the extent that a defendant validly waived that right. *Id.* ¶¶ 16-18. We further held that such a knowing, voluntary, and intelligent waiver could be shown "only if the defendant has been informed he could [by delaying his sentencing] forfeit the right to appeal." *Id.* ¶ 20. We have been presented with no evidence that Sahagun-Llamas received such a warning.

¶29 Even if we concluded that no specific advisory was required to demonstrate a knowing, voluntary, and intelligent waiver, Sahagun-Llamas had no reason to believe that his absconding might result in the loss of his appellate record. At the time he absconded, Arizona statute required the clerk to preserve the record twenty-five years beyond his sentencing. Thus, he received neither actual nor constructive notice that his flight could affect his right to an appellate record. For this reason, he could not possibly have knowingly and intelligently waived his appellate rights by absconding. *See id.*[10]

¶30 The state contends a new trial would violate the constitutional rights of the victims, in particular the right to a "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II, § 2.1(A)(10). Some delay is inevitable any time we grant a new trial. Further, like the victim's right to finality, the defendant's right to appeal is expressly protected in the Arizona Constitution. *See State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 240-41 (App. 1992) (balancing defendant's

[10]Given our prior decision in *Bolding*, we are not inclined to follow the path of *Verikokides*, quoted at length by the state, in which the Utah Supreme Court held that a defendant had forfeited his state constitutional right to meaningfully appeal by absconding after trial so as to cause a seven-year delay in proceedings, during which the record of the original trial was lost. 925 P.2d 1255.

right to due process against victim's constitutional rights). The state has failed to offer any criteria by which we could harmonize or balance those interests here.[11]

¶31 Lastly, the state argues that granting Sahagun-Llamas a new trial would prejudice the state. Even assuming that any prejudice to the state would be sufficient to override a defendant's constitutional entitlement to a record on appeal, we find little prejudice here. The testimony of each of the state's witnesses has been preserved in the existing transcripts, which are available for use at retrial if necessary. *See* Ariz. R. Evid. 804(b)(1) (prior testimony of now-unavailable witness in criminal case admissible under state hearsay rules); *State v. Armstrong*, 218 Ariz. 451, ¶ 32 (2008) (no violation of Confrontation Clause to admit transcript of prior testimony if witness now unavailable and defendant had prior opportunity to cross-examine him/her). The state presents no claim that any inculpatory evidence has been lost since trial.

Justification Instructions

¶32 Sahagun-Llamas asked the trial court to instruct the jury on self-defense and defense of a third person. The court denied that request on the ground that A.R.S. § 13-401 "indicates that those defenses are not available under the circumstances of this case." Sahagun-Llamas contends this ruling was in error with respect to the thirteen endangerment counts.[12] We review a trial court's refusal to provide justification instructions for an abuse of discretion. *See State v. Carson*, 243 Ariz. 463, ¶ 17 (2018). An error of law is an abuse of discretion. *State v. Cowles*, 207 Ariz. 8, ¶ 3 (App. 2004).

¶33 Section 13-401 establishes that justification defenses are unavailable to a defendant who is charged with recklessly injuring or killing an innocent third person. Sahagun-Llamas therefore concedes that it was appropriate for the trial court to refuse to instruct the jury on self-defense and defense of another with regard to the aggravated assault

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[11] By enacting § 13-4033(C), our legislature has devised a fair compromise between these interests. That provision, as applied by this court in *Bolding*, creates a mechanism by which the state can protect victims against any delays created by an absconding defendant. *Bolding*, 227 Ariz. 82, ¶¶ 16-20.

[12] Although we have already vacated these convictions for the reasons set forth above, we nonetheless address this claim to avoid error on any retrial.

charges, which were based on an injury to the bus driver. However, endangerment does not require proof of actual injury, only proof that a defendant recklessly placed a victim in imminent danger of such injury (or death). A.R.S. § 13-1201(A).

¶34 The state does not address the relevance of the statute cited by the trial court, urging instead that we should affirm the court's denial of the requested instruction "because it was not supported by the slightest evidence." *See State v. King*, 225 Ariz. 87, ¶ 14 (2010) ("A defendant is entitled to a self-defense instruction if the record contains the 'slightest evidence' that he acted in self defense." (quoting *State v. Lujan*, 136 Ariz. 102, 104 (1983))). In assessing whether the defense presented the slightest evidence supporting self-defense, we must view the evidence "in the light most favorable to the *defendant*." *Carson*, 243 Ariz. 463, ¶ 17 (emphasis added).

¶35 As our supreme court has explained, the slightest evidence standard "presents a low threshold." *Id.* ¶ 19. Sahagun-Llamas "need[ed] only show some evidence of 'a hostile demonstration, which may be reasonably regarded as placing [him] apparently in imminent danger of losing [his] life or sustaining great bodily harm.'" *Id.* (quoting *King*, 225 Ariz. 87, ¶ 15). And *Carson* makes clear that circumstantial evidence can suffice for this showing. *See id.* ¶ 20.

¶36 Here, the parties presented evidence that Sahagun-Llamas and R.C. had been assaulted and injured by the other men at the car wash. Those men were armed and fired at least two shots back in their direction. And Sahagun-Llamas, who assisted police in locating his weapon after the incident, reported to them that he had fired toward his and R.C.'s fleeing assailants because they were pointing a weapon and threatening to kill him. This evidence was sufficient to meet the "slightest evidence" standard. The trial court should have provided the defendant's requested justification instructions as to the endangerment charges and should grant such a request if made on retrial.

Double Jeopardy

¶37 Finally, Sahagun-Llamas contends his convictions for both aggravated assault and simple assault of the bus driver violate principles of double jeopardy. The state agrees and asks us to vacate the conviction and one-year sentence for simple assault.

¶38 The state charged Sahagun-Llamas on alternative theories of aggravated assault, both stemming from the same conduct but unique in

that they involved, respectively, the alleged use of a deadly weapon (count three) and the alleged causation of serious physical injury (count four). The jury found him guilty as charged on count three. But on count four, it found him not guilty of aggravated assault causing serious physical injury but guilty of the lesser-included offense of simple assault (i.e., "recklessly causing any physical injury to another person," A.R.S. § 13-1203(A)(1)). The latter offense, however, was also a lesser-included offense of count three. Because the two offenses thus became the "same offense" for double jeopardy purposes, *State v. Garcia*, 235 Ariz. 627, ¶ 5 (App. 2014), and because double jeopardy violations constitute fundamental error, *State v. McGill*, 213 Ariz. 147, ¶ 21 (2006), we agree with the parties that the conviction and sentence for simple assault on count four must be vacated, *see State v. Estrella*, 230 Ariz. 401, ¶¶ 16-17 (App. 2012).

Disposition

¶39 For the foregoing reasons, Sahagun-Llamas's convictions and sentences for aggravated assault, assault, and endangerment are vacated and we remand for a new trial consistent with this opinion. As noted earlier, his convictions and sentences on the drug charges were not raised in this appeal and remain undisturbed.

E S P I N O S A, Judge, specially concurring in part and dissenting in part:

¶40 I write separately because although I agree that the simple assault conviction must be vacated and this case should be remanded for a new trial, I would do so on narrower grounds than those relied upon by the majority, and only for retrial of the endangerment counts. I do not join in the majority analysis and conclusion pertaining to the loss of a transcript for the one day of the six-day trial here because, regardless of its loss, Sahagun-Llamas has not demonstrated he is entitled to a new trial on that basis.

¶41 Whether or not the appellate record may be constitutionally inadequate despite Sahagun-Llamas having absconded and evaded the justice system for thirteen years, the missing transcript is unnecessary for purposes of this appeal. Sahagun-Llamas's only specific claim in this regard is that the trial court erred by denying his Rule 20(a) motion because he asserts the state could not prove that the bullet that struck the bus driver as he drove the children in the immediate vicinity was fired by Sahagun-Llamas and not his assailants. He contends that without the transcript of the fourth day of trial, in which R.C. and his ballistics expert, Watkins, testified, it cannot be determined whether there was sufficient

evidence supporting his conviction for aggravated assault. But sixteen years ago, the jury heard all of the evidence, including day four of the trial, and the jurors were properly instructed they were the sole judges of the witnesses' credibility, and could accept or reject the testimony of any experts. Although Sahagun-Llamas now argues this court is unable to determine the issue absent the missing testimony, it is not our role to reevaluate the testimony or come to a different conclusion if there was substantial evidence at trial supporting the jury's verdict. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013) (we do not reweigh evidence and will defer to jury's resolution of conflicting testimony if supported by record).

¶42 Rule 20(a), Ariz. R. Crim. P., provides that "[a]fter the close of evidence on either side, . . . the court must enter a judgment of acquittal . . . if there is no substantial evidence to support a conviction." Substantial evidence is that which a reasonable jury could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, ¶ 24 (1999). On appeal, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 214 Ariz. 518, ¶ 8 (App. 2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). And even if "reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal." *West*, 226 Ariz. 559, ¶ 18 (quoting *State v. Lee*, 189 Ariz. 590, 603 (1997)).

¶43 To prove Sahagun-Llamas committed aggravated assault, the state was required to demonstrate he intentionally, knowingly, or recklessly caused any physical injury to the bus driver with a dangerous weapon. A.R.S. §§ 13-1203(A)(1), 13-1204(A)(2). The existing record contains substantial evidence supporting that crime. Sahagun-Llamas admitted to police that he was to deliver drugs to an individual at a car wash on 22nd Street, he had taken his loaded handgun with him, and, after being assaulted, fired it in the direction of the silver-blue vehicle, also referred to as "the Taurus," as it fled east on 22nd Street. Meanwhile, the bus driver was driving his school bus nearby on 22nd Street, when a bullet passed through the passenger side windshield of the bus, striking his arm and grazing his chest.

¶44 Police later recovered three shell casings from Sahagun-Llamas's gun at the car wash, and his fingerprint was on the grip of the gun, confirming he had fired his gun from that location.

Sahagun-Llamas now urges the importance of the testimony from the fourth day of trial, claiming that in its absence it cannot be determined whether sufficient evidence supported the aggravated assault verdict. Notably however, in his Rule 20 motion to the trial court, which had been deferred to the close of the six-day trial, it is telling that Sahagun-Llamas did not mention any testimony from either R.C. or Watkins, asserting only that "[t]he [s]tate hasn't presented any evidence that would show which way he fired the weapon or whether he was the only person firing the weapon," which claim the trial court summarily rejected.

¶45 Contrary to that argument, then and now, in fact the state did present evidence that Sahagun-Llamas shot his handgun in the direction of the school bus. First, he admitted to police that, fearing the occupants of the Taurus intended to kill him, he had shot towards the "back tires" of that vehicle as it departed the car wash. Two witnesses in another vehicle, who did not testify but whose interviews were played at trial, reported that the bus had been directly behind them when the Taurus bolted in front of them, heading east on 22nd Street. The state also introduced evidence by way of an illustrative diagram that depicted Sahagun-Llamas shooting east toward the direction of the Taurus and the school bus at the time of the incident, to which he expressed agreement. Although there was evidence some shots had been fired from the Taurus, and on the fourth day of trial Sahagun-Llamas introduced testimony to support his theory that the bullet that had struck the bus driver could have come from the Taurus rather than his gun, that was a factual issue for the jurors to determine, after being properly instructed they were the judges of credibility, and could accept or reject the testimony of any experts. *See Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (we defer to the jury's resolution of conflicting testimony). Significantly, in his Rule 20 motion, made two days after those witnesses had testified, Sahagun-Llamas did not claim that their testimony "precluded the possibility that [he] fired the shot that struck [the bus driver]," as he now asserts to claim insufficiency of the evidence in this long-delayed appeal.

¶46 Sahagun-Llamas also argues he made a "prima facie showing of reversible error," and goes even further, claiming fundamental error. But those claims are only now premised on his speculation about "[t]he complexity of [Watkins's] measurements and calculations" allegedly needed to determine "whether [he] fired the bullet that struck [the bus driver]." As noted above, the jury heard that evidence and rejected it, as it was entitled to do. There was, however, substantial evidence for the jury to determine that it was Sahagun-Llamas whose bullet injured the bus driver and endangered the lives of the schoolchildren. Thus, in ruling on Sahagun-Llamas's motion for judgment of acquittal, the trial court

committed no error. *See West*, 226 Ariz. 559, ¶ 18; *see also State v. Fischer*, 242 Ariz. 44 (2017) (comparing and contrasting trial court's role pursuant to motion for new trial, which is not at issue here).

¶47 My colleagues suggest I have "overlook[ed]" that "Sahagun-Llamas has been deprived of any appellate opportunity to challenge adverse evidentiary rulings that may have occurred" on the missing trial day. But that is not a claim or even potential theory raised by the defense at any time, either below during the Rule 20 hearing or now on appeal. And although we will apply correct law in affirming a trial court's rulings, *see State v. Wassenaar*, 215 Ariz. 565, ¶ 50 (App. 2007), we do not reverse on speculative theories and claims raised sua sponte on appeal unless fundamental error has at least been raised or is apparent in the record. *See State v. Moody*, 208 Ariz. 424, n.9 (2004) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim." (quoting *State v. Carver*, 160 Ariz. 167, 175 (1989))); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (when defendant does not argue alleged error was fundamental, the argument is waived). The only such claim here relates to the sufficiency of the evidence, and my colleagues identify no error or prejudice, except by conjecture. *See State v. Dickinson*, 233 Ariz. 527, ¶ 13 (App. 2013) (In fundamental error review, "speculation" does not carry the burden of demonstrating prejudice.).

¶48 The majority also charges that because the trial court may grant a judgment of acquittal "[a]fter the close of evidence on either side" and even after the verdict, Ariz. R. Crim. P. 20(a)(1), (b), those "provisions would make little sense if the defense case could have no conceivable impact in assessing a sufficiency claim." My colleagues cite *West*, 226 Ariz. 559, ¶ 17, for the principle that a "jury finding of guilt" does not "cure the erroneous denial of an acquittal motion," and, of course, that is abundantly correct. But I do not suggest the defense is always irrelevant to a sufficiency of the evidence challenge; only that it is immaterial here, on the specific facts and claims of error raised. It is my colleagues who overlook that the court in *West* considered the denial of a post-verdict motion for judgment of acquittal, a request Sahagun-Llamas did not make sixteen years ago; indeed, the *West* court was careful to distinguish the more limited role of the trial court in assessing a motion brought under Rule 20(a), as is the case here, stating "[w]hen reasonable minds may differ on inferences drawn from the facts, the case *must* be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal." *Id.* ¶ 18 (quoting *Lee*, 189 Ariz. at 603) (emphasis added).

¶49 Because Sahagun-Llamas has failed to demonstrate any colorable claim of trial error, let alone fundamental error, I would find the issue of the missing transcript of no consequence and moot, and I would affirm the conviction for aggravated assault. I agree with my colleagues, however, that the denial of the requested justification instruction was error. And despite the state's harmlessness argument, the denial of the instruction cannot be said to have had no possible impact on the verdicts given the evidence, even if slight, that Sahagun-Llamas acted in self-defense. *King*, 225 Ariz. 87, ¶ 14 (defendant entitled to self-defense instruction if record contains slightest evidence he acted in self-defense). In sum, I respectfully disagree with my colleagues' analysis and remand of the aggravated assault conviction, but concur that a new trial on the thirteen endangerment counts is required.