IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KEVIN DUNBAR,
Appellant.

No. 2 CA-CR 2018-0064
Filed April 29, 2020

Appeal from the Superior Court in Pima County
No. CR20152260001
The Honorable Richard S. Fields, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

James Fullin, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

OPINION

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

E P P I C H, Presiding Judge:

¶1 After a jury trial, Kevin Dunbar was convicted of attempted first-degree murder, aggravated assault with a deadly weapon, kidnapping, and possession of a deadly weapon by a prohibited possessor. He now appeals, contending he was denied the right to self-representation, insufficient evidence supported his kidnapping conviction, he was entitled to an *in camera* review of the victim's mental health records, and the trial court committed various errors in giving and rejecting certain jury instructions and at sentencing. We affirm Dunbar's convictions, but vacate his sentences and remand for resentencing on all counts because counts one, two, and five were improperly enhanced, counts two and three were improperly aggravated, and counts one and two were improperly imposed consecutively.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *See State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). Dunbar and R.W. were dating, and they lived together for a few weeks in R.W.'s condominium in Tucson. After R.W. ended the relationship and Dunbar had moved out, he repeatedly continued to contact her. When R.W. returned from work one day, she saw an unfamiliar car in her apartment complex. Rather than parking in her normal spot, she backed her car into a spot on the other side of the parking lot. As R.W. was collecting her belongings, she noticed Dunbar driving towards her.

¶3 After asking Dunbar what he was doing at the complex, R.W. got back into her car and telephoned 9-1-1. Meanwhile, Dunbar pulled his car in front of hers, blocking her escape. Dunbar approached the car and indicated he wanted to talk with R.W. She refused and told him she would not talk with him until he unblocked her car. Dunbar returned to his car and moved it slightly, but it continued to block R.W.'s. While Dunbar was back at his car, R.W. saw him doing something, but was unsure what it was. Dunbar returned to talk to R.W. and asked if she was mad at him and hated him; R.W. responded that she did. In response, Dunbar fired a gun multiple times into R.W.'s car hitting her in the arm, stomach, and thigh. Dunbar walked away toward his car and then turned around and fired another shot into the front windshield grazing R.W.'s head. Dunbar left the apartment complex in his car, which he had rented the day before, and tossed the gun he had used in a garbage can. The rental car was returned to a self-service location in Alabama, and the police arrested Dunbar three months later in New York.

¶4 A grand jury indicted Dunbar for attempted first-degree murder, possession of a deadly weapon by a prohibited possessor, kidnapping, and two counts of aggravated assault. A jury found him not guilty of one count of aggravated assault, but convicted him of the remaining counts. The trial court sentenced him to concurrent and consecutive terms of imprisonment totaling thirty-seven years, and Dunbar timely appealed. We have jurisdiction under A.R.S. §§ 13-4031 and 13-4033(A)(1).

Right to Self-Representation

¶5 Before trial, Dunbar elected to represent himself, and the trial court appointed an attorney to act in an advisory capacity after advising him of the seriousness of the charges and the dangers and disadvantages of self-representation. Dunbar filed several pretrial motions while representing himself and was granted multiple continuances to become familiar with his case and litigate his motions.

¶6 At a hearing almost a year after Dunbar elected to represent himself, his advisory attorney indicated Dunbar might want to be represented by an attorney. Dunbar agreed but then asked a question about special actions. The court accepted the attorney's suggestion to discuss Dunbar's representation at the next hearing, but asked the attorney to file a notice beforehand if Dunbar decided to have her represent him. At the next hearing, the advisory attorney asked Dunbar to clarify, on the record, whether he wanted her to take over as lead counsel.[1] Dunbar indicated he wanted her to represent him after he received the results of the special action he had filed. The court warned Dunbar "[w]e can't come to one hearing and say one thing and then change our mind and come back and do it differently." The court allowed Dunbar to represent himself, and after litigating some motions during that hearing, Dunbar claimed his right to represent himself was being infringed because he "never surrendered [his]

[1]At various times during the proceedings before the trial court the issue was characterized as to whether advisory counsel would be "lead" counsel. There being no indication that it was ever contemplated that Dunbar be represented by more than one attorney, we presume from the context this was meant to refer to the issue of whether Dunbar would be represented by counsel or represent himself. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (no constitutional right to hybrid representation).

Faretta rights."[2] The court clarified that Dunbar had previously surrendered his *Faretta* rights and then allowed Dunbar to continue to represent himself.

¶7 At the start of the next hearing, Dunbar's advisory attorney indicated it was her understanding that Dunbar wanted her to take over as lead counsel because two special actions he had filed had been decided. After addressing some of Dunbar's concerns, the court appointed the advisory attorney as lead counsel with no objection from Dunbar. After the advisory attorney discussed with the court the potential witness list for the defense, Dunbar interjected and said he had more concerns. The following exchange then occurred:

> [The Court]: Okay, well, those are matters that you'll need to talk with [your attorney] about. She's now lead counsel.
>
> [Dunbar]: She is not lead counsel.
>
> [The Court]: She is. I assure you, Mr. Dunbar, that she is.
>
> [Dunbar]: No, I do not render my rights.
>
> [The Court]: Well, two times you've told me differently.
>
> [Dunbar]: I didn't render my rights.
>
> [The Court]: Okay.
>
> . . . .
>
> [The Court]: We are about a month away from trial, Mr. Dunbar, and you have always agreed that when it comes to trial that you need to have somebody represent you, have you not?
>
> [Dunbar]: No, I—if I can address my issues. My issues were not addressed, and certain witness I will call that she won't. So, I'm not going to render my rights. That's why I called her

[2] *See Faretta v. California*, 422 U.S. 806, 817-19 (1975) (criminal defendant has constitutional right to defend himself).

> Monday and Friday and let her know that. She should check her voice mail.
>
> [The Court]: Okay, let me see counsel in chambers.

After a brief recess, the court asked Dunbar what his final answer was. Dunbar said he was "proceeding pro-se," and the court warned him, "I'm not going to do this dance with you again so you're going to have to live with your decision." Dunbar replied, "Yeah."

¶8 Less than a week later, Dunbar filed a motion, prepared by the advisory attorney and signed by her and Dunbar, waiving his right to self-representation and requesting re-appointment of counsel. The motion stated:

> Defendant has decided that he wishes to be represented by counsel going forward.
>
> As evidenced by his signature below, Mr. Dunbar understands and agrees to relinquish his right to represent himself until and through the trial currently scheduled for November 28, 2017. He further understands and agrees that the Court may not allow him to reassert his right to proceed in propria persona between now and the trial, or allow hybrid representation. Defendant acknowledges that this decision is not a result of force, threats, coercion or promises not contained in this document and that he agrees to be represented by undersigned counsel knowingly, intelligently and voluntarily.

The court granted the motion, appointed advisory counsel as lead counsel, and indicated it would not accept filings other than those filed by the attorney, including motions Dunbar had personally submitted after filing his waiver of self-representation.

¶9 On the morning of trial, before a jury had been empaneled, Dunbar attempted to raise another motion on his own behalf. The trial court told Dunbar it would not consider his pro se motions because he was represented by counsel. The following exchange occurred:

[Dunbar]: I'm represented by counsel?

[The Court]: You're represented by [an attorney] now.

[Dunbar]: I didn't put that on record yet.

. . . .

[The Court]: It is on record, your signature was included with the motion that I granted as of—

[Dunbar]: Well, I object to that, Your Honor.

[The Court]: Okay, noted. All right.

[Dunbar]: As a matter of fact, I want to go back.

[The Court]: I'm sorry?

[Dunbar]: I want to go back.

[The Court]: No, I'm not going to do that.

[Dunbar]: Well, I object to proceeding, Your Honor, my [*Faretta*] rights are being surrendered.

[The Court]: Your motions are over, Mr. Dunbar. All right, you guys ready for the jury?

[Dunbar]: No, I want to go back.

[The Prosecutor]: He wants to go back to the jail.

[The Court]: You want to go back to the jail now?

[Dunbar]: I have no place here. My rights are being forfeited.

[The Court]: Well, if you want to go back to the jail, I can't stop you. It's not a good idea.

> [Dunbar]: Well, Your Honor, I'm not being represented by . . . myself and my rights are being infringed on or surrender[ed], it's like I don't have a say in this process.

After further discussion, Dunbar decided to remain in the courtroom.

¶10 On appeal, Dunbar argues the trial court committed structural error by denying his request to represent himself on the morning of trial. Specifically, Dunbar claims the trial court was required to conduct a colloquy to ascertain whether he was making a valid waiver of the right to counsel because his waiver of right to counsel was timely and unequivocal. The denial of a defendant's motion for self-representation is reviewed for abuse of discretion, but the erroneous denial of self-representation at trial is structural error. *State v. McLemore*, 230 Ariz. 571, ¶ 15 (App. 2012). In the limited number of cases where structural error occurs, "we automatically reverse the guilty verdict entered." *State v. Ring*, 204 Ariz. 534, ¶ 45 (2003).

¶11 "The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and represent himself." *State v. Lamar*, 205 Ariz. 431, ¶ 22 (2003) (citing *Faretta v. California*, 422 U.S. 806, 836 (1975)). To invoke this right, a defendant must waive his or her right to counsel in a timely and unequivocal manner. *Id.* If a defendant makes a timely and unequivocal request to proceed pro se, the court ordinarily should grant that request if it finds it knowing, intelligent, and voluntary. *State v. Henry*, 189 Ariz. 542, 548 (1997). However, the right to self-representation is not unqualified and "must be balanced against the government's right to a 'fair trial conducted in a judicious, orderly fashion.'" *State v. Boggs*, 218 Ariz. 325, ¶ 59 (2008) (quoting *State v. De Nistor*, 143 Ariz. 407, 413 (1985)).

¶12 The state contends Dunbar's request was untimely. But where, as here, a request for self-representation is made before the jury is empaneled, it is timely. *See State v. Weaver,* 244 Ariz. 101, ¶ 10 (App. 2018). And even though in some circumstances a court may deny a timely motion for self-representation if made for purpose of delay, *see State v. Thompson*, 190 Ariz. 555, 557 (App. 1997), the record does not support such a finding here. Dunbar did not ask for a continuance on the morning of trial and the court did not ask Dunbar's reasons for requesting self-representation to determine whether the request was in bad faith. *See Weaver,* 244 Ariz. 101, ¶ 16 & n.3 (no delay found because trial court did not sufficiently develop

record to demonstrate defendant was unprepared to proceed and intended to delay trial).

¶13 Next, we consider whether Dunbar's request was unequivocal. Dunbar contends "[i]t does not matter that [he] previously waived his right to self-representation because he clearly reasserted it after he changed his mind."[3]

¶14 The requirement of an unequivocal request serves two purposes. First, it protects a defendant's right to be represented by counsel by ensuring a defendant does not inadvertently waive counsel while thinking aloud about the pros and cons of self-representation. *Henry*, 189 Ariz. at 548. Second, it "prevents a defendant from 'taking advantage of the mutual exclusivity of the rights to counsel and self-representation.'" *Id.* (quoting *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989)); *see also United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (unequivocal requirement prevents a defendant from manipulating the mutual exclusivity of the rights to counsel and self-representation); *United States v. Turner*, 897 F.3d 1084, 1104 (9th Cir. 2018) (finding defendant manipulated the proceedings by vacillating between asserting his right to self-representation and his right to counsel), *cert. denied*, 139 S. Ct. 1234 (2019). Allowing a defendant to proceed pro se on an equivocal request risks allowing a defendant to later claim that his right to counsel was improperly denied. *Henry*, 189 Ariz. at 548. There is "no constitutional rationale for placing trial courts in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules." *Meeks v. Craven*, 482 F.2d 465, 468 (9th Cir. 1973).

¶15 Whether a defendant makes an unequivocal request to self-representation when his previous position has persistently vacillated is a matter of first impression in this state. Other courts have found that a defendant shifting "back and forth in his position with respect to self-representation" before the jury is selected may be found to have "forfeited his right to self-representation by his vacillating positions." *See Stockton v. Commonwealth*, 402 S.E.2d 196, 202 (Va. 1991) (quoting *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir. 1976)); *cf. Turner*, 897 F.3d at 1103-05

[3]Dunbar does not argue that he did not knowingly, intelligently, and voluntarily waive his right to self-representation through the motion he filed. He only argues he should be entitled to change his mind.

(defendant waived his right to counsel by vacillating between asserting right to self-representation and right to counsel).

¶16 In *Stockton*, the court held that the defendant forfeited the right of self-representation because he shifted his position with respect to self-representation and his request was a delaying tactic. 402 S.E.2d at 202. Stockton initially wanted a firm to represent him, then he represented himself, then he changed his mind and retained the initial firm, and then he requested to represent himself during jury selection. *Id.* at 201. Similarly, in *Bennett*, the court held that the trial court correctly found that the defendant "forfeited his right to self-representation by his vacillating positions which continued until just six days before the case was set for trial," despite having been warned by the trial court. 539 F.2d at 50-51. The court held that Bennett's position on self-representation was equivocal and, thus the trial court could deny self-representation. *Id.* at 51. The decisions in these cases align with the view that the right to self-representation is less essential than the right to counsel. *See State v. Hanson*, 138 Ariz. 296, 300 (App. 1983) ("Self-representation does not further any fair trial interests and is protected solely out of respect for the defendant's personal autonomy."); *McLemore*, 230 Ariz. 571, ¶ 17 (right to counsel, unlike right to proceed pro se, attaches automatically, is self-executing and persists until affirmatively waived); *see also Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000) ("[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."); *Frazier-El*, 204 F.3d at 559 ("In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation.").

¶17 Here, Dunbar forfeited his right to self-representation through his vacillating positions. The trial court warned Dunbar that it was not going to allow him to continually change his mind—a warning Dunbar ignored. Less than one month before trial, Dunbar signed the motion waiving his right to proceed pro se and acknowledging that the court might not allow him to reassert that right. On the morning of trial, Dunbar denied having previously waived that right and attempted to reassert it. This behavior suggests Dunbar was manipulating the judicial proceedings by vacillating on his stance on self-representation.

¶18 Contrary to Dunbar's assertion, nothing in the record suggests that the trial court denied Dunbar's request to represent himself because his request was untimely. Rather, the record indicates the court

denied the request because of Dunbar's vacillating positions and signed waiver. Indeed, the court reminded Dunbar of the signed waiver in denying his request. Considering Dunbar's vacillation and signed waiver, the trial court was under no obligation to conduct another colloquy with Dunbar on the day of the trial to see if he could waive his right to counsel yet again. *See Hanson*, 138 Ariz. at 300; *cf.* S*tate v. Russell*, 175 Ariz. 529, 532 (App. 1993) (implying a finding of constitutional waiver of right to counsel despite a lack of colloquy because record as a whole supported waiver of counsel).

Evidence of Kidnapping

¶19 Next, Dunbar argues the state did not present sufficient evidence to support his kidnapping conviction, and the trial court erred in denying his motion for directed verdict under Rule 20, Ariz. R. Crim. P. A court must grant a motion for judgment of acquittal for an offense "if there is no substantial evidence to support a conviction." "On all such motions, '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. West*, 226 Ariz. 559, ¶ 16 (2011) (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). We review the sufficiency of evidence to sustain a conviction de novo. *Id.* ¶ 15.

¶20 "A person commits kidnapping by knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony." A.R.S. § 13-1304(A)(3).[4] "'Restrain' means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13-1301(2). "Restraint is without consent if it is accompanied by . . . [p]hysical force, intimidation or deception . . . ." *Id.*

¶21 The evidence at trial was sufficient to sustain Dunbar's kidnapping conviction here. Dunbar parked his car in front of R.W.'s car, physically restricting her ability to leave the scene. The victim's response showed she did not consent to the restraint: in addition to asking Dunbar to move, she called 9-1-1. While Dunbar contends R.W. was not substantially restrained because she could have attempted to maneuver her

[4]Absent material revision since the relevant date, we cite the current version of statutes.

car around Dunbar's—the spaces surrounding her car were unoccupied—or fled the scene on foot, this argument is unpersuasive. The fact that R.W. arguably could have taken extraordinary measures to escape does not change the fact that she was confined. A reasonable jury could conclude Dunbar's actions substantially interfered with R.W.'s liberty if it concluded that Dunbar's placement of the car and refusal to move out of the way compelled R.W. to forgo the protection of her car and the chance to flee on foot, or navigate around his car. *See State v. Dutra*, 245 Ariz. 180, ¶ 19 (App. 2018) (finding sufficient evidence of confinement where defendant's threatening act compelled victim to forgo the chance to flee). And it could also conclude Dunbar used this confinement with the intent to inflict injury or aid in his commission of a felony, as it kept R.W. from fleeing before Dunbar approached her with a gun and shot her multiple times.

¶22 Dunbar contends the state improperly argued that two separate actions constituted kidnapping, the blocking of R.W.'s car and Dunbar's use of a gun, violating his double jeopardy rights. As the state points out, however, this argument materially misconstrues the prosecutor's argument. In closing, the prosecutor only argued Dunbar's use of the car was the required restraint. He never suggested an alternative theory of restraint as Dunbar contends.

Discovery

¶23 Next, Dunbar argues the trial court abused its discretion and denied him his due process rights when it refused to grant his request for R.W.'s medical records. Specifically, Dunbar claims the medical records were relevant for impeachment and to challenge the victim's identification of him as her assailant. Dunbar contends "[t]he court should have ordered an in camera inspection of the medical records to determine whether they contained exculpatory evidence that Dunbar was entitled to at trial."

¶24 Dunbar filed a pretrial motion requesting the court "subpoena [R.W.'s] mental health records from the state of Pennsylvania, Maryland, and Arizona and provide a copy to the defendant for impeachment of the victim['s] credibility" because R.W. has "a mental health history that extends over 15 years." In the motion, Dunbar alleged R.W. had been diagnosed with severe depression and bipolar disorder, had a family history of schizophrenia, "a history of not taking her medication, being paranoid and being delusional," and "a history of dishonesty." Dunbar claimed personal knowledge that R.W. did not take her medication often and "her mental conditions have her creating illusions" which may affect her "testimony and identification." At a hearing, the state argued

Dunbar had not made a showing of a need or relevance for the medical records and the state was not in possession of them. Dunbar argued the records were relevant for R.W.'s state of mind. The trial court denied the motion.

¶25 Generally, "[a] trial court has broad discretion over discovery matters, and we will not disturb its rulings on those matters absent an abuse of that discretion." *State v. Kellywood*, 246 Ariz. 45, ¶ 5 (App. 2018). However, to the extent a defendant "sets forth a constitutional claim in which he asserts that the information is necessary to his defense," we will conduct a de novo review. *State v. Connor*, 215 Ariz. 553, ¶ 6 (App. 2007). Under both the federal and Arizona constitutions, a defendant has a due process right to present a defense, including a right to effective cross-examination of witnesses at trial. *State ex rel. Romley v. Superior Court* (*Roper*), 172 Ariz. 232, 236 (App. 1992) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973) (right to present defense) and *Davis v. Alaska*, 415 U.S. 308 (1974) (right to effective cross-examination)). However, a defendant has no general constitutional right to pretrial discovery in a criminal case "[b]ecause the state is obliged by the constitution, case law, and the rules of criminal procedure to provide the defense with all exculpatory and other specified information in its possession." *Connor*, 215 Ariz. 553, ¶ 21; *see also State v. Tucker*, 157 Ariz. 433, 438 (1988) (State is only constitutionally required "to disclose exculpatory evidence that is material on the issue of guilt or punishment."). A prosecutor's obligation to disclose information not directly possessed or controlled by the prosecutor's office or staff is generally limited to information possessed or controlled by entities who have participated in the investigation or evaluation of the case. *See* Ariz. R. Crim. P. 15.1(f); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecutor has "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case").

¶26 Nevertheless, consistent with due process, a court may order additional information not in the possession of the state to be disclosed if the defendant demonstrates that "the defendant has a substantial need for the material or information to prepare the defendant's case" and "cannot obtain the substantial equivalent by other means without undue hardship." Ariz. R. Crim. P. 15.1(g)(1). In cases where a defendant requests the production of a victim's medical records, their request will almost inevitably clash with a victim's rights. *See* Ariz. Const. art. II, § 2.1(A)(5) (victim's constitutional right to refuse a discovery request); A.R.S. § 13-4062(4) (physician-patient privilege); A.R.S. § 32-2085(A) (psychologist-patient privilege). "[W]hen the defendant's constitutional right to due

process conflicts with the Victim's Bill of Rights in a direct manner . . . then due process is the superior right." *Roper*, 172 Ariz. at 236.

¶27 Victims may be compelled to produce medical records for *in camera* inspection if the defendant shows a "reasonable possibility that the information sought . . . include[s] information to which [he or] she [is] entitled as a matter of due process." *Kellywood*, 246 Ariz. 45, ¶ 8 (quoting *Connor*, 215 Ariz. 553, ¶ 10).[5] However, in light of the competing constitutional interests and statutory privileges, "the burden of demonstrating a 'reasonable possibility' is not insubstantial, and necessarily requires more than conclusory assertions or speculation on the part of the requesting party." *See id.* ¶ 9. Defendants must provide a "sufficiently specific basis to require that the victim provide medical records to the trial court for an in camera review." *Connor*, 215 Ariz. 553, ¶¶ 11, 23 (finding trial court did not deny defendant right to present full defense when defendant broadly requested complete disclosure of all of the victim's medical records). A trial court does not abuse its discretion in denying a wide-ranging request for the disclosure of the victim's medical records. *See id.* ¶ 24 ("The unlimited nature of this request provided a sufficient basis upon which the trial court could have denied the motion as presented without abusing its discretion."). In *Connor*, the defendant asked for "any and all medical treatment, counseling, psychological and/or psychiatric records" of the victim to "solidify the Defendant's position that the decedent was the initial aggressor." *Id.* ¶ 4. We found that the defendant's request was unlimited in nature because the defendant did not limit his request to information in the victim's medical records that would be necessary for his defense. *See id.* ¶¶ 23-24.[6]

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[5]Another panel of this court recently issued *R.S. v. Thompson*, 247 Ariz. 575 (App. 2019), imposing a higher burden for defendants to receive an *in camera* inspection of medical records. *See id.* ¶ 3 (holding that defendant must show "substantial probability" that information sought is necessary when seeking *in camera* review of privileged information). We need not address whether this higher burden applies, because Dunbar cannot meet the lesser showing required by the reasonable possibility test.

[6]Unlike Connor, who did not renew his motion on more specific grounds, Dunbar filed a motion for reconsideration, arguably asserting greater specificity. From the record it does not appear the trial court ruled on the motion, which had been filed three days before Dunbar signed the written waiver of his right to self-representation and agreeing to be represented by counsel. We need not address the court's failure to address

¶28 Here, Dunbar has not provided a sufficiently specific basis for requiring R.W. to produce her medical records. Dunbar's request was nothing more than a conclusory assertion that R.W.'s medical records could contain exculpatory information because Dunbar did not explain how the broad assertion that R.W. was "delusional" would support his misidentification defense. More importantly, at trial Dunbar abandoned his proposed claim of misidentification, instead arguing self-defense. He has offered no explanation as to how R.W.'s medical records would be relevant to the issue of whether his actions in shooting her were justified, and thus they bear no apparent relationship to the defense actually presented to the jury.

¶29 Furthermore, Dunbar requested all of R.W.'s mental health records spanning over fifteen years from three different states. Dunbar never alleged or showed that R.W.'s medical records were in the state's possession or control nor identified any specific agency or provider that treated R.W. Dunbar also did not limit his request to information necessary for a misidentification defense or that would be material to the victim's perception or recollection of the events at issue at trial.[7] Similar to *Connor*, the unlimited nature of Dunbar's request gave the trial court a sufficient reason to deny the motion without abusing its discretion. *See Connor*, 215 Ariz. 553, ¶ 24. Therefore, the trial court did not err in denying Dunbar's request for access to R.W.'s medical records.

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the motion in any event, in light of Dunbar's failure to raise the issue on appeal.

[7]Our specially concurring colleague asserts that we create "a nearly insurmountable obstacle to securing disclosure," but a defendant who makes broad requests for a victim's highly personal medical information must make at least some showing of how the requested evidence, even crediting the defendant's claims and speculation, would be relevant to his defense. *See State v. Sarullo*, 219 Ariz. 431, ¶¶ 19-21 (App. 2008) (acknowledging defendant's due process discovery rights but upholding trial court's refusal to order victim to produce medical records "for the years surrounding the [assault]" where insufficient showing her medication and counseling information was needed for his theory of defense); *Roper*, 172 Ariz. at 239 (requiring disclosure of victim's medical records if, *inter alia*, "necessary for impeachment of the victim relevant to the defense theory").

Jury Instructions

¶30 Dunbar additionally challenges the trial court's instruction of the jury, contending the court erred by giving a flight instruction and refusing one for attempted provocation manslaughter as a lesser-included offense of attempted first-degree murder. "A party is entitled to any jury instruction reasonably supported by the evidence." *State v. Burns*, 237 Ariz. 1, ¶ 48 (2015). We review a trial court's decision to give or refuse a jury instruction for abuse of discretion. *State v. Solis*, 236 Ariz. 285, ¶ 6 (App. 2014) (giving of instruction); *State v. Kiles*, 225 Ariz. 25, ¶ 27 (2009) (refusal of instruction).

¶31 "Leaving the scene is considered flight only if the manner of leaving suggests consciousness of guilt." *State v. Hunter*, 136 Ariz. 45, 48-49 (1983). "The inquiry focuses on 'whether [the defendant] voluntarily withdrew himself in order to avoid arrest or detention.'" *State v. Wilson*, 185 Ariz. 254, 257 (App. 1995) (alteration in *Wilson*) (quoting *State v. Salazar*, 112 Ariz. 355, 357 (1975)). Dunbar testified he left the scene because he "got nervous" after he saw an ambulance coming for R.W. After leaving, he disposed of the firearm he had used, drove to Alabama—a state outside the scope of his rental agreement—to return the car he was driving, and then traveled to New York and remained there until he was tracked down and apprehended almost three months later. These facts suggest an attempt to avoid arrest or detention and were sufficient to warrant a flight instruction.

¶32 Nor did the court err in declining to instruct the jury on attempted provocation manslaughter as a lesser-included offense of attempted first-degree murder. A person commits provocation manslaughter by "committing second degree murder . . . upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." A.R.S. § 13-1103(A)(2); *see also* A.R.S. §§ 13-1001 (attempt), 13-1104 (second-degree murder). "'Adequate provocation' means conduct or circumstances sufficient to deprive a reasonable person of self-control." A.R.S. § 13-1101(4). "[W]ords alone are not adequate provocation to justify reducing an intentional killing to manslaughter." *State v. Vickers*, 159 Ariz. 532, 542 (1989).

¶33 Dunbar's account of the events leading up to the shooting was largely consistent with the factual recitation above. But he also testified that when he went to move his car out of the way of R.W.'s, he "thought" R.W. had moved her car towards him and had struck his car. He stated he retrieved the gun and fired at R.W. because he felt she "was trying to hurt him or jam him in the door," saw her reaching for what he believed to be a

gun under her seat, and was "afraid for [his] life." Dunbar's testimony weighs against issuing an attempted provocation manslaughter instruction here. By his own account, the decision to fire at R.W. was not borne from a loss of self-control, but a fear of bodily injury. Although that claim could support a self-defense instruction—which Dunbar received—it does not support the instruction he now argues he was entitled to. We see nothing in the evidence presented that otherwise suggests the decision was made "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." § 13-1103(A)(2). Under these facts, the trial court did not err in denying Dunbar's requested instruction.

Sentencing

Enhanced Sentences

¶34 Dunbar argues his out-of-state convictions did not amount to a historical prior felony conviction under A.R.S. § 13-105(22), and the trial court therefore erred in sentencing him as a category two repetitive offender under A.R.S. § 13-703.

¶35 We review de novo whether a foreign felony conviction supports an enhanced sentence. *See State v. Ceasar*, 241 Ariz. 66, ¶ 11 (App. 2016). A person shall be sentenced as a category two repetitive offender if the person "stands convicted of a felony and has one historical prior felony conviction" or has been "convicted of three or more felony offenses that were not committed on the same occasion but . . . are not historical prior felony convictions." § 13-703(B).

¶36 A historical prior felony conviction generally includes "[a]ny felony conviction that is a third or more prior felony conviction." A.R.S. § 13-105(22)(d). However, "[a] person who has been convicted of a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony under the laws of this state is not subject to [§ 13-105(22)]." § 13-105(22)(f).

¶37 In 2012, the comparative element approach applicable to § 13-703 was abandoned by the legislature for *most* out-of-state convictions "to ensure that if a foreign conviction is considered a felony by the jurisdiction in which the offense was committed, that conviction would be considered a historical prior felony conviction." *State v. Johnson*, 240 Ariz. 402, ¶ 17 (App. 2016). However, the comparative element approach still applies to a felony weapons possession violation. *See* § 13-703(M) ("A person who has been convicted of a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony

under the laws of this state is not subject to this section."). The comparative element approach requires courts to determine that "the foreign conviction includes 'every element that would be required to prove an enumerated Arizona offense'" to be punishable. *State v. Crawford*, 214 Ariz. 129, ¶ 7 (2007) (quoting *State v. Ault*, 157 Ariz. 516, 521 (1988)). "A charging document or judgment of conviction may be used only to narrow the statutory basis of the foreign conviction, not to establish the conduct underlying it." *State v. Moran*, 232 Ariz. 528, ¶ 16 (App. 2013). If under any scenario it would have been legally possible for the defendant to have been convicted of the foreign offense but not the Arizona offense, then the foreign offense fails the comparative elements test. *See id.*

¶38 Here, the trial court sentenced Dunbar as a category two repetitive offender for counts one (attempted first-degree murder), two (possession of a deadly weapon by a prohibited possessor), and five (kidnapping) based on the belief that Dunbar's three previous convictions amounted to one prior historical felony conviction under § 13-105(22)(d). At a presentencing hearing, the trial court found beyond a reasonable doubt that Dunbar had been convicted of three prior felonies: (1) a 2007 federal conviction for false reporting; (2) a 2000 New York felony weapon possession conviction; and (3) a 1993 New York felony weapon possession conviction. Dunbar's charging documents and judgment of conviction showed he was convicted of violating New York Penal Law § 265.02(1) for the felony weapon possession convictions.

¶39 As the state concedes, while both offenses require possession of a deadly weapon, a person can be convicted of New York Penal Law § 265.02(1)[8] if they had previously been convicted of a misdemeanor, *see* New York Penal Law § 10.00(6), whereas in Arizona, a person cannot be convicted of weapons misconduct unless they had been previously convicted of a felony, *see* A.R.S. §§ 13-3102(A)(4), 13-3101(7)(b). We agree. Since the foreign offenses do not include every element that would be required to prove an enumerated Arizona offense, the two felony weapon possession convictions could not be used to enhance Dunbar's sentence under § 13-105(22)(d). Therefore, we vacate Dunbar's sentences for counts one, two, and five, and remand for resentencing on those counts.

[8]The elements of this offense have not materially changed since the offenses were committed in 1991 and 1998.

Aggravated Sentences

¶40 Dunbar argues the trial court improperly aggravated his sentences. The trial court sentenced Dunbar to the maximum sentence for all counts. The court found that the use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crimes was inherent in the jury verdicts and then listed various aggravating factors it considered for each count.

¶41 We review de novo whether a particular aggravating factor may be used by a court to aggravate a sentence. *State v. Tschilar*, 200 Ariz. 427, ¶ 32 (App. 2001). A trial court may impose a maximum prison term only if one or more statutory aggravating factors are found by the trier of fact or admitted by the defendant, except that an alleged prior felony conviction under A.R.S. § 13-701(D)(11) shall be found by the court. § 13-701(C). A statutory aggravating factor may also be implicitly found in the jury's verdict. *See State v. Martinez*, 210 Ariz. 578, ¶ 21 (2005) ("Under Arizona's sentencing scheme, once a jury implicitly or explicitly finds one aggravating factor, a defendant is exposed to a sentencing range that extends to the maximum punishment . . . ."). Section 13-701(D) lists twenty-seven aggravating factors, including use or possession of a deadly weapon during the commission of the crime, emotional harm to victim, lying in wait, prior felony convictions within ten years preceding the offense date, and the so-called "catch-all" category, which permits consideration of any other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime. Once a statutory aggravating factor is found, the court may find by a preponderance of the evidence additional aggravating circumstances. *See Martinez*, 210 Ariz. 578, ¶ 26. However, a court cannot rely solely on the "catch-all" aggravator to increase a defendant's statutory maximum sentence because that provision is "patently vague." *See State v. Schmidt*, 220 Ariz. 563, ¶¶ 1, 9-10 (2009). Under Arizona law, the statutory maximum sentence in a case where no aggravating factors have been proven is the presumptive sentence. *Id.* ¶ 7.

¶42 With respect to count three (aggravated assault), the court found the following aggravating circumstances: prior overall criminal history, lying in wait, and emotional impact on the victim. As the state concedes, the jury did not find the lying in wait or emotional harm to the victim as aggravating circumstances and these aggravators were not implicit in the verdict or admitted by Dunbar. Therefore, we only need to determine whether Dunbar's sentence for count three could be aggravated

based on his prior felony convictions.[9] A prior felony conviction under § 13-701(D)(11) qualifies as a statutory aggravating factor if "[t]he defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense." A foreign conviction—a felony conviction committed outside the jurisdiction of this state—is considered a felony conviction under § 13-701(D)(11) if that offense would be punishable as a felony if committed in the state of Arizona. "In order to determine whether a foreign conviction would be a felony in Arizona, the test is whether it includes every element that would be required to prove an enumerated Arizona offense." *State v. Inzunza*, 234 Ariz. 78, ¶ 25 (App. 2014) (internal quotations omitted). "This comparative analysis focuses exclusively on the statutory elements of offenses and any relevant case law, as opposed to the factual basis of a conviction." *Id.*

¶43 Although the court found that Dunbar had been convicted of three felony offenses, only the 2007 federal conviction under 18 U.S.C. § 1001 fell within ten years of Dunbar's current offenses. As the state correctly concedes, a person can be convicted of 18 U.S.C. § 1001(a) for making a false statement or misrepresentation as long as they intended to make a false or fraudulent statement, *see United States v. Lange*, 528 F.2d 1280, 1288 (5th Cir. 1976), whereas in Arizona a person cannot be convicted of a felony offense for making a false statement to law enforcement without the state proving that defendant intended to "hinder the apprehension, prosecution, conviction or punishment of another for any felony," *see* A.R.S. § 13-2512; *see also* A.R.S. § 13-2907.01 (knowingly making a false statement to a state law enforcement agency is a Class 1 misdemeanor). Since the foreign offense does not include every element that would be required to prove an enumerated Arizona offense, it was not considered a prior felony under § 13-701(D)(11). Thus, none of Dunbar's prior felony convictions met the statutory requirements of § 13-701(D)(11) and the court therefore erred in sentencing Dunbar to the maximum sentence for count three.

[9] Although the court referred to Dunbar's "prior overall criminal history" as an aggravating factor, it specifically listed Dunbar's three felony convictions in the minute entry, suggesting it was considering these offenses as prior felony convictions under § 13-701(D)(11). *See State v. Bonfiglio*, 231 Ariz. 371, ¶ 14 (2013) ("A statement that the prior conviction was a prerequisite for an aggravated sentence, even if the court did not rely upon it as its reason for aggravating the sentence, will inform the defendant of the court's rationale for imposing the sentence.").

¶44 With respect to counts one (attempted first-degree murder) and five (kidnapping), the court found, among other aggravating factors, use, threatened use, or possession of a deadly weapon. At trial, Dunbar admitted possessing the gun used during the commission of the offenses.[10] *See State v. Miranda-Cabrera*, 209 Ariz. 220, ¶ 29 (App. 2004) (finding facts admitted by defendant at trial constitute facts admitted by the defendant for sentence aggravation purposes); *Ring*, 204 Ariz. 534, ¶ 93 ("In cases in which a defendant stipulates, confesses or admits to facts sufficient to establish an aggravating circumstance, we will regard that factor as established."). Therefore, the use and possession of a deadly weapon could properly be applied as a statutory aggravating factor under § 13-701(D)(2) to expose Dunbar to a maximum sentence for counts one and five.[11]

¶45 With respect to count two (possession of a deadly weapon by a prohibited possessor), the court found the following aggravating circumstances: prior overall criminal history and emotional impact on the victim. As mentioned above, Dunbar's prior felony convictions did not meet the statutory requirements of § 13-701(D)(11) and the jury did not find nor was it implicit in the verdict that there was an emotional impact on the victim. Nor could the court consider the prior convictions under the "catch-all." *See Schmidt*, 220 Ariz. 563, ¶ 10 ("Use of the catch-all as the sole factor to increase a defendant's statutory maximum sentence violates due process."). The court thus erred in sentencing Dunbar to the maximum sentence for count two.

¶46 In sum, the court erred in aggravating counts two and three because there was no statutory aggravating factor found by the jury, admitted by defendant, or implicit in the verdict. Therefore, Dunbar was

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[10]According to Dunbar, he knew the gun used for the offenses was in his rental vehicle when he blocked R.W.'s car and he used the gun in self-defense to protect himself from R.W.

[11]After one statutory aggravating factor was found for counts one and five, the court could consider other aggravating factors upon finding them by a preponderance of the evidence. *See Martinez*, 210 Ariz. 578, ¶ 26. Although none of Dunbar's prior felony convictions met the statutory requirements of § 13-701(D)(11), these priors could be considered under the "catch-all" category. *See Schmidt*, 220 Ariz. 563, ¶ 11. The court could also find by a preponderance of the evidence that there was emotional harm to the victim and that Dunbar was lying in wait based on the testimony at trial.

not eligible for the maximum sentence on those counts and we remand for resentencing.

Consecutive Sentences

¶47 The trial court ordered Dunbar's prison sentence for count five (kidnapping) to run consecutively to count one (attempted first-degree murder). His sentence for count two (possession of a deadly weapon by a prohibited possessor) was also ordered to be served consecutively to count one. Dunbar argues these sentences violate A.R.S. § 13-116, which prohibits consecutive sentences for offenses arising from a single act.

¶48 We review de novo a trial court's decision to impose consecutive sentences under § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6 (App. 2006). "An act or omission . . . made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." § 13-116. To determine whether defendant's conduct constitutes a single act, which requires concurrent sentences, we apply the three-part test set out in *State v. Gordon*, 161 Ariz. 308, 315 (1989). *See State v. Bush*, 244 Ariz. 575, ¶ 90 (2018); *State v. Forde*, 233 Ariz. 543, ¶ 138 (2014).

¶49 First, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge" and if the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible. *Gordon*, 161 Ariz. at 315. The "ultimate charge [is] the one that is at the essence of the factual nexus and that will often be the most serious of the charges." *Id.* Second, we consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under [§ 13-116]." *Id.* Third, we consider "whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences." *Id.*

¶50 Here, both parties agree the ultimate crime is attempted first-degree murder, and the secondary crime is kidnapping. "A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person . . . [i]ntentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be." § 13-1001(A)(1). "A person commits first degree murder if . . . [i]ntending or knowing that the person's

conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation." § 13-1105(A)(1). "A person commits kidnapping by knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony." § 13-1304(A)(3).

¶51 First, if we subtract the evidence necessary to convict Dunbar for the attempted first-degree murder—intentionally or knowingly shooting R.W.—the remaining evidence supports the kidnapping charge in this case. The kidnapping charge required proof that Dunbar restricted R.W.'s movements without consent and without legal authority by confining R.W. with the intent to inflict physical injury. *See* § 13-1304(A)(3) (kidnapping); § 13-1301(2) (restraint). Therefore, once Dunbar formed the intent to inflict physical injury, refused to move his car out of R.W.'s path, and confined R.W., the crime of kidnapping was complete. *See State v. Viramontes*, 163 Ariz. 334, 339 (1990). Thus, under the first part of the *Gordon* test, Dunbar was eligible for consecutive sentences for kidnapping and attempted first-degree murder.

¶52 Second, it was not factually impossible for Dunbar to commit attempted murder without also committing kidnapping. Dunbar could have committed the attempted murder without kidnapping R.W. by, for example, parking next to her and shooting her without any restraint. Instead, Dunbar parked in front of her and restrained her movements by blocking her in. Third, Dunbar's act of kidnapping caused R.W. to suffer an additional risk of emotional harm not inherent to the attempted murder. Dunbar's restraint of the victim terrorized her to the point she called 9-1-1, showing that the restraint caused additional harm. Therefore, Dunbar did not commit a single act within the meaning of § 13-116 and the trial court did not err by imposing consecutive sentences for count one (attempted first-degree murder) and count five (kidnapping). *See State v. Carlson*, 237 Ariz. 381, ¶ 82 (2015) (holding consecutive sentences for first-degree murder and kidnapping was proper because it was possible to commit murder without kidnapping, kidnapping without murder, and the kidnapping created a risk of emotional and physical harm to victims in addition to harms caused by murder).

¶53 We reject Dunbar's claim that the trial court attempted to distinguish *Gordon* by finding that Dunbar completed two kidnappings. The court made no such finding and the case Dunbar cites, *State v. Jones*, 185 Ariz. 403 (App. 1995), is inapposite. In *Jones*, we found that a defendant could not be charged with two counts of kidnapping the same victim because the "continuous confinement of the victim until her escape did not

give rise to more than one count of kidnapping." *Id.* at 406. *Jones* is inapplicable here because Dunbar was not charged with two counts of kidnapping.

¶54 However, we reach a different conclusion regarding the consecutive sentences for count one (attempted first-degree murder) and count two (possession of a deadly weapon by a prohibited possessor). Even if we assume that consecutive sentences were permissible under the first part of *Gordon*, under the facts of this case, as the state concedes, it was factually impossible for Dunbar to shoot R.W. without also committing weapons misconduct because Dunbar is a prohibited possessor and the use of the gun would necessarily constitute weapons misconduct. *See State v. Carreon*, 210 Ariz. 54, ¶ 108 (2005) (finding second part of *Gordon* not met because defendant could not have attempted murder without also committing weapons misconduct). Additionally, R.W. did not suffer any additional risk of harm from the weapons misconduct beyond that inherent in the ultimate crime. We therefore instruct the trial court that consecutive sentences are inappropriate for counts one and two.

Disposition

¶55 We affirm Dunbar's convictions but vacate his sentences and remand for resentencing on all counts because counts one, two, and five were improperly enhanced and counts two and three were improperly aggravated. We also find the court erred in ordering counts one and two to run consecutively.

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

¶56 I agree fully with all segments of the majority opinion except one. My colleagues affirm the trial court's refusal to order disclosure, for an *in camera* review, of the victim's mental health records. Our opinion holds that Dunbar both failed to provide "a sufficiently specific basis" for seeking disclosure and failed to adequately limit the scope of that request. *Supra* ¶ 28.

¶57 I disagree that these were appropriate bases to deny the request. Although not verbose, Dunbar's pro se pleadings and in-court argument together articulate the logic for believing exculpatory information might have been found within the victim's mental health treatment records. Dunbar maintained, based on his prior history with R.W., that: (1) she suffers from major depression, schizophrenia, and bipolar disorder, which sometimes rendered her delusional; and (2) she had

not been consistently taking her medications to treat those disorders.[12] Such mental health conditions could influence the reliability of the victim's identification of him as the assailant and the accuracy of all features of her testimony against him. He asserted that those materials would therefore be important for effective cross-examination. Given this legitimate evidentiary concern and the logic of locating pertinent and reliable information surrounding R.W.'s mental health condition within her mental health treatment records,[13] I believe Dunbar demonstrated a reasonable possibility that those records might contain exculpatory information necessary for him to receive a fair trial.

¶58 It is unclear how Dunbar could have been more specific about what portion of R.W.'s mental health records might contain exculpatory information without already possessing them. By imposing elevated standards of specificity upon defendants who seek disclosure of information, we create a nearly insurmountable obstacle to securing disclosure: we suggest that a defendant must already know the contents of the requested documents to be entitled to discover those contents. We thereby risk crippling a defendant's due process right to acquire important exculpatory information.

¶59 As I observed in *Kellywood*, the "reasonable possibility" standard does not semantically suggest we have erected a difficult barrier to conduct this form of discovery, and we should resist applying that

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[12]The state did not challenge Dunbar's assertions that R.W. suffered from these forms of mental illness or that she received treatment for them "over fifteen years [in] three different states." *Supra* ¶ 29.

[13]On appeal, Dunbar loosely refers to his request as one for "medical records." But both the trial court record and the content of Dunbar's appellate briefs make clear that Dunbar has sought only the victim's mental health records. This distinguishes the instant case from *State v. Connor*, where we deemed the request inadequately specific, in part, because the defendant indiscriminately sought both the medical records and mental health records of the victim. 215 Ariz. 553, ¶ 24. There, we also emphasized that those records could not conceivably be used to cross-examine the deceased victim. *Id*. ¶ 27. Here, by contrast, the state called the victim as a witness, and the defendant specifically sought the mental health records to conduct an effective cross-examination of her. *See Roper*, 172 Ariz. at 240-41 (identifying due process interest in effective cross-examination as basis for requiring disclosure of victim's records).

standard as such. 246 Ariz. 45, ¶ 24 (Eckerstrom, C.J., dissenting); *see also R.S. v. Thompson*, 247 Ariz. 575, ¶ 23 (App. 2019) (acknowledging courts have applied more stringent standard than "reasonable possibility"). In assessing these requests, our trial courts should not overlook that a victim's privacy interests—in all but those portions of their records that are truly exculpatory—are fully protected by the requirement of *in camera* review. Given that protection, the due process right of a criminal defendant to acquire potentially exculpatory information substantially outweighs the entitlement of the state or victim to withhold such information from the trial judge's review.[14]

¶60 Although I would hold that the trial court erred in denying Dunbar's motion for disclosure, that error was ultimately irrelevant to the trial outcome. At trial, Dunbar did not assert that R.W. had misidentified him. Rather, he testified that he reflexively fired shots in her direction, without any specific intention to injure her, because he believed she was attempting to assault him with her car. That claim by Dunbar was rendered implausible by the other evidence in the case. Dunbar undisputedly fired numerous shots directly into R.W.'s windshield at close range, several of which struck R.W. He discharged those shots in two discrete time windows, allowing ample time for deliberation. Two neighbors each saw Dunbar fire the last of those shots after hearing the first flurry. Both testified that they saw Dunbar standing immediately in front of R.W.'s car and aim directly at her windshield. Neither testified that R.W.'s car was ever moving. By contrast, R.W.'s testimony conformed to the eyewitness evidence and was corroborated by the tape of her 9-1-1 call, which recorded the sounds of the entire shooting incident. Given this weight of evidence, the trial court's error in denying Dunbar's requests for disclosure was harmless beyond a reasonable doubt. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). I therefore concur with the disposition on appeal.

[14] In many criminal cases, as here, the primary witness to the defendant's alleged actions is the alleged victim. In such cases, defense counsel must explore the reliability and credibility of the accuser in order to competently prepare for trial and cross-examination.