IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LOUIE THOMAS MACHADO,
Appellant.

No. 2 CA-CR 2013-0080
Filed March 12, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20063933
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

H O W A R D, Judge:

¶1 Following a jury trial, appellant Louie Machado was convicted of manslaughter. On appeal, he argues the trial court erred in refusing to give or omitting certain jury instructions and making incorrect evidentiary rulings, and imposed an illegal sentence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2000, R.R. attended a pizza party at her church following the night service. She drove home and, when she arrived, Machado confronted and shot her in the front yard. R.R. died of a single bullet wound to her chest.

¶3 In 2008, Machado was convicted of second-degree murder after a jury trial. We reversed the conviction and remanded the case for a new trial after concluding the trial court erred by precluding certain evidence supporting Machado's defense that J.H., and not Machado, had killed R.R. *State v. Machado*, 224 Ariz. 343, 230 P.3d 1158 (App. 2010), *aff'd*, 226 Ariz. 281, 246 P.3d 632 (2011). Following his second trial, a jury found Machado guilty of manslaughter, a lesser-included offense of second-degree murder. The court sentenced him to an aggravated eighteen-year prison term. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Jury Instructions

Negligent Homicide Instruction

¶4 Machado first argues the trial court erred in refusing to instruct the jury on the lesser-included offense of negligent homicide. He claims that the court failed to view the evidence in the light most favorable to his defense, and that the evidence supported the instruction. We review a trial court's decision whether to give a particular jury instruction for an abuse of discretion. *State v. Brown*, 233 Ariz. 153, ¶ 24, 310 P.3d 29, 37 (App. 2013). A court abuses its discretion when it commits an error of law. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006). We defer to a trial court's assessment of the evidence. *Id.* ¶ 23.

¶5 Generally, "negligent homicide is a lesser-included offense of manslaughter and the only difference between the offenses is an accused's mental state at the time of the incident." *State v. Nieto*, 186 Ariz. 449, 456, 924 P.2d 453, 460 (App. 1996). "'Negligent homicide is distinguished from reckless manslaughter in that for the latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, he is unaware of the risk.'" *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, n.7, 165 P.3d 238, 243 n.7 (App. 2007), *quoting State v. Walton*, 133 Ariz. 282, 291, 650 P.2d 1264, 1273 (App. 1982); *see also* A.R.S. §§ 13-105(10)(c), (d), 13-1102(A), 13-1103(A)(1).

¶6 A defendant is entitled to an instruction on a lesser-included offense if sufficient evidence supports giving the instruction. *Wall*, 212 Ariz. 1, ¶¶ 17-18, 126 P.3d at 151; *see also* Ariz. R. Crim. P. 23.3. Evidence is sufficient if "'the jury could rationally fail to find the distinguishing element of the greater offense.'" *State v. Bearup*, 221 Ariz. 163, ¶ 23, 211 P.3d 684, 689 (2009), *quoting State v. Detrich*, 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (1994). In other words, "[t]he jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151.

¶7 "It is not enough that, as a theoretical matter, 'the jury might simply disbelieve the state's evidence on one element of the

crime' because this 'would require instructions on all offenses theoretically included' in every charged offense." *Id.*, *quoting State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984). Rather, "the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Id.* A trial court "must view the evidence in the light most favorable to the proponent." *State v. Nottingham*, 231 Ariz. 21, ¶ 14, 289 P.3d 949, 954 (App. 2012).

¶8 If the defendant employs an all-or-nothing defense such as third-party culpability, he is not precluded from receiving a lesser-included instruction. *Wall*, 212 Ariz. 1, ¶ 25, 126 P.3d at 152. But, in such a case, the defendant generally "produces evidence that he simply did not commit the offense and the state produces evidence that he committed the offense as charged," leaving "little evidence on the record to support an instruction on the lesser included offenses." *Caldera*, 141 Ariz. at 637, 688 P.2d at 645. The record, consequently, "is such that defendant is either guilty of the crime charged or not guilty." *State v. Salazar*, 173 Ariz. 399, 408, 844 P.2d 566, 575 (1992). In such cases, "the trial court should refuse a lesser included instruction" because it is not supported by any evidence. *Id.*

¶9 At trial, Machado's defense was that J.H. had killed R.R. The evidence adduced at trial showed that Machado brought a loaded gun to R.R.'s house at night and waited outside until she returned home. The two had an argument, R.R. stated she "did not want to go," and Machado then shot R.R. in the chest, causing her death. Machado told his mother that he arrived at R.R.'s house intending to "scare her" because her father owed Machado's father a "drug debt," and that he used an "old antique gun" because it could not be traced. Additionally, because R.R. was shot in the chest, the evidence shows Machado pointed the loaded gun directly at her. Based on this evidence, no jury could rationally conclude that he was unaware of the risk of his actions by showing up to R.R.'s house with a loaded gun at night and confronting her. *See* §§ 13-105(10)(d), 13-1102(A); *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151.

¶10 Additionally, the evidence Machado now points to does not support a finding that he committed only negligent homicide. *See Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151. First, Machado contends

that because he "was [nineteen] at the time of the offense and no one ever had seen him handling guns or other weapons," a jury could rationally find he was unaware of the risks. He does not explain, however, and we fail to see, how his age would have allowed the jury to find that he was unaware of the risk posed by pointing a loaded gun at the victim in an effort to scare her. The risk inherent in the situation is precisely why R.R. would have been scared, as Machado intended. This evidence thus does not support his argument.

¶11 Machado also relies on the testimony of one of his former girlfriends that she had never seen Machado with a gun or weapon, and a detective on the case that he "never had any information that [Machado] had ever carried or even possessed a gun." This testimony, however, only shows that others did not see Machado with a gun. It does not demonstrate he was completely unfamiliar with guns, or that he was unaware that pointing a loaded gun at someone posed a "substantial and unjustifiable risk." *See* §§ 13-105(10)(d), 13-1102(A); *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151.

¶12 Next, Machado contends that trigger pressure on antique revolvers "varies from revolver to revolver," and thus "a rational jury could find that [Machado] failed to perceive a substantial and unjustifiable risk." Again, however, he does not explain why this fact compels the conclusion he was unaware of the risks associated with pointing a loaded gun at R.R. to scare her. And although trigger pressure may vary among guns, no testimony indicated that Machado was unfamiliar with the trigger pressure required on the particular gun he used. Moreover, Machado had stated he used an antique revolver because it "couldn't be traced." Thus, when viewed in the context of other evidence presented at trial, whether trigger pressure varies among antique guns would not lead a rational jury to conclude that Machado was completely unaware of the risks posed by his conduct. *See Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151.

¶13 Machado additionally argues that because he intended only to scare R.R., not harm her, the jury could conclude he failed to perceive the risk that his conduct would cause death. However, his intentions are irrelevant to whether he understood the risks associated with pointing a loaded gun at R.R. to scare her. An

instruction on negligent homicide required evidence supporting an inference that Machado "fail[ed] to perceive a substantial and unjustifiable risk" that his conduct would result in R.R.'s death. § 13-105(10)(d). Even if the jury accepted that Machado originally did not intend to harm R.R., that conclusion would not affect its analysis of whether he was unaware of the risks associated with his conduct. *See Bearup*, 221 Ariz. 163, ¶ 23, 211 P.3d at 689.

¶14 Finally, Machado points to evidence which suggested he and R.R. had an argument which was then followed by a scream and a single gunshot. Machado contends that R.R.'s "scream was a startling event which led to the accidental pulling of the trigger." Again, however, whether Machado accidentally pulled the trigger does not mean he was unaware of the risk associated with his conduct. This evidence does not support his argument.

¶15 Machado claims the "[e]vidence showed that there may have been a struggle." But the testimony Machado relies on to make this claim instead only showed there may have been an argument preceding the gunshot, not a physical altercation. K.J. testified she heard "an argument" at R.R.'s house and heard R.R. say she "did not want to go." This testimony suggests a verbal argument, but does not suggest any physical struggle which may have supported a negligent homicide instruction. Consequently, we reject Machado's characterization of the evidence in support of his claim.

¶16 "[W]e recognize that a jury could disregard the fact the evidence only supported [manslaughter] and decide to convict of [negligent homicide]," but that possibility, without more, does not require us to find the trial court erred as a matter of law in refusing to give the jury the instruction on the lesser-included offense of negligent homicide. *State v. Sprang*, 227 Ariz. 10, ¶ 13, 251 P.3d 389, 393 (App. 2011); *see also Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151. Viewed in the light most favorable to Machado, *see Nottingham*, 231 Ariz. 21, ¶ 14, 289 P.3d at 954, none of the evidence supports the giving of a negligent homicide instruction. Consequently, the court did not abuse its discretion in denying Machado's request for that instruction. *See Brown*, 233 Ariz. 153, ¶ 24, 310 P.3d at 37.

¶17 Machado next contends the trial court abused its discretion by applying the incorrect standard for determining

whether he was entitled to the negligent homicide instruction. In particular, he challenges the court's statement that the instruction would require a showing that "someone who presumably points a loaded weapon at another is so stupid that they don't foresee a risk, which is what negligent homicide is, you're just too stupid to know there's a risk." He did not, however, object to the court's use of this standard and therefore has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, because we have determined already that the instruction was not warranted under the appropriate standard, Machado has not met his burden of demonstrating that fundamental error occurred. *See id.* ¶ 20.

Manslaughter Instruction

¶18 Machado next argues the trial court erred by omitting a portion of the statutory definition of "recklessly" during its instruction on manslaughter, resulting in the jury being instructed on an inaccurate mental state. He argues this omission violated his Fifth and Sixth Amendment rights to have a jury find that he was guilty of each essential element of the crime. We review de novo whether jury instructions correctly state the law. *State v. Gonzales,* 206 Ariz. 469, ¶ 7, 80 P.3d 276, 278 (App. 2003). "In our review, we read the jury instructions as a whole to ensure that the jury receives the information it needs to arrive at a legally correct decision." *State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d 662, 665 (2005). Moreover, we review de novo issues of statutory interpretation. *State v. Mangum,* 214 Ariz. 165, ¶ 6, 150 P.3d 252, 254 (App. 2007).

¶19 At trial, Machado did not object to the trial court's instruction on manslaughter on the grounds that it improperly stated the required mental state or that it violated his constitutional rights.[1] He has therefore forfeited review for all but fundamental,

[1]In his reply brief, Machado contends he properly preserved this issue for appeal because he submitted a proposed jury instruction for manslaughter, which included the awareness element. However, he told the trial court his proposed instruction was for the purpose of ensuring the jury was instructed as to the difference between the levels of recklessness required for second-degree murder and manslaughter. And he never objected to the

prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *State v. Lopez*, 217 Ariz. 433, ¶ 6, 175 P.3d 682, 684 (App. 2008) (failure to object on one ground does not preserve issue for appeal on another ground). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). An instruction which incorrectly states the law concerning a culpable mental state, however, can constitute fundamental error. *See State v. Walker*, 138 Ariz. 491, 494, 675 P.2d 1310, 1313 (1984) (incorrect instruction on mental state required for arson constituted fundamental error).

¶20 To show Machado committed manslaughter, the state was required to prove, in relevant part, that he "[r]ecklessly caus[ed] the death of another person." § 13-1103(A)(1). "'Recklessly' means . . . that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." § 13-105(10)(c). Here, the trial court instructed the jury that "[t]he crime of manslaughter requires proof that the defendant caused the death of another person by conduct showing a conscious disregard of a substantial and unjustifiable risk of death." As the state concedes, the final instructions thus omitted the "aware of" portion of the statutory language for the mental state for manslaughter.

¶21 Machado contends that whether he was "aware of" the risk is a separate element from whether he "consciously disregard[ed]" that risk. The omission, he reasons, thus relieved the state of its burden to prove every element of the offense. The state, on the other hand, argues that "aware of and consciously disregards" is a single element because "a person cannot consciously

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court's final instructions on the grounds that the court had omitted an element of the required mental state. Consequently, the court was never given an opportunity to correct any alleged error and the issue is forfeited for review on appeal absent fundamental, prejudicial error. *See Sprang*, 227 Ariz. 10, ¶ 4, 251 P.3d at 391; *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008).

disregard something without first being aware of it." The state contends the instruction, taken as a whole, adequately informed the jury of the correct standard.

¶22 "When resolving questions of statutory interpretation, we first consider the language of the statute, which provides 'the best and most reliable index of a statute's meaning.'" *State v. Thomas,* 219 Ariz. 127, ¶ 6, 194 P.3d 394, 396 (2008), *quoting Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). Unless defined by statute, "we interpret statutory terms 'in accordance with their commonly accepted meanings.'" *State v. Petrak*, 198 Ariz. 260, ¶ 10, 8 P.3d 1174, 1178 (App. 2000), *quoting State v. Reynolds,* 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992). And "[w]e assume that the legislature accords words their natural and obvious meanings unless otherwise stated [and a] dictionary may define a word's natural and obvious meaning." *State v. Jones*, 188 Ariz. 388, 392, 937 P.2d 310, 314 (1997) (citation omitted).

¶23 "[C]onscious" is defined as "having an awareness of one's environment." *The American Heritage Dictionary* 391 (5th ed. 2011). Thus, as a threshold matter, a defendant must be aware of a risk before he is able to consciously disregard that risk. Rather than exist as a separate and distinct element, the "awareness" portion in the definition of "recklessly" is merely a portion of the "consciously disregards" requirement. *See* § 13-105(10)(c). As this court has stated before, "[t]he culpable mens rea of recklessly consists of a conscious disregard of a substantial and unjustifiable risk." *Walton*, 133 Ariz. at 290, 650 P.2d at 1272. We note that in *Walton*, the court, when comparing the culpable mental states of manslaughter and negligent homicide, also stated that "[t]he legislature obviously intended that the *awareness* of the risk be a meaningful distinguishing factor between the two offenses." *Id.* at 291, 650 P.2d at 1273 (emphasis added). Although Machado urges otherwise, the court's use of both terms when describing the mental state of manslaughter only strengthens our conclusion: a defendant cannot consciously disregard a risk without first being aware of that risk. *See id.* at 290-91, 650 P.2d at 1272-73. Consequently, the trial court's instruction did not omit an essential element of manslaughter because, when read as a whole, it adequately instructed the jury on the law. *See Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d at 665; *see also State*

v. Johnson, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003) (reversal appropriate only where "instructions, taken as a whole, may have misled the jury").

¶24 Moreover, Machado has failed to carry his burden to show prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Machado argues that "[w]ithout a complete and correct instruction on 'awareness,' it is possible the jury was confused and convicted on a lesser standard of proof and of a lesser crime than the law requires." He relies on the fact that the jury found Machado not guilty of second-degree murder, which requires a showing that the defendant, "[u]nder circumstances manifesting extreme indifference to human life, . . . engage[d] in conduct that creates a grave risk of death" and was "aware of and consciously disregard[ed] a substantial and unjustifiable risk." A.R.S. §§ 13-1104(A)(3), 13-105(10)(c). The difference between second-degree murder and manslaughter, however, is not the "awareness" of the risk. Instead, the difference is whether the defendant was acting under circumstances manifesting extreme indifference to human life and created a grave risk of death. *State v. Valenzuela*, 194 Ariz. 404, ¶ 11, 984 P.2d 12, 14-15 (1999). And Machado does not point to anything in the record to support his theory.

¶25 Machado cites *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984) to support his assertion that the "'awareness' of the defendant is an important element of manslaughter." But Machado's reliance on *Fisher* is unavailing. The portions on which he relies were part of the court's determination whether the defendant was entitled to an instruction on negligent homicide based on his defense that he was too intoxicated to be aware of any substantial or unjustifiable risk. *Id.* at 247-48, 686 P.2d at 770-71. The court was not interpreting the distinct elements of the culpable mental state of manslaughter. *Id.* We therefore find the language in *Fisher* unpersuasive in this context.

Third-Party Culpability Instruction

¶26 Machado argues the trial court denied his right to a fair trial by refusing to give his proffered third-party culpability instruction, in light of the state's rebuttal to his closing argument. To the extent Machado argues the court erred in refusing to give the

instruction as part of the final jury instructions, which were given before closing arguments, we review the court's refusal for an abuse of discretion and "review de novo . . . whether the jurors were properly instructed." *State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616-17 (2009).

¶27 Even when a third-party culpability theory is supported by the evidence, trial courts are not required to instruct the jury on third-party culpability if "the court properly has instructed the jury on the presumption of innocence and the state's burden of proof." *State v. Welch*, 236 Ariz. 308, ¶ 29, 340 P.3d 387, 395 (App. 2014). The substance of a third-party culpability instruction is "'adequately covered' by the instructions 'on the presumption of innocence and the [s]tate's burden of [proof].'" *Id.*, *quoting State v. Parker*, 231 Ariz. 391, ¶ 56, 296 P.3d 54, 68 (2013).

¶28 In this case, the trial court properly instructed the jury on Machado's presumed innocence, the state's burden to prove "every part of each charge beyond a reasonable doubt," the definition of "reasonable doubt," and that Machado was not required to prove his innocence or produce evidence in his defense. Consequently, the court did not err in refusing to give Machado's proffered instruction on third-party culpability as part of the final jury instructions. *See id.* ¶ 30.

¶29 Machado argues, however, the instruction became necessary after the state's rebuttal argument either misled or confused the jury as to the burden of proof required for a guilty verdict. The state correctly points out that Machado did not object during the state's rebuttal, or request any additional instructions. Thus, he appears to argue the trial court should have given sua sponte the third-party culpability instruction in response to the state's rebuttal. We review the failure to give the instruction sua sponte after the state's rebuttal solely for fundamental, prejudicial error. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 684.

¶30 Machado has not shown the trial court's failure to give the instruction, even after the state's rebuttal, was error. As stated by our supreme court, "No Arizona case has required a third-party culpability instruction." *Parker*, 231 Ariz. 391, ¶ 55, 296 P.3d at 68. And Machado does not point to any decision since *Parker* in which

an Arizona court concluded the failure to give a third-party culpability instruction was error, let alone fundamental error.

¶31 Further, the only authority Machado cites to support a claim of fundamental error is *State v. Price*, 123 Ariz. 197, 598 P.2d 1016 (App.), *aff'd in part, rev'd in part on other grounds*, 123 Ariz. 166, 598 P.2d 985 (1979). In *Price*, we held that a trial court's failure to properly instruct the jury on the intent required for accomplice liability constituted fundamental error. *Id.* at 199, 598 P.2d at 1018. Machado does not explain how *Price*, which concerned the failure to instruct properly on an essential element of a crime, relates to the failure to give a third-party culpability instruction, which generally is unnecessary. *See Parker*, 231 Ariz. 391, ¶ 56, 296 P.3d at 68. Consequently, Machado has not met his burden to show fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

***Willits*[2] Instruction**

¶32 Machado next argues the trial court erred in failing to give a *Willits* instruction sua sponte regarding a lost voice sample from J.H., lost tapes of 9-1-1 calls from two witnesses, and R.R.'s pager. "'To be entitled to a *Willits* instruction, a defendant must prove that (1) the state failed to preserve material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice.'" *State v. Glissendorf*, 235 Ariz. 147, ¶ 8, 329 P.3d 1049, 1052 (2014), *quoting State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988). To prove evidence has a tendency to exonerate, the defendant cannot "simply speculate about how the evidence might have been helpful." *Id.* ¶ 9. Rather, the defendant must show "a real likelihood that the evidence would have had evidentiary value." *Id.* We review a trial court's failure to give a *Willits* instruction sua sponte for fundamental error. *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990).

[2]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

1) Voice Sample of J.H.

¶33 Shortly after R.R.'s murder, her mother, L.A., received an anonymous phone call in which the caller said he did not mean to kill R.R., he was "mad at" R.R., and she and her friend did not "do what he wanted." Police later obtained a voice sample from J.H. to use in a voice lineup so L.A. could identify the caller. However, they never conducted the lineup and the sample was lost before L.A. could make an identification. At Machado's second trial, L.A. testified that she recognized Machado as the anonymous caller.

¶34 On appeal, Machado alleges the lost voice sample from J.H. could have exonerated him because, had the police presented it to L.A., she could have identified J.H. as the anonymous caller. He bases this belief on the fact that L.A. originally described the caller as a "white male" who spoke "very correct English" with "no slang" and no accent. At most, Machado's contention that the use of J.H.'s voice sample would have had a tendency to exonerate him is unsupported speculation. *See Glissendorf*, 235 Ariz. 147, ¶ 8, 329 P.3d at 1052. The trial court did not err by failing to give the *Willits* instruction sua sponte.

¶35 Moreover, Machado cannot show that the exemplar was fundamental to his case or that he was prejudiced. *See Henderson,* 210 Ariz. 561, ¶ 20, 115 P.3d at 607. L.A.'s testimony showed the inconsistencies between her original description of the caller and her identification of Machado at trial. She testified that after the November 2000 call she "always had . . . that voice in [her] head," but she failed to identify Machado as the caller after a face-to-face conversation with him two months after the call. And another witness testified that L.A. told him previously that Machado was not the caller. Irrespective whether L.A. would have identified J.H. using the lost voice sample, Machado was able to present ample evidence at trial to impeach L.A.'s identification of Machado as the caller. Any positive identification of J.H. as the caller would have been merely cumulative to this impeachment evidence. *See State v. Hansen*, 156 Ariz. 291, 294-95, 751 P.2d 951, 954-55 (1988) (no prejudice from loss of evidence when equivalent evidence presented at trial). Thus, he also fails to show he was prejudiced by the loss of the voice sample and has not demonstrated he was entitled to a

Willits instruction. *See Henderson,* 210 Ariz. 561, ¶ 20, 115 P.3d at 607.[3] No fundamental error occurred.

2) 9-1-1 Tapes

¶36 Machado also alleges lost tapes of 9-1-1 calls from two witnesses, K.J. and D.L., had a tendency to exonerate him because their statements during the 9-1-1 calls were inconsistent with statements they made placing Machado at the scene of the murder and could have been used to impeach their testimony. Specifically, K.J. testified on direct examination that the person she saw fleeing the scene had a "stocky build," was around "five-six to . . . five-ten, probably 220 pounds, [with a] shaved head . . . [and f]air complected," but her statement to the police in the hours following the murder identified a "white male, medium build, [with a] shaved head." Machado alleges K.J.'s statements to the 9-1-1 operator may have been similarly inconsistent to her testimony. And D.L. testified he had seen Machado walking from the direction of R.R.'s house just after the shooting, but he did not report seeing anyone to the 9-1-1 operator when asked.

¶37 The witnesses were impeached on these grounds by their own testimony. K.J. readily admitted that she reported to the police she had seen a white male with a medium build leaving the scene, and she was "not exactly sure what happened" that evening. D.L. similarly admitted he did not report seeing Machado to the 9-1-1 operator that evening. And he admitted his failure to identify Machado as the person he saw leaving the scene—despite knowing Machado "reasonably well"—until after he saw Machado's arrest photo on the news approximately six years later.

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[3]Machado also cited our opinion deciding his first appeal to support his claim that he was entitled to a *Willits* instruction regarding the lost voice sample. *See Machado*, 224 Ariz. 343, ¶ 55, 230 P.3d at 1177. But the issue of a *Willits* instruction was not before this court in that appeal, and any reference to *Willits* was mere dictum. *See Creach v. Angulo*, 186 Ariz. 548, 552, 925 P.2d 689, 693 (App. 1996).

¶38 Any evidence from the 9-1-1 tapes was cumulative and not necessary to impeach either witness's later statements incriminating Machado because both witnesses admitted their prior inconsistent statements made close in time to the murder. Further, Machado had other ample evidence, such as K.J.'s failing memory and D.L.'s inability to identify Machado until after his arrest, to impeach the incriminating statements. Consequently, Machado was not prejudiced by the loss of these tapes and was not entitled to a *Willits* instruction. *See Glissendorf*, 235 Ariz. 147, ¶ 8, 329 P.3d at 1052. Thus, he has not shown fundamental error or prejudice. *See Henderson,* 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

3) R.R.'s Pager

¶39 Machado further alleges that R.R.'s pager "if timely analyzed, . . . could have been concrete, objective evidence of who called [R.R.] close to the time of the shooting," and that the jury should have been allowed to infer R.R. received a call from the real killer, J.H. But he presents no evidence that R.R. received a telephone call from her killer, let alone a telephone call from J.H. He argues only that the state "should not be allowed to take advantage of its own loss by claiming [the pager's] contents are unknown."

¶40 Machado is not entitled to a *Willits* instruction "merely because a more exhaustive investigation could have been made." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). And Machado, not the state, bears the burden of demonstrating the need for a *Willits* instruction. *See Glissendorf*, 235 Ariz. 147, ¶ 8, 329 P.3d at 1052. He has not demonstrated a "real likelihood" that an analysis of the pager "would have had evidentiary value" by alleging, without any evidentiary support, that the killer called R.R. and that an analysis of the pager would have revealed both a call and the killer's identity.[4] *Id.* ¶ 9. His claim that an examination of the pager would have produced evidence tending to exonerate him is merely speculative. *See id.* ¶ 8.

[4]In fact, a detective had conducted a review of the pager prior to its loss and found only a telephone number that was inactive at the time of the shooting.

¶41 Machado has failed to demonstrate that the trial court committed any error, let alone fundamental error, in failing to give a *Willits* instruction on any of the evidence. *Lopez*, 163 Ariz. at 113, 786 P.2d at 964.

J.H.'s Post-Murder Demeanor

¶42 Machado next argues the trial court erred by precluding testimony from S.C. describing J.H.'s reaction when he told her of R.R.'s death. "Decisions on the admission and exclusion of evidence are 'left to the sound discretion of the trial court,' and will be reversed on appeal only when they constitute a clear, prejudicial abuse of discretion."[5] *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994), *quoting State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989) (citation omitted). "The prejudice must be sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed." *Id.* When reviewing evidentiary issues, we view "the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *State v. Harrison,* 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998), *quoting State v. Castro,* 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989).

¶43 Third-party culpability evidence is admissible pursuant to Rules 401, 402, and 403, Ariz. R. Evid. *Machado*, 224 Ariz. 343, ¶ 14, 230 P.3d at 1167. "Under those rules, the proffered evidence must clear only two hurdles to be admissible: it must be relevant, meaning it must tend to create reasonable doubt as to the defendant's guilt, and, in accordance with Rule 403, the probative value of the evidence must not be substantially outweighed by the risk that it will cause undue prejudice, confusion of the issues, or delay." *Id.* (citation omitted). Evidence that does no more than create a "'[v]ague grounds of suspicion'" is not sufficiently relevant. *State v. Bigger*, 227 Ariz. 196, ¶ 43, 254 P.3d 1142, 1155 (App. 2011), *quoting State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 617

[5]Although Machado claims the trial court failed to view the evidence in the light most favorable to the defense, and its decision is therefore not entitled to deference, we find no evidence of such an error.

(1988) (alteration in *Bigger*). And evidence is unduly prejudicial if it causes jurors to have an "adverse emotional reaction" to the third-party such that the reaction "would distract the jury from fairly assessing the state's case." *Machado*, 224 Ariz. 343, ¶ 18, 230 P.3d at 1168.

¶44 According to S.C., J.H. visited her at work a day or two after R.R.'s death to inform her of the news. After he delivered the news, S.C. "kind of lost it and started getting hysterical and was crying." At that point, J.H. began "laughing" at her and said it was because of her reaction. The trial court concluded this testimony was "peripheral to the homicide" and that the "probative value [did] not outweigh the danger of unfair prejudice."

¶45 On appeal, Machado contends the testimony was not peripheral because "it involved a circumstance surrounding the homicide itself: the reactions of those who knew [R.R.] personally." He argues the trial court "fail[ed] to find the probative value of [J.H.'s] demeanor" by "not giv[ing J.H.'s] demeanor appropriate evidentiary weight."

¶46 Viewed in the light most favorable to Machado, *see Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518, this evidence provides nothing more than vague grounds of suspicion, *see Bigger*, 227 Ariz. 196, ¶ 43, 254 P.3d at 1155. It did not tend to create a reasonable doubt as to Machado's guilt, and the trial court did not abuse its discretion in excluding the evidence. *See id.* ¶¶ 41, 43.

¶47 Moreover, even assuming this evidence was relevant, it must still undergo a Rule 403 analysis. *See Machado*, 224 Ariz. 343, ¶ 14, 230 P.3d at 1167. Because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice . . . it has broad discretion in deciding the admissibility" of the evidence. *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518. Here, the trial court concluded that any probative value was outweighed by "the danger of unfair prejudice." Viewed in the light most favorable to Machado, *see id.*, J.H.'s seemingly untoward reaction would provoke an emotional reaction from the jury that would "distract the jury from fairly assessing the state's case." *Machado*, 224 Ariz. 343, ¶ 18, 230 P.3d at 1168. We thus cannot say the court abused its discretion by

precluding the evidence based on its finding that the danger of unfair prejudice outweighed any potential probative value under Rule 403. *See id.* ¶ 14; *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518.

¶48 Machado also appears to argue the preclusion violated his right to a complete defense pursuant to *Chambers v. Mississippi*, 410 U.S. 284 (1973). Machado did not make this argument to the trial court and has therefore forfeited review for all but fundamental, prejudicial error. *See Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Fundamental error must be an "'error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.* ¶ 19, *quoting Hunter*, 142 Ariz. at 90, 688 P.2d at 982.

¶49 In *Chambers*, the United States Supreme Court concluded that testimony bearing "all the circumstantial hallmarks of reliability underlying traditional exceptions to the general rule precluding hearsay" was admissible pursuant to a defendant's Sixth Amendment right to present a complete defense. *Machado*, 224 Ariz. 343, ¶ 13, 230 P.3d at 1166-67; *see also Chambers*, 410 U.S. at 302. In that case, the defendant sought to introduce testimony that a third-party had confessed to the crime on four separate occasions. *Chambers*, 410 U.S. at 289. Mississippi did not recognize any hearsay exception allowing for this testimony and also had a common law "voucher" rule, which precluded a party from impeaching his own witness. *Id.* at 295, 299. The Supreme Court determined that a defendant's right to present a complete defense trumps a "mechanistically" applied state rule when the proffered statement bears "persuasive assurances of trustworthiness and thus [is] well within the basic rationale" of a hearsay exception. *Id.* at 302. Consequently, after analyzing the statements under the hearsay exception for declarations against interest, the Court found they were admissible. *Id.* at 300-01.

¶50 The Court in *Chambers* acknowledged that "[f]ew rights are more fundamental than that of an accused to present witnesses [and evidence] in his own defense." *Id.* at 302. But "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* In that case, Mississippi did not recognize an exception for declarations against penal interest, only for

declarations again pecuniary interest. *Id.* at 299. The evidence, however, fell within the rationale for the exception against declarations against interest and exhibited the hallmarks of reliability, and the trial court erred by precluding the confessions. *Id.* at 300-02.

¶51 Machado does not explain how *Chambers* would apply to testimony that is irrelevant and unduly prejudicial under the rules of evidence. Rather, he simply asserts that "[d]efense evidence may not be excluded from the jury based on a mechanistic application of the Rules of Evidence." Although Machado has a right to a complete defense as explained above, he must still "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* at 302. A defendant may not simply invoke *Chambers* to present any and all evidence in an attempt to avoid abiding by the same rules of evidence the state must adhere to. *See id.* at 302; *State v. Prasertphong*, 210 Ariz. 496, ¶ 26, 114 P.3d 828, 834 (2005). Because the trial court properly could conclude that the probative value outweighed the risk of unfair prejudice, Machado has not persuaded us that the preclusion of this testimony violated his constitutional rights and therefore was an "'error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting Hunter*, 142 Ariz. at 90, 688 P.2d at 982. We therefore reject his argument.

Limitation on Cross-Examination of D.L.

¶52 Machado next argues the trial court erred by limiting his cross-examination of D.L., thus violating his Sixth and Fourteenth Amendment right to confrontation. Specifically, he contends he should have been allowed to ask D.L. if he believed Machado was guilty when D.L. told police, in 2007, he remembered seeing Machado near R.R.'s house minutes after R.R. was shot. Machado concedes he did not challenge the court's ruling below, and therefore has forfeited review for all but fundamental, prejudicial error. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683-84; *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶53 The Sixth Amendment guarantees a defendant the right to confront witnesses against him, which includes the right to cross-examine witnesses concerning their bias, motive, and prejudice. *Davis v. Alaska*, 415 U.S. 308, 315-17 (1974). "While wide latitude is to be allowed in cross-examination, the inquiry must be relevant." *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986). And a trial judge "'retain[s] wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant.'" *State v. Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d 564, 584 (2002), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). "We evaluate cross-examination restrictions on a case-by-case basis to determine whether the defendant was denied the opportunity to present evidence relevant to issues in the case or the witness'[s] credibility." *Id.* We will not disturb a trial court's ruling absent a clear showing of prejudice. *State v. Doody,* 187 Ariz. 363, 374, 930 P.2d 440, 451 (App. 1996).

¶54 At trial, Machado presented expert testimony regarding "confirmation bias." The expert explained that confirmation bias is "the very common human behavior of believing something to be true and then sifting through all available information and picking from it information that is consistent with the bias, and rejecting information that is inconsistent with the bias." He explained that a witness may receive information after an event has happened, which the witness then incorporates into his or her memory of the original event and can alter the way he or she remembers the event. This "post event information," particularly if it comes from a source of authority, leaves the witness with "a memory that contains a mixture of presumably accurate information that you got immediately from the original event as it was happening, but also post event information whose accuracy is dubious."

¶55 D.L. testified that as he was calling 9-1-1 after R.R. was shot, he passed Machado, who was coming from the direction of R.R.'s house, on the street, but he did not tell police this information until 2007 following Machado's arrest. The trial court precluded Machado from asking D.L. if, based on rumors circulating at the

time he made his statement to police, "[he, himself] believed [Machado] to be guilty." Machado contends the jury was thus "missing an important piece of evidence concerning [the expert's] testimony about 'confirmatory bias' and the acquisition of post-event information."

¶56 Based on the testimony that was presented, Machado cannot show he was prejudiced by the trial court's ruling. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. D.L. already had testified that he initially failed to tell the 9-1-1 operator or police that he passed someone who appeared to be coming from R.R.'s house in the moments after R.R. was shot. He also testified that in the years between R.R.'s murder and Machado's arrest, he did not recognize the person he passed as being Machado, despite the fact that Machado and D.L.'s son were close friends, Machado spent time at D.L.'s home and was "welcome" there, and D.L. had looked at Machado's photograph in a yearbook. D.L. testified that it was not until he saw "the arrest photo of [Machado] on the news" in 2006 that he realized it was Machado he had passed on the street. Additionally, he had heard rumors that Machado had confessed to shooting R.R. And D.L. saw no need to inform the police that he had seen Machado at the scene because he heard and apparently believed Machado had admitted to being there.

¶57 Based on this testimony, the jury was "in possession of sufficient information to assess the bias and motives of" D.L. *State v. Bracy,* 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985). Moreover, Machado was able to thoroughly cross-examine D.L. on the basis of his identification, his motives for coming forward only after seeing Machado's arrest photo, and his claim that, despite his familiarity with Machado, he never before realized Machado had been the person he passed on the street. Because he testified he had heard rumors that Machado had admitted the shooting, and therefore had not told police he had seen Machado at the scene, evidence was presented that supported Machado's theory that D.L.'s identification resulted from confirmation bias. Having reviewed the circumstances surrounding the trial court's ruling, Machado was not "denied the opportunity to present evidence relevant to issues in the case or the witness'[s] credibility." *Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d at 584. Machado has not met his burden of demonstrating

fundamental, prejudicial error occurred, and we reject his argument. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶58 Machado also contends the testimony was relevant and admissible under Rules 401 through 403, Ariz. R. Evid., and the trial court thus erred in precluding it. We review evidentiary rulings for an abuse of discretion. *Ayala*, 178 Ariz. at 387, 873 P.2d at 1309. We need not decide, however, whether the trial court erred in precluding the testimony because any error was harmless beyond a reasonable doubt. "Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not contribute to the verdict." *State v. Davolt*, 207 Ariz. 191, ¶ 39, 84 P.3d 456, 470 (2004). To determine if the error contributed to the verdict, we must review the remainder of the evidence presented at trial. *See State v. Rodriguez*, 186 Ariz. 240, 246, 921 P.2d 643, 649 (1996).

¶59 In addition to the testimony presented surrounding D.L.'s identification described above, Machado also told police, R.R.'s family, several friends, his cousin, and his then-girlfriend that he was present when R.R. was shot. Machado later told that same girlfriend, "I did it. . . . I killed [R.R.]." And Machado told his mother that he intended to "scare" R.R. because of a drug debt between her and Machado's father, but ended up shooting her. Additionally, Machado's mother testified Machado used an "old antique gun," and a forensic examiner determined the type of bullet used in the shooting was "uncommon" and "popular back in the 1920s [and] 1930s." Lastly, the pay phone used to make the anonymous call to R.R.'s mother apologizing for killing R.R. was located just two miles from Machado's residence.

¶60 In light of the testimony surrounding the reliability of D.L.'s identification, *see supra* ¶ 56, and the remainder of the evidence presented at trial, we conclude that any error in precluding D.L.'s answer as to whether he believed Machado was guilty was harmless beyond a reasonable doubt. *See Davolt*, 207 Ariz. 191, ¶ 39, 84 P.3d at 470.

Precluded Testimony

¶61 Machado argues the trial court erred by precluding the testimony of four witnesses: D.B., S.E., L.L., and K.H. We review a

court's evidentiary rulings for an abuse of discretion. *Ayala*, 178 Ariz. at 387, 873 P.2d at 1309. And we view "the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518, *quoting Castro*, 163 Ariz. at 473, 788 P.2d at 1224. We address each witness's testimony in turn.

1) D.B.

¶62 Machado argues the trial court erred by precluding D.B.'s testimony that J.H. kept "a list of names . . . on his wall in his bathroom [and] said these are people that had double crossed him or done him wrong, that they would get their day, they would be taken care of . . . one day." Machado contends this evidence was "indicative of [J.H.'s] tendency to hold a grudge . . . [and] that he was capable of waiting several days before exacting revenge on a person." Machado did not make this argument below, and has therefore forfeited review for all but fundamental, prejudicial error. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683-84; *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Machado reasons that the preclusion of this testimony prejudiced him because the state argued that J.H. "was an unlikely suspect in [R.R.'s] murder because of his quick temper." This evidence, Machado contends, would rebut that claim and "create a reasonable doubt as to [Machado's] guilt."

¶63 D.B. dated J.H. nearly five years after R.R.'s death and no evidence was presented that R.R.'s name was on the list, or that J.H. ever "exact[ed] revenge on" a person on that list. Consequently, given the length of time between R.R.'s death and J.H.'s statements to D.B., and the lack of any indication that J.H. actually acted on his threats of revenge, this testimony was only minimally probative.

¶64 Evidence of J.H.'s "revenge list" was thus nothing more than a vague suspicion and "did not tend to create a reasonable doubt as to [Machado's] guilt." *Bigger*, 227 Ariz. 196, ¶ 43, 254 P.3d at 1155. Furthermore, the evidence was unfairly prejudicial because it invited jurors to make a decision based on an emotional reaction to hearing that J.H. kept such a list. *See Machado*, 224 Ariz. 343, ¶¶ 14, 18, 230 P.3d at 1167-68. Accordingly, the trial court acted within its discretion by precluding the evidence, *see Ayala*, 178 Ariz.

at 387, 873 P.2d at 1309, and no error occurred, fundamental or otherwise, *see Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶65 Machado next argues that, even if the trial court correctly applied the rules of evidence, he still was entitled to present this evidence pursuant to *Chambers*. Machado did not make this argument to the court and therefore has forfeited review for all but fundamental, prejudicial error. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683-84; *see also Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶66 As the state correctly points out, D.B.'s statement that J.H. told her that the names represented "people that had double crossed him or done him wrong . . . [and] they would be taken care of . . . one day" was offered to prove the truth of the matter asserted and was hearsay. *See* Ariz. R. Evid. 801(c). Thus, to be admissible, the testimony must fall into "the basic rationale" of a hearsay exception and must bear "persuasive assurances of trustworthiness." *Chambers*, 410 U.S. at 302.

¶67 Machado has not, however, made such a showing. Rather, he simply asserts that the application of the rules of evidence, in these circumstances, denied him his right to a complete defense and thus warrants reversal. But, as explained above, although Machado has a right to a complete defense, he still must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* Accordingly, Machado's bare reliance on *Chambers* fails.

¶68 In the absence of any indication that the probative value outweighed the risk of unfair prejudice, Machado has not persuaded us that the preclusion of this testimony violated his constitutional rights and was therefore an "'error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting Hunter*, 142 Ariz. at 90, 688 P.2d at 982. We reject his argument.

2) S.E.

¶69 Machado next contends the trial court erred by precluding the testimony of S.E. because it violated the law of the case doctrine and it improperly interfered with his right to present a complete defense. The parties agreed below, and on appeal, that S.E. would have testified that J.H. told her he was with R.R. when she died.

¶70 Machado first contends that because S.E.'s testimony was ruled admissible at his first trial, her testimony should have been allowed in the second trial because it was the law of the case. S.E., however, did not testify in Machado's first trial. Additionally, Machado's Motion to Admit Previously Admitted Evidence incorporated his Motion for Introduction of Third Party Culpability Evidence, which was filed before the first trial and never mentioned S.E. The first trial court therefore never ruled on the admissibility of S.E.'s testimony. Rather, when the objection to S.E.'s testimony arose during the second trial, the trial court was ruling on the issue for the first time. Accordingly, Machado's law of the case argument fails. *See State v. Wilson*, 207 Ariz. 12, ¶ 9, 82 P.3d 797, 800 (App. 2004) (law of case doctrine not applicable "'if the prior decision did not actually decide the issue in question, if the prior decision is ambiguous, or if the prior decision does not address the merits'"), *quoting Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993).

¶71 Machado argues for the first time on appeal that precluding this testimony violated his right to a complete defense under *Chambers*. Accordingly, we review for fundamental, prejudicial error. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683-84; *see also Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. He argues that J.H.'s statement that he was with R.R. when she died falls within the statement against penal interest hearsay exception and was "made under circumstances that assured its reliability." *See* Ariz. R. Evid. 804(b)(3).

¶72 Whether a statement falls into the statement against penal interest hearsay exception involves an analysis of several factors. *See State v. LaGrand*, 153 Ariz. 21, 27-28, 734 P.2d 563, 569-70 (1987). But other than Machado's statement that no evidence

indicated S.E. intended to commit perjury, it does not appear that J.H.'s statement to her "is supported by corroborating circumstances that clearly indicate its trustworthiness." Ariz. R. Evid. 804(b)(3)(B); *see also LaGrand*, 153 Ariz. at 27-28, 734 P.2d at 569-70 (explaining what corroborating circumstances tend to indicate trustworthiness of statement). The record does not establish any corroborating or contradicting evidence, the relationship between J.H. and S.E. or J.H. and Machado, the amount of time that passed between R.R.'s death and when the statement was made, or the "psychological and physical environment surrounding the making of the statement."[6] *LaGrand*, 153 Ariz. at 27-28, 734 P.2d at 569-70. Accordingly, because Machado has failed to establish that J.H.'s statements to S.E. fell within the statement against interest hearsay exception or exhibited any traditional markers of reliability, the trial court did not err in refusing to admit the evidence based on *Chambers*. Because no error occurred, fundamental or otherwise, Machado's argument fails. *See Henderson,* 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

3) L.L.

¶73 Machado next argues the trial court erred by precluding L.L.'s testimony that J.H. grew increasingly aggressive and began drinking excessively in the three months following R.R.'s death. Machado contends the evidence was relevant because it "arguably demonstrates the manifestations of his guilty conscience and makes it more likely that he committed the murder" and the probative value outweighed any risk of unfair prejudice.[7]

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[6]Below, Machado sought to have S.E.'s testimony recorded as an offer of proof which may have enabled us to review the record more thoroughly. The state then suggested using the argument on the issue to serve as the offer of proof. Machado did not object to this procedure and confirmed that he had "told [the court] what [S.E.] was going to say."

[7] Machado contends the law of the case doctrine would normally prohibit L.L.'s testimony because this court previously ruled this testimony was cumulative to other evidence of J.H.'s violence towards women, *see Machado*, 224 Ariz. 343, ¶ 28, 230 P.3d at 1170, but a change of circumstance occurred because he offered

¶74 At trial, Machado presented evidence showing that: (1) J.H. had threatened to shoot R.R. shortly before the murder based on her involvement in a dispute between his then-girlfriend and himself; (2) J.H. may have had access to the type of firearm likely used to kill R.R.; (3) in 2000, J.H. pointed an "older-looking . . . revolver" at his then-girlfriend and her sister outside their home and forced them into his car; (4) in 2005, J.H. forced a former girlfriend into his car at gunpoint[8] and told her he had killed before and would kill again; (5) J.H. provided detectives and his former girlfriend with multiple alibis, none of which were substantiated; (6) several former girlfriends of J.H. testified that he had a violent personality and a temper, forcing one's parents to obtain a restraining order and another to leave the state; (7) in 2001, J.H. attempted to block another car from driving down a road and pointed a "revolver" at the driver and passenger, and then chased the car through residential streets until it eventually was pulled over after running a red light; (8) following R.R.'s death, J.H. kept a picture of her in his bedroom and referred to her as his "higher power" and "angel"; and (9) J.H. was initially the only suspect in the case, and police obtained a warrant for a voice sample to allow R.R.'s mother to identify the anonymous caller.[9]

¶75 Additional testimony from L.L. that J.H. had grown increasingly aggressive and began drinking more in the months following R.R.'s death was cumulative to the evidence Machado already had presented on J.H.'s culpability, particularly his multiple alibis for the night of the murder and his fascination with R.R. following her death. *See* Ariz. R. Evid. 403. And hearing about

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this evidence at the second trial to show J.H.'s "guilty conscience." Even assuming, without deciding, that this is a change in relevant circumstances and that law of the case does not apply, we affirm the trial court's ruling on other grounds and need not address this argument.

[8]Police later determined the gun had been modified so it could not fire.

[9]As discussed above, the voice lineup never was conducted and the voice sample ultimately was lost.

J.H.'s escalation in aggression and drinking, in addition to the reported incidents of violence against his former girlfriends and behavior, would have been unduly prejudicial to the state's case. *See Machado*, 224 Ariz. 343, ¶ 18, 230 P.3d at 1168; *see also* Ariz. R. Evid. 403.

¶76 Moreover, without any link between J.H.'s behavior and R.R.'s death other than the timing, the testimony created only "[v]ague grounds of suspicion." *Fulminante*, 161 Ariz. at 252, 778 P.2d at 617; *see also Bigger*, 227 Ariz. 196, ¶ 43, 254 P.3d at 1155. It did not tend to create a reasonable doubt as to Machado's guilt and therefore was not relevant. *See Machado*, 224 Ariz. 343, ¶ 14, 230 P.3d at 1167. Thus, because the testimony was not relevant and was cumulative and unduly prejudicial, the trial court did not abuse its discretion in excluding it. *See Bigger*, 227 Ariz. 196, ¶¶ 41, 43, 254 P.3d at 1154-55; *see also* Ariz. R. Evid. 401, 403.

4) K.H.

¶77 Machado also argues the trial court erred by precluding K.H. "from testifying about [Machado's] denial of his alleged confession to killing [R.R.]." He appears to contend that the preclusion violated his constitutional right to present a complete defense under *Chambers*. Machado did not object on these grounds below, and we therefore review for fundamental, prejudicial error. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683-84.

¶78 Machado does not explain what hearsay exception this testimony would fall under, or how this testimony bears the "circumstantial hallmarks of reliability." *Machado*, 224 Ariz. 343, ¶ 13, 230 P.3d at 1166-67; *see also Chambers*, 410 U.S. at 302. And this particular type of testimony—exculpatory statements by defendants—has repeatedly been held to be inadmissible "because [it] lack[s] the reliability of statements against interest." *State v. Anaya*, 170 Ariz. 436, 441-42, 825 P.2d 961, 966-67 (App. 1991); *see also State v. Smith*, 138 Ariz. 79, 84, 673 P.2d 17, 22 (1983) (no error in precluding defendant's exculpatory statement made to police officer); *State v. Wooten*, 193 Ariz. 357, ¶¶ 46-48, 972 P.2d 993, 1002-03 (App. 1998) (no error in precluding hearsay statement that defendant denied responsibility for crime); *State v. Barger*, 167 Ariz. 563, 565-67, 810 P.2d 191, 193-95 (App. 1990) ("self-serving hearsay"

did not fit into any hearsay exception and therefore inadmissible); *State v. Duffy*, 124 Ariz. 267, 275, 603 P.2d 538, 546 (App. 1979) (noting trustworthiness of "self-serving" statements is "highly suspect"). Machado has not cited any authority to the contrary, and his argument therefore fails.

Sentencing

¶79 Machado next argues the trial court abused its discretion by imposing an aggravated sentence because the state did not provide pretrial notice of an aggravating circumstance, that same factor was not found by a jury, and the court imposed the same term of imprisonment for his manslaughter conviction as had been imposed on his second-degree murder conviction following his first trial.

¶80 After the jury returned its verdict, Machado stipulated to R.R.'s age at the time of the murder as an aggravating factor and agreed to waive a jury trial on emotional harm as an aggravating factor. In reliance on the evidence produced at trial, the court found emotional harm to R.R.'s mother beyond a reasonable doubt and set the sentencing hearing.

¶81 Days before the sentencing hearing, the parties received a presentence report that included Machado's criminal history; the report showed a number of convictions and a term of probation that had been revoked. At sentencing, the state argued for an aggravated sentence based on the previously determined aggravating factors in addition to the criminal behavior in the report. The court accepted as aggravating factors R.R.'s age, emotional harm, and Machado's "behavior after October of 2000, that is having been convicted of an offense for which [he had been] placed on probation, for which [he] did not successfully complete probation." Finding that the aggravating factors outweighed the mitigating factors, the court sentenced him to an aggravated prison term of eighteen years, which the court acknowledged was the same sentence he had received following his first trial.

Aggravating Circumstances

¶82 Machado argues his sentence is illegal because the state failed to provide pretrial notice of its intent to allege his post-offense behavior as an aggravating factor in violation of his due process rights and Rule 13.5, Ariz. R. Crim. P., and it was not determined by the jury as required by the Sixth Amendment. We review challenges to the legality of a sentence de novo. *State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005).

¶83 Machado did not raise the state's failure to provide pretrial notice or the lack of a jury determination when he objected to the trial court's consideration of his post-offense criminal behavior. Because he did not object on either basis below, we review for fundamental, prejudicial error. *See State v. Dixon*, 231 Ariz. 319, ¶ 12, 294 P.3d 157, 159 (App. 2013). "The imposition of an illegal sentence is fundamental error." *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007). But "[t]o be entitled to relief for fundamental error, [a defendant] must also demonstrate that he suffered prejudice as a result of that error." *State v. Molina*, 211 Ariz. 130, ¶ 21, 118 P.3d 1094, 1100 (App. 2005); *see also Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608.

¶84 Regarding the alleged defect in notice, even if we were to accept Machado's contention that the lack of pretrial notice was sentencing error, he does not explain how he suffered prejudice. Machado contends he was surprised by the state's allegation of his post-offense behavior at sentencing, especially in light of his agreement with the state "to limit the aggravating factors to the age of the victim and emotional harm to the family." However, the presentence report includes Machado's criminal history. *Cf. State v. Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d 947, 953 (App. 1998) (listing aggravating factors in presentencing memorandum sufficient for notice as a matter of due process). And he does not explain what evidence he would have presented at sentencing to counter this allegation if he had received pretrial notice and does not otherwise challenge the sufficiency of the evidence supporting the allegation. *See Molina*, 211 Ariz. 130, ¶ 22, 118 P.3d at 1100; *see also State v. Cropper*, 205 Ariz. 181, ¶ 15, 68 P.3d 407, 410 (2003) (noting failure to "allege that the delay prejudiced [defendant's] ability to contest" aggravating circumstance in capital case).

¶85 Further, the trial court was entitled to find sua sponte at sentencing any further aggravating factors supported by information contained in the presentence report.[10] *See State v. Marquez*, 127 Ariz. 3, 5-7, 617 P.2d 787, 789-91 (App. 1980); *see also State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). Because two aggravating factors already had been found, the court could have considered Machado's post-offense behavior at sentencing even without a pretrial allegation from the state. Consequently, Machado cannot demonstrate that he suffered prejudice as the result of any alleged defect in notice, and is not entitled to relief under fundamental error review. *See Molina*, 211 Ariz. 130, ¶¶ 22-23, 118 P.3d at 1100.

¶86 Regarding his claim that a jury determination was required on his post-offense behavior, it is well established that "once a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute." *Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d at 625. Here, Machado already had admitted R.R.'s age as an aggravating factor, and the trial court had found the additional factor of emotional harm after Machado waived a jury trial on that factor. The court therefore was entitled to find additional factors when exercising its discretion to impose an aggravated sentence. *See id.* Consequently, we find no error, fundamental or otherwise, resulted from the court's determination of this aggravating factor. *See id.* ¶ 27.

Length of Sentence

¶87 Machado further argues the trial court violated his due process right to fair sentencing procedures because "the court went out of its way to arrive at the same sentence" imposed during the first trial by considering his post-offense behavior as an aggravating factor but failing to consider his good behavior in prison, which he alleges was "the only evidence that represented a factual change between the first and second sentencing hearings."

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[10]Machado did not dispute the information contained in the presentence report below, and he does not challenge it on appeal.

¶88 "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). The court abuses its discretion only if it "act[s] arbitrarily or capriciously or fail[s] to adequately investigate the facts relevant to sentencing." *Id.* The court must consider fully all facts relevant to sentencing, but "the weight to be given any factor asserted in mitigation falls within [its] sound discretion," and we will not reweigh the factors found by the court. *State v. Vermuele*, 226 Ariz. 399, ¶¶ 15-16, 249 P.3d 1099, 1103 (App. 2011).

¶89 Here, the trial court considered all of the mitigating and aggravating evidence presented to it at the sentencing hearing. It specifically found Machado's "disruptive childhood," his "family and community support," his "age at the time of the offense," and his employment as mitigating factors. It also considered, but rejected, as a mitigating factor any good behavior while in prison. *See Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357 (court is not required to find mitigating circumstance after giving mitigating evidence "due consideration"). And after considering all the aggravating evidence—including the extensive evidence of the emotional harm to R.R.'s family and friends—the court found that the aggravating circumstances outweighed the mitigating circumstances. Consequently, Machado fails to show the court neglected its obligation to consider all the facts relevant to sentencing. *See Vermuele*, 226 Ariz. 399, ¶ 16, 249 P.3d at 1103.

¶90 Machado does not cite any authority for his proposition that the trial court violated his due process rights by refusing to impose a lesser sentence solely because he was convicted of a lesser crime on remand, or because the only new evidence at his second sentencing hearing was mitigating evidence. To the contrary, the court does not violate a defendant's due process rights by imposing the same sentence after conviction of a lesser crime on remand. *State v. Mincey*, 130 Ariz. 389, 413-14, 636 P.2d 637, 661-62 (1981); *State v. Towns*, 136 Ariz. 541, 542-43, 667 P.2d 242-43 (App. 1983). Moreover, the court does not need to compare the evidence supporting a defendant's previously imposed, vacated sentence to the evidence

presented at resentencing because the court is "sentencing anew." *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984). In fact, the court runs the risk of error by considering evidence presented during the previous sentencing hearing. *See State v. Smith*, 141 Ariz. 510, 511, 687 P.2d 1265, 1266 (1984) (concluding court committed error by relying on transcript of defendant's previous sentencing hearing when resentencing to death); *see also State v. Arnett*, 125 Ariz. 201, 203, 608 P.2d 778, 780 (1980) ("When defendant is to be resentenced . . . it would seem that the evidence and testimony should be as fresh as possible.")

¶91 Thus, Machado has failed to demonstrate the trial court abused its discretion in sentencing him to an aggravated prison term of eighteen years, and we will not disturb his sentence. *See Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357.

Disposition

¶92 For the foregoing reasons, we affirm Machado's conviction and sentence.