IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GUSTAV RAY BLAND,
Appellant.

No. 2 CA-CR 2014-0065
Filed February 25, 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NOT FOR PUBLICATION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. CR20121472
The Honorable Jane L. Eikleberry, Judge

AFFIRMED IN PART;
VACATED AND REMANDED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Gustav Bland was convicted after a jury trial of one count of aggravated assault with a deadly weapon/dangerous instrument, and one count of aggravated assault causing serious physical injury. The offenses arose from an altercation in which Bland brandished a weapon at A.S. and his father, M.S, and then shot M.S. Bland was sentenced to concurrent terms totaling fifteen years' imprisonment. He contends the trial court made several errors pertaining to a potential witness he met in jail. First, he argues the court improperly rejected his request to secure immunity for the witness or, alternatively, to require the witness to invoke his constitutional rights in the jury's presence. Second, he maintains the court improperly precluded an earlier statement by the witness. Finally, he contends the court erred in rejecting his "no duty to retreat" instruction. For the following reasons, we affirm Bland's convictions on both counts and the sentence as to count two, but vacate his sentence on count three[1] and remand for resentencing.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict. *See State v. Haight-Gyuro*, 218 Ariz. 356,

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[1]Bland was charged with five counts, but the state requested dismissal of one count before trial, and the jury acquitted him of two others.

¶ 2, 186 P.3d 33, 34 (App. 2008). In April 2012, Bland went to M.S.'s apartment. M.S.'s son, A.S., was there with M.S., and his other son, J.S. J.S. left shortly after Bland arrived.

¶3 Bland and A.S. had a disagreement that resulted in A.S. telling Bland to leave. As M.S. followed Bland out the door, arguing with him, Bland pulled a gun from his waistband and pointed it at M.S. A.S. then walked out of the apartment and Bland pointed the gun at him. M.S. punched Bland in the face, knocking him down. As M.S. was turning to walk away, Bland shot him in the back. Bland ran away when he heard police sirens, but was found nearby and arrested.

¶4 Bland was charged with attempted first degree murder and four counts of aggravated assault. He was convicted and sentenced as described above, and this timely appeal followed.

Statement of Defense Witness

¶5 Bland argues he was denied his constitutional right to present a complete defense because the trial court refused to order immunity for a defense witness.[2] We review a trial court's decision to admit evidence for an abuse of discretion. *See State v. McCurdy*, 216 Ariz. 567, ¶ 6, 169 P.3d 931, 935 (App. 2007). Constitutional

[2] Bland requested immunity from the state and judicial immunity if the state refused. On appeal, he focuses on immunity from the state, but also appears to argue the trial court should have granted judicial immunity, citing *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). He concedes, however, that *Smith* was abrogated in *United States v. Quinn*, 728 F.3d 243, 265 (3d Cir. 2013). More important, judicial immunity as recognized by *Smith* was not recognized by other circuits, *see id.* at 251-52, and is not recognized in Arizona, *see State v. Jeffers*, 135 Ariz. 404, 424, 661 P.2d 1105, 1125 (1983).

questions are reviewed de novo.[3] *See State v. McGill*, 213 Ariz. 147, ¶ 53, 140 P.3d 930, 942 (2006).

¶6 Pursuant to statute, the state has the authority and discretion to grant immunity. *See* A.R.S. § 13-4064 (immunity statute); *State v. Axley*, 132 Ariz. 383, 388, 646 P.2d 268, 273 (1982) (immunity a matter of prosecutorial discretion); *see also United States v. Quinn*, 728 F.3d 243, 253 (3d Cir. 2013). Although the state has no obligation to grant witness immunity, Arizona and federal courts recognize that due process may require the state to grant immunity to a defense witness if: (1) the defendant would otherwise be prevented from presenting clearly exculpatory evidence, or (2) the prosecutor engages in misconduct. *Axley*, 132 Ariz. at 388, 646 P.2d at 273; *see also Quinn*, 728 F.3d at 258, 262.

Witness Immunity to Present Clearly Exculpatory Evidence

¶7 Bland argues he was prevented from presenting clearly exculpatory evidence from A.E., whom he met in jail after his arrest. While Bland was looking at photographs related to the case, A.E. told Bland that he had been involved in the events before and after the shooting. Later, in a taped interview, A.E. told a defense investigator that he knew the victim and his sons because he had sold heroin to them and they owed him money. A.E. reported that on the night of the shooting, either the victim or one of his sons had called A.E. to say they had a truck to give him, but the owner was "causing problems" so A.E. needed to "come over and help . . . with him." A.E. said that when he arrived, J.S. met him in the back of the apartment complex and told A.E. to meet him at a nearby coffee shop, where J.S. showed A.E. a gun and asked him to hold it. Bland argues A.E.'s statement is exculpatory because it indicates there was a gun in M.S.'s apartment at the time of the shooting, and that

[3]Bland cites both the Arizona and United States Constitutions in his brief, but does not develop a separate argument regarding the Arizona Constitution. It is thus waived on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

"[Bland's] fears about the gravity of the situation when [A.S.] came out of the apartment to assist his father . . . were not unfounded."

¶8 In this context, clearly exculpatory evidence is that which would exonerate the defendant. *Quinn*, 728 F.3d at 262; *cf. State v. Montaño*, 204 Ariz. 413, ¶ 52, 65 P.3d 61, 72 (2003) (in context of *Brady*[4] violation, exculpatory evidence could have provided reasonable doubt). Testimony that is speculative, severely impeached by prior inconsistent statements or, even if believed would not exonerate the defendant, is not exculpatory. *Quinn*, 728 F.3d at 262. Additionally, testimony that is overwhelmingly undercut by the record lacks credibility and cannot be exculpatory. *Id.* at 263.

¶9 Here, A.E.'s statement was undermined by evidence in the record that J.S. was not present at the time of the shooting. J.S. told police that he was not there, his initial attempt to return was blocked by police, and he successfully returned to the apartment only after an officer told him that his father had been shot. At trial, M.S. testified that J.S. left the apartment before the shooting. An officer also testified that he telephoned J.S. to tell him about his father, and that it took J.S. twenty to thirty minutes to return to the scene. Additionally, neighbors did not mention seeing J.S. at the scene during or after the shooting, and police officers arrived within two minutes of the incident, in time to see Bland running away. No other witness placed J.S. outside the apartment or provided any evidence of an opportunity for him to retrieve a gun, call A.E., meet A.E. at the back of the apartment, and leave the scene in the presence of police.

¶10 Further, even if A.E.'s statements were not contradicted, they were not clearly exculpatory. To justify use of deadly physical force, the person must "believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force." A.R.S. § 13-405(A)(2). The question of belief is objective, based on whether

[4]*Brady v. Maryland*, 373 U.S. 83 (1963).

a reasonable person would believe physical force was necessary. *See State v. King*, 225 Ariz. 87, ¶¶ 11-12, 235 P.3d 240, 243 (2010); A.R.S. §§ 13-404(A), 13-405(A).

¶11 Bland knew a gun had previously been in the house but never testified he saw one the night of the shooting. Existence of a gun that Bland did not claim to see that night was irrelevant to Bland's state of mind. *Cf. State v. Fish*, 222 Ariz. 109, ¶ 37, 213 P.3d 258, 270-71 (App. 2009) (prior bad acts not relevant to defendant's state of mind regarding self-defense where defendant unaware of bad acts). For the same reason, the existence of a gun learned long after the events cannot corroborate Bland's knowledge at the time of the events. *Cf. State v. Turner*, 92 Ariz. 214, 220-21, 375 P.2d 567, 571 (1962) (later-discovered knife material evidence when defendant testified victim had knife in hand). A.E.'s statements about the gun were not clearly exculpatory.

Witness Immunity Due to Prosecutorial Misconduct

¶12 Bland also argues the prosecutor engaged in misconduct by withholding immunity.[5] In this context, prosecutorial misconduct occurs when the state takes action to interfere with judicial factfinding. *See State v. Axley*, 132 Ariz. 383, 388, 646 P.2d 268, 273 (1982) (no violation unless unavailability due to "'suggestion, procurement, or negligence of the government'"), *quoting State v. Stewart*, 131 Ariz. 407, 409, 641 P.2d 895, 897 (App. 1982); *Quinn*, 728 F.3d at 258 (misconduct requires deliberate actions by state). For example, *Axley* relies on *United States v. Morrison*, 535 F.2d 223, 225-26 (3d Cir. 1976), in which the prosecutor repeatedly warned the defense witness she could be charged for drug crimes and perjury for testifying, even surrounding her with law

[5] Bland asserts the prosecutor "misdirected the court's attention to incorrect facts," and cites to several statements made by the state in its briefs, but he does not explain the significance of those facts or further explain that argument. Thus, we decline to address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

enforcement the night before her testimony to remind her further. Unlike the witness in *Morrison*, Bland does not contend A.E. was intimidated or refused to testify at the suggestion of the state. Rather, A.E. did not testify because he made clear his intent to invoke the Fifth Amendment if he was asked more about the events.[6] *See Axley*, 132 Ariz. at 388, 646 P.2d at 273 (no prosecutorial misconduct where witness unavailable due to stated intention to invoke Fifth Amendment). The trial court did not err by denying Bland's motion to require the state to provide witness immunity.

Motion for New Trial Based on Witness Immunity

¶13 Bland also argues the trial court erred by denying his motion for new trial on the issue of witness immunity. We review the denial of a motion for new trial for an abuse of discretion. *State v. Neal*, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984). Bland does not provide any additional arguments in support of the motion for new trial. Rather, he argues the trial court erred by denying the motion based on its earlier findings regarding witness immunity. Because we find no error regarding that ruling, the trial court did not abuse its discretion by denying the motion for new trial.

Witness Invocation of Fifth Amendment

¶14 Bland argues in the alternative that the trial court erred by allowing A.E. to invoke the privilege out of the presence of the jury. We review a trial court's decision to excuse a witness asserting

[6]Bland also claims the state committed misconduct because it did not grant immunity even though it would not have charged A.E. with crimes because it believed the statement incredible. But he provides no authority for the argument that the state must provide immunity for a witness it believes is lying or risk committing prosecutorial misconduct. On the contrary, lack of credibility supports denial of immunity. *See Quinn*, 728 F.3d at 263.

the privilege for abuse of discretion.[7] *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 10, 42 P.3d 1177, 1181 (App. 2002).

¶15 Bland's argument invokes competing constitutional interests—his Sixth Amendment right to compel a witness to testify, and A.E.'s Fifth Amendment right against self-incrimination. *See id.* A party may call a witness who intends to invoke the Fifth Amendment, but the right is not absolute. *State v. McDaniel*, 136 Ariz. 188, 194, 665 P.2d 70, 76 (1983), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989). When a trial court has extensive knowledge of the case and determines that a witness could "legitimately refuse to answer essentially all relevant questions," then the court may excuse that witness from testifying. *McDaniel*, 136 Ariz. at 194, 665 P.2d at 76. A witness's refusal is legitimate when he or she demonstrates a reasonable ground to apprehend danger from testifying. *Rosas-Hernandez*, 202 Ariz. 212, ¶ 11, 42 P.3d at 1181.

¶16 Bland argues A.E. should have testified because the entire context of his statements was not incriminating. He argues that everything in A.E.'s statement up to the point he took the gun from J.S. would not have been incriminating, but anything after the gun would have been because A.E. was a prohibited possessor. We disagree. Had A.E. testified consistent with his statement to the investigator, the relevant testimony would have been that A.E. went to the apartment as part of a plan to rob Bland, and that J.S. then asked A.E. to hold a gun for him. These statements, at the very least, involve J.S. in an attempted robbery.[8] *See State v. Maldonado*, 181

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[7]Although he claims his due process rights were violated, he does not adequately develop a separate constitutional argument and therefore has waived any such argument on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

[8]Additionally, testimony that would have limited A.E.'s status to an observer rather than a participant would have stood on inadmissible hearsay statements, such as the plans to take the truck, and J.S.'s asking A.E. if he could take the gun.

Ariz. 208, 211, 889 P.2d 1, 4 (App. 1994). The trial court could find A.E. had a reasonable ground to apprehend danger from testifying. *Rosas-Hernandez*, 202 Ariz. 212, ¶ 11, 42 P.3d at 1181. It did not err by requiring A.E. to invoke the Fifth Amendment out of the presence of the jury.

Witness's Prior Statement

¶17 Bland next argues the trial court erred when it precluded the admission of A.E.'s statement to the defense investigator.[9] He argues, as he did below, that it was admissible as a statement against interest pursuant to Rule 804(b)(3), Ariz. R. Evid. We review the court's decision for abuse of discretion. *See State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003).

¶18 Rule 804(b)(3) allows admission of hearsay evidence when an unavailable witness makes a statement that is contrary to that witness's interest and "is supported by corroborating circumstances that clearly indicate its trustworthiness." Assuming the statement was contrary to A.E.'s interest, we focus on other factors indicating trustworthiness. In *State v. LaGrand*, 153 Ariz. 21, 27-28, 734 P.2d 563, 569-70 (1987), the Arizona Supreme Court reviewed seven possible factors, noting it would be impossible to articulate a complete list. The first and most important factor in *LaGrand* was a review of corroborating and contradictory evidence. *Id.* at 27, 734 P.2d at 569. Other factors included the relationship between the declarant and the listener, relationship between declarant and defendant, number of times the statement was made, amount of time between the event and the statement, whether the declarant would benefit from the statement, and the environment in which the statement was made. *Id.* at 27-28, 734 P.2d at 569-70.

[9] Bland briefly makes a broad due process argument but ultimately relies on the rules of evidence without developing a separate constitutional argument. We decline to address the constitutional argument on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶19 Bland relies entirely on corroborating facts, particularly A.E.'s description of the meeting location, A.E.'s statement that J.S. told him he had Bland's truck key but could not get the truck yet, and J.S.'s statement to the defense investigator that he met A.E. for the first time that night.[10] The first fact is not difficult to corroborate, and the rest is contradicted by other facts. By the time police were present, A.S. had the truck key—he told an officer he had found it on the couch. Further, J.S. never said he knew A.E. before the shooting, which is necessary to corroborate A.E.'s statement. Additionally, as noted above, the entire statement is contradicted by repeated testimony that J.S. was no longer at the apartment when his father was shot.

¶20 A.E. and Bland's relationship also weighs against trustworthiness. *Id.* They met because they were in the same "pod" in jail, and A.E. alleged that he started talking to Bland when he saw Bland looking at photographs. Bland had the opportunity to provide A.E. with the facts necessary to make a statement that was somewhat corroborated, by describing his truck or the apartment complex.

¶21 Two factors weigh in favor of trustworthiness—the relationship between A.E. and the defense investigator and the fact that A.E. does not appear to benefit from the statement. *See id.* Other factors have little impact on the calculus. A.E. only made the statement once so inconsistencies cannot be tested. Additionally, several months passed before he made the statement, and the length of time is inversely proportional to the statement's trustworthiness. *Id.*

¶22 Ultimately, the contradictory facts and lack of corroborating facts, coupled with the relationship between A.E. and

[10]J.S. immediately corrected himself and said it was the next morning. J.S. explained that A.E. knocked on the door of the apartment the morning after the shooting and asked him what had happened. J.S.'s testimony at trial was consistent with the correction.

Bland, support the trial court's conclusion that the hearsay statements by A.E. were insufficiently trustworthy to be admissible under Rule 804(b)(3). *See id.*; *see also State v. Tankersley*, 191 Ariz. 359, ¶ 47, 956 P.2d 486, 497-98 (1998) (statement with no corroborating evidence, made only once, and from which declarant would benefit did not meet requirements of Rule 804(b)(3)), *abrogated on other grounds by State v. Machado*, 226 Ariz. 281, 246 P.3d 632 (2011). The trial court did not err by denying admission of A.E.'s statement.

Jury Instructions

¶23 Bland argues the court erred by denying his request for a "no duty to retreat" jury instruction.[11] Before trial, Bland argued he was entitled to an instruction that he had no duty to retreat, but the trial court denied the request because he was a prohibited possessor, and was therefore engaged in an unlawful act by possessing the gun. Bland repeats his argument on appeal.

¶24 We review de novo whether the jury instructions correctly stated the law. *State v. Payne*, 233 Ariz. 484, ¶ 136, 314 P.3d 1239, 1270 (2013). When interpreting a statute, our goal is to give effect to the legislature's intent, and we need not look beyond the plain language of the statute unless it is unclear or the result would be absurd. *See State v. Estrada*, 201 Ariz. 247, ¶¶ 16-17, 34 P.3d 356, 360 (2001). Section 13-405(B), A.R.S. states, "A person has no duty to retreat before threatening or using deadly physical force . . . if the person is in a place where the person may legally be and is not engaged in an unlawful act." Bland's status as a prohibited possessor meant that he was engaged in an unlawful act when he went to the apartment with a firearm; therefore, the right not to retreat was unavailable to him.

[11]Bland states he was denied his Fourteenth Amendment due process right to a fair trial, but does not develop a constitutional argument with citations to case law. Any separate constitutional argument is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶25 Bland relies on the crime prevention justification statute, A.R.S. § 13-411, to argue that "engaged in an unlawful act" would not apply to violation of the prohibited possessor statute. But § 13-411 does not apply here because it is not necessary to incorporate other statutes where the plain language of the applicable statute is neither unclear nor the resulting application absurd. *See State v. Dixon*, 231 Ariz. 319, ¶¶ 10-11, 294 P.3d 157, 159 (App. 2013).

¶26 And even if we assume the statute is unclear, Bland's reliance on the crime prevention statute fails. He argues that because § 13-411(A) does not include the prohibition on being "engaged in an unlawful act," it would be "a difficult proposition to argue that a prohibited possessor had a duty [to] retreat pursuant to A.R.S. § 13-405(B) when he was defending against one of the enumerated crimes in A.R.S. § 13-411(A)." He thus appears to argue the two justification statutes are inconsistent.

¶27 The two statutes, however, have different applications. Section 13-411 may only be invoked when there is evidence the defendant used force to prevent one in a list of crimes, including aggravated assault. And § 13-411 provides broader protection to a defendant who falls within its scope. *See State v. Korzep*, 165 Ariz. 490, 492, 799 P.2d 831, 833 (1990) (section 13-411 less limiting than other defenses). Further, "the only limitation on the use of deadly force under § 13-411 is the reasonableness of the response," whereas "the other justification defenses require an immediate threat to personal safety before deadly force may be used." *Id.* The two statutes are not inconsistent; rather, they have different purposes. Bland does not argue § 13-411 would apply here, and his interpretation of § 13-405 is not tenable. The trial court did not err by denying the instruction regarding Bland's duty to retreat.

Sentencing Error

¶28 In our review of the record, we found a sentencing error in count three, aggravated assault with a deadly weapon/dangerous

instrument.[12] We will not ignore fundamental error when we find it, and the imposition of an illegal sentence is fundamental, reversible error. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650-51 (App. 2007).

¶29 Bland was sentenced as a category two repetitive offender pursuant to A.R.S. § 13-703(B)(2), and was not eligible for a sentence less than the presumptive pursuant to A.R.S. § 13-708(A), because he was on probation at the time of the offense. The trial court found as an aggravating factor "the enormous amount of physical and emotional harm caused to [M.S.]." It listed no further aggravating factors.[13] With only one aggravating factor, the prison term imposed could not exceed thirteen years. *See* A.R.S. § 13-703(F), (I). The court's sentence of fifteen years was illegal. *See State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995) ("The failure to impose a sentence in conformity with mandatory sentencing statutes makes the resulting sentence illegal.").

¶30 In supplemental briefs on this issue, both Bland and the state request that this court modify the sentence to the maximum term of thirteen years. Although the parties cite cases in which the court of appeals has done so, *see State v. Goudin*, 156 Ariz. 337, 339, 751 P.2d 997, 999 (App. 1988), neither cites a case in which the court of appeals exercised sentencing discretion as would be required here. Specifically, while the trial court was required to impose no less than the presumptive sentence of 6.5 years, it would have been required to exercise its discretion to determine the weight to give to the single permissible aggravating factor it identified. A.R.S.

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[12] We ordered, and both parties submitted supplemental briefing on this issue.

[13] Bland contends there was just one aggravating factor, while the state contends it could be split into two—physical harm and emotional harm. The state concedes, however, that the physical harm was an element of the offense, and therefore could not be used as a separate aggravating factor. *See* A.R.S. § 13-701(D)(1). Either interpretation leaves only one aggravating factor.

§§ 13-703(F), (I); 13-708(A). Although the parties apparently assume that the trial court would have imposed no less than the maximum sentence with only one aggravating factor, for this court to accept that assumption would invade the discretion that belongs exclusively with the trial court. *See State v. Pena*, 209 Ariz. 503, ¶¶ 23-26, 104 P.3d 873, 879 (App. 2005) ("The exercise of sentencing discretion is the trial judge's, not ours."). Therefore, we must remand for resentencing on count three.

Disposition

¶31 For the foregoing reasons, we affirm the convictions as to both counts and the sentence as to count two. We vacate the sentence on count three and remand for resentencing.