

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSE ANTONIO LOPEZ,
Appellant.

No. 2 CA-CR 2014-0176
Filed December 7, 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NOT FOR PUBLICATION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 Pinal County
No. CR200701110
The Honorable Boyd T. Johnson, Judge

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Following a jury trial, appellant Jose Lopez was convicted of child abuse and first-degree murder and sentenced to consecutive terms of seventeen years' and natural life imprisonment. On appeal, he raises a number of issues. Because we find the trial court committed reversible error by failing to instruct the jury on lesser included offenses of child abuse that were supported by the evidence, we reverse the convictions and remand for a new trial.

Factual and Procedural Background

¶2 The victim was a twenty-one-month-old girl who died shortly after being taken to a hospital on July 4, 2007, by Lopez and her mother. Lopez was living with the child's mother at the time, and he was caring for the victim when she suffered the blunt-force head injuries that caused her death.

¶3 At trial, Lopez testified that the victim had a tantrum and had slammed the back of her head onto the floor the previous day, July 3. Lopez was concerned for the victim at the time, and he called the child's mother to ask whether to seek medical attention for her. The victim seemed normal to her mother, however, so no action was taken. The next day, according to Lopez, he slipped and fell on the victim when he was attempting to spank her for refusing to take a nap, which then "crushed" her against a wooden nightstand. Lopez called the victim's mother at work soon thereafter, and the two then took the child to the hospital.

¶4 According to testimony offered by several physicians, Lopez's explanation for the child's injuries was unlikely. The trial court refused his request for instructions on lesser included offenses of child abuse. Lopez then absconded from trial, and the court

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issued a bench warrant for his arrest. The jury convicted him in absentia of both crimes with which he was charged: intentional or knowing child abuse and first-degree felony murder. He was apprehended over a year later.

Jurisdiction

¶5 Lopez’s absence from the conclusion of trial “prevent[ed] sentencing from occurring within ninety days after conviction.” A.R.S. § 13-4033(C). However, this court has held that § 13-4033(C), under which an absconding defendant waives his right to appeal a conviction, cannot apply unless the defendant has been “informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days.” *State v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011). We have reviewed the record and found no evidence that the trial court provided Lopez any such admonition. Accordingly, we conclude his absence did not waive his right to appeal. We therefore agree with the state that we have jurisdiction of this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1) and (4).

Child Abuse Instructions

¶6 Lopez first challenges the trial court’s refusal to provide any instructions on lesser included offenses of child abuse. The state charged Lopez with intentional or knowing child abuse under circumstances likely to result in serious physical injury, a class two felony offense, pursuant to A.R.S. § 13-3623(A)(1).

¶7 Before trial, Lopez disclosed defenses of accident or lack of intent. He later filed a written request for jury instructions that implicitly referred to the Revised Arizona Jury Instructions (RAJI) published by the State Bar of Arizona. Specifically, he requested the “Standard Criminal Jury Instruction” number twenty-two entitled “Lesser-Included Offense,” as well as “Statutory Jury Instructions” defining “Knowingly” and “Recklessly.” At the conference for settling instructions, he clarified that he was requesting instructions on the lesser included offenses of reckless or negligent child abuse under § 13-3623(A)(2) and (3), respectively, or child abuse under

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circumstances not likely to create a risk of serious physical injury, pursuant to § 13-3623(B).

¶8 The state objected to the proposed instructions, arguing the medical testimony refuted Lopez’s account of how the victim’s injuries occurred. The state also maintained that, based on all the evidence presented, a reasonable jury could find only that he had either committed intentional or knowing child abuse or a non-criminal accident. The trial court sustained the objection and denied the request.

¶9 Lopez now contends the trial court committed reversible error by refusing to instruct the jury “on lesser-included mental states on the Child Abuse charge,” specifically reckless and negligent child abuse pursuant to § 13-3623(A)(2) and (3).¹ Even though he submitted incomplete proposed instructions in writing to the court, Lopez presented more than enough detail in his written and oral requests to preserve the issue for appeal under our recent precedent of *State v. Vassell*, 238 Ariz. 281, ¶ 18, 359 P.3d 1025, 1029-30 (App. 2015). The state does not dispute that the issue was preserved below. In addition, the trial court did not reject the instructions due to Lopez’s failure to comply with procedural rules, but instead rejected them for a lack of evidentiary support. *Cf. State v. Geeslin*, 223 Ariz. 553, ¶¶ 5-10, 225 P.3d 1129, 1130-31 (2010) (finding appellate review available when court rejected request on merits). We therefore apply a harmless-error standard of appellate review to this claim of alleged error. *See State v. Valverde*, 220 Ariz. 582, ¶¶ 9, 11, 208 P.3d 233, 235, 236 (2009).

¶10 When properly requested, a trial court must provide jury instructions and verdict forms for all necessarily included offenses. *See Ariz. R. Crim. P. 23.3; State v. Lua*, 237 Ariz. 301, ¶ 5, 350 P.3d 805, 807 (2015). An offense is necessarily included if (1) it is a lesser included offense of the crime charged and (2) the evidence supports an instruction on the lesser offense. *See Geeslin*, 223 Ariz.

¹Because he has abandoned on appeal his request for an instruction pursuant to § 13-3623(B), we do not address that issue. *See State v. Barraza*, 209 Ariz. 441, ¶ 20, 104 P.3d 172, 178 (App. 2005).

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553, ¶ 7, 225 P.3d at 1130; *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006). For evidence to be sufficient in this context, the evidence must allow a jury to reasonably find (a) the state failed to prove an element of the greater offense and (b) the defendant committed only the lesser. *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151. In other words, “[we] must examine whether the jury could rationally fail to find the distinguishing element of the greater offense.” *State v. Delahanty*, 226 Ariz. 502, ¶ 23, 250 P.3d 1131, 1136 (2011), quoting *State v. Bearup*, 221 Ariz. 163, ¶ 23, 211 P.3d 684, 689 (2009) (alteration in *Delahanty*).

¶11 On appeal, the state does not dispute that reckless and negligent child abuse are lesser included offenses of intentional or knowing child abuse. See A.R.S. §§ 13-105(10), 13-202(C), 13-3623(A), (B); *State v. Payne*, 233 Ariz. 484, ¶ 71, 314 P.3d 1239, 1261 (2013); *State v. Bay*, 150 Ariz. 112, 117, 722 P.2d 280, 285 (1986). Intentional or knowing child abuse under § 13-3623(A)(1), the class two felony, is distinguished by an intent to injure a child or an awareness or belief that the child will be injured or endangered. See § 13-105(10)(a), (b); *Payne*, 233 Ariz. 484, ¶¶ 69-71, 314 P.3d at 1260-61. Reckless child abuse, a class three felony, occurs when a person consciously disregards a substantial and unjustifiable risk of injury or endangerment. See §§ 13-105(10)(c), 13-3623(A)(2). Negligent child abuse, a class four felony, results when a person fails to perceive such a risk. See §§ 13-105(10)(d), 13-3623(A)(3).

¶12 As the state did below, it claims on appeal that the medical evidence demonstrated the victim’s injuries “could not have been the result of mere reckless or criminal negligent conduct.” Therefore, it contends that the jury could not have conceivably found that the state failed to prove an element of the greater offense. The record, however, does not support this assertion. Nor does the record support the state’s contention that only the greater *mens rea* could be found from the evidence.

¶13 Lopez testified he did not intentionally or knowingly injure the victim. He claimed instead that on July 4, 2007, he fell on her while spanking her for not going down for a nap. By his account, he slipped when the victim lunged away from him. His

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200-pound body then pushed the victim into a nearby nightstand and effectively “crushed” her.

¶14 This testimony was consistent with the expert opinion offered by Dr. Ronald Salik, a pediatric emergency room physician called by the defense. He testified that the full force of Lopez’s weight falling on the victim and striking her head against the nightstand was a possible explanation for her injuries. He further emphasized that treating physicians are not qualified to determine the instrumentality causing the injury or whether it was intentional or accidental. Salik opined that the fatal injuries could have been caused by one blow or multiple blows. He further stated that it was possible the victim had suffered a small fracture from an earlier fall that became aggravated with the later incident.

¶15 Contrary to the state’s suggestion, none of the three other witnesses who testified on the topic of medical causation refuted Lopez’s testimony. Dr. Octavio Vidal, the treating emergency room physician, testified it was “possible . . . but not probable” that a 200-pound person falling on a child could produce the “massive force” necessary to inflict the victim’s head injuries. Vidal specifically doubted such an account because he believed it would not explain all the victim’s injuries he had observed. Yet one of those injuries—a liver laceration—was later found to be in the process of healing, meaning it had been sustained some weeks earlier. Thus, a jury could conclude the liver injury did not occur at the same time as the head injuries, as the treating physicians had assumed. And although Vidal noted bruises on other parts of the victim’s body, none were observed during the victim’s autopsy.

¶16 Dr. Sandra Aviles, a treating pediatric intensivist, testified that it did not appear from the victim’s injuries that she had been struck more than once. In Aviles’s opinion, a scenario such as the one described by Lopez would “[p]robably not” have produced the victim’s head injuries, but she acknowledged such injuries can result from “a significant fall” or from being “pushed or slammed forcefully onto . . . or against a surface.”

¶17 The medical examiner and forensic pathologist, Dr. Vladimir Shvart, agreed it was possible that the victim’s fatal head

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injuries had resulted from one blow, although he too believed it to be unlikely. He further testified that those injuries “could be” accounted for “if [the victim] would be forced [into] the nightstand with additional force,” as might happen with a 200-pound person falling on her as she struck her head. Shvart also emphasized that he could not determine whether an injury was intentionally caused or accidental.

¶18 In sum, the record shows that the distinguishing element of intent or awareness of the risk of injury was placed in dispute by Lopez’s testimony. See §§ 13-105(10)(a), (b), 13-3623(A)(1) through (3); *State v. Celaya*, 135 Ariz. 248, 252, 660 P.2d 849, 853 (1983). The record contains a measure of conflict and uncertainty in the medical evidence about how the victim’s injuries occurred and whether they could have been unintentional, as Lopez claimed. The jury therefore reasonably could have found that the state failed to prove beyond a reasonable doubt the greater child abuse offense. See *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151.

¶19 The jury also could have found that Lopez committed a lesser offense. See *id.* In *State v. Dugan*, our supreme court determined that a lesser included offense instruction is required when conflicting evidence could lead the jury to accept portions of a defendant’s testimony and reject others. 125 Ariz. 194, 196, 608 P.2d 771, 773 (1980). In so ruling, our high court took guidance from federal courts applying an analogous rule of criminal procedure regarding lesser offenses. *Id.* at 195, 608 P.2d at 772. Under this approach,

[t]he jury is not confined in its findings to matters that are directly set forth in testimony but may base an inference of [a] lesser offense on a “reconstruction that is fairly inferable” from the evidence, gleaned perhaps by putting together some items from one witness, some from another, and some from the jury’s own experience and sense of probabilities.

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United States v. Huff, 442 F.2d 885, 890 (D.C. Cir. 1971), quoting *Belton v. United States*, 382 F.2d 150, 156 (D.C. Cir. 1967). Our supreme court again followed these principles in *Wall*. There, the court held an instruction on a lesser included offense was required even though the defendant had denied having any knowledge of the greater crime. 212 Ariz. 1, ¶¶ 5-7, 30-31, 126 P.3d at 149, 153.

¶20 Here, as in *Dugan* and *Wall*, the jury could have believed part of Lopez’s story and still found that he committed a lesser form of child abuse. On the one hand, Lopez testified that he loved the victim and was an excellent stay-at-home father, he denied that he was angry with her when he attempted to spank her, and he characterized her death as an unforeseeable accident that “wasn’t different at all” in terms of the discipline he exercised, except for the fact that the victim lunged away from him as “she had never done . . . before.” On the other hand, the jury heard admissions from Lopez that the twenty-one-month-old victim sometimes angered him by whining, particularly by “overreacting” to his discipline. The jury also heard testimony that the victim had slammed her own head into the floor the previous day during a tantrum after Lopez took her lollipop away, which possibly resulted in a small skull fracture. This episode alarmed Lopez to the point that he consulted with the victim’s mother about taking the child to the hospital. Moreover, Lopez admitted he had spanked the victim “excessively” and “hard, not like I normally do” during the later incident in which she suffered her fatal trauma. From such evidence, the jury reasonably could have concluded, given Lopez’s size and apparent anger, as well as the victim’s young age and special vulnerability, that he acted recklessly or with criminal negligence when he attempted to spank the victim as he did, because he disregarded or failed to perceive the substantial and unjustified risk of injuring the child in so doing.

¶21 The state disputes this conclusion, arguing that Lopez presented an all-or-nothing “accident” defense and that the record contains nothing to support a lesser mental state beyond mere speculation. To support this contention, the state asserted at oral argument that the jury was limited to accepting or rejecting Lopez’s testimony about the episode, with “no middle ground” available.

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This position is undermined by *Wall*, which clarifies that a defendant is entitled to an instruction even on an interpretation of the evidence that is inconsistent with his statements or his all-or-nothing defense. *See* 212 Ariz. 1, ¶¶ 4-7, 30-31, 126 P.3d at 149, 153. The state's brief also asserts that lesser included offense instructions were inappropriate because Lopez "did not unequivocally state that he acted recklessly or with criminal negligence." At oral argument, however, the state conceded that mental states are typically inferred from circumstantial evidence, *see State v. Noriega*, 187 Ariz. 282, 286, 928 P.2d 706, 710 (App. 1996), and, as noted above, "[t]he jury is not confined in its findings to matters that are directly set forth in testimony." *Huff*, 442 F.2d at 890.

¶22 A jury may draw upon its common sense and experience when deciding a case. *State v. Aguilar*, 169 Ariz. 180, 182, 818 P.2d 165, 167 (App. 1991). Such experience might suggest that, under normal circumstances, a toddler under two years old lunging away from a 200-pound man would not cause that man to fall on the child. Hence, the jury could have drawn a reasonable, non-speculative inference that Lopez caused the victim's injuries by being angry with her and making irresponsible decisions concerning her safety. Quoting § 13-3623(A), the state countered at oral argument that the only alternative to a finding of guilt on the greater offense would be a finding that the episode was a non-criminal accident, because Lopez's description of events gave him no reason to believe he was acting "[u]nder circumstances likely to produce death or serious physical injury." But such a showing was not required for the instructions to issue. Our supreme court has held that no *mens rea* requirement applies to the "circumstances" clause of § 13-3623(A). *Payne*, 233 Ariz. 484, ¶¶ 69-71, 314 P.3d at 1260-61. The circumstances here objectively demonstrated that death or serious physical injury was likely to result from the defendant's conduct, and the record would allow a finding of recklessness or negligence with respect to the risk of physical injury or endangerment.

¶23 Despite the state's suggestion, this is not a situation where the only basis for a lesser included instruction would have

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been the theoretical possibility of the jury disbelieving the state's evidence. *See Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151. As noted, Lopez's testimony expressly denied that he intended to injure the victim or that he had reason to believe she would suffer an injury. He also presented an account of the incident that could be consistent with expert medical testimony. The present case is therefore unlike those in which courts typically find overwhelming evidence of a culpable mental state. *Cf. Delahanty*, 226 Ariz. 502, ¶¶ 25-27, 250 P.3d at 1136 (defendant shot police officer multiple times after stating he would "shoot to kill when he got pulled over"); *State v. Womble*, 225 Ariz. 91, ¶¶ 21-22, 235 P.3d 244, 251 (2010) (defendant planned murder for weeks and told therapist of plan to kill).

¶24 In fact, the trial court initially recognized that instructions on lesser included offenses appeared to be supported by the evidence, asking the parties whether the instructions should be given sua sponte. To the extent the question of evidentiary support thus appeared to be a close one, the instructions should have been given, "for it is the jury's exclusive province to assess the weight and credibility of evidence." *State v. Bernstein*, 237 Ariz. 226, ¶ 18, 349 P.3d 200, 204 (2015). "While [the] defendant's testimony in the case before us is not the most credible story that has passed before our eyes, a jury could believe it," and it cannot be said, as a matter of law, that the question of intentional or knowing child abuse was the only one that should have been submitted to the jury. *State v. Plew*, 155 Ariz. 44, 50, 745 P.2d 102, 108 (1987).

¶25 With Lopez having discharged his burden of showing error, *see Geeslin*, 223 Ariz. 553, ¶ 5, 225 P.3d at 1130, the state carries the burden on appeal of establishing, beyond a reasonable doubt, that the failure to instruct the jury did not affect the verdicts. *See Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236. The state does not expressly argue in its answering brief that the error here was harmless, nor would the record support such a contention, for the reasons already discussed. The state charged Lopez with intentional or knowing child abuse pursuant to § 13-3623(A)(1) because that crime served as the predicate felony for the first-degree murder charge in count two of the indictment. *See* A.R.S. § 13-1105(A)(2). The lesser included child abuse offenses would not serve as

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predicate offenses for a first-degree murder conviction. *See* §§ 13-1105(A)(2), 13-3623(A)(2), (3). Thus, when the prosecutor objected to the proposed instructions, she told the trial court, “[I]f you give a lesser, there is certainly the chance that it’s going to completely disembowel my case.”

¶26 “The rule requiring instruction on lesser-included offenses is designed to prevent a jury from convicting a defendant of a crime, even if all of its elements have not been proved, simply because the jury believes the defendant committed some crime.” *Wall*, 212 Ariz. 1, ¶ 16, 126 P.3d at 151. As Lopez points out, the jury submitted multiple questions to the trial court concerning the final instructions, and the jury indicated at one point that it might have been deadlocked.² On this record, we cannot conclude the lack of instructions on the lesser included offenses had no effect on the verdicts. We therefore must reverse the convictions and remand for a new trial.

Other Issues

¶27 Given the likelihood that certain non-trivial issues raised on appeal will again present themselves on remand, we next address several of Lopez’s additional contentions.

Duplicity

¶28 A duplicitous indictment or charge—that is, one that alleges two or more offenses in a single count—is subject to remedial measures in the trial court because it might impair the notice given to the defendant, hamper any future pleading of double jeopardy, and risk a nonunanimous verdict. *See State v. Delgado*, 232 Ariz. 182, ¶¶ 18-19, 303 P.3d 76, 82 (App. 2013). Lopez complains that his indictment contains “conjunctive allegations” and that the trial court failed to ensure the jury was unanimous in finding which of “the

²Because our disposition renders moot Lopez’s argument that the trial court coerced the verdicts, we do not separately address that issue.

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three alternate ways” under § 13-3623(A) the child abuse was committed. These objections are unfounded.

¶29 The indictment here is not duplicitous, because it charges only a single offense of child abuse. As we noted in *State v. Paredes-Solano*, certain statutory offenses are single or unified crimes that can be committed in alternative ways, and the jury need not be unanimous about the manner in which the offense occurred in order to find the defendant guilty. 223 Ariz. 284, ¶ 14, 222 P.3d 900, 905-06 (App. 2009); *see, e.g., State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993) (kidnapping); *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) (first-degree murder); *State v. Dixon*, 127 Ariz. 554, 561, 622 P.2d 501, 508 (App. 1980) (theft). Section 13-3623(A) describes such an offense. *State v. West*, 725 Ariz. Adv. Rep. 4, ¶ 19 (App. Nov. 13, 2015). The subsection allows a conviction if, under circumstances likely to seriously injure or kill a child, the defendant (i) injures a child, (ii) permits a child in his or her care or custody to be injured, or (iii) permits a child to be placed in a situation where the child is endangered. § 13-3623(A). The defendant’s *mens rea* then determines the classification of the offense. *See id.*; *West*, 725 Ariz. Adv. Rep. 4, ¶ 22.

¶30 In *State v. Payne*, our supreme court confirmed that child abuse pursuant to § 13-3623(A) is a “single crime” that can be “committed in multiple ways,” without separate findings or unanimity required as to the manner in which the offense was perpetrated. 233 Ariz. 484, ¶¶ 83, 84-85, 314 P.3d at 1263; *see also State v. Jones*, 188 Ariz. 388, 392 & n.1, 937 P.2d 310, 314 & n.1 (1997) (describing elements of predecessor statute). Although Lopez asserts “a unanimous verdict *was* required on the precise matter [sic] in which the offense was committed,” our supreme court in *Payne* rejected this argument, as the state correctly points out in its answering brief. 233 Ariz. 484, ¶¶ 84-85, 314 P.3d at 1263. No error occurs from the failure to elect or specify which act in subsection (A) of § 13-3623 constitutes the offense. “[A]s long as only one charge is alleged in a count of an indictment, jurors may ‘reach a verdict based on a combination of alternative findings.’” *Payne*, 233 Ariz.

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484, ¶ 81, 314 P.3d at 1263, *quoting State v. Dann*, 220 Ariz. 351, ¶ 79, 207 P.3d 604, 620 (2009).³

Misconduct and Bias

¶31 Lopez next contends the prosecutor committed misconduct with the “complicity of the trial court,” and he argues these actions should disqualify the entire Pinal County Attorney’s Office as well as the judge who presided over trial from further involvement in the case. He bases his argument on the fact that the prosecutor presented a memorandum decision to the trial court when settling jury instructions. Under the version of Rule 31.24, Ariz. R. Crim. P., in effect at the time of trial, memorandum decisions could be cited only to establish certain procedural facts; they could not be cited for legal authority. 189 Ariz. LXXIII, XCVII (1997).

¶32 Upon being informed that the case relied on was an unpublished decision, the prosecutor first exclaimed, “Oh, my god,” and she promptly apologized for providing the trial court with the decision. However, she went on to argue that “[t]he facts of this case are very, very similar” to those in the memorandum decision. The court did not disregard the decision based on Lopez’s objection, but expressly based its ruling on that case. The court expressed the

³However, to the extent the state suggested below that the victim’s weeks-old liver laceration could be substantive evidence of guilt supporting the child abuse charge under count one of the indictment, as opposed to mere other-act evidence offered for a limited purpose under Rule 404(b), Ariz. R. Evid., this would render the charge duplicitous and require some remedial action by the court. *See State v. Klokic*, 219 Ariz. 241, ¶ 32, 196 P.3d 844, 851 (App. 2008) (curative measures appropriate when separate acts serving as predicate for conviction are subject to separate defenses or evidence otherwise provides reasonable basis for distinguishing between acts); *see also West*, 725 Ariz. Adv. Rep. 4, ¶ 40 (acknowledging problem when state “alleges multiple, distinct acts as to the separate means” of committing offense).

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belief that the case “was helpful” because “the facts of that case do parallel to a large degree the facts of this case.”

¶33 Although the prosecutor’s action after discovering her error was improper under our then-existing procedural rules, it did not rise to the level of misconduct warranting reversal or disqualification, much less disqualification of the entire office.

Prosecutorial misconduct “is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal.”

State v. Ramos, 235 Ariz. 230, ¶ 22, 330 P.3d 987, 994 (App. 2014), quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). Viewed in context, the prosecutor’s reliance on the memorandum decision was an insignificant impropriety. The state did not seek an undue advantage at the expense of the defendant’s due process rights but instead sought a ruling it believed to be supported by the law and thus likely to be upheld on appeal. Indeed, our amended rules of procedure now under certain circumstances allow parties to cite, and courts to consider, our unpublished decisions issued after 2014 for whatever non-precedential value they might have. See Ariz. R. Sup. Ct. Order R-14-0004 (Sept. 2, 2014) (amending Rule 111(c), Ariz. R. Sup. Ct., and Rule 31.24, Ariz. R. Crim. P.). Thus, although we do not condone either the prosecutor’s persistence in arguing the relevance of the memorandum decision or the trial court’s consideration of that decision, we reject Lopez’s disqualification argument.

¶34 The record similarly fails to show judicial bias that would require a change of judge for cause. “Bias and prejudice mean a hostile feeling or spirit of ill will, or undue friendship or favoritism, toward one of the litigants.” *State v. Hill*, 174 Ariz. 313, 322, 848 P.2d 1375, 1384 (1993). Judges are presumed to be free of

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bias, and judicial rulings alone almost never constitute evidence of bias. *State v. Ellison*, 213 Ariz. 116, ¶¶ 37, 40, 140 P.3d 899, 911, 912 (2006). Here, the record does not demonstrate any bias or favoritism. To the contrary, it confirms that the judge attempted to act impartially when settling jury instructions, basing his rulings on what he believed to be the most relevant legal information available.

¶35 In addition to the matter of the memorandum decision, Lopez argues the trial judge was biased because he said to the prosecutor at sentencing, “Tell me what you think I need to do” regarding consecutive sentences. The full record of the hearing reveals that the court was simply asking the state to clarify its position on whether it believed consecutive sentences were required by law. After this comment, the court told the prosecutor to “[m]ake your presentation.” In context, nothing suggests the court “abdicated it[]s authority . . . to the prosecution,” as Lopez now claims.

Disposition

¶36 Due to the error in denying lesser included offense instructions under § 13-3623(A)(2) and (3), the convictions and sentences are reversed and the case is remanded to the trial court for further proceedings consistent with this decision.