IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GUILLERMO ORTEGA III,
Appellant.

No. 2 CA-CR 2014-0202
Filed September 3, 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NOT FOR PUBLICATION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 Gila County
No. S0400CR201300250
The Honorable Robert Duber II, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

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 Guillermo Ortega III was convicted after a jury trial of one count of second-degree murder, one count of attempted second-degree murder, two counts of aggravated assault causing serious physical injury, and two counts of aggravated assault with a deadly weapon or dangerous instrument. He was sentenced to concurrent and consecutive prison terms totaling 38 years. On appeal, Ortega argues the trial court erred by giving an incorrect jury instruction for the "in the presence of a child" aggravator and denying his motion for acquittal pursuant to Rule 20, Ariz. R. Crim. P. For the following reasons, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In April 2013, Ortega and his former wife, V.O., were at a family outing when an argument began. The family members drove separately to V.O.'s house, but the argument continued inside the home when V.O. told Ortega to "just get [his] stuff." At some point, Ortega began stabbing V.O. When her brother, E.G., attempted to intervene, he too was stabbed. Ortega's children were playing in the yard, but the sounds of the physical altercations could be heard outside the home. V.O. left the house while bleeding profusely in an attempt to summon emergency aid. These events were heard or observed by the children.

¶3 Ortega then departed the house, put the children in his vehicle, and dropped them at his parents' house. Ortega was next observed in his vehicle stopped on the side of the road with flashing lights on. The occupants in a passing car stopped to determine if he

needed assistance. Ortega declined help and asked to be left alone, but because he appeared disoriented and had a leg wound, they called for an ambulance. Ortega was arrested at the hospital where he had been taken for treatment of his leg.

¶4 V.O. died in the hospital two days later. Ortega was charged, tried, and convicted as described above, and this appeal followed.

Presence of Child Jury Instruction

¶5 Ortega argues the trial court erred in its jury instruction for the domestic violence aggravating factor. We review de novo whether jury instructions accurately state the law. *State v. Bocharski,* 218 Ariz. 476, ¶ 47, 189 P.3d 403, 414 (2008). We will not reverse "'unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors.'" *State v. Sucharew*, 205 Ariz. 16, ¶ 33, 66 P.3d 59, 69 (App. 2003), *quoting State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995).

¶6 A domestic violence offense [1] "committed in the presence of a child" is an aggravating factor at sentencing if proven at trial. A.R.S. § 13-701(D)(18). There is no statutory definition of "in the presence of a child." The trial court instructed the jury the term "presence" meant: "to see, hear or know by personal presence or perception of the actual event or its immediate aftermath." Ortega's objection to the inclusion of "or its immediate aftermath" was overruled.

¶7 On appeal, Ortega argues the jury instruction misstated the law because it allowed the jury to apply the aggravating factor if a child "merely witnessed the aftermath." The state argues that *State v. Burgett*, 226 Ariz. 85, 244 P.3d 89 (App. 2010) and *State v. Torres*, 233 Ariz. 479, 314 P.3d 825 (App. 2013), support the inclusion of the immediate aftermath language in the instruction.

[1]The subsection refers to A.R.S. § 13-3601(A) to define various situations that constitute domestic violence. § 13-701(D)(18).

¶8 Although the courts in *Burgett* and *Torres* did not address jury instructions, their discussion of the purpose and scope of the relevant statute supports the inclusion of "immediate aftermath." Those courts both noted that "by enacting § 13-701(D)(18), the legislature plainly sought to punish more severely those who expose children to domestic violence." *Burgett*, 226 Ariz. 85, ¶ 6, 244 P.3d at 91; *see also Torres*, 233 Ariz. 479, ¶ 12, 314 P.3d at 828.

¶9 In *Burgett*, the court concluded the statute did not require that a child be in same room where a domestic violence offense occurred before the aggravating circumstance could be found. 226 Ariz. 85, ¶ 7, 244 P.3d at 91-92. In that case, the evidence was sufficient to support the aggravating factor where children witnessed the aftermath of domestic violence by seeing the bleeding victim run out of his bedroom, after having seen their mother, the defendant, leaving their room with a box cutter immediately before the attack and having heard the victim's screams. *Id.* ¶¶ 5, 7.

¶10 In *Torres*, although the child was present for an argument that preceded the domestic violence offense, no evidence suggested that the child, who was not in the same room as the incident, saw or heard the commission of the offense. 233 Ariz. 479, ¶¶ 2-3, 13, 314 P.3d at 826, 828. Nonetheless, this court affirmed the trial court's finding that the child "was not merely in proximity to the offense but also was sufficiently exposed to the attendant domestic violence so that she could be characterized as 'present' for that offense pursuant to § 13-701(D)(18)." *Id.* ¶ 14. The court found determinative that the child was with the defendant for "the entire aftermath of the murder and was present in the apartment where the body of her mother was found when the police arrived." *Id.* ¶ 15. The *Torres* court noted that:

> [t]o hold that a child who was entirely unaware of the offense was "present" would be inconsistent with th[e] purpose [of punishing more severely those who expose children to domestic violence] . . . . [T]he evidence here, albeit circumstantial, provided a sufficient basis for the trial

> court to infer that [the child] had some sensory experience of the offense itself.

Id. ¶ 16. Thus, the jury instruction properly stated the law because the jury could infer by evidence of the aftermath that the child was sufficiently exposed to domestic violence to be "present" under the statute. The trial court did not err.

¶11 Moreover, assuming for the purpose of argument the jury instruction was erroneous, any error would have been harmless. *See State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231, 239 (2003). An error is harmless if it appears "'beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.'" *Id.*, *quoting Chapman v. California*, 386 U.S. 18, 24 (1967). "If no rational jury could find otherwise even if properly instructed, 'the interest in fairness has been satisfied and the judgment should be affirmed.'" *Id.*, *quoting Rose v. Clark*, 478 U.S. 570, 579 (1986).

¶12 Even had the jury received Ortega's requested instruction, which would have removed "or its immediate aftermath" and therefore would have read, "'In the presence of' means to see, hear or know by personal presence or perception of the actual event," any rational jury would have found the aggravator proven beyond a reasonable doubt. Both children—N., who was about twelve at the time of the offense, and D., who was about three—were at the river with V.O. and Ortega when the argument began. This was more than a disagreement—E.G. called to his mother because he "was nervous [with] how angry [Ortega] seemed" and "because the kids [were] around." The life-threatening physical injuries took place in a "[v]ery" small house with D. playing in the side yard near the front door. D. and a family friend were so close to a window that the friend could hear "stuff being pushed around" and "something hit[ting] the wall." Not far from where D. was playing, E.G. heard "thumps" and "gurgling." Finally, from their position in the yard, both children witnessed their mother bleeding from the neck and running away from the house screaming for help. D. clearly observed his mother because he called out, "[M]ama, where are you going? Where is mama going without me[?]"

¶13 The state presented ample evidence that the children did not merely witness the aftermath but were also sufficiently exposed to the accompanying domestic violence to be characterized as being "presen[t]" for the offense pursuant to § 13-701(D)(18), and no rational jury could have found otherwise. Thus, even assuming the instruction was erroneous, any error was harmless.

Rule 20 Motion for Acquittal

¶14 Ortega also argues the trial court erred by denying his Rule 20 motion for acquittal, made at the close of the state's case-in-chief. Regarding the murder and attempted murder counts, he argued there was no evidence he intended to cause V.O.'s or E.G.'s death or knew his conduct would cause death or serious physical injury, as required by A.R.S. § 13-1104(A)(2), because he was struggling with each of the victims when they were stabbed. He made a similar argument with respect to the aggravated assault counts, stating there was no evidence he was acting intentionally, knowingly, or recklessly, as required by A.R.S. § 13-1203(A)(1). Ortega also claimed he was "protecting himself" against E.G. when he stabbed him. Ortega did not renew his motion at the close of evidence.

¶15 On appeal, he appears to again contend there was insufficient evidence of his state of mind, arguing V.O. stabbed him in the leg first and then he struggled with her and later E.G., fearing for his life. We begin with Ortega's argument regarding E.G., because Ortega did not argue self-defense as to V.O. in his Rule 20 motion. We review de novo the court's denial of a Rule 20 motion for judgment of acquittal, to determine "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. West*, 226 Ariz. 559, ¶¶ 15-16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990) (emphasis in original). Further, "'[w]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.'" *Id.* ¶ 18, *quoting State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶16 Ortega does not cite specific facts to support his argument, other than to say he was in the midst of a struggle with E.G. when E.G. was stabbed, implying that the stabbing was self-defense or accidental. But E.G. testified that he watched Ortega follow V.O. into a bedroom and, less than a minute later, he heard "thumps" and "gurgling." When E.G. turned the corner and could see into the room, he saw V.O. kneeling down with Ortega behind her and his arm around her neck. E.G. told Ortega to stop. Ortega let go of V.O. but then "charge[d]" at E.G., tackling and stabbing him during their struggle. When E.G. said, "'Please stop. You're killing me. You're killing me,'" Ortega answered, "'You don't think I'm going to kill you? I'm going to kill both of you.'"

¶17 Viewed in the light most favorable to the prosecution, *West*, 226 Ariz. 559, ¶ 15-16, 250 P.3d at 1191, a rational trier of fact could have found that Ortega knew his actions would cause death or serious physical injury as required to commit attempted second-degree murder, and that he acted either intentionally, knowingly, or recklessly as required for aggravated assault. *See* A.R.S. §§ 13-1001(A)(2), 13-1104(A)(2), 13-1203(A)(1), and 13-1204. To the extent Ortega argues his conduct was justified, the state presented substantial evidence from which the jury could find, beyond a reasonable doubt, that his actions were not legally justified and that he was guilty of attempted second-degree murder and aggravated assault. *See State v. Lopez*, 230 Ariz. 15, ¶¶ 4-7, 279 P.3d 640, 642-43 (App. 2012) (evidence that defendant appeared to intentionally aim at victim during shooting sufficient to contradict justification theory).

¶18 Ortega appears to support his justification defense with his testimony after the Rule 20 motion, in which he stated that he fought over the knife with E.G. But even if this issue had been raised in a timely manner, the conflicts in testimony were questions for the jury to weigh and resolve. *See West*, 226 Ariz. 559, ¶ 18, 250 P.3d at 1192.

¶19 Similarly, Ortega also appears to argue there was insufficient evidence of state of mind as to the second-degree murder and aggravated assault charges related to V.O. because they "fought over the knife." But as with the charges related to E.G., the

evidence at the time of the Rule 20 motion indicated Ortega was standing behind V.O., who was on her knees, and explicitly stated his intent to kill her. A rational trier of fact could have found the evidence satisfied the requisite states of mind necessary for second-degree murder and aggravated assault. *See West*, 226 Ariz. 559, ¶ 15-16, 250 P.3d at 1191; A.R.S. §§ 13-1104(A)(2), 13-1203(A)(1), 13-1204. The trial court did not err by denying the Rule 20 motion.

Sufficiency of the Evidence

¶20 Finally, because Ortega did not raise a self-defense argument as to V.O. in his Rule 20 motion, we construe his argument on appeal as one of insufficient evidence supporting the jury's verdict. Because it was not raised below, he has forfeited review for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). A conviction based on insufficient evidence constitutes fundamental error. *State v. Stroud*, 209 Ariz. 410, ¶ 6 n.2, 103 P.3d 912, 914 n.2 (2005). "'Reversible error based on insufficiency of the evidence occurs only when there is a complete absence of probative facts to support the conviction.'" *State v. Felix*, 237 Ariz. 280, ¶ 30, 349 P.3d 1117, 1126 (App. 2015), *quoting State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶21 E.G.'s testimony that Ortega had his arm around V.O.'s neck and attacked E.G. when he walked in on them, saying he would kill both V.O. and E.G., indicates that Ortega knew his actions would cause death or serious physical injury, and that he acted either intentionally or recklessly when he killed V.O. and did not act in self-defense. Further, V.O.'s autopsy revealed a six-inch stab wound to her neck and additional wounds to her neck, shoulder, and upper arm, as well as numerous wounds to her hands and arms that the forensic pathologist identified as "defensive wounds." Ortega, in contrast, had just one stab wound to his leg and no defensive wounds. This evidence was sufficient to support the jury's conclusion that Ortega intended to cause death or serious physical injury when he stabbed V.O., and that he did not act in self-defense, therefore, no fundamental error occurred.

Disposition

¶22 For the foregoing reasons, Ortega's convictions and sentences are affirmed.