IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL ALAN VODEN,
Appellant.

No. 2 CA-CR 2015-0297
Filed September 6, 2016

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NOT FOR PUBLICATION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. S0400CR201300569
The Honorable Gary V. Scales, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Following a jury trial, Michael Voden was found guilty of manslaughter. On appeal, he argues the trial court abused its discretion by excluding evidence of the local police department's use-of-force policy and limiting his cross-examination of the state's witnesses about reasonable use of force, erred by denying his motion for a mistrial, and erred by instructing the jury on the offense of heat-of-passion manslaughter. Because we find no abuse of discretion, we affirm.

Factual and Procedural Background

¶2 In November 2013, R.B.'s dog jumped over his fence and into Voden's backyard. While R.B. was in Voden's yard to retrieve his dog, Voden came out of his house with a gun and, shortly thereafter, shot R.B. four times. R.B. died from those wounds.

¶3 Voden was charged with second-degree murder, and the jury found him guilty of manslaughter as a lesser offense. The trial court sentenced him to a seventeen-year prison term. We have jurisdiction over Voden's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Use-of-Force Policy

¶4 Voden first argues the trial court abused its discretion by granting the state's motion in limine to preclude evidence of the Payson Police Department's use-of-force policy and limiting his cross-examination of the state's witnesses, and by denying his motion for a new trial, which was based on the preclusion of that

evidence. He contends those rulings violated his due process rights and prevented him from receiving a fair trial.

¶5 Voden did not, however, make this argument until his motion for a new trial after the jury reached its verdict. He therefore has waived its review for all but fundamental, prejudicial error. *See State v. Henderson,* 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Davis,* 226 Ariz. 97, ¶ 12, 244 P.3d 101, 104 (App. 2010) (issues raised for first time in motion for new trial not preserved for appellate review). Voden has not argued on appeal that the purported error was fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano,* 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal if not argued); *State v. Fernandez,* 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it).

¶6 Voden also argues, however, that the trial court erred by granting the state's motion in limine because the evidence was, in fact, relevant pursuant to Rule 401, Ariz. R. Evid., an argument he did timely present below. To the extent Voden's argument relates to the court's ruling on that issue, we review for an abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶7 Evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Ariz. R. Evid. 401. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403. The trial court "has considerable discretion in determining whether the probative value of the evidence is substantially outweighed by its unfairly prejudicial effect." *State v. Gilfillan,* 196 Ariz. 396, ¶ 29, 998 P.2d 1069, 1078 (App. 2000).

¶8 The trial court instructed the jury on the justification defenses of self-defense and crime prevention. A.R.S. §§ 13-404, 13-405, and 13-411. The use of deadly physical force in either

self-defense or crime prevention is justified when an objectively reasonable person would believe such force is necessary to protect himself, or, as relevant here, to prevent an aggravated assault. §§ 13-404, 13-405, 13-411; *see also State v. King*, 225 Ariz. 87, ¶ 11, 235 P.3d 240, 243 (2010).

¶9 Sections 13-404, 13-405, 13-411 clearly state the relevant standard by which the jury was to judge Voden's actions, and the trial court's instructions mirrored the statutes. Voden argues, however, that the Payson Police Department's use-of-force policy would have a tendency to show what actions a law enforcement agency believed were reasonable "when defending against an unarmed individual" and, therefore, whether Voden's actions here were reasonable.

¶10 But that policy cannot modify the statutes' standard for the use of deadly force for crime prevention or self-defense. And the jury was charged with determining reasonableness. *See State v. Salazar*, 182 Ariz. 604, 610, 898 P.2d 982, 988 (App. 1995) ("[T]he question of reasonableness is quintessentially a matter of applying the common sense and the community sense of the jury to a particular set of facts and, thus, it represents a community judgment."), *quoting Wells v. Smith,* 778 F. Supp. 7, 8 (D. Md. 1991). We cannot see how a police department's policy for active-duty police officers confronted with someone posing a threat would help the jury understand whether Voden, who was not a police officer, acted as an objectively reasonable person would when reacting to his unarmed neighbor under the circumstances here. The policy was irrelevant and the trial court properly precluded it. Ariz. R. Evid. 401, 402.

¶11 Moreover, to any extent the policy was relevant, the trial court did not abuse its discretion in finding that any probative value was outweighed by the risk of confusing the jury by introducing different standards of conduct. *See* Ariz. R. Evid. 403. The court did not abuse its discretion by precluding the evidence. *Gilfillan,* 196 Ariz. 396, ¶ 29, 998 P.2d at 1078.

¶12 Voden further argues the trial court erred by restricting his cross-examination of various police officers when it precluded

questioning on their opinions of what an appropriate use of force would be under various circumstances. He contends this, like the use-of-force policy, was relevant, and thus within the scope of cross-examination. Ariz. R. Evid. 611(b). We review restrictions on the scope of cross-examination for an abuse of discretion. *See State v. Fleming,* 117 Ariz. 122, 126, 571 P.2d 268, 272 (1977).

¶13 The testimony was irrelevant and properly precluded for the same reasons the use-of-force policy, explained above, was irrelevant. *See* Ariz. R. Evid. 402; *see also State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 8, 312 P.3d 123, 127 (App. 2013). Moreover, the line of questioning appears to ask for an expert's opinion on the appropriate use of force. But "[b]ecause jurors are capable of determining whether the use of force in self-defense is reasonable, expert testimony bearing on that issue is generally inadmissible." *Salazar*, 182 Ariz. at 610, 898 P.2d at 988. The trial court did not abuse its discretion in precluding this line of questioning. *See Fleming,* 117 Ariz. at 126, 571 P.2d at 272.

Prosecutorial Misconduct

¶14 Voden next argues the trial court erred by denying his motion for a mistrial based on alleged prosecutorial misconduct. He contends the prosecutor improperly commented on the evidence by referring to a transcript the court had precluded.

¶15 "We review a trial court's denial of a motion for mistrial for an abuse of discretion, bearing in mind that a mistrial is a 'most dramatic' remedy that 'should be granted only when it appears that that is the only remedy to ensure justice is done.'" *State v. Blackman*, 201 Ariz. 527, ¶ 41, 38 P.3d 1192, 1203 (App. 2002), *quoting State v. Maximo,* 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991). We defer to the court because it "is in the best position to determine whether the [alleged error] will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000).

¶16 Prosecutorial misconduct constitutes reversible error "if (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Gallardo,*

225 Ariz. 560, ¶ 34, 242 P.3d 159, 167 (2010), *quoting State v. Velazquez,* 216 Ariz. 300, ¶ 45, 166 P.3d 91, 102 (2007) (alteration in *Velazquez*). The misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974).

¶17 During cross-examination of R.B.'s widow, Voden pointed out inconsistencies between her initial statements to police officers and her testimony at trial. On redirect examination, the prosecutor moved to admit the entire transcript of her statements to police officers after the shooting to demonstrate consistencies between her statements then and at trial. The trial court sustained Voden's objection to its admission on the grounds it constituted hearsay. Shortly thereafter, the prosecutor stated: "We're probably going to go on a break in a minute, but when we come back I'm going to get into as much of the interview as the Court will allow me, okay." Voden argued the comment violated Rule 103(d), Ariz. R. Evid., by suggesting that additional evidence incriminating Voden existed but was inadmissible, and moved for a mistrial on that basis. The court denied the motion.

¶18 We are not persuaded that the prosecutor's comment about the transcript constituted misconduct at all. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. The statement was made in the context of the prosecutor's attempt to rebut Voden's assertion that R.B.'s testimony was "different" from her statements to police and implication the differences were attributable to her civil lawsuit filed against Voden after she made her statements to police. And although the trial court had ruled the entire transcript was inadmissible hearsay, the prosecutor could properly introduce portions of the transcript as needed to rehabilitate R.B. as a witness and rebut Voden's charge of fabrication. *See* Ariz. R. Evid. 801(d)(1)(B) (witness's prior consistent statement non-hearsay if introduced "to rebut an express or implied charge" of recent fabrication or "to rehabilitate the declarant's credibility as a witness when attacked").

¶19 Voden argues the prosecutor's statement "signal[ed] to the jury that there [was] additional evidence of Mr. Voden's guilt

that they [had] not heard." But the prosecutor was referring to the transcript of R.B.'s interview with police officers, which Voden had already discussed with her at length, and alluding to his attempts to show consistencies between her previous statements and her trial testimony. The record does not show that the prosecutor intended, or the jury would have interpreted, this statement to be an implication that additional, inadmissible evidence of Voden's guilt existed.

¶20 Moreover, the trial court specifically instructed the jury that it must determine the facts only from the testimony of the witnesses and the exhibits introduced in court. We presume the jury followed this instruction. *See State v. Jean*, 239 Ariz. 495, ¶ 10, 372 P.3d 1019, 1023 (App. 2016). On this record, Voden has failed to show that the prosecutor's single remark constituted misconduct at all, let alone misconduct depriving Voden of a fair trial. The court did not abuse its discretion by denying Voden's motion for a mistrial on this basis. *See Blackman,* 201 Ariz. 527, ¶ 41, 38 P.3d at 1203.

Heat-of-Passion Manslaughter

¶21 Voden lastly argues the trial court erred by instructing the jury on heat-of-passion manslaughter, A.R.S. § 13-1103(A)(2), and by concluding it is a lesser-included offense of second-degree murder, A.R.S. § 13-1104(A)(2). We review de novo whether an offense is included within the charged offense. *State v. Lua*, 237 Ariz. 301, ¶ 5, 350 P.3d 805, 807 (2015).

¶22 Our supreme court recently addressed this exact issue in *Lua*.[1] *Id.* ¶ 1. It concluded that, if supported by the evidence, a heat-of-passion instruction is appropriate in a second-degree murder trial despite the fact that the defendant was not separately indicted for the offense. *Id.* ¶¶ 18-19. The court also provided an approved instruction for such circumstances, which is identical to the one given to the jury by the trial court in this case. *Id.* ¶ 20.

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[1]*Lua* was decided after Voden's trial ended.

¶23 Voden has not argued the evidence was insufficient to support the instruction.[2] Nor has he argued that *Lua* is somehow incorrect or that we should not follow it. *See State v. McPherson*, 228 Ariz. 557, ¶ 13, 269 P.3d 1181, 1186 (App. 2012) (court of appeals bound by decisions of supreme court). We therefore reject Voden's argument that the trial court erred by instructing the jury on heat-of-passion manslaughter as a lesser offense of second-degree murder.

Disposition

¶24 For the foregoing reasons, we affirm Voden's conviction and sentence.

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[2]Voden argues in his reply brief that the state did not present sufficient evidence to warrant the instruction, but we do not address arguments raised for the first time in a reply brief. *See State v. Brown*, 233 Ariz. 153, ¶ 28, 310 P.3d 29, 39 (App. 2013).