IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JAMES SCOTT SUNDERLAND,
Appellant.

No. 2 CA-CR 2015-0145
Filed September 25, 2017

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NOT FOR PUBLICATION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. S1100CR201400041
The Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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Counsel for Appellee

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly[1] concurred.

S T A R I N G, Presiding Judge:

¶1 Following a jury trial, James Sunderland was convicted of first-degree murder and two counts of child abuse. On appeal, he argues the trial court violated his right to a unanimous verdict, erred in making various evidentiary rulings and by failing to excuse a juror from deliberations, and sentenced him illegally by considering aggravating factors not found by the jury. For the reasons that follow, we find no error and affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining [Sunderland's] convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In May 2013, Sunderland was caring for two-year-old C.S. at the apartment Sunderland shared with C.S. and A.Q., C.S.'s mother and Sunderland's then-girlfriend. Sunderland called 9-1-1 and reported that C.S. had suddenly stopped breathing while Sunderland was changing his diaper. He told first responders C.S. had fallen eight to ten feet down a hill while hiking "a few days" earlier.

¶3 The paramedics who arrived shortly thereafter observed several "trauma-based" injuries to C.S., particularly to his head. Based on the severity of his injuries, C.S. was flown by helicopter to a trauma center in Phoenix, where doctors performed surgery in an attempt to reduce the swelling of his brain. C.S. died a short time later. A medical examiner determined the cause of death was "multiple blunt-force trauma," including a "fatal brain injury." The

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

medical examiner additionally found fifty-two bruises, many of which were more than a week old, all over C.S.'s body and abdominal injuries inconsistent with the fall described by Sunderland.

¶4 Sunderland was indicted and convicted, as noted above, and the trial court sentenced him to a natural-life term for the first-degree murder count, and 2.5-year terms of imprisonment for each child abuse count, to be served concurrently. We have jurisdiction over Sunderland's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Unanimous Verdict

¶5 Sunderland first argues the trial court violated his right to a unanimous verdict because the indictment charged him "in the conjunctive" with three possible manners of committing child abuse, the court did not instruct the jury it needed to be unanimous as to the exact manner in which the crimes were committed, and the verdict forms similarly did not require the jury to specify the exact manner. Sunderland did not object on any of these grounds below and has therefore forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *see also State v. Paredes-Solano*, 223 Ariz. 284, ¶ 8, 222 P.3d 900, 904 (App. 2009). A violation of the right to a unanimous jury verdict constitutes such error. *Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d at 908.

¶6 As stated in the indictment, Sunderland was charged with two counts of child abuse pursuant to A.R.S. § 13-3623(B)(1). That offense is committed when a person intentionally or knowingly, "[u]nder circumstances other than those likely to produce death or serious physical injury," (1) "causes a child . . . to suffer physical injury or abuse," or (2) "having the care or custody of a child . . . causes or permits the person or health of the child . . . to be injured," or (3) "having the care or custody of a child . . . causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is endangered." § 13-3623(B)(1). The indictment also charged Sunderland with first-degree murder "by committing the crime of Child Abuse under [§] 13-3623(A)(1)." Child abuse pursuant to § 13-3623(A)(1) is identical to (B), except that it occurs when a

person acts "[u]nder circumstances likely to produce death or serious physical injury."

¶7 The thrust of Sunderland's argument is that, because § 13-3623(A) and (B) together provide three ways in which child abuse can occur, the state was required to elect an exact manner in which the child abuse was committed and the jury had to likewise be unanimous about the exact manner in which the crime occurred. He additionally points out that the verdict forms only asked the jury whether Sunderland was guilty of "First Degree Murder" and "Child Abuse." Thus, Sunderland concludes, "[g]iven the extremely general verdict forms and the child abuse and [first-degree] murder charges alleging numerous ways the crimes could be [committed,] . . . the jurors cannot be presumed to have reached a unanimous verdict on the underlying charges given the alternatives presented."

¶8 The Arizona Constitution guarantees criminal defendants the right to a unanimous jury verdict. Ariz. Const. art. II, § 23; *see State v. West*, 238 Ariz. 482, ¶ 13, 362 P.3d 1049, 1055 (App. 2015). The jury must be unanimous on whether the charged crime was committed, but it does not need to be unanimous as to the precise manner in which the crime was committed. *West*, 238 Ariz. 482, ¶ 13, 362 P.3d at 1055.

¶9 In *West*, we observed that child abuse under § 13-3623(A) is a "single unified offense," which means that the statute identifies a single crime—child abuse—and provides multiple means of committing that crime. *Id.* ¶ 19. We further concluded that although a defendant is "entitled to a unanimous jury verdict on whether []he committed child abuse, []he [is] not entitled to a unanimous jury verdict 'on the precise manner in which the act was committed'" so long as substantial evidence supports the conviction under all three means provided in § 13-3623(A). *Id.* ¶ 30, *quoting State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993).

¶10 *West* controls here.[2] So long as substantial evidence supports Sunderland's convictions under each of the three means provided in § 13-3623(A) and (B), the jury needed only to be unanimous that he committed child abuse, but did not need to be unanimous as to the exact means. *See id.* ¶¶ 13, 30. Accordingly, the state was not required to elect and prove the precise manner of child abuse, the trial court was not required to instruct the jury it had to be unanimous as to the manner, and the verdict forms did not need to specify the precise manner. *See id.*

¶11 Sunderland has failed to make any argument on the issue whether substantial evidence supports all three means of committing child abuse. Consequently, he has waived this argument for review, and we do not address it further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief shall include appellant's contentions with citations to legal authority); *see also West*, 238 Ariz. 482, ¶ 75, 362 P.3d at 1068 (failure to support claim on appeal constitutes waiver). Furthermore, although we will not ignore fundamental error if we see it, we see no error, fundamental or otherwise. *See State v. Fernandez,* 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).

Lesser-Included Offense Instruction

¶12 Sunderland next argues the trial court erred by failing to instruct the jury "on lesser-included mental states on the Child Abuse charge supporting [first-degree] murder." He maintains this failure violated his rights to a fair trial and due process. Sunderland did not request an instruction on any lesser-included mental states below; thus he has forfeited review of this issue for all but fundamental, prejudicial error. *See State v. Bearup*, 221 Ariz. 163, ¶¶ 21-22, 211 P.3d 684, 689 (2009); *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶13 Sunderland, however, contends he was not required to object on these grounds because the trial court had an "independent

[2]Although *West* dealt specifically with § 13-3623(A), we see no reason, nor does Sunderland provide one, that it would not apply equally to § 13-3623(B).

duty" to instruct the jury on "lesser included mental states." We have noted that, "[u]nder some circumstances, a trial court's failure to sua sponte instruct the jury on a lesser-included offense may constitute fundamental, prejudicial error." *State v. Fiihr*, 221 Ariz. 135, ¶ 9, 211 P.3d 13, 15 (App. 2008). But this does not relieve Sunderland of his burden, on appeal, to demonstrate that, under the circumstances in this case, the alleged error went "to the foundation of [his] case" and took from him "a right essential to his defense." *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim."); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). As he has failed to argue in any meaningful fashion that fundamental, prejudicial error occurred,[3] Sunderland has waived review of this argument. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

Misleading Jury Instructions

¶14 Sunderland maintains the trial court erred because "[t]he jury instructions as a whole misled the jury where the instructions allowed the State to obtain a felony murder conviction without a unanimous and informed showing of *mens rea*." In particular, he points to the court's failure to require the jury to determine the precise means by which the child abuse was committed and its failure to

[3]Even had Sunderland not waived this issue for review, no error, fundamental or otherwise, occurred. *See Henderson,* 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (to show fundamental error, defendant must first demonstrate error); *see also Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650. "[T]here are no lesser-included offenses to felony murder," *State v. Canion*, 199 Ariz. 227, ¶ 15, 16 P.3d 788, 792 (App. 2000), "because the *mens rea* necessary . . . is supplied by the specific intent required for the felony," *State v. LaGrand*, 153 Ariz. 21, 30, 734 P.2d 563, 572 (1987). First-degree murder based on child abuse requires that the child abuse was committed intentionally or knowingly. *See* A.R.S. §§ 13-1105(A)(2), 13-3623(A)(1). The trial court thus committed no error in not instructing the jury on any lesser mental states.

instruct on the lesser-included mental states of child abuse. We have addressed both of these arguments above, rejecting them or finding them waived. Although Sunderland does briefly contend both alleged errors, taken together, constitute "fundamental/structural error," he has failed to develop this argument in any way that would allow meaningful appellate review. We therefore do not address it further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶15 Sunderland also contends the trial court should have provided his proposed limiting instruction for the other-act evidence admitted pursuant to Rule 404(b), Ariz. R. Evid. *See* Ariz. R. Evid. 105. That instruction related to evidence Sunderland had on a prior occasion kicked C.S. in the buttocks, causing him to fall, and that Sunderland laughed about it. According to Sunderland, his preferred instruction "more closely match[ed] the federal instruction." He raised this argument during trial, but, while settling the final jury instructions, stated he was "okay with" the court giving the standard instruction and not his preferred federal instruction, and no longer had an objection. *See* Rev. Ariz. Jury Instr. ("RAJI") Stand. Crim. 26A. Thus, Sunderland has waived review except for fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *State v. Cruz*, 218 Ariz. 149, ¶ 105, 181 P.3d 196, 213 (2008) ("An objection that is withdrawn is waived, and we thus review only for fundamental error.") (internal citations omitted); *State v. Whittle*, 156 Ariz. 405, 406, 752 P.2d 494, 495 (1988) ("Under [Rule 21.3(c)] a party may not assign as error on appeal the failure to give an instruction unless the party objects to such failure in the trial court.").

¶16 Sunderland has failed to argue in any meaningful fashion that there was fundamental, prejudicial error, and has therefore waived review of this argument. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140. And, even had he not waived review on this basis, Sunderland has failed to cite any legal authority on this issue—his only argument is that "the federal version of the Rule 404 instruction . . . [is] not bogged down by 'legalease' that [is] confusing." Consequently, by failing to cite any legal authority or develop this argument in any meaningful way, he has waived it for

review. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

Evidence of Flight

¶17 Sunderland next argues the trial court erred by admitting photographs and testimony related to Sunderland's and A.Q.'s luggage, which they had with them while attempting to travel to Alaska shortly after C.S.'s death. Specifically, Sunderland argues the evidence was irrelevant. We review a court's ruling on the admission of evidence for an abuse of discretion. *State v. Cota*, 229 Ariz. 136, ¶ 10, 272 P.3d 1027, 1033 (2012).

¶18 The photographs at issue show six pieces of luggage that were seized at the airport when Sunderland and A.Q. were arrested while attempting to travel to Alaska about two weeks after C.S.'s death. An officer testified the luggage was "heavy" and appeared to contain "every worldly possession" of Sunderland and A.Q., including clothing, household items, movies, paperwork related to C.S.'s funeral arrangements, and children's toys and clothing. The contents were unorganized and not "nicely folded."

¶19 Evidence is relevant, and thus admissible, if "it has any tendency to make a fact more or less probable than it would be without the evidence," and that fact "is of consequence in determining the action." Ariz. R. Evid. 401, 402. Evidence of a suspect's flight from apprehension is generally relevant and admissible. *See State v. Speers*, 209 Ariz. 125, ¶¶ 28-30, 98 P.3d 560, 567-68 (App. 2004). This is because "[f]light or concealment after a crime . . . bears on the issue of the defendant's consciousness of guilt." *State v. Weible*, 142 Ariz. 113, 116, 688 P.2d 1005, 1008 (1984).

¶20 Sunderland argues the trial court abused its discretion because the evidence "did not make any relevant fact more or less likely." He appears to thus contend the evidence does not make the fact of whether Sunderland committed child abuse more or less probable. The state conversely argues the evidence demonstrates "a desire to quickly flee" and "consciousness of guilt."

¶21 We agree with the state. The "standard of relevance is not particularly high," and the contents of the luggage, its volume, the manner in which it was packed and the timing of the trip, together with other evidence discussed below, sufficiently suggest for relevance purposes that Sunderland and A.Q. were attempting to flee the state. *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988); *see also Speers*, 209 Ariz. 125, ¶¶ 29-30, 98 P.3d at 568 (defendant's passport and printout of travel information for roundtrip flight to Portugal, found in defendant's backpack, relevant and admissible to show he was attempting to "flee" country). We cannot say the trial court abused its discretion in allowing the photographs and testimony to be admitted as "potential evidence of consciousness of guilt." *See Weible*, 142 Ariz. at 116, 688 P.2d at 1008; *see also Cota*, 229 Ariz. 136, ¶ 10, 272 P.3d at 1033.

¶22 Moreover, the photographs and testimony were cumulative to other evidence presented at trial. *See State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) (erroneous admission of entirely cumulative evidence harmless). A.Q. had told her mother that she and Sunderland were going to Alaska with "no intention to return." When her parents went to the couple's apartment the day after the two were arrested, they found it in disarray, with large trash bags full of items lying on the floor, and a table and beds that had been "flipped over." In addition, the electricity had been turned off and all of C.S.'s toys were missing.

¶23 Sunderland, however, argues he and A.Q. were traveling to Alaska for family support, and they had not received any directive from police to remain in Arizona. These alternative explanations, however, go to the weight of the evidence, and not its admissibility. *See State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("possible alternative explanations for the shooting . . . go to the weight of the evidence, not to its admissibility"); *see also State v. Jeffers,* 135 Ariz. 404, 415, 661 P.2d 1105, 1116 (1983) (evidence of defendant's escape admissible as showing consciousness of guilt despite alternative explanations for escape).

¶24 Sunderland further contends the evidence was both "unfairly prejudicial" and "impinged upon [his] right to be presumed

innocent until proven guilty at trial."[4] He did not, however, object on these grounds below and has therefore forfeited review of them for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. He has further waived review on appeal by not only failing to develop either of these arguments in a way that would permit meaningful appellate review, *see* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Bolton,* 182 Ariz. at 298, 896 P.2d at 838, but also by failing to argue any potential error was fundamental or prejudicial, *see Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

Other-Act Evidence

¶25 Sunderland next argues the trial court erred by admitting, pursuant to Rule 404(b), a neighbor's testimony that, a few weeks before C.S. died, he had seen Sunderland kick C.S. from behind and laugh when C.S. fell. He contends the evidence was irrelevant, not admitted for a proper purpose, and more prejudicial than probative. *See* Ariz. R. Evid. 401, 402, 403. We review a trial court's ruling on the admission of other-act evidence for an abuse of discretion, *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997), viewing "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).

¶26 The state filed a pre-trial motion to admit the neighbor's testimony pursuant to Rule 404(b), contending it was offering the evidence to show absence of mistake or accident. After considering the parties' arguments and Sunderland's defenses, the trial court

[4]When the trial court asked Sunderland whether the photographs contained anything prejudicial, Sunderland's attorney responded, "No." However, because he did object to the admission of the evidence, we do not consider any potential error to have been "invited." *See State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009) (invited error doctrine requires party claiming error on appeal to affirmatively have injected error into prior proceedings).

concluded the evidence was admissible to show Sunderland's intent, as well as absence of mistake.

¶27 Generally, "evidence of other bad acts is not admissible to show a defendant's bad character." *State v. Aguilar*, 209 Ariz. 40, ¶ 9, 97 P.3d 865, 867 (2004); *see* Ariz. R. Evid. 404(a). But such evidence may be introduced to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). Before it will be permitted to introduce such evidence, the state must establish there is clear and convincing evidence the defendant committed the other acts; the evidence must be offered for a proper purpose; it must be relevant; and, consistent with Rule 403, Ariz. R. Evid., its probative value must not be substantially outweighed by a danger of unfair prejudice. *State v. Terrazas*, 189 Ariz. 580, 582-83, 944 P.2d 1194, 1196-97 (1997).

¶28 Sunderland first contends the evidence was irrelevant and not admitted for a proper purpose. The state was required to show Sunderland committed child abuse "intentionally and knowingly." A.R.S. §§ 13-1105(A)(2), 13-3623(A)(1), (B)(1). His defense was that he had nothing at all to do with C.S.'s injuries and was unaware of them. Viewing the evidence in the light most favorable to the state, *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518, evidence that Sunderland had kicked C.S. hard enough in the buttocks to knock him over and then laughed about it was relevant, circumstantial evidence to rebut his defense and show that C.S.'s injuries were caused intentionally by Sunderland and not by mistake or accident. *See* Ariz. R. Evid. 401, 404(b); *see also State v. Villalobos*, 225 Ariz. 74, ¶¶ 17-19, 235 P.3d 227, 232-33 (2010) (evidence of defendant's prior abuse of child-victim admissible to rebut defense that injuries not inflicted intentionally); *Mott*, 187 Ariz. at 545, 931 P.2d at 1055 (defendant's prior abuse of child-victim relevant and admissible to show motive). Because the evidence was relevant, offered for a proper purpose, and not to prove Sunderland's bad character, the trial court did not abuse its discretion in finding it admissible. *See Aguilar*, 209 Ariz. 40, ¶ 10, 97 P.3d at 868.

¶29 Sunderland next argues the prejudicial impact of the evidence outweighed any probative value. "The trial court is in the best position to balance the probative value of challenged evidence

against its potential for unfair prejudice" and therefore "has broad discretion in deciding the admissibility" of the evidence. *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518. Although the evidence was likely harmful to Sunderland, "not all harmful evidence is unfairly prejudicial." *State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997). In light of Sunderland's defense and the charges against him, we cannot say the court abused its discretion in finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518.

¶30 Sunderland additionally contends the testimony did not establish, by clear and convincing evidence, that he was the person the neighbor saw kick C.S. He did not, however, raise this argument below, either during the pre-trial hearing on the matter or during the neighbor's testimony at trial. By failing to object on these grounds below, and by failing to argue on appeal that the error was fundamental and prejudicial, he has waived review of this issue. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08; *see also Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

¶31 Sunderland lastly appears to argue, again, that the trial court erred by not providing his suggested limiting instruction based on the federal instruction. *See* Ariz. R. Evid. 105. As stated above, however, he has forfeited review for all but fundamental, prejudicial error by withdrawing his objection below. *See Cruz*, 218 Ariz. 149, ¶ 105, 181 P.3d at 213. And he has waived review entirely by failing to argue such error occurred, *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140, or, alternatively, failing to develop his argument in a way that would permit meaningful appellate review, *see* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

Admission of Medical Reports

¶32 Sunderland next argues the trial court erred by admitting three medical reports, asserting each constituted impermissible hearsay. We review the trial court's admission of evidence for an abuse of discretion. *Cota*, 229 Ariz. 136, ¶ 10, 272 P.3d at 1033.

¶33 Hearsay is an out-of-court statement offered "in[to] evidence to prove the truth of the matter asserted in the statement."

Ariz. R. Evid. 801(c); *see also State v. Lopez*, 217 Ariz. 433, ¶ 8, 175 P.3d 682, 684 (App. 2008). Such statements are generally inadmissible, unless they fall within a recognized exception. Ariz. R. Evid. 802; *see also Lopez*, 217 Ariz. 433, ¶ 8, 175 P.3d at 684. One of those exceptions applies to statements that are "made for—and [are] reasonably pertinent to—medical diagnosis or treatment" and "describe[] medical history; past or present symptoms or sensations; their inception; or their general cause." Ariz. R. Evid. 803(4).

¶34 The three reports Sunderland argues constitute impermissible hearsay include a radiologist's report of the CT[5] scan of C.S.'s brain, face and cervical spine, which was admitted through the testimony of Dr. John Egan. Egan is the pediatric trauma surgeon who conducted the initial evaluation of C.S. after he was airlifted to the hospital.

¶35 Sunderland argues this report constituted inadmissible hearsay because the radiologist, and not Egan, authored the report and Egan did not "mak[e] decisions about [C.S.'s] next steps based on the [r]eport." However, after initially examining C.S., Egan ordered the CT scan and, after reviewing the radiologist's report, determined that C.S.'s injuries were "life-threatening at that point." He then "called the neurosurgery team," who determined that immediate surgery was necessary. Because Egan relied on the radiologist's report to determine C.S.'s medical condition and what further treatment was necessary, and the report described C.S.'s condition at the time he was admitted to the hospital, it falls under the medical treatment exception. *See* Ariz. R. Evid. 803(4). The trial court did not err by admitting it. *See Cota*, 229 Ariz. 136, ¶ 10, 272 P.3d at 1033.

¶36 Sunderland additionally argues the radiologist's report contained impermissible hearsay within hearsay because "it was another witness testifying about the writing and conclusions in a report made by another witness about a CT scan done by someone else." "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule." Ariz. R. Evid. 805. Both the CT scan and the

[5]Computed tomography.

radiologist's report described C.S.'s condition just prior to his surgery, were made in the course of and for the purpose of C.S.'s medical treatment, and were relied upon by Egan to diagnose and treat C.S. *See* Ariz. R. Evid. 803(4). Because each part falls within the medical treatment exception, the report, as a whole, does not violate the general rule against hearsay. *See* Ariz. R. Evid. 805.

¶37 The next report which Sunderland contends was inadmissible hearsay is a consultation report authored by Dr. Ruth Bristol, the pediatric neurosurgeon who operated on C.S., and about which Egan testified.[6] Egan stated he had requested the consultation from Bristol in the course of determining the best medical treatment options for C.S. Egan was also present during Bristol's consultation and testified that her conclusions led to C.S. being taken to surgery, where Egan assisted Bristol and they confirmed the CT scan results. Bristol's statements, about which Egan testified, were thus "made for—and . . . reasonably pertinent to—[C.S.'s] medical diagnosis or treatment" and described C.S.'s "medical history." Ariz. R. Evid. 803(4). The trial court did not err in allowing the testimony. *See Cota*, 229 Ariz. 136, ¶ 10, 272 P.3d at 1033.

¶38 The third report at issue is the "Patient Care Report," authored by Justin Simpson, a paramedic who responded to Sunderland's 9-1-1 call and treated C.S. before he was transferred to the hospital. The report was a "general summary of [Simpson's] treatment of [C.S.]," which he created "minutes" after C.S. was taken by helicopter to the hospital. In addition to Simpson's own observations, the report contained information relayed to him by one of the first responders to the scene, fire captain Andy Huxtable, who had treated C.S. before Simpson arrived. Sunderland argues the

[6] Sunderland erroneously contends the trial court allowed Bristol's report to be admitted through Egan, although he did not author the report. The court allowed Egan to testify about the contents of the report and to provide a general overview of Bristol's conclusions. The report, however, was actually admitted during Bristol's testimony.

inclusion of Huxtable's statements in Simpson's report constituted inadmissible hearsay.

¶39 The information Huxtable conveyed to Simpson included the statement from Sunderland that C.S. had reportedly fallen down a hill two to three days prior and, other than vomiting which began the night before, had been acting normally since then; the first set of vital signs taken from C.S., which included his heart rate, glucose level, and Glasgow Coma Score; and the medical treatments that had been performed or attempted by Huxtable's crew prior to Simpson's arrival. Simpson testified that getting this information was "important so that [he could] give proper interventions or . . . proper treatment" and determine whether the current treatments were "helping" or "hurting" C.S. He also stated that understanding how the injuries reportedly happened would "heavily influence[]" his decisions on what medical treatments were most appropriate. And Huxtable's information was, like Simpson's own observations, made in the course of treating C.S. and described his medical condition at that time. *See* Ariz. R. Evid. 803(4). These statements thus fall within the medical treatment exception, *see id.*, and the trial court did not err in admitting the report, *see Cota*, 229 Ariz. 136, ¶ 10, 272 P.3d at 1033.

¶40 Although Sunderland does not address the applicability of the medical treatment exception in his opening brief, citing *State v. Dixon*, 107 Ariz. 415, 418, 489 P.2d 225, 228 (1971), he does argue that "any alleged hearsay exception" cannot apply because "a hearsay declarant must personally observe the matter of which he/she speaks." Although he does not elaborate, we presume his contention is that because Simpson did not personally hear the patient history provided by Sunderland and did not observe Huxtable's treatments himself, the medical treatment exception cannot apply here.[7] *Dixon*,

[7]We do not interpret Sunderland's argument on this point to apply to either the radiologist's report or Bristol's consultation report. As to the former, Egan testified that he reviewed the CT scan results himself and agreed the radiologist's findings were accurate. Egan also testified he was present during Bristol's consultation with C.S. Consequently, Egan did have personal knowledge of the contents of

however, dealt with the excited utterance exception to the hearsay rule, not the medical records exception. 107 Ariz. at 417-18, 489 P.2d at 227-28; *see* Ariz. R. Evid. 803(2). In that case, we noted that "[b]efore the utterance may be admitted as a hearsay exception there must also be a showing that the person making the statement did, in fact, have an opportunity to observe personally the matter of which he speaks." *Id.* at 418, 489 P.2d at 228. The court found that because the declarant made the statement after later returning to the scene of the crime, and not directly after the startling event, it did not constitute an "excited utterance." *Id.*

¶41 *Dixon* does not support Sunderland's argument. That case, as noted above, was limited to an analysis of whether the statement at issue met the requisite factors to qualify as an "excited utterance." *Id.* It does not apply to whether a statement qualifies as one "made for medical diagnosis or treatment." *See* Ariz. R. Evid. 803(4). Indeed, a medical professional conveying statements made to her for diagnosis and treatment will rarely have "personally observe[d] the matter of which [she] speaks." The exception exists because "practitioners will seek and patients will give reliable information to further necessary treatment." *State v. Rushton*, 172 Ariz. 454, 457, 837 P.2d 1189, 1192 (App. 1992). We thus reject Sunderland's argument on this point.

¶42 Sunderland next contends each report also violated his Confrontation Clause rights because he could not "fully confront[] or cross-examine[]" the person who conducted the CT scan, the radiologist, or Huxtable.[8] The Confrontation Clause bars "the introduction of testimonial statements by a nontestifying witness,

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both reports. Moreover, Bristol herself testified to the contents of her report.

[8] Bristol testified at trial about her consultation report and Sunderland had the opportunity, which he took, to confront and cross-examine her about its contents. Because Sunderland's argument that the admission of her report violates his Confrontation Clause rights relies on his erroneous contention that it was admitted through Egan, we do not address it further.

unless the witness is unavailable to testify, and the defendant . . . had a prior opportunity for cross-examination." *State v. Ortiz*, 238 Ariz. 329, ¶ 31, 360 P.3d 125, 133 (App. 2015), *quoting Ohio v. Clark*, ___ U.S. ___, ___, 135 S. Ct. 2173, 2179 (2015). Sunderland did not object below on Confrontation Clause grounds and has therefore forfeited review for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; *see also State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006) ("A 'hearsay' objection does not preserve for appellate review a claim that admission of the evidence violated the Confrontation Clause."). To meet his burden under this standard of review, Sunderland must first establish error occurred. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. "[W]e review de novo challenges to admissibility based on the Confrontation Clause." *State v. Bennett*, 216 Ariz. 15, ¶ 4, 162 P.3d 654, 656 (App. 2007).

¶43 "Testimonial evidence is '*ex parte* in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially.'" *State v. Medina*, 232 Ariz. 391, ¶ 54, 306 P.3d 48, 62 (2013), *quoting Crawford v. Washington*, 541 U.S. 36, 51 (2004). A court must objectively evaluate the circumstances surrounding the statements to determine whether their "primary purpose" was to "establish or prove past events potentially relevant to a later criminal prosecution," thus making the statements testimonial, or whether they were made to assist in an ongoing emergency. *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also State v. Hill*, 236 Ariz. 162, ¶ 14, 336 P.3d 1283, 1287 (App. 2014).

¶44 Sunderland contends that Simpson's report and the radiologist's report are like the testimonial, forensic report at issue in *Bullcoming v. New Mexico*, 564 U.S. 647, 663-64 (2011), and that Simpson and Egan were merely "surrogate[s]" conveying Huxtable's and the radiologist's "testing and conclusions." In *Bullcoming*, the United States Supreme Court found that a blood-alcohol analysis created to determine whether Bullcoming was driving while intoxicated was testimonial because it was "created solely for an

'evidentiary purpose'" and "made in aid of a police investigation." *Id.*, *quoting Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 311 (2009).

¶45 Sunderland's attempt to analogize Huxtable's statements and the radiologist's report to the forensic report in *Bullcoming* is unavailing. Both Huxtable's statements and the radiologist's report, unlike a certified report of a defendant's blood-alcohol in an intoxicated driving case, were not made to aid in a police investigation or to serve some evidentiary purpose. Rather, they were made for the purpose of diagnosis and treatment in an ongoing medical emergency. *See Davis*, 547 U.S. at 822. As this court has previously stated, "[i]f the primary purpose of the encounter is the provision and receipt of medical care, the statement is non-testimonial." *Hill*, 236 Ariz. 162, ¶¶ 22, 24-25, 336 P.3d at 1288-89 (victim's statements to emergency room nurse, including those incriminating defendant, not testimonial because made for purpose of medical treatment). Because these reports and the statements contained within them were not testimonial, Sunderland's Confrontation Clause rights were not violated, and no error, fundamental or otherwise, occurred.

¶46 Sunderland further argues that the admission of all three reports constitutes "further reversible error" because Simpson and Egan impermissibly testified to reports "written by others." Sunderland's exact argument, apart from the hearsay argument addressed above, is unclear, but the legal authority he cites addresses the admission of a witness's prior inconsistent statements. *See* Ariz. R. Evid. 613(b) (allowing impeachment of witness with extrinsic evidence of prior inconsistent statement). In this case, however, the state was not attempting to impeach any witness with these medical reports as a prior inconsistent statement and instead sought to introduce them as evidence of C.S.'s medical condition and medical treatments just prior to his death. We therefore fail to see how these authorities are relevant to this case and, in the absence of any further explanation from Sunderland, do not address this argument further.[9]

[9]Sunderland also cites *State v. Schroeder*, 167 Ariz. 47, 804 P.2d 776 (App. 1990), for the proposition that "one witness may not comment on credibility of another." That case states that "an expert

Admission of Hospital Photographs

¶47 Sunderland next argues the trial court abused its discretion by admitting photographs of C.S. taken at the hospital.[10] Sunderland maintains the photographs were irrelevant, inflammatory, and more prejudicial than probative. We review the admission of photographs for an abuse of discretion. *Cruz*, 218 Ariz. 149, ¶ 125, 181 P.3d at 216.

¶48 Before admitting a potentially inflammatory photograph, a trial court must consider "(1) the relevance of the photograph, (2) its 'tendency to incite or inflame the jury,' and (3) the 'probative value versus potential to cause unfair prejudice.'" *Id.*, *quoting State v. Spreitz*, 190 Ariz. 129, 141, 945 P.2d 1260, 1272 (1997). "In murder cases, '[n]otwithstanding an offer to stipulate to the cause of death, photographs of a murder victim are relevant if they help to illustrate what occurred.'" *Id.* ¶ 126, *quoting State v. Rienhardt*, 190 Ariz. 579, 584, 951 P.2d 454, 459 (1997). Even gruesome photographs "may be admitted provided [they have] probative value apart from merely illustrating the atrociousness of the crime." *State v. Poland*, 144 Ariz. 388, 401, 698 P.2d 183, 196 (1985).

¶49 The hospital photographs at issue were taken while C.S. was in the intensive care unit following surgery. They depict bruising visible on C.S.'s front legs, penis, and buttocks.

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witness may not give an opinion" on a victim's credibility. *Id.* at 50, 804 P.2d at 779. As neither Simpson nor Egan purported to do so, we fail to see how this case applies here.

[10]Sunderland additionally argues the trial court erred by allowing autopsy photographs of C.S. to be admitted. He has not, however, identified the specific exhibits he contends were irrelevant, inflammatory and unduly prejudicial. By failing to do so, he has provided insufficient argument on appeal for this court to review his claim. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838; *West*, 238 Ariz. 482, n.10, 362 P.3d at 1064 n.10 ("An opening brief may not incorporate by reference any issue or argument . . . .").

¶50 The trial court noted that Sunderland's defense was "twofold": first, that C.S.'s injuries were sustained during a fall down a hill while hiking two days before C.S. was taken to the hospital; and, second, that C.S.'s death was caused by surgical intervention, and not his previous injuries. It then found the photographs were "relevant to the existence of the condition [C.S.] was in, not only presurgery but during surgery and post-surgery in the [intensive care unit]." They additionally went "to the issue of whether or not the injuries sustained by [C.S.] were of an accidental nature or were deliberately inflicted." The court also found that, although "obviously disturbing," the photographs were not of "an inflammatory nature" given the other testimony and exhibits portraying C.S.'s medical condition after Sunderland called 9-1-1. Lastly, it determined the probative value was not "substantially outweigh[ed]" by any prejudicial effect.

¶51 Sunderland, however, argues the photographs were irrelevant because "post-surgical . . . photographs cannot provide any proper evidence regarding the question of child abuse." But, as we have previously found in a murder case in which child abuse was the predicate felony, photographs depicting the bruising on the child's body are relevant to show the child had been abused. *See State v. Lopez*, 174 Ariz. 131, 138-39, 847 P.2d 1078, 1085-86 (1992). Additionally, the photographs were relevant in "determining the truth of" Sunderland's assertions that C.S.'s injuries were sustained accidentally in a fall two days earlier, and they also corroborated the various medical professionals' testimony regarding C.S.'s bruises. *State v. Staatz*, 159 Ariz. 411, 415, 768 P.2d 143, 147 (1988), *disapproved of on other grounds by State v. LeBlanc*, 186 Ariz. 437, 440, 924 P.2d 441, 444 (1996).

¶52 Sunderland also contends the photographs "unfairly bias[ed] and inflame[d] the jury" because they show evidence of the medical treatments performed on C.S. With regard to medical treatment, however, the photographs only show the intraosseous line[11] that had been placed in C.S.'s leg. Given the testimony that this

[11]An intraosseous line "is a needle that goes straight into the bone" so that the "tip of the needle is actually in the bone marrow."

line had been placed at the hospital, we fail to see how its appearance in the photographs would have added to their prejudicial impact in any way that outweighed their significant probative value. Moreover, "[s]uch photographs cannot be deemed sufficiently gruesome to inflame the jurors because 'the crime committed was so atrocious that photographs could add little to the repugnance felt by anyone who heard the testimony.'" *Lopez*, 174 Ariz. at 139, 847 P.2d at 1086, *quoting State v. Roscoe*, 145 Ariz. 212, 223, 700 P.2d 1312, 1323 (1984).

¶53 Sunderland further contends the photographs were "needless[ly] cumulative" because photographs of C.S.'s injuries prior to hospital intervention were also admitted. But Sunderland put the surgical intervention directly at issue by arguing it was the actual cause of C.S.'s death. Consequently, photographs of C.S.'s body both before and after surgical intervention were relevant to the issues in this case. Moreover, because the photographs were not inflammatory, even if they were cumulative, any error in their admission would be harmless. *See State v. McCall*, 139 Ariz. 147, 158, 677 P.2d 920, 931 (1983) (admission of cumulative, but not inflammatory photographs, harmless).

Sleeping Juror

¶54 Sunderland next contends the trial court violated his right to a fair trial by failing to excuse or to designate as an alternate a juror who was sleeping during portions of trial. However, as explained below, it is clear the "sleeping juror" did not participate in deliberations. Thus, "any error with respect to [her] is harmless." *State v. Glassel*, 211 Ariz. 33, ¶ 41, 116 P.3d 1193, 1206-07 (2005); *cf. State v. Martinez*, 218 Ariz. 421, ¶ 35, 189 P.3d 348, 356 (2008) (declining to address argument potential juror ultimately not selected should have been struck for cause).

¶55 On the third day of trial, out of the presence of the jury, the trial court noted that it had seen juror twelve, E.U., closing her eyes "a little bit." On the sixth day of trial, the prosecutor alerted the court that he noticed E.U. appearing to fall asleep for about "three minutes" during the testimony of A.Q.'s mother. The detective seated with the prosecutor then stated he had noticed E.U. with her eyes

closed on "multiple occasions" during the testimony of "several" witnesses. The parties then stipulated that E.U. would be designated an alternate but not dismissed at that time. After reading the final jury instructions, the court designated E.U. as the second alternate. The court informed E.U. she would not be participating in deliberations and instructed her to leave the courtroom and not return unless later recalled by the court. Consequently, the record clearly demonstrates that the "sleeping juror" was excused and did not participate in deliberations.

¶56 Sunderland rests his argument on the fact that, at one point, the trial court referred to E.U. as juror eleven. Juror eleven did participate in deliberations and the verdict. From the context of the court's repeated discussions and reference to E.U. by name, we conclude the court's one-time mention of her as juror eleven, and not juror twelve, was a simple misstatement. Moreover, Sunderland was aware of the repeated issues with E.U., and he did not object when the court excused E.U. as an alternate and allowed juror eleven to participate in deliberations. The parties' exchanges clearly show that E.U. was, in fact, the "sleeping juror" whom the parties had agreed to designate as an alternate and, as such, she was excused prior to deliberations, and any potential error was rendered harmless. *See Glassel*, 211 Ariz. 33, ¶ 41, 116 P.3d at 1206-07; *Martinez*, 218 Ariz. 421, ¶ 35, 189 P.3d at 356.

Aggravating Factors Used in Sentencing

¶57 Sunderland lastly contends the trial court imposed an illegal natural-life sentence by relying on aggravating factors not found by the jury. He has forfeited review of this argument for all but fundamental, prejudicial error by failing to object on these grounds below. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002). An illegal sentence, however, constitutes fundamental error. *Id.*

¶58 "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also State v. Aleman*, 210 Ariz. 232, ¶ 21, 109 P.3d 571, 578 (App. 2005).

"[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004); *see also Aleman*, 210 Ariz. 232, ¶ 21, 109 P.3d at 578.

¶59 Sunderland was convicted of first-degree murder pursuant to § 13-1105(A)(2) by committing child abuse. When a "defendant is convicted of first degree murder pursuant to [§ 13-1105(A)(2)], the [trial] court shall determine whether to impose a sentence of life or natural life." A.R.S. § 13-752(A). In making that determination, "the court may . . . consider any evidence introduced before sentencing or at any other sentencing proceeding" and "[s]hall consider the aggravating and mitigating circumstances listed in [A.R.S.] § 13-701 and any statement made by a victim." § 13-752(Q).

¶60 At sentencing, the trial court stated it found several aggravating factors, including the presence of an accomplice, that the crime was "especially heinous, cruel, and depraved," and the physical, emotional and financial harm to the victim and victim's family. *See* § 13-701(D). Sunderland argues that the court was not authorized to consider any of the aggravating factors listed in § 13-701(D) because they had not been found by a jury. He thus contends the court "relie[d] on inappropriate factors" and the case must be remanded for sentencing without consideration of any factors listed in § 13-701(D).

¶61 Sunderland's argument is without merit. Section 13-752(Q) expressly requires a trial court to consider the aggravating and mitigating factors listed in § 13-701. And our supreme court has found that, under *Blakely* and *Apprendi*, "the Sixth Amendment does not require that a jury find an aggravating circumstance before a natural life sentence can be imposed" for first-degree murder. *State v. Fell*, 210 Ariz. 554, ¶ 19, 115 P.3d 594, 600 (2005).[12] Curiously,

[12]The statutes at issue in *Fell* have since been renumbered and amended, but the substance has remained the same. 210 Ariz. 554, ¶¶ 4-6, 10, 14, 115 P.3d at 596-98; *see* 2005 Ariz. Sess. Laws, ch. 325, §§ 2, 3; *see also* 2008 Ariz. Sess. Laws, ch. 301, §§ 26, 39 (renumbering

Sunderland has not cited *Fell* or argued it is somehow inapplicable here. Because the trial court acted appropriately by considering the aggravating factors under § 13-701(D) and imposing a natural-life sentence without further jury findings, no error, much less fundamental error, occurred.

Disposition

¶62 For the foregoing reasons, we affirm Sunderland's convictions and sentences.

A.R.S. §§ 13-703, 13-703.01 to A.R.S. §§ 13-751, 13-752). Accordingly, *Fell* still controls sentencing for non-capital, first-degree murder.