IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL DWAYNE LEDAY JR.,
Appellant.

No. 2 CA-CR 2015-0478
Filed April 10, 2017

Appeal from the Superior Court in Pima County
No. CR20140376001
The Honorable Richard D. Nichols, Judge

AFFIRMED AS CORRECTED

COUNSEL

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

Kevin M. Burke, Interim Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 After a jury trial, Michael Leday was convicted of two counts of second-degree murder, one count of aggravated assault causing serious physical injury, and one count of aggravated assault with a dangerous instrument. He was sentenced to concurrent and consecutive terms totaling 57.5 years. He argues the trial court erred by denying his motion for a change of venue, denying his request for a self-defense justification instruction, making certain evidentiary rulings, and improperly aggravating his sentence. We affirm for the reasons stated below.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Delahanty*, 226 Ariz. 502, n.2, 250 P.3d 1131, 1133 n.2 (2011). At about 3:00 A.M. on New Year's Day 2014, Leday and C.B. got out of a taxicab in a residential area of Tucson. Witnesses at a nearby party saw Leday take off C.B.'s clothing, climb on top of her, and attempt to have sex with her in the middle of the street, even as she screamed for him to stop. A car stopped nearby; P.B., the driver, called the police[1] and stepped out of the car[2] while on the telephone. Leday told P.B. "that if he want[ed] [C.B.], he [could] take her, that he[was] no use to her anymore." Leday walked around

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[1]After a couple of minutes on the telephone, P.B. said to the 9-1-1 operator "Just come over here now, would you? Before I hurt this guy right now."

[2]At some point, P.B.'s girlfriend V.C. also got out of the car, but she could not remember anything that happened from that point until she woke up in the hospital severely injured.

toward the driver's-side door of the car. P.B. told Leday to back off and not get too close. Leday then punched P.B. and a fistfight ensued between them. Multiple witnesses said Leday was the initial aggressor and P.B. was "defending himself." P.B. tried to back away from the fight at one point but Leday "[f]ollow[ed] him" and kept swinging at him.

¶3 Leday forced his way into the driver's seat of the car. He honked the horn and revved the engine multiple times, and then drove forward, running over C.B.'s legs as she lay in the street. He put the car in reverse, backed up, put it in drive again, and ran over C.B. "back and forth." He continued into a wash and hit a tree, and then backed up and came back toward the street. P.B. positioned himself between the car and C.B. Then Leday accelerated and ran over P.B., dragging him. At some point, Leday got out of the car, punched P.B., and said, "[D]o you want to be a hero[?]" Leday drove away in the car, about thirty seconds or a minute passed, and then he returned and ran over C.B. again. Finally, he came to a stop, got out of the car, screamed "Oh my God, oh my God, what did I do, call the cops," and left.

¶4 Altogether, Leday ran over C.B. about five times, and ran over P.B. three times. C.B. died at the scene, and P.B. died later; a forensic pathologist opined both deaths were caused by blunt-force injuries sustained as the result of being run over by a vehicle. Leday also ran over V.C. at some point during the incident, causing serious injuries which she survived. DNA[3] matching that of P.B. and C.B. was found on the undercarriage of the car.[4] DNA matching Leday's was found in the center of the car's deployed driver's-side airbag, on the windshield at the site of impact, and on the interior handle of the driver's-side door. The car's electronic data system showed that the vehicle had been going seventy-eight miles per hour five seconds before the airbag had deployed, and that the accelerator was pressed

[3]Deoxyribonucleic acid.

[4]V.C. could not be excluded as a DNA contributor to another sample taken from the car's undercarriage.

to one hundred percent capacity at the moment of the impact that had caused the airbag to deploy.

¶5 Leday took a bus to Missouri the day after the incident and was eventually apprehended in Kansas City after a foot chase with law enforcement officers there. He spontaneously commented to a Missouri detective: "I'm going to get the death penalty for this shit."

¶6 After a jury trial, Leday was convicted of second-degree murder of P.B. and C.B., aggravated assault with a dangerous instrument of V.C., and aggravated assault causing serious physical injury of V.C.[5] We have jurisdiction over his appeal pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Motion for Change of Venue

¶7 Leday argues the trial court erred by denying his motion for a change of venue based on pretrial publicity pursuant to Rule 10.3, Ariz. R. Crim. P. "A party seeking a change of venue must show that the prejudicial pretrial publicity 'will probably . . . deprive[] [the party] of a fair trial.'" *State v. Cruz*, 218 Ariz. 149, ¶ 12, 181 P.3d 196, 203 (2008), *quoting* Ariz. R. Crim. P. 10.3(b) (alterations in *Cruz*). We review a ruling on a motion for a change of venue for an abuse of discretion. *State v. Forde*, 233 Ariz. 543, ¶ 11, 315 P.3d 1200, 1210 (2014).

¶8 A reviewing court employs a two-step inquiry to decide "whether, under the totality of the circumstances, the publicity attendant to defendant's trial was so pervasive that it caused the proceedings to be fundamentally unfair." *Id.* ¶ 12, *quoting Cruz*, 218 Ariz. 149, ¶ 13, 181 P.3d at 203. First, the court will ask "whether the publicity so pervaded the proceedings that the trial court erred by not presuming prejudice." *Id.* If prejudice is not presumed, the court determines "whether the defendant showed actual prejudice." *Id.*

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[5]Leday was acquitted of attempted first-degree murder, and its lesser-included offense of attempted second-degree murder, as to V.C.

¶9 The defendant's burden of showing presumptive prejudice from pretrial publicity is "extremely heavy." *Id.* ¶ 13, *quoting State v. Bible*, 175 Ariz. 549, 564, 858 P.2d 1152, 1167 (1993). "The publicity must be so unfair, prejudicial, and pervasive that jurors could not decide the case fairly, even if they avow otherwise." *Id.*; *see also State v. Bigger*, 227 Ariz. 196, ¶ 10, 254 P.3d 1142, 1146 (App. 2011), *quoting Cruz*, 218 Ariz. 149, ¶ 15, 181 P.3d at 204 (pretrial coverage "must be so 'extensive or outrageous that it permeated the proceedings or created a "carnival-like" atmosphere'"). Courts will consider not only the quantity but also the effect of pretrial publicity, and are reluctant to presume prejudice when the publicity was "primarily factual and non-inflammatory" or "did not occur close in time to the trial." *Bigger*, 227 Ariz. 196, ¶ 11, 254 P.3d at 1146, *quoting State v. Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d 717, 727 (2001).

¶10 Leday has not carried the extremely heavy burden of showing presumptive prejudice. The news articles he attached to his motion for a change of venue were largely factual in nature, and all were published more than a year before the beginning of trial. *Cf. Forde*, 233 Ariz. 543, ¶ 14, 315 P.3d at 1211 (no presumed prejudice where most news accounts "essentially factual" and published in immediate aftermath of crimes, about eighteen months before trial). The coverage primarily discussed the crime itself, Leday's apprehension and extradition, and the effects of the crime on the victims and their families. One article quoted a police spokesperson as saying that Leday had "aggressively used [P.B.'s] vehicle as a weapon to strike all three victims multiple times," but indeed this was the state's theory of the case as to the first-degree murder and attempted first-degree murder counts, and it was essentially factual with the possible exception of the word "aggressively." Leday also emphasizes that numerous articles included characterizations of him as a "monster" or characterizations of P.B. as a "hero," "good Samaritan," "gentleman," or "stand-up guy," but most of these characterizations were merely quotes from P.B.'s loved ones. Such characterizations are neither surprising nor inflammatory coming from those who had lost a loved one in a tragic incident.

¶11 The pretrial coverage in this case was not nearly as inflammatory as that in *Bible*, in which certain news reports

incorrectly stated the defendant was a child molester, had "'flunked' a lie detector test" in connection to the case, and had admitted involvement in the charged offenses. 175 Ariz. at 564, 858 P.2d at 1167. Even on those facts, our supreme court declined to presume prejudice, observing that the record did not show the coverage had "utterly corrupted" the trial. *Id.* at 564-65, 858 P.2d at 1167-68, *quoting Murphy v. Florida*, 421 U.S. 794, 798 (1975). As in *Bible*, here the trial court did not abuse its discretion in determining Leday did not establish that the coverage was so outrageous as to foreclose the possibility of a fair trial.

¶12 Leday also argues reader comments posted on the internet website versions of some of the news articles support his claim of presumptive prejudice. Although we agree some of the comments were inflammatory, "[a] smattering of online comments found on news stories hardly substantiates a finding of community prejudice in a large community such as [Tucson]." *State v. Griego*, 377 P.3d 1217, ¶ 34 (Mont. 2016); *accord Powell v. State*, 49 A.3d 1090, 1098 (Del. 2012) (inflammatory online comments deserved only minimal weight in presumptive prejudice analysis). To the extent the comments created the potential for actual prejudice among jurors, "the best method to uncover [such] potential prejudice is through the voir dire process," which here revealed no prejudice, as discussed below. *Griego*, 377 P.3d 1217, ¶ 34.

¶13 Nor has Leday shown actual prejudice. "For a court to find actual prejudice, jurors must have formed preconceived notions of guilt they were unable to set aside." *Bigger*, 227 Ariz. 196, ¶ 20, 254 P.3d at 1148; *see also Cruz*, 218 Ariz. 149, ¶ 21, 181 P.3d at 204 (dispositive question is what effect publicity had on objectivity of jurors actually seated). Here, of the jurors actually seated, just three had seen any media reports related to the case. One affirmed she could approach the case with an open mind notwithstanding the news reports she had seen; another said he did not know any details about the case and that it only "r[ang] a vague bell." The third, who also affirmed during voir dire that she could approach the trial with an open mind, was later randomly selected as an alternate juror and did not actually participate in the deliberations. The record reveals no actual prejudice to Leday from the pretrial publicity. *See Bigger*,

227 Ariz. 196, ¶¶ 20-22, 254 P.3d at 1148-49 (no actual prejudice where most jurors had "only vague recollections" of media coverage and none had formed opinion as to defendant's guilt or innocence). The court did not abuse its discretion in denying Leday's motion for a change of venue.

Justification Instruction

¶14 Leday's next assignment of error is the trial court's refusal to give the self-defense justification instruction he requested as to the counts involving P.B. and V.C.[6] "A defendant is entitled to a self-defense instruction if the record contains the 'slightest evidence' that he acted in self-defense." *State v. King*, 225 Ariz. 87, ¶ 14, 235 P.3d 240, 243 (2010), *quoting State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983); *see also id.* ¶ 15 ("hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing her life or sustaining great bodily harm," constitutes "slightest evidence"), *quoting Lujan*, 136 Ariz. at 104, 664 P.2d at 648. Yet the instruction is not required "unless it is reasonably and clearly supported by the evidence." *State v. Vassell*, 238 Ariz. 281, ¶ 9, 359 P.3d 1025, 1028 (App. 2015), *quoting State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692-93 (App. 2005). We review the court's ruling for a clear abuse of discretion, viewing the facts in the light most favorable to Leday, the instruction's proponent. *Vassell*, 238 Ariz. 281, ¶¶ 2, 8, 359 P.3d at 1026, 1027-28.

¶15 "A person is justified in . . . using deadly physical force against another . . . [w]hen and to the degree a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force." A.R.S. § 13-405(A)(2). "An essential element of self-defense is the accused's freedom from fault in provoking the difficulty that gives rise to the use of the force." *State v. Zamora*, 140 Ariz. 338, 341, 681 P.2d 921, 924 (App. 1984); *see* A.R.S. § 13-404(B)(3). Furthermore, "after a fight has broken off, one cannot pursue and kill merely because he once feared for his life." *State v. Buggs*, 167 Ariz.

[6] Leday concedes he was not entitled to a justification instruction as to the murder count involving C.B.

333, 337, 806 P.2d 1381, 1385 (App. 1990), *citing State v. Powers*, 117 Ariz. 220, 227, 571 P.2d 1016, 1023 (1977); *cf. State v. Barger*, 167 Ariz. 563, 567-68, 810 P.2d 191, 195-96 (App. 1990) (approving instruction that stated "The right to use physical force in self-defense ends when the apparent danger ends.").

¶16 There was not the slightest evidence Leday used deadly physical force in self-defense against V.C.'s use of deadly physical force. There was no evidence V.C. used or attempted to use physical force against Leday at all, much less unlawful deadly physical force. § 13-405(A)(2). Absent any evidence of a "hostile demonstration" by V.C., *King*, 225 Ariz. 87, ¶ 15, 235 P.3d at 243, *quoting Lujan*, 136 Ariz. at 104, 664 P.2d at 648, the record did not reasonably and clearly support a justification theory as to her and a justification instruction was not required, *Vassell*, 238 Ariz. 281, ¶ 9, 359 P.3d at 1028.

¶17 Nor did the record support a justification instruction as to P.B. All but one eyewitness to the fight testified Leday threw the first punch, even after P.B. had told him to back off and not get too close. The one witness who did not so testify, stated he did not know who had thrown the first punch, but agreed Leday had been the initial aggressor. No witnesses claimed P.B. had initiated the physical confrontation. *See* § 13-404(B)(3) (use of physical force by initial aggressor not justified absent his withdrawal).

¶18 But even assuming arguendo that, in the light most favorable to Leday, the evidence showed P.B. had been the initial aggressor and Leday was justified in using physical force in self-defense against P.B.'s initial punch, Leday was not justified in following P.B. and continuing to swing at him after P.B. had attempted to back away from the fight. *See Buggs*, 167 Ariz. at 337, 806 P.2d at 1385. Nor was Leday justified in using deadly physical force against P.B. (or V.C.) after the alleged danger had ended and Leday had found safety inside the car. *See Barger*, 167 Ariz. at 567-68, 810 P.2d at 195-96; *see also* § 13-405 (deadly physical force must be "immediately necessary" to be justified). The trial court did not abuse its discretion in refusing Leday's request for a justification instruction. *Vassell*, 238 Ariz. 281, ¶ 9, 359 P.3d at 1028.

Evidentiary Issues

Admission of Defendant's Pretrial Statement

¶19 Leday argues the trial court abused its discretion by admitting his statement to the Missouri detective that he was "going to get the death penalty for this shit." At trial, he sought to preclude the statement on relevance grounds, but on appeal he argues it was inadmissible pursuant to Rule 403, Ariz. R. Evid. As he acknowledges, our review is limited to fundamental, prejudicial error. *See generally State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). It is Leday's burden to show an error that went to the foundation of the case, took from him a right essential to his defense, and was of such magnitude that he could not possibly have received a fair trial. *Id.*

¶20 Evidence is relevant if it has any tendency to make any fact of consequence more or less probable than it would be without the evidence. Ariz. R. Evid. 401. Irrelevant evidence is inadmissible. Ariz. R. Evid. 402. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or needlessly presenting cumulative evidence, among other risks. Ariz. R. Evid. 403. "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Ortiz*, 238 Ariz. 329, ¶ 9, 360 P.3d 125, 130 (App. 2015), *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶21 The trial court reasonably concluded Leday's statement was relevant to show consciousness of guilt. *Cf. State v. Updike*, 151 Ariz. 433, 433-34, 728 P.2d 303, 303-04 (App. 1986) (defendant's statement "keep your mouth shut and nobody will get in trouble" relevant to show consciousness of guilt). However, Leday argues its probative value was substantially outweighed by the risk of needlessly presenting cumulative evidence, because Leday's flight to and within Missouri and his statement "Oh my God, oh my God, what did I do, call the cops" had already established consciousness of guilt. In the alternative, he argues the probative value was substantially outweighed by the risk of unfair prejudice because the

reference to the death penalty, an emotionally charged issue, suggested decision on the basis of emotion or horror.

¶22 Leday has not established that admission of his statement went to the foundation of the case, deprived him of a right essential to his defense, and deprived him of a fair trial. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. Furthermore, even assuming for the sake of argument that the statement was inadmissible pursuant to Rule 403, he has failed to show prejudice. *See id.* ¶ 20 (defendant's burden to show prejudice in fundamental error review). The jury was instructed not to consider possible punishment—such as the death penalty—in reaching its verdict, and we presume the jurors followed that instruction. *State v. Newell*, 212 Ariz. 389, ¶¶ 68-69, 132 P.3d 833, 847 (2006). The verdict also suggests the evidence did not inflame the jury—the jury found Leday not guilty of first-degree murder of P.B. and C.B. and instead convicted him of second-degree murder on those counts. It also found Leday not guilty on the charge of attempted first-degree murder, as well as its lesser-included offense of attempted second-degree murder, as to V.C. *Cf. State v. Bocharski*, 200 Ariz. 50, ¶ 34, 22 P.3d 43, 50 (2001) (attention to detail in verdict and conviction for lesser-included offenses may suggest verdict not based on outrage). Thus, had any error occurred, it would be neither fundamental nor prejudicial.

Preclusion of Victim's Prior Conviction

¶23 Leday contends the trial court erred by denying his pretrial motion to allow admission of evidence regarding P.B.'s conviction for a 2005 drive-by shooting at a strip club pursuant to Rules 404 and 405, Ariz. R. Evid. We review evidentiary rulings for an abuse of discretion. *State v. Steinle*, 239 Ariz. 415, ¶ 6, 372 P.3d 939, 941 (2016).

¶24 "Evidence of a pertinent trait of character of the victim of the crime offered by an accused" is admissible to prove action in conformity therewith. Ariz. R. Evid. 404(a)(2). Such evidence may be in the form of reputation or opinion testimony. Ariz. R. Evid. 405(a). Rule 404(b) provides, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but may be admissible to show "motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, a person's character trait that is "an essential element of a charge, claim, or defense" may be proved by "relevant specific instances of the person's conduct." Ariz. R. Evid. 405(b).

¶25 A victim's character is not an element a party must prove to make out a prima facie case of self-defense; therefore, it is not an "essential element" of self-defense under Rule 405(b). *State v. Fish*, 222 Ariz. 109, ¶¶ 29-30, 213 P.3d 258, 268 (App. 2009). When a defendant offers evidence of the victim's aggressive or violent character to show that the victim was the initial aggressor, it is admissible only if it is in the form of reputation or opinion, not if it is in the form of a specific instance of violence or aggression by the victim which was not known to the defendant at the time of the alleged crime.[7] *See id.* ¶¶ 25-35. There was no evidence that Leday knew of P.B.'s prior conviction before committing the alleged crimes. And Leday offered the conviction as a specific instance of conduct to prove P.B.'s violent character and conformity therewith on the night in question. Thus, the trial court did not abuse its discretion in excluding the evidence under Rules 404(a)(2) and 405(a)-(b). *Fish*, 222 Ariz. 109, ¶ 35, 213 P.3d at 270.

¶26 Leday further argues the conduct that gave rise to P.B.'s prior conviction was so similar to his alleged conduct on the night in question that evidence about the 2005 incident was admissible to show P.B. had a modus operandi in such situations. *See* Ariz. R. Evid. 404(b); *cf. Fish*, 222 Ariz. 109, ¶¶ 41-49, 213 P.3d at 271-74. In the 2005 incident, P.B. was kicked out of a strip club after a dispute with his ex-girlfriend who was a dancer there, after which he shot at the bouncer of the club. In the present incident, P.B. stopped his car and called 9-1-1 to report a man on the street "abusing" or attempting to

[7]If the defendant actually knew of a prior violent act by the victim at the time of the crime, then that specific act may be admissible not as propensity evidence, but rather to show the defendant's state of mind at the time of the alleged crime and the reasonableness of his actions. *Fish*, 222 Ariz. 109, ¶¶ 36-38, 213 P.3d at 270-71; *see* Ariz. R. Evid. 404(b).

rape a woman, and a fistfight ensued. The trial court did not err in finding these two incidents "factually dissimilar," and thus, the 2005 incident had minimal probative value in terms of showing P.B.'s purported modus operandi. And the court implicitly and reasonably concluded that the danger of unfair prejudice from evidence that P.B. had committed drive-by shooting at a strip club was high. Thus, even assuming for the sake of argument that Rule 404(b) applied as it did under the unique facts of *Fish*, *see* 222 Ariz. 109, ¶ 49, 213 P.3d at 274, the evidence was still inadmissible pursuant to Rule 403, *see Fish*, 222 Ariz. 109, ¶¶ 50-54, 213 P.3d at 274-75.[8]

Sentencing Issues

¶27 Leday contends the trial court erred by aggravating his sentences on Counts One and Two. We review a sentence within the statutorily-prescribed range for an abuse of discretion, but determine de novo whether the court may use a particular factor in aggravation. *State v. Tschilar*, 200 Ariz. 427, ¶ 32, 27 P.3d 331, 339 (App. 2001). We interpret sentencing statutes de novo. *State v. Urquidez*, 213 Ariz. 50, ¶ 11, 138 P.3d 1177, 1180 (App. 2006).

¶28 Counts One and Two of the indictment charged Leday with first-degree murder of P.B. and C.B., respectively. Before trial, the state alleged each count of the indictment was of a dangerous nature in that each involved a deadly weapon or dangerous instrument—a motor vehicle. The state later filed a notice of intent to prove two aggravating factors: (1) the especially cruel, heinous, or depraved manner in which the offenses were committed, and (2) physical, emotional, or financial harm to V.C. and to the families of P.B. and C.B. *See* A.R.S. § 13-701(D)(5), (9).

¶29 The jury found Leday guilty of the lesser-included offense of second-degree murder on Counts One and Two. At the

[8]Leday appears to argue that evidence can never be unfairly prejudicial to the state, but he is mistaken. We have often upheld trial courts' preclusion of evidence as unfairly prejudicial to the state under Rule 403. *E.g.*, *State v. Foshay*, 239 Ariz. 271, ¶ 40, 370 P.3d 618, 626 (App. 2016) (evidence of victim's personal drug use).

aggravation hearing, the state withdrew its allegation of harm to C.B.'s family, and abandoned its allegation the crimes had been committed in an especially cruel, heinous, or depraved manner by not objecting when that issue was not submitted to the jury. The jury found beyond a reasonable doubt that Counts One and Two involved the use of a dangerous instrument. The jury found the Count One aggravating factor of emotional or financial harm to P.B.'s family not proven beyond a reasonable doubt.

¶30 At the sentencing hearing, the trial court found three aggravating factors as to Counts One and Two: (1) the dangerous nature of the offenses which were committed with a dangerous instrument, namely, a motor vehicle, (2) the emotional harm Leday caused V.C. and the families of P.B. and C.B., and (3) Leday's lack of remorse as evidenced by his escape from Tucson and attempted escape in Missouri. The court imposed the maximum sentence of twenty-five years on Counts One and Two pursuant to A.R.S. § 13-710(A).

¶31 Leday argues the jury did not find any aggravating factor as to Counts One and Two because the state failed to prove harm to P.B.'s family beyond a reasonable doubt, withdrew the allegation of harm to C.B.'s family, and abandoned its claim that the crimes were committed in a cruel, heinous, or depraved manner. Therefore, he contends, the trial court erred by aggravating the sentence based only on the aggravating factors it found at the sentencing hearing. He cites *Apprendi v. New Jersey*, in which the United States Supreme Court held that "[o]ther 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." 530 U.S. 466, 490 (2000); *accord Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *see also State v. Brown*, 209 Ariz. 200, ¶¶ 12-13, 99 P.3d 15, 18 (2004) (in Arizona, absent jury findings, presumptive sentence is "statutory maximum" within meaning of *Apprendi*).

¶32 The state contends the jury did find one aggravating factor as to Counts One and Two—the use of a dangerous instrument, a motor vehicle. *See* A.R.S. § 13-701(D)(2). Leday maintains the jury only found the dangerous-instrument sentence enhancement

pursuant to A.R.S. §§ 13-105(13) and 13-704, not the dangerous-instrument aggravating factor under § 13-701(D)(2).

¶33 Section 13-701(D)(2) provides "the trier of fact shall determine and the court shall consider" as an aggravating circumstance the "[u]se, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under § 13-704." Use, threatened use, or possession of a deadly weapon or dangerous instrument is not an essential element of second-degree murder. *See* A.R.S. § 13-1104(A) (crime may be completed without any deadly weapon or dangerous instrument). Nor was the use of a deadly weapon or dangerous instrument used to enhance Leday's sentence on Counts One and Two under § 13-704 because he was sentenced for those counts under § 13-710, not § 13-704. Thus, the jury properly considered the dangerous-instrument aggravating circumstance under § 13-701(D)(2), and found it proven beyond a reasonable doubt as to Counts One and Two.

¶34 Under Arizona's noncapital sentencing law, once the jury has found at least one aggravating circumstance beyond a reasonable doubt, the court may consider other factors relevant to the exercise of its discretion in determining the specific sentence to impose on the defendant within the applicable statutory sentencing range. A.R.S. § 13-701(F); *State v. Martinez*, 210 Ariz. 578, ¶ 16, 115 P.3d 618, 623 (2005). The court may find such facts by a preponderance of the evidence without violating the Sixth Amendment principles articulated in *Apprendi* and *Blakely*. *Martinez*, 210 Ariz. 578, ¶¶ 26-27, 115 P.3d at 625-26; *see* A.R.S. § 13-701(F); *see also United States v. Watts*, 519 U.S. 148, 156-57 (1997) (jury's verdict of acquittal does not prevent sentencing court from finding conduct underlying acquitted charge proven by preponderance of evidence).[9]

[9]Leday argues *Blakely* tacitly superseded this aspect of *Watts*, citing only a dissent from an Eighth Circuit opinion to support his position. *See United States v. Lasley*, 832 F.3d 910, 922 (8th Cir. 2016) (Bright, J., dissenting). But Arizona courts have rejected this position and continued to rely on *Watts* even after *Blakely*. *See, e.g.*, *State v.*

¶35 The jury found beyond a reasonable doubt that Counts One and Two involved the use of a dangerous instrument. This *Blakely*-compliant, jury-determined, aggravating circumstance "establishe[d] the facts legally essential to expose the defendant to the maximum sentence" prescribed in the applicable sentencing statute, § 13-710(A). *Martinez*, 210 Ariz. 578, ¶ 21, 115 P.3d at 624. Later, at the sentencing hearing, the trial court found the three aggravating factors noted above, and considered them in the course of determining the appropriate sentence within the § 13-710(A) range. The court did not abuse its discretion in imposing maximum sentences on Counts One and Two.

¶36 In the alternative, Leday argues he did not receive adequate notice of the state's intent to prove use of a dangerous instrument as an aggravating circumstance, but only as an enhancer, and contends using that circumstance as an aggravator was "fundamentally unfair." He maintains the state's allegation, filed on the same date as the indictment, that all counts and any lesser-included offenses involved "use and/or discharge and/or threatening exhibition of a deadly weapon and/or dangerous instrument, to wit: a motor vehicle," only put him on notice of the state's intent to prove the dangerous nature enhancement, not the (factually identical) dangerous nature aggravating factor. But even accepting for the sake of argument the state could have made more clear its intent to use the dangerous instrument allegation as either an enhancer or an aggravator, Leday suffered no prejudice because he had actual notice that he would need to defend against the use of a dangerous instrument on all counts, and in fact did so.

¶37 Leday also attacks the particular aggravating factors the trial court found. First, he argues the court erred by finding the aggravating factor of emotional harm to P.B.'s immediate family after the jury had found that allegation not proven beyond a reasonable doubt. But because the jury found the dangerous instrument aggravating circumstance beyond a reasonable doubt with respect to

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Yonkman, 233 Ariz. 369, ¶ 14, 312 P.3d 1135, 1140 (App. 2013) (relying on *Watts* for proposition that "an acquittal carries no preclusive effect under a lesser evidentiary standard").

the murder counts, the court was then free to find by a preponderance of the evidence other aggravating factors relevant to its exercise of discretion in selecting a sentence on those counts within the applicable statutory range. A.R.S. § 13-701(F); *Martinez*, 210 Ariz. 578, ¶¶ 26-27, 115 P.3d at 625-26. Testimony at the sentencing hearing provided sufficient evidence for the court to find emotional harm to P.B.'s family. And that the jury did not find harm to P.B.'s family proven beyond a reasonable doubt is not logically inconsistent with the court later finding that fact proven by a preponderance of the evidence. *See Watts*, 519 U.S. at 156-57.

¶38 Second, Leday challenges the trial court's finding of emotional harm to C.B.'s family as an aggravating factor at sentencing after the state had withdrawn that allegation during the aggravation phase. He argues the state circumvented his Confrontation Clause rights because he could have cross-examined the state's witnesses about this factor during the aggravation phase but could not do so at sentencing. *See Williams v. New York*, 337 U.S. 241, 250 (1949) (right of cross-examination does not apply at sentencing). He cites only *State v. McGill*, 213 Ariz. 147, ¶ 51, 140 P.3d 930, 942 (2006) and its discussion of *State v. Greenway*, 170 Ariz. 155, 161 n.1, 823 P.2d 22, 28 n.1 (1991), but those cases are inapposite because they deal with rebuttal testimony during the aggravation phase of a capital case. *See McGill*, 213 Ariz. 147, ¶¶ 49-52, 140 P.3d at 941-42. Leday has not shown those holdings extend to this circumstance or that the court erred. *See State v. Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d 174, 176 (2010) (defendant-appellant must establish error under any standard of review).

¶39 Third, Leday argues the trial court improperly considered lack of remorse in aggravation. But the court did not violate Leday's Fifth Amendment right to remain silent by relying on his refusal to admit guilt to aggravate his sentences for lack of remorse. *Cf. State v. Trujillo*, 227 Ariz. 314, ¶¶ 9-15, 257 P.3d 1194, 1197-98 (App. 2011). Indeed, Leday actually made an allocution statement at the sentencing hearing, saying "[i]t was an accident," he was "really sorry," and he "never meant to hurt anybody." Additionally, the court found Leday lacked remorse not based on anything he said or failed to say, but based on his escape from Tucson

and attempted escape in Missouri. The court's finding did not intrude upon Leday's right to silence and was not error.

¶40 Leday's final argument is that the trial court made a clerical error in his sentence that we should correct pursuant to Rule 24.4, Ariz. R. Crim. P. As to Count Four, aggravated assault with a dangerous instrument against V.C., the court initially found the same three aggravating factors as it did in Counts One and Two, and imposed a maximum sentence of seven years under § 13-702(D). The court specified that the sentence in Count Two would be consecutive to that of Count One, and the sentences in Counts Four and Five[10] would be concurrent with each other and consecutive to the sentence in Count Two.

¶41 The trial court later amended the minute entry as to Count Four, striking the three aggravating circumstances it had previously found on that count and reducing the sentence to the presumptive term of 3.5 years. The amendment also stated the sentence in Count Four would commence "upon completion of the sentence of imprisonment previously imposed as to Count One," rather than the sentence previously imposed as to Count Two as originally ordered. The court said its original minute entry would "remain in full force and effect in all other respects."

¶42 We agree with Leday that the amendment's statement that the sentence in Count Four would commence upon completion of the sentence in Count One rather than the sentence in Count Two was a clerical error. Therefore, we correct the clerical error in the amendment to show that Count Four commences upon the completion of Count Two.[11]

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[10]Count Five was aggravated assault causing serious physical injury to V.C.

[11]Citing A.R.S. § 13-116, Leday also appears to argue the court erroneously ordered his sentences in Counts Four and Five to run consecutively. He is mistaken; the court ordered those sentences to run concurrently.

Disposition

¶43 We affirm Leday's convictions and sentences, as corrected, for the reasons stated above.