IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRUCE ALAN MCCULLOUGH,
Appellant.

No. 2 CA-CR 2016-0342
Filed November 30, 2017

Appeal from the Superior Court in Pima County
No. CR20131970001
The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

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

Dean Brault, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Bruce McCullough was convicted of first-degree murder and sentenced to life in prison without the possibility of release for twenty-five years. On appeal, McCullough contends the trial court erred in denying his motions to suppress, admitting unauthenticated autopsy photographs, admitting other-act evidence, denying his motion for a mistrial, and denying his motion for a judgment of acquittal. He also argues the jury instructions improperly shifted the state's burden of proof. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming McCullough's conviction. *See State v. Musgrove*, 223 Ariz. 164, ¶ 2 (App. 2009). In March 1976, D.S.'s mother went to visit her daughter at the house D.S. shared with McCullough. When no one answered the door, D.S.'s mother left, went shopping, and returned several hours later. Again, however, no one answered the door. A neighbor approached D.S.'s mother, who had grown concerned for her daughter's wellbeing, and the two went around to the back of the house, where the mother crawled through a window. She walked through the bedroom into the hallway, where she saw "[D.S.'s] legs protruding out of the bathroom doorway." Upon touching her daughter's leg and thinking it was cold, she began "yell[ing] for the gentleman outside to come in, that [her daughter] was hurt." After the neighbor went inside, he immediately "grabbed [the mother's] arm and . . . pulled [her] out of the house." They went back to his house and called for emergency services.

¶3 Shortly thereafter, Tucson Police Department officers and paramedics responded. After entering the house, Officer Thomas smelled a "very strong stench" that he thought was a "body wasting." He saw a "large butcher knife laying on the table" and a trail of blood from the living room through the kitchen, down the hallway, and into the bathroom. He thought there must have been an altercation because he noticed "overturned furniture, broken vases, [and] broken bottles," as well as

bloodstained clothing, throughout the kitchen and living room. He also saw D.S.'s legs protruding from the bathroom into the hallway.

¶4 In the bathroom, Thomas saw that D.S. was lying face down with a "large quantity of body fluid and blood . . . caked to the floor and . . . completely around [her body]." He also saw three concrete bricks near D.S.'s head. According to Thomas, the brick "closest to her head had a quantity of blood and . . . brain material" on it, while the other two bricks also had bloodstains on them. He noticed a "large gaping hole" in the back of D.S.'s head, such that "you could basically look straight down into her skull." The paramedics approached the body and advised that "there[was] nothing [they could] do."

¶5 A forensic pathologist, Dr. Winston, later determined D.S.'s cause of death to be "blunt [force] injuries of the head," with "sharp force injuries as a contributing factor." He identified multiple lacerations and abrasions on D.S.'s face, a "sharp force injury" to her neck and wrist, and a "large laceration" to the back of her head. With respect to the "large laceration," Dr. Winston explained that "part of the [skull] bone [was] missing," leaving the "underlying brain" exposed.

¶6 After detectives searched unsuccessfully for McCullough, a warrant was issued for his arrest. Thirty-seven years later, in May 2013, detectives in the cold case homicide unit found McCullough living in San Diego, California, under a different name. A grand jury indicted him for first-degree murder.

¶7 At trial, McCullough testified, acknowledging that he had a physical altercation with D.S. in March 1976 and that she had died as a result. However, he maintained that she was the instigator and that he had only acted in self-defense. He explained that, after the fight, he attempted suicide and was admitted to a locked hospital ward for treatment. McCullough testified that he left without being properly discharged and traveled to San Bernardino, California, on a freight train. After living in an abandoned church for about three months, McCullough hitchhiked to San Diego, where he resided until 2013.

¶8 The jury found McCullough guilty of first-degree murder, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motions to Suppress

¶9 McCullough first argues the trial court erred in ruling on his motion to suppress (1) McCullough's statements made to detectives in 2013; (2) observations made by police during their initial entry into McCullough's house; and (3) the coroner's observations—as contained in his autopsy report—upon his entry into McCullough's house. We review a ruling on a motion to suppress for an abuse of discretion, and, in doing so, our review generally is limited to the evidence presented at the suppression hearing. *State v. Spencer*, 235 Ariz. 496, ¶ 8 (App. 2014). But because there was no hearing in this case, to the extent we need to, "we draw our facts from the uncontested material appended to [McCullough's] suppression motion." *State v. Navarro*, 241 Ariz. 19, n.1 (App. 2016). In addition, we review related constitutional issues de novo. *State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007).

2013 Statements to Detectives

¶10 Before trial, McCullough filed a motion to suppress his statements made to detectives in 2013, based on a violation of his Sixth Amendment right to counsel.[1] Attached to his motion was a letter written by attorney Donn Alpert in December 1976, indicating that McCullough's parents had retained Alpert "with reference to the pending investigation of their son" and requesting "no law enforcement officer or agents of any law enforcement division question [McCullough] with reference to the outstanding charges." McCullough reasoned that Alpert's representation letter was still in effect in 2013, when two detectives questioned him in his San Diego home after reading him the *Miranda*[2] warnings. McCullough argued that the detectives had no right to do so because he did not waive his Sixth Amendment right by initiating the communication himself.

[1]McCullough's motion, which was first filed by his court-appointed counsel and then refiled by McCullough while representing himself, also included an argument based on a violation of his Fifth Amendment right against self-incrimination. However, because that argument is not raised on appeal, we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief shall include argument with contentions of appellant and citations to authorities and parts of record relied upon); *State v. Bolton*, 182 Ariz. 290, 298 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Accordingly, McCullough maintained that the detectives had "ignored" his right to counsel and that his statements must be suppressed.

¶11 In response, the state argued the Sixth Amendment is a "personal right[] that cannot be invoked by a third party" and, therefore, Alpert's letter was insufficient to trigger McCullough's right to counsel. In addition, relying on *Maryland v. Shatzer*, 559 U.S. 98 (2009), the state asserted that, even if McCullough's right to counsel had been invoked, the detectives could "reinitiate questioning" because "there was effectively a break in custody" that removed "any threat of a 'police dominated atmosphere.'" The trial court denied McCullough's motion without an evidentiary hearing. It essentially adopted the state's position, reasoning that McCullough's Sixth Amendment right "had not attached since he did not personally invoke his right to counsel." Even assuming McCullough's Sixth Amendment right had "attached via . . . Alpert's letter," the court further reasoned that "law enforcement [was] allowed to re-initiate questioning" because McCullough was never in custody and it had "been nearly 40 years since the right to counsel would have been invoked."

¶12 The Sixth Amendment to the United States Constitution provides defendants with the right to assistance of counsel for their defense. U.S. Const. amend. VI; *see State v. Pecard*, 196 Ariz. 371, ¶ 26 (App. 1999). This fundamental right "is meant to assure fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 361, 364 (1981). When a suspect invokes his right to counsel, all questioning must stop. *Edwards v. Arizona*, 451 U.S. 477, 481 (1981); *State v. Smith*, 193 Ariz. 452, ¶ 30 (1999). In addition, after a suspect requests counsel, a subsequent waiver of that right must be defendant initiated. *Edwards*, 451 U.S. at 484-85; *Smith*, 193 Ariz. 452, ¶ 30.

> The rationale of *Edwards* is that once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities" behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect.

Shatzer, 559 U.S. at 104-05, *quoting Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (alteration in *Shatzer*).

¶13 On appeal, McCullough argues that, because he had "retained counsel to represent him during the homicide investigation," his right to counsel "could not be waived without counsel's presence." He relies on *State v. Hackman*, 189 Ariz. 505, 507-08 (App. 1997), for the proposition that "once counsel is appointed, counsel must be present for an accused to validly waive his Sixth Amendment rights." Although *Hackman* is similar to this case in that neither Hackman nor McCullough initiated the second police contact, *see Edwards*, 451 U.S. at 484-85, it is dissimilar because McCullough never personally asserted his right to counsel. *See also State v. Boggs*, 218 Ariz. 325, ¶ 28 (2008) (distinguishing *Hackman* and declining to hold that "an accused cannot waive the right to counsel unless counsel is present when the accused himself initiates contact with the police"). Indeed, McCullough seems to overlook the trial court's conclusion that his Sixth Amendment right had not yet been triggered—a conclusion with which we agree.

¶14 In *Moran v. Burbine*, the United States Supreme Court had to determine whether a defendant's Fifth Amendment right against self-incrimination was violated when he waived his rights pursuant to *Miranda* and confessed to the murder of a young woman. 475 U.S. 412, 415-16 (1986). While he was talking with the police, the defendant's sister had attempted to retain a lawyer to represent him, and the attorney had received assurances from officers that the defendant would not be questioned until the next day. *Id.* The Court recognized that the Fifth Amendment right is a "personal one that can only be invoked by the individual whose testimony is being compelled." *Id.* at 433 n.4. Because the defendant's lawyer, and not the defendant, had invoked the right to counsel—and in fact the defendant had validly waived the right pursuant to *Miranda*—the Court found no violation of the Fifth Amendment requiring suppression of his confession. *Id.* at 424, 428.

¶15 Similarly, courts have uniformly held that the Sixth Amendment right to counsel is also a personal right. *Faretta v. California*, 422 U.S. 806, 819-20 (1975); *State v. Transon*, 186 Ariz. 482, 486 (App. 1996). Thus, only a defendant "can decide whether to seek the assistance of counsel." *Transon*, 186 Ariz. at 486.

¶16 Like the trial court, we conclude that McCullough did not personally invoke his Sixth Amendment right to counsel. Alpert, who had been retained by McCullough's parents, could not by his December 1976 letter invoke the right for McCullough. Thus, the detectives could not have violated McCullough's Sixth Amendment right by approaching him at his

home in 2013 and asking him questions after they had advised him of the *Miranda* warnings.

¶17 McCullough nevertheless attempts to distinguish this case from *Moran*. He argues that in *Moran*, "the attorney only asked to speak with the defendant," but here, "the attorney informed the police that he had been retained to assist . . . in the criminal investigation and asked them not to speak with [McCullough]." He maintains that, by "ignor[ing] the attorney's instructions," the police "interfered with the attorney-client relationship." We are unpersuaded by this distinction. The critical fact remains that a defendant must personally invoke the Sixth Amendment right to counsel.[3] *See Faretta*, 422 U.S. at 819-20; *Transon*, 186 Ariz. at 486. Like the defendant in *Moran*, McCullough failed to do so, regardless of what his purported attorney communicated to the police.

¶18 Even assuming Alpert's 1976 letter was sufficient to trigger McCullough's Sixth Amendment right to counsel, however, there was no violation of that right given that detectives did not question McCullough until thirty-seven years later. In *Shatzer*, the United States Supreme Court concluded that, once a suspect invokes his right to counsel, police may not subject him to custodial investigation without counsel for fourteen days following his release from custody unless the suspect initiates the later communication. 559 U.S. at 109-10. The Court explained:

> When . . . a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends.

Id. at 107.

[3]To be clear, although an attorney conceivably can invoke the right to counsel's presence for questioning on a defendant's behalf if that attorney has been retained by the defendant himself and therefore speaks for the defendant, that is not what occurred here. Accordingly, we do not address that separate issue.

¶19 Like the trial court, we find this reasoning applies here. Even assuming McCullough had requested counsel in 1976, "[t]he protections offered by *Miranda*, which [the Supreme Court has] deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present . . . , adequately ensure[d] that result," where McCullough was essentially questioned "after a [sufficient] break in [time] that . . . dissipate[d any] coercive effects." *Id.* at 109. Additionally, unlike the suspect in *Shatzer*, McCullough was never subject to custodial interrogation in 1976, which only further supports the conclusion that McCullough's "change of heart" was not the result of "the mounting coercive pressures of 'prolonged police custody'" and instead was due "to the fact that further deliberation in familiar surroundings ha[d] caused him to believe (rightly or wrongly) that cooperating with the investigation [was] in his interest." *Id.* at 105, 108.

¶20 McCullough argues *Shatzer* is distinguishable, reasoning that "unlike the defendant [there], who had no counsel, but only [requested] counsel, McCullough had an attorney who was retained to represent him during the criminal investigation [and] had instructed the police not to interview his client." However, there is nothing in the record to show Alpert ever met with or in fact represented McCullough. Alpert's letter indicated he was retained by McCullough's parents and requested police refrain from questioning McCullough. Alpert did not request to meet with McCullough or to be present for any questioning, and nothing in the record suggests that Alpert had any continuing role in this case throughout the intervening thirty-seven years.

¶21 In sum, because McCullough never personally invoked his Sixth Amendment right to counsel in 1976, that right was not violated in 2013 when detectives approached him at his home and questioned him after advising him of the *Miranda* warnings. Even assuming McCullough had invoked the right to counsel in 1976, it was not improper for the detectives to approach him for questioning thirty-seven years later regarding the outstanding murder charge. Accordingly, the trial court did not err in denying the motion to suppress. *See Spencer*, 235 Ariz. 496, ¶ 8; *Gay*, 214 Ariz. 214, ¶ 4.

Police Observations during Initial Entry into Home

¶22 McCullough also filed a motion to suppress "all evidence gathered . . . as a result of a warrantless search of [his] home." He argued that officers initially responded to and entered his house in March 1976, regarding a "Fire/Rescue follow-up." And despite finding D.S.'s body and "clearly underst[anding] the home was a crime scene," McCullough

maintained the officers made "[r]epeated entries into the residence" to photograph, diagram, and search—all without a warrant. Accordingly, he asserted that the "search and seizure of evidence from [his] home" violated the Fourth Amendment and that the evidence must be suppressed. After the state filed an untimely response, McCullough requested the trial court strike it.

¶23 At a subsequent hearing, the trial court found the state's response untimely and granted McCullough's request to strike. [4] Consequently, the court also granted McCullough's motion to suppress. However, the court noted it would "consider any evidence that may have been observed and/or seized by either civilians or law enforcement personnel in keeping with U.S. Supreme Court or Arizona appellate case law." Specifically, the court explained that it anticipated allowing the state to "introduce any evidence that had obvious evidentiary value and was observed by any personnel who were lawfully in the position to observe such evidence," including "the victim's body and any objects which were observed to be murder weapons."

¶24 At trial, the court clarified the scope of its prior ruling:

> I believe that the officers who responded to a crime scene, a homicide scene in particular with the obvious deceased victim and the signs of foul play could secure the residence to make sure that there are no other bodies, no other individuals in the house, no animals that are subject to confinement. They can describe the scene as they observed it.
>
> They cannot describe anything that was not in plain view. If they opened drawers, if they looked under the bed, if they opened books or envelopes, these would all be activities that would require a search warrant. But I believe they had a right to be in every room in the residence to secure it, and they can describe what they saw.

[4] At the hearing, the state conceded that it was unable to locate a warrant from 1976, and the trial court "proceed[ed] as if this was a warrantless search."

Consistent with this ruling, the two officers who initially entered the house with the paramedics described D.S.'s body and what they saw lying around it, including the concrete bricks.

¶25 "The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures." *State v. Jones*, 188 Ariz. 388, 395 (1997). This includes the warrantless search of a person's home. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). However, a warrantless search is reasonable, and therefore constitutional, "if it falls within a recognized exception." *Missouri v. McNeely*, 569 U.S. 141, 148 (2013); *accord State v. Peoples*, 240 Ariz. 244, ¶ 9 (2016).

¶26 On appeal, McCullough argues the trial court "relied on two warrant exceptions to find that the initial observations of the first officers in the house would be admissible—the first was law enforcement's community caretaking function and the second was the protective sweep." However, he asserts that neither exception applies here. In response, the state maintains that McCullough mistakenly refers to the "emergency aid exception" as the "community caretaking function." And it contends that the evidence gathered from the officers' initial entry into the home was admissible based on the emergency-aid, protective-sweep, or murder-scene exception to the warrant requirement. Because we conclude the emergency-aid exception applies, we need not address other possible exceptions.[5] *See State v. Ahumada*, 225 Ariz. 544, ¶ 5 (App. 2010) ("We will uphold a trial court's ruling on a motion to suppress if it is correct for any reason.").

¶27 Under the emergency-aid exception to the warrant requirement, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *accord State v. Sainz*, 18 Ariz. App. 358, 360 (1972). This exception "does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises." *State v. Wilson*, 237 Ariz. 296, ¶ 12 (2015). "Instead, it requires only 'an objectively reasonable basis for believing,' that 'a person within [the house] is in need of immediate aid." *Id.*, *quoting Michigan v. Fisher*, 558 U.S. 45, 47 (2009)

[5]As the state points out, many courts, including our supreme court, have declined to apply the community-caretaking function to homes. *See, e.g.*, *United States v. Pichany*, 687 F.2d 204, 209 (7th Cir. 1982); *State v. Wilson*, 237 Ariz. 296, ¶ 24 (2015).

(alteration in *Fisher*); *see also Mincey v. Arizona*, 437 U.S. 385, 392 (1978). And officers "may seize any evidence that is in plain view during the course of their legitimate emergency activities." *Mincey*, 437 U.S. at 393; *see also State v. Bennett*, 237 Ariz. 356, ¶ 12 (App. 2015).

¶28 Here, while on routine patrol, Officer Thomas received a call for "Fire/Rescue follow-up."[6] The dispatcher notified Thomas that "the information was received from Fire," that "Fire/Rescue was enroute," and that the night before there was "an attempt to locate" McCullough, who had "escape[d]" from a local hospital and had "suicidal tendencies." Upon arriving at the scene, Thomas met Officer Norris and two paramedics. Neighbors who were out front indicated that they had called the police and told them, "It's over there," identifying McCullough's house. Based upon the totality of this information, we conclude that the officers had an objectively reasonable basis for believing someone inside the home was in need of assistance. *Cf. State v. Sharp*, 193 Ariz. 414, ¶ 14 (1999) ("cumulative impact" of missing-person report, screams from motel room, and no answer at door or over telephone gave officers reasonable belief that emergency existed inside); *Bennett*, 237 Ariz. 356, ¶ 10 (deputies had reasonable grounds to believe emergency was at hand based on 9-1-1 hang-up and no response at door).

¶29 McCullough contends that the officers' belief was not objectively reasonable because they "responded to the residence" based on a report of "a body that had been dead for some time." He maintains that, during the emergency call, the neighbor reported "it was too late to render aid to [D.S.]" He therefore reasons that the officers were "there to investigate a crime," not to respond to an emergency.

¶30 However, the record contains no evidence that the neighbor reported D.S. was "dead" or that the dispatcher relayed any such information to the officers. We acknowledge, however, that Thomas's report does show that, upon arriving at the scene, the neighbor stated, "It's a little late for you guys. I'm sure you won't be needed." Although foretelling, this statement was somewhat uncertain. Moreover, police officers "should be allowed sufficient freedom in performing their duties to protect the safety of the public." *Sainz*, 18 Ariz. App. at 360. These officers

[6]Again, because no evidentiary hearing was held on this motion, "we draw our facts from the uncontested material appended to [McCullough's] suppression motion." *Navarro*, 241 Ariz. 19, n.1.

"would have been remiss in their duty had they taken the word" of the neighbor that there was nothing they could do to help the victim. *Id.*

¶31 Moreover, the officers' conduct upon entering the house was consistent with the purpose of the emergency-aid exception. *See Bingham City*, 547 U.S. at 406 (describing officers' entry based on emergency-aid exception as reasonable). The officers and paramedics entered the house together and almost immediately observed D.S.'s legs on the hallway floor. While the paramedics went to check on D.S., Thomas observed "a white female lying face down with a large pool of dried blood around the upper torso," "several large bricks l[]ying next to the body," and "a large gaping hole in the back of the subject's head." After realizing they could not help D.S., Thomas "immediately . . . informed [Norris] not to touch anything, ordered the paramedics out of the residence, . . . [and] advised radio that it was a homicide." Because the officers properly entered McCullough's house under the emergency-aid exception to the warrant requirement, the trial court did not err in allowing them to describe their plain-view observations. *See Spencer*, 235 Ariz. 496, ¶ 8; *Gay*, 214 Ariz. 214, ¶ 4.

Coroner's Observations during Entry into Home

¶32 In a somewhat related motion, McCullough also asked the trial court to preclude the state from admitting the 1976 autopsy report because it contained on-the-scene observations by the coroner, Dr. Brucker, who had since died.[7] McCullough claimed that Dr. Brucker's observations had to be precluded because they were unlawfully made in violation of the Fourth Amendment when Dr. Brucker entered the home without a warrant to retrieve D.S.'s body.[8] In response, the state maintained that the

[7] Although this motion was styled a "motion to preclude," both parties treat it as a motion to suppress on appeal. Because the issue involves the "constitutionality of the obtaining of evidence," we also treat it as a motion to suppress. *State v. Lelevier*, 116 Ariz. 37, 38 (1977) (explaining motion to suppress raises pretrial, constitutional challenge to state's method of obtaining evidence).

[8] As part of this motion, McCullough also argued that the state's expert, Dr. Winston, should be precluded from testifying as to D.S.'s cause of death because such testimony would necessarily rely upon Dr. Brucker's observations and testimonial statements, as well as autopsy photographs, all of which were inadmissible. However, because McCullough only challenges the "evidence obtained by the coroner during his warrantless entry into the home" on appeal, we do not address the propriety of Dr.

then-valid murder-scene exception to the warrant requirement applied. *See State v. Mincey*, 115 Ariz. 472, 482 (1977) ("We hold a reasonable, warrantless search of the scene of a homicide . . . where there is reason to suspect foul play does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance."), *reversed by Mincey*, 437 U.S. at 395, 402; *see also State v. Duke*, 110 Ariz. 320, 324 (1974) (warrantless search of crime scene at time of discovery of body reasonable). After hearing argument, the trial court denied the motion, explaining that Dr. Brucker "was properly on the crime scene premises at the request of law enforcement."

¶33 On appeal, McCullough argues that the murder-scene exception to the warrant requirement does not apply because it was "disapproved" prior to this offense in *Sample v. Eyman*, 469 F.2d 819 (9th Cir. 1972). He further contends that, because the exception was later "invalidated" by the United States Supreme Court in *Mincey*, 437 U.S. at 395, it would not apply here in any event given that constitutional principles—like this exception—are generally applied retroactively. *See State v. Slemmer*, 170 Ariz. 174, 179-80 (1991). In response, the state again asserts "the murder scene exception would have applied to this case," but it does not address the retroactivity issue raised by McCullough.[9] For the reasons that follow, we likewise do not address the validity of the murder-scene exception.

¶34 Even assuming the trial court erred in denying McCullough's motion and in allowing the state to introduce the 1976 autopsy report, we must affirm McCullough's conviction if the error was harmless. *See State v. Coven*, 236 Ariz. 393, ¶ 17 (App. 2015). "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588 (1993). "Put another way, the proper inquiry is 'whether the guilty

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Winston's testimony. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298.

[9]As part of the officers' initial entry into the home, the state seems to suggest that the good-faith exception to the warrant requirement applies, but it does not reurge this argument with respect to Dr. Brucker's observations in the home. In addition, the state does not make any argument as to the retroactivity of the good-faith exception. *Cf. State v. LaPonsie*, 136 Ariz. 73, 75 (App. 1982) (declining to apply good-faith exception in A.R.S. § 13-3925 retroactively).

verdict actually rendered . . . was surely unattributable to the error.'" *State v. Green*, 200 Ariz. 496, ¶ 21 (2001), *quoting Bible*, 175 Ariz. at 588.

¶35 Here, the information that Dr. Brucker had described in his 1976 autopsy report was cumulative to other evidence properly admitted at trial. In his report, Dr. Brucker described the location, position, and condition of D.S.'s body, the blood surrounding it, nearby body material, and the "[d]eep laceration" on her neck and wrist. Officers Thomas and Norris similarly testified as to D.S.'s body, the blood and "brain material," and D.S.'s injuries. In addition, McCullough himself described hitting D.S. on the head three times with a concrete brick and cutting her wrist and neck with a knife, as well as her position on the bathroom floor. The jurors additionally saw photographs of D.S.'s injuries for themselves. The coroner's observations were not only cumulative, *see State v. Williams*, 133 Ariz. 220, 226 (1982) (erroneous admission of evidence that is "entirely cumulative" constitutes harmless error), they were actually relatively "benign" in light of the other evidence, *State v. Doerr*, 193 Ariz. 56, ¶ 33 (1998).

¶36 In addition, Dr. Brucker's observations "were not really in dispute." *Williams*, 133 Ariz. at 226. McCullough's defense was that D.S. had initiated the altercation by hitting him over the head with a glass votive candle and that he only responded instinctively out of fear for his life. The key issue for the jury was thus whether McCullough acted with the necessary premeditation or malice aforethought to kill D.S., or whether his conduct was justified based on self-defense. *See infra* ¶ 39. We fail to see how the coroner's observations were detrimental to McCullough's defense. *Cf. State v. Tucker*, 157 Ariz. 433, 448 (1988) (erroneous admission of evidence that was "only minimally more detrimental" to defendant's credibility than other proper evidence harmless). Accordingly, we are satisfied beyond a reasonable doubt that the coroner's observations as contained in his 1976 autopsy report did not contribute to or affect the jury's verdict. *See Bible*, 175 Ariz. at 588.

Motion for a Judgment of Acquittal

¶37 McCullough also contends the trial court erred by denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. We review de novo the denial of a motion for a judgment of acquittal. *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 104 (2017). In doing so, we view the evidence in the light most favorable to sustaining the verdict and resolve all inferences against the defendant. *State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004).

¶38 A trial court "shall enter a judgment of acquittal . . . if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7 (App. 2007), *quoting State v. Mathers*, 165 Ariz. 64, 67 (1990). Evidence is substantial if reasonable people could fairly disagree whether it establishes a fact in issue. *Davolt*, 207 Ariz. 191, ¶ 87. Substantial evidence may be direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005).

¶39 In 1976, murder was defined as follows:

> A. Murder is the unlawful killing of a human being with malice aforethought.
>
> B. Malice aforethought may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

Former A.R.S. § 13-451 (1956), *repealed by* 1977 Ariz. Sess. Laws, ch. 142, § 15. Our legislature further provided:

> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premediated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree.

Former A.R.S. § 13-452 (1973), *repealed by* 1977 Ariz. Sess. Laws, ch. 142, § 15.

¶40 On appeal, McCullough contends that "the state presented no evidence of premeditation or malice aforethought." He argues "the only evidence at trial was that an altercation occurred between [him and D.S.]"

He maintains that "[t]he physical condition of the home . . . was entirely consistent with McCullough's explanation of self-defense or sudden quarrel/heat of passion" and that "none of the physical evidence supports an inference that he had planned and then reflected upon a decision to murder [D.S.]"

¶41 "[M]alice aforethought relates not merely to the state of the mind of the person who unlawfully kills another, but to the moral aspects of the case as indicated by all the conditions and circumstances attending and characterizing the act." *Bennett v. State*, 15 Ariz. 58, 62 (1913); *see also State v. Schantz*, 98 Ariz. 200, 206 (1965) ("Malice aforethought is more than ill will, hatred or revenge. It means the intent to kill without legal justification."). Similarly, "[p]remeditation and deliberation may be shown by facts and circumstances surrounding the homicide, and malice in law does not require actual malice toward the unintended victim." *State v. Singleton*, 66 Ariz. 49, 57 (1947) (citations omitted).

¶42 Circumstances tending to show malice aforethought and premeditation include a defendant's "repeated blows, . . . any one of which was sufficient to cause death." *State v. Sellers*, 106 Ariz. 315, 316 (1970); *see also State v. Lopez*, 158 Ariz. 258, 263 (1988) (nature, severity, and placement of victim's injuries provide evidence of premeditation). They also include a defendant's inflicting of additional wounds after the victim has been rendered helpless and a defendant's conduct after the murder. *See State v. VanWinkle*, 230 Ariz. 387, ¶ 16 (2012) (premeditation can be based on evidence that defendant renewed attack against unresisting victim); *State v. Nelson*, 229 Ariz. 180, ¶ 18 (2012) (hiding murder weapon, disposing of bloody shirt, and returning sleeping bag with victim's blood circumstantial evidence of premeditation); *State v. Summerlin*, 138 Ariz. 426, 434 (1983) (defendant's "excessive and purposeful actions" show "more than just a 'reactionary' homicide" and therefore relevant to premeditation).

¶43 Here, McCullough admitted at trial that he killed D.S. by hitting her on the head three times with a concrete brick. Although D.S.'s "aggression [had] end[ed] at that point" and she was "down on the ground," McCullough explained that he picked up a knife and "struck her twice"—once on the wrist and once on the neck—and then "stuck [the knife] into the back of her head." He said he did so to "finalize it, . . . sort of like killing the beast to make sure it's dead." And McCullough acknowledged, "[A]fter all this was done, [he] walked out of the house," eventually fleeing to San Diego using a different name. These are circumstances tending to show premeditation and malice aforethought.

¶44 McCullough nevertheless relies on his expert's testimony that "a person may also act reflexively in the midst of [a] struggle and strike repeated, hard blows without thinking about it." McCullough thus reasons that "the mere fact of multiple, substantial blows provides no inference into whether the defendant reflected upon his decision to commit a murder." But our case law does not support that proposition. *See, e.g.*, *Sellers*, 106 Ariz. at 316. In addition, the expert acknowledged that "excessive wounding" is not always the reflexive response to a perceived threat and that it could be the result of "malice" or "rage." *See State v. Garcia*, 138 Ariz. 211, 214-15 (App. 1983) ("Where the evidence discloses facts from which the jury could legitimately deduce either of two conclusions, it is sufficient to overcome a motion for acquittal.").

¶45 McCullough additionally contends that his "conduct afterward is inconsistent with deliberation, intent, and planning." Specifically, he maintains, if he "had planned to kill [D.S.], he would not have tried to kill himself" after doing so and "[h]is subsequent flight from the hospital to California was impulsive and improvised." However, before trying to kill himself, McCullough cleaned the knife and simply walked out of the house. In addition, after traveling to San Diego, McCullough lived there for thirty-seven years using a false name. Such conduct supports an inference of premeditation and deliberation. *Cf. Nelson*, 229 Ariz. 180, ¶ 18 (hiding murder weapon and disposing of bloody shirt circumstantial evidence of premeditation); *State v. Duke*, 110 Ariz. 320, 325 (1974) (removing spent cartridge from gun circumstantial evidence from which jury could find shooting deliberate and premeditated). Again, although McCullough may have presented evidence to dispute the state's theory of the case, the state's evidence was nonetheless sufficient to defeat McCullough's motion for a judgment of acquittal. *See Garcia*, 138 Ariz. 211, 214-15.

¶46 In ruling on the motion for a judgment of acquittal, the trial court noted that it was "a very close question" whether McCullough had acted with the necessary malice aforethought, premeditation, and deliberation. We agree. But "[w]hen reasonable minds may differ on inferences from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal." *State v. Lee*, 189 Ariz. 608, 615 (1997). Here, the state presented substantial evidence from which a jury could have found McCullough guilty beyond a reasonable doubt. *See Sharma*, 216 Ariz. 292, ¶ 7. Accordingly, the court did not err in denying the motion for a judgment of acquittal. *See Escalante-Orozco*, 241 Ariz. 254, ¶ 104.

Autopsy Photographs

¶47 McCullough next argues the trial court erred in admitting autopsy photographs because the state failed to properly authenticate them. We review the admission of photographs for an abuse of discretion. *State v. Pandeli*, 215 Ariz. 514, ¶ 22 (2007).

¶48 Before trial, as part of his motion to preclude the 1976 autopsy report, McCullough sought to preclude the autopsy photographs because they lacked foundation and could not be authenticated. He pointed out that the coroner, Dr. Brucker, and the crime scene technician who took the photographs were dead and he argued that the photographs "may not accurately depict the purported factual content." After hearing argument, the court reserved its ruling on the issue for trial to see "what, if any, foundation the State [could] offer."

¶49 At trial, when Dr. Winston, the forensic pathologist, was testifying, the prosecutor asked him a number of questions about autopsy photographs. The pathologist explained that each autopsy is assigned a specific case number. He also described, based on his experience, the general process of a crime scene technician taking photographs during an autopsy. With regard to this case, the pathologist noted that the autopsy photographs had the same case number written on them as the 1976 autopsy report prepared by Dr. Brucker. When the state moved to admit the autopsy photographs, McCullough renewed his objection. However, the court concluded "circumstantial [evidence] supports the admission of the photographs" and admitted them.

¶50 "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ariz. R. Evid. 901(a). "The trial court 'does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic.'" *State v. Fell*, 242 Ariz. 134, ¶ 6 (App. 2017), *quoting State v. Lavers*, 168 Ariz. 376, 386 (1991). "If that standard is met, any uncertainty goes to the weight rather than the admissibility of the evidence." *Id.*

¶51 On appeal, McCullough again argues "there was insufficient evidence presented that the photographs admitted were taken in connection with the autopsy in this case." Because neither Dr. Brucker nor the crime scene technician were available to testify, he maintains, "[N]o one

could verify with accuracy that the photographs were authentic and accurate representations of the body."

¶52 "[A] flexible approach is appropriate, allowing a trial court to consider the unique facts and circumstances in each case—and the purpose for which the evidence is being offered—in deciding whether the evidence has been properly authenticated." *State v. King*, 226 Ariz. 253, ¶ 9 (App. 2011), *quoting State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 14 (App. 2008) (alteration in *King*). Examples of evidence that satisfy the authentication requirement include: testimony from a knowledgeable witness who explains what the item is; distinctive characteristics—such as appearance, contents, and patterns—taken together under the circumstances; evidence describing a process and showing it produces an accurate result; and an expert's comparison with a verified specimen. Ariz. R. Evid. 901(b).

¶53 Thus, circumstantial evidence may be used to establish the authenticity of evidence. *See State v. Wooten*, 193 Ariz. 357, ¶ 57 (App. 1998). For example, in *Haight-Gyuro*, the state sought to admit a video recording showing the defendant using a stolen credit card to make purchases at a retail store. 218 Ariz. 356, ¶¶ 2, 14. A store employee testified that he had set up the store's video surveillance system, had used the receipt's date, time, and register number to determine which camera had recorded the transaction, and described the items purchased with the stolen credit card. *Id.* ¶¶ 15-16. This court found that evidence "sufficient for the jury to conclude that the video recording accurately depicted the transaction in which the stolen credit card had been used." *Id.* ¶ 17.

¶54 Here, to comply with Rule 901(a), the state must have presented sufficient evidence to allow the jury to conclude that the photographs were the ones taken during the 1976 autopsy of D.S. Although neither Dr. Brucker nor the crime scene technician—those with personal knowledge of the autopsy—were available to testify that the photographs were what they were claimed to be, the state nonetheless offered the testimony of Dr. Winston, who explained the process for autopsies generally, identified the case number for D.S.'s 1976 autopsy, and matched that case number on the autopsy photographs and the autopsy report. A detective assigned to the case in 1976 similarly testified that during his fifteen years with the homicide unit, the Tucson Police Department would generally send its own forensic photographer to take pictures of autopsies related to an investigation.[10] This is sufficient, circumstantial evidence to

[10]Another detective testified based on his 1976 report that he had attended the autopsy done by Dr. Brucker and that he was accompanied by

support a finding that the autopsy photographs were what the state claimed. *See* Ariz. R. Evid. 901(a); *Wooten*, 193 Ariz. 357, ¶ 57.

¶55 McCullough nevertheless argues that "[t]he circumstantial evidence here fell far below the amount of circumstantial evidence in *Haight-Gyuro*." [11] But as *Haight-Gyuro* makes clear, and McCullough acknowledges, we must apply a flexible approach to authentication because "[e]very photograph . . . , the context in which it was taken, and its use at trial will be different." 218 Ariz. 356, ¶ 14, *quoting Bergner v. State*, 397 N.E.2d 1012, 1017 (Ind. Ct. App. 1979) (alteration in *Haight-Gyuro*). Because there was evidence from which the jury could reasonably conclude that the autopsy photographs were authentic, any further uncertainty was an issue of weight, not admissibility. *See Fell*, 242 Ariz. 134, ¶ 6. Accordingly, the trial court did not err in admitting the autopsy photographs. *See Pandeli*, 215 Ariz. 514, ¶ 22.

Other-Act Evidence

¶56 McCullough also argues the trial court erred in admitting evidence of "a single, isolated incident" in which he had previously hit D.S. because it was "nothing more than propensity evidence." We review the admission of evidence for an abuse of discretion. *State v. Burns*, 237 Ariz. 1, ¶ 56 (2015); *State v. Connor*, 215 Ariz. 553, ¶ 32 (App. 2007).

¶57 Before trial, McCullough filed a motion in limine to preclude D.S.'s friend, C.B., from testifying about an incident in which she had observed McCullough assault D.S. In its response, the state maintained that the incident was admissible to show motive, intent, and premeditation. After a hearing, the trial court denied McCullough's motion, finding D.S.'s testimony was admissible to show "motive and intent" and "the probative value outweigh[ed] the danger of unfair prejudice." At trial, C.B. testified that, about a month before D.S.'s death, she went to the movies with McCullough and D.S. She explained that they had all been drinking and

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a technician who took photographs of D.S.'s injuries. However, he had no independent recollection of the case.

[11]We find McCullough's reliance on *Lohmeier v. Hammer*, 214 Ariz. 57 (App. 2006), misplaced. In that case, unlike here, there was someone with personal knowledge who was available to testify as to the accuracy of photographs, and there was no need to resort to circumstantial evidence to support their admission. *Id.* ¶¶ 8-9. In addition, this court concluded that the trial court did not err in admitting them. *Id.* ¶ 11.

"ended up getting kicked out of the theatre" for being "loud and rowdy" after D.S. had kissed C.B. According to C.B., McCullough became angry, "there was a lot of yelling back and forth," and McCullough then hit D.S. on the face.

¶58 Generally, "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." Ariz. R. Evid. 404(b). However, such evidence may be admissible for other purposes, including to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Before admitting other-act evidence, the trial court must find: "(1) clear and convincing proof that the defendant committed the act; (2) it is offered for a proper purpose under Rule 404(b); (3) it is relevant to prove that purpose; and (4) its probative value is not substantially outweighed by the danger of unfair prejudice."[12] *Escalante-Orozco*, 241 Ariz. 254, ¶ 77; *see also* Ariz. R. Evid. 401, 402, 403. In addition, if the evidence is admitted, the court must give an appropriate limiting instruction upon request. *Escalante-Orozco*, 241 Ariz. 254, ¶ 77; *see also* Ariz. R. Evid. 105.

¶59 On appeal, McCullough argues this evidence was not admissible to show motive or intent because, when he hit D.S., "it was in response to a specific act on her part and was not reflective of some deeper dysfunction in their relationship." He also asserts the evidence "had little, if any, relevance" and, even if "marginally relevant, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice." Lastly, McCullough maintains that "the limiting instruction was not enough to cure the error."

¶60 First, we agree with the trial court that this other-act evidence was admissible under Rule 404(b) to show motive, intent, and premeditation. Arizona courts have "'long held that where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible.' Such evidence 'tends to show the malice, *motive or premeditation* of the accused.'" *State v. Wood*, 180 Ariz. 53, 62 (1994), *quoting State v. Jeffers*, 135 Ariz. 404, 418 (1983) (emphasis

[12] As the state points out, McCullough does not argue that C.B.'s testimony did not meet the clear-and-convincing standard. We therefore could deem the argument waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298. In any event, C.B.'s "in-person testimony satisfied the clear-and-convincing requirement." *State v. Vega*, 228 Ariz. 24, ¶ 19 (App. 2011).

added in *Wood*); *cf. State v. Leteve*, 237 Ariz. 516, ¶ 16 (2015) (defendant's past difficulties with former wife admissible under Rule 404(b) to show his intent and motive in killing their sons). McCullough nevertheless attempts to distinguish those cases by arguing that they involved "a persistent and even escalating level of conflict between the couple," while this case involved "a single, isolated incident of drunken misconduct." But circumstances surrounding the other act, rather than affecting the evidence's admissibility, constitute factors "to be considered by the jury in determining the weight of the evidence." *Jeffers*, 135 Ariz. at 418.

¶61 Second, the other-act evidence was relevant under Rule 401. Previous quarrels or difficulties are generally relevant in a murder case because prior ill will renders commission of the crime more probable than not and, as mentioned above, tends to show malice or premeditation of the defendant. *Leonard v. State*, 17 Ariz. 293, 303-04 (1915). Here, the past assault by McCullough was relevant to show his intent and motive in killing D.S. *See Leteve*, 237 Ariz. 516, ¶ 16. It also tended to show malice or premeditation. *See Wood*, 180 Ariz. at 62.

¶62 Third, the trial court did not err in concluding that the probative value of this evidence was not outweighed by the danger of unfair prejudice under Rule 403. "The trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice. Thus, it has broad discretion in deciding the admissibility." *State v. Harrison*, 195 Ariz. 28, ¶ 21 (App. 1998). "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *Lee*, 189 Ariz. at 599-600, *quoting State v. Mott*, 187 Ariz. 536, 545 (1997). McCullough offers no meaningful argument on this point, which would justify our finding this contention waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298 (1995). In any event, we cannot say that the evidence suggested resolution of this case on an improper basis, given that the other act was significantly less violent than the charged offense. *Cf. State v. Via*, 146 Ariz. 108, 122 (1985) (any error in admitting evidence of prior attempted drug deal harmless because that conduct was "far less egregious than that with which defendant was charged").

¶63 Last, at McCullough's request, the trial court provided a limiting instruction under Rule 105. Contrary to McCullough's position on appeal, the instruction was not intended to "cure the error" in admitting the other-act evidence. Rather, the purpose of the instruction was to direct the jury to consider the evidence for a proper purpose. *See* Ariz. R. Evid. 105. And we presume the jurors follow their instructions. *See State v. Dann*,

205 Ariz. 557, ¶ 46 (2003). Accordingly, based on the foregoing, the court did not abuse its discretion in admitting this other-act evidence. *See Burns*, 237 Ariz. 1, ¶ 56; *Connor*, 215 Ariz. 553, ¶ 32.

Motion for a Mistrial

¶64 McCullough argues the trial court erred in denying his motion for a mistrial after C.B. unexpectedly testified that D.S. was planning to leave McCullough—evidence the court had precluded prior to trial. He further maintains the court "compounded the error by prohibiting [him] from presenting the reasons that [D.S.] was planning to leave." We review for an abuse of discretion the denial of a motion for a mistrial. *State v. Miller*, 234 Ariz. 31, ¶ 23 (2013); *State v. Mills*, 196 Ariz. 269, ¶ 6 (App. 1999).

¶65 As part of its response to McCullough's motion in limine to preclude C.B. from testifying about McCullough's prior assault of D.S., the state also asked the trial court to permit testimony from C.B. about D.S.'s "intent to go to Mexico" because "things were not working out between her and [McCullough]." The state argued this evidence rebutted McCullough's statements that "he was planning on leaving [D.S.]" and his claim of self-defense. In his response, McCullough claimed that D.S. "was considering leaving him" because she "worked as a prostitute and . . . became aware of highly lucrative employment opportunities in the sex trade in . . . Mexico." After a hearing, the court precluded C.B. from testifying "about [D.S.'s] state of mind or the relationship," reasoning that such testimony would be "ambiguous, potentially confusing, [and] potentially prejudicial as to what could be described as an abusive relationship."

¶66 At trial, during C.B.'s redirect examination, the following exchange occurred with the prosecutor:

> Q. Just on the relationship, based on your observations, were they in any sort of romantic relationship?
>
> A. They were, but she was planning on leaving him.

McCullough objected on hearsay grounds, but the trial court did not explicitly rule on the objection because the prosecutor had finished her questioning and C.B. was dismissed as a witness. At the next break outside the presence of the jury, McCullough moved for a mistrial based on C.B.'s statement. Alternatively, he asked that C.B. be recalled so that he could ask

her "why [D.S.] was contemplating leaving [McCullough]." The court denied the motion, reasoning that "[t]he objectionable answer was inadvertent and is not grounds for a mistrial." Shortly thereafter, the jury submitted the following question: "When the defense objected at the end of the friend's testimony, did you sustain or deny the objection." In response, the court informed the jury, "I sustained the objection, and you should disregard the answer that was given in response to the question."

¶67 "When a witness unexpectedly volunteers an inadmissible statement, the action called for rests largely within the discretion of the trial court which must evaluate the situation and decide if some remedy short of mistrial will cure the error." *State v. Adamson*, 136 Ariz. 250, 262 (1983). That court "is in the best position to determine whether a particular incident calls for a mistrial because [it] is aware of the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and the possible effect on the jury and the trial." *State v. Williams*, 209 Ariz. 228, ¶ 47 (App. 2004). "[T]he declaration of a mistrial is the most dramatic remedy for a trial error and should be granted only if the interests of justice will be thwarted otherwise." *State v. Roque*, 213 Ariz. 193, ¶ 131 (2006), *disagreed with on other grounds by Escalante-Orozco*, 386 P.3d 798, ¶¶ 13-14.

¶68 On appeal, McCullough argues that the trial court erred in denying his motion for a mistrial because C.B.'s statement "obviously had an impact on the jury," pointing out that the jury "submitted a question to the court about whether McCullough's hearsay objection had been sustained or overruled." However, the question shows that the jurors were closely paying attention and were trying to determine whether they could consider C.B.'s answer. The court instructed them to disregard C.B.'s statement, and we presume the jurors follow their instructions. *See Dann*, 205 Ariz. 557, ¶ 46.

¶69 McCullough also contends that the trial court "should have . . . allowed [him] to elicit the actual reason that [D.S.] was leaving." But that court was in the best position to determine whether follow-up questioning was appropriate. *See Adamson*, 136 Ariz. at 262. The court very well may have concluded that calling further attention to the matter would only have compounded the problem. *Cf. State v. Perry*, 116 Ariz. 40, 47 (App. 1977) (counsel declined court's offer to strike testimony from record because he feared it would just call further attention to testimony).

¶70 Notably, this was a single, unsolicited statement in the middle of a six-day trial. *Cf. State v. Stone*, 151 Ariz. 455, 459 (App. 1986)

(prosecutor's improper statements were "merely isolated references and not significant in relation to the trial proceedings in their entirety"). The trial court was in the best position to determine the statement's effect on the jury and the trial. *See Williams*, 209 Ariz. 228, ¶ 47. We cannot say the court abused its discretion in denying the motion for a mistrial. *See Miller*, 234 Ariz. 31, ¶ 23; *Mills*, 196 Ariz. 269, ¶ 6.

Jury Instructions

¶71 McCullough lastly argues that "[t]he first-degree murder instruction improperly shifted the burden of proof." Specifically, he contends, "[T]he trial court erroneously instructed the jury that it could find implied malice," despite case law concluding that "implied malice unconstitutionally shifts the burden of proof to the defendant."

¶72 As explained above, in 1976, murder was defined as "the unlawful killing of a human being with malice aforethought." Former § 13-451(A). The murder statute further provided:

> Malice aforethought may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

Former § 13-451(B).

¶73 In *Sandstrom v. Montana*, the United States Supreme Court held that a jury instruction indicating "the law presumes that a person intends the ordinary consequences of his voluntary acts" was unconstitutional because the jury may have interpreted it "as . . . either a burden-shifting presumption . . . or a conclusive presumption," thereby violating the Fourteenth Amendment's requirement that the state prove every element of an offense beyond a reasonable doubt. 442 U.S. 510, 512, 517, 524 (1979). Similarly, in *Francis v. Franklin*, the Court found the following instruction unconstitutional because the jury may have understood it "as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent":

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be

> rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

471 U.S. 307, 309, 315, 325 (1985). The Court reiterated that the Due Process Clause of the Fourteenth Amendment "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Id.* at 313.

¶74 Finally, in *Yates v. Evatt*, the trial court's first-degree murder instructions included "that 'malice is implied or presumed' from the 'willful, deliberate, and intentional doing of an unlawful act' and from the 'use of a deadly weapon.' With respect to the unlawful act presumption, the jury was told that the 'presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence.'" 500 U.S. 391, 401 (1991). As to the deadly weapon presumption, "the jurors were told that it was their responsibility 'under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer.'" *Id.* The Supreme Court of South Carolina concluded that "each presumption violated *Sandstrom* and *Francis*," and the United States Supreme Court apparently agreed, ultimately concluding that "[t]he burden-shifting jury instructions found to have been erroneous in this case may not be excused as harmless error." *Id.* at 401-02, 411.

¶75 Based on this case law, McCullough requested removing all of the language from former § 13-451(B) from the jury instructions. Instead, he proposed the following language in its place: "Malice aforethought is the deliberate intent to unlawfully take away the life of a fellow human being. Malice aforethought is more than ill will, hatred or revenge. It means the intent to kill without legal justification. It must not be an after-thought." The trial court instructed the jury as follows:

> Malice aforethought is the deliberate intent to unlawfully take away the life of a fellow human being. It is more than ill will, hatred, or revenge. It means the intent to kill without legal justification. Malice may be proven by circumstances attending the killing that show an abandoned and malignant heart.

¶76 On appeal, McCullough challenges the final sentence of this instruction, which was in part adopted from former § 13-451(B). McCullough argues that it "unconstitutionally shifted the burden to [him] to prove that the killing was not with malice aforethought."

¶77 As a preliminary matter, the parties dispute whether we should review this issue for harmless or fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 18-19 (2005). McCullough maintains that harmless error applies because he preserved the argument for appeal by "provid[ing] requested instructions to the [trial] court with case law that held implied malice instructions were unconstitutional and provid[ing] the court with a legally correct instruction." On the other hand, the state argues that the issue is waived for all but fundamental error because "there is no record whatsoever that he objected to the jury instruction for malice aforethought given by the trial court." We agree with the state.

¶78 Although McCullough argued that "'implied malice' constitutes unconstitutional burden shifting" in his proposed instructions, he does not appear to have objected to the trial court's actual instruction before the jury retired to deliberate. *See* Ariz. R. Crim. P. 21.3(c) ("No party may assign as error on appeal the court's giving . . . [of] any instruction . . . unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of his or her objection."). The court seems to have compromised between the language of the 1976 first-degree murder statute and McCullough's proposed instruction. It was therefore incumbent upon McCullough to notify the court of the continuing problem, thereby giving that court "an opportunity to correct [the] asserted error." *State v. Winter*, 109 Ariz. 505, 505 (1973). McCullough's failure to do so forfeits the issue absent fundamental, prejudicial error. *See id.*; *cf. State v. Schurz*, 176 Ariz. 46, 54 (1993) (general objection to instructions that differed from defendant's requested instructions not sufficient to preserve specific issue).

¶79 However, we conclude there was no error, fundamental or otherwise, with respect to this jury instruction. As the Supreme Court made clear in *Francis*, our threshold inquiry is to determine whether the instruction created "a mandatory presumption or merely a permissive inference." 471 U.S. at 314 (citation omitted); *see also State v. Platt*, 130 Ariz. 570, 574 (App. 1981). "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *Francis*, 471 U.S. at 314. By contrast, "[a] permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *Id.*

¶80 Here, unlike the problematic instructions in *Sandstrom*, *Francis*, and *Yates*, the challenged instruction did not mention any sort of presumption—conclusive or rebuttable.[13] Instead, the jury was told, "Malice may be proven by circumstances attending the killing that show an abandoned and malignant heart." This language allowed the jury to exercise its discretion and infer malice based on the overall circumstances of the case. *See State v. Spoon*, 137 Ariz. 105, 109-10 (1983) ("In determining the nature of the presumption, the words actually spoken to the jury must be examined and interpreted as a reasonable juror could have interpreted them."). Put another way, the jury was told, "before drawing an inference of malice, [it] must first conclude that the facts surrounding the killing indicate that the defendant acted with a 'malignant heart.'" *Lamb v. Jernigan*, 683 F.2d 1332, 1340 (11th Cir. 1982). The thrust of the instruction seems to be "a directive to the jury that the finding of malice must often be based entirely on circumstantial evidence." *Id.*

¶81 Moreover, the instruction did not "expressly relieve the prosecution of proving circumstances that indicate malice." *Id.*; *cf. United States v. Washington*, 819 F.2d 221, 225-26 (9th Cir. 1987) ("Advising the jury that it may treat the use of a deadly weapon as evidence of malice aforethought is not the same as *requiring* it to presume or infer malice aforethought from that evidence."). Indeed, because the language of the instruction was passive—"may be proven"—we fail to see how it necessarily shifted the burden of proof, as McCullough maintains. Notably, the jury was also instructed that the state "must prove each element of the charge beyond a reasonable doubt." *See State v. Hunter*, 142 Ariz. 88, 90 (1984). And we must read the instructions as a whole in determining whether a specific instruction was erroneous. *See State v. Duarte*, 165 Ariz. 230, 232 (1990); *see also State v. Rhymes*, 107 Ariz. 12, 17-18 (1971) ("[N]o case will be reversed because of some isolated paragraph or portion of an instruction which, standing alone, might be misleading[,] especially where the court has fully and properly instructed the jury as to all applicable aspects of the law."). Accordingly, we conclude the instruction created a

[13]We agree with the parties that *Sandstrom*, *Francis*, and *Yates* would be retroactive to McCullough's case. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

permissive inference, "which does not unconstitutionally shift the burden of proof." *Platt*, 130 Ariz. at 574.

¶82 A permissive inference nonetheless violates due process "if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Francis*, 471 U.S. at 314-15. Because this is a case-by-case analysis, we must review the evidence presented at trial. *See United States v. Warren*, 25 F.3d 890, 898-99 (9th Cir. 1994). As discussed above, McCullough admitted at trial that he killed D.S. by hitting her on the head three times with a concrete brick. After D.S. was lying on the ground, McCullough picked up a knife, cut her wrist and her neck, and then "stuck [the knife] into the back of her head." "Upon these facts, the jury rationally could 'make the connection permitted by the inference' and conclude that [McCullough] acted with malice aforethought." *Id.*, *quoting County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979).

Disposition

¶83 For the reasons stated above, we affirm McCullough's conviction and sentence.