IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JAMES LEROY MASON JR.,
Appellant.

No. 2 CA-CR 2018-0202
Filed October 17, 2019

Appeal from the Superior Court in Pima County
No. CR20154903001
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, James Mason was convicted of second-degree murder and sentenced to eighteen years' imprisonment. On appeal, Mason argues the trial court erred by instructing the jury "on the law and defense theories," by precluding a defense witness from testifying about the victim's "prior acts of domestic violence," and by denying his motion to preclude the state from using "prejudicial titles." For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to affirming Mason's conviction. *See State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). Mason lived with and cared for his mother, J.N., and seventy-two-year-old stepfather, A.N. Because he had "a hard time getting around," A.N., who weighed 137 pounds and stood over six feet tall, spent most of his time in a recliner in the living room, eating and sleeping there, and even urinating in a container nearby. When A.N. did get up, he used a walker for support.

¶3 On Thanksgiving Day 2015, before leaving for work, Mason prepared dinner for J.N., A.N., and J.N.'s minor grandson, K.M., who was visiting. Early the next morning, when Mason returned home, he played video games with K.M. After A.N. woke up, he urinated from his recliner into the container, which started an argument between A.N. and Mason. The two continued arguing, and A.N. threatened to kick Mason out of the house.

¶4 Later, Mason told K.M., "I can't take it anymore." At Mason's direction, K.M. took J.N. to her bedroom so they did not have to hear the two men arguing. While in his grandmother's room, K.M. heard "stuff falling," and he also heard Mason say, "What are you going to do now? Put a gun up to me? You don't have a gun. It's in your room." Mason then called out to K.M., commenting, "Come look at what [A.N.] made me do to him." K.M. walked into the living room and saw A.N. slouched over in his

recliner with a knife in his stomach. Mason, who appeared angry, threw A.N.'s walker and directed K.M. to call the police. A.N. was dead when officers arrived. An examination of A.N.'s body revealed "four sharp-force injuries" to the chest, two of which punctured his heart. Mason was charged with first-degree murder.

¶5 At trial, Mason testified that A.N. "kept guns near him all the time," including by his recliner, and that he had previously threatened to shoot Mason, even pointing a gun at Mason's head. Mason also explained that when A.N. drank alcohol, he became "aggressive" and "violent," hitting people with his cane and using vulgar language. According to Mason, A.N.'s behavior extended to other family members, including J.N. and K.M. A.N. had been drinking leading up to the incident, and Mason testified that, during their argument, A.N. threatened to shoot him and started to reach for something from his recliner. Because Mason thought A.N. was reaching for a gun and "was going to kill [him]," Mason explained that he grabbed a nearby Bowie knife and stabbed A.N.

¶6 The jury found Mason not guilty of first-degree murder but found him guilty of the lesser-included offense of second-degree murder. The trial court sentenced him as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Jury Instructions

¶7 Mason argues the trial court erred by failing to give the following jury instructions: (1) under a justification defense, when there have been prior acts of domestic violence against the defendant by the victim, the defendant's state of mind should be viewed from the perspective of a reasonable person who has been a victim of such domestic violence; (2) defense of others; and (3) the weight and credibility to be given to a defendant's trial testimony. He also contends that these errors cumulatively denied him his constitutional due process right to a fair trial.

¶8 In reviewing jury instructions, we consider them "as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision." *State v. Dann*, 220 Ariz. 351, ¶ 51 (2009). We review for an abuse of discretion the giving or refusing of requested instructions. *State v. Johnson*, 212 Ariz. 425, ¶ 15 (2006). However, we review de novo whether the jury instructions accurately stated the law. *State v. Bocharski*, 218 Ariz. 476, ¶ 47 (2008).

¶9 An objection to the trial court's "failing to give any instruction . . . must be made before the jury retires to consider its verdict." Ariz. R. Crim. P. 21.3(b); *see also* Ariz. R. Crim. P. 21.3(a) (requiring trial court to "confer with parties before closing argument and inform them of its proposed jury instructions"). If a defendant fails to properly object to the instructions below, the issue is forfeited for all but fundamental, prejudicial error. *Dann*, 220 Ariz. 351, ¶ 51; *see also* Ariz. R. Crim. P. 21.3(b) ("If a party does not make a proper objection, appellate review may be limited."). "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). The first two prongs of the fundamental-error analysis also require a separate showing of prejudice. *Id.*

State of Mind

¶10 Approximately fourteen months before trial, relying on A.R.S. § 13-415, Mason filed a motion requesting the following jury instruction: "If there have been past acts of domestic violence against the defendant by the victim, the state of mind of a reasonable person shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence." He also requested instructions, pursuant to A.R.S. §§ 13-3601(A) and 13-1203(A)(2), providing that "'[d]omestic violence' includes an assault against a stepchild" and "'[a]ssault' includes intentionally placing another person in reasonable apprehension of imminent physical injury." At trial, Mason testified that A.N. was "violent," physically and verbally, toward him and that he had acted in self-defense when he stabbed A.N. However, when the trial court and counsel were settling jury instructions, Mason did not mention his prior request for the state-of-mind and domestic-violence instructions, and the court did not give them.

¶11 On appeal, Mason argues the trial court erred in failing to instruct the jury to consider the reasonableness of his state of mind—in connection with his justification defense—from the perspective of a domestic-violence victim because he had "introduced evidence of ongoing acts of domestic violence by [A.N.]." He contends we must review this issue for harmless error because he requested the instructions before trial. The state counters that fundamental-error review applies because Mason "did not request the instructions during the settling of the instructions, despite the court's repeated invitations to add to or amend the jury

instructions, nor did he object to the absence of the instructions in the final jury instructions."

¶12 The purpose of requiring an objection to the failure to give a requested instruction below is to provide the trial court with an opportunity to address the issue and correct any error. *State v. Bean*, 119 Ariz. 412, 414 (App. 1978); *see also* Ariz. R. Crim. P. 21.3(b). Although trial courts have the responsibility of ruling on pending motions, "if an accused wants to rely on the [matters] raised in those motions he or she has the responsibility of bringing them to the court's attention and seeing that a record of the rulings makes its way to the reviewing court." *State v. Lujan*, 136 Ariz. 326, 328 (1983). Here, although Mason requested the state-of-mind and domestic-violence instructions in a pretrial filing, he did not re-urge the issue at trial during the settling of the jury instructions, instead indicating that he had nothing else to add to the final packet of instructions. Consequently, the trial court did not address Mason's request from over a year earlier. The argument is therefore forfeited for all but fundamental, prejudicial error.[1] *See Escalante*, 245 Ariz. 135, ¶ 21.

¶13 Pursuant to § 13-415, "If there have been past acts of domestic violence as defined in § 13-3601, subsection A against the defendant by the victim, the state of mind of a reasonable person" purportedly acting in self-defense under A.R.S. §§ 13-404 and 13-405 "shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence." As this court has explained, § 13-415 "is a limited statutory codification of Arizona case law holding that prior acts of violence by the [victim] are generally admissible as evidence of [the] defendant's state of mind if the defendant either personally observed the acts or was aware of the acts before the homicide." *State v. Vogel*, 207 Ariz. 280, n.4 (App. 2004). Before § 13-415 was added, "the Recommended Arizona Jury Instruction for self-defense then in use required a jury to evaluate a defendant's claim of justification from the perspective of 'a reasonable person in the defendant's *situation*.'" *Id.* (emphasis in *Vogel*)

[1]At oral argument, the state conceded that if Mason had properly requested the state-of-mind instruction during the settling of the instructions, it would have been proper for the trial court to give it because "there was evidence . . . as to domestic violence." However, Mason also conceded at oral argument that the possibility of a change in defense strategy between the time of the original written request for the instruction and trial might explain the abandonment of the request for the instruction.

(quoting Recommended Arizona Jury Instruction (Criminal) 4.04 (1989)). The current instructions include similar language—"a reasonable person in the situation." *See* Rev. Ariz. Jury Instr. (RAJI) Stat. Crim. 4.04, 4.05 (5th ed. 2019).[2] However, in a footnote the instructions now provide, "If there have been past acts of domestic violence . . . against the defendant by the victim, the state of mind of a reasonable person shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence." *Id*.

¶14 In this case, the jury instructions included the standard "reasonable person in the situation" language in explaining how to evaluate Mason's justification defense. *See id.* Specifically, the court instructed the jury:

> A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed: A reasonable person in the situation would have believed that physical force was immediately necessary to protect the person against another's apparent attempted or threatened use of unlawful physical force; and the Defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the situation.
>
> . . . .
>
> The use of physical force or deadly physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present. Actual danger is not necessary to justify the use of physical force or deadly physical force in self-defense.
>
> You must decide whether a reasonable person in a similar situation would believe that physical force or deadly physical force was

[2] Because the version in use at the time of Mason's trial is not meaningfully different, *see* RAJI Stat. Crim. 4.04, 4.05 (4th ed. 1996), we cite the current RAJI here.

> immediately necessary to protect against another's use, attempted use, threatened use, apparent attempted use, apparent threatened use of . . . unlawful physical force or deadly physical force[. Y]ou must measure the Defendant's belief against what a reasonable person in the situation would have believed.

The state argues that the substance of the requested state-of-mind instruction was covered by these instructions to the extent they discuss "a reasonable person in the situation" because "[t]hat situation necessarily included any previous act of domestic violence perpetrated by [A.N.] on Mason."

¶15 These instructions coupled with the closing arguments of counsel made clear that Mason's state of mind, as it pertained to his justification defense, was to be determined from the perspective of a reasonable person who had been subjected to A.N.'s behavior. *See State v. Mott*, 187 Ariz. 536, 546 (1997) ("A trial court is not required to give a proposed instruction when its substance is adequately covered by other instructions."); *State v. Bruggeman,* 161 Ariz. 508, 510 (App. 1989) ("Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions."). Specifically, Mason argued:

> A reasonable person, would a reasonable person with the experiences that [Mason] had with [A.N.] believe that [A.N.] is threatening him and reaching for a gun? Yes, that's reasonable.
>
> The man had guns around him. He was pointing at them, pointing them at him, pointing them at [Mason]. He was angry. He was quick to snap. He had shot the gun before.
>
> A reasonable person is going to think about all of these things and say, "Agh, this guy is telling me he's going to kill me and he's reaching for something. I should probably believe him." That's reasonable, and the State has presented nothing to dispute that.
>
> . . . .

> So when [Mason] saw what was about to happen, what he believed was about to happen and he reached for the knife, he had no duty to try to leave first; and he was doing what a reasonable person with the life experiences that he had had with [A.N.] would have done in that same situation.
>
> . . . .
>
> [Mason] knew what [A.N.] was capable of, and you heard some testimony about a cigarette burn. . . . The man liked to hit people with canes, point[ed] guns at people, and apparently animals weren't off limits either.
>
> . . . .
>
> [A.N.] was a dangerous, threatening person. [Mason] knew it. He had experienced it. He had seen it firsthand.
>
> . . . .
>
> [Mason] has cooperated from Day 1 and he sits here today for his trial because he knows what he did is self-defense and any reasonable person would have done the same. Any reasonable person would have done the same.

And the prosecutor did not suggest that A.N.'s prior acts of abuse could not be considered. Thus, based on the instructions given and the closing arguments of counsel, the jury received the information necessary to arrive at a legally correct decision. *See Bocharski*, 218 Ariz. 476, ¶ 47. No fundamental error thus occurred. *See Escalante*, 245 Ariz. 135, ¶ 21; *cf. State v. Fierro*, 220 Ariz. 337, ¶¶ 11-14 (App. 2008) (no error in instructions on elements of offense, particularly in light of arguments of counsel).

Defense of Others[3]

¶16 During the settling of jury instructions, Mason requested a defense-of-others instruction. The state objected, asserting that "[t]here [was] no evidence to suggest that [A.N.] was being threatening to either of the two people in the other room." It also pointed out that A.N. never left his recliner during the altercation. Mason responded that his testimony of A.N.'s "abuse of these two other people" and A.N.'s "arsenal of weapons" was "enough to qualify for th[e] instruction." The trial court declined to give the instruction, reasoning that "if [Mason] had time to reflect upon what could happen to other folks or anything else before he committed the act," that "undermines the premeditation defense," which may "cause . . . confusion to the jury."

¶17 On appeal, Mason argues the trial court erred in declining to give a defense-of-others instruction because our supreme court has "soundly rejected the idea that a court can deny a warranted justification instruction due to a fear that the jury might be confused by the inconsistency." *See State v. Carson*, 243 Ariz. 463, ¶¶ 13-14 (2018). However, we must affirm if the court's ruling is legally correct for any reason, *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7 (App. 2012), and the record lacks evidence supporting the defense.

¶18 Section 13-406, A.R.S., provides the basis for the defense-of-others instruction:

> A person is justified in threatening or using physical force or deadly physical force against another to protect a third person if, under the circumstances as a reasonable person would believe them to be, such person would be justified under § 13-404 or 13-405 in threatening or using physical force or deadly physical force

[3]As part of this issue, Mason also suggests the trial court "failed to give [his] requested [instruction on the] definition of reflection." But he offers no meaningful argument on this issue and does not assert the error was fundamental. *See* Ariz. R. Crim. P. 31.10(a)(7) (opening brief must include "supporting reasons for each contention" with legal authorities and record references). Accordingly, it is waived. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim."); *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (argument waived when defendant does not argue error was fundamental).

> to protect himself against the unlawful physical force or deadly physical force a reasonable person would believe is threatening the third person he seeks to protect.

Except as otherwise provided, "a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force." § 13-404(A). And "[a] person is justified in threatening or using deadly physical force against another" if § 13-404 applies and "[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." § 13-405(A).

¶19 A defendant is entitled to a defense-of-others instruction "whenever there is the slightest evidence of justification for the defensive act." *State v. Wright*, 163 Ariz. 184, 185 (App. 1989) (quoting *State v. Bojorquez*, 138 Ariz. 495, 497 (1984)). "In making this assessment, a court must view the evidence in the light most favorable to the proponent of the jury instruction."[4] *State v. Nottingham*, 231 Ariz. 21, ¶ 14 (App. 2012). For self-defense, "[t]he 'slightest evidence' is that evidence 'tending to prove a hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing [his] life or sustaining great bodily harm.'" *Wright*, 163 Ariz. at 185 (quoting *State v. Wallace*, 83 Ariz. 220, 223 (1957)). And in the defense-of-others context, the instruction is appropriate "where the facts permit the inference that the defendant has acted under the reasonable apprehension of danger to a person other than himself." *Id.* at 186.

¶20 At trial, Mason testified that he "use[d] the knife to defend [himself]." Indeed, Mason was the only one in the living room at the time he claimed he thought A.N. was reaching for a gun. Although Mason testified that A.N. "could have shot everybody," including K.M. and J.N., who were also in the house, it was undisputed that K.M. and J.N. were in

[4] At oral argument, defense counsel seemed to suggest that this standard applied to every issue raised on appeal. We disagree. This standard is limited to our review of whether the evidence supporting Mason's defense warranted a particular jury instruction. *See, e.g.*, *State v. King*, 225 Ariz. 87, ¶ 13 (2010); *State v. Rodriguez*, 192 Ariz. 58, ¶¶ 16, 20 (1998).

another room down the hall and that A.N., who was seated in his recliner, moved slowly and used a walker for support. *See State v. Vassell*, 238 Ariz. 281, ¶ 9 (App. 2015) (in slightest-evidence analysis, speculation cannot substitute for evidence). There was thus not the slightest evidence to support the inference that Mason had stabbed A.N. because he was acting under a reasonable apprehension of an immediate danger to others. *See Wright*, 163 Ariz. at 186.

Weight and Credibility of Mason's Statements

¶21 During the settling of the jury instructions, the following exchange occurred:

> [Defense counsel]: . . . I also want to request an instruction . . . about any statements made by the Defendant. I can give it to the Court. It's just regarding this jury's consideration of it and—
>
> [Trial court]: Voluntariness of the statements?
>
> [Defense counsel]: Yes.
>
> [Trial court]: Okay. That is a standard RAJI.
>
> [Defense counsel]: Okay.
>
> [Trial court]: Do you have any objection to that?
>
> [Prosecutor]: No, Your Honor.
>
> [Trial court]: I will give that instruction, the standard RAJI on voluntariness of statements.

Later that day, when reviewing the final instructions, the trial court noted, "And the voluntariness instruction on the statements is in there." *See* RAJI Stand. Crim. 19 (5th ed. 2019). Defense counsel responded that she "saw that," and the court asked if there was "anything else on the final package." Defense counsel did not indicate that there was.

¶22 On appeal, Mason argues that he "requested that the jury be instructed how to evaluate his testimony" but the trial court "misunderstood" and "erroneously instructed the jury to determine whether [his] statements to the police were voluntarily given." Relying on

RAJI Stand. Crim. 18(b) (5th ed. 2019),[5] Mason contends the court should have instructed the jury, "You must evaluate the defendant's testimony the same as any witness' testimony." He further reasons that because the jury was not instructed "how to evaluate his testimony in comparison with the non-party witnesses, the instructional error likely caused the jury to discredit [his] testimony."

¶23 As a preliminary matter, we disagree with Mason that he effectively requested the instruction below.[6] Although it appears that defense counsel may have been trying to request the instruction, she did not do so, instead agreeing with the trial court that his concerns were addressed by the standard instruction on the voluntariness of a defendant's statements. Because Mason did not fully apprise the court of the issue, and therefore the court had no opportunity to correct it, the issue is forfeited for all but fundamental, prejudicial error. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008).

¶24 Although the trial court did not give RAJI Stand. Crim. 18(b), it did instruct the jury on the credibility of witnesses generally. *See Dann*, 220 Ariz. 351, ¶ 51. Specifically, the court instructed the jury that it "must decide whether to believe the witnesses and their testimony." It also instructed, "You may accept everything a witness says, or part of it, or none of it." The substance of the instruction on the weight and credibility of a defendant's trial testimony was adequately provided by these other instructions, which necessarily gave the jury the same standard for all the witnesses. *See Mott*, 187 Ariz. at 546. Accordingly, no error occurred, fundamental or otherwise. *See Escalante*, 245 Ariz. 135, ¶ 21; *cf. State v. Young*, 115 Ariz. 162, 163 (App. 1977) ("Where, as here, the court properly

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[5]In his opening brief, Mason cites "RAJI No. 36," a former version of current RAJI Stand. Crim. 18(b). *See* Rev. Ariz. Jury Instr. (RAJI) Stand. Crim. 36 (4th ed. 1996). The language of the rule, however, is the same. We therefore cite the current version.

[6]On appeal, the state argues that because defense counsel requested the instruction on the voluntariness of a defendant's statements, he invited any purported error and fundamental-error review is not necessary. We are unconvinced, however, that the invited-error doctrine applies because this is not a situation where the defendant expressly requested—and the trial court gave—the now objected-to instruction. *See State v. Lucero*, 223 Ariz. 129, ¶¶ 17, 20-21, 31 (App. 2009) (purpose of invited error to avoid gamesmanship).

instructed the jury on credibility of witnesses generally, the refusal to give appellant's special instruction was not error.").

Cumulative Error

¶25 Mason also challenges "the cumulative effect of the[se] instructional errors." He reasons that, "[t]aken together, these errors deprived [him] of his constitutional rights to a fair trial and to have the jury instructed fairly on the law." Because he did not raise this argument below, it is forfeited for all but fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶26 "In criminal cases, however, Arizona rejects the 'cumulative error doctrine' outside the context of prosecutorial misconduct claims." *State v. Romero*, 240 Ariz. 503, ¶ 16 (App. 2016) (quoting *State v. Hughes*, 193 Ariz. 72, ¶ 25 (1998)). Mason has not established error and resulting prejudice with regard to the challenged instructions. Accordingly, they "cannot add up to one reversible error." *Hughes*, 193 Ariz. 72, ¶ 25.

Preclusion of Defense Witness

¶27 Mason next argues the trial court erred by precluding a defense witness from testifying about A.N.'s "prior acts of domestic violence," specifically, his gun possession and animal cruelty. He maintains that the preclusion "forc[ed him] to testify in order to present the evidence," thereby violating his "right to present a complete defense and the privilege against self-incrimination." We review the preclusion of evidence for an abuse of discretion. *State v. King*, 213 Ariz. 632, ¶ 7 (App. 2006). However, we review constitutional issues de novo. *State v. Foshay*, 239 Ariz. 271, ¶ 34 (App. 2016).

¶28 "When the Defendant raises a justification defense, he is entitled to offer at least some 'proof of the victim's reputation for violence.'" *State v. Connor*, 215 Ariz. 553, ¶ 13 (App. 2007) (quoting *State v. Zamora*, 140 Ariz. 338, 340 (App. 1984)). "However, he may do so only in limited ways." *Id.* First, he "may offer into evidence specific instances of violence committed by the victim," provided the defendant knew of them. *Id.*; *see also State v. Fish*, 222 Ariz. 109, ¶ 16 (App. 2009). Second, he "may also offer reputation or opinion evidence that the victim has a violent or aggressive character trait." *Connor*, 215 Ariz. 553, ¶ 13; *see also* Ariz. R. Evid. 404(a)(2).

Victim's Prior Gun Possession

¶29 Before trial, the state sought to preclude "[a]ny testimony . . . that [A.N.] frequently carried or kept a firearm nearby." The state argued that "this testimony would be irrelevant, only confuse the issues, and [was] substantially more prejudicial than probative." At a hearing on the motion, Mason stated that he planned to call M.V., a "friend of the family," as a witness. He explained, "[M]y intent of calling her was to have her testify about a time when she was at the home with [A.N., J.N., and Mason] and that there was a gun clearly visible to all parties when she was there. A gun in [A.N.'s] seating area." Mason added that he had "knowledge [of the incident] as well because he was there on that day." The trial court precluded M.V.'s testimony, explaining:

> I think [Mason] can testify to it. I don't see a basis for calling a third party to testify to that. Because whether she saw it there, that's not relevant. What's relevant is if he saw it there and was aware that [A.N.] typically had a gun there or he was concerned about that or what his subjective knowledge was of that.

¶30 During the discussion that followed, the trial court recognized that "[w]hen the defendant raises a justification defense, he is entitled to offer at least some proof of the victim's reputation for violence . . . in limited circumstances." The court pointed out that Mason could raise a justification defense without testifying himself, "depending on what the testimony is from the other witnesses." "But beyond that," the court noted, reputation evidence was only admissible after Mason testified as to "what [he] knew" and "why." Mason indicated that he understood, also adding that he planned to elicit testimony of A.N.'s "propensity for violence when intoxicated" through cross-examination of K.M.

¶31 On appeal, Mason contends the trial court erred in precluding M.V.'s testimony because she would have testified to "acts of violence by [A.N.] that she witnessed when [Mason] was also present." However, he identifies no specific instances of violence committed by A.N. of which Mason was aware and M.V. would have testified. *See Connor*, 215 Ariz. 553, ¶ 13. Below, Mason claimed that M.V. would "testify about a time when she was at the home with [A.N, J.N., and Mason] and . . . there was a gun [in A.N.'s seating area] clearly visible to all parties." But merely being in possession of a gun, without more, is not a "specific instance[] of violence." *Id.*; *see also State v. Taylor*, 169 Ariz. 121, 124 (1991) (defining violence and

finding victim's act of immersing child in scalding water as act of violence). The state also contends, "[A]bsent any indication that [M.V.] actually saw any violent acts/threats by [A.N.] with a gun, the evidence was not relevant to Mason's justification defense and was therefore inadmissible." The state's contention is not entirely correct. This court has previously determined that a defendant is "allowed to introduce specific instances of the victim's possession of a gun, of which the defendant was aware, as this evidence [is] relevant to the defendant's state of mind at the time of the incident." *Zamora*, 140 Ariz. at 341.

¶32 Mason seems to suggest that M.V.'s testimony would have been relevant to his state of mind because it "corroborate[d]" Mason's "version of events" that he thought A.N. was reaching for a gun. But he did not make this argument below, and he does not meaningfully develop it on appeal. *See State v. Bolton*, 182 Ariz. 290, 297-98 (1995) (we only consider issues not raised below for fundamental error; failure to argue claim on appeal constitutes waiver). Even assuming the trial court erred by precluding the gun-possession evidence, and such error amounted to fundamental error, *see Escalante*, 245 Ariz. 135, ¶ 21, Mason has not met his burden of establishing prejudice warranting reversal because the evidence that Mason sought to elicit from M.V. was provided by K.M.—that A.N. regularly kept guns near his recliner. *See State v. Carlos*, 199 Ariz. 273, ¶ 24 (App. 2001) (error in precluding defense witness's testimony harmless where "testimony would have been merely cumulative of other evidence in the case").

¶33 Mason further argues that M.V.'s "testimony would have shown [A.N.'s] character for being drunk and aggressive toward his family and his penchant for holding or keeping a loaded gun within arm's reach." He reasons this evidence was "relevant to show that [A.N.] was the probable first aggressor." *See Connor*, 215 Ariz. 553, ¶ 13. But, again, this was not how Mason described M.V.'s testimony to the trial court. "Having failed to offer the evidence for the purpose suggested in this appeal, [Mason] cannot now predicate error based upon its exclusion." *State v. Fendler*, 127 Ariz. 464, 477 (App. 1980). And, even assuming he properly proffered M.V.'s testimony below, any error in its exclusion was harmless because K.M. similarly testified that A.N. "drank a lot," was "violent when he was drunk," and kept guns near him. *See Carlos*, 199 Ariz. 273, ¶ 24.

¶34 Notably, it appears that while discussing this issue, the trial court and the parties seemed to conflate the two types of evidence discussed in *Connor*. Under *Connor*, 215 Ariz. 553, ¶ 13, reputation or opinion testimony from M.V. that A.N. had "a violent or aggressive character trait"

would have been admissible, even without Mason's knowledge. *See* Ariz. R. Evid. 404(a)(2), 405(a). But because M.V.'s testimony would have been cumulative, as discussed above, any error by the court was harmless. *Cf. State v. Gallegos*, 178 Ariz. 1, 13 (1994) (even assuming trial court erred in precluding defendant's statements that he was drunk and did not intend to kill victim, any error was harmless because statements were "merely cumulative" to other testimony); *State v. McKinley*, 157 Ariz. 135, 138 (App. 1988) (no error in preclusion of testimony that would have been cumulative).

Victim's Prior Animal Cruelty

¶35 On the first day of trial, the state also sought to preclude "third party statements" concerning A.N.'s "prior animal abuse," explaining, "If [Mason] actually testified or is able to show that he had knowledge of this and it would affect his state of mind, then I think it would be appropriate to bring in the third parties because it is only relevant if it goes to his state of mind." Mason agreed, reasoning that if he testified "about instances of abuse or violence against animals that he personally witnessed[, t]hat would go to his state of mind and his knowledge of [A.N.'s] temperament, aggressiveness and violence." Later that day, the trial court precluded the evidence of animal cruelty, explaining that "although normally incidents that would affect the Defendant's state of mind would be relevant," in this case, "the probative value of [the] allegations of animal cruelty . . . are substantially outweighed by the danger of unfair prejudice." Mason responded, "Okay."

¶36 Two days later, before taking the stand, Mason sought guidance from the trial court on whether he could testify that "prior to [A.N.'s] stabbing, [A.N.] had admitted to [Mason] about having burned [Mason's] dog with his cigarette," which "reignited an argument between them." The state objected, asserting that it had no notice of the incident and that the evidence was "overly prejudicial" in light of any minimal probative value. The court noted that it had "doubts [about] the veracity of the allegation," at that point in the trial process, but nonetheless allowed the testimony to "complete the story as to what happened on the day of the stabbing."

¶37 On appeal, Mason contends the trial court erred by precluding evidence of A.N.'s animal cruelty because such evidence was "relevant and admissible to prove both the reasonableness of [his] belief that deadly force was necessary and to prove [A.N.'s] conduct in conformity." But other than the single incident regarding the burning of

Mason's dog with a cigarette, which was admitted, Mason made no offer of proof about other instances of animal cruelty.

¶38 "A party may claim error in a ruling to . . . exclude evidence only if the error affects a substantial right of the party and . . . [the] party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Ariz. R. Evid. 103(a)(2). "The purpose of the rule requiring that specific grounds of objection be stated is to allow the adverse party to address the objection and to permit the trial court to intelligently rule on the objection and avoid error." *State v. Granados*, 235 Ariz. 321, ¶ 19 (App. 2014).

¶39 Here, when the state first raised the issue of A.N.'s animal cruelty, Mason did not clearly object to the preclusion of the evidence and instead seemingly agreed with the state that the evidence was relevant if he "personally witnessed [it]" and it affected "his state of mind and his knowledge of [A.N.'s] temperament, aggressiveness and violence." Later, when the trial court precluded the evidence based on its finding of unfair prejudice, *see* Ariz. R. Evid. 403, Mason made no offer of proof as to what the allegations of animal cruelty entailed, *see* Ariz. R. Evid. 103(a)(2).[7] Because Mason did not make an offer of proof, the court could not "reevaluate [its] decision in light of the actual evidence to be offered," and this court cannot "determine if the exclusion affected [Mason's] substantial rights." *State v. Hernandez*, 232 Ariz. 313, ¶ 42 (2013) (quoting *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 967 (2d Cir. 1972)). The argument is therefore foreclosed on appeal. *Cf. id.* ¶¶ 42-43 (appellate court had no basis to review defendant's argument that trial court erred in allowing him to impeach victim with prior inconsistent statements where defendant made no offer of proof of inconsistencies).

Constitutional Rights

¶40 Mason further contends that the preclusion of A.N.'s "prior acts of domestic violence," "coupled with the requirement that he testify in

[7] Contrary to Mason's suggestion otherwise, the trial court's preclusion of this evidence was not based on its determination that "it simply did not believe the claims of animal cruelty." Rather, the court indicated that it "doubt[ed] the veracity of the allegation" that A.N. had burned Mason's dog with a cigarette, given that the first time he raised the issue was the third day of trial. And because the court allowed that specific instance of animal cruelty to be admitted, the court was not interfering with the jury's role of weighing the evidence, as Mason suggests.

order to introduce evidence," violated his "fundamental due process rights to compel witnesses in his favor and against his privilege of self-incrimination." Because he did not raise this argument below, it is forfeited for all but fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 21; *see also Lopez*, 217 Ariz. 433, ¶ 4 (objection on one ground does not preserve issue on another ground).

¶41 "The constitutional rights to due process and confrontation guarantee a criminal defendant 'a meaningful opportunity to present a complete defense.'" *State v. Abdi*, 226 Ariz. 361, ¶ 27 (App. 2011) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). However, in the exercise of these rights, a defendant must nonetheless "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *State v. Prasertphong,* 210 Ariz. 496, ¶ 26 (2005) (quoting *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973)); *see also State v. Dickens,* 187 Ariz. 1, 14 (1996) ("Although a defendant has a fundamental constitutional right to confront witnesses and present a defense, the right is limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance."), *abrogated in part on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶ 15 (2012). And while a defendant "is frequently forced to testify . . . in an effort to reduce the risk of conviction," the "choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." *Williams v. Florida*, 399 U.S. 78, 83-84 (1970).

¶42 The trial court's exclusion of the evidence in this case did not deprive Mason of his constitutional rights. *See Foshay*, 239 Ariz. 271, ¶ 34. As discussed above, the gun-possession evidence that Mason sought to introduce through M.V. was admitted through K.M. As to the animal-cruelty evidence, the court seemingly followed our established rules of evidence. *See* Ariz. R. Evid. 103, 403. To the extent Mason felt compelled to testify in order to otherwise present this evidence, his privilege against self-incrimination was nonetheless not violated. *Cf. State v. Clayton*, 109 Ariz. 587, 601 (1973) ("Defendant may feel he was 'coerced' into testifying and, in a sense he was, in that he was well-advised to do so if he wanted to present evidence [supporting] an instruction on self-defense, but it is not coercion in the sense that it was illegal or error.").

Prejudicial Titles

¶43 Mason lastly asserts the trial court erred by denying his motion in limine to preclude the state from using "prejudicial titles," including "victim," "murder," and "crime scene." He reasons that because

his defense was one of justification, "alleging that [A.N.] was not a victim," the state's use of such titles "hobbled [his] right to be presumed innocent." We review a trial court's orders managing trial proceedings for an abuse of discretion. *State ex rel. Montgomery v. Kemp*, 239 Ariz. 332, ¶ 14 (App. 2016). However, we review related constitutional challenges de novo. *Id.*

¶44 Before trial, Mason filed a motion in limine to preclude the state from using "prejudicial labels before the jury at any time," including "[r]eferences to [A.N.] as 'the victim,'" "[r]eferences to [A.N.] having been 'murdered,'" "[r]eferences to [the] home as a 'crime scene,'" and "[r]eferences to the knife in question being a 'murder weapon.'" Mason reasoned that the use of such labels implied the state had "already met its burden of proving that [A.N.] was murdered, . . . thereby undermining . . . Mason's constitutionally guaranteed right to the presumption of innocence" and "shifting the burden of proof to [him] to disprove the labels' validity." The state opposed the motion, reasoning that the terms were appropriate because it had alleged A.N. was "a victim of first degree murder" and it had "a good faith basis that the evidence will show" as much. At a hearing, Mason argued that while "prosecutors are allowed to argue that the evidence amounts to guilt," they are not allowed to impose "their personal beliefs about guilt" on the jury. He asserted that the state's use of the titles would effectively do so. The trial court "caution[ed] the State against excess usage of the terms, particularly 'murder weapon,'" finding "weapon" was an appropriate substitute, during "openings or closings or in cross-examination of the witness[es]," but denied the motion in limine. The court provided Mason with "leave to re-raise the issue" if "it becomes excessive at some point."

¶45 Relying on *Z.W. v. Foster*, 244 Ariz. 478 (App. 2018), Mason contends on appeal that "the term 'victim' may be appropriate in a proceeding where the dispute centers around who perpetrated the crime, and not whether a crime was in fact committed." However, Mason maintains that in a case like this one, "where the defendant disputes that a crime occurred, the term 'alleged victim' is appropriate." *Z.W.* does not support Mason's position.

¶46 In that case, Z.W. was the named victim of one count of child molestation and two counts of sexual abuse. 244 Ariz. 478, ¶ 1. The trial court denied Z.W.'s "request to preclude reference to her as the 'alleged victim,'" and Z.W. sought special-action review of that decision. *Id.* This court first pointed out that while "the Victims' Bill of Rights does not specify how a victim should be referred to in court proceedings," it does nonetheless "confirm[] that every crime victim in Arizona has the right to

be treated throughout the criminal justice process with 'fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse.'" *Id.* ¶¶ 4-5 (quoting Ariz. Const. art. II, § 2.1(A)(1)). "Although 'alleged victim' connotes some degree of uncertainty as to whether a crime occurred," this court reasoned that "until a defendant has been convicted of a charged offense, the case involves an alleged criminal act against an alleged victim" and use of that title "does not inherently violate [the] victim's right." *Id.* ¶ 5. However, we concluded that the trial court "retains discretion to assess—on a case-by-case basis—whether a particular reference to a victim undermines the victim's right to be treated with fairness, respect, and dignity under the particular circumstances presented." *Id.* ¶ 7. And this court found no abuse of discretion in the denial of Z.W.'s motion to preclude the use of the term "alleged victim." *Id.*

¶47 Contrary to Mason's suggestion, *Z.W.* does not conclude that the term "alleged victim" should be used when the defendant disputes whether a crime occurred and that the term "victim" is appropriate when there is no dispute that a crime occurred, only who committed it. Rather, this court stressed that "trial courts should have flexibility in determining how to refer to crime victims during criminal proceedings." *Id.* ¶ 8. Mason has pointed us to no binding authority—and we are aware of none—that requires the use of the title "alleged victim" in criminal proceedings. *See State v. Dean*, 226 Ariz. 47, ¶ 19 (App. 2010) (legal precedent from other jurisdictions not controlling on this court).

¶48 Here, although the trial court denied Mason's motion in limine, it cautioned the state against overuse of the terms, stating that Mason could re-assert the issue if the state's use became excessive. The prosecutor used the term "victim" three times during opening statements and four times during closing arguments. Three of the state's witnesses also used the term during their testimony. However, at no point did Mason object on the basis that the use had become excessive. Accordingly, we cannot say the trial court abused its discretion. *See Montgomery*, 239 Ariz. 332, ¶ 14.

¶49 Moreover, even assuming the state's use of the terms constituted error, we are confident beyond a reasonable doubt that it was harmless. *See State v. Leteve*, 237 Ariz. 516, ¶ 25 (2015) (error not reversible if harmless); *Romero*, 240 Ariz. 503, ¶ 7 (in deciding whether error is harmless, question is whether guilty verdict actually rendered was surely unattributable to error). Errors may be vitiated by jury instructions or arguments. *Romero*, 240 Ariz. 503, ¶¶ 19-20.

¶50 Here, the jury was instructed that it "must not think [Mason] is guilty just because [he] has been accused" and that the state had the burden of proving him guilty beyond a reasonable doubt. The trial court informed the jury that it had to "decide whether [Mason] is guilty or not guilty by determining what the facts in the case are" and that "[i]n deciding the facts of this case, [it] should consider what testimony to accept and what to reject." The jury was also instructed, "In their opening statements and closing arguments, the lawyers have talked or will talk to you about the law and the evidence. What the lawyers said or will say is not evidence, but it may help you understand the law and the evidence." We presume the jury followed its instructions. *See State v. Jeffrey*, 203 Ariz. 111, ¶ 18 (App. 2002). Likewise, these concepts—the state's burden of proof and the jury's duty to decide the case—were thoroughly discussed during opening statements and closing arguments. Accordingly, any error with respect to the state's use of any "prejudicial titles" was harmless. *Cf. State v. Payne*, 233 Ariz. 484, ¶ 113 (2013) (prosecutorial vouching harmless given instructions that lawyers' arguments not evidence and jury must consider witness's motive or prejudice).

Disposition

¶51 For the foregoing reasons, we affirm Mason's conviction and sentence.