IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GREGORY GASTELUM GUTIERREZ,
Appellant.

No. 2 CA-CR 2018-0130
Filed August 12, 2020

Appeal from the Superior Court in Pima County
No. CR20135376001
The Honorable Casey F. McGinley, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Jennifer L. Holder, Assistant Attorney General, Phoenix
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Gregory Gastelum Gutierrez appeals from his convictions following his retrial for attempted second-degree murder, aggravated assault of a minor under fifteen with a deadly weapon/dangerous instrument, aggravated assault with a deadly weapon/dangerous instrument, and aggravated assault causing serious physical injury. The trial court imposed a combination of concurrent and consecutive sentences, for a total of 20.5 years in prison.

Issues

¶2 On appeal, Gutierrez first contends that the trial court erred by denying his motion to preclude retrial on double-jeopardy grounds, claiming his motion for mistrial—during his first trial—had been involuntary and the product of "goad[ing]" and judicial overreach, and that the mistrial was not "manifestly necessary." Next, he contends the court erred in denying his motion to preclude the state's expert on the grounds the expert did not meet the requirements in Rule 702, Ariz. R. Evid. Gutierrez also contends the court erred by precluding him from presenting certain evidence related to one of his experts' qualifications. Finally, he contends the evidence did not support instructing the jury on flight as consciousness of guilt, and the instruction given was an improper comment on the evidence. We affirm.

Factual and Procedural Background

¶3 Gutierrez' first trial ended in a mistrial prompted by an alleged disclosure violation by defense counsel. Two months before the originally scheduled date of the retrial, Gutierrez filed a Motion to Preclude Retrial Based on Double Jeopardy, alleging the motion for mistrial was not voluntary. The trial court denied the motion.

¶4 We view the following facts presented at Gutierrez' second trial in the light most favorable to upholding the jury's verdicts. *State v.*

Payne, 233 Ariz. 484, n.1 (2013). The procedural background of the first trial will be discussed below as to Gutierrez' double-jeopardy claim.

¶5 On December 14, 2013, Gutierrez left his home at about 1:00 p.m. to borrow a drill from his father and go to the store. During these errands, he purchased and consumed gin, drank a six-pack of beer while at his parents' house, and then another six-pack of beer after that. After doing so, Gutierrez went to the home of J.D., his son's friend. He knocked and then entered through the unlocked door. Gutierrez approached J.D. who then introduced Gutierrez to his father, B.D., and they all went into the kitchen. Once in the kitchen, Gutierrez lunged at J.D. and stabbed him in the neck and shoulder. B.D. pushed J.D. out of the way, and J.D. ran out of the house to a neighbor's. B.D. started "grappling" with Gutierrez, and Gutierrez then stabbed him.

¶6 J.D., at his neighbor's house, then saw Gutierrez leave in his truck, "driving pretty fast," and "banging" over speed bumps. Pima County Sherriff's Deputy John George initially responded to J.D.'s home after the stabbing, and the neighbor described the truck Gutierrez was driving. A couple of hours later, Deputy George saw a truck coming toward him that matched the description of Gutierrez' truck. He pulled over to run the license plate; Gutierrez drove past him, turned around, and drove up from behind, hitting the deputy's patrol car. Gutierrez backed up and then rammed the deputy's car again. He backed up a second time, hitting a parked car before accelerating forward to hit the patrol car a third and final time. George eventually arrested Gutierrez.

¶7 When arrested, Gutierrez had blood on him, gave off a "strong odor of alcoholic beverages," and swayed. His eyes were red, watery, and bloodshot, and his speech slurred. Field sobriety tests indicated impairment. A toxicology test later showed Gutierrez' blood alcohol concentration (BAC) was .203. A search of his truck turned up three knives, once of which "had blood on [it] and human hair."

¶8 Gutierrez' wife, T.G., said that, when she had not heard from Gutierrez, she called and texted him around 4:00 p.m. to find out where he was. Gutierrez texted back, "I'm so sorry." T.G. also said that Gutierrez called her "frantic" and "upset" and said he thought he just killed J.D. He also said B.D. was a "pervert" and that he stabbed him. Gutierrez told his wife police were surrounding him, and he was going to run them over because "he wanted the police to shoot him."

¶9 The state charged Gutierrez with attempted first-degree murder, aggravated assault of a law enforcement officer with a deadly weapon/dangerous instrument, aggravated assault of a minor under fifteen with a deadly weapon/dangerous instrument, aggravated assault with a deadly weapon/dangerous instrument, and aggravated assault causing serious physical injury. The state alleged that all of the offenses were dangerous, and that aggravated assault of a minor under fifteen was a dangerous crime against children. Before trial, the state abandoned the attempted first-degree murder charge and proceeded with the charge of attempted second-degree murder. Gutierrez noticed his intent to present the defense of guilty except insane (GEI). As noted above, Gutierrez' first trial resulted in a mistrial. Gutierrez argued at his retrial that he was guilty except insane and suffered from post-traumatic stress disorder (PTSD), anxiety, and depression, and recently had his medication changed. As a result, he argued, he did not know the difference between right and wrong.

¶10 The jury found Gutierrez guilty of each charge. Before sentencing, the state moved to vacate the guilty verdict on count two—aggravated assault on a peace officer—and to dismiss the charge with prejudice, which motion the trial court granted. The court sentenced Gutierrez as described above and this appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Analysis

Double Jeopardy

¶11 Gutierrez claims the trial court committed error by denying his motion to preclude retrial on double-jeopardy grounds. On appeal, as he did below, Gutierrez argues the prosecutor engaged in misconduct in the first trial, and that his motion for mistrial had been involuntary and the product of "goad[ing]" and judicial overreach.

¶12 "Whether double jeopardy bars retrial is a question of law, which we review *de novo*." *State v. Moody*, 208 Ariz. 424, ¶ 18 (2004). Under what is commonly referred to as "the double jeopardy clause" of the Fifth Amendment to the United States Constitution "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, under Article II, § 10 of the Arizona Constitution, "[n]o person shall . . . be twice put in jeopardy for the same offense." "The Double Jeopardy Clauses in the United States and Arizona Constitutions prohibit: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple

punishments for the same offense." *Lemke v. Rayes*, 213 Ariz. 232, ¶ 10 (App. 2006) (footnote omitted). Under certain circumstances, the prohibition against double jeopardy may bar a re-trial following a mistrial. *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984).

Background

¶13 In August 2015, Raymond Panzarella replaced Gutierrez' prior counsel. He informed the state that he was "attempting to organize and synthesize" Gutierrez' medical and psychiatric reports, but agreed the state's expert should have the opportunity to review those reports. Panzarella disclosed a portion of Gutierrez' medical records, and informed the state that he had provided all records that were relevant to Gutierrez' mental health and PTSD.

¶14 Then, at the first trial, T.G. testified extensively about changes in Gutierrez' demeanor after returning from his military deployment in Iraq, anxiety medications he was taking, and his alcohol abuse. The next morning, before the jury was brought into the courtroom, the state expressed its concerns that, based on T.G.'s testimony, there were documents relevant to Gutierrez' mental health that had not been disclosed. Specifically, the state noted that T.G.'s testimony touched on issues such as anxiety and depression that were not in the disclosed medical records, and identified treatment the previous November, although the state had no treatment records from this period. The state also noted it had just learned that T.G. had acted as a paralegal in the case, examined the records, identified those related to PTSD, and then disclosed only those records to the defense expert and to the state.

¶15 Panzarella then told the state that he had not disclosed all of Gutierrez' medical records, but maintained that he had disclosed the documents which he intended to use at trial and therefore complied with his disclosure obligations under Rule 15.2, Ariz. R. Crim. P. The trial court found that Gutierrez put "at issue not only [Gutierrez'] mental status at the time of the events but his mental health status at the time leading up" to the offense, including medications he was taking. The court explained that the spirit of Rule 15.2, Ariz. R. Crim. P., is that, if a party places "something at issue, giving only a select portion of documents to opposing counsel, . . . [it] allows for a surprise . . . [the rule was intended] to protect against."

¶16 The trial court ultimately ordered Gutierrez to provide all of the undisclosed documents to the state for its review that afternoon to determine whether there were relevant records and whether "there's some

kind of prejudice in not knowing what these documents entailed." The court further encouraged the parties to research "whether it's a manifest injustice to declare a mistrial and what circumstances would be appropriate for that," should it become necessary, because

> out of all the sanctions or all the options available to it, this seems to the [c]ourt to be a situation that can only be resolved with allowing the State more time, and I don't know how we could do that and give them proper time and keep this jury, because this isn't something that could be done in a day or even two.

¶17 After a recess, the state informed the trial court that it had found several documents that it wished to have its expert review. The court advised Gutierrez that it would allow the state to cross-examine his expert with the undisclosed documents to determine whether they would affect his opinion, and would allow the state to reveal to the jury how "those documents were prepared, who it was that was responsible for their preparation, and who it was that chose what documents were prepared." The court questioned whether Gutierrez' expert should be permitted to testify if the state was not afforded an opportunity to adequately prepare. The court suggested it take testimony from all of the experts to see if the additional documents would affect their opinions, to which both Gutierrez and the state consented. But the court stated,

> I fully expect the doctors would need more than a day and a half to examine 1,000 pages as far as for a diagnosis. I think we are dangerously close to a situation where even regardless of what your opinion on it is that the Court could easily find a manifest necessity exists for a mistrial.

¶18 After the experts testified they could review the documents and provide trial testimony within the jury's availability, the state said it would not seek a mistrial. The court expressed its concern that the defense expert "necessarily will have to be confronted with the fact that he didn't have a full set of information" and that "if there is even a chance that the jury is relying on things that through no fault of the defendant that are improper to rely on" or "that could sway their opinions in ways we don't

want them to because we want to get the trial done in a short period of time, that concerns me."

¶19 The next morning, the state further discussed that it had specifically asked if there were any records between November and December that it did not have, and Panzarella had said no; however, in going through the additional records, the state found a number of records during this period. The state considered "that a real problem." The trial court also expressed concern with the situation and questioned, "How is this not a monumental problem? How does the Court allow this to proceed with that kind of a revelation?" Panzarella then stated that he "was not intimately familiar with all of [the over one thousand pages of medical records] . . . . If there is something I missed in there, I apologize to counsel and I apologize to the Court." He then claimed that he had no intention of "hiding the ball and claiming that there [were] more documents we were not disclosing."

¶20 After further discussion involving the trial court and the parties, Panzarella said he had spoken to Gutierrez and "he agree[d] it would behoove us all at this point to mistry the case and start over again." The court asked Panzarella, "by making the motion . . . we are agreeing . . . a retrial will occur in this case. Is that your understanding?" Panzarella replied, "That is my understanding." The court directly addressed Gutierrez, explained the experts would review all of the documents, and a new trial would occur. Gutierrez affirmed that he understood. The court granted the motion for mistrial, finding:

> that under the circumstances that currently exist, it is, quite candidly, impossible for [Gutierrez] to have a fair trial that addresses the issues that are supposed to be addressed, that [does not] introduce intentional error or reasons for review of the case and also that [does] not result in potential cross examination of witnesses that would undoubtedly prejudice [Gutierrez'] case and his right to a fair trial.

¶21 Thereafter, the trial court granted the state's motion for sanctions. This court granted special-action relief and reversed the imposition of sanctions, finding defense counsel did not commit a discovery violation, but "express[ed] no opinion . . . whether Panzarella's conduct warrants sanction on any other basis." *Panzarella v. McGinley*, 2 CA-SA 2016-0069, ¶ 17 (Ariz. App. Dec. 14, 2016) (mem. decision).

¶22 Several months later, Gutierrez filed a Motion to Preclude Retrial Based on Double Jeopardy, alleging the motion for mistrial was not voluntary, but the result of judicial or prosecutorial overreaching. The trial court denied the motion, finding that "the Defendant was questioned by [the trial court judge] at length on the record and undeniably consented to the declaration of a mistrial with the full understanding that a re-trial would be the result." And "[d]efense counsel was not 'goaded' into requesting a mistrial" and thus the court did "not find any judicial overreaching or bad faith on the part of the Court. Nor [did it] find any prosecutorial misconduct." The court concluded it need not reach the issue of manifest necessity.

Prosecutorial Misconduct

¶23 On appeal, Gutierrez contends the state committed prosecutorial misconduct when it made "intentional and repeated misrepresentations to the trial court about the status of disclosure" and that it "should have been aware" that the documents existed and sought them out. He further asserts that the state claimed a purported disclosure violation only after "real[izing] that the records [it] had not sought out might actually be important." And that this claim was raised only after "the State's case took a turn for the worse and was raised for the improper purpose of either getting the entire GEI defense precluded or a mistrial declared." Thus, Gutierrez claims "[b]ecause the mistrial was a result of prosecutorial misconduct and overreaching, [his] right to be free from double jeopardy was violated such that his convictions must be vacated and the charges dismissed with prejudice." We disagree.

¶24 "Generally, when a mistrial is granted on motion of defendant, retrial is not barred on double jeopardy grounds" because the defendant is "deemed to have consented to a retrial." *Miller v. Superior Court*, 189 Ariz. 127, 130 (App. 1997). However, our supreme court has held that if prosecutorial misconduct causes a mistrial, a retrial may be barred under the following circumstances:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
>
> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and

> which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
>
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool, 139 Ariz. at 108-09 (footnote omitted). Thus, Arizona law recognizes an "important distinction between simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *State v. Minnitt*, 203 Ariz. 431, ¶ 30 (2002).

¶25 Here, Gutierrez fails to direct this court to, and we fail to find, any instances of prosecutorial misconduct. The record does not demonstrate that the state intentionally and deliberately "injected error in the first trial in order to force the defendant to request a mistrial." *State v. Detrich*, 178 Ariz. 380, 385 (1994). Specifically, there is no indication that the state made "intentional and repeated misrepresentations to the trial court about the status of disclosure." The prosecutor merely brought a suspected disclosure violation to the trial court's attention and asked it to rule on what testimony could be elicited and also requested access to undisclosed records. Further, the state did not "misrepresent" the status of disclosure—defense counsel on more than one occasion conceded not all of the records had been disclosed. Our decision resolving Gutierrez' earlier-filed special-action concluding, in part, that Gutierrez "did not fail to provide disclosure mandated by Rule 15," does not indicate, in itself, that the prosecutor acted improperly in raising concerns with what she perceived to be a potential disclosure violation. *Panzarella*, No. 2 CA-SA 2016-0069, ¶ 17; *see State v. Aguilar*, 217 Ariz. 235, ¶ 11 (App. 2007) (erroneous legal argument regarding disclosure issue not prosecutorial misconduct). Indeed, we noted in that decision "it appears Panzarella may have misled the state and the respondent judge about the extent and content of Gutierrez's medical records." *Panzarella*, No. 2 CA-SA 2016-0069, ¶ 17. Further, even if the prosecutor should have known additional records existed and sought them out, not doing so is, at most, negligence. As such, we do not find that any prosecutorial misconduct occurred.

Judicial Overreach

¶26 Gutierrez argues the trial court's conduct "was improper and clearly intended to prompt a mistrial request by the defense," and its

declaration of a mistrial was "not necessary, it was punitive." He further claims that the court engaged in "significant judicial overreaching by threatening to allow irrelevant, prejudicial, and improper evidence to come in as punishment for the purported disclosure violation. The improper conduct was unquestionably intended to goad the defense into requesting a mistrial . . . ." We again disagree.

¶27 Double jeopardy prohibits a retrial in cases in which the trial judge, acting in bad faith, "threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (quoting *Downum v. United States*, 372 U.S. 734, 736 (1963)); *City of Tucson v. Valencia*, 21 Ariz. App. 148, 151 (1973) ("the general rule is that when defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety or overreaching designed to avoid an acquittal, reprosecution might well be barred"). Thus, in order to bar retrial, a judge's conduct must be "intentionally calculated to force a mistrial." *State v. Marquez*, 113 Ariz. 540, 543 (1976). Simple judicial error is insufficient to bar retrial after the defendant requests, and is granted, a mistrial. *See id.*

¶28 Gutierrez argues the trial could have continued without prejudice to either party "because all three experts testified that they could go through the undisclosed documents and be ready by either the following afternoon, or the day after, the State had additional witnesses to present, and the jury said that they would be able to return the following week." Indeed, trial could have continued but for the fact that Gutierrez moved for mistrial. The record reflects the court intended to move forward with the trial when, the day before Gutierrez moved for mistrial, it confirmed the order of witnesses for the following day. Additionally, the court did not "threaten[]" to preclude Gutierrez' expert, nor was the discussion regarding the possibility of allowing testimony about the undisclosed records intended to "punish" defense counsel. The court was explaining to the parties what may occur if certain circumstances were to arise, in other words, if the undisclosed documents were found to be relevant. There is no judicial overreaching in this. Finally, contrary to Gutierrez' argument, the court's encouraging the parties to research "manifest necessity" did not constitute an attempt to force a mistrial; it was, again, the court evaluating all possible scenarios and directing the parties to be prepared with legal argument if they were to arise.

¶29 Here, absolutely nothing in the record supports an assertion that the trial court's actions were undertaken in bad faith, or intentionally

calculated to force a mistrial for any reason. Indeed, the court repeatedly voiced concern regarding Gutierrez receiving a fair trial, and neither below nor on appeal, has Gutierrez questioned the court's sincerity. Nor did the court's exploration of consequences of not requesting a mistrial constitute goading Gutierrez into moving for one. As such, we do not find the court engaged in overreaching that precluded retrial on double-jeopardy grounds.[1]

Expert Opinion Evidence

¶30 Gutierrez next contends the trial court erred by failing to preclude Dr. James Sullivan, witness for the state, from testifying in the retrial because he claims the testimony did not meet the requirements of Rule 702, Ariz. R. Evid. Gutierrez claims Sullivan, a clinical psychologist, was not a part of the "relevant scientific community" because he lacked experience in medicine and psychopharmacology and because his opinion was based on insufficient facts. This court reviews the interpretation of court rules *de novo*, *State v. Bernstein*, 237 Ariz. 226, ¶ 9 (2015), but we review a trial court's ruling on the admissibility of expert testimony for an abuse of discretion, *State v. Ortiz*, 238 Ariz. 329, ¶ 5 (App. 2015).

¶31 Gutierrez retained Dr. Lauro Amezcua-Patiño, a psychiatrist, to conduct an examination and opine on Gutierrez' mental state at the time of the offense. Amezcua-Patiño's report concluded that a combination of prescribed medications and alcohol "led to a state of involuntary intoxication with a consequent acute amnestic state that prevented Mr. Gutierrez from understanding the nature of his actions and differentiating between right and wrong." Based on the report, and Gutierrez' seeming change in defense strategy, the state moved for an additional examination by its expert, Dr. Sullivan. Gutierrez opposed the

[1]Gutierrez additionally argues that a mistrial was not "manifestly necessary" because the trial court did not appear to consider all relevant circumstances and options. However, because we determine that Gutierrez' motion for mistrial was not the result of prosecutorial misconduct or judicial overreaching, but was a voluntary request and consent to a mistrial, we need not reach the issue of manifest necessity. *See Jones v. Kiger*, 194 Ariz. 523, ¶ 8 (App. 1999) (manifest necessity analysis relevant when court orders a mistrial *sua sponte* over defendant's objection); *State v. Dickinson*, 242 Ariz. 120, ¶ 16 (App. 2017) ("Because [appellant] did not consent to the mistrial, principles of double jeopardy bar retrial unless the mistrial resulted from a showing of manifest necessity . . . .").

motion, arguing an additional examination would not be "useful in evaluating or rebutting our expert's opinion" and that "[t]he [s]tate has two favorable evaluations from two doctors already." The trial court granted the state's motion. Sullivan examined Gutierrez and his report concluded "that Mr. Gutierrez did, in fact, know that his behaviors were wrong, at the time he was engaging in them."

¶32 Thereafter, Gutierrez moved to preclude Dr. Sullivan's testimony pursuant to Rule 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). He claimed that Sullivan did "not possess the requisite experience to evaluate and provide psychiatric opinions as to [Gutierrez'] state of mind at the time of the alleged offenses." Gutierrez highlighted Dr. Amezcua-Patiño's expertise in pharmacology, specifically his knowledge of how medications can interact with and exacerbate mental health conditions, leaving a patient "more susceptible to a dissociative event implicating their sanity at the time of an alleged offense." He argued that, because Sullivan had no training in psychopharmacology and was not an expert in intoxication/toxicology, he could "provide no expert opinion . . . in rebuttal." Gutierrez also claimed Sullivan's opinion was unreliable because he had not reviewed all of Gutierrez' records and did not know which medication he was on at the time of the offense.

¶33 The state opposed the motion, noting it intended to call Dr. Sullivan "to rebut the implication that [Gutierrez] was unable to appreciate the wrongfulness of his actions due to a mental disease or defect." It also argued that, because Sullivan is a board-certified neuropsychologist "with knowledge of both PTSD and GEI evaluations . . . his testimony would help the jury determine a fact at issue in this case," he was therefore an appropriate witness. The state also claimed Sullivan "reviewed all of the relevant documentation in this case" to render an opinion as to Gutierrez' state of mind at the time of the offense.

¶34 At the subsequent hearing, Gutierrez conceded he was "not challenging [Dr. Sullivan's] qualifications in a more general sense," and that Sullivan was qualified to testify as a GEI expert generally. However, he argued that "just because [Sullivan] can opine on the prongs of GEI" does not mean he has the "particularized experience on this case to rebut or opine as to what [Dr. Lauro Amezcua-Patiño] is going to provide" as required by Rule 702 and *Daubert,* referring specifically to Gutierrez' use of prescription drugs to treat his PTSD and other conditions. He also argued that, because Sullivan is not a toxicologist, he could not testify given that Gutierrez had alcohol in his system. The state countered that Sullivan was "obviously qualified" to testify as to the two prongs of GEI defense—

whether a mental disease or defect existed and whether Gutierrez appreciated the wrongfulness of his conduct. The state also said it had a toxicologist that would testify about the effects of alcohol on the human brain, and it would not expect Sullivan to testify as to the effects of alcohol beyond his own knowledge.

¶35 The trial court held a *Daubert* hearing on the fourth day of trial, outside the presence of the jury. Dr. Sullivan testified he had more than twenty years of experience evaluating defendants' states of mind, and that he evaluates GEI cases "several times a year." He testified to his training as a clinical psychologist with specialization in neuropsychology. Sullivan testified that, although he did not consider himself an expert in toxicology or psychopharmacology, he comes across such "issues on a regular basis and [has] . . . some knowledge in those areas," and regularly has to rule out alcohol in making diagnoses. He further testified he knew the medications Gutierrez was taking at the time of the offense, but did not see a reason to consider those in making his conclusions.

¶36 The trial court denied Gutierrez' motion to preclude Dr. Sullivan's testimony, finding that Sullivan "has the requisite training, experience, and knowledge to be considered an expert in the field of Guilty Except Insane (GEI) evaluations as well as mental disease, mental defect, or ability to appreciate wrongfulness of conduct." It further found his "opinions in this case, assuming they are consistent with those in his written evaluation, are based on sufficient facts or data, are the product of reliable principles and methods, and have been reliably applied . . . and that [Sullivan] meets the criteria under Rule 702."

¶37 A witness who is qualified as an expert may testify if he has specialized knowledge that will aid the jury in understanding the evidence or a fact in issue, when his testimony is based on sufficient facts, and when his testimony is the product of reliable principles and methods, and such principles and methods have been reliably applied. Ariz. R. Evid. 702. To qualify as an expert, a witness need only have "skill and knowledge superior to that of [people] in general." *State v. Girdler*, 138 Ariz. 482, 490 (1983) (quoting *State v. Watson*, 114 Ariz. 1, 12 (1976)). "The degree of qualification goes to the weight given the testimony, not its admissibility." *State v. Davolt*, 207 Ariz. 191, ¶ 70 (2004). "'Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony' and to decide between 'competing methodologies within a field of expertise.'" *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, ¶ 20 (App. 2014) (quoting Ariz. R. Evid. 702 cmt. to 2012 amend.). The party seeking to admit expert testimony must only show

the testimony to be relevant and reliable by a preponderance of the evidence. *Id.* ¶ 19.

¶38 When evaluating an expert's reliability, the Supreme Court in *Daubert* established the following additional non-exclusive set of factors:

> (1) whether the expert's theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the technique or theory is generally accepted within the relevant scientific community; (4) the known or potential rate of error of the technique or theory when applied; and (5) the existence and maintenance of standards controlling application of the technique.

Miller, 234 Ariz. 289, ¶ 24 (citing *Daubert*, 509 U.S. at 593). "No single *Daubert* factor is dispositive of the reliability of an expert's testimony, and not all of the *Daubert* factors will apply to 'all experts or in every case.'" *Id.* ¶ 25 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)); *see also State v. Favela*, 234 Ariz. 433, ¶ 8 (App. 2014) (*Daubert* rejected rigid standards of admissibility and moved towards relaxing traditional barriers in line with the "liberal thrust" of the Federal Rules).

¶39 Gutierrez first challenges Dr. Sullivan's testimony by claiming Sullivan was not a part of the "relevant scientific community." In so arguing, Gutierrez claims that "in order to determine whether an expert's scientific testimony would help or mislead the jury, the first inquiry must be: what is the relevant scientific community?" This argument misconstrues the requirements of Rule 702 and *Daubert*. The *Daubert* factors noted above are relevant to evaluating the reliability of an expert's principles and methods, and are not determinative of whether the expert's knowledge will help the trier of fact understand the evidence or determine a fact in issue. *See Miller*, 234 Ariz. 289, ¶ 24 ("To assist courts in evaluating the reliability of expert testimony, *Daubert* set forth a non-exclusive list of factors.").

¶40 Regardless, Gutierrez' argument that Dr. Sullivan is not part of the relevant scientific community is without merit. As a clinical psychologist and neuropsychologist who has evaluated GEI cases "several times a year" for more than twenty years, Sullivan is, as to the circumstances of this case, a member of the relevant scientific community.

Indeed, Gutierrez conceded Sullivan was qualified to testify as to the GEI defense generally. Gutierrez fails to provide any additional argument as to the reliability of Sullivan's testimony, and does not, other than claiming he is not part of the relevant scientific community, further argue his testimony is the product of unreliable principles and methods.

¶41 Gutierrez also appears to argue, albeit indirectly, that Dr. Sullivan's testimony was not relevant to any fact at issue, claiming that "[w]ithout any expertise in medicine or psychopharmacology, Sullivan was unable to provide the jury with any additional or contrary information regarding how [Gutierrez'] medication regimen may or may not have played a role in the alleged offense." This argument is also without merit.

¶42 Because Gutierrez raised a GEI defense, the relevant issue was whether he "was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." A.R.S. § 13-502(A). However, a GEI defense "is not available to a defendant whose voluntary use of intoxicating alcohol and/or drugs aggravates a pre-existing mental disorder or creates a temporary episode of mental incapacity." *State v. Hudson*, 152 Ariz. 121, 126 (1986). Notwithstanding the difference of opinion between Drs. Amezcua-Patiño and Sullivan, their opinions were submitted to address the same question: whether Gutierrez was "afflicted with a mental disease or defect" and whether he knew "the criminal act was wrong." § 13-502(A). Whether, as Amezcua-Patiño posited, Gutierrez' medication and PTSD made him more susceptible to experiencing a mental defect, was not the ultimate and only issue; therefore, Sullivan's lack of experience in toxicology and psychopharmacology was not a question of admissibility, but a question of weight for the jury to consider. *See State v. Romero*, 239 Ariz. 6, ¶ 23 (2016) (witness's lack of experience performing type of analysis conducted by opposing expert "might have affected the weight a juror would give his testimony, but it did not bar its admission"). Further, our supreme court has held "when one party offers an expert in a particular field . . . the opposing party is not restricted to challenging that expert by offering an expert from the same field or with the same qualifications" and the trial court should consider only "whether the proffered expert is qualified and will offer reliable testimony that is helpful to the jury." *Id*. ¶ 15.

¶43 Gutierrez further challenges Dr. Sullivan's testimony because he claims Sullivan's opinion was based on insufficient facts. "The assessment of the sufficiency of the facts and data is a quantitative, not qualitative analysis." *Miller*, 234 Ariz. 289, ¶ 22. "[T]he facts or data underlying an expert's testimony may include inadmissible evidence,

hypothetical facts, and other experts' opinions." *Id.* In his report, Sullivan noted he reviewed the police report, text messages between Gutierrez and his wife, his wife's interview, seven years' worth of medical records, his psychological evaluation, reports by two defense experts, and Gutierrez' court-ordered competency evaluation. He also reviewed Gutierrez' county jail medical records.

¶44 After reviewing the documents and interviewing Gutierrez, Dr. Sullivan testified he was "comfortable" saying he could offer an opinion as to Gutierrez' state of mind at the time of the offense. Contrary to Gutierrez' claim that Sullivan "was not provided or did not consider critical information pertaining [to] Mr. Gutierrez' treatment leading up to and at the time of the alleged offenses," Sullivan testified that the information regarding what medications Gutierrez was taking "was in [his] possession." However, Sullivan stated he did not see a reason to consider those because he did not believe Gutierrez suffered a mental defect at the time of the offense that prevented him from appreciating the wrongfulness of his actions. This evidence was more than sufficient for the trial court to conclude that Sullivan's testimony was based on sufficient facts and data. Thus, Sullivan's testimony meets the requirements under Rule 702 and *Daubert*, and the court did not abuse its discretion in admitting his testimony.

Preclusion of a Defense Expert's Qualifications

¶45 Next, Gutierrez contends the trial court abused its discretion by precluding evidence of Dr. Amezcua-Patiño's work with the Psychiatric Security Review Board (PSRB) in support of his expert qualifications. This court reviews the admissibility of expert testimony for an abuse of discretion, viewing the evidence in the light most favorable to the proponent of the evidence. *State v. Ortiz*, 238 Ariz. 329, ¶ 5 (App. 2015).

¶46 The morning Dr. Amezcua-Patiño was scheduled to testify, the state moved to preclude him from testifying about his experience with the PSRB in regards to what happens to people after they are found GEI. The state asserted it would be an improper comment on the evidence by explaining what would happen if the jury found Gutierrez guilty but insane. The state seemingly relied upon Amezcua-Patiño's pretrial interview in which he explained his experience with PSRB involved overseeing those who were convicted as GEI and were thereafter under PSRB supervision. Gutierrez argued that, because he had the burden to establish Amezcua-Patiño's qualifications and knowledge as an expert witness, "it [was] incumbent upon [defense counsel] to examine with

[Amezcua-Patiño] the experiences that he has participated in that lend [themselves] to that expertise." The trial court granted the state's motion, reasoning that, as to the PSRB:

> [T]hat information is really only understandable if you understand what a Psych Review Board does. And if you understand that the Psych Review Board looks at folks who have been found guilty except insane and decides [what happens to them], that informs the jury of something that they're not entitled to know[,] which is what occurs after a certain verdict. They shouldn't be considering that.
>
> . . . .
>
> They should be considering their verdict based solely on the evidence before them, not what could happen to [Gutierrez] if they choose a specific verdict.

The court found the evidence substantially more prejudicial than probative, and Gutierrez then requested a limiting instruction to remedy the prejudice. The court stated a limiting instruction would not be "fruitful," explaining that "limiting instructions are usually for after the cat's out of the bag as opposed to allowing it and then limiting it."

¶47 During its cross-examination, the state questioned Dr. Amezcua-Patiño about his experience testifying in court and his experience with determining whether a defendant could appreciate the wrongfulness of his actions. After a recess, Gutierrez moved to admit the previously-precluded evidence, arguing the state "opened the door regarding [Amezcua-Patiño's] PSRB experience" by attacking his credibility. The trial court found "[t]he cross-examination was fair," and that "[a]dding the information about his [PSRB] work does nothing to inform the jury about his—the propriety of his opinions in this case or his work during the trial state as far as guilty except insane." It denied the motion on the basis that the testimony had a "very low probative value" and would be "significantly prejudicial."

¶48 A trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice [or] confusing the issues." Ariz. R. Evid. 403. "Unfair prejudice results if the

evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545 (1997). The court has "considerable discretion in deciding whether to exclude evidence under this rule." *State v. Cooperman*, 232 Ariz. 347, ¶ 17 (2013). Additionally, our supreme court has recognized "that calling attention to the possible punishment is improper because the jurors do not sentence the defendant." *State v. Jones*, 197 Ariz. 290, ¶ 38 (2000); *see also State v. Allie*, 147 Ariz. 320, 326 (1985) ("The jury's function is to determine the guilt or innocence of a party without consideration of the possible sentence.").

¶49 On appeal, Gutierrez makes no argument that the introduction of Dr. Amezcua-Patiño's work with the PSRB was not prejudicial as it relates to calling attention to the possible punishment of Gutierrez if he were found GEI, but instead directs his argument to the probative value of this evidence. He claims that "the trial court unfairly hampered [his] ability to present [his] defense by limiting what the jury heard regarding [Amezcua-Patiño's] qualifications." The trial court determined the probative value of Amezcua-Patiño's work with the PSRB was low, and the danger of unfair prejudice was high. On the record before us, given the standard by which we evaluate such rulings, we cannot conclude that the trial court abused its discretion in precluding evidence of Amezcua-Patiño's work with the PSRB.

Flight Instruction

¶50 Finally, Gutierrez contends the trial court erred by instructing the jury on flight as consciousness of guilt because there was insufficient evidence to support the instruction and because the instruction was an improper comment on the evidence. We review a court's decision to give a jury instruction for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 51 (2009). However, because Gutierrez makes this argument for the first time on appeal, we review only for fundamental error. *State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).

¶51 In such a review, if trial error exists, the appellate court must determine, based on the totality of the circumstances, whether the error was fundamental. *Id.* ¶ 21. "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." *Id.* If the defendant establishes fundamental error under prongs one or two, he must make an additional showing of prejudice. *Id.* Nonetheless, the defendant

must first show the existence of trial error. *Id.* We find no error here, much less fundamental error.

¶52 "A party is entitled to an instruction on any theory reasonably supported by the evidence." *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31 (App. 2002) (quoting *State v. Shumway*, 137 Ariz. 585, 588 (1983)). A flight instruction is appropriate when evidence shows that (1) the accused left the scene in a manner showing consciousness of guilt, or (2) the accused attempted to conceal him or herself. *State v. Hunter*, 136 Ariz. 45, 48-49 (1983). The trial court must "be able to reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *State v. Speers*, 209 Ariz. 125, ¶ 28 (App. 2004) (quoting *State v. Weible*, 142 Ariz. 113, 116 (1984)). "For example, running away from the scene as upon open pursuit, rather than walking, normally suggests consciousness of guilt." *Hunter*, 136 Ariz. at 49. However, "[e]ven without pursuit, a defendant's manner of leaving the scene may manifest consciousness of guilt." *State v. Clark*, 126 Ariz. 428, 434 (1980).

¶53 The jury here received the following instruction:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding, or concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reasons for running away, hiding, or concealing evidence. Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.

¶54 Gutierrez argues that the speed in which he drove away was not "excessive enough to indicate that he was leaving the scene in a manner obviously inviting suspicion or announcing guilt; people drive faster than they should through neighborhoods all of the time" and he "did not drive far after leaving the neighborhood." He further emphasizes that "when [he] actually came into contact with law enforcement, he had the opportunity to evade, however . . . he turned his truck around and instigated contact with the deputy."

¶55 The evidence showed that after stabbing J.D. and "grappling" with and stabbing B.D., Gutierrez left in his truck. J.D. testified he saw

Gutierrez "driving pretty fast," and "banging" over speed bumps. A neighbor testified that she saw Gutierrez drive straight over all three speed bumps, and that he was going faster than one would normally drive through the area, approximately twenty-five to thirty-five miles per hour. Another neighbor testified that Gutierrez was going "extremely fast," and called attention to the presence of children in a park. Then, a couple of hours later, upon encountering a sheriff's vehicle, Gutierrez repeatedly, albeit not at a high speed, ran into the deputy's car with his truck.

¶56 Contrary to Gutierrez' argument, the jury could reasonably infer from this testimony that Gutierrez was leaving the scene in a manner that suggested consciousness of guilt. The evidence did, indeed, show that the speed he drove away was "excessive" and "extremely fast." Moreover, his ramming the deputy's car, although not itself an act of evasion or escape, was consistent with a desire not to be captured. Consequently, we find the flight instruction was supported by the evidence and the trial court did not abuse its discretion in so instructing the jury.

¶57 Gutierrez also contends the flight instruction was an improper comment on the evidence by the trial court because it assumed Gutierrez did indeed flee. However, the Arizona Supreme Court has long held that "a jury instruction on flight does not constitute comment on the evidence." *State v. Celaya*, 135 Ariz. 248, 257 (1983) (citing *State v. Hatton*, 116 Ariz. 142, 150-51 (1977)). Further, a defendant's alternative explanation for his or her flight does not preclude a flight instruction. *Hunter*, 136 Ariz. at 49. Therefore, we do not find the flight instruction was an improper comment on the evidence.

Disposition

¶58 For the foregoing reasons, we affirm Gutierrez' convictions and sentences.