IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LAMONT MAPP ADAMS,
Appellant.

No. 2 CA-CR 2018-0319
Filed July 27, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20175615001
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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Counsel for Appellee

James Fullin, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Lamont Mapp Adams appeals from his conviction for first-degree murder. He contends his conviction should be reversed because: (1) the trial court erroneously precluded third-party culpability evidence, (2) the prosecutor committed misconduct by referring to excluded evidence in his closing remarks, (3) the court gave an improper premeditation jury instruction, and (4) the state presented insufficient evidence to prove premeditation. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Adams' conviction. *See State v. Murray*, 247 Ariz. 447, ¶ 2 (App. 2019). On Thanksgiving morning in 2017, Adams asked J.R. to say hello to his girlfriend who was waiting for him in a car in the parking lot of an apartment complex. While the three of them were talking, J.R.'s boyfriend, C.S., arrived. J.R. invited C.S. to come over but C.S. demanded that she come to him instead; J.R. went over to talk to C.S. because she noticed he was very upset.

¶3 Adams intervened and confronted C.S. after he saw C.S. poke at J.R. and attempt to grab her in an aggressive manner. C.S. responded by telling Adams, "Who the fuck are you? This is my bitch." Adams went to the trunk of the car and retrieved a gun. Tensions rose and J.R. was able to slip away after C.S. tried to reach for her again. Adams then ordered J.R. to get into the car with his girlfriend. After C.S. approached the car, Adams' girlfriend put the car in reverse to get out of the parking lot. Adams entered the car but before getting far, he got out of the car and returned to confront C.S. in the street.

¶4 C.S. told Adams to approach him so he could beat him up, and the two confronted each other at close range. Although Adams was fumbling with the gun, C.S. did not appear to be taking him seriously because he was taunting Adams and laughing at him. Adams said the gun was not working because the clip was in backwards. After further

confrontation, C.S. sustained a bullet wound that killed him. No witness testified to seeing the shooting.

¶5 After a six-day jury trial, Adams was found guilty of first-degree murder. The trial court sentenced him to natural life in prison, and Adams appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Third-Party Culpability Evidence

¶6 Adams argues the trial court violated his constitutional right to present a complete defense by precluding third-party culpability evidence. We review the admissibility of proffered third-party culpability evidence for an abuse of discretion, *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 62 (2017), *abrogated on other grounds by State v. Escalante*, 245 Ariz. 135 (2018), but we review alleged constitutional violations de novo, *State v. Foshay*, 239 Ariz. 271, ¶ 34 (App. 2016).

¶7 A criminal defendant has the constitutional right to present a complete defense, *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006), and in general "may present evidence that a third party committed the crime for which he is charged," *State v. Blakley*, 204 Ariz. 429, ¶ 63 (2003). However, "a defendant may not, in the guise of a third-party culpability defense, simply 'throw strands of speculation on the wall and see if any of them will stick.'" *State v. Machado*, 226 Ariz. 281, n.2 (2011) (quoting *State v. Machado*, 224 Ariz. 343, n.11 (App. 2010) (quoting David McCord, "*But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 Tenn. L. Rev. 917, 984 (1996))). Rules 401 through 403 of the Arizona Rules of Evidence govern the admission of third-party culpability evidence. *Id.* ¶ 16. Such evidence must first be relevant, that is, it must "tend to create a reasonable doubt as to the defendant's guilt." *State v. Gibson*, 202 Ariz. 321, ¶ 16 (2002) (emphasis omitted). If the evidence is relevant, it is admissible unless otherwise precluded by the federal or state constitution or by applicable statutes or rules. Ariz. R. Evid. 402. And, the trial court has discretion to exclude relevant third-party culpability evidence if its probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403. When examining evidence of third-party culpability under Rule 403, we, as does the trial court, view the evidence in the light most favorable to the proponent and maximize its probative value while minimizing its prejudicial effect. *State v. Bigger*, 227 Ariz. 196, ¶ 42 (App. 2011).

¶8 Before trial, the state filed a motion to preclude some evidence of third-party culpability as "hearsay and speculation," as well as evidence about the victim's past, including allegations that the victim was in a gang and sold drugs. Adams filed a consolidated response to these two motions and narrowed his third-party culpability defense to implicate only J.R. and A.W. Adams alleged that A.W., an acquaintance of C.S., purportedly used to belong to the same gang as C.S., lived in the apartment complex where the shooting occurred, correctly identified to police the caliber of the bullet that had wounded C.S., and had admitted taking C.S.'s backpack after the shooting. At a hearing on these motions, Adams clarified that he sought to introduce, among other things, the following third-party culpability evidence: (1) A.W.'s criminal history, (2) A.W.'s close relationship with C.S. due to an alleged gang affiliation, and (3) specific instances of conduct between J.R. and C.S. We address each in turn.

A.W.'s Criminal History

¶9 At the pretrial hearing, Adams told the court he sought to introduce A.W.'s 2006 felony conviction for armed robbery and various misdemeanor assault convictions to show A.W. had a propensity for violence.[1] The state argued that even if this evidence had some probative value it was substantially outweighed by its prejudicial effect. The court precluded Adams from asking propensity questions related to A.W.'s prior convictions but allowed Adams to impeach A.W.'s credibility with any prior felony convictions within the past ten years. Adams now argues the trial court abused its discretion by limiting A.W.'s criminal history because

[1] Adams effectively conceded A.W. only had one armed-robbery conviction after the court informed him that the two armed-robbery convictions he referred to had the same case number and the same date. Based on the exhibit attached to his motion, Adams seems to have been referring to A.W.'s two misdemeanor assault convictions in 2003 and 2000 and a possible misdemeanor assault conviction that occurred sometime around 2017. Because there is no information in the record about the facts surrounding the 2017 misdemeanor assault charge nor whether it resulted in a conviction, we assume there was no conviction. *See State v. King*, 226 Ariz. 253, n.3 (App. 2011) (we assume the evidence on appeal supports the trial court's actions when record is incomplete).

it showed A.W.'s "capacity for violence" and was therefore relevant to a third-party culpability defense.[2]

¶10 Although we agree that prior offenses showing an alternate suspect's capacity for violence might be relevant, *see Machado*, 226 Ariz. 281, ¶¶ 1–7, the trial court did not abuse its discretion here. A.W.'s convictions occurred many years before the murder, and nothing in the record suggests the circumstances of the previous offenses were similar to the shooting in this case or that they were otherwise linked to it. *See Blakley*, 204 Ariz. 429, ¶¶ 63, 68 (finding no abuse of discretion in excluding third-party culpability evidence where third party's prior offenses were not similar to the crime defendant was alleged to have committed). And A.W.'s felony convictions for armed robbery (whether for one count or two counts charged in the same indictment), offenses that can be committed using a simulated weapon and without discharging a firearm, *see* A.R.S. § 13-1904(A), do not concretely demonstrate such a capacity. Adams has provided no record nor argument explaining any further relevant details about those incidents. Viewed in the light most favorable to Adams, the facts surrounding these prior convictions had little if any tendency to create a reasonable doubt as to his guilt. *See Bigger*, 227 Ariz. 196, ¶ 43 (court properly excluded third-party culpability evidence that created no more than vague grounds of suspicion and had little probative value). In any event, any relevance was so tenuous and speculative that the evidence was properly excluded under Rule 403. *See State v. Dann*, 205 Ariz. 557, ¶ 36 (2003) (court did not abuse its discretion by precluding third-party culpability evidence where "the tenuous and speculative nature of the evidence caused it to fail the Rule 403 test").

A.W.'s Alleged Gang Affiliation

¶11 At the pretrial hearing, Adams also argued that A.W. and C.S.'s prior gang affiliation was relevant to his third-party culpability defense because it showed how close A.W. and C.S. were.[3] Adams reasoned this close relationship would show that A.W.'s behavior on the

[2]To the extent Adams suggests on appeal that A.W. had a violent drug dealing criminal history, we do not address it because there is nothing in the record to support it.

[3]Adams has not argued that A.W.'s alleged gang affiliation might have been relevant to show A.W.'s willingness to use violence to settle disputes. We therefore do not address whether that affiliation would have been relevant on the "capacity for violence" theory.

day of the shooting was abnormal because A.W. took C.S.'s backpack after seeing C.S. was shot, did not stay to render aid to C.S., and told police he knew the caliber of the gun used to shoot C.S. In response, the state argued the purported gang affiliation was just a rumor and that this evidence was irrelevant to a third-party culpability defense. The court ruled that Adams could introduce evidence of A.W.'s long-term friendship with C.S. but he could not address a possible gang affiliation because it was irrelevant. Adams now argues the trial court abused its discretion by precluding him from introducing evidence of A.W.'s prior gang membership because this evidence was relevant to show that A.W.'s conduct on the day of the shooting was inconsistent with his long-time relationship with C.S., suggesting some antagonism between them.[4]

¶12 However, the trial court did not abuse its discretion here because evidence that A.W. and C.S. had purportedly been members of the same gang in the past would not have tended to create a reasonable doubt as to Adams' guilt. As Adams effectively conceded below, this evidence had low probative value because Adams was able to establish that C.S. and A.W. had a long-standing friendship with other undisputed evidence. Thus, even if the trial court erred in precluding evidence of their common gang membership, that evidence was merely cumulative to other evidence admitted at trial establishing a long friendship, and any possible error was therefore harmless. *State v. Williams*, 133 Ariz. 220, 226 (1982) (The "erroneous admission of evidence which was entirely cumulative constitute[s] harmless error.").

Specific Instances of Conduct between J.R. and the Victim

¶13 The court asked Adams what specific instances of conduct he sought to introduce, and Adams noted three events that were particularly important to him. These included: (1) an incident where C.S. burned J.R. with a hair straightener approximately a week before the murder, (2) an incident that occurred the night before the murder where C.S. had thrown rocks at J.R., and (3) the fact that C.S. called J.R. derogatory names and had demeaned and degraded her on the day of the murder. The court ruled that Adams could explore these three instances because they were relevant to a third-party culpability defense and they were within a reasonable time period—one week—before the murder. The court informed the parties that

[4]The court actually precluded Adams from asking A.W. questions about C.S.'s possible gang affiliation but this effectively prohibited inquiry into the allegation that C.S. and A.W. were members of the same gang.

if other specific instances of conduct became relevant for them to bring them to the court's attention before cross-examination.

¶14 On the third day of trial, the state sought to introduce J.R.'s testimony from Adams' preliminary hearing because J.R. was not available to testify at trial. Adams did not object and during discussions of redactions sought to preserve two of J.R.'s statements from her preliminary hearing testimony admitting (1) that C.S. was "violent toward [J.R.] and other people" and (2) that C.S. was "violent with [J.R.] on a number of occasions." The state opposed the introduction of these statements because this evidence was too general and prejudicial. The court said it would "stick with [its] original ruling," which suggests that it was precluding these two statements for the reasons mentioned in its first ruling—concerns about the probative value of events between C.S. and J.R. that did not occur within a reasonable time period prior to the murder.

¶15 On appeal, Adams argues the trial court erred by precluding these two statements. The portion of J.R.'s statement indicating the victim was violent to people other than J.R. is irrelevant to Adams' third-party culpability defense because it does not tend to show that J.R. or A.W. killed C.S. *See Escalante-Orozco*, 241 Ariz. 254, ¶¶ 2-3, 62, 68-69 (third-party culpability evidence suggesting third party hit his wife on other occasions did not tend to create reasonable doubt as to defendant's guilt because this had nothing to do with third-party's relationship to victim and the jury would have to speculate to find otherwise). Furthermore, although the court's language was imprecise, it appears the court precluded the second statement—that C.S. had been violent toward J.R. on a number of occasions—on Rule 403 grounds. *See State v. Ramirez*, 178 Ariz. 116, 128 (1994) ("[T]he trial court is presumed to know and follow the law."). That portion of the statement, while relevant to show J.R.'s motive as a woman who had endured sustained abuse by the victim, was cumulative to other admissible portions of J.R.'s preliminary hearing testimony. Those portions demonstrated, albeit somewhat less directly, that C.S. had been violent toward J.R. on multiple occasions, including in the minutes immediately before the shooting. Therefore, even if the trial court erred in precluding this testimony, that error would have been harmless in light of much more powerful evidence of motive that was properly admitted. *See Williams*, 133 Ariz. at 226.

Prosecutorial Misconduct

¶16 During closing argument, Adams proposed alternate theories for the shooting and argued:

> I think it is pretty well uncontested that this isn't about money, what happened here. This is about [C.S.] beating on [J.R.], and [Adams] trying to help him (sic) out, and then an argument about it. So motive, well, one motive we have all heard in the news is a beaten woman, and it's sa[]d, but it happens all the time where somebody is abused. And maybe they don't have the courage to fight back, or in extreme circumstances, kill their abuser. Maybe they do, maybe they don't, but isn't that a motive to want to stop somebody?
>
> . . . .
>
> [J.R.] is not alone. In this complex she has a friend, she has [A.W.].
>
> . . . .
>
> There is this fight here, [A.W.] can see it or hear it, it drifts this way, [A.W.] comes out to check on his friend [J.R.]. You know, she spent the night last night, they are friends. He hopes that [C.S.] doesn't keep beating on her like he always does. So he comes out to check on her, and he has a real gun. And, who knows, maybe even, maybe even [C.S.] owes [A.W.], owes [A.W.] something. Maybe there is money for some rent money, or some transaction, who knows.

¶17 In response, the prosecutor argued:

> So all this distraction about really it was [J.R.], she was a battered woman—another thing, you never heard any testimony about battered woman. They were in a bad relationship. I think what [J.R.] said was that he bear hugged her and caused her to burn herself. That is stupid, it was inconsiderate, but you didn't hear any testimony about a battered woman at all.

¶18 For the first time on appeal, Adams argues the prosecutor's reference to the absence of battered-woman testimony during closing

argument was improper because the state had already successfully precluded evidence of long-term abuse between C.S. and J.R. Adams suggests this reference amounted to prosecutorial misconduct and denied him a fair trial because the prosecutor referred to excluded evidence to misleadingly undermine Adams' third-party culpability defense.

¶19 Because Adams did not object at trial to the alleged instance of prosecutorial misconduct, our review is limited to fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Fundamental error is a more restrictive standard of review because it is designed to "encourage defendants to present their objections in a timely fashion at trial, when the alleged error may still be corrected, and to discourage defendants from reserving a curable trial error as a 'hole card' to be played in the event they are dissatisfied with the results of their proceedings." *State v. Davis*, 226 Ariz. 97, ¶ 12 (App. 2010) (quoting *Henderson*, 210 Ariz. 561, ¶ 19). To prevail under fundamental error review, the defendant must first show error. *See Henderson*, 210 Ariz. 561, ¶ 23. Only if that threshold is met may a defendant then attempt to establish 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." *Escalante*, 245 Ariz. 135, ¶ 21.

¶20 Under fundamental error review, a defendant cannot prevail on a prosecutorial misconduct claim unless he "demonstrate[s] that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Goudeau*, 239 Ariz. 421, ¶ 193 (2016) (quoting *State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998)). Prosecutorial misconduct will only amount to reversible error in situations where "(1) the prosecutor committed misconduct and (2) a reasonable likelihood exists that the prosecutor's misconduct could have affected the verdict." *Id.* (quoting *State v. Benson*, 232 Ariz. 452, ¶ 40 (2013)).

¶21 Prosecutorial misconduct involves intentional conduct that the prosecutor knows to be improper and prejudicial, rather than conduct resulting from "legal error, negligence, mistake, or insignificant impropriety." *State v. Martinez*, 221 Ariz. 383, ¶ 36 (App. 2009) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984)). "Counsel is given wide latitude in closing argument to 'comment on the evidence and argue all reasonable inferences therefrom.'" *State v. Johnson*, 247 Ariz. 166, ¶ 24 (2019) (quoting *State v. Zaragoza*, 135 Ariz. 63, 68 (1983)). However, counsel may not "comment on matters which were not introduced in evidence" or

"call matters to the attention of the jury that the jury could not properly consider." *Id.* (quoting *Zaragoza*, 135 Ariz. at 68).

¶22 Here, the court precluded two general statements relating to C.S. and J.R.'s relationship: (1) a statement mentioning that that C.S. was "violent toward [J.R.] and other people" and (2) a statement that C.S. was "violent with [J.R.] on a number of occasions." In his closing remarks, the prosecutor did appear to capitalize on the preclusion of this evidence that more directly emphasized that J.R. suffered from chronic abuse and was therefore arguably a "battered woman." However, assuming arguendo that this rendered the prosecutor's otherwise germane argument improper, any error in allowing that argument would not have affected the outcome of the trial. As noted above, Adams was able to introduce various statements that showed C.S. and J.R. were in an abusive relationship and he presented his third-party culpability defense implicating J.R. and A.W.[5] Moreover, the trial court instructed the jury that anything said by counsel in closing arguments was not evidence and we presume the jurors followed the court's instruction. *See State v. Newell*, 212 Ariz. 389, ¶¶ 68-69 (2006). And Adams has not argued or shown how this one-time reference in closing argument so infected the proceedings with unfairness as to deny him due process. *See Goudeau*, 239 Ariz. 421, ¶ 193. Therefore, even if the prosecutor's comment was improper it would not have risen to the level of reversible error.

Sufficiency of the Evidence

¶23 Next, Adams argues the trial court erred by denying his Rule 20, Ariz. R. Crim. P., motion for a judgment of acquittal, claiming that the state failed to present substantial evidence that he killed C.S. with premeditation. Specifically, Adams contends his conviction should be reversed because the state's evidence showed only a passage of time but not the actual reflection required for premeditation.

¶24 A trial court must grant a motion for acquittal "if there is no substantial evidence to warrant a conviction." *Goudeau*, 239 Ariz. 421, ¶ 169 (quoting Ariz. R. Crim. P. 20). "Substantial evidence 'is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.* (quoting *State v. West*, 226 Ariz. 559, ¶ 16 (2011)). If, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could

[5]At trial, Adams introduced both general statements that C.S. was abusive and specific instances of abusive conduct.

have found the essential elements of the crime beyond a reasonable doubt," a motion for acquittal must be denied. *West*, 226 Ariz. 559, ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

¶25 We review de novo both the sufficiency of the evidence and the trial court's denial of a motion for acquittal. *See id.* ¶ 15. "In determining whether substantial evidence supports a conviction, we consider both direct and circumstantial evidence, and resolve all inferences against the defendant." *Goudeau*, 239 Ariz. 421, ¶ 169 (citation omitted). Importantly, "the probative value of the evidence is not reduced simply because it is circumstantial." *State v. Anaya*, 165 Ariz. 535, 543 (App. 1990).

¶26 "The sufficiency of the evidence must be tested against the statutorily required elements of the offense." *State v. Pena*, 209 Ariz. 503, ¶ 8 (App. 2005). "A person commits first degree premeditated murder if, '[i]ntending or knowing that the person's conduct will cause death, the person causes the death of another person . . . with premeditation.'" *State v. Payne*, 233 Ariz. 484, ¶ 94 (2013) (alteration in original) (quoting A.R.S. § 13-1105(A)(1)). "'Premeditation' means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection." *State v. Thompson*, 204 Ariz. 471, ¶ 12 (2003) (quoting A.R.S. § 13-1101(1)). Premeditation requires "actual reflection and more than mere passage of time," *State v. Boyston*, 231 Ariz. 539, ¶ 60 (2013), but it may be proven by circumstantial evidence alone, *see, e.g.*, *State v. Nelson*, 229 Ariz. 180, ¶¶ 16-19 (2012); *see also Thompson*, 204 Ariz. 471, ¶ 31 ("[T]he state may use all the circumstantial evidence at its disposal in a case to prove premeditation.").

¶27 Here, sufficient evidence supported the premeditation element for first-degree murder because there is ample circumstantial evidence showing that Adams reflected on his decision to shoot C.S. Adams admitted to police he was arguing with C.S. on the day of the shooting, two witnesses testified they saw Adams retrieve a gun from the trunk of a car after he began arguing with C.S., and one witness testified that Adams said "fuck this" as he went to retrieve the gun. *See Thompson*, 204 Ariz. 471, ¶ 31 (acquisition of weapon by defendant before a killing is circumstantial evidence that can show defendant reflected); *Nelson*, 229 Ariz. 180, ¶ 16 (same). J.R. also testified that shortly before C.S. was shot, Adams said the gun was not working properly at one point, that Adams was struggling to fix the gun, and that Adams returned to confront C.S. after he had already begun leaving the scene in a car. *See Commonwealth*

v. Fernandez, 104 N.E.3d 651, 660-61 (Mass. 2018) (finding sufficient evidence of premeditation and reflection where defendant said "[f]uck that shit" and returned to shoot victim after beginning to ride away on his bicycle). A rational trier of fact could have found beyond a reasonable doubt that Adams reflected on his decision to shoot C.S., thereby committing premeditated first-degree murder.

Premeditation Jury Instruction

¶28 Lastly, Adams contends for the first time on appeal that the trial court's jury instruction defining premeditation, together with certain of the prosecutor's closing remarks, violated his right to a fair trial because it improperly signaled to the jury that premeditation could involve a "very short" time period of reflection. Specifically, Adams takes issue with the last sentence of the premeditation jury instruction given in this case and argues it should not have been given according to *Thompson*.

¶29 The court instructed the jury:

> Premeditation means the defendant intended to kill another human being, or knew he would kill another human being. And after forming that intent or knowledge, reflected on the decision before the killing. It is in this reflection, regardless of the length of time in which it occurs, that distinguishes first-degree murder from second-degree murder.
>
> An act is not done with premeditation, if it is an instant [e]ffect of a sudden quarrel or heat of passion. The time needed for reflection is not necessarily prolonged, and the space of time between [the] intent [or] knowledge to kill, and the act of killing[] may be very short.

¶30 During closing argument the prosecutor stated:

> And the last part that makes it first-degree murder, is that the defendant acted with premeditation. Now premeditation is defined for you, but essentially it means that [Adams] intended to kill [C.S.], and he reflected on it. There is some period of reflection before he killed him.

> Ladies and gentlemen, what you heard from all of the evidence in the case, is that the initial altercation was separated by [Adams' girlfriend], and [Adams] pulling the car out and starting to drive away. That moment when [Adams] got out of the car, and he walked back towards [C.S.], separates this case between first-degree murder premeditated, and the lesser offense of second-degree murder or manslaughter.
>
> This is why: When [Adams] made that decision to stop the car, to exit the car, and to walk back down towards [C.S.] with the gun in his hand, when he pulled the trigger, that was a decision he made and it was an intentional decision, and it was one with premeditation.
>
> Now remember, this isn't just them fumbling over a gun. This isn't them just, a gun happened to fall into his lap. The defendant, according to several witnesses, went to the car to pull out that gun to point it at [C.S.]. This was nothing less than premeditated murder.

¶31 Furthermore, after the defense made its closing argument, the prosecutor added the following to its premeditation argument:

> One thing that I want to remind you is that the state has charged Mr. Adams with premeditated murder. And the entire instruction is there on page 15, read the entire instruction. One thing I want to say about the reflection, is there is no time period on reflection.
>
> If I pull out a gun and I point it at another human being, there is no other intent but to kill that human being. You pull a trigger and send a bullet in path through that victim, you intend the consequences.
>
> As far as reflection goes, reflection can be fleeting, it can be in a moments time, but the reflection that is needed is sufficient for you to

> make a determination of what you are going to do, how you are going to do it, and that is what [Adams] did on that morning when he lowered the gun, and pointed it at the victim, chambered another round, and pulled the trigger.

¶32 We review de novo whether a jury instruction accurately reflects the law, *State v. Lehr*, 227 Ariz. 140, ¶ 51 (2011), and when "evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel," *State v. Lizardi*, 234 Ariz. 501, ¶ 5 (2014) (quoting *State v. Johnson*, 205 Ariz. 413, ¶ 11 (App. 2003)). Once again, because Adams did not object, we review for fundamental error only.[6] *See Henderson*, 210 Ariz. 561, ¶ 19; *Escalante*, 245 Ariz. 135, ¶ 21; *Nelson*, 229 Ariz. 180, ¶ 21 (reviewing for fundamental error only when defendant failed to object to a premeditation instruction and the prosecutor's arguments regarding premeditation).

¶33 Here, Adams fails to show there was error, much less fundamental error. The premeditation instruction given in this case was nearly identical to the one given in *Thompson* and as Adams concedes, courts may give the last sentence of that premeditation jury instruction "when the facts of a case require it." 204 Ariz. 471, ¶ 32. Adams suggests the facts in this case did not require the instruction because there were no direct eyewitnesses to the shooting. However, *Thompson* did not give a specific indication about when the last sentence would be inappropriate, it just clarified that premeditation may be proven by circumstantial evidence and the focus should be on actual reflection rather than the mere passage of time. *See id.* ¶¶ 29–33 ("The state may argue that the passage of time *suggests* premeditation, but it may not argue that the passage of time is premeditation."). In *Lizardi*, this court clarified that the final sentence of the instruction is required in situations where the jury could conclude that a defendant considered murder for a brief moment. 234 Ariz. 501, ¶ 6 ("Even if the jury concluded [the defendant] had considered murder for only a brief

[6] Although Adams arguably waived his claim because he did not argue on appeal that the error was fundamental, *see State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to allege fundamental error waives argument), we exercise our discretion and address the merits of his claim. *See State v. Aleman*, 210 Ariz. 232, ¶ 24 (App. 2005) (appellate court has discretion to address waived arguments).

moment, it would require the last sentence of the instruction to determine how to apply the law.").

¶34 Given the facts of this case, the final sentence of the trial court's jury instruction was appropriate. And contrary to Adams' suggestion, the state did not impermissibly argue that a certain passage of time was enough to show premeditation. In fact, the state informed the jury that the proper inquiry was on reflection, not a specific time period. The state then argued that there was circumstantial evidence in this case that supported a finding of premeditation. Because the jury instruction on premeditation and the state's closing argument complied with *Thompson*, there is no error here.

Disposition

¶35 We affirm Adams' conviction and sentence.