IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LEDOR BELE NDOLO,
Appellant.

No. 2 CA-CR 2019-0185
Filed January 15, 2021

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201802534
The Honorable Christopher J. O'Neil, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Ledor Ndolo was convicted of two counts of aggravated assault and two counts of disorderly conduct. The trial court sentenced him to concurrent prison terms, the longest of which is 7.5 years. On appeal, Ndolo argues the court erred by failing to sua sponte order a competency examination, failing to "ensure" the jury panel and venire included African Americans, and admitting irrelevant and unfairly prejudicial evidence. He contends the court also committed reversible error by allowing inaccurate statements from witnesses about Ndolo's legal right to possess his car, permitting the state to comment on his decision to remain silent, not modifying the verdict forms to include a specific finding for his justification defense, and not making a record of bench conferences. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences in the light most favorable to affirming Ndolo's convictions. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). In late 2017, Ndolo planned to move from Texas to Arizona and contracted with A.O.'s company for the delivery of his car to San Tan Valley in the beginning of March 2018. When A.O. and his employee, B.F., arrived at Ndolo's new residence with the car, Ndolo met them outside. A.O. told Ndolo that during the trip his car had leaked on another car and had damaged it. Ndolo told him, "I don't give a fuck. You got insurance." A.O. prepared to unload the car, which had to be jump-started. Meanwhile, Ndolo noticed a minor scratch on the driver's door and said, "How about you go fuck yourself, and I'm going to take my car for what you all done to my car."

¶3 A.O. explained to Ndolo that he should make a claim for damage through the company's insurance and that he could not just take the car without paying. A.O. then told B.F. to get the keys from inside the car. Ndolo "grabbed [B.F.] by the throat and had him up against the car." When B.F. pushed him off, Ndolo cut his elbow on the car. A.O. retrieved

the key, while the other two "tussl[ed]." Ndolo pulled out another key, got into the car, and drove it into his driveway.

¶4 B.F. called 9-1-1 to report that Ndolo was refusing to pay for the delivery, that the situation was getting "out of hand," and that Ndolo had "put his hand on [them]." A.O. attempted to get into the car to load it onto the trailer, but Ndolo stopped him, saying "back up," "step away," and that it was "time to go." A.O. responded, "I ain't gonna fucking play these touching games."

¶5 Ndolo then went to his SUV and pulled out a .22-caliber rifle. A.O. asked if Ndolo was "threatening" him, and Ndolo replied, "Yea get away." Ndolo tried to move A.O. away from the car, grabbed A.O.'s phone, and threw it. Ndolo then called 9-1-1 to report that A.O. and B.F. were on his property and were refusing to leave. While on the phone with 9-1-1, he fired four "warning shots" into the air and pointed the gun at B.F. and A.O. The dispatcher who answered B.F.'s 9-1-1 call told him to get off the property, and he and A.O. retreated onto the road. Police arrived and Ndolo laid the gun on the driveway, where they recovered it.

¶6 A grand jury indicted Ndolo, and a jury found him guilty on each count. The trial court sentenced him as described above. Ndolo timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Sua Sponte Competency Examination

¶7 Ndolo claims the trial court committed reversible error by failing to sua sponte halt the trial and order a competency examination. We review the court's decision whether to order such an examination for an abuse of discretion. *See State v. Kemp*, 185 Ariz. 52, 67 (1996).

¶8 At sentencing, defense counsel informed the trial court that Ndolo's family had raised "concerns about [Ndolo]'s mental health, not to a degree where [it] would have been a defense," but should be considered as a mitigating factor at sentencing. The court responded that it was "baffl[ed]" by Ndolo's decisions during the altercation with A.O. and B.F. and noted concerns about "his ability to make judgments" based on "aspects of [Ndolo's] behavior [and] the way in which he testified at trial, [which] seem[ed] . . . quite abnormal." But it concluded Ndolo was competent.

¶9 Although Ndolo contends the trial court's statements at sentencing show that it had concerns about his competency, the record does

not support his argument that he was incompetent to stand trial. Contrary to his earlier comments, Ndolo's counsel assured the trial court he "believe[d] that [Ndolo was] competent in assisting [his defense], in understanding what the process was, what [they] were to do at trial, and how [Ndolo] was going to assist." The court likewise was able to observe and interact with Ndolo during the four-day trial. Although the court expressed concerns about "aspects of Mr. Ndolo's behavior . . ., [which] seem[ed] . . . quite abnormal," it agreed that Ndolo was competent. The court noted that he was "perfectly capable of thoughtfully engaging with issues," "perfectly communicative, [and] perfectly understanding when he's communicated with." Indeed, "[c]ompetent choices are not to be equated with wise choices; competent defendants are allowed to make choices that may not objectively serve their best interests." *State v. Kayer*, 194 Ariz. 423, ¶ 38 (1999). The record supports the court's conclusion, and we find no abuse of discretion.

Panel and Venire

¶10 Ndolo argues that the trial court "abused its discretion by failing to ensure members of the venire and the resulting empaneled jury had minority and/or African American individuals." Because Ndolo did not raise this issue at trial, he has forfeited review for all but fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶¶ 12, 21 (2018); *State v. Stokley*, 182 Ariz. 505, 514 (1995) (reviewing argument that death-qualified jury was not drawn from fair cross-section of community under fundamental error).[1] Further, on appeal, Ndolo does not argue the alleged error was fundamental. It is therefore waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008).

¶11 Moreover, even assuming the argument were not waived, Ndolo has not met his burden of establishing error. *See Escalante*, 245 Ariz. 135, ¶ 21. "Although a 'defendant in a criminal case is entitled to a fair and impartial jury for the trial of his case, . . . he is not entitled to be tried by any particular jury.'" *State v. Morris*, 215 Ariz. 324, ¶ 40 (2007) (alteration in *Morris*) (quoting *State v. Atwood*, 171 Ariz. 576, 624 (1992)). Because Ndolo

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[1]Ndolo asserts this error is structural and is therefore "not subject to fundamental error analysis or harmless error analysis." We disagree. Our supreme court has stated that improperly excusing prospective jurors, potentially preventing a fair cross-section of the community, would only be reversible if the defendant "could also show actual prejudice." *State v. Morris*, 215 Ariz. 324, ¶¶ 41, 43 (2007).

asserts that the jury venire was not a fair cross-section of the community, not that the state improperly struck minority jurors, he must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Ndolo fails to argue that the representation of African Americans was not fair and reasonable in relation to the population in the community and that the underrepresentation was caused by systematic exclusion.[2] Accordingly, we find no error, fundamental or otherwise.

Admissibility of AK-47 Evidence

¶12 Ndolo maintains the trial court erred by admitting irrelevant and unfairly prejudicial evidence of an unrelated weapon and ammunition. "We review a trial court's ruling on the admissibility of evidence for an abuse of discretion." *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 7 (App. 2013); *see also State v. Payne*, 233 Ariz. 484, ¶ 56 (2013).

¶13 When the police arrived, they conducted a protective sweep of Ndolo's house. Inside, they found ammunition and a loaded AK-47 assault rifle. They seized these items, and the state sought to admit them at trial.

¶14 Before the start of trial on the first day, Ndolo moved to preclude evidence of the AK-47 and ammunition recovered from inside the house. He asserted that the AK-47 "wasn't the weapon that was used"; it "was found inside the home" and had "nothing to do with the incident

[2]Ndolo asserts in his reply brief that "[t]here is clearly a question of a systemic lack of minority jurors being called for jury duty and being empaneled as jurors in Pinal County." We do not address arguments raised for the first time in a reply brief. *See State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013) ("Arguments raised for the first time in a reply brief, however, are waived . . . .").

itself." He thus maintained the evidence "has no relevancy or value to the case other than to prejudice [him]." The state argued the evidence was relevant to show Ndolo's "recklessness in handling firearms." The trial court permitted the state to introduce the evidence.

¶15 During cross-examination, Ndolo elicited testimony from the case agent that the AK-47 was neither involved in nor "near the incident." And in his closing argument, Ndolo told the jury that the AK-47 "ha[d] absolutely nothing to do with this case and [his] defense and the charges." He elaborated that: "At the end of the day, that AK-47, no one said it was used. No one said [he] said he was going to use it. No one testified that he went inside the home to get it or attempt to get it." He reiterated that the AK-47 was "not in the vicinity" and that "[n]o one's claiming it was used, threatened to be used, so that is not a material fact that you should consider with regards to the facts and determining whether or not [he] was justified in what he did." In its rebuttal closing argument, the state referred only to the AK-47 in arguing that Ndolo was "reckless in his ownership [and] use of firearms."

¶16 To be admissible, evidence must be relevant. Ariz. R. Evid. 402. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401; *see State ex rel. Thomas v. Duncan*, 216 Ariz. 260, ¶ 13 (App. 2007); *cf. Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496 (1987) ("[E]vidence is relevant only if it relates to a consequential fact . . . ."). However, even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403; *see State v. Hardy*, 230 Ariz. 281, ¶ 40 (2012).

¶17 Trial courts have "considerable discretion in determining relevance and admissibility of evidence." *See State v. Kiper*, 181 Ariz. 62, 65 (App. 1994). In this case, the state's contention that the AK-47 and ammunition showed Ndolo was not acting in self-defense, but instead "was arming himself for a confrontation," is not supported by the evidence. There was no evidence that Ndolo attempted to retrieve the AK-47 or ammunition from inside his home or otherwise threatened to use them during the confrontation. The evidence was wholly irrelevant. *See* Ariz. R. Evid. 401; *State v. Poland*, 132 Ariz. 269, 281 (1982) (admission of weapon "not connected with the crime" abuse of discretion when irrelevant and potentially prejudicial). Any minimal probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of

the issues, and misleading the jury. *See* Ariz. R. Evid. 403. The trial court abused its discretion in admitting this improper evidence.[3]

¶18 We must next consider whether the error requires reversal. When a defendant objects to error below, we review for harmless error. *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). Under this standard, the state bears the burden of establishing "beyond a reasonable doubt that the error did not contribute to or affect the verdict." *Id.* Put another way, "the question 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *State v. Leteve*, 237 Ariz. 516, ¶ 25 (2015) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). We evaluate the improper evidence at issue, but nonetheless consider it based on the record as a whole. *See State v. Bible*, 175 Ariz. 549, 588 (1993); *see also State v. Romero*, 240 Ariz. 503, ¶ 8 (App. 2016) (listing factors to consider as part of harmless-error analysis).

¶19 Here, Ndolo admitted to removing the .22 rifle from inside his SUV and shooting four "warning shots" into the air. The jury also listened to the recordings of the 9-1-1 calls and heard B.F. saying that Ndolo was "pointing the gun at [A.O.]" and A.O. telling Ndolo to "get [his] fucking hands off of [A.O.]" There was substantial evidence that Ndolo had committed the offenses charged by using a deadly weapon to "[i]ntentionally plac[e A.O. and B.F.] in reasonable apprehension of imminent physical injury," *see* A.R.S. §§ 13-1203(A)(2) (assault), 13-1204(A)(2) (aggravated assault), and by "[r]ecklessly handl[ing], display[ing], or discharg[ing] a deadly weapon," with the "intent to disturb the peace or quiet of [A.O. and B.F.], or with knowledge of doing so," *see* A.R.S. § 13-2904(A)(6) (disorderly conduct).

¶20 Remaining is whether Ndolo had been justified because he was acting in self-defense. B.F. and A.O. testified about Ndolo having been the initial aggressor and how the altercation had begun. There were also issues with Ndolo's credibility. He alleged for the first time at trial that A.O. had stabbed him and had threatened him with a gun. But these accusations were inconsistent with his previous statements and with the case agent's observations that there was no blood on A.O.'s knife. And B.F. and A.O.'s testimony that Ndolo had been the initial aggressor was mostly

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[3]Ndolo also argues that the evidence should have been precluded pursuant to Rule 404, Ariz. R. Evid. Because we find error under Rules 401 and 403, we do not consider this argument.

consistent with one another, their past statements, and video and audio recordings. We are satisfied that the evidence of the unrelated weapon and ammunition did not affect the jury's verdict and that the error was thus harmless. *See Henderson*, 210 Ariz. 561, ¶ 18.

Lay Witness Testimony on the Law

¶21 Ndolo asserts the trial court erred by not sua sponte correcting the state when it elicited testimony and argued inaccurately that A.O. was entitled to legally possess Ndolo's car for nonpayment. Because Ndolo raises this argument for the first time on appeal, we review it for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶¶ 12, 21.

¶22 A.O. testified that he "had the right to possess [Ndolo's car]" because Ndolo had not paid for the delivery. It was his business practice to only give the owner the key after he had received payment, and if the owner did not pay, he would reload the vehicle and leave. Later, the case agent, in response to a question by Ndolo, testified that A.O. and B.F. "had a lawful right to be [on Ndolo's property] because of the vehicle" and that they "had a contract on the vehicle to possess" it. During closing, the state argued Ndolo had acted unlawfully by taking the car and in doing so he had been "stealing services" from A.O. and B.F.

¶23 First, we address the state's argument on appeal that Ndolo waived this error by inviting it. "The invited error doctrine prevents a party from injecting error into the record and then profiting from it on appeal." *State v. Rushing*, 243 Ariz. 212, ¶ 14 (2017). An error is invited if, either strategically or carelessly, the party creates, argues in favor of, or opens the door to it. *See State v. Robertson*, 249 Ariz. 256, ¶ 16 (2020); *Escalante*, 245 Ariz. 135, ¶ 38; *State v. Leyvas*, 221 Ariz. 181, ¶ 25 (App. 2009). It requires the party do more than "merely acquiesce[] in it." *Robertson*, 249 Ariz. 256, ¶ 16.

¶24 As Ndolo points out, the state was first to introduce evidence that A.O. could legally possess the car because of Ndolo's failure to pay. While Ndolo did ask follow-up questions of the case agent, this falls short of creating, arguing in favor of, or opening the door to the evidence after it has already been admitted. *See id.*; *Escalante*, 245 Ariz. 135, ¶ 38; *Leyvas*, 221 Ariz. 181, ¶ 25. Thus, any error was not invited, and we review for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 38. Under this standard, the defendant must show error and, if it exists, that the error is fundamental. *See 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." *State v. Sallard*, 247 Ariz. 464, ¶ 16 (App. 2019) (emphasis omitted) (quoting *Escalante*, 245 Ariz. 135, ¶ 21). Additionally, the defendant must make a showing of prejudice if alleging error under factors one and two. *Id.*

¶25 Assuming without deciding Ndolo is correct that A.O. and B.F. had no right to possess the car once they had delivered it,[4] he provides no authority, nor are we aware of any, that the trial court had a duty to sua sponte correct the testimony of lay witnesses expressing legal conclusions. He cites *Durnin v. Karber Air Conditioning Co.*, 161 Ariz. 416, 419 (App. 1989), for the proposition that courts have a duty "to make sure that evidence about the law is presented accurately." But that case stands for the proposition that courts are "required to refuse instructions which do not correctly state the law." *Id.* Therefore, *Durnin* is inapposite because jury instructions—unlike statements from witnesses—carry the inherent authority and weight of the court and must be correct pronouncements of the law. Additionally, the court instructed the jury it was to "apply the law [the court] give[s it] to the facts as [it] determine[s] them." Accordingly, we do not find error. Nonetheless, even assuming error, Ndolo has not sustained his burden of demonstrating the error was fundamental and prejudicial. *See Escalante*, 245 Ariz. 135, ¶ 21.

Comment on Right to Remain Silent

¶26 Ndolo contends the state, through its case agent, commented on his decision to invoke his right to remain silent. Because he raises this argument for the first time on appeal, we generally would review it for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶¶ 12, 21, 38. But when a party affirmatively invites error into the trial court proceedings and later challenges that error on appeal, the party is precluded from any review of the issue, "even under the exacting standard of fundamental error." *State v. Lucero*, 223 Ariz. 129, ¶ 17 (App. 2009).

¶27 As discussed above, "[t]he invited error doctrine prevents a party from injecting error into the record and then profiting from it on appeal." *Rushing*, 243 Ariz. 212, ¶ 14. We look to "the source of the error, which must be the party urging the error." *State v. Logan*, 200 Ariz. 564, ¶ 11 (2001). An error is invited if, either strategically or carelessly, the party creates, argues in favor of, or opens the door to it. *See Robertson*, 249 Ariz.

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[4]On appeal, the state does not assert that A.O. or B.F. had a right to possess the car after delivery.

256, ¶ 16; *Escalante*, 245 Ariz. 135, ¶ 38; *Leyvas*, 221 Ariz. 181, ¶ 25. Invited error requires the party do more than "merely acquiesce[]" to it. *Robertson*, 249 Ariz. 256, ¶ 16. If the party invited the error by opening the door to it, the evidence or answer must be "pertinent" and "responsive to the invitation." *Leyvas*, 221 Ariz. 181, ¶ 25 (quoting *State v. Wilson*, 185 Ariz. 254, 259 (App. 1995)).

¶28 Here, after a jury question, Ndolo's counsel asked the case agent two follow-up questions. First, he asked, "In your interview with my client, he told you he wasn't aware of what [A.O.'s and B.F.'s] intentions were, correct? He stated that." After she answered in the affirmative, Ndolo asked, "Did you follow up and ask him what he meant by that?" The case agent responded, "He said he didn't want to speak to me." The question originated with Ndolo, and the answer was pertinent and responsive to that question. *See Leyvas*, 221 Ariz. 181, ¶ 25. Thus, the error was invited and this issue has been waived. *See Lucero*, 223 Ariz. 129, ¶ 17.

Verdict Form

¶29 Ndolo maintains the trial court erred by not including "justified in self-defense" on the verdict forms. We review a court's decision regarding verdict forms for an abuse of discretion. *See State v. O'Laughlin*, 239 Ariz. 398, ¶ 4 (App. 2016).

¶30 Before voir dire, Ndolo requested that the trial court modify the "not guilty" portion of the verdict forms to include "justified self-defense." The court denied the request, stating it did not want to limit the jury "to only one way of finding [Ndolo] not guilty, as the State has the burden in every respect to prove the case." In its final instructions, the court informed the jury, "The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge." And during his closing arguments, Ndolo told the jury he had feared for his life and "he was justified in what he did." He concluded by asking the jury to find him "not guilty." For each count, the jury received a verdict form which included "Guilty" and "Not Guilty" as the only choices.

¶31 Ndolo argues that the trial court erred by failing to add "justified in self-defense" to "not guilty" on the verdict forms. He also asserts that failing to modify the verdict forms shifted the burden to the defense and prevented the parties from ensuring that the jury made all the requisite findings on his justification defense. We disagree.

¶32 Trial courts must provide juries with verdict forms that "show every choice of verdict that the jury could return." *State v. Knorr*, 186 Ariz. 300, 303 (App. 1996); *see also State v. Sanchez*, 135 Ariz. 123, 124 (1983). Further, we will only reverse for a verdict form error if the error prejudices the defendant's rights. *Sanchez*, 135 Ariz. at 124.

¶33 Here, the sole defense was that Ndolo was acting in self-defense and was therefore justified in using force. It was abundantly clear that the jury should find him not guilty if the state failed to prove beyond a reasonable doubt that he had not been justified. Further, the trial court was not required to provide a verdict form listing each element that the state is required to prove beyond a reasonable doubt. *See State v. Jackson*, 186 Ariz. 20, 28 (1996) (interrogatories not required). The verdict forms provided the jury with all possible verdict choices and did not shift the burden to the defense. *See Knorr*, 186 Ariz. at 303; *see also Sanchez*, 135 Ariz. at 124. Thus, we find no abuse of discretion.

Failing to Record Bench Conferences

¶34 Ndolo contends that the trial court erred by failing to record bench conferences. He maintains he was prejudiced because there was no record of his objection to the admissibility of the ammunition.[5] Because he raises this argument for the first time on appeal, we review it for fundamental, prejudicial error. *See State v. Dann*, 220 Ariz. 351, ¶ 102 (2009); *see also Escalante*, 245 Ariz. 135, ¶¶ 12, 21.[6]

¶35 Control of the courtroom and trial proceedings lies within the discretion of the trial court. *See Bible*, 175 Ariz. at 595; *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶ 31 (App. 2007). However, both our supreme court and this court have "disapproved of the practice of holding

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[5]In his opening brief, Ndolo argued that his objection to the AK-47 was also not in the record. However, Ndolo withdrew this argument after discovering "a problem with the review of the transcript on the computer," which had caused him to miss six pages.

[6]This is a rare issue where an objection may not be in the record because of the very error alleged—failure to record bench conferences. But Ndolo does not allege that he objected to the unrecorded bench conferences. *See* Ariz. R. Civ. App. P. 13(a)(7)(B) (requiring appellant to include "where the particular issue was raised and ruled on"). Further, we would reach the same conclusion under either harmless error or fundamental error analysis. *See Henderson*, 210 Ariz. 561, ¶ 18; *Escalante*, 245 Ariz. 135, ¶ 21.

unrecorded bench conferences." *State v. Hargrave*, 225 Ariz. 1, ¶ 61 (2010); *see also State v. Bay*, 150 Ariz. 112, 115 (1986) ("This practice, if customary, should be immediately discontinued."); *State v. Paxton*, 186 Ariz. 580, 589 (App. 1996). Although unrecorded bench conferences "may be expedient and avoid some delay, it more often leads to confusion and inefficiency, frequently defeating the goal of preserving for appellate review an accurate record of what actually transpired in the trial proceedings." *State v. Babineaux*, 22 Ariz. App. 322, 324 (1974). But our supreme court "ha[s] never required 'the verbatim reporting of all bench conferences.'" *Hargrave*, 225 Ariz. 1, ¶ 61 (quoting *State v. Berndt*, 138 Ariz. 41, 46 (1983)). What is required is a record that is "sufficiently complete to allow 'adequate consideration of the errors assigned.'" *Id.* (quoting *State v. Moore*, 108 Ariz. 532, 534 (1972)).

¶36 Contemporaneously recording the bench conferences would have been the better practice in this case. *See Hargrave*, 225 Ariz. 1, ¶ 61; *see also Bay*, 150 Ariz. at 115; *Paxton*, 186 Ariz. at 589. Nonetheless, the record is sufficiently complete for us to consider the issues raised on appeal. *See Hargrave*, 225 Ariz. 1, ¶ 61. Moreover, the parties were subsequently permitted to make a record of the bench conferences. Accordingly, we find no error, fundamental or otherwise, in the court's failure to record bench conferences. *See Dann*, 220 Ariz. 351, ¶ 102; *Escalante*, 245 Ariz. 135, ¶¶ 12, 21.

Disposition

¶37 For the foregoing reasons, we affirm Ndolo's convictions.

S T A R I N G, Vice Chief Judge, specially concurring:

¶38 I concur with the above analysis, including that the strength of the evidence against Ndolo rendered harmless the erroneous admission of evidence concerning the AK-47. *See Leteve*, 237 Ariz. 516, ¶ 25 (guilty verdict must be surely unattributable to error). I write separately, however, to address the overreach I see reflected in the state's decision to introduce the evidence in the first place, and in the manner in which the state now attempts to use it.

¶39 Nothing in the record even suggests it was unlawful for Ndolo to possess the AK-47. And, as the majority makes clear, the AK-47 was neither present during the incident nor played any role in it. The AK-47 was inside Ndolo's home, and there is no evidence anyone other than Ndolo had been in his home, or that he attempted to enter his home

during the incident. Deputies only located the AK-47 when they entered his home after detaining him outside, where the entire incident occurred.

¶40 Notably, although the state argued before trial that the AK-47 was relevant to whether Ndolo was reckless with firearms, on appeal it argues: "The evidence of the loaded AK-47 rebutted Ndolo's claim of self-defense and instead showed that he was arming himself for a confrontation." This incendiary allegation is unsupported by the record, and, if anything, serves only to bolster the conclusion that evidence of the AK-47 was "wholly irrelevant" or clearly proscribed by Rule 403. Evidence of the AK-47 should never have been introduced.