IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RAQUEL MARCELLA BARRERAS,
Appellant.

No. 2 CA-CR 2019-0204
Filed July 1, 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NOT FOR PUBLICATION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 Pima County
No. CR20142983002
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Raquel Barreras was convicted of and sentenced for first-degree murder, abandonment or concealment of a dead body, and four counts of child abuse. On appeal, Barreras only challenges her convictions and sentences for first-degree murder and one count of child abuse, arguing the trial court erred in admitting certain evidence and improperly aggravated her sentence. She also contends her sentences violate her right to be free from double jeopardy. For the following reasons, we affirm Barreras's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions and resolve reasonable inferences against Barreras. *See State v. Hunter*, 227 Ariz. 542, ¶ 2 (App. 2011). In March of 2014, M.W. and R.M. were cleaning a rental property owned by M.W. M.W. discovered a toy box under a pile of trash on the back patio. R.M. removed blankets from the toy box and discovered the skeletal remains of a child, R.B. Barreras and her husband were the parents of R.B. and the Barreras family had been the last tenants of the property, living there from April 2013 until January 2014.

¶3 Barreras was subsequently charged with one count of child abuse as to R.B. (count one), first-degree murder (count two), abandonment or concealment of a dead body (count three), and three counts of child abuse as to her three other minor children (counts four through six).[1] On the first day of trial, Barreras pleaded guilty to counts three through six. A jury subsequently convicted her of counts one and two. The trial court sentenced her to imprisonment for a term of natural life for count two

[1] Barreras's husband was charged with the same crimes and convicted on all counts except abandonment or concealment of a dead body.

followed by twenty-four years' imprisonment for count one.[2] This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Evidentiary Rulings

¶4 On appeal, Barreras contends testimony that she isolated R.B. in a "covered playpen in the spare concrete laundry room"; that she "beat[] [him] with a broomstick"; and that his brother saw his remains was inadmissible because it was irrelevant and substantially outweighed by a danger of unfair prejudice.[3] In addition, she contends R.B.'s brother's testimony about seeing R.B.'s remains was cumulative. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion, but review its interpretation of the rules of evidence de novo. *State v. Johnson*, 247 Ariz. 166, ¶ 127 (2019).

¶5 At trial, Barreras moved to preclude the evidence described above on relevance and unfair prejudice grounds.[4] Specifically regarding disparate treatment evidence, Barreras argued testimony that she was "mean" to R.B., "kept him in a playpen for long hours," or that she "didn't

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[2] The court ordered Barreras to serve counts three through six concurrently with count two, the longest of the sentences.

[3] Barreras also contends this evidence "confused the issues," but does not explain how beyond her assertions regarding relevance and undue prejudice. Because this argument is not developed on appeal, it is waived. *See State v. Sanchez*, 200 Ariz. 163, ¶ 8 (App. 2001) (failure to develop argument results in waiver); *see also* Ariz. R. Crim. P. 31.10(a)(7) (appellate brief must provide supporting reasons for contentions, legal authority, and references to the record).

[4] In June 2020, we received notice that the superior court was unable to locate the written motion in limine on these issues. Barreras located a copy, moved for us to order a supplement to the record, and the motion was filed in superior court (after trial was complete). We granted the motion to supplement, but the state notes in its brief that the motion in limine "is not part of the record on appeal." To the extent this is a challenge to our granting the motion to expand the record and considering the written motion, we need not address it. The hearing transcript clearly shows the objections on relevance and undue prejudice; the parties' arguments; and the trial court's consideration of the arguments, motion, and its resulting conclusions. Thus, the written motion is extraneous.

let anyone come in and out of the laundry room" was irrelevant and highly prejudicial because the state's theory was that she withheld food. Thus, she argued, it was solely being used to show that she was a bad mother. As to evidence that she spanked R.B. with a broom, in addition to objecting on relevance and unfair prejudice grounds, Barreras argued the testimony's reliability could not be assessed because R.B.'s sister was the only child who witnessed it and she was five-years old when it happened. And regarding the discovery of R.B.'s remains, Barreras argued any testimony was irrelevant and prejudicial because she had pleaded guilty to concealment of R.B.'s body. She contended "[t]he issues before the jury have to do with the abuse of [R.B.] . . . issues that occurred prior to his death. What happened to him after he died, really the only issue is that [his body] was concealed."

¶6 The trial court concluded all of the evidence discussed above was admissible, with some limitations, because (1) it did not believe the state's case was "as laser-focused" on malnutrition as Barreras described; (2) the evidence was relevant "in and of itself"; and (3) the evidence was admissible under Rule 404(b), Ariz. R. Evid., proper purposes being to show intent and consciousness of guilt.[5] In its rulings, the court precluded other testimony related to Barreras striking R.B., R.B. sustaining a bruise, and the appearance of R.B.'s remains in the toy box.

Rules 401 and 402

¶7 We first consider Barreras's contention that the evidence was irrelevant. Evidence is relevant if it (1) "has any tendency to make a fact more or less probable than it would be without the evidence" and (2) "the fact is of consequence in determining the action." Ariz. R. Evid. 401. Unless otherwise provided, relevant evidence is generally admissible at trial. Ariz. R. Evid. 402. The trial court is in the best position to determine the relevancy of evidence, *State v. Togar*, 248 Ariz. 567, ¶ 21 (App. 2020), and "[the] standard of relevance is not particularly high," *State v. Oliver*, 158 Ariz. 22, 28 (1988). For evidence to be relevant, it does not have to be

[5] On appeal, Barreras does not contest the admissibility of the evidence under Rule 404(b), she solely provides the standard of review of other-act evidence and states, "the trial court shoehorned its analysis into . . . Rule 404(b), even though the State had not submitted that evidence in compliance with the [Rule]." Assuming this is an argument that the state failed to properly provide her with notice of other-acts evidence, *see* Rule 404(b)(3), she has not developed this argument on appeal and thus it is waived. *See Sanchez*, 200 Ariz. 163, ¶ 8; *see also* Ariz. R. Crim. P. 31.10(a)(7).

"sufficient to support a finding of ultimate fact; it is enough if the evidence, if admitted, would render the desired inference more probable." *Togar*, 248 Ariz. 567, ¶ 13 (quoting *State v. Paxson*, 203 Ariz. 38, ¶ 17 (App. 2002)).

¶8 The record supports the trial court's conclusion that the evidence at issue was relevant. *See* Ariz. R. Evid. 401. The state alleged Barreras had committed child abuse "intentionally or knowingly," meaning evidence that had any tendency to show that she knew or intended R.B. would be injured or endangered was of consequence—evidence of her disparate treatment of R.B. and of prior spanking with a broom was such evidence. *See State v. Villalobos*, 225 Ariz. 74, ¶ 19 (2010) (prior abuse relevant to show mental state in child abuse prosecution); *State v. Payne*, 233 Ariz. 484, ¶¶ 69-70 (2013) (mental state applies to "caus[ing] (or permit[ting]) injury"). This evidence could also be reasonably construed as motive evidence. *See State v. Leteve*, 237 Ariz. 516, ¶ 16 (2015) ("We have long recognized that evidence of prior ill will or difficulties between a defendant and a murder victim may be relevant to show motive . . . .").

¶9 Barreras reasserts on appeal that her guilty plea to concealment of R.B.'s body rendered R.B.'s brother's testimony about seeing R.B.'s remains irrelevant.[6] However, despite her plea, the evidence was still of consequence in determining whether she was responsible for first-degree murder and to show lack of mistake or accident. *See State v. Via*, 146 Ariz. 108, 122 (1985) (evidence showing identity and absence of mistake or accident relevant). At the hearing, there were representations that three people would testify to the discovery of the remains—M.W. and R.M., who were cleaning the property, and R.B.'s brother. Of those three witnesses, only R.B.'s brother could testify to seeing the remains in the toy box while the family was still living at the home, and thus it was of consequence to R.B.'s cause of death.[7] *See State v. Davolt*, 207 Ariz. 191, ¶ 61

[6]Barreras asserts in her brief's issue statement, "The trial court erred in denying [her] motions in limine to preclude evidence rendered irrelevant by her guilty pleas . . . ." However, in the body of her brief, she only discusses the guilty pleas rendering this testimony irrelevant. Therefore, to the extent her issue statement attempts to assert that her guilty pleas rendered the other at-issue evidence irrelevant, she has not developed this argument and it is waived. *See Sanchez*, 200 Ariz. 163, ¶ 8; *see also* Ariz. R. Crim. P. 31.10(a)(7).

[7]The trial court clearly ruled M.W.'s and R.M.'s testimony was admissible with limitations, but it does not appear that it made an explicit ruling on the admissibility of R.B.'s brother's testimony, apart from stating

(2004) ("The fact and cause of death are always relevant in a murder case."). Further, it was relevant because placement of R.B.'s body in a toy box could reasonably demonstrate consciousness of guilt. *See State v. Fillmore*, 187 Ariz. 174, 179 (App. 1996) (evidence that tends to show consciousness of guilt is relevant). Accordingly, the evidence at issue was relevant, and the trial court did not abuse its discretion in so finding.

Rule 403

¶10 We next consider Barreras's argument that "[t]he testimony of the two minor siblings of R.B. was very powerful, and those facts were horrific, yet not relevant to the State's theory of the case," and thus its probative value was substantially outweighed by a danger of unfair prejudice. The trial court may exclude relevant evidence if it determines its probative value is substantially outweighed by a danger of unfair prejudice. Ariz. R. Evid. 403. "Unfair prejudice means an undue tendency to suggest decision on an improper basis . . . such as emotion, sympathy or horror." *State v. Riley*, 248 Ariz. 154, ¶ 70 (2020) (quoting *State v. Schurz*, 176 Ariz. 46, 52 (1993)). The court has broad discretion in making a Rule 403 determination because it is "in the best position to balance" the evidence. *Togar*, 248 Ariz. 567, ¶ 23 (quoting *State v. Salamanca*, 233 Ariz. 292, ¶ 17 (App. 2013)). Barreras has not shown the court abused its discretion in admitting the evidence here.[8]

¶11 The trial court did not err in permitting testimony regarding R.B.'s disparate treatment under Rule 403, as this evidence was probative

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that he could not testify to the appearance of R.B.'s remains. This implicitly suggests the court denied the motion to preclude R.B.'s brother's testimony, and in any event, "[w]hen a court fails to expressly rule on a motion, we deem it denied." *State v. Mendoza-Tapia*, 229 Ariz. 224, ¶ 22 (App. 2012).

[8]Barreras cites two cases in which the trial court was determined to have erred in admitting evidence under Rule 403. However, those cases are distinguishable, and therefore unpersuasive, because the unfair prejudice was the result of graphic, inflammatory descriptions. *See State v. Fernane*, 185 Ariz. 222, 223, 225-28 (App. 1995) (evidence graphically detailed abuse of defendant's other child who had died from complications of the abuse over a decade prior and error compounded by failure to grant a severance); *Davolt*, 207 Ariz. 191, ¶ 63 (gruesome videos and photographs of victims' "charred bodies" substantially outweighed probative value when defendant did not contest identity of victims or that murders had occurred).

to the state's theory of intentional neglect and malnutrition, and it was within the court's discretion to determine that its value was not substantially outweighed by a danger of unfair prejudice. *See State v. Gibson*, 202 Ariz. 321, ¶ 17 (2002) (the "greater the probative value . . . the less probable that factors of prejudice . . . can substantially outweigh the value" (quoting 1 Joseph M. Livermore et al., *Arizona Practice: Law of Evidence* § 403, at 82-83, 84-86 (4th ed. 2000))). The court was also within its discretion to determine the probative value of R.B.'s siblings' testimony was not substantially outweighed by unfair prejudice, *see* Ariz. R. Evid. 403, especially considering its limitations on the testimony—R.B.'s brother was precluded from discussing details of the appearance of R.B.'s remains and the state was precluded from eliciting testimony regarding R.B. sustaining a bruise and questioning another witness about Barreras striking R.B. These limitations further reduced the prejudice to Barreras. *See State v. Kiper*, 181 Ariz. 62, 66 (App. 1994); *see also State v. Schurz*, 176 Ariz. 46, 52 (1993) ("not all harmful evidence is unfairly prejudicial"). Accordingly, the court acted within its discretion in admitting this evidence.

¶12 Barreras also argues that R.B.'s brother's testimony regarding R.B.'s remains was cumulative and, thus, should have been precluded. *See* Ariz. R. Evid. 403 (trial court may exclude relevant evidence if probative value substantially outweighed by danger of being needlessly cumulative). But the testimony was not cumulative for the reasons stated above. *See State v. Verive*, 128 Ariz. 570, 576 (App. 1981) (testimony not cumulative where the testimony at issue provided independent corroboration of a material issue). And, even assuming it were, its admission would be harmless. *See State v. Williams*, 133 Ariz. 220, 226 (1982) ("[Arizona Supreme Court has] held that erroneous admission of evidence which was entirely cumulative constituted harmless error.").

Sentencing

¶13 Barreras asserts the trial court violated her Sixth Amendment constitutional right by aggravating her sentences without a proper jury finding and violated her right against double jeopardy by imposing consecutive sentences for first-degree murder and child abuse. We review these issues de novo. *State v. Dunbar*, 249 Ariz. 37, ¶ 41 (App. 2020) (aggravating factors); *Lemke v. Rayes*, 213 Ariz. 232, ¶ 10 (App. 2006) (double jeopardy).

Aggravated Sentences

¶14 Barreras contends the trial court improperly aggravated her sentence for child abuse because the jury's finding that R.B. had been under the age of fifteen was used as a dangerous crime against children sentence enhancement and thus could not be used as an aggravating factor. Apart from a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *see* A.R.S. § 13-701(C). In Arizona, if no aggravators have been proven, the presumptive sentence is the statutory maximum. *Dunbar*, 249 Ariz. 37, ¶ 41.

¶15 Once the trier of fact properly finds an aggravating factor, the trial court can then find additional aggravating factors. § 13-701(F). The legislature has the power to authorize "that a given circumstance constituting an element of an offense . . . may also afford the basis for both enhancing and aggravating the sentence imposed," but "the authorization must be explicit and the specific factor expressly identified." *State v. Alvarez*, 205 Ariz. 110, ¶¶ 7-8 (App. 2003).[9]

¶16 Here, the jury explicitly found that R.B. was a child under the age of fifteen, which qualified Barreras's child-abuse offense for the statutory enhancement as a dangerous crime against children. *See* A.R.S. § 13-705(D). The trial court subsequently found the following aggravating circumstances: "the manner in which the crime was committed was especially cruel, heinous, and depraved" and the "victim suffered enormous physical and emotional harm." But status as a child under the age of fifteen is not a statutorily enumerated aggravator for a sentence of imprisonment, and the jury here found no statutorily enumerated aggravator. *See* § 13-701(D)(1)–(27); *but cf.* A.R.S. § 13-751(A), (F)(7) (murder of a child under the age of fifteen is an aggravating circumstance in consideration of whether to impose the death penalty); *see also Dunbar*, 249 Ariz. 37, ¶ 41 (court cannot solely rely on "catch-all" aggravator to increase maximum sentence). Therefore, the court could not use the jury's finding that R.B. was a child under the age of fifteen to find additional aggravating factors, *see* § 13-701(F); *Dunbar*, 249 Ariz. 37, ¶ 41, and it erred

[9]Thus, Barreras is incorrect in generally asserting that a jury finding used for a sentence enhancement cannot also be used as an aggravating factor.

in aggravating Barreras's sentence for child abuse on this ground, *see Alvarez*, 205 Ariz. 110, ¶ 8.[10]

¶17 However, we will affirm a trial court's conclusion if legally correct for any reason. *State v. Huez*, 240 Ariz. 406, ¶ 19 (App. 2016). Here, Barreras was properly subjected to an aggravated term for her child-abuse conviction because, while pleading guilty to other charges committed during the same time period as the child-abuse charge at issue, she admitted to being "convicted of a felony within the ten years immediately preceding the date of the offense[s]" and the court found this admission to be true. § 13-701(C), (D)(11). This prior conviction did not have to be submitted to the jury for the court to aggravate her sentence. *See* § 13-701(C) (maximum term under § 13-705 may be imposed if subsection 11 is "found to be true by the court"). Accordingly, the court's aggravated sentence of twenty-four years for child abuse was legally correct. *See* § 13-705(D).

¶18 Barreras also argues the trial court improperly aggravated her sentence for first-degree murder because she was sentenced to natural life. However, our supreme court has held that, under the Sixth Amendment, in a first-degree murder case, the only prerequisite to the imposition of a natural life sentence is a guilty verdict. *State v. Fell*, 210 Ariz. 554, ¶¶ 11, 19 (2005). Therefore, Barreras's first-degree murder sentence was not an aggravated sentence. *See id*.

Double Jeopardy

¶19 Barreras contends the trial court erred by imposing consecutive sentences for her convictions for first-degree felony murder and child abuse. She argues this error violated her right to be free from

[10]The state cites *State v. Stuck*, for the proposition that "the victim . . . under the age of 15 is well-recognized in Arizona law as a proper basis for imposing greater punishment," because there we concluded the court did not abuse its discretion in using the victim's age of sixteen as an aggravating factor. 154 Ariz. 16, 23 (App. 1987). However, *Stuck* was decided many years before *Blakely*, 542 U.S. 296, and there was not an equivalent statutory provision to § 13-701(F) at the time. *See* 1987 Ariz. Sess. Laws, ch. 121, § 1. Because § 13-701(F) now requires the trier of fact to find "at least one aggravating circumstance" before the court can find others, *Stuck* is unpersuasive.

double jeopardy because "it was factually impossible for [her] to commit [first-degree felony murder] without committing [child abuse]."

¶20 Consecutive sentences are only permissible under the Double Jeopardy Clause of the United States Constitution if each crime for which the defendant is sentenced requires "proof of an additional fact which the other does not." *Blockburger v. United States*, 248 U.S. 299, 304 (1932); *State v. Anderson*, 210 Ariz. 327, ¶ 139 (2005). Thus, in analyzing a double jeopardy claim, we must "ensure that each crime contains an element not present in the other." *Anderson*, 210 Ariz. 327, ¶ 139.

¶21 Here, Barreras was convicted of intentional or knowing child abuse under circumstances likely to produce death or serious physical injury. That crime required proof beyond a reasonable doubt that she, intentionally or knowingly,

> [u]nder circumstances likely to produce death or serious physical injury, . . . cause[d] [R.B.] to suffer physical injury or, having the care or custody of [R.B.] cause[d] or permit[ted] [R.B.] to be injured or . . . cause[d] or permit[ted R.B.] to be placed in a situation where the person or health of [R.B. was] endangered.

A.R.S. § 13-3623(A)(1). Barreras was also convicted of first-degree felony murder—the predicate felony being child abuse under § 13-3623(A)(1). *See* A.R.S. § 13-1105(A)(2). This required proof beyond a reasonable doubt that she had committed the offense of child abuse under § 13-3623(A)(1) as described above and that "in the course of and in furtherance of th[at] offense . . . [she] cause[d] the death of [R.B.]." § 13-1105(A)(2).

¶22 Our supreme court has held when a defendant is convicted of felony murder, "the 'ultimate crime' for which [she is] convicted is first-degree murder" because "[i]n Arizona, first degree murder is only one crime regardless of whether it occurs as a premeditated murder or a felony murder." *State v. Carlson*, 237 Ariz. 381, ¶ 82 (2015) (quoting *State v. Encinas*, 132 Ariz. 493, 496 (1982)). "Murder requires causing the death of another, whereas child abuse requires a child victim. Thus, each offense requires an element that the other does not." *State v. Jones*, 235 Ariz. 501, ¶ 13 (2014) (citations omitted). Accordingly, Barreras's consecutive sentences for felony murder and its predicate felony of child abuse do not constitute

double jeopardy.[11] *See Carlson*, 237 Ariz. 381, ¶ 84 (felony murder and its predicate felony are "distinct crimes and may be punished separately in a single trial without running afoul of double jeopardy principles" and thus, consecutive sentences permissible (quoting *State v. Siddle*, 202 Ariz. 512, ¶ 15 (App. 2002))).

Disposition

¶23 For the foregoing reasons, we affirm Barreras's convictions and sentences.

[11] Barreras attempts to distinguish *Carlson* because there, she contends, the predicate felony was "easily segregable from the murder," whereas here, "the literal same actions and omissions underlie the predicate felony . . . and the felony murder charge." However, as stated above, the double jeopardy analysis is whether "each crime contains an element not present in the other." *Anderson*, 210 Ariz. 327, ¶ 139. If that is satisfied, the double jeopardy claim fails. *Id.* To the extent Barreras is attempting to raise a "single act" claim under A.R.S. § 13-116, *see id.* ¶¶ 140–44, she has not developed, nor cited any authority for, this argument on appeal and thus it is waived, *see Sanchez*, 200 Ariz. 163, ¶ 8; Ariz. R. Crim. P. 31.10(a)(7).