IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTAJUAN STEWART CARSON JR.,
Appellant.

No. 2 CA-CR 2020-0006
Filed December 10, 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NOT FOR PUBLICATION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. CR20194645001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Diane Leigh Hunt, Assistant Attorney General, Tucson
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 Eppich and Chief Judge Vásquez concurred.

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

¶1 Antajuan Carson Jr. appeals from his convictions after a jury trial for one count of aggravated assault with a deadly weapon and one count of attempted first-degree murder. The trial court sentenced him to concurrent thirty-five year prison terms. On appeal, Carson claims that the court erred when it: (1) precluded his statement to officers at the scene; (2) violated double-jeopardy principles by denying his motion to dismiss the aggravated assault conviction; (3) imposed an aggravated sentence based on the state's untimely presentation of aggravating factors; and (4) awarded restitution to the Tucson Police Department for damage to a patrol vehicle. We affirm.

Factual and Procedural Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, ¶ 2 (App. 2001). In March 2019, at approximately 2:00 a.m., Officer Alvaro Silva, a patrol officer with the Tucson Police Department, was en route to another call when he noticed a car pass him at a rate of speed higher than he was traveling. Silva activated his emergency lights and initiated a traffic stop. The car then took two more turns before coming to "a rather sudden stop." Silva activated his "takedown lights," "bright white lights" that serve to conceal the officer while improving his view of the occupants of the stopped car.

¶3 The driver, later identified as Carson, stepped out of the car. Officer Silva immediately got out of his car, positioned himself behind the driver-side door, and faced Carson. Carson then ran at Silva while holding a gun. Carson almost immediately began firing at Silva while running towards him. Silva then moved sideways and backwards to get to the rear of the patrol car but fell to the ground on his backside. While still sitting, Silva began returning fire. Carson eventually reached the driver's door of

the patrol car and opened it further while Silva continued firing. Carson fell to the ground, and Silva ceased firing. Silva was not injured. Carson sustained multiple gunshot wounds.

¶4 It was later determined that Carson had fired fourteen rounds at Officer Silva and a number of the bullets struck the patrol vehicle. In an interview with the investigating detectives, Silva recalled that, when he had seen Carson coming towards him with a gun, he started shooting at Carson, but he could not remember if Carson had fired at him first. At trial, Silva testified that Carson had shot at him first and that, in the original interview, he had still been "very shook up" and "emotional." The state and defense counsel agreed that the sequence of shots was unclear.

¶5 Carson was convicted and sentenced as describe above.[1] This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

Admissibility of Statement

¶6 On appeal, Carson argues that the trial court erred by precluding a statement he had made at the scene following his arrest. We review a trial court's evidentiary rulings for an abuse of discretion, giving deference to the court's determination regarding relevance and unfair prejudice. *State v. Smith*, 215 Ariz. 221, ¶ 48 (2007); *see also State v. Forde*, 233 Ariz. 543, ¶ 77 (2014) ("We review the trial court's application of the hearsay rule for an abuse of discretion."). "In analyzing a ruling on a motion to suppress, we consider 'only the evidence presented at the suppression hearing.'"[2] *State v. Hummons*, 227 Ariz. 78, ¶ 2 (2011) (quoting *State v. Garcia*, 224 Ariz. 1, ¶ 6 (2010)).

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[1]Carson was also charged with one count of possession of a deadly weapon by a prohibited possessor. After a bifurcated trial, Carson was convicted and sentenced to a twelve-year term of imprisonment for that count, to be served concurrently with the sentences imposed for his convictions of attempted murder and aggravated assault.

[2]In this case, it does not appear that any evidence was presented at the hearing on the motion to suppress, but that the parties instead argued from their respective motions. Because the state does not dispute that Carson made a comment about Officer Sinclair being "okay," we cite here the facts provided in the parties' motions below. To whatever extent the

¶7 Tucson Police Department Officer Dennis Sinclair was one of the first officers to arrive at the scene after the shooting ended. Sinclair and another officer arrived within two minutes of the last shot, immediately placed Carson in handcuffs, and began rendering aid. Sinclair said that, during that time, Carson said something along the lines of, "Please tell me he's okay." The state moved to preclude Carson from introducing or referencing the statement during trial and claimed the statement was "self-serving hearsay." Carson responded that the statement was admissible under a number of exceptions to the hearsay rule including the excited utterance exception, the then-existing state of mind exception, and the "residual exception."

¶8 At a hearing on the motion, the trial court noted that it did not see the relevance of Carson's statement made a couple minutes after the shootout. And it concluded that "the potential prejudicial effect is significant given the fact that a jury could interpret [the statement] as some sort of . . . reflection back as to what his state of mind was two or three minutes later when he opened fire allegedly on the officer" and it could "potentially confuse the jury into some sort of . . . hybrid self-defense claim." Ultimately, the court explained, "while I do find it is self-serving hearsay and rather than go into the full hearsay exception analysis, I find that it is of minimal probative value and the prejudicial effect significantly outweighs the probative value."

¶9 "Hearsay" is a declarant's out-of-court statement offered to prove "the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). Hearsay is generally not admissible, *see* Ariz. R. Evid. 802, but it may be if certain enumerated exceptions to the rule apply, such as those asserted by Carson, *see* Ariz. R. Evid. 802; *see also* Ariz. R. Evid. 803(2), (3) (excited utterance, then-existing mental state); Ariz. R. Evid. 807 (residual exception). However, even if a hearsay statement is deemed admissible, a court may exclude it under Rule 403, Ariz. R. Evid., "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury." And, because the trial court is in the best position to conduct the Rule 403 evaluation, it has broad discretion in this determination. *State v. Gomez*, 250 Ariz. 518, ¶ 15 (2021).

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record is unclear, we presume the evidence would have supported the trial court's ruling. *Cf. State v. Zuck*, 134 Ariz. 509, 512-13 (1982) (appellate court will presume missing portions of record support trial court's ruling).

¶10 On appeal, Carson urges again that his statement at the scene is admissible under a number of hearsay exceptions. The state notes, however, and we agree, that Carson fails to address the trial court's Rule 403 ruling that, whatever its probative value, that value was substantially outweighed by the danger of unfair prejudice. Carson arguably addresses the court's determination of relevancy, but does so without addressing the court's ultimate conclusion under Rule 403. The failure to argue a claim usually constitutes abandonment and waiver of that claim. *State v. Carver*, 160 Ariz. 167, 175 (1989); *State v. Moody*, 208 Ariz. 424, n.9 (2004). Accordingly, because Carson makes no argument as to the trial court's Rule 403 ruling barring the evidence, and such argument would need to be developed, we consider this argument abandoned and waived.[3]

Double Jeopardy

¶11 At the time of sentencing, Carson argued that, because the aggravated assault charge and the attempted murder charge were based on the same act, they merged and, thus, the aggravated assault conviction should be dismissed. The trial court explained that "[t]he evidence showed several distinct and separate acts taken by the defendant" and thus denied the motion to dismiss. Carson argues again on appeal that this violated his double-jeopardy rights. We review de novo a question of double jeopardy. *State v. Cope*, 241 Ariz. 323, ¶ 8 (App. 2016).

¶12 Relying on *State v. Essman*, 98 Ariz. 228 (1965), Carson argues that a merger of charges occurs when a single act supports both an aggravated assault and attempted first-degree murder conviction. In *Essman*, the defendant was charged and convicted of both assault with a deadly weapon and felony murder. *Id*. at 235.[4] The trial court instructed the jury that the felony-murder doctrine applied "when the killing is done in the perpetration or attempt to perpetrate a felony such as assault with a

[3] Carson also argues on appeal that the trial court abused its discretion in precluding evidence of the extent of his injuries. But, because he concedes that the admissibility of this evidence was tied to the admissibility of his statement, we need not reach this issue.

[4]The "felony-murder doctrine" allows the state to charge a killing as first-degree murder if the death occurs during the defendant's commission of an underlying felony, even if the defendant had no separate intent to kill. *See State v. McLoughlin*, 139 Ariz. 481, 485-86 (1984); A.R.S. § 13-1105(A)(2) (felony-murder statute).

deadly weapon." *Id.* Our supreme court disagreed, holding that "[t]he felony-murder doctrine does not apply where the felony is an offense included in the charge of homicide. The acts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support a conviction for felony murder . . . ." *Id.* Some forty years later, our Supreme Court however, recognized that the broad holding of *Essman* had long been abrogated, distinguished and limited. *See State v. Moore*, 222 Ariz. 1, ¶ 59 (2009).

¶13 Notwithstanding the viability of *Essman*, Carson's reasoning as to merger has no application here. Carson was not convicted of felony murder but of attempted murder. Unlike felony murder, which necessarily depends upon the commission of the predicate felony, attempted murder and aggravated assault may be entirely unrelated crimes, and each have different elements.

¶14 The Double Jeopardy Clauses of both the United States and Arizona Constitutions protect a criminal defendant from multiple punishments for the same offense. *State v. Jurden*, 239 Ariz. 526, ¶ 10 (2016). When "the same conduct is held to constitute a violation of two different" provisions of the criminal code, we must "determine whether there are two offenses or only one." *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). The test in such a determination "is whether each provision requires proof of a fact which the other does not." *Id.* (quoting *Blockburger*, 284 U.S. at 304).

¶15 Attempted first-degree murder and aggravated assault each requires proof of at least one element the other does not. *See State v. Price*, 218 Ariz. 311, ¶ 5 (App. 2008) ("To determine whether offenses are the same, we analyze the elements of the offenses, not the facts of the case."). Unlike aggravated assault, the offense of attempted first-degree murder requires either proof of premeditation or the intentional or knowing murder of a law enforcement officer, but it does not require proof that the defendant either used a deadly weapon or dangerous instrument or intended to place the victim in reasonable apprehension of physical injury, as is required of aggravated assault. *See* A.R.S. §§ 13-1105(A)(1), (3), 13-1001, 13-1203(A)(2), 13-1204(A)(2); *see also State v. Fernandez*, 216 Ariz. 545, ¶ 31 (App. 2007) (holding aggravated assault is not a lesser-included offense of attempted murder); *State v. Laffoon*, 125 Ariz. 484, 487 (1980) (holding same and recognizing "[a] defendant need not necessarily commit assault when attempting murder"). Therefore, there is no double jeopardy violation here.

¶16 Alternatively, as the trial court recognized, the jury could have determined that each offense arose from separate and distinct acts. By approaching Officer Silva's car with a gun, the deadly weapon or dangerous instrument pursuant to § 13-1204(A)(2), Carson intentionally placed Silva in reasonable apprehension of imminent physical injury, *see* § 13-1203(A)(2). And then, by firing his weapon numerous times toward Silva, Carson took a "step in a course of conduct planned to culminate in commission" of first-degree murder. § 13-1001(A)(2). Under this alternative, there was not a single or "same act," but rather a series of acts, albeit within a definable course of conduct. Charging and securing convictions on such separate acts does not constitute a double jeopardy violation. *See State v. Rios*, No. 2 CA-CR 2020-0106, ¶¶ 24-27, 2021 WL 5232459 (Ariz. Ct. App. Nov. 10, 2021) (finding no double jeopardy violation when defendant was convicted of two counts of aggravated harassment based on a series of text messages); *State v. Rodriguez*, 251 Ariz. 90, ¶ 14 (App. 2021) (determining the state may charge multiple acts of assault that occurred during the course of a single transaction).

Aggravators

¶17 Carson further argues that the trial court committed fundamental, prejudicial error when it allowed the state to prove aggravating factors, and ultimately imposed an aggravated sentence, without proper disclosure. However, Carson did not object to the lack of—or untimely—notice before trial, during trial, or before sentencing. Because Carson did not object below, we review only for fundamental, prejudicial error. *State v. Roseberry*, 210 Ariz. 360, ¶ 21 (2005); *see also State v. Bocharski*, 218 Ariz. 476, ¶ 12 (2008) ("We review a failure to provide timely notice of aggravating circumstances for prejudice.").

¶18 The state initially charged Carson in May 2019 with attempted first-degree murder and possession of a deadly weapon by a prohibited possessor. It alleged a number of aggravating factors and sentence-enhancement factors. That indictment was dismissed without prejudice. The state then re-indicted Carson in September 2019 with the two previously charged offenses and an additional charge of aggravated assault with a deadly weapon. Upon the state's motion, and without objection, the trial court dismissed the initial indictment and ordered all rulings, pending motions, and discovery exchanges transferred from the old case to the new case.

¶19 During trial, the parties discussed, at-length, the initially noticed aggravating factors. Defense counsel specifically objected to a

number of the aggravators going to the jury, citing factual and not procedural objections. Ultimately, the jury was presented with a verdict form listing two aggravating factors and one sentence enhancement. The jury found all three proved. Then, following a priors trial, the trial court found that Carson had two prior historical felony convictions.

¶20 At sentencing, the trial court discussed factors it considered in aggravation, including the factors found by the jury, Carson's prior convictions, and that he had used a deadly weapon during the attempted first-degree murder. The court found an aggravated sentence was warranted and imposed one. At no time below did defense counsel indicate any surprise regarding the use of aggravators, nor does Carson claim he lacked actual notice of the aggravators ultimately alleged.

¶21 For the first time on appeal, Carson asserts that, by virtue of the dismissal of the original indictment, the state intended to dismiss the notice of aggravating factors as well, and was required to re-notice them after the second indictment. Even assuming there were error, Carson does not argue on appeal, and we do not find, that he was prejudiced by the state's failure to formally re-submit the aggravating factors following the re-indictment.[5]

¶22 A defendant is only entitled to sufficient notice of aggravators to "have a reasonable opportunity to prepare a rebuttal." *State v. Scott*, 177 Ariz. 131, 141-42 (1993) (quoting *State v. Ortiz*, 131 Ariz. 195, 207 (1981)); *see also State v. Jenkins*, 193 Ariz. 115, ¶ 21 (App. 1998) (notice of aggravating factors in state's sentencing memorandum provided sufficient notice for due process purposes). The relevant issue in determining prejudice is whether the claimed untimely notice somehow prejudiced the defendant's "litigation strategy, trial preparation, examination of witnesses, or argument." *State v. Lehr*, 227 Ariz. 140, ¶ 70 (2011) (quoting *State v. Freeney*, 223 Ariz. 110, ¶ 28 (2009)); *see also State v. Cropper*, 205 Ariz. 181, ¶ 15 (2003) (holding state's failure to provide written notice of intended aggravating factor was not reversible error when defendant had timely actual notice and

[5]In its answering brief, the state notes that Carson failed to argue prejudice, and Carson responds in his reply brief with an argument not otherwise made in his opening brief—that the lack of notice of aggravating factors denied Carson the opportunity to properly evaluate whether to plead guilty. We do not, however, consider arguments raised for the first time in a reply brief, and we therefore do not consider this argument. *State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013).

was not prejudiced). Because Carson does not claim that any such prejudice occurred here, he has not met his burden to establish fundamental, prejudicial error.

Restitution

¶23 Finally, Carson argues that the trial court abused its discretion by awarding Tucson Police Department (TPD) restitution when it had not been named a victim of any of the offenses of which he was convicted. We review an award of restitution for an abuse of discretion. *State v. Lewis*, 222 Ariz. 321, ¶ 5 (App. 2009). "A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles." *Id.* (quoting *State v. Jackson*, 208 Ariz. 56, ¶ 12 (App. 2004)).

¶24 Following Carson's convictions, the state requested restitution for TPD for the damage caused to its patrol vehicle in the gunfight. Carson objected on the same grounds as he does on appeal, that TPD had not been named a victim of any of the offenses of which he was convicted.

¶25 Pursuant to A.R.S. § 13-603(C), "If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime . . . in the full amount of economic loss as determined by the court." Carson claims here, as he did below, that under the "plain language" of the statute, "§ 13-603 mandates a restitution order only on behalf of the person or entity whom the specific offense for which the defendant was convicted was committed against." In ordering the restitution, the trial court reasoned that, although TPD may not be a victim under the literal reading of the victim's rights provisions, the damage to the patrol car occurred as a direct result of the aggravated assault and attempted murder of its occupant. We agree with the trial court.

¶26 We find that our opinion in *State v. Guilliams*, 208 Ariz. 48 (App. 2004) states the proper rule. In *Guilliams*, the defendant—a prison maintenance worker—helped an inmate escape from an Arizona Department of Corrections (ADOC) facility, pleaded guilty to facilitating the attempted escape, and was ordered to pay restitution to ADOC for costs associated with apprehending the inmate. *Id.* ¶¶ 2-7. The defendant argued on appeal that ADOC was not entitled to restitution because ADOC was not a victim and escape is a victimless crime. *Id.* ¶ 11. We explained that, although the term "victim" is not defined in § 13-603, in interpreting that statute, our supreme court in *State v. Wilkinson*, 202 Ariz. 27, ¶ 7 (2002) "focused on the relationship between the criminal conduct and the claimed

economic loss, noting that the test is whether the particular criminal conduct directly caused an economic loss." *Guilliams*, 208 Ariz. 48, ¶ 13. We thus explained that "[u]nder this analysis, the restitution statutes do not require that a specific victim be named in a statute, indictment, or verdict form" and, accordingly, concluded that the trial court did not abuse its discretion in awarding ADOC restitution. *Id.* ¶¶ 14-15.

¶27 Similarly, here, although TPD was not a victim under the statutes defining the offenses for which Carson was convicted or identified as a victim in the indictment, Carson's criminal conduct directly caused TPD's economic losses. TPD is thus considered a victim under the restitution statutes, and the trial court did not abuse its discretion in awarding restitution to TPD.

Disposition

¶28 For the foregoing reasons, we affirm Carson's convictions and sentences.