IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL BENJAMIN MILLER,
Appellant.

No. 2 CA-CR 2020-0052
Filed May 19, 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NOT FOR PUBLICATION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. CR20182639001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, 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 Daniel Miller appeals his convictions following a jury trial for second-degree murder, attempted first-degree murder, and two counts of aggravated assault. The trial court sentenced him to concurrent and consecutive prison terms totaling sixty years. On appeal, Miller claims that the state presented insufficient evidence that he acted with premeditation and the trial court erred in giving a flight instruction and in denying his motion for a mistrial.[1] We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Miller. *State v. Miller*, 187 Ariz. 254, n.1 (App. 1996). Miller and Hannah,[2] one of the victims, had known each other for years at the time of the crime and had dated at one point. Mark, the other victim, had introduced Hannah and Miller to one another several years before. In May 2017, Hannah had been living with Miller in Phoenix when she broke off the relationship and moved to Tucson to reside at the home she and Miller had previously shared.

¶3 On June 6, 2017, Mark was staying with Hannah because she had "concerns for [her] safety" from Miller. That evening, Hannah and Mark slept in the same bed. The next morning, on June 7, Hannah woke up

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[1]Miller also claimed in his opening brief that the trial court erred when it aggravated his sentence for attempted first-degree murder because the requisite two aggravating factors had not been established. However, in his reply brief he conceded, "The state is correct that there are two aggravating factors. [He] withdraws this argument."

[2] The victims and non-law enforcement witnesses are identified throughout by pseudonyms.

to Mark saying "What the f___, Danny?" She saw Miller standing in the room, holding a knife, and that he had cut Mark. Hannah said she then saw Mark wiping up blood on his chest and stomach. Hannah said everyone then left the room, and she saw Miller's truck in her driveway. She went up to the truck and saw Miller in the driver seat with a revolver, loading it with bullets. According to Hannah, Mark then went up to the truck, and Hannah thought they were just talking. She then saw Mark's eyes go "blank," he stepped aside, and then fell over. Hannah yelled, "Danny, what did you do? What did you do?" and then she heard "a lady and a [man]'s voice," but lost her vision. Although she had been shot, she had no recollection of it.

¶4 Hannah's neighbor, Albert, heard firecracker-like sounds, went outside and saw a man pointing a gun at "a lady and a man" that were on the ground. He heard a total of four gun shots and heard a lady yelling. Albert then saw the man with the gun get back in his truck and drive off. Albert's girlfriend called the police.

¶5 When police arrived, they found Hannah and Mark lying in the middle of the street. Hannah was conscious, making a "faint noise," but Mark did not have a pulse and was pronounced dead at the hospital. Both victims had pools of blood under their heads. When a police sergeant asked Hannah who did this to her, she said, "Danny."

¶6 Hannah had been shot twice in the head; one of those shots into her face. She required two surgeries and physical therapy for the lasting effects of a traumatic brain injury. Mark had been shot once in the face and once in the abdomen, and had lacerations and abrasions on his chest and abdomen.

¶7 The next day, on June 8, the police found Miller at an apartment complex in Phoenix where they saw him enter a second-story apartment. The police surrounded the apartment and announced their presence. An officer attempted to disable a surveillance camera that was in the window of the apartment by shooting it with a bean-bag gun. The launched bean bag broke the window. The officer shot another bean bag to ensure the camera was disabled, and as he did, Miller jumped out of the second-story window at the rear of the apartment, landing on his back on a concrete surface. Miller was arrested and charged with first-degree murder of Mark, attempted first-degree murder of Hannah, aggravated assault with a deadly weapon (knife) of Mark, aggravated assault with a deadly weapon (firearm) of Hannah, aggravated assault causing serious physical injury of Hannah, and burglary.

¶8 At trial, Miller admitted that he shot Hannah and Mark, but argued he did not do so with premeditation but rather in the heat of passion upon finding the two in bed together. As to the homicide charges, the jury was instructed on first-degree murder, second-degree murder, and provocation manslaughter. The jury found Miller not guilty of first-degree murder of Mark, but guilty of second-degree murder as a lesser-included offense, guilty of attempted first-degree murder of Hannah, guilty of both counts of aggravated assault of Hannah, not guilty of aggravated assault of Mark, and not guilty of burglary. Miller was convicted and sentenced as described above and appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

Sufficiency of Evidence of Premeditation

¶9 On appeal, Miller argues that the state did not present sufficient evidence to sustain his conviction for attempted first-degree murder of Hannah. He claims, specifically, that there was insufficient evidence of premeditation.

¶10 At trial, Miller did not move for a judgment of acquittal on this basis pursuant to Rule 20, Ariz. R. Crim. P., and therefore we review only for fundamental error. *State v. Windsor*, 224 Ariz. 103, n.2 (App. 2010). However, a conviction based on insufficient evidence constitutes fundamental error. *Id.*; *State v. Clark*, 249 Ariz. 528, ¶ 16 (App. 2020). We will not reverse a conviction for insufficient evidence unless the state has failed to present substantial evidence of guilt. *Windsor*, 224 Ariz. 103, ¶ 4. "Substantial evidence is 'more than a mere scintilla' and is proof that reasonable persons could accept as convincing beyond a reasonable doubt." *Id.* (quoting *State v. Nunez*, 167 Ariz. 272, 278 (1991)).

¶11 A person commits first-degree premeditated murder if "[i]ntending or knowing that the person's conduct will cause death, the person causes death of another person . . . with premeditation." A.R.S. § 13-1105(A)(1). A conviction for attempted first-degree murder requires the same proof of premeditation as for the completed crime. *See* A.R.S. § 13-1001; *see, e.g.*, *State v. Aguilar*, 224 Ariz. 299, ¶¶ 16-25 (App. 2010). Premeditation occurs when

> 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. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

A.R.S. § 13-1101(1). In stating that "proof of actual reflection is not required," "the legislature sought to relieve the state of the often impossible burden of proving premeditation through direct evidence." *State v. Thompson*, 204 Ariz. 471, ¶ 27 (2003). Thus, premeditation may be proved by inference derived from circumstantial evidence. *State v. Nelson*, 229 Ariz. 180, ¶ 16 (2012). Because "the passage of time is not, in and of itself, premeditation," *Thompson*, 204 Ariz. 471, ¶ 29, "[t]here is no prescribed period of time which must elapse between the formation of the intent to kill and the act of killing," *State v. Ovante*, 231 Ariz. 180, ¶ 14 (2013). Nonetheless, the record must reflect that the defendant considered his act, and did not merely react to an instant quarrel or in the heat of passion. *Ovante*, 231 Ariz. 180, ¶ 14.

¶12 Miller claims, because Hannah had no recollection of what happened after Mark was shot, there was thus no evidence of premeditation. And, he claims, the circumstantial evidence supports a finding of no premeditation. He points to his not having brought the gun into the house, that his gun was not pre-loaded, and that, although he loaded it while Hannah was at first standing beside his truck, he did not use the opportunity to shoot her then. We do not agree.

¶13 "[T]hreats made by the defendant to the victim, a pattern of escalating violence between the defendant and the victim, or the acquisition of a weapon by the defendant before the killing" are all circumstances that may establish premeditation. *Id.* (quoting *Thompson*, 204 Ariz. 471, ¶ 31). Here, Hannah testified that Mark was staying with her because Miller had caused her to have concerns for her safety. And, although Miller did not have the gun when he came into Hannah's house, he had it readily available in the vehicle he drove there, he returned to that vehicle and, rather than immediately driving away, loaded the gun before speaking with, and then shooting, Mark and Hannah, each multiple times. *See State v. Lopez*, 158 Ariz. 258, 263 (1988) ("The nature, severity and placement of the injuries to the victim also provide some evidence of premeditation."); *State v. Pittman*, 118 Ariz. 71, 75 (1978) (shooting victim multiple times may be evidence of premeditation).

¶14 Miller argues nonetheless that Hannah "could have confronted [Miller] verbally or physically and the shooting [could] have

been from a sudden quarrel." Hannah, however, testified that she could not see anything after yelling, "Danny, what did you do?," in reaction to Miller shooting Mark. A reasonable juror could find that Miller shot Hannah almost immediately after shooting Mark, and not after a speculative verbal or physical confrontation. Furthermore, there was no evidence presented from any witness or otherwise that Hannah did, in fact, verbally or physically confront him other than questioning what he had just done.

¶15 The jury could have, based on the evidence presented, reasonably concluded that Miller's conduct in bringing a firearm to the scene, returning to his truck to retrieve it, counting the bullets and then loading the firearm immediately before firing, evidenced premeditation. Sufficient evidence therefore supports the conviction.

Flight Instruction

¶16 As he did below, Miller also argues the trial court erred in giving a flight instruction to the jury. We review a trial court's decision to give a jury instruction for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 51 (2009).

¶17 Miller objected to the trial court giving a flight instruction on the basis that his drive back to Phoenix and his actions during the arrest—jumping out of the back window after a bean bag was shot through his front window—did not support a flight instruction. The state claimed that a jury could draw a reasonable inference that his leap from the second-story apartment window before his arrest was flight. The court overruled Miller's objection and provided the following jury instruction:

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

¶18 "A party is entitled to an instruction on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16 (1998). A flight instruction is appropriate "if the state presents evidence from which jurors may infer 'consciousness of guilt for the crime charged.'" *State v. Parker*, 231 Ariz. 391, ¶ 44 (2013) (quoting *State v. Edwards*, 136 Ariz.

177, 184 (1983)); *State v. Solis*, 236 Ariz. 285, ¶ 7 (App. 2014). Under the circumstances of this case, "the evidence is viewed to ascertain whether it supports a reasonable inference that the flight or attempted flight was open, such as the result of an immediate pursuit." *State v. Smith*, 113 Ariz. 298, 300 (1976).

¶19 On appeal, Miller claims that the evidence supports an inference that Miller was "fleeing from an attack and not from a lawful apprehension by the police." In support of this theory, he claims that the police only announced themselves after he fled. The state, however, correctly notes that a police officer testified that the police had in fact announced their presence before Miller jumped from the second-story window. A jury could reasonably infer from the officer's testimony that Miller's flight was an attempt to evade police there to arrest him rather than to avoid an unidentified attacker. Regardless, however, Miller's alternative explanation for his flight does not preclude the trial court from giving a flight instruction; at most, it creates a question of fact for the jury to resolve. *Parker*, 231 Ariz. 391, ¶ 50. The court did not abuse its discretion in giving the flight instruction.

¶20 Miller also argues that "Arizona should abolish the flight instruction as other jurisdictions have" and obliquely invites us to do so here. The state correctly notes, and Miller concedes, that we are bound by the Arizona Supreme Court's decisions permitting the flight instruction. *See State v. Smyers*, 207 Ariz. 314, n.4 (2004); *see also Parker*, 231 Ariz. 391, ¶¶ 43-50 (upholding flight instruction). Accordingly, we decline the invitation.

Motion for Mistrial

¶21 Lastly, Miller argues that the trial court erred when it refused to correct the prosecutor's misstatement of the burden of proof on rebuttal, and then when it denied his motion for a mistrial. The state claims that the prosecutor did not misstate the burden of proof or engage in any other misconduct.

¶22 The trial court here instructed the jury that the state has the burden of proving Miller guilty "beyond a reasonable doubt." The court then instructed the jury that "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." During Miller's closing argument, defense counsel repeatedly stated that the state must prove the charges "beyond *any and every* reasonable doubt." (Emphasis added.) In the state's rebuttal closing argument, the prosecutor stated that

defense counsel "kept saying that the State must prove its case, and he kept using a phrase, any and every reasonable doubt. That is not accurate." Defense counsel objected, and the court overruled the objection stating that "[t]his is argument." The prosecutor then repeated the instruction given by the court that proof "beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."

¶23 Miller later moved for a mistrial "based on prosecutorial misconduct" because the prosecutor "misinstructed and misapplied the law, accused counsel of, ironically, the same during her rebuttal argument." The trial court denied the motion.

¶24 We review a denial of a motion for mistrial made on the grounds of prosecutorial misconduct for an abuse of discretion. *State v. Dansdill*, 246 Ariz. 593, ¶ 27 (App. 2019). As our supreme court most recently held

> [t]o prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. To that end, a defendant must demonstrate that (1) misconduct exists and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.

State v. Murray, 250 Ariz. 543, ¶ 13 (2021) (internal citations and quotations omitted) (quoting *State v. Morris*, 215 Ariz. 324, ¶ 46 (2007)). Certainly, if either party misstates the burden of proof, a mistrial or later vacation of conviction could result. *See id.* ¶ 40 (reversing conviction based on prosecutor's misstatement of reasonable-doubt standard).

¶25 The prosecutor here, however, did not misstate the burden of proof and did not commit prosecutorial misconduct. Our supreme court in *State v. Portillo*, 182 Ariz. 592, 596 (1995) provided a specific reasonable doubt instruction every trial court must give in a criminal trial. The instruction provided that the "state has the burden of proving the defendant guilty beyond a reasonable doubt." *Id.* We have since clarified that the court in *Portillo* provided a specific instruction because it did not intend for trial courts to modify the instruction in any substantive way. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15 (App. 2003). The same inherently

holds true for counsel. *See State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 88 (2018) (prosecutor may not improperly argue burden of proof). Thus, when defense counsel here repeatedly stated that the state had the burden of proving guilt beyond "any and every" reasonable doubt, the prosecutor did not act improperly in clarifying that this was not the instruction the trial court provided. Nor did the prosecutor mislead the jury by then, correctly, repeating the relevant sections of the court's *Portillo* instruction to the jury. Neither did the prosecutor "impugn the integrity of defense counsel," by pointing out defense counsel's departure from the approved jury instruction. *See State v. Denny*, 119 Ariz. 131, 134 (1978). We cannot therefore say that the trial court abused its discretion in denying Miller's motion for a mistrial.

Disposition

¶26 For the foregoing reasons, we affirm Miller's convictions and sentences.