IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTHONY RENE FIMBRES,
Appellant.

No. 2 CA-CR 2020-0069
Filed August 30, 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NOT FOR PUBLICATION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. CR20181551001
The Honorable Gus Aragon, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

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

¶1 Anthony Fimbres appeals from his conviction and sentence for first-degree premeditated murder. For the reasons that follow, we affirm Fimbres's conviction and sentence.

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 Fimbres. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In April 2018, as J.C. sat inside his truck on the street in front of his home and his two sons, J.M. and A.M.,[1] stood nearby, three or four men in a gold SUV drove slowly down the street. An occupant of the SUV opened fire from the rear passenger-side window, wounding J.C. and A.M. After the SUV sped away, J.M. removed J.C.—who had been shot in the arm, chest, and side—from the truck and carried him toward the house before calling 9-1-1. A.M., who had been shot in the neck, discussed "death and dying" with J.C., and J.C. prayed.

¶3 On their way to J.C.'s home, police officers saw a large plume of smoke coming from a nearby alley and discovered a gold SUV engulfed in flames. When officers arrived at the scene of the shooting, they found J.C. lying on the ground in a pool of blood. One of the officers went to retrieve a medical bag to tend to J.C.'s injuries while another officer stood nearby. At that time, J.C. stated, "[I]t was Anthony Fimbres." J.M. heard his father's statement, but the officer did not initially respond. J.C. then looked at J.M. and said, "[T]ell them it was Anthony Fimbres." J.C. was transported to the hospital but died later that day as a result of his injuries.

¶4 After a jury trial, Fimbres was convicted of first-degree premeditated murder but acquitted of endangerment, discharging a

[1]Because one of J.C.'s sons shares his first and last name, we refer to both sons by their first and middle initials.

firearm at a nonresidential structure, drive-by shooting, and two counts of aggravated assault. He was sentenced to natural life in prison. 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).

Admission of Dying Declaration

¶5 Fimbres first argues the trial court erred in admitting J.C.'s statement that "it was Anthony Fimbres" as a dying declaration because the state failed to establish J.C. had firsthand knowledge of who had shot him, and therefore the testimony lacked the necessary foundation for admissibility under Rule 602, Ariz. R. Evid. We review the court's admission of evidence for an abuse of discretion. *See State v. Fischer*, 219 Ariz. 408, ¶ 24 (App. 2008).

¶6 Generally, out-of-court statements offered to prove the truth of the matter asserted are inadmissible unless an exception to the rule against hearsay applies. Ariz. R. Evid. 801(c), 802. Pursuant to Rule 804(b)(2), Ariz. R. Evid., "statement[s] under the belief of imminent death" "are not excluded by the rule against hearsay if the declarant is unavailable as a witness." This rule requires that the statement (1) be used in a homicide prosecution or in a civil case, (2) was made while the declarant believed death was imminent, and (3) concerned the cause or circumstances of the death. *Id.*; *see also State v. Adamson*, 136 Ariz. 250, 254 (1983). As with other declarations under the hearsay rules, the declarant "must have had an opportunity to observe or personal knowledge of the fact declared." *Adamson*, 136 Ariz. at 255; *see* Ariz. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

¶7 Before trial, Fimbres moved to preclude admission of J.C.'s statements, "it was Anthony Fimbres" and "tell them it was Anthony Fimbres," arguing J.C. lacked "immediate and first-hand knowledge of who killed him" and admission of the statement would violate his rights under the Confrontation Clause of the Sixth Amendment. In response, the state pointed to J.C.'s opportunity to see his assailants and argued that, because there had been no interrogation and J.C. made the statement during an ongoing emergency, admission of the statement would not violate the Confrontation Clause.

¶8 At the motions hearing, J.M. testified he had been "looking towards" J.C., who was on his phone while sitting in his car parked on the street in front of their home before the shooting. He further testified that

"right before the shots started to be fired," J.C. had been "looking towards" the gold SUV driving down their street. J.M. stated he had been further away from the SUV than his father but could see at least three people in the car and a rifle pointing out of the rear passenger side of the car. And, he said the SUV's passenger-side windows had been open, and although the windows on his father's truck were rolled up, his father would have been "able to see the people in the vehicle." He also testified J.C. had been receiving threatening text messages and phone calls from Fimbres. The trial court denied Fimbres's motion, noting that if "appropriate foundation is provided at trial," the testimony would be admitted into evidence.

¶9 At trial, J.M. testified he had not seen whether his father saw the car driving down the street or turned to look at it. When J.M. referred to J.C.'s statement, Fimbres objected, arguing the statement lacked foundation because J.C. had not "had the opportunity to see who was in" the SUV. In response, the trial court stated, "That's all fodder for argument, whatever the basis for what his belief was, you can argue about that, but he made a certain statement," and as long as there was "testimony that [J.C.] appeared morbid," it would admit the statement. After J.M. testified his father had been bleeding, appeared to be in pain, and talked about dying, he stated his father "[l]ooked at [him] and . . . said tell them it was Anthony Fimbres." He further testified "it appeared . . . that [his] father was trying to speak" to a nearby police officer, but the officer did not "appear to respond or . . . hear what he was saying."

¶10 J.M. subsequently testified his father had been "significantly closer" to the SUV than he was. Further, he explained that although the passenger-side window of his father's truck was tinted and closed at the time of the shooting, making it difficult to see inside the truck, J.C. would have been able to see the men in the gold SUV because the tint was "like a two-way mirror," allowing him to see out. However, he also testified his father had not been "looking at his passenger side window as th[e] SUV pulled up." A.M. testified that although his father had been "looking down at his phone," "he [proceeded] to get up once he heard the shots."

¶11 On appeal, Fimbres argues testimony at trial "made clear that it was highly improbable, if not impossible, that [J.C.] could see his assailants," and "[t]his fact, combined with . . . Fimbres' alibi, makes it certain that [J.C.] did not see Fimbres in the vehicle that drove by and shot him." Further, he contends there was no evidence that he had communicated, directly or indirectly, with J.C. for at least six months leading up to the shooting. Thus, he concludes, there "was no foundation,

no basis for knowledge, nothing at all presented to the trial court and the jury to suggest [J.C.]'s hearsay statement was anything more than a guess or a suspicion," and the court erred in "ignor[ing]" the personal-knowledge requirement under Rule 602.[2]

¶12 The state counters the statement was admissible because "the evidence showed [J.C.] had the *opportunity* to see his attackers, and whether he actually did was a question of fact for the jury." Specifically, the state points to J.M.'s testimony at the pretrial hearing that his father looked toward the SUV, as well as A.M.'s testimony at trial that his father looked up. And, the state asserts, "the shooters' SUV slowly approached [J.C.]'s vehicle in daylight, with the windows down, and the approach was unusual enough that [J.C.'s sons], who were farther away, looked in that direction before the shots were fired." Moreover, the state argues that because "the shooting did not end with one shot," there "was time for [J.C.] to look up even if he was surprised." We agree.

¶13 The state presented evidence from which the jury could conclude J.C. "had an opportunity to observe or personal knowledge of" who shot him, and therefore the trial court did not err in admitting his statement. *Adamson*, 136 Ariz. at 255. Testimony at trial indicated the shooting took place at approximately 12:30 p.m. And, as noted, J.M. testified that J.C. had been closer to the SUV and would have been able to see through his truck's tinted windows, and A.M. testified that his father "g[o]t up" when he heard gunshots. Even though the evidence regarding J.C.'s opportunity to observe his attackers was conflicting, this does not preclude admission of his statement. *See* 1 Kenneth S. Broun et al., *McCormick on Evidence* § 10 (8th ed. 2020) ("When reasonable persons could differ as to whether the witness had an adequate opportunity to observe, the witness's testimony is admissible; and the jury will later make its own appraisal of his opportunity to know in evaluating the weight of the testimony during deliberations."); *State v. King*, 213 Ariz. 632, ¶¶ 33, 34 (App. 2006) ("[D]iscrepancies in the evidence affect the weight of evidence, not its admissibility."). Further, although the court appears to have based its decision regarding admissibility on the requirements of Rule 804(b)(2)

[2]Fimbres asserts, for the first time on reply, that J.C.'s statement is subject to various interpretations and does not "convey . . . an allegation that [he] was in the truck or that he shot [J.C.]." However, we do not address claims first raised on reply. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7 (App. 2009).

and declined to expressly consider the issue of J.C.'s personal knowledge under Rule 602, "[w]e are obliged to affirm the trial court's ruling if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464 (1984).

¶14 Additionally, Fimbres argues the trial court's admission of J.C.'s statement offends the Confrontation Clause because any such statement was testimonial in light of evidence that J.C. had "attempted to communicate" Fimbres's name to police standing nearby as he was dying. "We review de novo evidentiary rulings that implicate the Confrontation Clause." *State v. Tucker*, 215 Ariz. 298, ¶ 61 (2007).

¶15 The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. This procedural guarantee "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)). Testimonial evidence is "*ex parte* in-court testimony or its functional equivalent . . . [including] pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford*, 541 U.S. at 51. Whether a statement is testimonial "is a factually driven inquiry and must be determined on a case-by-case basis" by taking into account "the totality of the circumstances surrounding [the statement]." *State v. Alvarez*, 213 Ariz. 467, ¶ 14 (App. 2006) (alteration in *Alvarez*) (quoting *State v. Parks*, 211 Ariz. 19, ¶¶ 43, 52 (App. 2005), *affirmed on remand*, 213 Ariz. 412 (App. 2006)).

¶16 We conclude J.C.'s statement was not testimonial. As the state asserts, J.C. "was speaking informally to his son in the immediate aftermath of a drive-by shooting, after his son had moved him to the courtyard out of fear the shooters would return." And, even if J.C. had intended to communicate his statement to the officer standing nearby, no interrogation took place—the statement was spontaneous and unsolicited. *See Crawford*, 541 U.S. at 52 ("[s]tatements taken by police officers in the course of interrogations are . . . testimonial"). Although "statements made in the absence of any interrogation are [not] necessarily nontestimonial," *Davis*, 547 U.S. at 822 n.1., nothing in the record before us indicates J.C. "intended or believed [his statement] might later be used in a prosecution or at a trial," *State v. Damper*, 223 Ariz. 572, ¶ 12 (App. 2010). Indeed, the circumstances of J.C.'s statement, including that he made the statement before officers had

secured the scene, while he was lying in a pool of blood and having difficulty breathing and communicating, indicate his statement was nontestimonial. *See State v. Hill*, 236 Ariz. 162, ¶ 20 (App. 2014) ("A statement to police is more likely to be non-testimonial if it is made during an emergency, while the witness still may be in danger or criminal activity may remain afoot."); *Alvarez*, 213 Ariz. 467, ¶¶ 14-20 & 14, 19 (statement of victim "found staggering in a roadway, bleeding profusely from his head, and slipping in and out of consciousness" was "nontestimonial" because purpose of police questioning was to meet ongoing emergency); *Michigan v. Bryant*, 562 U.S. 344, 371-74, 377-78 (2011) (when police did not know where shooting took place, who assailant was, and whether assailant still posed danger, victim's statement to officer who found him shot and bleeding at gas station nontestimonial due to ongoing emergency). The trial court's admission of the statement did not violate the Confrontation Clause.[3]

Motions for Judgment of Acquittal

¶17 Next, Fimbres argues the evidence was insufficient to support his conviction for first-degree murder and, therefore, the trial court erred in denying his motions for judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. "We conduct a de novo review of the trial court's decision [on a Rule 20 motion], viewing the evidence in a light most favorable to sustaining the verdict." *State v. West*, 226 Ariz. 559, ¶ 15 (2011) (alteration in *West*) (quoting *State v. Bible*, 175 Ariz. 549, 595 (1993)).

¶18 Under Rule 20(a)(1), a trial court must grant a judgment of acquittal if no substantial evidence supports a conviction. "Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Rodriguez*, 192 Ariz. 58, ¶ 10 (1998). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987). "Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn

[3]Fimbres also asserts that "[i]n finding the statement non-testimonial, the trial court did not reach the more complicated and nuanced question of whether a dying declaration, where the declarant actually perishes, offends the confrontation clause—an issue that has yet to be decided by our nation's highest court." Based on our conclusion that the court did not err in finding J.C.'s statement nontestimonial, we need not address this issue.

therefrom, the case must be submitted to the jury." *State v. Landrigan*, 176 Ariz. 1, 4 (1993) (citation omitted). In reviewing the sufficiency of the evidence, we neither reweigh evidence nor assess the credibility of witnesses. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013). "Evidence is no less substantial simply because the testimony is conflicting or reasonable persons may draw different conclusions therefrom." *State v. Mercer*, 13 Ariz. App. 1, 2 (1970).

¶19 At the conclusion of the state's case in chief, Fimbres moved for a judgment of acquittal pursuant to Rule 20, arguing the state had not presented sufficient evidence to show he committed the charged offenses. The trial court denied the motion. After trial, Fimbres renewed his motion and urged the court to enter a judgment of acquittal "on its own initiative" based on the jury's "inconsistent" and "impossible" verdicts, contending "there is no way any rational trier of fact . . . could have found [him] guilty of first degree, premeditated murder while admitting the state had not proven any other counts beyond a reasonable doubt." Again, the court denied the motion, finding substantial evidence to support the jury's verdict and that "reasonable minds of jurors could differ over whether [Fimbres] was proven guilty of First Degree Murder." The court continued, "When potentially inconsistent verdicts are rendered as to separate counts, as in this matter, it is possible they are the result of jury nullification, compromise or leniency."

¶20 Fimbres was convicted under A.R.S. § 13-1105(A)(1), which provides that a person commits first-degree murder if, "[i]ntending or knowing that the person's conduct will cause death, the person causes the death of another person . . . with premeditation." The state's theory at trial was that Fimbres had committed this offense as either a principal or an accomplice. Pursuant to A.R.S. § 13-303(A)(3), "A person is criminally accountable for the conduct of another if: . . . [t]he person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice." An accomplice is defined as a person who, "with the intent to promote or facilitate the commission of an offense," solicits, aids, or "[p]rovides means or opportunity to another person to commit the offense." A.R.S. § 13-301.

¶21 On appeal, Fimbres contends "no evidence put [him] at the scene and no evidence showed he helped anyone who killed [J.C.]," pointing to the trial court's alleged error in admitting J.C.'s statement and inconsistencies in testimony about his ownership of the car that had been

found burning in the alley. Further, Fimbres reasserts his argument that the jury rendered "impossible" verdicts in finding he was guilty "for the bullets striking [J.C.] but not for the passage through the truck to hit [him] nor for the damage caused after hitting [him], as well as the injuries and damage caused by those bullets that missed." Specifically, he contends "to be guilty of premeditated murder, he must be either principal or accomplice"; if he was a principal, "he would be guilty of all counts," and if he was an accomplice, the "law requires . . . evidence that [he], with the intent to kill [J.C.], aided or assisted another person" in committing the murder. Fimbres asserts the state did not present evidence indicating he had acted as an accomplice. Thus, he concludes, the jury's inconsistent verdicts "are further proof there was insufficient evidence to find him guilty of murder as well as the other charges."

¶22 Sufficient evidence supports Fimbres's conviction. As discussed above, the trial court did not err in admitting J.C.'s statement indicating "it was . . . Fimbres" who was responsible for the shooting, and this statement supports the jury's conclusion. Moreover, as the state argues, "additional circumstantial evidence is sufficient to show Fimbres committed premeditated murder, either as an accomplice or in the [SUV] itself." Indeed, the state presented evidence that (1) J.C. and Fimbres had been in the business of selling marijuana together; (2) J.C. had owed Fimbres approximately 1.2 million dollars; (3) J.C. had provided Fimbres with a quitclaim deed to his father's property as collateral for his debt, but the deed failed to transfer any interest in the property to Fimbres; (4) Fimbres had sent threatening text messages to J.C. approximately six months before the shooting; (5) J.C. had subsequently provided guns to his partner and sons for protection; (6) Fimbres had texted the mother of his child approximately one month before the shooting, referring to the 1.2-million-dollar debt and stating, "a thief can run but he can't hide"; (7) Fimbres had owned the gold SUV found burning near the shooting scene; and (8) head stamps on bullet casings found at the scene of the shooting matched casings found near the burning SUV and a live round of ammunition found inside Fimbres's house. *See State v. Stuard*, 176 Ariz. 589, 603 (1993) (no distinction between circumstantial and direct evidence).

¶23 The jury could reasonably conclude from the evidence that Fimbres had been involved in the shooting and accordingly find him guilty of first-degree premeditated murder, either as a principal or as an accomplice. *See* § 13-1105(A)(1); § 13-303(A)(3). Although Fimbres points to conflicting testimony, this does not render the evidence insufficient to support his conviction. *See Mercer*, 13 Ariz. App. at 2; *West*, 226 Ariz. 559,

¶ 16. And, to the extent he asks us to reweigh the evidence and credibility of witnesses on appeal, such is beyond our appellate purview. *See Buccheri-Bianca*, 233 Ariz. 324, ¶ 38; *State v. Bustamante*, 229 Ariz. 256, ¶ 5 (App. 2012) ("credibility of witnesses and the weight given to their testimony are issues for the jury").

¶24 As to Fimbres's contention that the jury's verdicts were "impossible" and indicate a lack of sufficient evidence supporting his conviction, we disagree. Indeed, the case Fimbres relies on in support of his argument, *State v. Hansen*, 237 Ariz. 61, ¶ 21 (App. 2015), is inapplicable. In that case, the jury returned contradictory verdicts on a single count, finding the defendant guilty of the greater offense but not guilty of the lesser-included offense. *See id.* ¶ 3. However, in this case, the jury found Fimbres guilty of first-degree premeditated murder but acquitted him of five *separate* charges. As the state argues, "[a]t most, this demonstrates an inconsistent verdict." Inconsistent verdicts are permissible in Arizona, *Gusler v. Wilkinson*, 199 Ariz. 391, ¶ 25 (2001); *State v. Zakhar*, 105 Ariz. 31, 32 (1969) ("consistency between the verdicts on the several counts of an indictment is unnecessary"), as the "inconsistency might not represent an error detrimental to the defendant but instead could be a favorable error or the result of jury nullification, compromise, or lenity," *Hansen*, 237 Ariz. 61, ¶ 20. "We do not guess about what the jury 'really meant' by its verdicts . . . ." *Id.* (quoting *United States v. Powell*, 469 U.S. 57, 68 (1984)). Because the evidence was sufficient to support Fimbres's conviction, the trial court did not err in denying his Rule 20 motions.

Motion for New Trial

¶25 Fimbres argues the trial court abused its discretion in denying his motion for a new trial filed pursuant to Rule 24.1, Ariz. R. Crim. P., relying on his arguments that J.C.'s statement lacked foundation and therefore was not admissible as a dying declaration and that the evidence was insufficient to support his conviction for first-degree premeditated murder. As discussed above, however, the court did not abuse its discretion in admitting J.C.'s statement, and the evidence was sufficient to support Fimbres's conviction. His argument concerning the denial of his motion for new trial fails.

Prosecutorial Misconduct

¶26 In supplemental briefing, relying on *State v. Murray*, 250 Ariz. 543 (2021), Fimbres argues the state "committed fundamental error by misleading the jury as to its burden of proof" when it used the phrase

"totality of the evidence" during its closing argument. Because Fimbres did not object at trial to the alleged prosecutorial misconduct, we review only for fundamental error. *See id.* ¶ 14. Review of a single, unobjected-to claim of prosecutorial misconduct or error requires us to determine "(1) whether it constitutes prosecutorial error; (2) if so, whether the error was fundamental; and (3) if fundamental, whether the error was prejudicial." *Id.* ¶ 17.

¶27 "[T]he first step in fundamental error review is determining whether trial error exists." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). "Prosecutors are given 'wide latitude' in presenting closing argument to the jury," *State v. Goudeau*, 239 Ariz. 421, ¶ 196 (2016) (quoting *State v. Comer*, 165 Ariz. 413, 426 (1990)), however, "their prerogative to argue their version of the evidence does not sanction a misstatement of law," *Murray*, 250 Ariz. 543, ¶ 18. Specifically, as relevant here, the state may not improperly argue the burden of proof. *See id.* ¶ 40; *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 88 (2018).

¶28 Before closing arguments, the trial court instructed the jury that "[t]he State must prove guilt beyond a reasonable doubt, based upon the evidence," "[t]he State has the burden of proving the defendant guilty beyond a reasonable doubt," which means "the State must prove each element of each charge beyond a reasonable doubt," and "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." At closing, the state argued:

> When you look at the totality of the evidence, it's clear, the person to whom $1.2 million was owed was Anthony Fimbres, the person who had 223 and 556 ammunition in his house, the ammunition calibers used to kill the victim, yet no guns to match those bullets, was Anthony Fimbres.
>
> The person who purchased a Toyota Sequoia from Alvarez and Lopez, in the weeks before this killing, was Anthony Fimbres. And the person who was disrespected, repeatedly by the victim, had to do something about it, is this defendant.
>
> And for those reasons, the evidence in this case shows this defendant is guilty of first-

> degree murder, aggravated assault, endangerment, drive-by shooting, [and] discharging at a non-residential structure. For these reasons the State ask[s] you to find him guilty and hold him accountable for taking [J.C.]'s life.

Neither party discussed the reasonable-doubt standard during closing arguments.

¶29 Fimbres contends the state erred in failing to refer to the reasonable-doubt standard in its closing argument and instead "ask[ing] the jury to find Fimbres guilty based on the 'totality of the evidence.'" He argues the state's presentation of this "relaxed standard," in combination with testimony from the state's witnesses, misled the jury and "steer[ed it] away from proof beyond a reasonable doubt." Fimbres points to a detective's testimony that he had found probable cause to arrest Fimbres based on the "totality of the evidence" and had concluded a text message was related to narcotics based on the "totality of the story," as well as a defense investigator's reference to the "totality of the circumstances." Thus, he concludes, the state "inject[ed] into Fimbres' defense the diluted burden of proof, urging the jury to apply the same totality standard to the circumstances it enumerated as the police had in deciding whether or not to arrest Fimbres," thereby relieving the state of its "constitutionally required burden." *Murray*, 250 Ariz. 543, ¶ 19.

¶30 The state responds that it "gave no indication it was even discussing the standard of proof when those statements were made, let alone attempting to redefine the reasonable-doubt standard, as occurred in *Murray*." Instead, it asserts it referred to the "totality of the evidence" in arguing how the jury "should *approach the evidence*" as a "method of analysis, not a standard of proof." Further, it contends, "witnesses used the phrase when they were explaining why they reached various conclusions in their respective investigations, not concerning a standard of proof for criminal liability." And, it argues "[i]t is inconceivable that the jury would hear passing references to three different formulations of a common phrase on separate days of a multi-week jury trial, recall these references when the State used a similar phrase in closing argument, and then create their own standard of proof."

¶31 Contrary to Fimbres's contention, the state did not misstate the reasonable-doubt standard by referring to the "totality of the evidence" in summarizing the evidence supporting its case during closing argument.

See Bible, 175 Ariz. at 602 ("during closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions"). As the state points out, it "never mentioned reasonable doubt when discussing the evidence that demonstrated Fimbres' guilt, and was not defining a standard of proof for the jury." And, the jury was instructed to consider "*all* of the evidence in the light of reason, common sense and experience." (Emphasis added.) Because the state's reference to the "totality of the evidence" did not conflict with or dilute the reasonable-doubt standard, about which the jury was properly instructed, we find no error, fundamental or otherwise.

Disposition

¶32 For the foregoing reasons, we affirm Fimbres's conviction and sentence.