IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ISAIAH JORDAN FRANKO,
Appellant.

No. 2 CA-CR 2020-0083
Filed July 27, 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NOT FOR PUBLICATION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. CR20181807001
The Honorable Javier Chon-Lopez, 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

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Isaiah Franko appeals from his convictions and sentences for felony murder, kidnapping, armed robbery, aggravated robbery, aggravated assault, abandoning or concealing a dead body, theft of means of transportation, attempted aggravated robbery, and attempted burglary. He argues the trial court erred in denying his motions to suppress evidence and his motion for judgments of acquittal on the attempted aggravated robbery and attempted burglary counts. He also asserts the court erred in admitting certain photographic evidence over his objection. For the reasons that follow, we affirm.

Factual and Procedural Background[1]

¶2 We view the evidence in the light most favorable to upholding Franko's convictions and sentences. *See State v. Rushing*, 243 Ariz. 212, n.2 (2017). Late on the night of April 25, 2018, T.A. was attacked in the parking lot outside the store where he worked after he refused to surrender the keys to his car. His assailants then placed him in the back seat of his car. Video surveillance recorded his car early the next morning

[1]In setting forth the factual history, Franko's counsel cites extensively to the defense's opening statements at trial, rather than citing directly to witness testimony or other evidence admitted at trial. Counsel should take care in the future to cite directly to trial testimony rather than to attorney arguments, which do not constitute evidence. *See* Ariz. R. Civ. App. P. 13(a)(5) (statement of facts in opening brief must contain "appropriate references to the record"), (a)(7)(A) (argument in opening brief must contain "appropriate references to the portions of the record on which the appellant relies"), (d) ("In any brief, references to evidence or other parts of the record must include a citation to the index, exhibit, or page of a certified transcript, authorized transcription, narrative statement, or agreed-upon statement where such evidence or other material appears."); *State v. Gonzales*, 105 Ariz. 434, 437 (1970) (attorney argument not evidence).

in the parking lots of a nearby store and gas station. Later that morning, police recovered the car, which had been crashed and abandoned not far from where it was stolen. Officers found a bloody machete on the car's front passenger floorboard, together with T.A.'s wallet. Blood was pooled in the backseat.

¶3 Around the same time, police officers located and detained Eric Reino. Reino initially denied involvement with the incident but eventually admitted his participation and directed police to T.A.'s body. Reino asked police to "let Mr. Franko go" multiple times. He provided police with several conflicting accounts of the incident, including that he had hit T.A. in the head with the machete, that he had stabbed T.A. with the machete, that he had stabbed T.A. "all over" with a different knife that broke in the process, and that he had been the one to drive T.A.'s car. He also stated Franko's only involvement had been to open the back door of the car to place T.A. inside and that he had sent Franko into the nearby store to purchase some items.

¶4 Police also arrested Franko after observing him flee the site of T.A.'s crashed car. Upon searching Franko, police seized a broken, bloody knife, a receipt from the nearby store, and a cell phone from his pockets. Police also seized a backpack Franko had with him.

¶5 Franko told police he had stabbed someone in self-defense at a bus station. However, DNA testing determined the blood on the knife belonged to T.A. T.A.'s blood was also found on Franko's clothing. No disturbance had been reported at the bus station where Franko claimed to have stabbed someone in self-defense.

¶6 Franko denied having attacked T.A., taking T.A.'s car, or having gone to the nearby store. However, a surveillance video from the store depicted him getting out of the driver's seat of the stolen vehicle and entering the store. And, the store receipt found in Franko's pocket was time-stamped around 1 a.m. on April 26, about an hour after T.A. had been killed. The receipt showed, among other things, that Franko had purchased disposable latex gloves and two bandanas. Officers found a package of latex gloves and two bandanas in the stolen vehicle.

¶7 Another surveillance video depicted Franko exiting the driver's seat of T.A.'s car at a gas station. An employee of that gas station testified that around 2 a.m. on April 26, two men attempted to open the locked door to the station's convenience store, pulling unusually hard on

the door's handle. Both men had partially covered their faces. When the employee looked at the men, they left quickly without attempting again to enter the store, prompting the clerk to push the panic button. The employee then saw the men run around to the back of the store and depart in a red car.

¶8 An autopsy revealed that T.A. had sustained multiple non-lethal injuries to his head, which could have been caused by a machete. He had also suffered multiple lethal stab-wound injuries to his chest and abdomen, all inflicted by something other than a machete.

¶9 After a seven-day trial, a jury found Franko guilty of the offenses noted above, and the trial court sentenced him to concurrent terms of imprisonment for the felony murder, kidnapping, armed robbery, aggravated robbery, and theft of means of transportation convictions, the longest of which was life in prison without the possibility of release for at least twenty-five years. Those terms were to be followed by consecutive and concurrent prison terms totaling four years for the remaining convictions. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Denial of Motion to Suppress Evidence

¶10 We review a trial court's denial of a motion to suppress for abuse of discretion, but we review constitutional issues de novo. *Rushing*, 243 Ariz. 212, ¶ 56. "[W]e consider only the evidence presented at the suppression hearing, and view it in the light most favorable to upholding the court's ruling." *State v. Blakley*, 226 Ariz. 25, ¶ 5 (App. 2010) (citation omitted). And, "[w]e may affirm on any basis supported by the record." *State v. Wassenaar*, 215 Ariz. 565, ¶ 50 (App. 2007).

Warrantless Search of Backpack

¶11 Franko argues the trial court erred in denying his motion to suppress evidence collected in what he characterizes as a warrantless search of his backpack.[2] Specifically, he argues that because an alleged search occurred around 8:00 a.m., about six hours after his arrest, it did not constitute a valid search incident to arrest. He further argues that no exigent circumstances justified a warrantless property search at that time. He thus maintains the alleged search violated his protection against

[2]Franko, however, does not identify any specific property or incriminating evidence found in, or related to, his backpack.

unreasonable search and seizure as provided by the Fourth Amendment to the United States Constitution.

¶12 The opening brief fails to acknowledge, however, that the trial court also denied Franko's motion to suppress on the grounds that any stationhouse search of the backpack was lawful as an inventory search and under the inevitable discovery doctrine.[3] The court specifically noted that any "alleged searches" conducted at the police station "were routine inventory and safeguarding procedures necessary to preserve and safekeep the evidence." And because Franko's backpack "was in lawful police custody when police officers viewed and manipulated the evidence at the station house," the court found that, by a preponderance of the evidence, any items found inside the backpack "would also have been inevitably discovered pursuant to the warrant" police obtained around 10:00 a.m. on April 26.

¶13 Even "[i]llegally obtained physical evidence may be admitted if the State can demonstrate by a preponderance of the evidence that such evidence inevitably would have been discovered by lawful means." *State v. Davolt*, 207 Ariz. 191, ¶ 35 (2004). One lawful method of discovering evidence occurs when police conduct an inventory search, or a search of "the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police stationhouse incident to booking and jailing the suspect." *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983); *see also State v. Snyder*, 240 Ariz. 551, ¶ 26 (App. 2016). An inventory search is a "well-defined exception to the warrant requirement." *Lafayette*, 462 U.S. at 643.

¶14 On this basis, the trial court correctly denied Franko's motion to suppress evidence items related to his backpack. At the suppression hearing, the court heard testimony and received photographic evidence indicating that police lawfully seized and searched Franko's backpack incident to his arrest. Specifically, officers testified that when they initially

[3]Because Franko fails to argue the trial court erred in regard to these alternative grounds on which it found the stationhouse search of his backpack lawful, he has waived any such claim of error. *See State v. Bolton*, 182 Ariz. 290, 298 (1995); *see also* Ariz. R. Crim. P. 31.10(a)(7)(A) (opening brief should contain argument "with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record"). We address them here only to the extent necessary to affirm the trial court's ruling. *See Wassenaar*, 215 Ariz. 565, ¶ 50.

had arrested Franko and opened the backpack, they placed items from the backpack into unsealed bags. The officer who conducted the objected-to stationhouse search similarly testified that "everything was in evidence bags" by the time he looked through the backpack. The court also heard testimony that around 10:00 a.m. on the day Franko was arrested, police had obtained a warrant authorizing a search of Franko's person. And a detective testified that he had removed the items from the backpack and placed them into sealed bags as part of placing them into evidence, shortly before Franko was sent to the jail around 4:00 or 5:00 p.m.

¶15 Given this evidence, the trial court correctly concluded that any incriminating items viewed during the alleged 8:00 a.m. search of Franko's backpack would inevitably have been lawfully discovered later that day, either pursuant to the warrant police obtained at 10:00 a.m. or as part of the routine inventory search conducted near the time Franko was transported to the jail later that day. *See Davolt*, 207 Ariz. 191, ¶ 35.

Warrantless Cell Phone Search

¶16 Franko also argues his Fourth Amendment rights were violated when officers conducted two warrantless searches of his cell phone. He argues both searches violated his right to privacy under the Fourth Amendment, and thus the trial court erred in denying his motion to suppress data obtained through those searches. Specifically, he maintains that because several hours passed between his arrest and the searches, they were not conducted incident to arrest, no information was urgently necessary, and "any potential exigency that may have once justified such a warrantless search had passed." He further argues that because he was not in possession of the phone, there was no risk of the data being destroyed.

¶17 "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' . . . ." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). A warrant is generally required before officers may search a cell phone. *Riley v. California*, 573 U.S. 373, 401 (2014). However, "case-specific exceptions," including an exigency exception, "may still justify a warrantless search of a particular phone." *Id.* at 401-02. The need to assist a seriously injured person falls squarely within the exigency exception. *See id.*; *see also Carpenter v. United States*, ___ U.S. ___, ___, 138 S. Ct. 2206, 2222-23 (2018) (Fourth Amendment's protection against warrantless cell-site data collection "does not limit [police] ability to respond to an ongoing emergency"); *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (Fourth Amendment "does not bar police officers from making warrantless entries

and searches when they reasonably believe that a person within is in need of immediate aid").

¶18 After Franko was arrested, police scrolled through the settings menu of his phone to obtain the device's phone number. They then used the phone number to file an "exigency form" with Franko's phone carrier, requesting call records and cell-site information for his phone's recent movements. Officers testified that they had requested the records on an exigency basis because they were still attempting to locate T.A., whom they believed to be, at minimum, seriously injured based on the large volume of blood found in his vehicle and who was not at his residence when other officers conducted a welfare check. They further testified that they had made the exigent circumstances request because cell phone carriers often take days or weeks to return records requested by search warrant, whereas records for exigency requests are returned much more quickly. Police later obtained warrants for the cell phone information.

¶19 The trial court did not abuse its discretion in denying Franko's motion to suppress the cell phone data because exigent circumstances justified the warrantless searches. As the court reasoned, "it was reasonable for police to elect to submit an exigency form" under these circumstances. And in any event, as with the alleged search of Franko's backpack, the same evidence collected before obtaining a warrant inevitably would have been discovered after police obtained the valid search warrants for Franko's phone and cell-site data. *See Davolt*, 207 Ariz. 191, ¶ 35. Thus, we find no error.

Rule 20 Motion

¶20 Franko also argues the trial court erred in denying his motion under Rule 20, Ariz. R. Crim. P., for judgments of acquittal on the charges of attempted aggravated robbery and attempted burglary in the third degree. He contends the state failed to provide substantial evidence to support either conviction. We review de novo whether the evidence was sufficient to support Franko's attempted aggravated robbery and attempted burglary convictions, viewing that evidence in the light most favorable to sustaining the jury's verdicts. *See State v. West*, 226 Ariz. 559, ¶ 15 (2011).

¶21 To defeat a Rule 20 motion for a judgment of acquittal, the state must have presented "substantial evidence," or evidence that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*,

125 Ariz. 417, 419 (1980). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also State v. Mathers*, 165 Ariz. 64, 66 (1990). If "reasonable minds may differ on inferences drawn from the facts," it is not appropriate for a trial court to enter a judgment of acquittal. *West*, 226 Ariz. 559, ¶ 18 (quoting *State v. Lee*, 189 Ariz. 590, 603 (1997)).

¶22 As relevant here, to secure a conviction for attempted aggravated robbery, the state was required to prove that Franko had attempted the crime by intentionally taking "any step in a course of conduct planned to culminate" in aggravated robbery or engaged "in conduct intended to aid another to commit" aggravated robbery. A.R.S. § 13-1001(A)(2)-(3). And to prove Franko had committed aggravated robbery, the state had to present evidence that, with the aid of at least one accomplice, A.R.S. § 13-1903(A), he had threatened or used force against any person "in the course of taking any property of another from his person or immediate presence and against his will," with the intent to coerce or prevent resistance against surrender of the property, A.R.S. § 13-1902(A).

¶23 As outlined above, the state presented evidence that Franko and Reino had attacked T.A. violently before taking his vehicle, then purchased several items from the nearby store, including two bandanas, and later attempted to enter a gas station convenience store around 2:00 a.m. As captured by surveillance video and as attested by the convenience store employee, a bandana or other cloth had partially obscured both men's faces when they attempted to enter the store. Both Franko and Reino "had something in their hands." The employee also testified that the men had parked the vehicle behind the store even though there was only one other car in the front lot at the time. Read in the light most favorable to sustaining the verdict, these facts are sufficient for a reasonable trier of fact to have inferred that Franko and Reino had intentionally taken steps toward forcibly robbing the convenience store, or at least threatening to use force to do so.

¶24 Similarly, to secure a conviction for attempted burglary in the third degree, as relevant here, the state needed to show that Franko had attempted to enter a nonresidential structure with the intent to commit any theft or felony. A.R.S. § 13-1506(A)(1). Robbery is a felony. § 13-1902(B). The facts presented to sustain the attempted aggravated robbery charge are likewise sufficient to support a reasonable juror's finding that Franko had

committed attempted burglary in the third degree. *See Jones*, 125 Ariz. at 419. Specifically, these facts support the reasonable inference that Franko attempted to enter the convenience store and commit the felony offense of robbery. Therefore, the trial court also did not err in denying Franko's Rule 20 motions for judgments of acquittal on the charges of attempted aggravated robbery and attempted burglary in the third degree.

Photographs of Victim's House[4]

¶25 Franko also argues the trial court erred in admitting into evidence photographs of T.A.'s residence. We review the court's admission of photographic evidence for an abuse of discretion. *State v. Goudeau*, 239 Ariz. 421, ¶ 150 (2016). And, we review this objected-to admission of evidence for harmless error. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005).

¶26 On the second day of trial, Franko moved to preclude a series of photographs of the interior and exterior of T.A.'s residence. The trial court denied the motion to preclude the photographs, reasoning they provided "background information" regarding the police officers' search for T.A. and that they were not prejudicial. Franko re-asserts on appeal that that these photographs were irrelevant, prejudicial, and served no probative value.

¶27 No reversible error occurred through the admission of the photographs because any hypothetical error would be harmless given the substantial evidence supporting the jury's verdicts. *See Henderson*, 210 Ariz. 561, ¶ 18. "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.* The photographs of T.A.'s residence were neither gruesome nor inflammatory, and we see nothing in them that would unfairly prejudice Franko. *See Goudeau*, 239 Ariz. 429, ¶¶ 151, 156 (even photograph of deceased victim depicting trajectory of gunshot wound and some blood apparent not unduly inflammatory). Further, as set forth above, the state presented ample evidence at trial to support the verdicts, which were "surely unattributable to" any hypothetical error in the

[4]In his opening brief, Franko also objects to the admission of a certain photograph depicting T.A. However, he concedes in his reply brief that the trial court precluded this photograph, and thus we do not address the argument.

admission of the photographs. *State v. Leteve*, 237 Ariz. 516, ¶ 25 (2015) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

Disposition

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