

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

JAVIER EFRAIN FIGUEROA,  
*Appellant.*

No. 2 CA-CR 2022-0046  
Filed January 27, 2023

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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NOT FOR PUBLICATION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).

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Appeal from the Superior Court in Pinal County  
No. S1100CR201900239  
The Honorable Steven J. Fuller, Judge

**AFFIRMED**

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COUNSEL

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Alice M. Jones, Acting Deputy Solicitor General/Chief of Criminal Appeals  
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**MEMORANDUM DECISION**

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Sklar concurred.

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V Á S Q U E Z, Chief Judge:

¶1 Javier Figueroa appeals from his conviction and sentence for attempted second-degree murder. He argues the trial court fundamentally erred by instructing the jury that he could commit attempted second-degree murder without intending to cause death. He also argues the state presented insufficient evidence to support that conviction. We affirm.

**Factual and Procedural Background**

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict. *See State v. Fierro*, 254 Ariz. 35, ¶ 2 (2022). In 2018, Figueroa was living in Casa Grande with his girlfriend, A.J., their one-year-old daughter, and Figueroa's brother, Angel. Figueroa and A.J. had arguments about his drinking, coming home late, and spending time with his friends instead of her and the baby. A.J.'s parents offered and prepared for her and the baby to move to their residence in Las Vegas. One evening in September 2018, Figueroa texted A.J. asking if she was home, and when she responded she was in Las Vegas, he replied, "[Yo]u better not be." A few hours later, while A.J. was sitting on the bed in the master bedroom, Figueroa returned to the house, walked into the bedroom, and shot A.J. in the head. Angel went to the bedroom and saw Figueroa holding a handgun and A.J. lying on the bed with a gunshot wound to her head. There was an open suitcase on the floor, and other clothing items had been packed into bags. The baby was also next to A.J. when she was shot, but had not been physically harmed.

¶3 Figueroa told Angel to call 9-1-1 and report that A.J. had been shot during a robbery. Figueroa then left the house with the baby, hid two handguns near an abandoned air conditioning unit, and hid his cell phone somewhere else. Figueroa eventually returned with the baby and asked law enforcement, who had arrived at the scene, what had happened to A.J. Officers observed that Figueroa had blood on various parts of his body. He was then handcuffed and placed in a patrol vehicle.

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¶4 When a detective interviewed Figueroa, he gave inconsistent and changing accounts of what had happened. His claims included that: he had come home and shot A.J., believing her to be an intruder; he had picked up the gun, which was already in the house, and while he was “checking” and “testing” it before putting it away, it “went off”; he had retrieved the gun from A.J.’s car and brought it into the house; and, he had not intended to shoot A.J., and had not realized the gun was loaded when he “squeezed the trigger.”

¶5 Figueroa told the detective he only had one gun which he had thrown out of the car into the desert after he left the house. But at trial, Angel testified Figueroa had told him he did not “remember which one [he] shot with.” He instructed Angel to find two guns he had hidden in an abandoned air conditioning unit and “put them away somewhere,” so Angel buried them in the desert. Figueroa also told the detective he had misplaced his cell phone earlier in the day, but Angel testified Figueroa had asked him to retrieve the phone from a wash.

¶6 A few months later, Angel assisted law enforcement in recovering the buried guns and turned over Figueroa’s cell phone. A.J. survived the shooting, but required prolonged treatment in an intensive care unit and suffered “severe short-term and long-term memory losses” and aphasia.

¶7 Figueroa was charged with attempted second-degree murder, aggravated assault, child abuse, and tampering with physical evidence. A jury found him guilty of all counts, and the trial court sentenced him to concurrent prison terms, the longest of which is an aggravated term of twenty-seven years. Figueroa appealed,<sup>1</sup> and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

## Discussion

### Attempted Second-Degree Murder

¶8 Figueroa argues the trial court improperly instructed the jury on attempted second-degree murder because it “allowed them to convict [him] if he intended to cause A.J. serious physical injury.” Figueroa acknowledges he did not object to the instruction below, and we therefore

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<sup>1</sup>Figueroa has raised no argument relating to his convictions or sentences for aggravated assault, child abuse, and tampering with physical evidence, and we therefore affirm them.

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review for fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).

¶9 The trial court instructed the jury as follows:

The crime of attempted second-degree murder requires proof that the defendant:

Without premeditation, intentionally committed any act that was a step in a course of conduct that the defendant believed would cause the death of [A.J.] by conduct which the defendant knew would cause her death or serious physical injuries.

Figueroa contends this language is similar to the fundamentally erroneous language in *State v. Ontiveros*, 206 Ariz. 539, ¶¶ 5, 10-11, 17, 19 (App. 2003), *State v. Dickinson*, 233 Ariz. 527, ¶¶ 8, 11-12 (App. 2013), and *State v. Juarez-Orci*, 236 Ariz. 520, ¶¶ 9, 16-17 (App. 2015). He further asserts that comparing this instruction to the one newly fashioned by our supreme court in *Fierro*, 254 Ariz. 35, ¶ 18, removes any doubt that giving the instruction was fundamental error.

¶10 The state argues that because the trial court included in its instruction the phrase “by conduct that the defendant believed would cause the death of [A.J.],” it is distinguishable from the erroneous instructions in *Fierro*, *Ontiveros*, *Juarez-Orci*, and *Dickinson*. The state maintains that in this case, “the instruction required the jurors to find Figueroa believed his conduct ‘would cause the death’ of the victim—either by conduct that would directly cause [A.J.]’s death or by causing serious physical injuries that would cause her death—the inclusion of the phrase ‘serious physical injuries’ was mere surplusage.” We need not decide whether the court fundamentally erred because even assuming it had, *see, e.g., State v. Felix*, 237 Ariz. 280, ¶ 14 (App. 2015) (instructing jury on nonexistent theory of criminal liability is fundamental error), Figueroa has not met his burden of showing he was prejudiced by any error, *see Escalante*, 245 Ariz. 135, ¶ 21; *see also Fierro*, 254 Ariz. 35, ¶ 20.

¶11 The relevant test for prejudice is whether “a reasonable, properly instructed jury ‘could have reached a different result’” absent the erroneous instruction. *Dickinson*, 233 Ariz. 527, ¶ 13 (quoting *State v. James*, 231 Ariz. 490, ¶ 15 (App. 2013)). We evaluate jury instructions in the context of case-specific factors, including the evidence at trial, asserted defenses,

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and parties' arguments to the jury. *James*, 231 Ariz. 490, ¶ 15; *Fierro*, 254 Ariz. 35, ¶ 21.

¶12 The evidence at trial, viewed in the light most favorable to sustaining Figueroa's conviction and resolving all reasonable inferences against him, *see Fierro*, 254 Ariz. 35, ¶¶ 2, 27, supported the state's theory of the case: that Figueroa had committed attempted second-degree murder by intending, but failing, to kill A.J. Specifically, the evidence showed that Figueroa and A.J. had been arguing and that A.J. had talked about leaving Figueroa to live with her parents in Las Vegas, having packed several bags on the night of the shooting. Figueroa had retrieved the gun from A.J.'s car and brought it into the residence. He initially told the detective that he had seen A.J. sitting on the bed and admitted he had purposely "pulled the trigger," believing she was an intruder. But right after shooting A.J., Figueroa directed his brother to lie to the 9-1-1 operator about what had happened; he never believed there was an intruder in the house. Figueroa then left the residence and hid the two guns and cell phone. He later lied to the detective about where the weapons and phone could be found, and instructed his brother to further conceal the weapons and his phone.

¶13 Figueroa contends that the "factual dispute of the trial centered around whether Figueroa intended to kill A.J. or whether this was a horrible tragic accident from mishandling a loaded gun" and thus, the faulty instruction went to the heart of his case. We recognize Figueroa's defense that he shot A.J. accidentally generally implicates *mens rea*. *See* A.R.S. § 13-105(10)(a)-(d) (defining culpable mental states). However, we disagree that the defense was affected by any potential error with the jury instruction. *See Fierro*, 254 Ariz. 35, ¶ 25. Figueroa never argued that he only meant to cause serious physical injuries to A.J. but not kill her. Instead, he argued the evidence established that he lacked *any* intent to cause *any* harm. And if the jury believed the evidence supported this defense, it necessarily would have acquitted him of attempted second-degree murder regardless of the instruction. *See State v. Postell*, 20 Ariz. App. 119, 122 (1973) ("If the shooting had been accidental, the element of intent would have had to be absent.").

¶14 Figueroa also asserts that the state did not "make much of an argument that [he] intended to kill A.J." but instead argued he was guilty because he hid the guns, did not call 9-1-1, and lied to law enforcement. The record belies that claim. To be sure, the state argued that Figueroa's leaving the scene, lying, and concealment of evidence constituted circumstantial evidence of his consciousness of guilt. *See State v. Allen*, 253 Ariz. 306, ¶ 115 (2022) (concealment of crime and untruthfulness establishes

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consciousness of guilt). But those arguments were in support of the state's unequivocal theory that Figueroa intended to kill A.J.

¶15 Importantly, the state never suggested the jury could base its attempted second-degree murder verdict on anything less than Figueroa's intent to kill, and it "was equally emphatic that the evidence could yield no other conclusion." *Fierro*, 254 Ariz. 35, ¶ 33. While a prosecutor's accurate statement of the law cannot correct a trial court's erroneous instruction, it can ameliorate it "such that it may be exceedingly difficult for the defen[dant] to prove prejudice under fundamental error review." *Id.*

¶16 Moreover, contrary to Figueroa's argument, the state did not "twice invite[] the jury to convict on the attempted second-degree murder charge if [Figueroa] knew his action would cause death or serious injury." Figueroa's first record citation refers to the trial court's reading of the attempted second-degree murder instruction. Regarding the second purported invitation, Figueroa quotes an isolated portion of the state's argument: "Did he know that his actions would cause her death or serious physical injury? I can't imagine a person not knowing that pointing a gun that close to someone'[s] head and pulling the trigger would not cause death, let alone serious physical [in]jury." While this argument refers to the improper "serious physical injury" language of the instruction, when viewed in the context of the state's entire argument, the state did not invite a guilty verdict on less than intent to kill. In the comments that immediately preceded the one to which Figueroa refers, the state conceded there was no evidence of premeditation. But it argued: "Did he intentionally commit an act that was a step in the course of conduct that he believed would cause the death of [A.J.], he pointed a gun at her and fired it." As in *Fierro*, this statement did not exploit any error in the instruction. *Id.* ¶ 31. Under these circumstances, Figueroa has not shown that a reasonable, properly instructed jury could have reached a different verdict. *See id.* ¶ 21; *Dickinson*, 233 Ariz. 527, ¶ 13.

### **Sufficiency of the Evidence**

¶17 Figueroa similarly argues the trial court erred by denying his motion, made under Rule 20, Ariz. R. Crim. P., for a judgment of acquittal of attempted second-degree murder, because the state presented insufficient evidence that he intended to kill A.J. We review de novo whether sufficient evidence supports a conviction. *See State v. West*, 226 Ariz. 559, ¶ 15 (2011). "[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

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reasonable doubt.” *Id.* ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). We will reverse only if no substantial evidence supports the conviction. *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005).

¶18 Figueroa challenges the state’s evidence as circumstantial, but criminal intent is typically shown by circumstantial evidence. *State v. Bearup*, 221 Ariz. 163, ¶ 16 (2009). “There is no distinction in the probative value of direct and circumstantial evidence. A conviction may be sustained on circumstantial evidence alone.” *State v. Green*, 111 Ariz. 444, 446 (1975). And to the extent the record contains some conflicting evidence, “it was for the jury to weigh the evidence and determine the credibility of the witnesses.” *State v. Williams*, 209 Ariz. 228, ¶ 6 (App. 2004). Based on the evidence presented at trial, as outlined above, we conclude the evidence was sufficient for the jury to find Figueroa guilty of attempted second-degree murder.

**Disposition**

¶19 We affirm Figueroa’s convictions and sentences.