NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS GRANT GARCIA, Appellant.	2 CA-CR 2009-0278 DEPARTMENT A <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084112

Honorable John S. Leonardo, Judge

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura Chiasson — Tucson
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B R A M M E R, Presiding Judge.

¶1 Jesus Grant Garcia appeals from his convictions and sentences for first-degree murder and weapons misconduct by possessing a dangerous weapon as a

prohibited possessor. He argues the trial court erred by denying his motion to sever the prohibited possession count from his first-degree murder count; by denying his jury challenge based on *Batson v. Kentucky*, 476 U.S. 79 (1986); by denying his motion for a mistrial and/or preclusion of evidence based on the state's allegedly untimely disclosure of a witness; and by commenting improperly on the evidence by giving an unwarranted premeditation instruction. Garcia additionally asserts that the state presented insufficient evidence of his prior felony conviction, that the admission of documentary evidence of a prior conviction violated his right to confrontation, and that the court should not have ordered his sentences to be served consecutively. We vacate Garcia's conviction and sentence for prohibited possession but affirm his conviction and sentence for first-degree murder.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the afternoon of October 13, 2008, R.F. and R.M. went to a convenience store. While inside the store, R.F., a gang member, encountered Garcia, who belonged to a rival gang. After a verbal confrontation, R.F. and Garcia went outside the store to fight.

¶3 Once outside, Garcia produced a semiautomatic handgun and attempted to shoot R.F., but the gun failed to fire. Garcia manipulated the pistol and, as R.F. was running away, fired again, shooting R.F. in the back and killing him. Garcia and several companions then fled in a vehicle. A nearby plainclothes police officer saw the shooting

and followed the vehicle. Another officer who had joined in the chase saw Garcia throw a pistol from the vehicle's window. Garcia was arrested after the vehicle crashed into a trailer.

¶4 Garcia was charged with first-degree murder of R.F., aggravated assault of R.M., and possession of a deadly weapon by a prohibited possessor. After a four-day trial, a jury convicted him of first-degree murder and prohibited possession of a deadly weapon but acquitted him of aggravated assault. The trial court sentenced him to life in prison without possibility of parole for twenty-five years for the first-degree murder conviction and to a consecutive, aggravated, five-year prison term for prohibited possession. This appeal followed.

Discussion

Motion to Sever

¶5 Garcia first asserts the trial court erred by denying his pretrial motion to sever the prohibited possession count from his first-degree murder charge. We review a trial court's decision denying a motion to sever for an abuse of discretion. *State v. LeBrun*, 222 Ariz. 183, ¶ 5, 213 P.3d 332, 334 (App. 2009). Pursuant to Rule 13.4(a), Ariz. R. Crim. P., a trial court must grant a motion to sever offenses when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense."[1]

[1]To the extent Garcia contends joinder of the offenses was improper under Rule 13.3(a)(2), Ariz. R. Crim. P., he does not develop this argument in any meaningful way, and we do not address it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal).

A trial court abuses its discretion in denying a motion to sever if the defendant can establish that, at the time he moved to sever, he had demonstrated to the court that the failure to sever would result in "'compelling prejudice against which the trial court was unable to protect.'" *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995), *quoting State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983).

¶6 Because the offenses were joined pursuant to Rule 13.3(a)(2), Ariz. R. Crim. P., the trial court instructed the jury as follows:

> Evidence concerning a prior conviction has been admitted for the limited purpose of establishing the prohibited possessor allegation in count three. You may not consider evidence of a prior conviction as proof of the defendant's character or tendency to act in a particular manner. You are not to consider this evidence as proof that the defendant committed the crimes alleged in counts one and two and you are not to consider this evidence as proof that the defendant was in possession of a deadly weapon.

The court also instructed the jury that the state was required not only to prove Garcia's guilt of each offense separately but also to prove his guilt beyond a reasonable doubt. Our supreme court has made clear that "a defendant is not prejudiced [by the joinder of offenses] if the jury is (1) instructed to consider each offense separately, and (2) is advised that each offense must be proven beyond a reasonable doubt." *State v. Atwood*, 171 Ariz. 576, 613, 823 P.2d 593, 630 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *see also State v. Prince*, 204 Ariz. 156, ¶ 17, 61 P.3d 450, 454 (2003). We presume the jury followed those instructions. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶7 Moreover, the state emphasized during its closing argument that the jury could not consider Garcia's previous criminal conviction in determining whether he was guilty of first-degree murder or aggravated assault. And, had the offenses been tried separately, much of the same evidence would have been admissible in both trials. Although a modified version of the events at issue could have been presented at trial to demonstrate Garcia was in possession of a deadly weapon, many of the same eyewitnesses to the murder of R.F. and the alleged aggravated assault of R.M. would have been available to testify to that fact. *Cf. State v. Stuard*, 176 Ariz. 589, 596, 863 P.2d 881, 888 (1993) ("If the evidence of one crime would have been admissible in a separate trial for the others, it is unlikely that Defendant suffered prejudice by the court's denial of severance.").

¶8 Garcia, however, cites cases from other jurisdictions criticizing the effectiveness of limiting instructions to ward off prejudice when, as here, proof of one of the charged crimes requires proof of a prior criminal conviction. *See, e.g., United States v. Nguyen*, 88 F.3d 812, 817 (9th Cir. 1996); *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986); *United States v. Daniels*, 770 F.2d 1111, 1114, 1118 (D.C. Cir. 1985). None of these cases hold, however, that severance always is required. Instead, each recognizes that a trial court may take steps—including the use of jury instructions—to limit any potential prejudice and that a reviewing court should consider the record as a

whole, including the weight of the evidence, to determine if any prejudice occurred.[2] *See Nguyen*, 88 F.2d at 817 (in light of strong evidence of guilt, no error in denial of severance when jury properly instructed); *Lewis*, 787 F.2d at 1323 (severance warranted when instructions insufficient and evidence of guilt weak); *Daniels*, 770 F.2d at 1118 (no prejudice when court "demonstrated a sufficiently scrupulous regard for the defendant's right to a fair trial").

¶9 Here, the evidence of Garcia's prior conviction was redacted to conceal the nature of his previous crime, and the jury was instructed in accordance with Arizona law. *See Prince*, 204 Ariz. 156, ¶ 17, 61 P.3d at 454; *Atwood*, 171 Ariz. at 613, 823 P.2d at 630; *State v. White*, 160 Ariz. 24, 31, 770 P.2d 328, 335 (1989) ("[P]otential prejudice to a defendant may be mitigated by prohibiting the prosecution from revealing the nature of the prior convictions."). And the evidence that Garcia had committed first-degree murder was very strong—Garcia had agreed to fight R.F., produced a pistol and attempted to shoot R.F. with it, manipulated the pistol after it failed to fire the first time, and shot an unarmed, fleeing R.F. in the back. Particularly in light of the compelling evidence of Garcia's guilt, the trial court took sufficient steps to prevent any theoretical prejudice

[2]Moreover, although the cases Garcia cites appear to rely on the fact that prior felony convictions presumptively are precluded by the rules of evidence due to their inherent prejudice, we note that evidence of other criminal acts, irrespective of whether the defendant was convicted for those acts, also is precluded presumptively. *See* Ariz. R. Evid. 404(b). We therefore see no significant analytical difference between the joinder of charges when one requires proof of a prior conviction and the joinder of any other charges. In both situations the jury would hear evidence of criminal conduct by the defendant not related directly to the crimes charged.

resulting from joinder of the charges and therefore did not abuse its discretion in denying Garcia's motion to sever.[3]

Batson Challenge

¶10 Garcia next asserts the trial court erred in denying his *Batson* challenge. Garcia had objected during jury selection, asserting the state had used its peremptory strikes impermissibly to remove from the panel three of six Hispanic jurors, F., G., and N. The state explained that F.'s husband recently had been released from prison for a class four felony and that G. "had multiple relatives" who had served time in prison, "including one for murder." The state asserted it had struck N. because it did not think "he was being as candid with us as we hoped because he lives in a neighborhood that is totally [gang] oriented" yet described his neighborhood inconsistently "with [the state's] intelligence of the neighborhood" and might "be afraid to get involved" due to a fear of retaliation. The court denied Garcia's challenge, finding "the reasons given for the strikes are race neutral and are reasonable."

¶11 A trial court's analysis of a *Batson* challenge involves three steps. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). Initially, the party challenging the strike must make a prima facie "showing of discrimination on the basis of race, gender, or some other protected characteristic." *State v. Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d 160, 162 (App. 2001). The proponent must then provide a neutral explanation for

[3]We reject Garcia's argument that the trial court abused its discretion by relying in part on an unpublished decision. Although doing so could potentially be unwise, the court properly applied the law.

the strike. *Id.* Finally, the challenging party must persuade the court that the proffered reason is pretextual. *Id.* In this third step, the trial court must determine the credibility of the proponent's explanation and "'whether the proffered rationale has some basis in accepted trial strategy.'" *Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d at 793, *quoting Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). "Th[e] third step is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is [an appellate c]ourt." *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006). We therefore defer to the trial court's factual findings and will reverse only if they clearly are erroneous. *Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d at 793.

¶12 Garcia asserts the state's reasons for the contested peremptory strikes were pretextual. He contends one other juror had an uncle convicted of first-degree murder and the nephew of another had been arrested for driving while intoxicated, and the fact the state declined to strike those "non-Hispanic" jurors demonstrates its strikes of F. and G. were racially motivated. He additionally asserts the state's reasons for striking G. were "not accurate" because G. stated it was her "son's father," not her husband, who had gone to prison on drug charges, and a friend's husband, not a relative of G.'s, who had been convicted of murder. As to N., Garcia asserts the state's reasons were "at odds" with N.'s responses during voir dire and "nothing about his responses . . . indicate[d] he was being deceptive in any way."

¶13 Garcia failed to raise any of these concerns in the trial court. He asserts, nonetheless, that it was the court's obligation to conduct further inquiry to ascertain

whether the state's proffered reasons were pretextual. We disagree. The United States Supreme Court has emphasized that the defendant bears the ultimate burden of demonstrating the state's peremptory strikes were improperly motivated. *See Johnson v. California*, 545 U.S. 162, 170-71 (2005); *see also Snyder v. Louisiana*, 552 U.S 472, 476-77 (2008) (trial court determines if defendant has shown purposeful discrimination). Arizona law reflects this burden. *See Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d at 162 ("After a neutral basis has been offered, the opponent of the strike must persuade the trial court that the proponent's reason is pretextual and that the strike is actually based on race, gender, or another protected characteristic."). Thus, in the absence of any argument by the defendant that the prosecutor's reasons were pretextual, a trial court is not required to conduct its own examination.

¶14 In any event, Garcia's failure to have raised below the arguments he now makes on appeal makes appellate review of the trial court's decision impossible as we cannot determine from the record the race or ethnicity of the remaining jurors. Therefore, we cannot determine whether race motivated the state's decision to not strike jurors who, at least facially, were situated similarly to the stricken jurors. And, although Garcia asserts the state's reasons for striking N. were unsupported, the trial court was in the better position to evaluate that claim and concluded otherwise. *See Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845.

¶15 Our supreme court has made clear that a defendant waives "the untimely presentation of evidence to support *Batson* arguments otherwise properly raised." *State*

v. Cruz, 175 Ariz. 395, 398, 857 P.2d 1249, 1252 (1993); *see also State v. Holder*, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987) (*Batson* challenge does not present fundamental error and is waived if no timely objection is made). Because Garcia failed to make any argument in the trial court that the state's strikes were pretextual, the court did not err in concluding he had not met his burden of demonstrating the strikes were racially motivated. Accordingly, it did not err in rejecting his *Batson* challenge.

Disclosure Sanctions

¶16 Garcia next asserts the trial court erroneously denied his motion for a mistrial or sanctions for the state's failure to disclose timely a law enforcement witness and his written report. On the fourth day of trial, Garcia informed the court he had recently learned the state planned to call police detective Gerardo Diaz to provide a foundation for admitting the handgun Garcia had thrown from the vehicle. Garcia also pointed out that Diaz's report stated he had interviewed two witnesses—children at a nearby school—whose descriptions of the relevant events were different from the other eyewitnesses who had testified. Garcia stated he might have presented his defense differently had he been aware of the report and had interviewed those witnesses. On this basis, he asked the court to declare a mistrial. Alternatively, Garcia asked the court to preclude Diaz from testifying as a sanction for the state's late disclosure.

¶17 Diaz testified, outside the jury's presence, that he had interviewed two thirteen-year-old witnesses, S. and R., both presumably students at a nearby school. S. told Diaz she had seen several people arguing with R.F. in the convenience store parking

lot, had heard gunshots, and had seen a "blue Impala that sped out of the parking lot." S. stated that R.F. "appeared to have already been injured" "when the argument was happening." Diaz further stated S. had been "very detailed" in her description of R.F.'s clothes but had been "unable to give [Diaz] any kind of facial description or . . . specific details on the vehicle." Diaz testified that R. also had told him "about a blue Impala" and said he had seen "an arm of [sic] a black sleeve from the passenger side of the vehicle point a gun and shoot the victim." Diaz noted, however, that R. had "kind of changed his story a little bit and said he actually never heard a gunshot" and that R. had told him "he also needs glasses and couldn't see so well what was going on."

¶18 The trial court found the state had committed a disclosure violation but denied both Garcia's mistrial motion and his motion to preclude Diaz from testifying. The court explained there was "little to any prejudice to [Garcia] since the testimony that [the children] gave appears to lack credibility and is contradicted by the bulk of the evidence in the case."

¶19 The state, of course, was required to disclose Diaz as a witness, as well as any relevant reports, prior to trial. *See* Ariz. R. Crim. P. 15.1(b)(1). Rule 15.7 "authorizes the trial court to sanction a party who does not timely disclose material relevant to the case." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). Such sanctions may include the preclusion of evidence, dismissal, granting a mistrial, or granting a continuance. Ariz. R. Crim. P. 15.7(a)(1)–(3). Any sanction, however, "should have a minimal effect on the evidence and merits of the case." *Towery*, 186

Ariz. at 186, 920 P.2d at 308. "Absent a showing of abuse by the trial court, we will not disturb the trial court's choice of sanction or its decision not to impose a sanction." *Id.* The preclusion of evidence is "rarely an appropriate sanction," and the refusal to impose a sanction is generally not an abuse of discretion "if the trial court believes the defendant will not be prejudiced." *Id.* Diaz's trial testimony was entirely consistent with the testimony of one of Garcia's companions that the handgun had been thrown from the vehicle, and Garcia identifies nothing in the record suggesting Diaz's testimony was inaccurate. Notably, Garcia did not request that trial be continued so he could interview Diaz. Although Garcia asserts he was prejudiced because the state relied on the pistol in closing argument, that is not the type of prejudice relevant to this inquiry. Instead, Garcia must demonstrate he was prejudiced by the state's late disclosure—not by the evidence itself. He has failed to do so. Accordingly, we find no error in the trial court's decision not to sanction the state by precluding Diaz from testifying.

¶20 The state's failure to disclose Diaz's report describing what S. and R. claimed to have seen presents a closer question. The state is obligated to disclose material evidence in its possession that is favorable to the accused. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Brady v. Maryland*, 373 U.S 83, 87 (1963); *see also* Ariz. R. Crim. P. 15.1(b)(8). Evidence is favorable to the accused if it is exculpatory or impeaching. *Strickler*, 527 U.S. at 281-82. The evidence in Diaz's report was at least marginally favorable to Garcia. The children's description of the vehicle they saw leaving the scene differed from the descriptions given by other witnesses, which arguably

could have cast doubt on the testimony of those witnesses. And R.'s statement to Diaz that a shot had been fired from the vehicle is inconsistent with other eyewitness testimony.

¶21 But a determination that evidence is favorable to the accused does not end the inquiry. A defendant also must demonstrate prejudice by showing "'there is a reasonable probability' that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Id.* at 289. We agree with the trial court's conclusion that the state's late disclosure did not warrant a mistrial because it did not prejudice Garcia. Again, Garcia did not ask for a continuance to interview Diaz or the children and, based on Diaz's description of the children's statements, we see no reasonable likelihood the jury would have reached a different result even had they testified.

¶22 The difference in their descriptions of the vehicle is of limited significance—both children viewed the events from some distance away, and Diaz explained that, in any event, S. had been unable to give a detailed description of the vehicle. Moreover, the eyewitnesses' descriptions of the vehicle were already inconsistent. Adding yet another description of the vehicle would not have appreciably affected the jury's view of their credibility. And, particularly considering the changes in R.'s story, the fact he did not hear a shot fired, and that he said he could not see very well, his statement that R.F. had been shot by someone in a vehicle could be viewed readily by the trial court as lacking credibility.

¶23 Notably, Diaz did not testify that S. had claimed to have seen a shot fired from the vehicle, or even to have seen a shot fired at all. The other eyewitnesses' testimony about the shooting was consistent: three witnesses testified Garcia had pulled out a gun, attempted to shoot R.F., manipulated the pistol after it failed to fire, and then fired the shot that killed R.F.[4] Garcia identifies nothing in the record corroborating the children's descriptions of the vehicle or R.'s statement that a shot had been fired from that vehicle. For these reasons, we cannot say the trial court abused its discretion in denying Garcia's mistrial motion. *See State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995) ("The trial court has broad discretion in ruling on a motion for mistrial, and failure to grant the motion is error only if it was a clear abuse of discretion.").

Premeditation Instruction

¶24 Garcia next contends the trial court improperly commented on the evidence when it instructed the jury, concerning premeditation, that "[t]he time needed for reflection is not necessarily prolonged, and the space of time between the intent to kill or knowledge that he would kill and the act of killing may be very short." Garcia had objected to that instruction, asserting it was "superfluous" and constituted an improper comment on the evidence.

[4]Because Garcia might have adopted a defense strategy other than self-defense or lack of intent had Diaz's report been disclosed, we do not consider in this analysis his admission, through counsel, that he had shot R.F. *See State v. Adams*, 1 Ariz. App. 153, 156, 400 P.2d 360, 363 (1965) ("Admissions by counsel during trial may generally be used against the client.").

¶25 Our constitution directs that judges "not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Ariz. Const. art. VI, § 27. A trial court violates this prohibition when it expresses an opinion about what the evidence proves or "'interfere[s] with the jury's independent evaluation of th[e] evidence.'" *State v. Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d 368, 388 (2006), *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998).

¶26 The trial court here instructed the jury pursuant to our supreme court's directive in *State v. Thompson*, 204 Ariz. 471, 65 P.3d 420 (2003). There, the court disapproved of including in jury instructions the phrase "actual reflection is not required," *id.* ¶ 32, although the phrase does appear in the statutory definition of premeditation. A.R.S. § 13-1101(1) ("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."). The court also discouraged use of the phrase "'as instantaneous as successive thoughts of the mind'" in premeditation instructions, expressing concern such instructions could mislead the jury by "needlessly emphasiz[ing] the rapidity with which reflection may occur." *Thompson*, 204 Ariz. 471, ¶ 32, 65 P.3d at 428. The court mandated an instruction to be given in first-degree murder cases and went on to state that "[o]nly when the facts of a case require it" should a trial court further instruct a jury that "'the time needed for reflection is not necessarily prolonged, and the space of time between the intent [knowledge] to kill and the act of killing may be very short.'" *Id.*

¶27 Garcia asserts this additional instruction was not warranted here because it impermissibly emphasized to the jury that the time for reflection could be brief. He reasons the instruction was improper and prejudicial because "time is the manner in which the State sought to prove premeditation," based on the state's argument in closing that the time for reflection could be "very short." We find this argument unavailing. The encounter between Garcia and R.F. was, in fact, brief and did not provide time for pre-planning, thus, it was entirely appropriate for the trial court to instruct the jury the time for reflection could be similarly brief. The instruction did not, as Garcia suggests, unduly emphasize that fact, nor did it improperly suggest the jury could find premeditation based on the passage of time alone. Accordingly, we conclude the instruction was proper and did not constitute an impermissible comment on the evidence.

Evidence of Prior Felony Conviction

¶28 Garcia asserts the evidence of his prior conviction, an element of the prohibited possession charge, was insufficient and the trial court therefore erred in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. A trial court may only grant a motion for a judgment of acquittal "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). Even if reasonable persons could "'fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'" *State v. Rodriguez*, 186

Ariz. 240, 245, 921 P.2d 643, 648 (1996), *quoting Atwood*, 171 Ariz. at 597, 832 P.2d at 614. "If reasonable minds could differ as to whether the properly admitted evidence, and the inferences therefrom, prove all elements of the offense, a motion for acquittal should not be granted." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "We conduct a de novo review of the trial court's decision, viewing the evidence in a light most favorable to sustaining the verdict." *Id.*

¶29 A person violates A.R.S. § 13-3102(A)(4) by, inter alia, "[p]ossessing a deadly weapon . . . if such person is a prohibited possessor." A "prohibited possessor" includes any person "[w]ho has been convicted within or without this state of a felony or who has been adjudicated delinquent for a felony. . . ." A.R.S. § 13-3101(A)(7)(b). A "felony" is "an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state." A.R.S. § 13-105(18). Thus, to be a "felony" for the purposes of § 13-3101(A)(7)(b), a conviction in another state must be for an offense for which Arizona law authorizes a term of imprisonment.

¶30 The sole evidence of Garcia's prior conviction consisted of two documents from California: an "abstract of judgment – prison commitment" and a "case print," both from San Bernardino County Superior Court. The title of Garcia's offense was redacted from both documents. Neither document otherwise indicates the nature of the offense or whether it was a felony under California law. The abstract instead describes the offense as a "felon[y] . . . or alternate felony/misdemeanor," and states only that Garcia was to be

incarcerated for sixteen months in the "Calif[ornia] Institution for men." But there is no evidence in the record suggesting Garcia's California offense was one that would subject him to a prison term under Arizona law. *See* § 13-105(18). Such evidence was required to demonstrate Garcia's previous conviction was for a "felony," as defined by § 13-105(18), for the purpose of proving he was a prohibited possessor under § 13-3101(A)(7)(b). We therefore vacate Garcia's conviction and sentence for prohibited possession of a deadly weapon. Accordingly, we need not address his remaining related arguments.

Disposition

¶31 For the reasons stated, we vacate Garcia's conviction and sentence for possession of a deadly weapon by a prohibited possessor but affirm his conviction and sentence for first-degree murder.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge