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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. HAROLD ARTHUR FISH, Appellant.	)	1 CA-CR 06-0675 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court) **FILED 6/30/09**

Appeal from the Superior Court in Coconino County

Cause No. CR 2005-0340

The Honorable Mark R. Moran, Judge

REVERSED AND REMANDED

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K E S S L E R, Presiding Judge

¶1 Harold Arthur Fish ("Defendant") appeals his conviction and sentence for second degree murder. For the reasons stated

below and in our separate opinion filed today, *see* Arizona Rule of Civil Appellate Procedure ("Ariz. R. Civ. App. P.") 28(g), we reverse and remand for a new trial.

FACTUAL AND PROCEDURAL HISTORY

¶2 In our separate opinion, we discuss the factual background to this case and do not repeat it here except as various facts relate to the issues addressed in this memorandum decision. We view the facts in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against Defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). As discussed in that separate opinion we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1), (3) (Supp. 2008).

DISCUSSION

¶3 We divide the issues Defendant raises into two categories: evidentiary rulings and jury instructions to the extent these issues may re-occur on remand. We do not address the juror misconduct issues raised on appeal since it is unlikely they will occur again on remand.[1]

[1] Defendant also requests we apply the cumulative error doctrine to find he is eligible for a new trial. However, cumulative error only applies to cases involving allegations of prosecutorial misconduct. *State v. Hughes*, 193 Ariz. 72, 78-79, ¶ 25, 969 P.2d 1184, 1190-91 (1998). Defendant raises no issue of prosecutorial misconduct.

I. Evidentiary Rulings

¶4 We review a superior court's evidentiary rulings for abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004); *State v. Salazar*, 182 Ariz. 604, 610, 898 P.2d 982, 988 (App. 1995) (citation omitted). An abuse of discretion occurs when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). An abuse of discretion also occurs when a discretionary finding of fact is not based on any evidence. *United Imports and Exports, Inc. v. Superior Court*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982) (citation omitted). We will affirm the trial court if the result was correct, even though we may not agree with the court's reasoning. *State v. Flores,* 218 Ariz. 407, 416 n.14, 188 P.3d 706, 715 n.14 (App. 2009).

A. The Screwdriver

¶5 Defendant contends the superior court erred in suppressing evidence that the Victim had a screwdriver in his back pocket prior to the shooting and in permitting the State to argue the Victim was unarmed when Defendant shot him. Specifically, Defendant argues the screwdriver was a deadly weapon, relevant to show the Victim's motive and ability to harm Defendant and to show that the Victim was the first aggressor. In the alternative, Defendant argues that even if the court was correct in precluding

evidence of the screwdriver, it erred when it allowed the State to characterize the Victim as unarmed.

¶6 The superior court precluded evidence of the screwdriver because Defendant admittedly did not see the screwdriver or otherwise know of its presence in the Victim's pocket at the time of the shooting. Therefore, the court reasoned that the presence of the screwdriver was not relevant to Defendant's mental state or to his claim of self-defense and any evidence of the Victim's potential use of the screwdriver would be speculative.

¶7 The superior court did not abuse its discretion. There was no evidence that Defendant knew of the screwdriver before the attack or that the Victim made any attempt to reach for the screwdriver to attack or threaten the Defendant. While evidence of a deadly weapon or dangerous instrument may be essential to prove self-defense, *see State v. Fowler*, 101 Ariz. 561, 564, 422 P.2d 125, 128 (1967), the court did not abuse its discretion in suppressing evidence of the screwdriver to show the Victim's motive or intent, the reasonableness of Defendant's conduct, or the identity of the first aggressor. This is because there was no evidence Defendant knew of the screwdriver or the Victim reached for or threatened Defendant with the screwdriver prior to the shooting. Indeed, it is this fact which distinguishes this case from *Fowler*, in which a knife was found at the scene of the crime but not disclosed by the police. In *Fowler*, the defendant raised

the self-defense claim stating that he had to shoot the victim because the victim had a reputation for carrying a knife and the resulting fear the defendant had of bodily injury caused him to shoot the victim. 101 Ariz. at 562, 422 P.2d at 126.

¶8 Nor do we discern any abuse of discretion in permitting the State to characterize the Victim as unarmed. Defendant incorrectly asserts that a screwdriver is a deadly weapon. A.R.S. § 13-105(13) (Supp. 2008) (a "deadly weapon" is "anything *designed* for lethal use") (emphasis added); see also A.R.S. § 13-3101(A)(1) (Supp. 2007). A screwdriver can, on the other hand be a dangerous instrument. A.R.S. § 13-105(11) (a "dangerous instrument" is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury"). When an item is not inherently dangerous as a matter of law, such as a gun or a knife, a jury question is presented whether the item might be a deadly weapon or a dangerous instrument based on how the defendant used the item. *State v. Schaffer*, 202 Ariz. 592, 595, ¶ 9, 48 P.3d 1202, 1205 (App. 2002) (citations omitted). Here, however, there is no evidence that the Victim used, attempted to use, or threatened to use the screwdriver during the altercation with Defendant, let alone in a manner capable of causing death or serious injury. Because the screwdriver did not qualify as a deadly weapon or dangerous instrument in this context, the court

did not abuse its discretion when it allowed the State to argue the Victim was unarmed.

B. The Victim's Mental Health Records

¶9 In reviewing the Victim's mental health records he had obtained under court order, Defendant learned the Victim had also allegedly been treated for mental health issues at Banner Health Arizona. Defendant moved the superior court for a subpoena to obtain those latter records so he could use them to discover other evidence of the Victim's aggressive character, drugs the Victim may have failed to take which would have affected his behavior at the time of the shooting, and to give to a defense expert to conduct a psychiatric autopsy regarding the Victim's aggressive behavior. The court ordered the requested subpoena but limited it to an *in camera* inspection by the court to determine whether the records contain relevant and admissible information. After its inspection of the records, the superior court denied the Defendant's discovery request finding the records are privileged under A.R.S. § 13-4062 (4) (Supp. 2008), the Victim had the right to refuse the Defendant's discovery request pursuant to the Victim's Bill of Rights, and the records do not contain information relevant to Defendant's self-defense claim. Defendant moved the court to reconsider its decision, contending the records were admissible to establish the identity of the first aggressor, the Victim's motive in attacking Defendant, and to permit the Defendant to present a

complete defense. The court denied that motion, holding it had considered those arguments in its earlier ruling, that the arguments were meritless and in any event admission of the documents would be unduly prejudicial under Arizona Rule of Evidence ("Ariz. R. Evid.") 403. The court also granted the State's motion to preclude admission of any of the Victim's mental health records and to preclude any psychiatric autopsy.

¶10 Defendant appeals the order denying disclosure of the Banner documents, but does not appeal the order excluding the admission of a psychiatric autopsy or the admission of any mental health records, thus waiving those issues on appeal. *State v. Rankovich*, 159 Ariz. 116, 121 n.2, 765 P.2d 518, 523 n.2 (1988).[2] In addition, in his reply brief, Defendant suggests that we review the Banner documents *in camera* to rule on this issue.

¶11 We review discovery issues for an abuse of discretion except to the extent that they might preclude Defendant from

[2] Defendant's opening brief is, at best, amorphous as to whether he is appealing only the order denying discovery of the Banner documents or also the admission of any mental health records. We read the brief to be limited to the discovery of the Banner documents because the argument is phrased in terms such as the "mental health records should have been fully disclosed," defendant was "entitled to the benefit of any reasonable opportunity to prepare his defense." Similarly, Defendant argued even if evidence of the Victim's prior violent acts was properly precluded, the court erred in granting the motion *in limine* because the records would contain the "identity of additional opinion and reputation witnesses who could testify about [the Victim's] character and reputation for violence and aggression," and the "records should have been discoverable." *See State v. Bolton,* 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to fully set forth argument on issue in brief amounts to waiver).

obtaining evidence necessary for his defense which raises a constitutional issue we review de novo. *State v. Connor,* 215 Ariz. 553, 557, ¶ 6, 161 P.3d 596, 600 (App. 2007).

¶12 We disagree with Defendant for several reasons. First, we could not find the Banner documents in the record on appeal. It is an appellant's obligation to ensure that the record on appeal is complete and we presume any missing documents support the superior court's decision. *State v. Rivera,* 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990) (citation omitted). Thus, we cannot hold that the superior court erred in denying disclosure of such documents to Defendant either to show the Victim's reputation for violence or that the Victim might have failed to take drugs at the time of the shooting which might have affected his behavior.

¶13 Second, the superior court did not err in how it proceeded in deciding the disclosure issue. Defendant does not dispute that the records he sought are protected from discovery under either the physician-patient or psychologist client privilege A.R.S. §§ 13-4062 (4), 32-2085 (2008).[3] As we explained in *Connor*,

[3] We cite to both statutes because we do not have the Banner records and thus do not know if they are covered under either or both of those statutes. Unless otherwise noted, we will cite to current versions of statutes unless there has been a substantive statutory amendment after the events below which would affect our analysis.

The superior court also held the documents were protected under the Victim's Bill of Rights. *See* Ariz. Const. art. 2, § 2.1 (A) (5) (crime victim has right to refuse discovery request by defendant); *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 237, 836 P.2d 445, 450 (App. 1992) (victim's medical records are within meaning of "other discovery request," which victim may

when a defendant can show a sufficient potential need for information not in the possession of the State, the court can order its production pursuant to Arizona Rule of Criminal Procedure ("Ariz. R. Crim. P.") 15.1(g). However, when such production might infringe on the victim's constitutional rights or statutory privileges, before ordering production for *in camera* review the defendant must show that his need at least potentially amounts to a constitutional dimension. If that requirement is met, then the court can conduct an *in camera* review to balance the competing rights to the information sought and if disclosure is necessary, circumscribe disclosure consistent with the defendant's right to a fair trial. *Connor,* 215 Ariz. at 561, ¶ 22, 161 P.3d at 604. We assume the court found that a constitutionally sufficient need was shown because it ordered the records produced *in camera.* It then proceeded to see if the records contained information needed to permit Defendant to prepare his defense, specifically, whether such evidence would assist him in showing the Victim was the first aggressor by dint of failing to take certain drugs or had a reputation for violence and aggression.[4] This was the correct

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refuse to disclose under Victim's Bill of Rights). We do not address that issue, but note that the Victim had died and we do not find anything in the record indicating that a relative or lawful representative of the Victim objected to the production of these documents. *See* A.R.S. § 13-4401(19) (Supp. 2008) (defining "victim" to include both various relatives and a court-appointed lawful representative of a deceased victim).

[4] As noted in our separate opinion filed today, Defendant could not introduce evidence of prior specific acts of the Victim

procedure to use.

¶14 Third, we cannot review whether the superior court reached a correct result on whether Defendant's need for facts in the Banner records outweighed the Victim's rights because the Banner records are not contained in the record on appeal. Because we are reversing the judgment for the reasons stated in our separate opinion, the superior court is free to reevaluate this issue on remand.

C. The Dogs' Conduct and Reputation

¶15 Defendant argues the superior court erred in excluding evidence of prior specific acts of two of the dogs and in admitting evidence of post-shooting conduct of those dogs. He argues that the prior specific act evidence was admissible to show the reasonableness of his response and that post-incident evidence should have been admitted only to show intent, knowledge, or common plan and scheme if there is a logical relationship between the incident and the conduct. We find no abuse of discretion.

¶16 The State filed a motion *in limine* to preclude introduction of evidence of the two dogs with the Victim who had attacked Defendant. The State later limited such motion to specific acts of the dogs, not objecting to opinion and reputation evidence. Defendant contended that as to those two dogs who

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to show he was justified in shooting the Victim to the extent such evidence was to show a character trait or intent or motive because Defendant did not know of such acts prior to the shooting.

attacked him, the specific act evidence was admissible under Ariz. R. Evid. 404 and 406 to show the pattern or habit of the dogs and was relevant to Defendant's description of the attack and his credibility.

¶17 Parallel to the State's motion, Defendant moved to exclude evidence of post-shooting conduct of the dogs contending it was not relevant to any issues in the case and its admission would be unduly prejudicial. The State argued that such evidence was relevant to show the dogs were not violent at the time of the shooting.

¶18 The superior court held that only opinion and reputation evidence was to be admitted about the dogs' conduct and that post-shooting conduct was limited to 90 days after the shooting as it might reflect on the conduct of the dogs at the time of the shooting. The court reasoned in part that Rules 404 and 406 had no bearing on this issue directly because those rules were limited to persons, not dogs. However, by analogy the reputation of the dogs for docility or violence would reflect on the reasonableness of the Defendant's conduct at the time of the shooting. The court ruled that specific prior conduct of the dogs was inadmissible because Defendant did not know of that conduct at the time of the attack and shooting.

¶19 Generally, when an issue of the viciousness of animals exists, evidence as to their docility and aggressiveness, both

before and after the incident, is admissible to show whether the dogs were vicious and what the person controlling the dogs knew about them at the time of the incident. *Paris v. Dance*, 194 P.3d 404, 410 (Colo. App. 2008). *Cf. James v. Cox,* 130 Ariz. 152, 154, 634 P.2d 964, 966 (App. 1981) (in civil case dealing with liability for dog bite, evidence of dog's dangerous propensities and gentle character admissible). Rulings about the character of animals that might be vicious are not governed by Rules 404, 406 and 608 because those rules are limited to evidence about the character of persons or witnesses. *Paris,* 194 P.3d at 410. While the Victim was not being charged with failure to keep the dogs under leash and regardless of whether he knew the dogs allegedly tended to be vicious, the evidence was offered in part to show the reasonableness of Defendant's conduct. This related not only in shooting at the dogs, but in contending with the Victim's conduct instead of fleeing with the dogs waiting off the trail. Indeed, both parties recognized that whether the dogs were violent at the time of the shooting should be admissible for various purposes. The superior court ruled correctly that the opinion and reputation evidence both before and up to ninety days after the incident was admissible because it would have relevance to whether the Defendant acted reasonably in response to the dogs' conduct and whether he could safely flee. Ariz. R. Evid. 401 and 402.

¶20 The only real issue is whether the superior court should have admitted specific act evidence of the two dogs' conduct before and after the shooting. Again, Rules 404(b) and 406 do not apply to this issue because they are limited to admissibility of evidence relating to persons, not dogs. However, we agree with the superior court that since Defendant did not know of those specific acts prior to the day of the shooting, admission of that specific conduct evidence was inadmissible by analogy to Rule 404. *State v. Santanna*, 153 Ariz. 147, 149, 735 P.2d 757, 759 (1987) (citation omitted). Thus, we cannot say that the court erred in finding the specific act evidence inadmissible.

¶21 It is unclear whether Defendant is also arguing that despite the superior court's order, the State introduced post-incident specific act evidence of docility. Our review of the record shows that Defendant did not object to specific act evidence offered by the State as to the dogs' docility, thus waiving that issue for appeal absent fundamental error. We need not determine whether such error was fundamental because we are reversing on other grounds and the admission of such specific act evidence despite the court's ruling is unlikely to occur on remand.

D. Expert Testimony

1. "Fight or Flight" Syndrome

¶22 Defendant argues the superior court erred in precluding Defendant's proffered expert testimony regarding physiological

responses to stress, otherwise known as the "fight or flight" syndrome. We agree with the court that most of such testimony was inadmissible because the effect of "fight or flight" syndrome, on a person's reaction to stress is within the common knowledge of a jury. However, some of the proffered testimony apparently dealt with the effect stress may have on a person's memory and thus could have affected the jury's determination of Defendant's credibility in recounting the shooting to officers and the grand jury. Since Defendant's credibility was a key issue in the case and we are reversing on other grounds, on remand the court should reconsider its decision on admission of such evidence to the extent it may affect Defendant's memory of the events and his credibility.

¶23 The State moved to preclude Defendant's expert, Dr. Pitt, because he was going to testify about the effect of fear on a person's reactions, that is, the "fight or flight" syndrome. Relying on *Braley v. State*, 741 P.2d 1061 (Wyo. 1987), the State argued that the effect of "fight or flight" syndrome is something all persons encounter and thus not within the realm of expert testimony under Ariz. R. Evid. 702. In response, Defendant provided the court with an offer of proof that such testimony was admissible because Dr. Pitt would not testify about the effects of fear and stress on people, but the cause of those effects based both on physiology and psychology. In addition, Dr. Pitt would render opinions about the effect of fear and stress on a person's

memory, which Defendant argued could go to the jury's evaluation of Defendant's credibility. Defendant distinguished *Braley* by noting the expert there was going to opine on the reasonableness of the defendant's conduct in reaction to fear, whereas Dr. Pitt would only be testifying generally on the effects of fear and stress in a traumatic setting. The court granted the State's motion, holding that the proposed testimony was really only the same testimony precluded in *Braley* in a different package and that since all people experience fear or stress in some traumatic setting, expert testimony would not assist the jury in evaluating the effect of stress on whether Defendant acted reasonably.

¶24 A court's determination of the admissibility of expert testimony is reviewed for an abuse of discretion. *State v. Salazar,* 182 Ariz. 604, 610, 898 P.2d 982, 988 (App. 1995) (citation omitted). "However, when the admissibility of expert opinion evidence is a question of 'law or logic,' it is this court's responsibility to determine admissibility." *State v. Moran*, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986) (citing *Chapple*, 135 Ariz. at 297 n.18, 660 P.2d at 1224 n.18). In this context, an abuse of discretion occurs when the reasons given by the court for its action are clearly untenable, legally incorrect, amount to a denial of justice or reach an end or purpose not justified by and clearly against reason and evidence. *Chapple*, 135 Ariz. at 297 n.18, 660 P.2d at 1224 n.18.

¶25 For the most part, we find no abuse of discretion in precluding the proposed evidence. Expert evidence is admissible under Rule 702 if the expert is qualified, the testimony deals with a proper subject, the opinion conforms to a generally accepted explanatory theory and its probative value outweighs any undue prejudicial effect. *Chapple*, 135 Ariz. at 291, 660 P.2d at 1218 (citation omitted). The only factor addressed below was whether the proposed testimony was a proper subject for expert evidence,[5] that is, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702. As the Arizona Supreme Court has put it conversely, "the test 'is whether the

[5] On appeal, the State argues in part that even if the evidence was of a proper subject, the superior court properly balanced the probative value of the evidence against any undue harm and that in any event, any error was harmless. The superior court never reached the balancing test so we should not affirm on that ground. *Girourard v. Skyline Steel, Inc.,* 215 Ariz. 126, 132, ¶ 20, 158 P.3d 255, 261 (App. 2007) (lack of evidence of weighing and exclusion of all evidence, including highly relevant evidence offered, precluded affirmance on basis of trial court's discretion in weighing probative value against undue prejudice under Rule 403). Moreover, on such an important issue as the Defendant's credibility as the only eyewitness to the shooting who could testify and the limited nature of the grand jury testimony at issue, such balancing on this record would not support preclusion under Rule 403. *See Chapple,* 135 Ariz. at 292, 660 P.2d at 1219 (consumption of time involved in taking testimony of expert as to effect of stress and other factors on memory retention and recall as well as perception in dealing with importance of accuracy of witness identification of defendant would outweigh any undue prejudice); *Moran,* 151 Ariz. at 384, 728 P.2d at 254 (general expert testimony on behavioral characteristics to explain seemingly strange behavior of child victim without opining on specific victim's veracity supported admission of testimony). Nor do we

subject of inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness . . . .'" *Chapple*, 135 Ariz. at 292, 660 P.2d at 1219 (citation omitted). Thus, we look not to "whether the jury could reach some conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony 'to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject .. . .'" *Chapple*, 135 Ariz. at 292-93, 660 P.2d at 1219-20 (citations omitted).

¶26 We agree with the superior court that, to the extent the expert evidence related to the causes of "fight or flight" syndrome, it was not the proper subject for expert testimony. The issue before the jury was whether the Defendant acted reasonably in light of his perception of what occurred prior to the shooting. Most jurors are familiar with "fight or flight" syndrome and how it can affect judgment. *Braley*, 741 P.2d at 1063-64. *Contra Filomeno v. State,* 930 So.2d 821, 822-23 (Fla. App. 2006) (holding that psychologist's excluded testimony on effect of "fight or flight" syndrome generally, but not as to individual defendant, was admissible to help the jury understand defendant's state of mind, but holding error in excluding evidence was harmless given defendant's testimony on why he felt he could not flee). To the

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need to reach the issue of harmless error because we are reversing

extent that Dr. Pitt was going to discuss the physiological causes of the syndrome, such evidence was either not relevant to the jury's determination of whether Defendant's perception was clouded by his fear or would not have assisted the jury in making a determination as to the reasonableness of his judgment. It was the effect of the "fight or flight" syndrome, not its causes, that was presented to the jury. Additionally, we disagree with Defendant that *Braley* was limited to whether the expert could opine as to the ultimate issue before the jury – the reasonableness of the defendant's conduct as it related to his justification defense. The expert opinion in *Braley* was also offered to show what stressors occurred in the incident and how they could have affected the defendant. *Id.* at 1063. This is similar to what Dr. Pitt would have testified to, although Dr. Pitt would not have testified as to the effect of these stressors on this particular defendant.[6]

¶27 We part company from the superior court on the issue of the effect of stress and the "fight or flight" syndrome on Defendant's perception and memory. While an expert cannot render an opinion as to whether a particular witness is credible, an expert can testify as to the effect of stress on the memory

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the conviction on other grounds.

[6] The State also relies on *Salazar,* 182 Ariz. at 610-11, 898 P.2d at 988-89, which affirmed the exclusion of expert testimony of the effect of a "fight or flight" syndrome on the reasonableness of the defendant's conduct. Unlike this case, the testimony in *Salazar* was expressly aimed at giving an opinion on

retention or recall of a victim or witness. *Moran*, 151 Ariz. at 381-82, 728 P.2d at 251-52. As the Arizona Supreme Court explained, "'Jurors, most of whom are unfamiliar with the behavioral sciences, may benefit from expert testimony' explaining behavior they might otherwise 'attribute to inaccuracy or prevarication.'" *Id.* at 381, 728 P.2d at 251 (quoting *State v. Lindsey,* 149 Ariz. 472, 474, 720 P.2d 73, 75 (1986)). While the issue in *Moran* and *Lindsey* dealt with the effect of molestation on a child victim, we see no distinction as to the effect "fight or flight" syndrome might have on memory recall and retention. While "fight or flight" syndrome's effect on a person's conduct and perception of danger might be a matter of common knowledge, its effect on a person's memory retention and recall may not be within such knowledge. Dr. Pitt might have testified to the effect that "most laymen believe that stressful events cause people to remember 'better' so that what is seen in periods of stress is more accurately related later [whereas] . . . stress causes inaccuracy of perception with subsequent distortion of recall." *Chapple,* 135 Ariz. at 294, 660 P.2d at 1221.

¶28 A key element of this case was Defendant's credibility as it related to the events leading up to the shooting, including inconsistencies in his statements made to the police and the grand jury. Evidence of behavioral science in this context could have

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the reasonableness of the defendant's conduct, an issue which is

assisted the jury in determining whether such inconsistencies reflected on Defendant's credibility or whether they were a result of "fight or flight" syndrome. *Moran*, 151 Ariz. at 381, 728 P.2d at 251. This would be especially true if there was evidence that most people think the effect of "fight or flight" syndrome increases perception and recall when it fact it might interfere with perception and memory. On remand, the superior court should reconsider this issue.

2. Handgun and Ammunition

¶29 Defendant contends the superior court erred in admitting the State's expert testimony regarding the powerful and expensive nature of the handgun and ammunition Defendant used to kill the Victim. Defendant argues this testimony is irrelevant and prejudicial.

¶30 Defendant has waived this issue absent fundamental error because he did not move to exclude this evidence by a motion *in limine* or object at trial to this evidence. *See State v. Velazquez*, 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, Defendant has the burden to show that error occurred, the error was fundamental, and that he was prejudiced thereby. *See Henderson* at 210 Ariz. at 567-68, ¶¶ 20-22, 115 P.3d at 607-08. Fundamental

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not the proper subject for expert testimony.

error is error that "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id*. at 568, ¶ 24, 115 P.3d at 608.

¶31 We discern no error, let alone fundamental error. Defendant relies on two cases to support his argument. In *United States v. Clifford,* 640 F.2d 150, 153 (8th Cir., 1981), the issue was not whether the type of weapon used was relevant for purposes of self-defense, but whether a different individual could testify why that witness might carry a gun and the court found that such evidence was not admissible. Defendant also relies on *United States v. Curtin*, 443 F.3d 1084, 1091 (9th Cir. 2006), in which the court held that possession of constitutionally protected sexually explicit material was inadmissible to show prior bad acts. However, the Ninth Circuit later vacated the panel's decision and ruled *en banc* that the First Amendment did not preclude the admission of sexually explicit material to show the Defendant's intent to engage in unlawful sexual conduct with a minor if the material was similar in nature to the crime alleged. *United States v. Curtin*, 489 F.3d 935, 953-57 (9th Cir. 2007).[7] Here, the State's use of the evidence was not to show prior bad acts, but to show the power of the weapons and ammunition relevant at a minimum

[7] In his reply brief, Defendant withdrew his reliance on the vacated decision in *Curtin*, but only as to his argument on grand jury testimony about Defendant's prior ownership of guns.

to show whether Defendant was objectively reasonable under the circumstances in firing several shots at close range into the Victim's chest.

3. Physical Description of Crime Scene

¶32 Defendant argues the superior court erred in not permitting JT, a forensic investigator with the Coconino County Medical Examiner's Office, to testify about flags placed by another investigator on the Victim's alleged path of travel towards Defendant prior to the shooting and apparently as to the distance between the Victim and Defendant at the time of the shooting. The State objected to that testimony, contending that JT lacked qualifications to lay the foundation as to why the flags had been placed where they were and without that explanation the evidence was not relevant. The court ruled that the evidence was not relevant, there was no foundation for the testimony, and JT was not an expert. The court did, however, allow JT to testify as to the number of disturbances in the soil he saw and the greatest distances between those disturbances.

¶33 We review a trial court's determination whether a witness is qualified as an expert for abuse of discretion. *State v. Lee*, 189 Ariz. 608, 613, 944 P.2d 1222, 1227 (1997). A witness may be qualified as an expert by "knowledge, skill, experience, training, or education." Ariz. R. Evid. 702. We find no abuse of discretion for several reasons. First, we do not think the court erred in

holding JT was not qualified as an expert as to the significance of the flags. A witness has been found to be an expert in footprint comparison based on extensive experience in tracking, qualification as an expert in other cases, training by experienced law enforcement officers, and teaching classes in tracking and footprint comparison. *State v. Murray*, 184 Ariz. 9, 29, 906 P.2d 542, 562 (1995). Similarly, a witness has qualified as an expert in blood spatter evidence based on experience in reconstruction of human remains, homicide courses, and 32 hours in blood spatter courses. *Lee*, 189 Ariz. at 613-14, 944 P.2d at 1227-28. In contrast, while JT had experience as a forensic investigator in over 250 homicide cases over six years for two medical examiners, his basic role was to work with law enforcement personnel in taking photos of crime scenes to report evidence to the medical examiners whether the forensic evidence contradicted statements of witnesses. There was no evidence JT had any experience or training in determining why flags were placed at the scene, only his statements that he worked with law enforcement officers in trying to determine the route the Victim took towards Defendant prior to the shooting. The only evidence about JT's tracking experience was his statement confirming he had worked at crime scenes where trying to determine paths of travel or routes taken by people were at issue. Based on this evidence, the court did not abuse its discretion in holding that JT was not qualified to discuss the meaning of the flags

placed at the scene. Second, without the context of the meaning of the flags, the existence of the flags would not have been relevant to any issue. Third, while Defendant implies that he was precluded from asking JT how close the Victim and Defendant had been at the time of the shooting, that is not what Defendant asked JT at trial. Rather, Defendant asked JT whether he had an opinion on that issue, whether it was in his report to the medical examiner, and whether he would defer to the medical examiner's opinion. Fourth, Defendant contends in his reply brief that lay testimony has often been admitted on similar topics. That argument was not raised below and we will not review it since it was raised only in the reply brief. *State v. Oakley,* 180 Ariz. 34, 36 n.1, 881 P.2d 366, 368 n.1 (App. 1994) (citation omitted). However, since we are reversing on other grounds, Defendant is free to argue on remand the issue of admissibility of JT's testimony as a lay witness relating to the significance of the flags.

4. Hand-to-Hand Combat

¶34 Defendant contends the court erred in preventing SF, the initial lead investigator from the Coconino Sheriff's Office, from: (1) Describing the problems an average person being on the trail might experience attempting to take on somebody coming from the high ground in hand-to-hand combat; and (2) Responding to a question whether the terrain and the angle presented serious problems if a person was going to opt for hand-to-hand combat.

Defendant contends that these questions were within areas of particular knowledge of law enforcement officials relating to their training and experience and would assist the jury to determine if Defendant had less lethal options available to him, not whether Defendant acted reasonably. The State contends that such an opinion would invade the province of the jury on the ultimate question of whether Defendant acted reasonably, which is reserved to the jury under *Salazar*, 182 Ariz. at 610-11, 898 P.2d at 988-89. The State also contends that Defendant failed to preserve this issue by making an offer of proof and that any error would be harmless.[8]

¶35 The State is correct that we cannot decide this issue because Defendant failed to make an offer of proof, thus precluding us from knowing what SF would have testified in response to the question. *State v. Gulbrandson,* 184 Ariz. 46, 59, 906 P.2d 579, 592 (1995). However, since this issue may reoccur on remand, we address the issue to guide the trial court on remand.

¶36 The State filed a motion in limine concerning SF, arguing that any expert opinion on whether the Defendant acted reasonably invaded the province of the jury under *Salazar*, 182 Ariz. at 610-11, 898 P.2d at 988-89. Defendant argued that the jury had to look at the situation from a reasonable person's perspective in

[8] Throughout its brief, the State only cites to the official reporter for Arizona cases. Pursuant to Ariz. R. Crim. P., 31.13(c)(1)(vi), citations to cases should be to the official reports and also when possible to the unofficial reports.

Defendant's position. The court ruled that any expert opinion on whether Defendant acted reasonably would invade the province of the jury under *Salazar.* At trial, Defendant asked SF the above questions and the court sustained the objection, apparently based on its pretrial ruling, and that any answer would be speculative.

¶37 An expert cannot opine on whether a defendant acted reasonably in defending himself as that determination is ultimately left to the jury to determine. *Salazar*, 182 Ariz. at 610-11, 898 P.2d at 988-89. However, a party can ask law enforcement personnel to render opinions based on their training and qualifications as to whether a party was acting unsafely. *Bliss v. Treece*, 134 Ariz. 516, 518-19, 658 P.2d 169, 171-72 (1983) (police officer could give expert opinion whether plaintiff was following defendant in his car too closely). The overriding principle for both rules is that an expert opinion can be rendered if it touches upon an ultimate issue or possibly invades the province of the jury provided the expertise of the witness will assist the trier of fact because the expert's knowledge is beyond that of the ordinary person. *Id.*; Ariz. R. of Evid. 702 and 704. Thus, the issue is whether the subject matter of the question is beyond the ordinary knowledge of jurors.

¶38 We hold that given the record on appeal and the issues raised on appeal, the trial court did not abuse its discretion in sustaining the objection to the two questions. Whether a person might have problems defending himself from a person running at him

downhill is something within the knowledge of jurors. Thus, it is not the proper subject for an expert opinion.[9]

5. Victim's Wounds

¶39 Defendant contends the superior court erred in denying his pretrial motion to preclude the medical examiner from testifying that the Victim's wounds were "defensive." We hold the court did not abuse its discretion in admitting that evidence.

¶40 In his written motion in limine and at argument on that motion, Defendant claimed he had interviewed the medical examiner and the examiner had stated the Victim's right hand had been in front of the Victim's left chest when one of the bullets was fired but the examiner could not determine why it was so positioned and there were ten possibilities. Included in those possibilities were it was the natural movement from running, the arm was raised in a defensive posture or was raised in an attack or offensive posture. Defendant claimed that to allow the witness to testify the arm was raised in a defensive posture was mere speculation especially

[9] In a related ruling, the superior court prohibited expert opinions on self-defense and whether Defendant acted reasonably. It denied the State's motion in limine to the extent such experts only provided factual information about concealed weapon training and use of force in the face of perceived danger. As we read the court's ruling, it would permit such factual information from experts provided adequate foundation was laid and then would permit Defendant to testify about why he reacted the way he did, including reliance on such materials and training he was exposed to prior to the shooting. Defendant has not appealed from that ruling and we do not opine on whether the court erred in limiting expert opinions from other witnesses on whether the terrain and situation, in light of that training, would have limited a person in Defendant's

because the witness had admitted he could not opine that the arm and hand were raised in a defensive position to a reasonable degree of medical certainty. The State argued that the medical examiner had said that the arm and hand were in that position for one of three reasons and while the witness could not be conclusive about which one, if the hand was raised in a defensive position it would assist the jury in determining whether Defendant had acted reasonably. The superior court denied the motion, holding that pursuant to *State v. Paxson*, 203 Ariz. 38, 49 P.3d 310 (App. 2002), an expert opinion identifying possible scenarios as to a fact was not speculative and could come in to assist the jury in determining a fact of consequence even if the opinion was not conclusive. It also held that *Paxson* was not limited to testimony of two possible scenarios, but its import was to determine if the theories would assist the jury in reaching a decision.

¶41 Expert testimony is relevant and admissible assuming the expert is qualified and the subject is beyond the knowledge of ordinary jurors if it makes the existence of any fact in issue more or less probable even if the evidence is insufficient to support a finding of an ultimate fact. All that is required is that if admitted, it would render the desired inference more probable. *Paxson*, 203 Ariz. at 41-42, ¶ 17, 49 P.3d at 313-14. When an expert cannot choose between several alternatives as to what

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position and knowledge from less lethal alternatives to protect

occurred, each possibility is speculative "in the sense that the evidence is inconclusive as to which of these two scenarios actually occurred, yet it is a certainty that one of these did occur." *Id.* at 41, ¶ 16, 49 P.3d at 313. Nor to be admissible, must the expert use magic words such as "to a reasonable degree of medical certainty or probability," because the evidence need only be sufficiently certain either for the fact-finder to conclude that the evidence is sufficient to such a degree or to choose from competing inferences. *Compare id.* at 41, ¶ 18, 49 P.3d at 314 (when expert testifies to two alternative explanations, testimony is admissible if sufficient for fact-finder to choose between competing inferences) with *In re MH 2007-001236,* 220 Ariz. 160, 169-71, ¶¶ 30-31, 204 P.3d 418, 427-29 (App. 2008) (expert need not utter magic words, but only produce sufficient evidence for fact-finder to determine if there was a reasonable degree of medical certainty).

¶42 Based on the record before it, the court found there were three possible alternative explanations for the location of the Victim's right arm and hand. At trial, the examiner testified that there were three possible reasons for the position of the Victim's hand and arm – natural movement from running, defensive position or offensive position. Although the examiner could not tell if it was an offensive or defensive position, he reasoned it was more likely

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himself.

not from a natural running or walking movement, and was more consistent with a defensive-type injury.

¶43 On appeal, Defendant contends *Paxson* was limited to a situation in which the expert testified to only two alternative explanations and here there were at least ten. We need not decide whether *Paxson* is so limited because there is no evidence of record that there were ten alternative explanations for the position of the right hand and arm, and the witness testified that one of the three alternative explanations – that the hand was there from a natural movement of running or walking - was unlikely. Thus, just as in *Paxson* there were only two alternative explanations. Moreover, just as in *Paxson,* the evidence was not speculative for these purposes simply because the examiner could not conclusively testify whether the evidence was conclusive of a defensive or offensive posture. Indeed, in this case the evidence was even more helpful to the jury than in *Paxson* because the expert testified that the position of the arm was more consistent with a defensive posture. The superior court did not err in admitting the evidence because it would assist the jury in choosing between those alternatives.

E. Defendant's Grand Jury Testimony

¶44 Defendant raises five issues regarding his redacted grand jury testimony read to the jury. We find no reversible error.

1. Gun Ownership

¶45 Defendant argues the superior court erred in admitting redacted portions of his grand jury testimony regarding his use, ownership, and collection of guns. Defendant's argument is limited to the superior court's balancing of whether such evidence was more prejudicial than probative under Ariz. R. of Evid. 403, relying on *Clifford,* 640 F.2d at 153, that such evidence is not relevant to the issues at trial. The State contends the superior court is in the best position to weigh the relevance of any evidence against any undue prejudice, and Defendant's knowledge and ownership of guns was relevant to prove he intentionally or knowingly killed the Victim. It also argues such evidence was cumulative to other evidence Defendant introduced on his firearms training and his collection of guns and any error was harmless. To understand this issue, we must discuss how the issue was presented below.

¶46 Defendant moved to exclude his grand jury testimony about his collection of guns on the basis that the exercise of his constitutional right to own guns was irrelevant to the issues at trial and would cause undue prejudice by arousing the passions of jurors who oppose gun ownership. The State responded that it had to prove Defendant killed the Victim either intentionally, knowingly, or with extreme indifference to human life, and that his knowledge of guns, the power of the gun he used and his use and knowledge of hollow point bullets, was relevant to that issue. The

superior court ruled that the evidence was relevant and was not outweighed by any undue prejudice, but it would limit such evidence to the last three years before the shooting. The State, defense counsel and the court met to review and redact the grand jury testimony on this and other issues. During those conferences, Defendant expressly requested that some grand jury testimony concerning his gun ownership more than three years prior to the shooting be admitted. The court granted that request. Given the position taken by the Defendant, the court went on to admit other evidence beyond the three-year period. Ultimately, the most recent evidence was Defendant's knowledge that the gun he used was one of the more powerful guns he owned and that he had been recommended by a gun shop to use hollow point bullets for self-defense because they were more powerful.

¶47 We review a decision to admit evidence under Rule 403 for an abuse of discretion because the trial court is in the best position to weigh the probative value of evidence against its possible undue prejudice. *State v. Canez,* 202 Ariz. 133, 153, ¶¶ 60-61, 42 P.3d 564, 584 (2002). For the same reasons we discuss *supra*, ¶¶ 29-31, concerning evidence of the power of the weapon and ammunition Defendant used being relevant to whether he acted reasonably in self-defense, his knowledge of the power of the weapon and the ammunition is relevant to the issue of whether he intentionally or knowingly killed the Victim. The jury was entitled to know that Defendant knew he was using a high powered

weapon with hollow-point bullets rather than he thought he was using a target gun to defend himself. The admission of other evidence about Defendant's history of collecting guns as a boy and young man, is also not reversible. While the court had ruled the grand jury testimony would be limited to a three-year period before the shooting, it was Defendant in a meeting with the State and the court to redact the grand jury transcript who wanted much of that historical evidence admitted. Defendant cannot now claim that was error. S*tate v. Pandeli,* 215 Ariz. 514, 528, ¶ 50, 161 P.3d 557, 571 (2007) (defendant who did not object to introduction of evidence below cannot assert its introduction was error on appeal). Moreover, even if such evidence should not have been admitted, its introduction was harmless. Most of that evidence dealt with Defendant's father buying him a .22 rifle as a child and his use of such caliber weapons in target practice and hunting, and that he might have a dozen weapons which he also used for boy scout training.

¶48 Defendant's reliance on *Clifford* is misplaced. There, the court had excluded evidence by another person of the dangerous nature of life on a reservation and the fact that many people had guns. The Defendant testified that he had carried a gun on the reservation for self-defense and used it to protect himself. The court ruled that his reason for carrying a gun was irrelevant because the mere possession of a gun does not go to the issue of whether its use is justified in self-defense. 640 F.2d at 153.

Here, it was Defendant who sought admission of some of the evidence of his history of gun ownership and the issue for which the testimony was introduced was not why he possessed guns, but to show his knowledge of the power of the weapon and ammunition used.

¶49 Accordingly, we find no abuse of discretion in the admission of this testimony.

2. Warning Shot, Center Mass, Brandishing a Weapon

¶50 Defendant testified to the grand jury that, based on his concealed weapon permit training, he did not show the Victim his handgun, did not fire a warning shot at the Victim, and did not try to shoot the Victim's limbs. Defendant also testified to the grand jury that brandishing a gun is illegal. The State offered that testimony into evidence at trial and over some objections by Defendant, the court admitted it. Defendant claims this testimony should not have been admitted at trial because it is irrelevant and prejudicial. We find no reversible error for several reasons.

¶51 First, some of these objections were waived below. In settling the objections to the introduction of the grand jury testimony, Defendant did not object to the issue of a warning shot except to the extent that questions by grand jurors should not be referenced. Similarly, at one point Defendant objected to the grand jury testimony as to winging the Victim rather than shooting at center mass as repetitive, without any substantive objection. We will not consider issues on appeal which were not sufficiently raised below. *Pandeli,* 215 Ariz. at 528, ¶ 50, 161 P.3d at 571.

¶52 Second, Defendant objected to admission of his grand jury testimony as to the legal issues of aiming at a person's arms or legs could create legal problems because the person might sue the shooter or a bystander might be injured. The State argued that the testimony should be admitted because it went to Defendant's state of mind when he shot the Victim. The superior court agreed and we find no error. The issue was what the Defendant was taught in his self-defense training as to why he should shoot at center mass. If his understanding was that he should shoot at center mass in part because he might incur legal exposure for injuries to the Victim or a third party if he did not shoot at center mass, that evidence does go to his state of mind.

¶53 Third, Defendant had an expert witness, MA, testify at trial that, as a part of the training to receive a concealed weapon permit, students are taught to fire at "center mass" in order to stop a threat; indeed, MA testified that shooting at someone's feet or hands is reckless because bystanders could be injured. For similar reasons, MA testified that students are taught not to fire warning shots. Students are also instructed not to hesitate in firing their weapon once a threat is perceived, thus indicating that brandishing a weapon should be avoided because the holder of the weapon may have to shoot very quickly after displaying the weapon. Therefore, Defendant's testimony to the grand jury on these subjects is cumulative and harmless. *State v. Fischer,* 219 Ariz. 408, 417 n.12, 199 P.3d 663, 672 n.12 (App. 2008).

¶54 Fourth, while Defendant told the grand jury that brandishing a weapon is always illegal and MA did not so testify, introduction of the grand jury testimony on that point was not erroneous or prejudicial. Defendant's testimony was "I was told you never brandish a weapon. That's a crime in and of itself." If that was Defendant's understanding, then the jury was entitled to understand his state of mind. Additionally, whether he erred in thinking brandishing a weapon was a crime was not prejudicial in light of the other evidence why a person should not brandish a weapon until immediately before possibly having to shoot an alleged attacker.

3. Defendant's Background

¶55 Defendant argues that his grand jury testimony regarding his attending Northern Arizona University, going on a two-year mission for his church, and his subsequent education at Brigham Young University should have been admitted at trial. For several reasons, we find no reversible error in the superior court's exclusion of such evidence.

¶56 First, Defendant has not provided us with the transcript from the objections by the State to Defendant's request to introduce evidence of where he received his education. It is the appellant's obligation to ensure the record on appeal is complete and if any part of the record is missing, we presume the missing record supports the superior court's decision. *Rivera,* 168 Ariz. at 103, 811 P.2d at 355 (citation omitted).

¶57 Second, Defendant agreed in the superior court that reference to his finishing his education at BYU and his mission should be deleted from the transcript. Even if this was error, it was invited error and we will not find reversible error when that error is invited. *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001).

¶58 Third, Defendant's wife testified at trial that Defendant earned two Bachelor Degrees and a Master's Degree. She further testified that when Defendant "was young he went to South America and that's where he picked up the Spanish language and culture and stuff that led to his being a Spanish teacher." We fail to discern what relevance Defendant's testimony regarding the names of the universities he attended and the characterization of his sojourn in South America as a "mission" adds to his wife's testimony. The superior court did not abuse its discretion in precluding Defendant's testimony on these facts.

4. Admission of Transcript

¶59 Defendant contends the superior court erred in admitting the redacted grand jury transcript into evidence and allowing the jury to review the transcript during deliberations. Defendant argues that doing so gave the transcript undue emphasis and "[t]he prejudicial effect of the testimony before the grand jury was amplified by the fact that a transcript was presented to the petit jury, while the presentation of other witnesses were [sic] not presented to the jury in transcribed form." We find no error.

¶60 A jury is entitled to consider any exhibits admitted at trial during its deliberations. *See* comment to Ariz. R. Crim. P. 22.2; *State v. Lichon*, 163 Ariz. 186, 192-93, 786 P.2d 1037, 1043-46 (App. 1989). If we view the transcripts as tangible evidence, Rule 22.2 (d) provides that the jury may take with it into deliberations such "tangible evidence as the court in its discretion shall direct." We review evidentiary decisions for an abuse of discretion given that the trial judge "has seen and heard the witnesses and is familiar with all the exhibits. In such instances, we will not substitute our judgment for that of the trial court since the decision involves consideration of all these matters." *State v. Snowden*, 138 Ariz. 402, 404-05, 675 P.2d 289, 291-92 (App. 1983). A court abuses its discretion when there is no factual or legal basis for its ruling. *State v. Gomez*, 211 Ariz. 111, 114, ¶ 12, 118 P.3d 626, 629 (App. 2005) (citation omitted).

¶61 The superior court did not abuse its discretion. The court permitted the jury to consider the physical transcript because three weeks had passed since the testimony was read to the jury at trial and there existed no other contemporaneous recording of this testimony that the jury could consider. This is a reasoned basis for admitting the transcript into evidence and permitting the jury to consider it during its deliberations. *Snowden*, 138 Ariz. at 404-05, 675 P.2d at 291-92 (admitting tape of 911 call to police and allowing jury to consider it during deliberation not abuse of discretion); *State v. Kennedy*, 122 Ariz. 22, 27, 592 P.2d 1288,

1293 (App. 1979) (superior court did not err in allowing jurors to take transcripts of taped confession into the jury room). *See also Lichon*, 163 Ariz. at 193, 786 P.2d at 1044 (jury had right to review during deliberation videotape of alleged obscene matter which was admitted during trial).

¶62 Moreover, the fact the transcript was the only recording of Defendant's testimony disposes of Defendant's argument that admitting it but not the tape of his statements to a law enforcement officer gave undue emphasis to his testimony. The superior court did not admit into evidence another transcript at issue, that of Defendant's statements to deputy SF, because the jury already had audio copies of the tape-recorded interviews. The interview transcripts were merely provided to the jury during trial for referencing while the recordings were played.

¶63 Defendant cites to various cases from other jurisdictions to support his argument that permitting a jury to review exhibits or a portion of the trial transcript during deliberations may result in the jury giving undue emphasis to that testimony. We find those cases either to be distinguishable on their facts or actually to support what the superior court did here. Thus, in *United States v. Morrow*, 537 F.2d 120, 148 (5th Cir. 1976), the district court denied a request for the jury to review over three hundred pages of transcripts because it would take more than a day for the jury to read them and they might give undue emphasis to them. Here, the redacted transcript was much shorter. In *United*

States v. Abbas, 504 F.2d 123, 125 (9th Cir. 1974), the court of appeals stated that courts should be reluctant to allow the jury to review charts summarizing evidence as argumentative and conclusory. Here, the evidence was a redacted grand jury transcript, not a conclusory summary of the testimony. In *United States v. Rodgers*, 109 F.3d 1138, 1144 (6th Cir. 1997), the court found no error in allowing the jury to review a transcript of a police officer's trial testimony because the court ordered the entire witness' testimony to be given to the jury, not just his direct testimony. Additionally, the court held there would be no undue emphasis problem because the jury did not indicate that it was going to hinge its decision on that testimony and there would be no undue delay. *Id.* Here, there was no note from the jury indicating its verdict hinged on the grand jury transcript. *See also United States v. Hernandez*, 27 F.3d 1403, 1409 (9th Cir. 1994) (error to allow jury to view evidence without limiting instruction when it requested evidence and stated its decision hinged on its review of that evidence).[10] Indeed, we do not even know if the jury reviewed the transcript during its deliberations. *See Lichon*, 163 Ariz. at 193, 786 P.2d at 1044 (while it might have been better for court to have instructed jury that if it was going to view videotape it should view the entire tape, failure to do so was not error when

[10] In *Hernandez*, the court also noted that a factor to consider is whether the transcript to be reviewed was accurate. 27 F.3d at 1409 n.6. That is not an issue here because Defendant expressly informed the court the grand jury transcript was accurate.

there was no indication the jury even viewed the tape during deliberations).[11] Finally, in *United States v. Smith*, 419 F.3d 521, 527-29 (6th Cir. 2005), the court of appeals held the trial court erred in allowing the jury to review a grand jury transcript when the court had not given any reason to permit the jury to do so. However, the court also found that the error was harmless in nature. Here, the court gave a reasoned decision about why the jury should be able to have the grand jury transcript during deliberations.

5. Specific Redactions

¶64 Defendant complains of four alleged errors in the redacted version of his grand jury testimony. First, he states that, contrary to the superior court's ruling, testimony responding to a follow-up question as to why Defendant did not try to shoot

[11] If on remand the transcript is again given to the jury, the superior court may consider the need for an instruction to the jury that it needs to reach a verdict based on all the evidence and should review the transcript as a whole. *Hernandez,* 27 F.23d at 1409 (limiting instruction should have been given); *Lichon*, 163 Ariz. at 193, 786 P.2d at 1044 (limiting instruction might be appropriate). We do not address whether such a limiting instruction should have been given because Defendant did not renew any request for a limiting instruction when the court decided to reconsider its earlier decision to deny the motion to admit the transcript as an exhibit. *See State v. Ellison*, 213 Ariz. 116, 133, ¶ 61, 140 P.3d 899, 916 (2006) (party generally waives objection if he fails to ask for limiting instruction). Moreover, Defendant did not address the lack of a limiting instruction in his opening brief, thus waiving that issue absent fundamental error. *Best v. Edwards*, 217 Ariz. 497, 504, n.7, 176 P.3d 695, 702 (App. 2008) (citation omitted). Failure to give such an instruction is not fundamental error in this context as we see no prejudice to Defendant and do not even know if the jury reviewed the transcript.

the victim in the arm or leg was "prejudicially removed." The specific testimony was as follows: "Number one, I was told not to do that [shoot the victim in the leg], and number two, I had no time. This man was running, you know. And just – I know it's hard – it's hard to – you know, to put yourself in that place and realize how difficult it is." Defendant, however, fails to explain how, "[i]n light of the other testimony from the grand jury [sic] that was allowed," he was prejudiced by this error.

¶65 Although Defendant had a copy of the redacted transcript before it was presented to the jury, our review of the record indicates he never presented the superior court an opportunity to cure this error. We therefore review for fundamental error. *See Velazquez*, 216 Ariz. at 309, ¶ 37, 166 P.3d at 100; *see also Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. To obtain relief under fundamental error review, Defendant has the burden to show that that the error caused him prejudice. *See Henderson*, 210 Ariz. at 567-68, ¶¶ 20-22, 115 P.3d at 607-08.

¶66 Defendant was not prejudiced by the redaction of this testimony because the substance of the testimony was otherwise presented to the jury. As previously noted, the fact that Defendant was instructed to shoot center mass and not to aim for a target's limbs was presented through Defendant's non-redacted grand jury testimony and MA's testimony at trial. *Supra* ¶ 53. In

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Henderson, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607; *Lichon*, 163

addition, in the redacted transcript considered by the jury, Defendant testified the Victim was only a short distance from him running at "full speed" when Defendant fired his gun. Thus, the omitted testimony would not have affected the jury's verdict, and Defendant fails to sustain his burden under fundamental error review. *See id.* at 569, ¶ 27, 115 P.3d at 609 (to show prejudice, defendant must show that absent error, a reasonable jury could have reached a different result).

¶67 Third, Defendant challenges the court's ruling redacting the following: "You know, I don't know how –- I can tell you where the feeling is. In me it's right here. Okay. And that feeling has stayed with me, you know, ever since then." Defendant characterizes this testimony as referencing his belief that the Victim was a serious threat and put Defendant in fear of his life. We cannot find where Defendant objected to that redaction, thus

waiving this issue on appeal. *McDowell Mountain Ranch Land Coal. v. Vizcaino,* 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997). Even if there had been an objection, there was no prejudice because the jury was presented with overwhelming evidence of Defendant's state of mind at the time of the shooting. For example, Defendant's grand jury testimony presented to the jury immediately before the redacted quote was:

Ariz. at 193, 786 P.2d at 1044; *Smith*, 419 F.3d at 529.

I never knew that somebody was going to kill me before, kill me for no reason, from my point of view. I hadn't done anything to this guy. And I'm just sitting there thinking – you know, sitting there with that gun in my hands thinking, good grief, this guy, he has accelerated. He's coming right at me. He's yelling profanities and throwing my own words back at me. He's going to hurt me, he's already promised that. He's going to do that. Whether he thinks I killed his dog or not, he's made up his mind to kill me here. There's nobody, nobody to pull the dogs or him off me. There is not a soul in the woods, at least as far as I was aware. It was him or me. There was no policeman there. There was no -– anyone there to help me at all. And he –- my impression was and belief that he was going to take that gun and use that against me or any other weapon that he had or a rock or the dogs or a combination thereof or just beat me and choke me.

¶68 Defendant further stated:

> So I got this vision of me rolling on the ground, trying to fight with this guy, you know, getting chewed . . . I know that I can't go back down, because . . . it's downhill, you know, and I'd have to turn to run and I know what happens when you turn from a dog. I mean, they get you right there.

The jury also heard his statement to an investigator that he "[a]bsolutely" was in fear of his life and "scared to death" because of the area's remoteness and "if I turn and run, the dogs are going to get me, you know, and he's going to get me anyhow because he's at full speed." As the Defendant stated, "[i]t was [the Victim] and me and the dogs, and I was going to lose." Accordingly, the redacted testimony, assuming it can be construed as a statement regarding Defendant's state of mind during the incident, would have been cumulative and its omission did not prejudice Defendant. *See State v. Shearer*, 164 Ariz. 329, 339-40, 793 P.2d 86, 96-7 (App. 1989).

¶69 Fourth, Defendant complains the following was improperly redacted because the statement is "extremely important":

> I backed off. It's just that –- I tried to get [the Victim] to back off. He wouldn't. I mean, I hopefully talked to you about how close he was, you know, when I finally had to shoot him. I mean, he was –- I will tell you, the police officer said, why didn't you shoot him up there? Why did you wait until he was right –- because I didn't want to shoot him. I tried not to shoot him. I was not out there to shoot dogs. I was not out there to shoot people. I was hiking, going home, and that's all I wanted to do.

This statement was made in response to a grand juror questioning Defendant as to why he fired a warning shot at the dogs. The superior court ordered the statement redacted because it was not responsive to the question. We find no abuse of discretion. Moreover, this testimony is cumulative to evidence that was presented to the jury immediately before the excised testimony:

> [I]n my opinion, you know, this was –- you know, it was never going to get this way. I was never going to have to deal with [the victim]. I mean, this is something that from my point of view, went progressively worse, and no matter what I did to try to stop it, to try to keep it from getting worse, you know, it was just, you know, out of my control.

See also supra, ¶¶ 67-68 (grand jury transcript testimony and Defendant's statements to an investigator about how the shooting occurred and how Defendant had no choice but to shoot the Victim).

¶70 Defendant also contends the version of the transcript presented to the jury "grossly distorted [Defendant's] testimony and did not present a full or fair explanation of his basis for self-defense" because the following statement by Defendant to the grand jury was redacted:

> I am as certain of that [the Victim would have killed me] as certain I am sitting here today. Sometimes you just got bad choices in life. Sometimes there's no good choice. My choice was to live and go home and be a father and a husband. And I'm sorry for him. I'm sorry for the life, you know, that was lost that day. And if I could bring him back, I would, but I can't. But I was going to go home.

¶71 Although the superior court ordered this testimony redacted because it is "commentary," the court also denied the prosecutor's request to order deleted the statement Defendant made immediately preceding the redacted testimony. Thus, the jury considered the following:

> So I didn't ask for an attorney. I didn't, you know, shut up. I didn't mislead them. I said, I'm going to cooperate fully and completely with you. I think it's my duty and obligation to account for my actions. I knew that I had killed a man. I did not feel it was murder. To my –- in my opinion, it was self-defense, absolutely. I had no other options. I would have done anything. I would have –- I would I would not have –- I would not have hurt that man, but he would have killed me. He would have killed me. Absolutely.

¶72 In light of the testimony presented to the jury, we cannot conclude that the superior court erred in redacting Defendant's additional comments regarding his state of mind at the time of the incident. We find no abuse of discretion.

II. Jury Instructions

¶73 Defendant raises a number of issues regarding the final jury instructions. We examine some of these issues in this decision and others in the separate opinion in this appeal.

¶74 We review a trial court's denial of a proposed jury instruction for abuse of discretion, but review de novo whether a jury instruction accurately states the law. *State v. Cox*, 217 Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007).

¶75 "A party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995) (citing *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983)). The test for jury instruction is whether the instruction adequately set forth the law applicable to the case. *State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998); *State v. Brooks*, 103 Ariz. 472, 445 P.2d 831 (1968). However, "[W]hen a jury is properly instructed on the applicable law, the trial court is not required to provide additional instructions that do nothing more than reiterate or enlarge the instructions in defendant's language." *Salazar,* 173 Ariz. at 409, 844 P.2d at 576. A court's denial of a requested jury instruction is not reversible error if the instruction given is adequately covered elsewhere. *State v. Barr*, 115 Ariz. 346, 349-50, 565 P.2d 526, 529-30 (App. 1977).

A. Self-Defense: Use of Force

¶76 Defendant argues that the superior court gave improper instructions regarding the use of deadly force. The jury was instructed on self-defense as follows:

> A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:
>
> 1. A reasonable person in the defendant's situation would have believed that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force;

and

2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the defendant's situation.

However, a person may use deadly force in self defense **only** to protect against another's use or threatened use of deadly physical force.

Apparent deadly force can be met with deadly force so long as the defendant's belief as to apparent deadly force was a reasonable one.

Deadly physical force means force which is used with the purpose of causing death or serious physical injury or in the manner of its use or intended use is capable of creating a substantial risk of causing death or serious physical injury.

Self defense justifies the use or threat of physical force only while the **apparent** danger continues. The right to use physical force in self defense ends when the **apparent** danger ends.

The standard for determining whether a defendant is entitled to the defense of self defense is whether a reasonable person, similarly situated, would believe that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force.

That the defendant's belief was honest is immaterial. You must measure the defendant's belief against what a reasonable person would believe.

(Italicized emphasis in original, bold emphasis added.)

¶77 Defendant contends that the bolded term "only" in the instruction misled the jury into believing the Victim's "actual deadly force" and not "reasonably apparent deadly force" was necessary to justify Defendant's use of deadly force in response. We disagree for several reasons. First, Defendant's proposed jury instruction used the word "only" as quoted above and in a separate instruction had the paragraph quoted above about apparent deadly force. Defendant also submitted a supplemental proposed instruction that apparently incorporated the language about apparent deadly force into the self-defense instruction.[12] We will not reverse any error, fundamental or not, if the error was invited by the appellant. *See Logan*, 200 Ariz. at 565-66, ¶ 9, 30 P.3d at 632-33.

¶78 Second, even if this issue arose again on remand, the instruction was not erroneous on this point. Self-defense jury instructions are valid if they adequately reflect the law when taken as a whole and the instructions do not mislead the jurors. *State v. Sierra-Cervantes*, 201 Ariz. 459, 462, ¶ 16, 37 P.3d 432, 435 (App. 2001) (instructions examined in their entirety to determine whether they adequately reflect the law, and we will reverse a conviction only if the instructions, as a whole, would mislead the jury). In *State v. Grannis*, 183 Ariz. 52, 900 P.2d 1

[12] The transcript of the hearing settling jury instructions reflects that the supplemental instruction incorporated Defendant's language about apparent force into his self-defense instruction.

(1995), our supreme court determined the trial court erred in instructing the jury, "[a] defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force[]" when no accompanying instruction allowed the jury to find reasonably apparent force justified the defendant's use of deadly force in self-defense. 183 Ariz. at 61, 900 P.2d at 10.[13] The instruction absent in *Grannis* was present here and was expressly proposed by Defendant to meet the requirements of *Grannis*. In this case, a reasonable juror reading the instruction in its entirety would not impose a requirement that actual deadly force be used or threatened against Defendant as a pre-condition to his use of force in self-defense. The instruction, taken as a whole, adequately reflects the law and would not mislead the jurors. Accordingly, the trial court did not abuse its discretion in giving this self-defense instruction.

Defendant did not include the proposed supplemental instruction in the record on appeal.

[13] "[A] person is justified in . . . using physical force against another when to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force." A.R.S. § 13-404(A) (2001).

"A person is justified in . . . using deadly physical force against another: 1. If such person would be justified in . . . using physical force against the other under § 13-404, and 2. When and to the degree a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force." A.R.S. § 13-405 (2001).

¶79 Defendant also contends the jury should have been instructed that his good faith belief that deadly force was justified was "insufficient" not "immaterial." We summarily reject this argument. In *State v. Tuzon*, 118 Ariz. 205, 209, 575 P.2d 1231, 1235 (1978), our supreme court held that in a homicide self-defense case, the standard for self-defense is objective, not subjective. That is, what matters is a reasonable person's belief, not the unreasonable, even if honest, belief of the accused.

¶80 Defendant argues that in *Korzep v. Superior Court*, 172 Ariz. 534, 540, 838 P.2d 1295, 1301 (App. 1991), we held that under a justification defense for use of force to prevent a crime, there was both an objective and subjective component to the defense. That is, if a defendant showed he believed that a crime was being committed and he needed to use force to prevent it, the burden shifted to the State to show that his belief was objectively unreasonable. *Korzep,* however, dealt with A.R.S. §§ 13-411(A) and (C). At the time *Korzep* was decided, subsection A provided that a person is justified in using deadly physical force if he or she reasonably believed that such force was immediately necessary to prevent certain crimes. Subsection C provided that a person is presumed to be acting reasonably for the purposes of that section if he is acting to prevent the commission of the crimes listed in

subsection A. Thus, the court in Korzep was interpreting the two subsections to find both objective and subjective components given the presumption of reasonableness in subsection C. A.R.S. §§ 13-404 and 13-405, dealing with self-defense, do not have any such presumption. Thus, an unreasonable, but honest belief, is not material and the instruction given was not error.

B. Motive

¶81 As final instructions were being settled, the superior court and the parties agreed that Defendant's request for the standard instruction regarding motive should be given.[14] However, the motive instruction was not included in the instructions provided to the jury. Defendant argues that the motive instruction was important to his case because the State's position was that Defendant was "salivating" at his chance to use his firearms training to shoot someone.

¶82 While motive is not an element in murder cases, it is always relevant in such cases, even when the Defendant either denies he committed the crime or claims self-defense. *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983). Thus, in Hunter, the defendant claimed self-defense in the murder case and the court gave an incomplete motive instruction merely stating that

[14] The instruction reads, "The State need not prove motive, but you may consider motive or lack of motive in reaching your verdict." RAJI Stand. Crim. 38.

"`[i]t is not necessary for the state to establish a motive for the defendant to commit the crime.´" 136 Ariz. at 49, 664 P.2d at 199. The supreme court held the instruction was incomplete because it did not inform the jury that "motive was a circumstance it could consider in determining guilt or innocence [and because] the instruction is incomplete, it has the potential to mislead the jury into thinking that motive or lack of motive is of no significance at all." 136 Ariz. at 50, 664 P.2d at 200. The court also found that the error was reversible given that the state conceded the defendant had no apparent motive to kill the victim and the instruction could have misled the jury into ignoring this fact when it may have otherwise considered it. *Id.* at 51, 664 P.2d at 201. Accordingly, we find the failure to give the agreed-upon instruction here was error.

¶83 However, both before and after the instructions were given to the jury, the court asked counsel if there were any instructions it overlooked and Defendant did not point out the omission of the motive instruction. Thus, as the State argues, Defendant waived this error below. Ariz. R. Crim. P. 21.3 (c). We need not decide, however, whether that error was fundamental because we are reversing on other grounds. On remand, if either party requests an appropriate motive instruction, the superior court should give it.

C. Dangerous Instruments/Responsibility for Dogs

¶84 Defendant argues that the superior court erred in refusing to instruct the jury that the Victim's dogs and rocks at his disposal could be considered dangerous instruments and that they presented a threat of death or serious physical injury. Defendant requested an instruction defining a "dangerous instrument." The State objected because there was no evidence the Victim had attempted to or did use the dogs or a rock to threaten Defendant. The superior court agreed with the State and denied the requested instruction. As we deal with the dangerous instrument instruction related to the dogs in our separate opinion, we limit our discussion here to the denial of the dangerous instrument instruction as to rocks.

¶85 We review a court's denial of a proposed jury instruction for abuse of discretion. *Cox*, 217 Ariz. at 356, ¶ 15, 174 P.3d at 268. "A party is entitled to an instruction on any theory of the case reasonably supported by evidence." *Bolton*, 182 Ariz. at 309, 896 P.2d at 849; *Shumway*, 137 Ariz. at 588, 672 P.2d at 932. The record does not reflect any evidence that the Victim used or threatened to use rocks to kill Defendant or cause him serious physical injury. *See* A.R.S. § 13-105(11) (defining dangerous instrument as "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury"). Therefore,

we agree with the superior court's denial of the instruction that rocks were a dangerous instrument.

D. Reasonable Doubt

¶86 Defendant argues that the reasonable doubt instruction given by the superior court is constitutionally deficient because it impermissibly lowered the State's burden of proof. We reject this argument.

¶87 The instruction given was previously mandated by *State v. Portillo,* stating "[W]e require as a matter of state law that commencing no later than January 1, 1996 Arizona trial courts give the reasonable doubt instruction . . . in every future criminal case." 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). The Arizona Supreme Court has repeatedly upheld the *Portillo* instruction, *State v. Lamar*, 205 Ariz. 431, 441, ¶ 49, 72 P.3d 831, 841 (2003) (citing cases), and we have no authority to overrule that court's decision on this matter. *State v. Hoover*, 195 Ariz. 186, 188-189, ¶ 14, 986 P.2d 219, 221-22 (App. 1998). Therefore, the court's use of the reasonable doubt jury instruction was not error.

CONCLUSION

¶88 For the reasons stated in our separate opinion, Defendant's conviction and sentence are reversed. This matter is

remanded to the superior court for further proceedings consistent with this decision and our separate opinion.

DONN KESSLER, Presiding Judge

CONCURRING:

PHILIP HALL, Judge

JOHN C. GEMMILL, Judge