ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

CHRISTOPHER MICHAEL MONTOYA,

Appellant.

CR–22–0106–AP

Maricopa County Superior Court
No. CR2017–006253–001

STATE OF ARIZONA'S ANSWERING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Did the alleged cumulative prosecutor error deny Montoya a fair trial?

2. Did the trial court's modification of Montoya's voir dire hypothetical prevent him from properly screening and selecting a constitutionally adequate jury?

3. Did the trial court abuse its discretion by denying Montoya's request to strike a juror for cause and by designating a sleeping juror as an alternate?

4. Did the trial court commit fundamental error by admitting relevant pictures of the victim, which showed the circumstances of the offense and the cause of death?

5. Did the trial court err by allowing Montoya to waive mitigation in compliance with this Court's precedents?

6. Did the trial court commit fundamental error by allowing the victims to present relevant and proper victim impact evidence to the jury?

7. Did the trial court commit fundamental error in instructing the jury about the especially cruel and heinous aggravator?

8. Did the trial court commit fundamental error in failing to advise Montoya that his noncapital convictions would be reviewed on direct appeal rather than in a petition for post-conviction relief, and he would not receive a second of-right petition for post-conviction relief where he could claim the ineffective assistance of counsel of his first petition for post-conviction relief counsel?

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STATEMENT OF THE CASE

On December 5, 2017, a grand jury indicted Christopher Montoya for eight felonies:

- First-degree premeditated/felony murder, for the killing of A.R. (Count 1);
- Burglary in the second degree (Count 2);
- Kidnapping (Count 3);
- Aggravated Taking Identify of Another (Count 4);
- Unlawful Use of Means of Transportation (Count 5);
- Theft (Count 6);
- Cruelty to Animals (Counts 7 and 8).

Record on Appeal ("R.O.A.") 1. On May 14, 2021, Montoya pled guilty to all eight counts and admitted two death-qualifying aggravators: that he had been previously convicted of a serious offense and that he killed A.R. in an especially cruel, heinous, or depraved manner. R.O.A. 242; A.R.S. § 13-751(F)(2), (6). A jury sentenced Montoya to death for A.R.'s murder on April 12, 2022. R.O.A. 423. The trial court sentenced Montoya to consecutive prison terms on the remaining seven counts, totaling 103 years. R.O.A. 424. The facts and evidence, viewed in the light

most favorable to upholding the verdicts and sentences imposed[1], reflect the following.

In April 2017, A.R. met Montoya through an online dating application. Reporter's Transcript ("R.T.") 3/30/22, at 21–22. Montoya quickly began leaving his belongings at A.R.'s home and frequently slept there. *Id.* at 22, 26, 47–48. While they were dating, Montoya was on probation for a previous aggravated assault conviction. R.T. 3/31/22, at 86. About two months later, A.R. discovered that Montoya was continuing to interact with other women on the dating application and told Montoya she wanted to end their relationship and he needed to remove his belongings from her house. R.T. 3/30/22, at 24–25, 27, 49–50. The following day, on June 19, A.R. told a friend that she had changed the code to her garage and Montoya returned the garage remote. *Id.* at 28. Following the breakup, Montoya continued to send text messages to A.R. and to come over to her house. *Id.* at 28–29.

On October 12, 2017, Montoya was waiting for A.R. when she returned home. *Id.* at 63. The next day, Montoya went to A.R.'s home when he thought she was at work. *Id.* at 30, 64–65. After these incidents, A.R. told her friend she was

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[1] *State v. Acuna Valenzuela*, 245 Ariz. 197, 224, ¶ 122 (2018); *State v. Gunches*, 240 Ariz. 198, 207, ¶ 41 (2016).

considering getting a restraining order against Montoya. *Id.* at 30, 65. Although A.R. was afraid of Montoya, she was reluctant to call the police or follow through and get a restraining order. *Id.* at 30–33.

On October 13, 2017, A.R. went on a date with a person unrelated to this case. *Id.* at 66. When she returned home, Montoya was waiting for her. Montoya hit her in the head with a hammer near her arcadia door, causing blood splatter. *Id.* at 149–50. He also threatened her with a knife. R.T. 5/14/21, at 24. At some point during the altercation, Montoya handcuffed A.R.'s hands behind her back, tied her feet together with a belt, and moved her to the bed in the master bedroom. R.T. 4/4/22, at 29, 34.

Montoya was able to extract from A.R. her phone password, pin number, and email user name and password. R.T. 4/4/22, at 140–41. After gaining this information, Montoya killed her anywhere from 4 days to 10 days before law enforcement discovered her body. *Id.* at 61. Montoya killed A.R. by hitting her at minimum 14 times in the head with a hammer. *Id.* at 80. The hammer blows caused numerous fractures in A.R.'s skull and three openings in her skull that directly exposed her brain. *Id.* at 43–48. After killing her, he wrapped the body in A.R.'s comforter and several tarps, using bungee cords and rope to secure the coverings. R.T. 3/30/22, at 150–53; R.T. 4/4/22, at 22–23. Montoya placed A.R.'s wrapped body in the master bathroom and left it there to decompose. R.T. 3/30/22,

at 155–56. He lit candles and placed them around A.R.'s house. R.T. 3/29/22, at 153, 158; R.T. 3/30/22, at 130. At some point Montoya also smothered one of A.R.'s dogs and left the body in a kennel with A.R.'s other dog. R.T. 5/14/21, at 30. The other dog survived but was extremely dehydrated. *Id.* at 27.

Montoya used A.R.'s personal information to gain access to her finances. Montoya ordered several items for himself from A.R.'s Amazon account. R.T. 4/5/22, at 54–55. He also used her card to make purchases at stores throughout the Phoenix area. *Id.* at 56–59. In total, Montoya spent $13,713 of A.R.'s money between October 12, 2017 and October 24, 2017. *Id.* at 59. Montoya was also seen on October 14 and 15 driving a dark grey Jeep Grand Cherokee, which was the same make, model, and color as A.R.'s Jeep. *Id.* at 65–66. He also removed most of A.R.'s belongings from her home, which were never recovered. R.T. 3/30/22, at 39, 110. To facilitate his continuing theft and to avoid detection, Montoya unscrewed the lightbulbs throughout the house, disconnected the garage door opener, and secured the backyard gate with zip ties. *Id.* at 110; R.T. 3/29/22, at 146–47, 155–56, 164.

On Saturday, October 14, 2017, Montoya started using A.R.'s phone to impersonate A.R. to her coworkers, friends, and family. R.T. 4/6/22, at 57–59. To help with this scheme, Montoya would only communicate through text messages and refused all telephone calls. R.T. 3/30/22, at 33–36, 73. The first indication that

Montoya was controlling A.R.'s phone happened when A.R.'s coworker/friend asked how her date went the previous night. *Id.* at 67. The response he received was uncharacteristically dark for A.R. *Id.* at 67–69. The following Monday, A.R. did not go to work, which was also very uncharacteristic for her. *Id.* at 69. After A.R. failed to appear for work, her coworker started texting A.R. to check if she was alright, but he only received short responses that did not match A.R.'s usual texting style. *Id.* at 69–72. A.R. continued to miss work and A.R.'s coworker started to aggressively question the user of A.R.'s phone. *Id.* at 71. To avert suspicion and explain the uncharacteristic behavior, Montoya told the coworker that A.R.'s father had a stroke and that was the reason she did not appear at work and was not accepting phone calls. *Id*.

A.R.'s friends and coworkers became suspicious that someone other than A.R. was controlling her phone. *Id.* at 33–34, 72–73. Their suspicions were confirmed through three events: the person using A.R.'s phone did not know what a pasty was, one of A.R.'s favorite foods; A.R.'s father did not have a stroke; and the person using A.R.'s phone quit her job over text. *Id.* at 72–73.

On October 23, 2017, in the late morning or early afternoon, Montoya left the Phoenix area but continued to use A.R.'s phone. R.T. 4/6/22, at 51–52. He drove to Kingman, Arizona. *Id.* at 52. Montoya remained there overnight and then went south towards Bagdad. *Id.* at 54–55. A.R.'s phone received its last call on

October 24, 2017, near the Tegner Street exit on Route 93. *Id.* at 55. Montoya disposed of A.R.'s phone, and law enforcement were never able to recover it. *Id.* Montoya's phone data showed he drove to Las Vegas later the same day. *Id.*

On October 24, 2017, A.R.'s friends contacted police to conduct a welfare check on A.R.'s home. R.T. 3/30/22, at 74. Officers conducted the check but did not see anything out of the ordinary. R.T. 3/29/22, at 134–35. Dissatisfied with the welfare check, A.R.'s friends decided to check on the house themselves after work. R.T. 3/30/22, at 74. When they arrived, they found numerous Amazon packages piled in front of A.R.'s doorway. *Id.* They opened some of the packages and found they held numerous cash gift cards. *Id.* at 74–75. After seeing this, the friends called 911 and waited for law enforcement. *Id.* at 75–76. While waiting, they decided to go through A.R.'s side gate to the backyard. *Id.* at 77. They found zip ties holding the side gate closed and the sliding glass door was shattered. *Id.* A.R. did not use zip ties to secure her side gate. *Id.* at 78. After this discovery, they called law enforcement again. *Id.* at 80. When law enforcement arrived, they did a protective sweep of the property and noted a lit candle in the master bedroom, a strong odor, and a large "package" in the master bathroom. R.T. 3/29/22, at 142. This "package" was later determined to be A.R.'s body. *Id.*

The police spoke with A.R.'s friends and the friends indicated that Montoya would not leave A.R. alone and they suspected he was involved in her

disappearance. *Id.* at 180. Based on these statements, Montoya became the primary suspect in A.R.'s murder. R.T. 4/5/22, at 83–84.

The day after police discovered A.R.'s body, October 25, 2017, the Mineral County Sheriff's Department saw Montoya going through Hawthorne, Nevada at around 100 miles per hour. R.T. 4/4/22, at 106. Montoya attempted to flee from the Sheriff's Deputies as they pursued him. *Id.* He crashed his truck in the desert and the Sheriff's Department quickly arrested him. *Id.* at 107. The Sheriff's Department opened a safe in Montoya's truck, which contained A.R.'s handgun. *Id.* at 108. They also found over $5,000 in cash in the truck. *Id.* at 109.

On October 27, City of Phoenix detectives went to Mineral County to look for evidence of A.R.'s murder in Montoya's truck and interview Montoya. *Id.* at 11, 110. Inside the truck, the detectives found numerous items belonging to A.R., such as: two computers, prescription pill bottles with A.R.'s name on them, mortgage paperwork for A.R.'s home, and both her personal and work debit/credit cards. *Id.* at 108, 119, 131, 137, 139.

Montoya pled to the indictment and the two aggravating circumstances of having previously committed a serious offense and that the murder was committed in an especially heinous, cruel or depraved manner. R.O.A. 242 at 5; R.T. 5/14/21, at 5–50. Montoya only presented acceptance of responsibility as mitigation, along with the mitigation his counsel could raise by cross examining the State's

witnesses. He waived the presentation of all other mitigation. After considering the mitigation and aggravating circumstances, the jury sentenced Montoya to death. R.O.A. 422.

For the non-capital offenses, the trial court found that Montoya admitted the aggravating factors, and the court "emphasize[d] that most of these counts were done for pecuniary gain. All of these counts had a substantial impact on the victim and the victim's family. [Montoya] does have a significant prior felony record. There was a use of a weapon. … This was a very senseless series of crimes." R.T. 4/12/22, at 19. In mitigation, the court found Montoya "did have a significant substance abuse problem …, and he did accept responsibility by entering into pleas to all seven counts and also admitting to aggravating factors for purposes of the penalty phase in Count I. … I do find that he had significant mental health problems …." *Id.* The trial court found the aggravation outweighed the mitigation and sentenced Montoya to consecutive terms as follows: Count 2, 20 years in prison; Count 3, 28 years in prison; Count 4, 20 years in prison; Count 5, 6 years in prison; Count 6, 20 years in prison; Count 7, 4.5 years in prison; and Count 8, 4.5 years in prison. *Id.* at 20–21. The total time for his non-capital counts is 103 years in prison. Montoya did not receive any pretrial incarceration credit. *Id.* at 21.

Montoya appealed from the judgments and sentences. R.O.A. 449. This Court has jurisdiction under Arizona Constitution Article VI, Section 5(3), and Arizona Revised Statutes §§ 13–4031, and –4033(A).

ARGUMENTS

I

THE PROSECUTOR EITHER DID NOT COMMIT ERROR OR ANY ERROR DOES NOT REQUIRE REVERSAL.

I. Standard of Review.

Montoya contends that the prosecutor engaged in misconduct throughout the trial, alleging the prosecutor improperly: (1) argued an unproven aggravator; (2) appealed to the passions and sympathies of the jury; (3) used proffered mitigation as a non-statutory aggravator; (4) misstated the law regarding mitigation; (5) vouched for two witnesses; (6) improperly questioned a witness; and (7) commented on Montoya's failure to testify. O.B. at 20–68.

Montoya admits he did not object below to any of the instances he now challenges. *Id.* at 24, 27, 32, 34, 37, 41, 48, 50, 55, 58, 61, and 66. This Court therefore reviews the issues for fundamental error. *State v. Bocharski*, 218 Ariz. 476, 491, ¶ 74 (2008). Under this standard, a defendant must first prove that an error occurred. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 23 (2005); *see also State v. Diaz*, 223 Ariz. 358, 360–61, ¶ 11 (2010) (under any standard of review, defendant "must first establish that some error occurred"). Second, the defendant

must prove that the error "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," and thus qualifies as fundamental. *Henderson*, 210 Ariz. at 568, ¶ 24. Third, the defendant must prove that the error prejudiced him. *Id.* at 568–69, ¶ 26. Because fundamental error review is a fact-intensive inquiry, the showing required to prove prejudice varies "depending upon the type of error that occurred and the facts of a particular case." *Id.*

II. Evaluating prosecutor misconduct and error claims.

At the penalty phase, the jury must make "a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *State v. Prince*, 226 Ariz. 516, 527, ¶ 20 (2011) (quoting *Kansas v. Marsh*, 548 U.S. 163, 174 (2006)); *see also* A.R.S. § 13-751(G) (jury shall consider defendant's character, record, propensities, and any circumstances of the offense). Accordingly, in the penalty phase, "the state may present any evidence that demonstrates that the defendant should not be shown leniency." A.R.S. § 13-752(G). Prosecutors have "wide latitude" in presenting arguments to the jury. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37 (2000). A prosecutor is allowed to argue "all reasonable inferences from the evidence," so long as he avoids "mak[ing] insinuations that are not supported by the evidence." *State v. Hughes*, 193 Ariz. 72, 85, ¶ 59 (1998).

In evaluating the propriety of a prosecutor's argument, this Court considers "whether the remarks called to the jurors' attention matters that they should not consider, and whether, 'under the circumstances of the particular case, [the remarks] probably influenced' the jurors." *State v. Roque*, 213 Ariz. 193, 224, ¶ 128 (2006) (alteration in original) (quoting *Sullivan v. State*, 47 Ariz. 224, 238 (1936)). In determining whether misconduct occurred, the prosecutor's statements must be considered in the context in which they were made. *State v. Sanders,* 245 Ariz. 113, 131, ¶ 78 (2018); *State v. Kemp*, 185 Ariz. 52, 62 (1996). "When reviewing the conduct of prosecutors in the context of 'prosecutorial misconduct' claims, courts should differentiate between 'error,' which may not necessarily imply a concurrent ethical rules violation, and 'misconduct,' which may suggest an ethical violation." *In re Martinez*, 248 Ariz. 458, 470, ¶ 47 (2020).

A. The prosecutor's closing argument did not amount to reversible error.

Montoya contends the prosecutor improperly argued that he relished in the murder. O.B. at 24–25. He argues this Court should review the claim under harmless error. *Id.* at 24. Although he did object, he did not object on the grounds of prosecutorial misconduct. *See.* R.T. 4/11/22, at 140; *see also State v. Cornell*, 179 Ariz. 314, 329 (1994) ("[I]f a defendant fails to object and then objects on inappropriate grounds, the issue is waived and does not require or permit reversal

absent fundamental error.”). Thus, this Court should review for fundamental, prejudicial error.

At the start and the end of the penalty phase, the trial court provided the jury with jury instructions. The court instructed the jury that “[t]he attorneys’ remarks, statements, and arguments are not evidence ….” R.T. 3/28/22, at 15; R.T. 4/11/22, at 24. The court also told the jury the aggravating circumstances Montoya pled to and the legal definition for both aggravators. R.T. 3/28/22, at 19–21; R.T. 4/11/22, at 21–23. In defining especially heinous, the trial court told the jury that Montoya admitted A.R.’s murder was especially heinous because Montoya “inflicted gratuitous violence.” R.T. 4/11/22, at 22. Although the trial court did not specifically instruct the jury about objections during argument, the trial court did instruct the jury that they could not consider testimony or exhibits as evidence when the court sustained an objection. R.T. 3/28/22, at 11–13; R.T. 4/11/22, at 21.

During closing arguments, the prosecutor explained that the jury must determine if the mitigation presented was sufficiently substantial to call for leniency. R.T. 4/11/22, at 139. She then encouraged the jury to “look to the record in this case and see if there’s evidence for a basis for mercy or leniency.” *Id.* In reviewing the evidence of the struggle between A.R. and Montoya, the prosecutor stated:

> [A.R.] died of a real death [sic]. Attacked in her living room. Blood spatter on the wall. A nick in her couch that was not there before,

> according to Maria. Handcuffed. And a belt around her ankles in her bedroom. *One can only imagine the control he had over her and how he may have enjoyed it*.

Id. at 139–40 (emphasis added).[2] Montoya now claims that the emphasized portion was urging the jury to consider the unproven aggravator that Montoya relished the murder. O.B. at 24–25.

Although arguing an unproven aggravator in closing argument can be considered error, that error is not reversible error when the jury is provided adequate instructions. *State v. Cota*, 229 Ariz. 136, 151, ¶ 81 (2012). Montoya's jury had the definition of the especially cruel and heinous aggravator, which did not include a reference to gratuitous violence. The trial court also instructed the jury not to consider the lawyer's arguments as evidence and not to consider testimony or exhibits where the court sustained an objection. *See State v. Gallardo*, 225 Ariz. 560, 569, ¶ 40 (2010) (courts presume "that jurors follow the court's instructions).

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[2] Montoya objected to this comment on the ground that it lacked foundation, and the trial court sustained the objection. R.T. 4/11/22, at 140. Montoya did not, however, argue that it constituted prosecutorial misconduct. Accordingly, Montoya's foundation objection did not preserve this issue for appeal. *See State v. Morris*, 215 Ariz. 324, 335, ¶ 47 (2007); *see also State v. Lopez*, 217 Ariz. 433, 434–35, ¶ 4 (App. 2008) ("[A] general objection is insufficient to preserve an issue for appeal … [a]nd an objection on one ground does not preserve the issue on another ground.") (internal citation omitted).

The trial court further minimized the prejudicial impact of this single sentence in the prosecutor's 71 page closing argument by sustaining Montoya's objection. *See State v. Dunlap*, 187 Ariz. 441, 461 (App. 1996) (holding the prosecutor's improper cross-examination caused minimal prejudice where the trial court sustained the objection and the jury instructions told the "jury to disregard any questions to which objections were sustained."). The jury instructions coupled with the court sustaining Montoya's objection cured or minimized any prejudice from the single statement. This makes any error harmless beyond a reasonable doubt. *See e.g. State v. Moody*, 208 Ariz. 424, 460, ¶ 151 (2004) (prosecutor's remark did not require reversal where defense counsel objected, trial court sustained objection, and jurors were instructed to disregard remark). Considering that any purported error was harmless beyond a reasonable doubt, Montoya has failed to establish fundamental, prejudicial error.

B. The prosecutor did not improperly appeal to the passions and sympathies of the jurors.

"Trial attorneys are generally granted wide latitude in presenting their closing arguments," *State v. Herrera*, 174 Ariz. 387, 396 (1993), but "may not make arguments that appeal to the jury's fear or passion," *State v. Lynch*, 238 Ariz. 84, 100, ¶ 48 (2015) (reversed on other grounds by *Lynch v. Arizona*, 578 U.S. 613 (2016)). None of the prosecutor's statements improperly appealed to the jury's fear

or passion, and Montoya has failed to meet his burden of demonstrating that fundamental, prejudicial error occurred.

1. The prosecutor did not appeal to the jurors' sympathies by noting the "horror," "shock," and "disgust" of the murder.

During closing arguments, the prosecutor, while arguing that the jury should return a death verdict, stated:

> What is the appropriate punishment for this defendant and this crime?
>
> The punishment in this case should reflect the horror, the shock, and the disgust that all of you must have felt when you learned of the cruel death this defendant chose to impose upon [A.R.].

R.T. 4/11/22, at 77. Montoya argues this comment "could only have been intended to inflame the minds of the jurors and coerce them into returning a death verdict." O.B. at 28. Montoya did not object to the prosecutor's comments; thus, this Court reviews the claim for fundamental error. *Bocharski*, 218 Ariz. at 491, ¶ 74.

The prosecutor's comment was not an improper appeal to sympathy or fear. Instead, it was a comment "on the vicious and inhuman nature of [Montoya's] acts" and went to the State's argument that A.R.'s murder was especially cruel, heinous or depraved. *State v. Comer*, 165 Ariz. 413, 426 (1990). Indeed, just after the comment Montoya takes issue with, the prosecutor reminded jurors that they "must not be swayed by mere sympathy or emotion." R.T. 4/11/22, at 78.

Moreover, this Court has found that direct appeals to the jury's fears do not deprive the defendant of a fair trial where the comment was isolated, the trial court sustained the objection, and the trial court instructed the jury that it was not to consider the possible effects of its verdict. *State v. Moody*, 208 Ariz. 424, 460, ¶ 152 (2004). In *Moody*, the prosecutor argued that "the defendant is asking you to excuse a man who has brutally [and] viciously . . . murdered two innocent women on the basis of a disorder that is not even settled in the mental health field. . . . Before you cut somebody loose on that kind of disorder . . . ." *Id.* at 459, ¶ 148. At this point, the defendant objected, and the trial court sustained the objection and instructed the jury to disregard the comments. *Id.* This Court determined that the prosecutor clearly had impermissibly appealed to the jury's fears that a verdict of not guilty by reason of insanity would result in the defendant's release. *Id.* at 460, ¶ 150. Nevertheless, this Court concluded that, "because it was an isolated comment, was promptly objected to, and was rendered less harmful by the court, we cannot conclude the comment, by itself, denied Moody a fair trial." *Id.* at ¶ 152.

The prosecutor's comment in this case does not even approach the "irresponsible, inappropriate, and inflammatory" comment the prosecutor made in *Moody*. *Id.* Unlike *Moody*, this comment did not play to the jurors' fear of future release because the jurors were well aware that Montoya would remain in prison for the rest of his life. R.T. 4/11/22, at 31–32. Rather, the comment was focusing

the jury on the aggravators and the circumstances of the offense. Before the offending comment, the prosecutor reminded the jury to think about the aggravators and the circumstances of the offense when weighing Montoya's mitigation. *Id.* at 76–78. Montoya admitted the murder was especially cruel and that he inflicted gratuitous violence during the murder. *Id.* at 22. The circumstances of the offense certainly support this aggravator, where Montoya: stalked A.R.; ambushed her in her home; handcuffed her hands and bound her legs with a belt; extracted her personal information; murdered her by repeatedly hitting her in the head with a hammer; and leaving her to decompose while he spent her money and disposed of her belongings. The comment was proper argument on why the jury should not give Montoya a life sentence.

Moreover, it was an isolated comment, and even if this Court found the comment appealed to the jurors' emotions, this Court "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). In addition, the trial court instructed the jury that the lawyers' arguments were not evidence. R.T. 4/11/22, at 24. Thus, the trial court cured any possible prejudice resulting from the prosecutor's comment. *See Prince*, 226 Ariz. at 538, ¶ 90. The prosecutor's remark did not deprive Montoya of a fair trial and,

as explained in more detail below, *see infra* § I(C)(3), Montoya cannot show that the jury's verdict would have changed had the trial court stuck this comment from the record. *See Henderson*, 210 Ariz. at 568, ¶ 22.

2. The prosecutor did not improperly use the victim impact statements to argue for a death sentence.

Arizona permits victim impact evidence during the penalty phase of capital sentencing proceedings. *See* Ariz. Const. art. II, § 2.1(A)(4) (entitling a victim to be heard at sentencing); A.R.S. § 13-752(R) (allowing victim to present information during penalty phase about the murdered person and the impact of the murder on the victim and other family members). "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Accordingly, "statements relevant to the harm caused by the defendant's criminal acts" are no longer barred, but "statements regarding sentencing" are prohibited. *Lynn v. Reinstein*, 205 Ariz. 186, 191, ¶ 17 (2003). Victim impact evidence may not "be so unduly prejudicial that it renders the trial fundamentally unfair." *State v. Tucker*, 215 Ariz. 298, 320, ¶ 92 (2007) (citing *Payne*, 501 U.S. at 825). Additionally, a victim may not recommend a particular sentence. *State v. Ellison,* 213 Ariz. 116, 141, ¶ 111 (2006).

After the State concluded its case, the jury heard victim impact statements from two of A.R.'s sisters, her mother, and her father. R.T. 4/6/22, at 61–83. Montoya did not object to the admission of these statements or to their contents. He does challenge portions of the victim impact statements in Claim VI of this appeal. *See* O.B. at 133–39. He also did not object during closing arguments to any of the prosecutor's argument with which he now takes issue.

a. The prosecutor did not transform the victim impact statements into a sentencing recommendation.

Montoya first argues that the prosecutor "mirrored" the victim impact statements in closing arguments and "improperly transformed the victim impact statements into an argument for a death sentence." O.B. at 32. This argument is entirely without merit.

The four victim impact statements lasted for approximately 50 minutes and comprise 22 pages of the transcript. R.O.A. 406 at 2; R.T. 4/6/22, at 61–83. Montoya has cited to seven instances during that 50 minutes in which a victim stated that A.R.'s murder had either "taken" or "robbed" A.R. of her life and future or the victims of their time with A.R. O.B. at 30–31 (citing R.T. 4/6/22, at 64, 69, 76, 82). A.R.'s mother also stated that A.R. had been "denied decency" in her death. R.T. 4/6/22, at 72. Montoya claims these separate comments made "theft . . . a running theme," in the victim impact statements. He does not assert error in these

statements, but only complains that the prosecutor "parroted" those statements during closing arguments. O.B. at 32–33.

Montoya argues the prosecutor made the proper victim impact statements into improper sentencing recommendations by using the same words as the victim impact statement. *Id.* He does not cite authority to support this argument. Because there is no legal authority to support his argument, he cannot show the prosecutor committed error.

Even if the prosecutor could change a victim impact testimony into a sentencing recommendation, the record supports the prosecutor's arguments and logical inferences. First, Montoya complains that the prosecutor argued that Montoya "stole" the opportunity of A.R.'s family to give her an open casket funeral and donate her organs because her body had decomposed so severely by the time she was discovered. R.T. 4/11/22, at 142–43. Next, Montoya points to the prosecutor's statement that Montoya assumed A.R.'s identity and manipulated A.R.'s friends and family "to keep his stealing going" and give himself more time to "take, take, take as much as he possibly could." *Id.* at 142. Lastly, Montoya quotes the prosecutor's statement that "[n]ot only did [Montoya] steal A.R.'s life, he stole her moral constituency and any dignity that was her due when he hammered the life out of her and treated her body with no regard." *Id.* at 142–43.

Each of these comments is directly related to the evidence presented. After killing A.R., Montoya wrapped her body in blankets and tarps, leaving it in such a state of decomposition that organ donation was impossible and law enforcement had to use dental records to identify her. And while A.R.'s body was decomposing, Montoya lived in her home and posed as A.R. in text messages with her friends and family, all while illegally spending and taking over $13,500 from her bank account. Indeed, Montoya pled guilty to taking the identity of another and theft.

Montoya's tenuous argument fails on all counts. First, there was not a "theft theme" that pervaded the victim impact statements which the prosecutor could have even hypothetically "parroted." Second, Montoya *did* steal from A.R. – both her identity and her money. The prosecutor's use of that language is natural and expected. Third, although Montoya asserts that the victim impact statements were fresh in the prosecutor and jury's minds during closing arguments, the victim impact statements happened 5 days *before* closing arguments. R.T. 4/6/22, at 61–83; R.T. 4/11/22, at 75–146. Simply using some of the same individual words used by A.R.'s family is not improper and does not constitute misconduct. Because there was no error, much less fundamental error, Montoya has failed to meet his burden. *See Henderson*, 210 Ariz. at 568, ¶ 22.

b. The prosecutor did not improperly make a comparative-mercy argument.

During closing arguments, the prosecutor argued, "When you heard the word mercy, think of the mercy that the defendant showed [A.R.] in her last moments. How he must have looked down on her with each blow, inflicting pain and death." R.T. 4/11/22, at 145. Montoya argues this was both impermissibly inflammatory and a misstatement of the law. O.B. at 33–36. According to Montoya, the prosecutor's remarks improperly invited the jurors to sentence Montoya to death based upon a comparative weighing of the value of A.R.'s life versus the value of Montoya's life.[3] O.B. at 34. Montoya's arguments fail.

Montoya's argument is based on the prosecutor's single statement: "When you heard the word mercy, think of the mercy that the defendant showed A.R. in her last moments." R.T. 4/11/22, at 145. This statement, on its face, is not asking the jury to weigh the value of A.R.'s life against Montoya's. Moreover, even if this Court construed it as such, Montoya takes the prosecutor's statements out of context. Immediately preceding this comment, the prosecutor told the jury:

> The state is confident when you review in a truthful manner, *without sympathy, prejudice, emotion*, when you look at the facts of this case

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[3] Montoya's citation to *Payne v. Tennessee*, 501 U.S. 808 (1991), and this Court's precedent applying it, appear misplaced because the statement at issue did not come from a victim impact statement. O.B. at 34–35.

> and you consider them, as the law instructs you to do, you will find that there is no mitigation or none sufficiently substantial to call for leniency for Christopher Montoya.

Id. at 145 (emphasis added). Further, before the prosecutor's closing argument, the trial court expressly instructed the jury that mitigating "factors under fairness or mercy may reduce the defendant's moral culpability." *Id.* at 26. Montoya's attorney repeatedly asked the jury to show Montoya "mercy" during closing arguments. *Id.* at 36 ("So on his behalf, we ask for your mercy, not because he's earned it, but because it is within your power. Mercy is given and you have been given this responsibility."); *Id.* at 37 ("And I ask that you bestow your mercy and your grace upon him and give him a natural life in prison.").

In *State v. John Allen*, this Court found that the prosecutor "skirted the line and arguably crossed it" by arguing, "The defendant said yesterday that [the victim] didn't deserve to die. Tell him by your verdict that his life is not more valuable than" the victim's. 248 Ariz. 352, 365–66, ¶¶ 48, 50 (2020). Despite that, no error occurred because the "remark was fleeting, did not directly urge jurors to determine the propriety of a death sentence based on a weighing of lives, and was made in the midst of more developed and lengthy arguments that properly focused on [John] Allen's character and the circumstances of [the victim's] murder." *Id.* at ¶ 50. Not only is the prosecutor's statement in this case far from the arguably improper statement in *John Allen*, but it too was a fleeting remark. The statement

here did not ask the jury to reach their verdict by weighing A.R.'s and Montoya's lives, did not talk about how valuable the lives were, and fell within a lengthy closing argument focusing on the circumstances of A.R.'s death and Montoya's character. Montoya cannot show error, much less fundamental, prejudicial error.

Furthermore, Montoya's reliance on *Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004), *State v. Storey*, 901 S.W.2d 886 (Mo. 1995), and *United States v. Johnson*, 713 F. Supp. 2d 595 (E.D. La. 2010) is misplaced. Not only are these cases without precedential effect, but they also do not support Montoya's argument that the prosecutor intended to inflame the jury by her brief comments. In *Catoe*, the court found that the defense attorney was constitutionally ineffective for not objecting to the prosecutor's arguments:

> [T]he solicitor not only suggested that Hall's life was worth less than his victims', he developed an arbitrary formula whereby if the jury finds Hall's life worth less than his victims', then the jury could reach no other conclusion than that the death penalty is justified.

601 S.E.2d at 341. Likewise, in *Storey*, the court found error where the prosecutor argued:

> Why do we have the death penalty? The reason we have the death penalty is because the right of the innocent people to live outweighs—by huge leaps and bounds, outweighs the right of the guilty not to die. The right of the innocent completely outweighs the right of the guilty not to die, and, so, it comes down to one basic thing. Whose life is more important to you? Whose life has more value? The Defendant's or [the victim's]?

901 S.W.2d at 902. And in *Johnson*, the court remanded for a new penalty phase proceeding based upon numerous inflammatory statements made by the prosecutor, including:

> 1. Calling for the death penalty in order to affirm that the victim's life was worthier than that of the "evil" defendant;
>
> 2. Commenting that sentencing the defendant to life would result in the defendant "receiving privileges, meals and visitors" in prison while the victim would "only receive[e] visitors at his grave;"
>
> 3. Arguing that the jury would be guilty of "capitulation, a failure of will and washing the blood from the defendant's hands if they returned a verdict other than death;" and
>
> 4. "[E]xhortations that justice 'demands' the death penalty and that the [victim's] family 'all wait for you to give them some justice."

713 F.Supp.2d at 630–38.

Thus, unlike the prosecutors' arguments in *Catoe*, *Storey*, and *Johnson*, the prosecutor in Montoya's case never argued that Montoya's life was less valuable than A.R.'s life. R.T. 4/11/22, at 145. Rather, read in the context in which the prosecutor made them, the statements remind the jury of its legal duty to assess the aggravating and mitigating factors presented in order to determine whether they should grant Montoya leniency. Montoya has failed to establish that fundamental, prejudicial error occurred. *See Henderson*, 210 Ariz. at 568, ¶ 22.

c. The prosecutor did not use the victim impact statements to compare the value of A.R.'s life with that of Montoya's.

Montoya next argues the prosecutor impermissibly used the victim impact statements to argue that a life sentence was not appropriate. O.B. at 36–39. As with Montoya's similar argument above, this one also fails.

During the victim impact statements, A.R.'s older sister described her last conversation with A.R.:

> During that conversation, we got into a little tiff and I was mad. I didn't end our conversation in the traditional way of saying, "I love you." The last time I spoke to . . . [A.R.] was on October 4th, 2017. I will never be able to make up with her or let her know that I loved her.

R.T. 4/6/22, at 64. A.R.'s younger sister told the jury that A.R. "knew how to have a good time" and "lived her life in a very big way." *Id.* at 67. She gave one such example:

> In July 2017, [A.R.] and I celebrated her 32nd birthday. She flew to Texas and we floated the river on a tube two days in a row. We had a good time and we were able to start planning on living together. That was the last time I got to be with [A.R.] in person.

R.T. 4/6/22, at 67–68.

During closing arguments, the prosecutor stated:

> Remember, [Montoya] has been part of the criminal justice system his whole life — his whole adult life.
>
> He's intelligent and well-spoken.

> A life sentence in this case will guarantee him birthdays, talking to loved ones, having visitations, and resolve any unresolved issues with family and friends.
>
> Life would not be a just punishment in this case based upon the circumstances of the offense, the first degree murder of [A.R], the aggravating circumstances of this murder, and the evidence before you about this defendant's character and history.

R.T. 4/11/22, at 143–44. Montoya argues the last sentence "transformed the impact statements into a sentencing recommendation" by arguing that, unlike A.R., Montoya would be able to celebrate birthdays and resolve any issues with his family. O.B. at 36–39. This argument fails.

First, the prosecutor's arguments cannot transform proper victim impact statements into an improper sentencing recommendation. Victim impact statements inform "the sentencing authority about the specific harm caused by the crime, thus allowing the jury to assess meaningfully the defendant's moral culpability" *Prince* 226 Ariz. at 535, ¶68 (quotation marks omitted). The prosecution has freedom to argue the defendant is not entitled to leniency, which includes referencing the victim impact statements. A.R.S. § 13-752(G); *Tucker*, 215 Ariz. at 320, ¶ 92 ("Evidence about the victim and the effect of the crime on the victim's family is admissible during the penalty phase as rebuttal to the defendant's mitigation evidence."). *See also Hughes*, 193 Ariz. at 85, ¶ 59 ("Counsel can argue all reasonable inferences from the evidence.").

Second, Montoya mischaracterizes the victims' statements. The victims' statements did not focus on the loss of A.R.'s ability to celebrate birthdays or resolve issues. A.R.'s sisters explained how A.R.'s death had impacted them and described A.R.'s personality, using a birthday trip as an example. R.T. 4/6/22, at 64–65, 67–68. Neither sister discussed that A.R. would no longer be able to celebrate birthdays or reconcile with family. Nor did the prosecutor reference the victims' statements in making the complained-of arguments.

Third, Montoya takes the prosecutor's statement out of context. The prosecutor argued to the jury that they should not sentence Montoya to life in prison because of the opportunities a life sentence would afford him. The prosecutor did not reference A.R. or the victim impact statements. The simple fact that A.R. and Montoya have birthdays and conflicts with loved ones—traits shared by the population at large—does not transform the prosecutor's reasonable comments into misconduct or change the victim impact statements into a sentencing recommendation.

Lastly, the jury instructions cured any potential error. *See* R.T. 4/11/22, at 24 (instructing the jury that the comments and arguments of counsel are not evidence); and *id.* at 25 (instructing the jury that it could only consider the victim impact statement to rebut mitigation and not as additional aggravation). Because

there was no error, much less fundamental, prejudicial error, Montoya has failed to meet his burden. *See Henderson*, 210 Ariz. at 568, ¶ 22.

d. Montoya cannot show that fundamental, prejudicial error occurred.

Montoya cannot demonstrate that fundamental, prejudicial error occurred. Even if this Court found the prosecutor's comments were constitute error, Montoya is still not entitled to relief. He has failed to meet his burden, under fundamental error review, of proving that those remarks deprived him of his right to a fair sentencing proceeding. *See State v. Acuna Valenzuela*, 245 Ariz. 197, 222, ¶ 109 (2018).

Specifically, Montoya fails to meet his burden of proving that the prosecutor's brief comments "were likely" to have improperly influenced the jury in reaching their death verdict. *Id.* The trial court instructed the jury that the arguments of counsel were not evidence and that it had a legal duty to consider the aggravating and mitigating circumstances in order to determine whether death was the appropriate sentence. R.T. 4/11/22, at 24, 30–31. Montoya fails to argue, much less prove, that the jurors did not follow their instructions. *See State v. Hulsey*, 243 Ariz. 367, 394, ¶ 123 (2018) (instructions "helped mitigate any impact" of cumulative prosecutorial misconduct); *see also Prince*, 226 Ariz. at 538, ¶ 90. Additionally, the evidence supporting the death sentence was overwhelming, especially in comparison with the relatively weak mitigation.

The jury heard that Montoya stalked A.R., attacked and brutally murdered her in her own home, wrapped her body in blankets and tarps, and then lived in her house for the next 10 days. R.T. 3/30/22, at 149–50; R.T. 4/4/22, at 29, 34. While living in A.R.'s house, with her body in the bathroom, Montoya posed as A.R. to her friends and family in texts, even going so far as attempting to quit A.R.'s job while posing as her. R.T. 3/30/22, at 33–36, 67–73; R.T. 4/6/22, at 57–59. He went out to stores and made purchases using A.R.'s credit and debit cards, ensuring he received cash back after each purchase. R.T. 4/5/22, at 54–59. Montoya emptied A.R.'s bank account, stole her gun safe containing her gun, and used her car. *Id.* at 65–66. He did not leave A.R.'s home until her friends said they were coming over to check on her because they knew something was wrong. Montoya killed one of A.R.'s two dogs, and then put its body in a kennel with the remaining dog, in the same bathroom he was keeping A.R.'s body. R.T. 5/14/21, at 27, 30. He ignored the other dog during these 10 days, leaving it on the verge of death when law enforcement discovered it. *Id.* at 27.

Under these circumstances, Montoya cannot show the victim impact comments during closing arguments after nine days of hearing testimony and evidence would have altered the jury's verdicts. *See State v. Davolt II,* 207 Ariz. 191, 205, ¶ 43 (2004) (finding no prejudice where the error would not have affected the verdicts); *State v. King*, 158 Ariz. 419, 424 (1988) (stating that

fundamental error is present only when the error contributed to or significantly affected the verdict).

C. The prosecutor did not improperly use Montoya's proffered mitigation as a non-statutory aggravator.

Montoya argues that the prosecutor's rebuttal of his mitigation evidence necessarily transformed that evidence into non-statutory aggravators. O.B. at 41. Specifically, Montoya contends that the State impermissibly argued that his acceptance of responsibility and remorse, his family ties, and his substance abuse were non-statutory aggravators. Because the prosecutor did not argue the jury should disregard those factors, and instead properly argued the jury should give them little weight, Montoya's arguments fail.

Prior to trial, Montoya waived his right to present any mitigating evidence. R.T. 9/17/21, at 35–44; R.O.A. 242. He agreed, however, that his attorneys could make arguments that mitigating factors were present based on the evidence elicited during the phase. *Id.*; R.T. 2/23/22, at 23–25, 32–33. The trial court summarized Montoya's mitigation during final jury instructions:

> The circumstances proposed as mitigation by the defendant for your consideration in this case are:
>
> Acceptance of responsibility. Waiver of defense mitigation presentation. Longstanding substance abuse problem. Family history of substance abuse. Michael Auer, his biological father, abandoned him. Tim Montoya, his adoptive father, abandoned him. Faith Montoya, his mother, had substance abuse issues. Good behavior

> while in prison. Chris has a daughter named Alexis. And any other factor identified by an individual juror as being mitigating.

R.T. 4/11/22, at 26.

Montoya now argues that the prosecutor committed misconduct by asking the jury to find that the mitigation argued by his attorneys did not call for leniency. O.B. at 40–49. He did not object to any of these statements, and this Court must review for fundamental, prejudicial error. *See Henderson*, 210 Ariz. at 568, ¶ 22.

In *Eddings*, the Supreme Court applied the rule it had enunciated in *Lockett v. Ohio*, 438 U.S. 586 (1978), dictating that "the sentencer . . . [must] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for aa sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett*, 438 U.S. at 604) (emphasis in original). The Court concluded that, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S. at 113–14 (emphasis in original).

Once, however, "the jury has heard all of the defendant's mitigation evidence, there is no constitutional prohibition against the State arguing that the evidence is not particularly relevant or that it is entitled to little weight." *State v. Anderson*, 210 Ariz. 327, 350, ¶ 97 (2005). *See also State v. Pandeli*, 215 Ariz.

514, 526, ¶ 32 (2007); *Sanders*, 245 Ariz. at 131–32, ¶¶ 83–85. Further, proper jury instructions can remedy any potential error. *See Pandeli*, 215 Ariz. at 526, ¶ 36 (finding any potential error cured when the jury instructions informed the jurors that they should consider and give effect to all the mitigation evidence).

a. Acceptance of Responsibility.

During closing arguments, Montoya's counsel argued at length that the jury should give great weight to Montoya's guilty plea and waiver of mitigation. R.T. 4/11/22, at 33–38, 42–43, 46–47, 64, 66–67, 70–71, 149–55. During the State's closing arguments, the prosecutor stated:

> There is an overwhelming wealth of evidence to establish Christopher Montoya's guilt. Period. That cannot be disputed. You heard from Detective Hansen regarding his observations about the amount of evidence gathered in this case.
>
> So when the state has all of this evidence, how much value — how much value should you give the acceptance of responsibility? Is this really a mitigating circumstance? Or was this a calculated decision by the defendant, knowing that it could be argued by his lawyers as mitigating?
>
> . . . .
>
> Further, to suggest the defendant always takes responsibilities [sic] for his actions rings hollow at best. You have heard testimony when there is a plea, there are benefits for the defendant. You also know that the defendant stated that he thought he should go to trial when talking to Detective Roe in this case. He said it was his -- in his best interest to go to trial. This is before he had four years to review the evidence, the surveillance videos, the scientific evidence, et cetera, that we've just talked about.

Id. at 94–95, 101.

Montoya now argues this argument misstated the law by telling the jury his acceptance of responsibility was not a mitigating circumstance. *See Eddings*, 455 U.S. at 110. He further argues the comments transformed his mitigation "into a non-statutory aggravating circumstance by suggesting that Mr. Montoya's guilty pleas and admission to aggravators was a strategic ploy to strengthen his mitigation at sentencing." O.B. at 42–43. On their face, however, the prosecutor's comments did not ask the jurors to disregard Montoya's acceptance of responsibility or suggest that it constituted a non-statutory aggravator. Rather, the comment properly suggested to the jury that, under all of the evidence and circumstances, it should assign little weight to Montoya's acceptance of responsibility. *See Anderson*, 210 Ariz. at 350, ¶ 97; *see also Busso-Estopellan v. Mroz*, 238 Ariz. 553, 554–55, ¶ 7 (2015) (each juror must individually determine how much weight to give defendant's acceptance of responsibility).

Montoya goes on to contend that the comment was improper because the evidence did not suggest Montoya's guilty plea and waiver of mitigation were strategic ploys. O.B. at 44–45. But an acceptance of responsibility can be earnest *and* a strategic maneuver at the same time. Moreover, the evidence demonstrated that Montoya initially denied any involvement in A.R.'s murder. R.T. 4/5/22, at 17, 22–23. It was not until four years into pre-trial litigation that he opted to change his

plea to the offenses and waive mitigation. It was therefore reasonable for the prosecutor to imply that Montoya's guilty plea and waiver of mitigation were based on the overwhelming amount of evidence against him, rather than him accepting responsibility for his crimes, and thus the jury should give it little weight. *See Hughes*, 193 Ariz. at 85, ¶ 59 ("Counsel can argue all reasonable inferences from the evidence.").

Montoya's reliance on *State v. Johnson*, 247 Ariz. 166 (2019), is unavailing. In that case, the defendant introduced his offers to plead guilty as mitigating evidence. *Id.* at 186, ¶ 46. In rebuttal, the State presented evidence that in exchange for pleading guilty, the defendant would have received a life sentence and therefore better prison housing conditions than a defendant on death row. *Id.* There was no evidence, however, that the defendant was aware of the difference in prison housing conditions between those serving life sentences and those on death row. *Id.* at 187, ¶ 53. Consequently, this Court determined the evidence was irrelevant and, in any event unduly prejudicial, and therefore the trial court improperly admitted it. *Id.* at ¶¶ 53–54.

Here, however, the State did not introduce any evidence to show an ulterior motive for pleading guilty. Rather, as explained above, the State only relied on the evidence introduced at trial and made reasonable inferences based on that evidence. As this Court stated in *Johnson*, "The State may rebut the motivation of

the plea offers by showing that some motivating factor compelled the plea offer other than remorse or an acceptance of responsibility." *Id.* at ¶ 54. It was well within the proper scope of argument for the prosecutor to suggest other reasons, besides remorse, for Montoya to plead guilty.

Moreover, the trial court remedied any potential error through the jury instructions. The jury received a myriad of instructions regarding its consideration of mitigating circumstances. R.T. 4/11/22, at 23, 25–30. Those instructions included directives to the jury that "[m]itigating circumstances may be found from any evidence presented during this sentencing trial"; "[m]itigating circumstances are any factors that are a basis for a natural life sentence instead of a death sentence, so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history or record, or circumstances of the offense"; and "[t]he effect you give to any mitigation is left to your sound discretion in determining whether there are mitigating circumstances sufficiently substantial to call for leniency." *Id.* When explaining that the State may present evidence to show that the defendant is not entitled to leniency, the court specifically informed the jurors, "*You shall not consider this part of the state's evidence as aggravation*, but only in determining whether the defendant should be shown leniency." R.T. 4/11/22, at 28 (emphasis added). The court's instructions thus remedied any possible error. *See Pandeli*, 215 Ariz. at 526, ¶ 36. Montoya has

not shown error, much less fundamental, prejudicial error. *See Henderson*, 210 Ariz. at 568, ¶ 22.

b. Montoya's Daughter.

One of Montoya's proffered mitigating circumstances was that he had a daughter, Alexis. R.T. 4/11/22, at 26. During closing arguments, the prosecutor noted:

> [Alexis' mother] told Detective Martin how once the defendant learned she was having a girl, the defendant had no interest. She told Detective Martin that he spent a total of maybe five hours with Alexis in the entirety of her 15-year life. That his parental rights had been severed. That she didn't want him to know where they lived. What value should you give that factor considering this evidence? He has no relationship with her.
>
> Interestingly, the evidence presented during this trial was that he abandoned his daughter, yet he also wants you to find leniency in the abandonment that he experienced of the same thing.
>
> What does his own abandonment of his daughter say about his character? He gave her no support, nothing. Now she becomes a reason why he should get leniency in this case?

R.T. 4/11/22, at 106.

Montoya does not dispute any of the evidence pointed out by the prosecutor. O.B. at 47–49. He instead makes the conclusory claim that this argument "transformed" a mitigating circumstance into a non-statutory aggravator. *Id.* at 48. But as the prosecutor was making a proper argument that the jury should give this mitigating factor little weight, Montoya's argument fails. *See Anderson*, 210 Ariz.

at 350, ¶ 97 ("Once the jury has heard all of the defendant's mitigation evidence, there is no constitutional prohibition against the State arguing that the evidence is not particularly relevant or that it is entitled to little weight."). Furthermore, the jury instructions remedied any potential error. *See Pandeli*, 215 Ariz. at 526, ¶ 36. Montoya has not fundamental, prejudicial error. *See Henderson*, 210 Ariz. at 568, ¶ 22.

D. The prosecutor's argument regarding excuse or justification was proper.

Montoya argues that the prosecutor engaged in misconduct by arguing that, "if you find a fact or circumstance that was offered to be nothing more than an excuse or justification for the murder, then it isn't mitigating." O.B. at 49–52 (quoting R.T. 4/11/22, at 82). The prosecutor's statement, however, mirrored the applicable instruction the trial court recited to the jury. R.T. 4/11/22, at 26 ("Mitigating circumstances are not an excuse or justification for the offense, but are factors under fairness or mercy may reduce the defendant's moral culpability."). These instructions appropriately reflected the relevant law. *See State v. Sammantha Allen*, 253 Ariz. 306, 359, ¶¶ 198–99 (2022); *see also State v. Kuhs*, 223 Ariz. 376, 386–87, ¶¶ 53–55 (2010) (holding that the mitigation definition in the penalty phase instructions did not exclude the jury from considering mitigation.). The statement, therefore, did not constitute error. *See Henderson*, 210 Ariz. at 568, ¶ 22.

E. The prosecutor did not improperly vouch for two witnesses.

Montoya argues the prosecutor committed misconduct by improperly vouching for two witnesses during trial. O.B. at 52–58. Because he did not object to either of these alleged instances, this Court's reviews for fundamental error. *See Henderson*, 210 Ariz. at 568, ¶ 22.

"There are 'two forms of impermissible prosecutorial vouching: (1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" *State v. King*, 180 Ariz. 268, 276–77 (1994) (alternation in original) (quoting *State v. Vincent*, 159 Ariz. 418, 423 (1989)). "Placing the prestige of the state behind its witness 'involves personal assurances of a witness's veracity,' while '[t]he second type of vouching involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record.'" *Acuna Valenzuela*, 245 Ariz. at 217, ¶ 75 (quoting *King*, 180 Ariz. at 277 (1994)). Neither form of vouching is present here.

1. Detective Hansen's testimony does not constitute prosecutorial vouching.

During trial, the State presented testimony from Detective Sean Hansen, a member of the FBI Cellular Analysis Survey Team. R.T. 4/6/22, at 6. The detective testified he reviewed the cell phone records from both A.R.'s and Montoya's cell phones, as well as the information on the dates, times, and

locations that someone used A.R.'s bank card. *Id.* at 10–11. At one point, the prosecutor asked the detective to describe the process of gathering "surveillance information and banking records and cellular records." *Id.* at 39. The following exchange took place:

> A. Sure. Well, it depends on what type of information you're looking for. For example, for the cellular data in this case, that would have been obtained by the companies via legal process, generally a search warrant. Identifying the video and going through all the video and identifying the financial records is an extremely lengthy process. It takes a lot of effort. We're looking at a lot of these examples here, and there's actually a total of 30 bank card transactions that were corroborated with video in this case.
>
> Q: Involving Mr. Montoya?
>
> A.: Involving Mr. Montoya, yes.
>
> Q: So overwhelming evidence?
>
> A: This is the largest amount that I have seen in 25 years.

Id. at 39–40.

He argues the "overwhelming evidence" question alone amounts to impermissible vouching when the witness provides an unresponsive answer favorable to the State. O.B. at 55. Montoya does not cite any cases supporting this argument. Therefore, the prosecutor did not err in asking the "overwhelming evidence" question.

Montoya contends this line of questioning implied that evidence not presented to the jury supported the State's evidence. O.B. at 55. The prosecutor's

questioning, however, is not improper prosecutorial vouching for the simple reason that it was not a statement from the prosecutor. The statement Montoya argues constituted improper vouching was the detective's testimony about his own experience conducting cell phone data analysis. *Id.* It therefore cannot be prosecutorial vouching. *See Acuna Valenzuela*, 245 Ariz. at 217, ¶ 75 (improper vouching occurs when prosecutor makes "'personal assurances'" or bolsters witness's credibility with "'prosecutorial remarks'") (*quoting King*, 180 Ariz. at 277).

To the extent Montoya is asserting the prosecutor's closing statement referencing the detective's testimony improperly bolstered the State's case, this argument also fails. O.B. at 54–55. The prosecutor's statement only mirrored the detective's testimony that, based on his own experience, it was the largest amount of cell phone data he had ever seen. Montoya fails to explain, and it is not readily evident, how the detective's testimony about his own personal experience somehow implied that other, unadmitted evidence supported the State's case. *See State v. Newell*, 212 Ariz. 389, 402, ¶ 62–63 (2006) (prosecutor's statement "that there were '3,000 pages of police reports' and that '[n]ot every witness was called'" was explanation of why certain witnesses were not called and not implication that unadmitted reports and testimony supported the State's case); *but see United States v. Roberts,* 618 F.2d 530, 533–34 (9th Cir. 1980) (finding

improper vouching for credibility of witness when prosecutor stated police officer was monitoring witness's testimony for truthfulness). Montoya cannot show error occurred, much less fundamental error. *See Henderson*, 210 Ariz. at 568, ¶ 22.

2. Testimony about Dr. Laura Fulginiti's credentials did not constitute impermissible vouching.

Montoya next claims that testimony elicited from Dr. Ann Bucholtz regarding Dr. Fulginiti's credentials improperly placed the prestige of the government behind Dr. Fulginiti's testimony. O.B. at 56–58. As Montoya did not object at trial, he must demonstrate fundamental, prejudicial error occurred. As no error occurred, Montoya cannot meet this burden.

Dr. Fulginiti testified as a forensic anthropologist with the Maricopa County Medical Examiner's office. R.T. 4/4/22, at 63. She had been asked by a medical pathologist from the Maricopa County Medical Examiner's office, Dr. Eric Little, to examine part of A.R.'s skull for trauma. *Id.* at 64–65. In her report, she noted a minimum of fourteen different impact sites on A.R.'s skull. *Id.* at 80.

Dr. Little conducted the autopsy on A.R.'s body and noted 8 different head injuries visible during the autopsy and measured the lacerations. *Id.* at 15, 38–48. Dr. Bucholtz testified to the results of Dr. Little's report. *Id.* at 15. She explained that although the medical examiner gave the injuries numbers, those numbers were "arbitrarily assigned" and "do[] not mean that [the injuries] were occurring in any particular order." *Id.* at 39, 44.

The prosecutor asked Dr. Bucholtz if Dr. Fulginiti "would be the person to talk to about . . . the different measurements of fractures underneath and how they related to each other in terms of A.R.'s skull." *Id.* at 43. Dr. Bucholtz answered, "Yes. That's why we utilize these consultants, their area of expertise. We -- I would defer to her ability to talk about those as far as the extent and their relationships and her reconstruction process." *Id.*

The prosecutor later asked Dr. Bucholtz to explain why Dr. Little's report listed eight head injuries, but Dr. Fulginiti's report listed 14. *Id*. at 54. She stated:

> As I said, Dr. Little and even my way of dealing with this is you try to isolate the actual areas on the skin and give them a number, but as far as how many times that it was used to create that particular injury, we can't always get a good estimate based on just looking at the skin itself, especially when it's not in the best condition to start with.
>
> It's not to say that you can't have one impact adjacent to or on top of another creating injury on injury or slightly next to each other. And a lot of times the underlying bone can give you a better idea of how many injuries were created in various areas. And Dr. Fulginiti will probably be discussing that with you. How she came up with the number that she came up with versus Dr. Little.

Id. She then explained that the medical examiner may refer a case to Dr. Fulginiti when there are "a multitude of fractures" because, "as a forensic bone doctor," she had "been trained in trauma of bone impacts and what kinds of instruments can create various injuries on bone themselves." *Id*. at 54–55.

Montoya argues the prosecutor engaged in misconduct by asking questions that have the potential for the witness to talk about the qualifications of other

witnesses. O.B. at 56–58. He does not cite any authority to support this argument. Thus, the prosecution did not err in questioning Dr. Bucholtz.

He fails to explain how Dr. Bucholtz's testimony constituted such vouching, given that it was witness testimony and not statements by the prosecutor. *Id.* Even if this Court considers the prosecution's questioning as vouching, Dr. Bucholtz did not testify about the credentials of Dr. Fulginiti or imply that the jury should give her testimony more weight because she was a State's witness. Instead, the doctor's testimony explained how Dr. Little and Dr. Fulginiti came to different conclusions about the number of impacts to A.R.'s head. This was proper testimony and was not impermissible vouching. As this is not error, Montoya cannot meet his burden of showing fundamental, prejudicial error occurred.

F. The prosecutor did not improperly question a witness about Montoya's character and the impact of a previous crime.

Montoya next argues the prosecutor violated a prior order of the trial court by improperly questioning Larry Binkley about Montoya's character. He also contends that Binkley's testimony constituted improper victim impact evidence because Binkley was a victim in a prior criminal case. O.B. at 59–63. Montoya admits he did not object during trial. *Id.* at 60–61. He cannot meet his burden of showing fundamental, prejudicial error.

1. Factual background.

Montoya stole the Binkleys' car while he lived with them in 2004. R.T. 3/29/22, at 35–40. About a year later, Montoya broke into the Binkleys' house and stole several items. *Id.* at 41–44.

Prior to trial, Montoya moved to preclude four of the State's penalty phase witnesses from testifying, two victims from Montoya's previous crimes and the case agents for both crimes. R.O.A. 343. Montoya included Larry Binkley, Montoya's uncle with whom he had also lived for a brief time, in his motion. R.O.A. 343; R.T. 3/29/22, at 25, 31–33. Montoya's general claim for all the witness was their testimony was irrelevant because Montoya had admitted his prior crimes as part of his change of plea. R.O.A. 343 at 3. He also claimed the victims' testimony would amount to impermissible victim impact statements about Montoya's previous crimes. *Id.* at 3–4. The State responded, asserting that the victims' testimony, including Binkley's, was relevant evidence about Montoya's "character, propensities, criminal record or other acts." R.O.A. 349 at 2 (quoting A.R.S. § 13-752(G)) (emphasis removed).

Following argument on Montoya's motion, the trial court held that the State could elicit testimony from both victims "to talk about the facts of the case and what factually happened, but it's going to be a fine line when we get into how it's affected them, say, emotionally or affected their lifestyle or how they live their

lives now." R.T. 3/7/22, at 11–21. The court declined to rule on the motion, instead stating, "I'm going to have to hear the questions and if you object, I'm just going to have to rule then because I can't rule in a vacuum." *Id*. at 21.

After Binkley testified to the facts and circumstances summarized above, the prosecutor asked, "What are your thoughts on [Montoya's] character?" R.T. 3/29/22, at 47. Binkley responded:

> And while he was [staying with me], generally, he stayed in the room. I mean, if I needed to talk to him, or if we wanted to review the day's activities, we would have to go get him and bring him out. And he contributed nothing, almost nothing about what he had been doing. So it was pretty obvious that he wasn't trying very hard, if, in fact, he was trying at all.
>
> So I just -- when I saw him, I just saw a kid that -- who was okay with a lifestyle that he had picked because it was working for him at that time. And I saw a kid that didn't have a lot of substance. He was just a shadow of a person with not much inside. Certainly, no willingness to say, can you help me change? Can you help me do this? Can you help me find something better? I'm really sorry about the things I've done. I never heard any of that.

Id. at 47–48. The defense did not object to this answer. *See Id.* at 48.

2. Legal background.

"At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency." A.R.S. § 13-752(G). Even if a defendant elects not to present mitigation, "the state may present any evidence that demonstrates that the defendant should not be shown leniency including any

evidence regarding the defendant's character, propensities, criminal record or other acts." *Id. See also State v. Champagne*, 247 Ariz. 116, 142, ¶¶ 89–90 (2019) (explaining that mitigation rebuttal may include any evidence that demonstrates the defendant should not be shown leniency, and need not be relevant to the defendant's proffered mitigation); *State v. Guarino*, 238 Ariz. 437, 440, ¶ 13 (2015) ("Taken together, A.R.S. §§ 13-751(G) and -752(G) permit jurors to hear evidence relating to circumstances of the crime and the defendant's character."); *Pandeli*, 215 Ariz. at 527, ¶¶ 41–42 (allowing any evidence demonstrating the defendant should not be shown leniency).

This Court has "repeatedly held that, taken together, the statutes governing the scope of mitigation rebuttal—[A.R.S] § 13–751(G) and § 13–752(G)—permit jurors to hear evidence relating to circumstances of the crime and the defendant's character, which they must do to fulfill their duty to evaluate all the relevant evidence when determining the defendant's sentence." *Champagne*, 247 Ariz. at 142, ¶ 89 (quotations omitted). This evidence need not directly rebut a defendant's mitigation. *See* A.R.S. § 13-752(G); *see also Champagne*, 247 Ariz. at 142, ¶ 89. A trial court should, however, refuse to admit rebuttal evidence that is unfairly prejudicial or otherwise violates due process. *Champagne,* 247 Ariz. at 142, ¶ 89.

3. Argument.

Montoya argues the prosecutor's question and Binkley's response violated the court's order and was contrary to the State's avowal to not elicit victim impact statements. O.B. at 61. However, the trial court told the parties that it would not rule on the admissibility of Binkley's testimony before trial but would make its ruling based on Montoya's objections. R.T. 3/7/22, at 21. Montoya did not object at trial to the prosecutor's question about Montoya's character or to Binkley's response. Thus, the court did not make a ruling on Binkley's testimony. Because the court did not rule on the admissibility of Binkley's testimony, the prosecutor did not violate the trial court's order by asking Binkley about Montoya's character.

Further, Montoya's assertion that Binkley's testimony about his character constituted impermissible victim impact evidence fails. Although Binkley was a victim of a crime perpetrated by Montoya, the testimony to which Montoya now objects was not testimony about the impact those crimes had on Binkley's life. Instead, Binkley was providing his opinion of the character of his nephew and someone who had lived with him. This evidence of Montoya's character is precisely the type of evidence that is relevant and allowed under A.R.S. § 13-752(G). Montoya has failed to establish that fundamental, prejudicial error occurred.

G. The prosecutor did not comment on Montoya's failure to testify.

Montoya argues that the prosecutor, in closing arguments, impermissibly commented on Montoya's failure to testify or allocute. O.B. at 63–67. Montoya concedes he did not object to the prosecutors' comments below. O.B. at 66. Therefore, this Court reviews it for fundamental error. *State v. Burns*, 237 Ariz. 1, 31, ¶ 146 (2015).

1. Legal background.

Telling the jury that a defendant's failure to testify supports an unfavorable inference against him violates the Fifth Amendment's protection against self-incrimination. *State v. Fuller*, 143 Ariz. 571, 574–75 (1985). But "[w]hether a prosecutor's comment is improper depends upon the context in which it was made and whether the jury would naturally and necessarily perceive it to be a comment on the defendant's failure to testify." *State v. Rutledge*, 205 Ariz. 7, 13, ¶ 33 (2003). The prosecutor may also "properly comment upon a defendant's failure to present exculpatory evidence." *Fuller*, 143 Ariz. at 575. It is also not improper to "highlight[] that [a] defendant's prior statement was not believable." *State v. Schrock*, 149 Ariz. 433, 439 (1986). The test is whether the comment is (1) "adverse, in that it supports an unfavorable inference against the defendant, and (2) operate[s] as a penalty for defendant's exercise of his constitutional right." *Id.* at 438.

2. Factual background.

During closing arguments, the prosecutor summarized the evidence supporting that A.R.'s murder was especially cruel and heinous. R.T. 4/11/22, at 95–99. During that recitation, the prosecutor stated:

> We also know that [A.R.'s] phone code, debit pin, and password were on a sheet of paper found in the defendant's truck in Mineral County. When [A.R.] had to give those up, any threats that went along with that, whether smothering Spike, her beloved puppy, had anything to do with giving up that information, we will never know.

Id. at 97–98.

Later during her argument, the prosecutor described A.R. as a "tough Texan, who all had described as a straight shooter, who loved big and spoke her mind …." *Id.* at 140. Although she had these characteristics, it meant nothing because Montoya "had her completely in his control with her [dogs] nearby" when he ambushed her. *Id.* The prosecutor then stated:

> He then chose to get all of her passwords. We don't know how he got them from her. The only witness to him during these moments was [A.R.]. Then the brutal death with the hammer to her head over and over and over again. We don't know why he chose to kill in such a manner. Only he does. But we do know that the defendant chose to use the hammer and the knife, both weapons that are only effective at close range. He consciously ignored the suffering of [A.R.].

Id. After this comment, the prosecutor argued Montoya's use of a hammer showed he was aware but indifferent to A.R.'s suffering as he hit her in the head no less than 14 times. *Id.*

The prosecutor then argued that Montoya would "not allow her to live without him" and described the "total nightmare" Montoya put her through before killing her. *Id.* at 141.The prosecutor argued A.R. knew that no one was coming to her rescue and that Montoya inflicted "[s]heer terror" on her. *Id.* Shortly thereafter, the prosecutor stated:

> We don't know if she pled for mercy or leniency. We don't know what he said to her. We don't know a lot because he did everything he could to get away with this crime and go on living his life.

Id.

3. Argument.

Montoya argues the prosecutor's closing statement improperly highlighted that Montoya did not allocate. O.B. at 65. He alleges this happened when the prosecutor reminded the jury that aspects of the crime remained unknown. *Id.* at 67. In context, the jury would not naturally and necessarily perceive the prosecutor's argument to be a comment on Montoya's failure to allocute.

The first statement came after the prosecutor described how the evidence showed the mental anguish Montoya inflicted on A.R. by Montoya: waiting for A.R. to come home; ambushing her by the backdoor with a knife and a hammer; restraining her; bringing her to the bedroom and assaulted her with the hammer. R.T. 4/11/22, at 95–97. After discussing the known evidence, the prosecutor moved to the first alleged improper comment. The prosecutor focused the jury to

the unknown anguish A.R. must have experienced for Montoya to extract her personal information, including the possibility that A.R.'s dog was smothered as part of this extraction. *Id.* at 97–98. Rather than focusing on Montoya's decision not to offer an allocution, the prosecutor's is arguing the jury should consider the mental anguish A.R. experienced while Montoya extracted her information when evaluating the strength of the aggravator.

The second comment also addressed the cruelty of Montoya's crime. As with the first comment, the context of the argument shows the suffering the "tough" and "strait shoot[ing]" A.R. must have experienced to have given her personal information to Montoya. *Id.* at 140. The prosecutor mentioning that the jury would never know why Montoya decided to use a hammer to murder A.R. is not a comment on Montoya's decision not to allocate, but used to focus the jury's attention to Montoya's indifference to A.R.'s suffering. Montoya's decision to use a hammer illustrates "[t]he intimacy of the contact between himself and [A.R.] during the act of killing" because Montoya "was close enough to see and feel [the] injuries he inflicted with each blow of the hammer …." *Id.* This statement is a powerful reminder to the jury that Montoya's crimes did not warrant a lenient sentence.

The third comment also addresses the mental anguish A.R. experienced as she went through this "total nightmare" and addressed the circumstances of the

offense *Id.* at 141. The prosecutor described how A.R. knew that no one would come to save her from the one person she was worried about. Although the prosecutor did mention the jury would never know what happened in A.R.'s final moments, this comment reminds the jury about the loss of evidence caused by Montoya's attempts to cover up A.R.'s murder.

The prosecutor's comments, consistent with *Rutledge* and *Schrock*, were not improper. The prosecutor did not make an unfavorable inference about Montoya's failure to allocute. Consequently, no error, fundamental or otherwise, occurred.

H. The cumulative effect of prosecutor's proper conduct does not require reversal.

Montoya lastly argues that the cumulative effect of the above-identified instances of alleged prosecutorial error requires reversal. O.B. at 67–68. Only one of the Montoya's claims is arguably prosecutorial error, the prosecutor's argument that Montoya relished the murder. This one brief instance did not deny Montoya of a fair trial.

This Court reviews a claim of cumulative prosecutorial error by determining "whether the cumulative effect of individual allegations 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Payne*, 233 Ariz. 484, at 515, ¶ 134 (2013) (quoting *Hughes*, 193 Ariz. at 79, ¶ 26). Misconduct warrants reversal only where the misconduct is "so pronounced and persistent that it permeated the entire atmosphere of the trial indicating that the

prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *Id.* (internal citations and quotation marks omitted). The defendant must show that misconduct exists and a "reasonable likelihood exists that the misconduct could have affected the jury's verdict." *State v. Murray,* 250 Ariz. 543, 548, ¶ 13 (2021). Montoya has not shown misconduct permeated the trial and infected it with unfairness. Neither has he shown a reasonable likelihood the alleged misconduct could have impacted the jury's verdict. Therefore, his claim of cumulative prosecutorial misconduct fails.

Even if there was persistent prosecutorial error, it did not rise to fundamental, prejudicial error or render the penalty phase fundamentally unfair. The evidence showed Montoya: stalked A.R. for weeks prior to the murder R.T. 4/6/22, at 22–23; attacked her in her own home R.T. 3/30/22, at 149–50; handcuffed her wrists R.T. 4/4/22, at 29; bound her feet with a belt and bungee cord *Id.* at 34; and forced A.R. to provide him with her cell phone code, the PIN for her debit card, and passwords to her computer and email account. R.T. 4/4/22, at 140–41. Using a hammer, he inflicted fourteen blunt force wounds to A.R.'s head. *Id.* at 80. After killing A.R., Montoya wrapped her body in blankets and tarps and put her body in her bathroom. R.T. 3/30/22, at 155–56.

Montoya lived in A.R.'s house for 10 days, posing as A.R. to her friends and family over texts, even going so far as sending a message to A.R.'s employer that

she was resigning from her job. R.T. 3/30/22, at 33–34, 67–73; R.T. 4/6/22, at 57–59. Montoya went to stores and made purchases using A.R.'s credit and debit cards, ensuring he received cash back after each purchase. R.T. 4/5/22, at 56–59. Montoya emptied A.R.'s bank account, stole her gun safe containing her gun, and stole her car. *Id.* at 59, 65–66, 127. At some point, Montoya killed one of A.R.'s two dogs, and then put its body in a kennel with the remaining dog, in the same bathroom he was keeping A.R.'s body. R.T. 3/30/22, at 132. He ignored the other dog during these ten days, leaving it without food or water. R.T. 5/14/21, at 27.

Under these circumstances, Montoya cannot show that any of the alleged instances of misconduct would have altered the jury's verdicts. *See also Davolt II,* 207 Ariz. at 205, ¶ 43 (finding no prejudice where the error would not have affected the verdicts); *King*, 158 Ariz. at 424 (stating that fundamental error is present only when the error contributed to or significantly affected the verdict.).

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT MODIFIED MONTOYA'S HYPOTHETICAL TO COMPLY WITH THE LAW.

Montoya argues the trial court prevented him from determining potential juror bias by limiting voir dire and asking rehabilitative questions. O.B. at 69. He alleges this violated his "rights to a fair and impartial jury, to due process, to

heightened reliability and to be free from cruel and unusual punishment." *Id.* For the reasons stated below, this claim lacks merit.

I. Standard of Review.

This Court normally "review[s] a trial court's ruling on voir dire of prospective jurors for abuse of discretion and necessarily defer largely to a trial court's sound discretion in such matters." *State v. Bush*, 244 Ariz. 575, 584, ¶ 29 (2018). Fundamental error review applies when the defendant does not preserve the claim during trial. *Id.* at 585, ¶ 35 (citing *Henderson,* 210 Ariz. at 567, ¶ 19). Montoya did not object to the trial court's modification of the hypothetical and the trial court's interjection to clarify. Therefore, the standard of review is fundamental error.

II. Factual and Procedural Background.

On January 12, 2022, the parties filed a Joint Proposed Jury Questionnaire with Identified Areas of Disagreement. R.O.A. 312. The questionnaire included a question asking the jurors if they would "automatically vote for the death penalty for someone convicted of First Degree Murder without considering the evidence about the Defendant's background, propensities, character, criminal record, or the circumstances of the offense?" *Id.* at 30. Neither party objected to the question.

On the same day, Montoya filed a motion to include a hypothetical question during the voir dire process. R.O.A. 313. The hypothetical is as follows:

> Imagine, for a moment, that you have been selected to sit as a juror in a case. Another case in another courthouse. You and your fellow jurors listen to all the evidence which concerns the murder of an innocent victim. The evidence shows you that this was not just a murder. This was a premeditated, meant to do it, cold blooded killing. The defendant woke up that morning, decided he was going to kill the victim and did so in cold blood.
>
> There was no justification or defense for this murder. It wasn't an accident, it wasn't self-defense, he wasn't protecting someone else, it wasn't a choice of two evils, and he wasn't forced to do it. You also decided that the defendant was not insane or intellectually disabled, and he wasn't intoxicated from any drugs or alcohol.
>
> As jurors, once the judge sent you into the jury room to deliberate, no one even sat down to discuss because there was no question about how guilty he was. Instead, the jury walks back into the courtroom and tells the judge he's guilty of first-degree premeditated murder and the judge records that verdict into the record.
>
> How then do you feel about the death penalty as the only appropriate punishment for this guilty murderer of an innocent victim?"

Id. at 12–13.

The trial court held a hearing to discuss the proposed questionnaires and the hypothetical. R.O.A. 328. During the status conference, the court noted "[t]he question would you automatically impose the death penalty or would you never impose the death penalty is clearly warranted. That's in the questionnaire anyway. But those – the Supreme Court has been clear about that. You can ask those questions." R.T. 2/3/22, at 19.

The court also heard argument about Montoya's proposed hypothetical. *Id.* at 5–27. Montoya argued that the court had previously agreed to the same

hypothetical in a different death penalty case and that *State v. Patterson*, 230 Ariz. 270, 274, ¶¶ 10–13 (2012) (holding the trial court did not abuse its discretion by requiring the defense to include consideration of mitigation when asking a hypothetical about imposing the death penalty), was not controlling. *Id.* at 6–13. The court expressed concern about the length of the hypothetical, and the defense stated they would shorten it. *Id.* at 13. The State argued the hypothetical would create juror confusion and misstate the law because it did not tell the jury to consider mitigating circumstances before making their sentencing decision for the hypothetical murderer. *Id.* at 15–24. After hearing arguments from both parties, the court took the matter under advisement to consider the then-recently decided *State v. Thompson*, 252 Ariz. 279 (2022). *Id.* at. 27–28.

The same day as the hearing, Montoya filed a modification of the hypothetical question. R.O.A. 327. Although shorter, the modified hypothetical still did not include language that the juror considers the mitigating circumstances before making their sentencing determination. *Id.* at 1. The modified hypothetical went as follows:

> Imagine that you have been selected to be on a jury for another case where you and your fellow jurors listened to all the evidence and decided that the defendant was guilty of a first-degree premeditated murder of an innocent victim. The evidence showed the defendant decided to kill the victim and did so. He wasn't intoxicated, insane or intellectually disabled. This wasn't self-defense, in the heat of passion or duress. There was no legal justification. This was a meant to do it, cold blooded killing of an innocent victim and you and the jury found

> him guilty. How then do you feel about the death penalty as the only appropriate punishment for this guilty murderer?

Id.

The court held a status conference on February 10, 2022, where it addressed the proposed hypothetical. R.O.A. 341. The court ruled Montoya could "ask this hypothetical but it must include a discussion and address mitigation." R.T. 2/10/22, at 8. Defense counsel requested clarification about the discussion of mitigation and whether providing the mitigation definition would satisfy the court's ruling. *Id.* at 13. At first the court stated that the defense must "raise mitigation and you have to give a correct recitation of the law on mitigation consistent with the jury instructions." *Id.* The court further clarified its ruling by saying that "if it is clear that [mitigation] is part of your discussion and if it's clear that you lay out the law correctly with mitigation and then ask the hypothetical, yeah." *Id.* at 14. In the minute entry, the court's order stated "Defendant's hypothetical must include a discussion and address mitigation." R.O.A. 341 at 2. The court also informed the parties that, if needed, it would "jump in and clarify" the issue of mitigation using *Patterson* and *Thomson* as guiding authority. R.T. 2/10/22, at 14. The defense did not object to this procedure.

On February 28, 2022, the parties filed the Final Joint Proposed Jury Questionnaire, which consisted of 106 questions over 32 pages. R.O.A. 355. The questionnaire included the definition of mitigation and asked if the jurors agreed

with the law and would be able to follow it. *Id.* at 29. One of the questions asked "[w]ill you, for whatever reason, automatically vote for the death penalty for someone convicted of First Degree Murder without considering the evidence about the Defendant's background, propensities, character, criminal record, or the circumstances of the offense?" *Id.* at 30. If the juror checked yes, then the question provided space for the juror to explain their answer. *Id.* Question 101 informed the juror that Montoya had pled guilty and asked whether "this [would] impact your ability to consider a natural life sentence in any way?" *Id.* at 31. Question 103 asked if the juror "agree[d] that it would be wrong for a juror to sit through the entire sentencing proceeding and then, for the first time, state during deliberations that regardless of the facts, he or she … would always vote for the death penalty?" *Id.* at 31–32.

On March 22, 2022, the defense started voir dire by defining and explaining mitigation to the jury. R.T. 3/22/22, at 33–35. After this discussion of mitigation, the defense asked the jury a hypothetical question that is substantively the same as that in R.O.A. 327. *Id.* at 35–36. The defense did not include in the hypothetical that the juror must consider all the mitigating circumstances. *Id.* The State asked to approach after it was clear the defense was not going to mention mitigation. *Id.* at 37. Anticipating the State's argument, the court asked the jurors, "given the facts that you've just been told, would you also consider the mitigation and consider

whether or not you find the migration sufficiently substantial to call for leniency?" *Id.* The court also asked if the jurors could "consider the mitigation in determining whether it was sufficient to overcome the death sentence even given those facts?" *Id.* Defense counsel did not object to either question or ask to approach.

Shortly after this exchange, the defense asked a summarized version of the hypothetical that again did not include asking the jurors if they would consider mitigation. *Id.* at 43. The State objected and the court interjected with "[g]iven those facts, if you found this person guilty, would you still be able to consider the mitigation and determine whether it would be sufficiently substantial to call for leniency? Could you still consider the mitigation?" *Id.* The defense asked to approach after this question. *Id.* at 44. Counsel stated they were complying with the court's ruling by having the definition of mitigation on the screen while asking the hypothetical. *Id.* at 44–47. The court disagreed and required the defense to mention mitigation when using the hypothetical. *Id.* at 47, 49. Defense counsel did so for the rest of the morning session. *Id.* at 49–50, 57–58, 62–64, 67 and 69.

During the afternoon session, defense counsel again asked the hypothetical, this time adding "what are your feelings about the death penalty after hearing mitigating circumstances?" *Id.* at 92–93. The State objected and the court stated that "the question has to be couched in that you have to consider mitigation and whether or not mitigation would be sufficiently substantial to call for leniency. So

that's part of the hypothetical, too." *Id.* at 93. The court then asked the juror, "[i]f you consider mitigation that's presented to you, what do you feel about the death penalty?" *Id*. at 93–94. The defense did not object to this interjection. Defense counsel included the consideration of the mitigating circumstances when it used the hypothetical during the remainder of voir dire. *Id.* at 95, 102, and 118; R.T. 3/23/22, at 18–19, 20, 44, 51, 58, 62, 66, 71, 155, and 180.

III. The trial court did not err in requiring Montoya to include in his hypothetical that the jurors must consider mitigation.

"The Sixth and Fourteenth Amendments guarantee a defendant's right to an impartial jury." *Thompson*, 252 Ariz. at 294, ¶ 48 (citing *Morgan v. Illinois*, 504 U.S. 719, 728 (1992)). A capital defendant has the right to challenge for cause any prospective juror whom "the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant …." *Morgan*, 504 U.S. at 729. General questions asking to the jurors if they can be fair and are able to follow the law are insufficient for determining whether the juror is able to consider mitigation. *Thompson*, 252 Ariz. at 294, ¶ 49. To comply with *Morgan*, "a defendant must be permitted, upon request, to make sufficient inquiry to determine which prospective jurors may have predetermined to impose the death penalty." *Id.* (citing *Morgan*, 504 U.S. at 729). *Morgan* is satisfied where the juror questionnaire asks whether the juror will automatically impose the death penalty regardless of the law, asks other questions about the juror's views on the death penalty, and the

defense has ample opportunity to question the jurors about their views. *State v. Johnson*, 212 Ariz. 425, 435, ¶ 34 (2006); *State v. Smith*, 215 Ariz. 221, 231, ¶ 43 (2007).

Arizona eliminated peremptory strikes when it amended Rule 18.4 of Arizona Rules of Criminal Procedure, which was effective on January 1, 2022. This Court also amended Rule 18.5, which governs the voir dire process. The rule now encourages the use of case specific questionnaires and oral examination. Ariz. R. Crim. P. 18.5(c), (f). The comment to the rule states, "[t]he court should refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law." Comment to Rule 18.5(c). The comment "does not limit or change" the requirements of Rule 18.5(f) and "does not strip away" the trial court's discretion to manage voir dire. *State v. Fournier*, 256 Ariz. 33, 39, ¶ 13 (App. 2023). "The rule does not forbid leading questions, by parties or the court, including those addressing rehabilitation." *Id.*; *see also* Ariz. R. Crim. P. 18.5(f).

"A trial court thus does not err merely by asking a leading question during voir dire, even when the question touches on a juror's fairness and impartiality." *Fournier*, 256 Ariz. at 39, ¶ 14. A trial court's interjection that the jury must consider mitigation before sentencing the defendant to death is a correct statement

of the law. *See e.g. Patterson*, 230 Ariz. at 274, ¶ 12 ("Error does not result from the court's correctly instructing prospective jurors on the law.").

Montoya argues the trial court violated *Morgan* by interjecting and requiring him to include the consideration of mitigation in his hypothetical. O.B. at 86–89. He claims the interjections prevented him from ascertaining whether the jurors "would be predisposed to impose a death sentence on someone convicted of first-degree murder." *Id.* at 88. This claim lacks merit.

To make his argument, Montoya ignores several key facts. First, the trial court approved of a 33-page questionnaire consisting of over 100 questions. Question 97 followed the requirements of *Morgan* by asking if the juror would always impose a death sentence. R.O.A. 355, at 30. The questionnaire asked several questions about the juror's ability to consider mitigation and their feelings about the death penalty. *Id.* at 26–32. Second, the trial court allowed the defense to ask its proposed hypothetical, with the condition that the hypothetical include a question asking whether the juror will consider mitigation. The defense agreed that the discussion should include mitigation but misunderstood the placement. Montoya does not explain how the trial court "tainted the entire capital proceeding" by requiring the hypothetical to include mitigation, rather than before

or after as the defense suggested. O.B. at 89. Third, the trial court permitted additional time for the defense to ask all the questions they deemed necessary.[4] The questionnaire, hypothetical, and the additional time for voir dire facilitated counsel's discovery of juror bias and their views on mitigation.

Montoya also argues the trial court's correction of trial counsel's misstatement of the law violated Rule 18.5 and the comment to this rule by allegedly asking "follow the law" questions and rehabilitating the jurors. O.B. at 87–88. But the comment to the 2022 amendment does not limit the trial court's authority to control the voir dire process and ask follow up questions. *Fournier*, 256 Ariz. at 39, ¶ 13. The trial court informed the defense it would interject if needed to correct a misstatement of the law, which it did during voir dire. Montoya characterizes this interjection as a "follow the law" question, which he believes is a "direct contradiction to the comment on Rule 18.5." However, "[e]rror does not result from the court's correctly instructing prospective jurors on the law." *Patterson*, 230 Ariz. at 274, ¶ 12. The trial court did not err in correcting the hypothetical's misstatement of the law.

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[4] The trial court did advise the parties that each side would be limited to 45 minutes per panel. However, the court consistently allowed the defense to exceed this limitation. R.T. 3/22/22, at 147–48; R.T. 3/23/22, at 76.

Patterson is dispositive to the resolution of this claim. There, the defense hypothetically asked jurors whether they believed the death penalty was appropriate when the "jury finds a defendant guilty of premeditated first degree murder and also finds at least one aggravator." *Id.* at ¶ 10. The jurors agreed that it would be. *Id.* The trial court interjected "to clarify that a fair and impartial juror is one who, even after finding guilt and aggravation, would be able to begin the sentencing phase without leaning toward or against the death penalty." *Id.* The trial court required the defense to include a question concerning the juror's ability to consider mitigation in its proposed hypothetical for the remainder of voir dire. *Id.* at ¶ 11. This Court held the trial court did not abuse its discretion because the trial court "did not curtail questions tending to reveal a prospective juror's predisposition to vote for death after finding guilt and an aggravator, but before hearing mitigation." *Id.* at ¶ 13. It also found the court "interfered only minimally with Patterson's voir dire questioning in order to avoid juror confusion and allowed him wide latitude to discover death-biased jurors." *Id.*

Like *Patterson*, the trial court here interjected clarifications to avoid juror confusion. The trial court in Montoya's case interjected more than did the *Patterson* court because Montoya continued to violate the court's order by asking the hypothetical without asking whether the jurors would consider all the mitigation. The trial court also did not curtail questions tending to reveal juror bias

for the imposition of the death penalty. The trial court allowed Montoya to ask *Morgan* questions in both the questionnaire and through voir dire. As with *Patterson*, the trial court did not abuse its discretion. Even if the trial court erred, Montoya has not shown fundamental, prejudicial error.

III

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING MONTOYA'S MOTION TO STRIKE FOR CAUSE JUROR 17[5] AND BY DESIGNATING JUROR 6[6] AS AN ALTERNATE JUROR.

Montoya argues the trial court abused its discretion when it denied his motion to strike Juror 17 and for designating Juror 6 as an alternate. As shown below, these claims lack merit.

I. The trial court did not abuse its discretion in denying Montoya's strike for cause against Juror 17.

Montoya argues the trial court abused its discretion when it denied his motion to strike for cause Juror 17. O.B. at 90. He argues the failure to strike this juror violated his "rights to due process, a fair trial, and to be free of cruel and unusual punishment under the Arizona and United States constitutions." *Id.* For the

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[5] The State will refer to prospective Juror 119 as Juror 17 throughout this section for ease of reference and to avoid confusion.
[6] The State will refer to prospective Juror 30 as Juror 6 throughout this section for ease of reference and to avoid confusion.

reasons stated below, the trial court did not abuse its discretion. Moreover, Montoya has not proven prejudice.

A. Standard of Review.

This Court reviews a trial court's decision to strike a potential juror for cause for an abuse of discretion. *Sammantha Allen*, 253 Ariz. at 330, ¶ 41. "A court abuses its discretion when its reasons for a ruling are 'clearly untenable, legally incorrect, or amount to a denial of justice.'" *Id.* (quoting *State v. Riley*, 248 Ariz. 154, 167, ¶ 7 (2020)).

B. Factual and Procedural Background.

Juror 17, along with all the other jurors, filled out a questionnaire before voir dire. The questionnaire asked jurors to rate their support of the death penalty on a scale from one to ten, with one being strongly opposed to the death penalty and ten being strongly in favor. R.O.A. 355, at 27. Juror 17 circled ten. Sealed Document R.O.A. 434 part 10 of 24, at 88. When asked if the juror agreed that the State should never seek the death penalty when the defendant accepts responsibility for his crimes, the juror checked he disagreed and wrote that it "should be no different [whether] accepts or is tried." *Id.* The juror also agreed with the definition of mitigation, did not "believe that a person who has pled guilty to First Degree Murder should always be sentenced to death," and was not "automatically for the

death penalty for someone convicted of First Degree Murder without considering" mitigation evidence. *Id.* at 90–91.

During voir dire, the defense presented its hypothetical to Juror 17, in which a defendant committed a cold-blooded premediated murder against an innocent victim. R.T. 3/23/22, at 37. Counsel assumed in the hypothetical that the juror considered mitigation, but did not state what the mitigation was. *Id.* At the end of the hypothetical, counsel asked "[h]ow do you feel about the death penalty as the only appropriate penalty of a guilty murderer of an innocent victim?" *Id.* Juror 17 responded that the hypothetical was "pretty clear, cut, and dry. So definitely I would lean towards the death penalty in that case." *Id.* at 37–38. He clarified that not every case is as "cut and dry" as the hypothetical presented by the defense. *Id.* at 38. The juror attempted to clarify his statement further by stating "that's why you have to review the facts and the circumstances before you could make--" but at this point the defense interrupted him to start a new line of questioning about the factors Juror 17 would consider in imposing either a life or death sentence. *Id.* at 38. The juror responded he wanted to know the circumstances behind the defendant's actions, such as whether he has a mental illness or the crime was the result of a heat of passion. *Id.* at 38–39. The defense followed up by asking how the absence of these factors would impact the juror's decision. *Id.* at 39. Juror 17 responded that he "would have to dissect the details first before I could honestly

give you an answer to that." *Id.* Although the juror agreed that the severity of the crime would weigh more heavily than the circumstances surrounding the offense, he also stated he would wait until he heard everything before reaching a decision. *Id.* at 39–40.

Defense counsel next focused on Juror 17's strong support for the death penalty. *Id.* at 40. The juror agreed he supported the death penalty but stated "[i]f it's warranted, it should be applied, but circumstances dictate whether it should be applied or not." *Id.* at 40–41.

Counsel then moved to Juror 17's views on acceptance of responsibility and substance abuse issues. *Id.* at 41–43. The juror stated that acceptance of responsibility means the defendant "admitted he's wrong" and also showed remorse. *Id.* 41–42. Juror 17 also wanted to know the circumstances around the acceptance of responsibility and was attempting to explain his position when counsel cut him off. *Id.* at 42.

The defense then moved to Juror 17's comments about substance abuse and asked for clarification. *Id.* Juror 17 indicated he was concerned not only about crimes drug addicts commit to maintain their addiction but also how many times the defendant was incarcerated. *Id.* at 42–43. Counsel then asked "you're kind of talking about the vicious cycle that goes into that?," which Juror 17 agreed with. *Id.* at 43. Counsel finished his questioning by affirming Juror 17 would not force

his view on substance abuse on the other jurors, which Juror 17 agreed he would not do. *Id.*

The defense moved to strike the juror for cause, arguing Juror 17 was a death presumptive juror because of his answer to the hypothetical, his favoring the offense's severity over the circumstances leading up to it, and his views on substance abuse. *Id.* at 108. The trial court acknowledged the potentially problematic answers after the hypothetical but noted the juror stated he would "have to dissect the facts, [he would] have to look at the severity of the crime. … He said he would have to hear everything." *Id.* at 110–11. Based on these answers, the trial court overruled the defense's objection to Juror 17, but permitted the defense to challenge Juror 17 at a later time. *Id.* at 111.

On March 24, 2022, the defense again challenged Juror 17 for cause, raising the same arguments from the day before but with greater detail. R.T. 3/24/22, at 111–16. The court discussed with the defense Juror 17's statements indicating he could consider mitigation, such as his responses to the substance abuse issue and that he wanted to hear all the evidence before making his decision. *Id.* at 116–17. The court also asked the State about Juror 17's support of the death penalty. *Id.* at 118–19. After the defense argued Juror 17 would discount all the substance abuse mitigation, the court pointed out Juror 17 stated that drug users should seek treatment and marijuana use should be legalized. *Id.* at 120–22. After argument,

the court overruled the defense's motion to strike Juror 17. *Id.* at 123. The court found that although Juror 17 favors the death penalty, his answers indicated he was not impaired and could serve on the jury. *Id.*

Juror 17 ultimately deliberated on Montoya's sentence. *See* R.O.A. 413 at 3 (Juror 17 not selected as alternate).

C. Law and Argument.

Criminal defendants have the right to be tried by an impartial jury. Ariz. Const. art. II, § 24; *State v. Velazquez*, 216 Ariz. 300, 306, ¶ 14 (2007). If defendants challenge a juror for cause, they bear the burden of "establish[ing] by a preponderance of the evidence that the juror cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.5(h). A trial court must dismiss a juror "if there is a reasonable ground to believe that the juror ... cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). "In making its determination, the court must consider the totality of a prospective juror's conduct and answers given during voir dire." Ariz. R. Crim. P. 18.5(h).

"With regard to the individual jurors, a juror's preconceived notions or opinions about a case do not necessarily render that juror incompetent to fairly and impartially sit on the case." *Acuna Valenzuela*, 245 Ariz. at 209, ¶ 24. "The trial court is in the best position to assess the demeanor of the venire, and of the individuals who compose it." *Id.* (quotations and citations omitted). "Because the

trial court has the opportunity to observe the potential juror's demeanor and credibility, we will not set aside the trial court's ruling on a challenge to a juror absent a clear showing that the court abused its discretion." *State v. Lavers*, 168 Ariz. 376, 390 (1991).

Montoya has not met his burden. His argument is based on the trial court's and the State's failure to ask rehabilitative questions. O.B. at 94. However, there was no need to rehabilitate Juror 17 because his answers to the questionnaire and during voir dire revealed he was a fair and impartial juror. Juror 17 stated he would not automatically vote for the death penalty without considering mitigation. Sealed Document R.O.A. 434 part 10 of 24, at 91. Throughout voir dire, Juror 17 stated he would need to consider all the circumstances and "dissect" the facts of the case before he could determine the appropriate sentence. R.T. 3/23/22, at 38–42. Juror 17's consistent responses throughout the questionnaire and voir dire showed he would consider all the evidence before making his sentencing determination. Montoya has not shown Juror 17 was incapable of rendering a fair and impartial verdict.

This Court has affirmed a trial court's denial of a motion to strike jurors who have favorable views of the death penalty. *See Velazquez,* 216 Ariz. 300; *Johnson*, 247 Ariz. at 196–97, ¶¶ 107–11 (2019) In *Velazquez*, the defendant moved to strike a juror because the juror stated that "he 'could not see' any circumstance in which

a penalty less than death would be appropriate if a defendant intended to commit the murder, was glad he committed the murder, and had no defense." 216 Ariz. at 307, ¶ 20. This Court held that "[t]hese remarks did not indicate that the juror would invariably impose a death sentence …" and the juror stated that he would consider the circumstances of the offense *Id.* In *Johnson*, two jurors stated that "they could not imagine a situation where the totality of the defendant's character could warrant mercy" after the defense presented a misleading hypothetical. 247 Ariz. at 197, ¶ 111. Both these jurors stated they "would keep an open mind during the trial, could consider mitigation evidence, and would not automatically vote for the death penalty." *Id.* at ¶ 110. For both cases, this Court held that a juror's favorable view of the death penalty does not "necessarily preclude the juror from serving on a jury; if the juror is willing to put aside his opinions and base his decision solely upon the evidence …." *Id.* at ¶ 109 (quoting *Velazquez*, 216 Ariz. at 307, ¶ 19).

The trial court did not abuse its discretion. Before making its ruling, the trial court carefully examined the transcript of Juror 17's voir dire, Juror 17's questionnaire, and heard arguments from both sides. R.T. 3/24/22, at 110–22. The trial court questioned the defense about their motion to strike Juror 17 for cause given Juror 17's consistent response that he would consider and dissect the details of the case. *Id.* at 115–17. The court also questioned the prosecutor about the

juror's highly favorable view of the death penalty and why this would not disqualify him. *Id.* at 118–19. Although the trial court was "troubled" by Juror 17's favorable view of the death penalty, it was satisfied by Juror 17's answers and found the juror "is not impaired to a degree that he should be struck for cause." *Id.* at 123. Juror 17's favorable view of the death penalty did not disqualify him from serving on the jury, because, like the jurors in *Velazquez* and *Johnson*, Juror 17 stated he would not automatically vote for the death penalty and would consider the circumstances of the offense before deciding Montoya's sentence. Montoya has not shown an abuse of discretion.

II. The trial court did not abuse its discretion in making Juror 6 an alternate.

Montoya argues the trial court abused its discretion by making Juror 6 an alternate after the parties and the court observed her sleeping through key portions of the trial. O.B. at 95–100. He also argues this Court should give "little deference" to the trial court's observations that Juror 6 repeatedly dosed off during trial and the juror's misconduct did not constitute reasonable grounds to remove her from the jury. *Id.* at 100–03. These claims lack merit and are unsupported by the record.

A. Standard of Review.

This Court reviews "the trial court's ruling regarding alleged jury misconduct for an abuse of discretion." *State v. Dann*, 220 Ariz. 351, 370, ¶ 106 (2009).

B. Factual and Procedural History.

During voir dire of Juror 6, she stated that she viewed the death penalty "as a last resort," which meant "all alternatives should be thoroughly exhausted or discussed or seen as options before" sentencing the defendant to death. R.T. 3/22/22, at 22, 24. The juror stated she would consider sentencing the defendant to death after hearing all the circumstances and mitigation. *Id.* at 68. The State moved to strike Juror 6 for cause because she would only impose the death penalty as a last resort. *Id.* at 72–75. The court overruled the State's objection, but allowed the State to re-raise the objection at a later time. *Id.* at 79–80, 160–61. The State filed a pleading that stated Juror 6 was unqualified to be a juror because of her belief that the death penalty should be used as a last resort and the juror "suffers from a mental condition that can sometimes manifest in unsubstantiated paranoia." R.O.A. 391 at 1. Montoya also filed a written response. R.O.A. 395.

On March 24, 2022, the court heard additional argument on striking Juror 6 and asked the parties for argument on Juror 6's mental health concerns. R.T. 3/24/22, at 83–85. The trial court again overruled the State's objection, rejecting the State's interpretation Juror 6's "last resort" statement. *Id.* at 93–94. The State argued that under the new rules, Juror 6 was impaired and should not serve on the jury. *Id.* at 94–97. The trial court again denied the objection. *Id.* at 97.

On April 4, 2022, the prosecutor first observed Juror 6 dosing off during testimony about the items recovered and inventoried from Montoya's vehicle. R.T. 4/4/22, at 154–55. The prosecutor informed defense counsel about the juror's conduct so they could "independently observe her sleeping throughout the testimony." *Id.* at 154. The prosecutor told the court that Juror 6 "repeatedly dosed off. She repeatedly nodded her … [and] close[d] her eyes, both eyes at the same time and shake her head to wake herself. She would nod off again." *Id.* Defense counsel stated he observed the juror closing and opening her eyes, but attempted to minimize this by arguing the testimony about the various items in Montoya's car was "a little bit boring." *Id.* at 155. The defense also argued that the State wished to remove the juror because of her views on the death penalty and was singling out Juror 6 for misconduct the entire jury engaged in. *Id.* at 155–56. In response, the prosecutor argued that she did not observe any other jurors sleeping, and she would have informed the court of any other misconduct she observed. The prosecutor also noted that the defense did not identify which of the other jurors were allegedly sleeping. *Id.* at 156–57.

The next day, the trial court indicated that it would give a general admonition on the importance of paying attention during the trial, rather than question the jurors individually. R.T. 4/5/22, at 4. The State objected, asking for the court to investigate the alleged misconduct. *Id.* at 5. Defense counsel again

responded that the evidence presented the day before was dry and boring. *Id.* at 6. After hearing argument from both parties, the court advised the jury of the importance of paying attention throughout the entire trial and asked the jurors to advise the court if there was anything hindering their ability to pay attention and stay awake. *Id.* at 8–9.

Later the same day, during the presentation of Montoya's recorded interview with detectives, the State emailed the defense and the trial court about Juror 6 nodding off again. R.O.A. 409, at 11. The trial court also informed the parties that it noticed that Juror 6 "was clearly having difficulty staying awake. She had very heavy eyelids; she was nodding. She caught herself a couple of times." R.T. 4/5/22, at 26. The judge decided to question the juror about her inability to stay awake. *Id.* at 27. Defense counsel claimed that Juror 11 was also nodding off but stated that they did not see Juror 6 sleeping. *Id.* The court stated they could address Juror 11 later after they brought in Juror 6. *Id.* at 28.

The court questioned Juror 6 about her difficulty staying awake, which she denied. *Id.* at 28–29. Juror 6 stated she was not taking any medication that would make her drowsy. *Id.* at 29. She also told the court that she was on mood stabilizers, Lamictal and Seroquel. *Id.* at 30–31. Contrary to her earlier claim, she admitted Seroquel causes drowsiness but stated she takes it at night and it does not cause drowsiness in the morning. *Id.* at 31. She further told the court that she had

been having sleeping issues recently, which was relatively common for her. *Id.* at 32. She clarified the trial was not causing her sleep issues. *Id.* at 32.

After the court's questioning, defense counsel avowed to the court they had done research on Seroquel and informed the court that one of the side effects was "heavy blinking and squinting." *Id.* at 79. The trial court stated that Juror 6 would stay on the jury and the parties could make a record at a later time about both Juror 6 and Juror 11. *Id.* at 80. On April 7, 2022, the parties made their record on Juror 6.[7] R.T. 4/7/22, at 30–45. The State requested the court designate Juror 6 as an alternate. *Id.* at 44. The court stated it would consider making Juror 6 an alternate but allowed the parties time to file written motions on the issue. *Id.* at 44–45. Both parties did. *See* R.O.A. 409 and 410.

On April 11, 2022, the trial court issued its ruling. The court noted it had heard all the arguments and read the pleadings on Juror 6. R.T. 4/11/22, at 14. The court went on to describe the medication Juror 6 used and her indication that these medications "did not make her sleepy and that it did not affect her." *Id.* During the first sleeping incident, the court "observed … she did have heavy eyelids and was having a hard time keeping awake, but I did not see evidence that she was actually sleeping at that time." *Id.* at 14–15.

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[7] The defense did not make a record on Juror 11.

The court stated that it watched Juror 6 carefully on April 5 during the playing of Montoya's interview and observed Juror 6 having "very heavy eyelids, nodding, and that [the trial court] observed her actually jerk three times. … But it appeared to me that she was, in fact, sleeping." *Id.* at 15. Two of the jerks were "extremely clear" while one of them was less clear. *Id.* The court made these observations before the State emailed the parties about Juror 6 sleeping. *Id.* at 16. The court did not believe Juror 6's statements that her medication was not impacting her ability to concentrate. *Id.* Although the court recognized both parties had separate reasons for wanting to either keep the juror on or get her off the jury, the court based its decision "solely upon my observations and the things that were brought to my attention by Number 6. I do not think that either side can get a fair and impartial verdict when a juror is sleeping." *Id.* at 16–17. The court also found Montoya's recorded interview was a "very significant and important … part of the State's presentation." *Id.* at 17. For these reasons, the court ordered the clerk to designate Juror 6 as one of the alternates. *Id.*

C. Law and Argument.

Under Rule 18.5, "the clerk or court official must determine the alternate juror or jurors by lot or stipulation." Ariz. R. Crim. P. 18.5(j)(2). A technical violation happens when a trial court does not follow the strict wording of the rule. *State v. Martinez*, 198 Ariz. 5, 9, ¶ 15 (App. 2000). "However, designation of

alternates by the trial judge does not require reversal in the absence of resulting prejudice." *Cota*, 229 Ariz. at 147, ¶ 44. "Because a defendant is not entitled to any particular jury, we may not reverse unless the court's action deprived the defendant of a fair and impartial jury." *State v. Smith*, 146 Ariz. 325, 327 (App. 1985). "We must defer to the trial court's resolution of conflicting evidence with respect to alleged juror misconduct, and will not set aside the court's findings of fact unless they are clearly erroneous." *Brooks v. Zahn*, 170 Ariz. 545, 550 (App. 1991) (internal citations omitted).

Montoya has not shown the trial court deprived him of a fair and impartial jury by designating Juror 6 an alternate. Although Montoya contends the court removed the juror for her death penalty views, the record does not support this contention. O.B. at 101–03. The trial court repeatedly overruled the State's challenges for cause based on her views of the death penalty. *See* R.T. 3/22/22, at 79–80; R.T. 3/24/22, at 93–94, 97 (trial court denying motion to strike Juror 6 for cause). The trial court designated Juror 6 as an alternate based "solely upon [its] observations and the things that were brought to [its] attention" and did "not think that *either* side can get a fair and impartial verdict when a juror is sleeping."[8] R.T.

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[8] It is likely Montoya would claim error for failing to remove the juror had Juror 6 deliberated and returned a death sentence. *See Prince*, 226 Ariz. at 533, ¶¶ 55–58.

4/11/22, at 16–17 (emphasis added). Montoya cannot show prejudice because he has not presented any evidence showing he did not have a fair and impartial jury during the penalty phase.

Montoya contends the trial court lacked a reasonable ground to designate Juror 6 as an alternate because this Court has found that a juror who slept for a short time during trial and remained on the jury did not amount to reversible error. O.B. at 98–99 (citing *Prince*, 226 Ariz. at 533, ¶ 57). In *Prince*, a juror fell asleep for a short period of time during non-critical portions of the trial. 226 Ariz. at 533, ¶ 58. The trial court kept the juror on the panel that deliberated during the aggravation phase.[9] *Id.* Although this Court held that it was not reversible error for the trial court to keep a juror who slept through a small portion noncritical testimony, it did not limit the trial court's discretion in handling juror misconduct. Unlike the noncritical testimony in *Prince*, Juror 6 fell asleep during a "very significant and important … part of the state's presentation." R.T. 4/11/22, at 17. Montoya concedes this in his brief. *Id.* at 113. Montoya also argues that Juror 6 gave repeated assurances that she would pay attention, O.B. at 98–100, but these assurances conflict with her actual and persistent behavior during trial *see* R.T.

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[9] The juror did not deliberate during the penalty phase because the juror continued to sleep through the trial. *Prince*, 226 Ariz. at 533, ¶ 55.

4/11/22, at 14–16 (describing all the instances of Juror 6 sleeping during trial). The importance of the evidence and Juror 6's repeated nodding off gave the trial court a reasonable ground to designate her as an alternate.

Montoya contends the COVID-19 protocols remove the deference appellate court give to the evaluation of jurors because the requirement to wear masks prevented the trial court from accurately determining whether Juror 6 was sleeping. O.B. at 100. However, Juror 6's mask did not hinder the trial court's ability to see her having "very heavy eyelids, nodding, and that [it] observed her actually jerk three times." R.T. 4/11/22, at 15. Although Montoya disputes the trial court's finding that Juror 6 had heavy eyelids, this Court defers to the trial court's resolution of conflicting evidence about juror misconduct. *Brooks*, 170 Ariz. at 550; *see also State v. Hoskins*, 199 Ariz. 127, 139, ¶ 37 (2000) ("In assessing a potential juror's fairness and impartiality, the trial court has the best opportunity to observe prospective jurors and thereby judge the credibility of each.") Montoya has not shown the trial court's ruling was "clearly erroneous" and therefore the trial court's findings cannot be set aside. *See Brooks*, 170 Ariz. at 550.

IV

THE TRIAL COURT CORRECTLY ADMITTED RELEVANT PHOTOGRAPHS.

Montoya contends the trial court abused its discretion when it admitted 10 photographs to assist Dr. Bucholtz's testimony. O.B. at 104–13. For the reasons

stated below, Montoya did not object to the admission of these photographs and has not shown the trial court erred in admitting the photographs the defense.

I. Standard of Review.

This Court reviews the admission of photographs for an abuse of discretion. *State v. Rushing*, 243 Ariz. 212, 219, ¶ 24 (2017). This Court reviews evidentiary objections raised for the first time on appeal for fundamental error. *Moody*, 208 Ariz. at 455, ¶ 120. A reviewing court may consider an argument abandoned and waived when a party fails to properly develop it on appeal. *State v. Vargas*, 249 Ariz. 186, 191, ¶ 22 (2020).

Montoya concedes that the specific photographs the defense objected to in R.O.A. 334 are different from the photographs he now argues the trial court admitted in error. O.B. at 107. He nevertheless asserts that his general objections to gruesome photographs in R.O.A. 293 "encompassed" these photographs. *Id*. Because Montoya did not object below, this Court reviews his claim concerning the admission of Exhibits 90 and 91 for fundamental error.

Montoya has abandoned and waived his claim of error for the admission of exhibits 81–85, 87, 89. [10] He does not develop his argument on why the trial court erred in admitting these exhibits.

II. Factual and Procedural History.

On December 2, 2021, the defense filed a motion in limine to preclude the use of gruesome photographs. R.O.A. 293. The defense asked broadly for the trial court to preclude photographs that are "not relevant, or … if relevant, whose relevance is marginal compared to the danger of unfair prejudice or confusing or misleading the jury, and or, … are duplicative …." *Id.* at 2. The motion outlined the general law for the admissibility of gruesome photographs, but did not specify which pictures the defense sought to preclude. *Id.* at 2–6. Montoya asked the court to preclude all pictures of the victim's decomposing body. *Id.* at 6. The motion ended with a request for a hearing on the motion, where the State would present the pictures it intended to use "and both the state and defendant may present argument about their admissibility." *Id.*

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[10] Except for exhibits 90 and 91, Montoya does not specify the exhibits he believes were improperly admitted. He only references "[t]he ten gruesome photographs of A.R.'s decomposing body that were admitted during the penalty phase." O.B. at 107. He does list exhibits 81–85, 87, 89, and 90–92 as photographs depicting A.R.'s decomposing body. *Id.* at 106. The State presumes that Montoya is challenging the admission of these exhibits.

The State informed the defense of the pictures it intended to use at trial, including the 10 photos Montoya asserts trial court admitted in error. R.T. 2/10/22, at 30; *see supra* n. 13. The defense filed a second motion, outlining the specific objections to 9 photographs, which did not include any of the 10 photographs he challenges on appeal. Sealed Document R.O.A. 334. The basis of the objections was that the photographs were either duplicative or irrelevant. *Id.* at 2. The defense did argue a photo of the cleaned scull fragments was unfairly prejudicial "because the bone pieces have been deliberately taken apart for the purpose of a photograph. Seeing the pieces displayed out is also irrelevant since it does not show where the strike marks are." *Id.*

The court held a hearing on the motion on February 10, 2022. Before moving to the specific objections, the State informed the court that it filed a thumb drive with all the medical examiner photos and all the photos of the forensic anthropologist. R.T. 2/10/22, at 28–29, *see also* Sealed Document R.O.A. 348. This thumb drive also had a folder with the photographs the State actually intended to use at trial. Sealed Document R.O.A. 348. The State included the additional pictures to show "how the state was judicious in terms of the photos that it selected." R.T. 2/10/22, at 29. The court then went through each of the objections and heard argument from both sides about the admissibility of the 9 photographs.

Id. at 30–44. The court denied the defense's motion on all but 1 photograph. R.O.A. 328 at 2.

At trial, the State admitted, without objection, exhibits 81–85, 87, 89–92. R.T. 3/30/22 at 124; R.T. 4/4/22, at 16.[11] Once admitted, the State had Dr. Bucholtz describe her observations of the victim's body depicted in the photographs, starting with the victim's upper body and hands. Exhibit 81 was a picture of the victim's body lying face down on top of a grey comforter with decomposition fluid around the body and her hands behind her back. R.T. 4/4/22, at 29. The doctor used Exhibit 85, a close up of the victim's hands, to show handcuffs holding them in place and a white wash cloth covering A.R.'s hands. *Id.* Exhibit 83 was a closer shot of the victim's wrists that showed the railroad-track like discoloration associated with handcuff injuries. *Id.* at 30–31. Exhibit 89 also showed the railroad-track marks from the handcuffs and some red discoloration that could either be an injury or part of the decomposition process. *Id.* at 36–37.

One of the autopsy photos, Exhibit 84, shows the railroad-track marks all along the victim's wrist and that the handcuffs were tight enough to prevent them coming off. *Id.* at 36–37. The doctor could not state exactly how tight the

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[11] Although the court admitted exhibit 81 on March 30, 2022, the State published the photo to the jury on April 4, 2022.

handcuffs were or if the marks occurred before or after the victim's death. *Id.* at 37–38. Exhibit 82 showed the handcuffs and that the victim's shirt had a V shaped cut in it. *Id.* at 32. Dr. Bucholtz explained that decomposition would not have caused this because bloating does not tear clothing. *Id.* at 32–33.

The State then moved to the victim's legs. In Exhibit 87, the victim was on her back and her legs were bound by both a belt and a bungee cord. *Id.* at 33–34. The doctor explained the belt was looser but not so loose that it would be easy for the victim to get out of it. *Id.* at 34. The bungee cord was tighter around the victim's legs. *Id.* Dr. Bucholtz explained this was important because it explained marks left on the body. *Id.* Exhibit 86 was a closer view of both the bungee cord and the belt wrapped around the victim's legs. *Id.* at 35.

After showing the victim's upper and lower body, the State moved to the victim's head injuries. The pictures showed the victim's head after the medical examiner removed her hair during the autopsy. *Id.* at 39. Exhibit 90 showed the top right portion of the victim's head and injuries labeled 1 through 4. *Id.* Exhibit 92 also showed the right side of the head but depicted injury 8. *Id.* at 40. Exhibit 91 was the top left portion of the victim's head with injuries labeled 5 through 7. *Id.* The doctor described the placement of each of the injuries. *Id.* at 39–40. Dr. Bucholtz used these pictures to create a diagram of the injuries to better depict each of the head injuries and their severity. *Id.* at 42–48. The doctor determined

there were no less than eight injuries to the victim's head. *Id.* at 48. Injuries 4, 5, and 6 were lethal because each had enough force to open a hole in the victim's skull and directly expose the victim's brain. *Id.* at 48–49. The remaining injuries also could have contributed to the victim's death. *Id.* at 48.

III. Law and Argument.

"Evidence is relevant if … it has any tendency to make a fact more or less probable than it would be without the evidence; and … the fact is of consequence in determining the action." Ariz. R. Evid. 401. Relevant evidence is generally admitted, except when "its probative value is substantially outweighed" by the danger of unfair prejudice. Ariz. R. Evid. 403. Although the rules of evidence do not apply in the penalty phase, the trial court is still governed by the general rules of relevance and whether the evidence is unfairly prejudicial. *Burns*, 237 Ariz. at 28–29, ¶ 130.

The defense and the State may present any evidence in the penalty phase of trial "that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency." A.R.S. 13-752(G). The State may also present evidence showing the defendant is not entitled to leniency, "regardless of whether the defendant presents evidence of mitigation." *Id.* The jury also must consider the circumstances of the offense as a potential mitigating factor. A.R.S. § 13-751(G). "[T]aken together, the statutes governing the scope of mitigation

rebuttal—§ 13-751(G) and § 13-752(G)—permit jurors to hear evidence relating to circumstances of the crime and the defendant's character, which they must do to fulfill their duty to evaluate all the relevant evidence when determining the defendant's sentence." *Champagne*, 247 Ariz. at 142, ¶ 89 (internal citations and quotation marks omitted).

"Generally, whether the trial court abused its discretion in admitting a photograph turns on (1) the photograph's relevance, (2) its tendency to inflame the jury, and (3) its probative value compared to its potential to cause unfair prejudice." *Rushing*, 243 Ariz. at 219, ¶ 25 (citation and internal quotation marks omitted). "Cause of death is always relevant." *Id.* at ¶ 27. Photographs may be relevant "to prove the corpus delecti, to identify the victim, to show the fatal injury, to determine the atrociousness of the crime, to corroborate state witnesses, to illustrate testimony, or to corroborate the state's theory of the crime." *State v. Hampton*, 213 Ariz. 167, 173, ¶ 18 (2006). "[T]here is nothing sanitary about murder and sometimes gruesome photographs properly will be introduced." *Cota*, 229 Ariz. at 147, ¶ 46 (internal quotation marks and citation omitted). "Nonetheless, photographs must not be introduced 'for the sole purpose of inflaming the jury.'" *Hampton*, 213 Ariz. at 173, ¶ 19 (2005) (quoting *State v. Gerlaugh*, 134 Ariz. 164, 169 (1982)).

"In order to preserve a challenge to the admissibility of evidence, parties must make a specific, contemporaneous objection to its admission. The motion or objection must state specific grounds in order to preserve the issue for appeal." *State v. Butler*, 230 Ariz. 465, 471, ¶ 21 (App. 2012) (citation and internal quotations omitted). "This gives the court an opportunity to correct any error and allows opposing counsel a chance to obviate the objection. Thus, a general objection is insufficient to preserve an issue for appeal." *State v. Lopez*, 217 Ariz. 433, 434, ¶ 4 (App. 2008) (internal citation and quotations omitted). "Further, an objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds." *State v. Hamilton*, 177 Ariz. 403, 408 (App. 1993). "[I]f the appellant fails to properly develop an argument, the court may consider it abandoned and waived." *Vargas*, 249 Ariz. at 191, ¶ 22.

IV. Exhibits 90 and 91.

Montoya contends the trial court erred in admitting exhibits 90 and 91 because the photographs were gruesome and "proved no fact other than those that were uncontested, otherwise established through testimony, and illustrated through other properly admitted exhibits." O.B. at 111. He fails to show error, much less fundamental and prejudicial error.

Although Montoya pleaded guilty and waived most mitigation, this did not limit the State's ability to present evidence of the circumstances of the offense and to show Montoya was not entitled to a life sentence. Exhibits 90 and 91 demonstrate the locations of the injuries on the victim's head, including the three fatal blows that tore holes in the victim's skull. R.T. 4/4/22, at 39–40. They also form the basis of the diagram Dr. Bucholtz created to further explain the fatal injuries and how they affected the victim's functioning after they occurred. *Id.* at 42.

Montoya argues Dr. Fulginiti's testimony made the photographs irrelevant. O.B. at 110–11. However, Dr. Fulginiti did not testify about the cause of death; she only described reconstructing the skull to determine the number of blows inflicted, the force needed to cause the injuries, and the object used to cause the injuries. R.T. 4/4/22, at 63–86. Therefore, the photographs were relevant to show the cause of death.

Montoya relies on the victim's state of decomposition to support his claim that the photographs are gruesome and prejudicial. O.B. at 111–13. However, the victim's state of decomposition relates to the circumstances of his offense. The evidence showed Montoya attacked A.R. in her home, bound, killed, and left to decompose for several days while Montoya drained her accounts and assumed her identity. Law enforcement discovered A.R. several days later, after Montoya's

attempts to deceive her friends and family failed. The police began their investigation immediately after discovering the victim's body. The victim's state of decomposition is the direct consequence of Montoya's crimes and his attempts to avoid discovery, and were relevant for the jury to consider. Montoya's crimes were not sanitary and the trial court properly admitted exhibits 90 and 91. *See Cota*, 229 Ariz. at 147, ¶ 46. The relevancy of these photographs outweighs any prejudice.

Montoya has not shown error, much less fundamental error, in the admission of exhibits 90 and 91. And, even if there was error, the error was harmless beyond a reasonable doubt.

V. Exhibits 81–85, 87, 89, and 92.

Montoya does not develop his arguments that the trial court erroneously admitted exhibits 81–85, 87, 89, and 92. *See* O.B. at 109–113. Therefore, he waives these arguments. Regardless, the trial court did not err in admitting these exhibits. All the exhibits were relevant and their probative value outweighed any potential prejudice. These photographs depict the circumstances of the offense, including that Montoya handcuffed the victim's hands behind her back, tied her legs together, and left her to decompose after murdering her. These photos are relevant for the jury's consideration on the contested issue of Montoya's sentence. Therefore, the trial court did not err in admitting them.

V

MONTOYA CAN WAIVE MITIGATION.

Montoya argues the trial court violated his rights under the Sixth, Eighth and Fourteenth Amendments when it allowed him to waive mitigation over his attorney's objection. O.B. at 114–32. He concedes this Court has consistently rejected this argument. *Id.* at 126–27. However, he contends this Court wrongly decided these cases and asks this Court to overrule them. *Id.* at 126–32. He has not presented a compelling reason to overturn this Court's long-standing precedent. *State v. McGill*, 213 Ariz. 147, 159, ¶ 52 (2006).

I. Standard of Review.

This Court reviews issues of constitutional law de novo. *State v. Coleman*, 241 Ariz. 190, 192, ¶ 6 (App. 2016).

II. Factual and Procedural History.

On February 24, 2021, Montoya's counsel informed the court that Montoya intended to plead guilty to the indictment and waive mitigation. R.T. 2/24/21, at 4. The court set another hearing so Montoya could be present and directly advise the court of his intentions. *Id.* at 10–13.

On March 19, 2021, counsel restated that Montoya intended to plead guilty and waive mitigation. R.T. 3/19/21, at 4. Counsel also stated they did not have any concerns about Montoya's competency but did not object to a competency

evaluation. *Id.* The court asked Montoya directly if he wished to plead to the indictment, admit the aggravators and waive mitigation. *Id.* at 5. Montoya stated that he did. *Id.* The court ordered Montoya, out of an abundance of caution, to go through a competency evaluation to ensure Montoya was "fully advised and competent to waive" important constitutional rights. *Id.* at 6. On May 14, 2021, after the doctors submitted their conclusions that Montoya was competent to waive mitigation, the court found Montoya was competent to waive the presentation of mitigation evidence. R.O.A. 221 at 2, R.T. 5/14/2021, at 4–5.

The defense filed three motions concerning Montoya's waiver of mitigation: Motion to find A.R.S. 13–752(G) Unconstitutional, R.O.A. 223; Defendant's Motion for Orders directing Presentation of Mitigating Evidence, R.O.A. 224; and Motion to Deny Defendant's Waiver of Mitigation, R.O.A. 225. On September 17, 2021, the trial court heard argument on these motions and denied them all.

After trial court denied the motions, it moved on to Montoya's mitigation waiver. The court questioned Montoya about why he was waiving mitigation. R.T. 9/17/21, at 35–36. Montoya responded that he did not want anyone he knew to be involved with the penalty phase, he felt that mitigation was just an excuse, and presenting mitigation would make him a hypocrite. *Id.* at 36–37, 39. He later clarified that he understood the law does not consider it an excuse and he knew he had the right to present mitigation, but his decision was based on his moral

judgment. *Id.* at 52. The trial court told Montoya about the medical experts who would testify about Montoya's substance abuse and mental health disorders. *Id.* at 36. The court also explained the consequences of not presenting mitigation and, generally, the unpleasant conditions on death row. *Id.* at 38.

After this conversation, the trial court then went through the colloquy with Montoya. *Id.* at 39–55. During the colloquy, the trial court explained what mitigation was, had defense counsel state a brief summary of proposed mitigation, ensured Montoya had discussed this mitigation with his attorney's, confirmed there were no competency issues, and questioned Montoya whether he was waiving mitigation knowingly, intelligently and voluntarily. *Id.* The trial court found Montoya's waiver of mitigation was knowingly and voluntary. *Id.* at 54.[12]

On March 8, 2022, the trial court again engaged Montoya in a colloquy concerning waiving mitigation, so there would be a recording that the defense could present to the jury as mitigation. R.T. 3/7/22, at 5. The trial court confirmed that Montoya wished to waive mitigation. R.T. 3/8/22, at 7. The court explained the consequences of not presenting mitigation in a death penalty case and the state would argue for a death sentence. *Id.* at 7–8. Montoya state he understood the

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[12] The transcript shows the trial court found Montoya knowingly and voluntarily waived mitigation. The minute entry states the court found Montoya knowingly, voluntarily and intelligently waived mitigation. R.O.A. 277 at 2.

process and stilled viewed mitigation as an excuse. *Id.* at 8–9. The court also explained that a death sentence would require Montoya to go to death row, which had less privileges and more restrictions than the general population. *Id.* at 10. Montoya also stated that he felt that most of the mitigation prepared by his counsel was irrelevant to his case. *Id.* at 11. The trial court then went through the following with Montoya: Montoya's educational history; medications; whether Montoya understood what was happening and that he understood he had the right to present mitigation; that Montoya's attorneys had prepared mitigation but that Montoya did not want them to present it; the wide scope of mitigation; whether Montoya discussed his mitigation with his counsel; the jury's role in determining the sentence; and that Montoya was competent to make the decision to waive mitigation. *Id.* at 11–17. The trial court also ensured that Montoya was making the decision voluntarily. *Id.* at 17–18. After the colloquy, the trial court accepted the waiver after finding it was knowingly and voluntarily made.[13] R.O.A. 369 at 2.

III. Waver of Mitigation and the Eighth Amendment.

A state rule or statute cannot prevent the sentencer from considering mitigation offered by a capital defendant. *Lockett*, 438 U.S. at 604–05; *Eddings,*

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[13] The transcript indicates only the court found the waiver only knowingly and voluntarily made. However, the minute entry states the court found that Montoya made a knowing, voluntary and intelligent waiver of mitigation. R.O.A. 369 at 2.

455 U.S. at 113–14. The defendant has a "right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence." *Marsh*, 548 U.S. at 175. "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990).

The Supreme Court has never held that a defendant may not waive a mitigation presentation. *See Blystone*, 494 U.S. 299; *Schriro v. Landrigan,* 550 U.S. 465 (2007). In *Blystone*, the jury sentenced the defendant to death under a Pennsylvania law that required a death sentence if his mitigation did not outweigh the aggravation. 494 U.S. at 302. Against the advice of counsel and the repeated warnings of the trial court, the defendant "decided not to present any proof of mitigation evidence during his sentencing proceedings." *Id.* at 306, n.4. When asked why he refused to present mitigation, the defendant responded, "I don't want anybody else brought into it." *Id.* The defendant's jury was "specifically instructed to consider, as mitigating evidence, any matter concerning the character or record of the defendant, or the circumstances of his offense." *Id.* at 307–08 (internal quotation marks omitted). Even though the defendant did not present any mitigation, the Supreme Court affirmed his conviction and held the given jury instruction satisfied "the dictates of the Eighth Amendment." *Id.* at 308.

In *Landrigan*, the capital defendant argued in his federal habeas proceeding that his trial attorneys were ineffective in their mitigation investigation and he would not have waived mitigation had his attorneys investigated properly. 550 U.S. at 472. During trial, the defendant instructed his attorney not to present any mitigating circumstances to the sentencing judge and told the sentencing judge there were not any mitigating circumstances. *Id.* at 469–70. The defendant also actively undermined the mitigation offered through his attorney. *Id.* at 470. The Ninth Circuit reversed the death sentence, holding (among other reasons) the state court unreasonably determined the defendant waived mitigation and could not show prejudice. *Id.* at 475–77. The Ninth Circuit also held the waiver was invalid because it was not "informed and knowing." *Id.* at 478–79. The Supreme Court rejected both arguments, holding the record clearly indicated the defendant waived mitigation and noted that it "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." *Id.* at 475–79.

Beginning with this Court's decision in *State v. Roscoe*, 184 Ariz. 484, 498–500 (1996), and continuing through *Riley*, 248 Ariz. at 200, ¶ 195, this Court has consistently relied on footnote four in *Blystone* to hold a defendant could waive mitigation. *Riley*, 248 Ariz. at 200, ¶ 195; *Gunches*, 240 Ariz. at 203–04, ¶¶ 15–20; *State v. Goudeau*, 239 Ariz. 421, 473–47, ¶¶ 244–45 (2016); *State v. Hausner*, 230 Ariz. 60, 84–86, ¶¶ 118 (2012); *State v. Murdaugh*, 209 Ariz. 19, 33–34, ¶¶ 70–71

(2004); *Roscoe*, 184 Ariz. at 498–500. This Court has concluded that "[a] defendant may waive mitigation if he is competent and makes the decision knowingly, intelligently, and voluntarily."[14] *Hausner,* 230 Ariz. at 84, ¶ 116.

When waiving mitigation in Arizona, the "trial court should engage the defendant in a colloquy to ensure that the defendant understands the penalty phase process, the right to present mitigation, and the consequences of waiving this right." *Id.* at 86, ¶ 122. The court should place on the record "that the defendant is waiving the presentation of mitigation knowingly, intelligently, and voluntarily." *Id.* Defense counsel should also put on the record that they discussed with the defendant the "nature of the mitigation that could be presented and the consequences of waiver." *Id.* Finally, the trial court should order a mental health evaluation if there are any doubts about the defendant's competency to waive mitigation. *Id.*

IV. Montoya knowingly, intelligently, and voluntarily waived mitigation and was competent to do so.

Montoya does not dispute that he knowingly, intelligently, and voluntarily waived mitigation and he was competent to do it. The trial court followed the procedures laid out in *Hausner* and accepted Montoya's waiver. R.T. 9/17/21, at

[14] The "knowingly, intelligently and voluntarily" standard is higher than that required by the constitution. *See Landrigan,* 550 U.S. at 479.

35–55, R.T. 3/8/22, at 11–18. Therefore, Montoya properly waived the majority of his mitigation.

V. The jury could find mitigation from any of the evidence presented.

Montoya argues his waiver of mitigation prevented the jury from considering and giving effect to his proposed mitigation, which violated the Eighth Amendment by making his death sentence inconsistent and unreliable. O.B. at 116–18. The Eighth Amendment requires the sentencer to consider all the proffered mitigation but does not require the defendant to present mitigation. Moreover, Montoya did present mitigation on his acceptance of responsibility and substance abuse.

The trial court instructed the jury that "[m]itigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history, or record, or circumstances of the offense." R.T. 3/28/22, at 21; R.T. 4/11/22, at 25–26.[15] The instructions also informed the jury that "[m]itigating circumstances may be offered by the defendant or the state or be apparent from the evidence presented during this sentencing trial." R.T. 4/11/22, at 26; *see also* R.T.

[15] The final instructions include "natural life" instead of just "life." Otherwise, the jury instructions are the same.

3/28/22, at 21. The court also instructed the jury that "[a] juror may find mitigation and impose a life sentence even if the defendant does not present any mitigation evidence." R.T. 3/28/22, at 23; R.T. 4/11/22, at 30. The trial court's instructions allowed the jury to consider any evidence presented by either party as mitigation. Therefore, Montoya's death sentence complies with "the dictates of the Eighth Amendment." *Blystone*, 494 U.S. at 308.

VI. *Riley* is an accurate statement of the *Blystone* holding.

Montoya argues this Court's decision in *Riley* misstated the Supreme Court's holding in *Blystone* by stating it "expressly held" a defendant could waive the presentation of mitigation. O.B. at 118–20. This claim lacks merit.

The Supreme Court has held a sentencing scheme that requires a defendant's mitigation to outweigh the aggravation to receive a life sentence does not violate the Eighth Amendment when the defendant waives mitigation. *Blystone*, 494 U.S. at 306–07. The Court held a jury instruction telling the jury to consider any evidence related to the defendant's character satisfied "the dictates of the Eighth Amendment." *Id*. at 308. Arizona has followed this precedent. *Riley*, 248 Ariz. at 200, ¶ 195.

The defendant in *Blystone* argued Pennsylvania's death penalty statute violated the Eighth Amendment as applied in his case because the statute mandated a death sentence when the aggravation outweighed the mitigation and the

defendant did not present any mitigation. 494 U.S. at 306–07, n.4. The Supreme Court "reject[ed] this argument." *Id.* at 306. In *Riley*, the defendant argued that A.R.S. § 13–752(G) violated the Eighth Amendment because it did not provide a mechanism for the jury to consider mitigation after the defendant waived it. 248 Ariz. at 198, ¶ 188. The "expressly held" language Montoya argues misapplied *Blystone*'s holding in *Riley* addressed the constitutionality of A.R.S. § 13–752(G) and not whether a defendant can waive mitigation. This Court correctly relied on the express holding of the Supreme Court in rejecting Riley's Eighth Amendment challenge to Arizona's capital sentencing statute. It should do likewise here.

VII. A defendant may waive mitigation in a capital sentencing hearing without violating the Eighth Amendment.

Montoya argues a defendant cannot waive mitigation because it would prevent the jury from considering all the mitigating circumstances and, therefore, violate the Eighth Amendment. O.B. at 121–23. As stated previously, "the dictates of the Eighth Amendment" are satisfied by a jury instruction stating the jury can consider any factor of the defendant's character or circumstances of the offense as mitigation. *Blystone*, 494 U.S. at 308. Montoya's jury had this instruction, which therefore satisfied the Eighth Amendment. *See supra.*

VIII. A defendant's waiver of mitigation does not violate his Sixth Amendment right to counsel.

Montoya argues the trial court violated his Sixth and Fourteenth Amendment rights and abused its discretion by allowing Montoya to waive mitigation over the objection of his counsel. O.B. at 123–32. He contends the decision about what to present as mitigation is a strategic one outside of Montoya's control. *Id.* This claim is without merit.

Presentation of mitigation is a fundamental decision within the control of the defendant. "The Sixth Amendment guarantees to each criminal defendant the 'Assistance of Counsel for his defence.'" *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (2018) (internal quotation marks omitted). "Trial management is the lawyer's province …." *Id.* at 1508. Trial counsel assists the defendant by determining "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez v. United States*¸ 553 U.S. 242, 248 (2008) (internal quotation marks and citations omitted). Under the Sixth Amendment, the defendant controls fundamental decisions, including but not limited to: asserting innocence during the penalty phase, "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy*, 138 S. Ct. at 1508.

Arizona also recognizes a defendant's freedom to limit mitigation evidence "where the client's request involves a strong privacy interest," *Roscoe*, 184 Ariz. at

499, or the defendant refuses to cooperate with a mitigation specialist, *State v. Kayer*, 194 Ariz. 423, 437, ¶ 46 (1999). "These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *McCoy*, 138 S. Ct. at 1508 (emphasis in original). "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review." *Id.* at 1511. "[R]equiring the defense to present mitigating evidence over the defendant's opposition arguably would conflict with the defendant's Sixth Amendment right to self-representation." *Hausner*, 230 Ariz. at 85, ¶ 119 (citing *United States v. Davis,* 285 F.3d 378, 384–85 (5th Cir. 2002); and *People v. Blair,* 36 Cal.4th 686, 31 (2005)).

Montoya argues he forfeited the right to decide whether to present mitigation when he accepted representation but never expressed a wish to die. O.B. at 125–26. This, he contends, made a life sentence the objective of the representation and Montoya could not interfere with that. *Id.* However, this argument is incompatible with *McCoy* and Arizona case law. The Court in *McCoy* held the trial attorney violated the defendant's Sixth Amendment right to trial autonomy when the attorney conceded guilt in the penalty phase over the defendant's strenuous objections. 138 S. Ct. at 1508–09. Montoya does not explain how an attorney presenting mitigation over the strenuous objections of the defendant would not also

require reversal. This Court has already held a defendant has the freedom to limit areas of mitigation. *Kayer*, 194 Ariz. at 437, ¶ 46. The decision to waive mitigation is not mere "trial management" but the fundamental decision of the defendant and is of equal importance as deciding to plead guilty, waive a jury trial, or forgo an appeal. *See McCoy*, 138 S. Ct. at 1508 ("Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel …, so may she insist on maintaining her innocence at the guilt phase of a capital trial."). To hold otherwise would violate the defendant's Sixth Amendment right to trial autonomy.

In Montoya's case, he vigorously stated he did not want his attorneys to present mitigation other than acceptance of responsibility and his addiction to cold medicine. He told the court directly that he did not "agree with any of" the proposed mitigation. R.T. 9/17/21, at 37, 43. He considered most of his mitigation as an excuse for his conduct and he believed the mitigation evidence was irrelevant. *Id.* Montoya stated he understood the consequences of not presenting mitigation but he "would rather just take that chance than feel like a hypocrite." *Id.* at 39. Montoya clarified that he understood he had a right to present mitigation and the law did not define mitigating as an excuse. *Id.* at 52. However, he felt in his own moral judgment that mitigation was an excuse and he personally did not feel he should present mitigation. *Id.* Montoya clearly expressed to the trial court his

objectives of the litigation. Allowing the defense to present mitigation over the express objection of Montoya would have violated his right to trial autonomy and resulted in reversible error. *Cf. McCoy*, 138 S. Ct. at 1511.

Montoya contends the case law on ineffective assistance of counsel supports his argument by holding it is a strategic decision to present or not present certain mitigating evidence. O.B. at 126, 131. He relies on *State v Pandeli*, 242 Ariz. 175 (2017), and *Strickland v. Washington*, 466 U.S. 668 (1984), to support his contention. Neither case involved a defendant who waived mitigation; rather the ineffective assistance of counsel claims were based on counsel's alleged failure to investigate and present mitigation. *See Strickland*, 466 U.S. at 675–76; *Pandeli*, 242 Ariz. at 181–92, ¶¶ 9–72. Counsel's presentation of mitigation in both cases did not infringe on the defendant's trial autonomy or ignore the express objections of the defendant. Therefore, these cases offer no support for Montoya's argument.

IX. This Court has consistently rejected Montoya's arguments.

Montoya concedes this Court has previously and consistently rejected his Sixth Amendment argument. O.B. at 126–27 (citing *Riley,* 248 Ariz. 154; *Goudeau*, 239 Ariz. 421; *Hausner*, 230 Ariz. 60; *Murdaugh*, 209 Ariz. 19 (2004); *State v. Kayer*, 194 Ariz. 423 (1999); and *State v. Roscoe*, 184 Ariz. 484 (1996)). He argues the court wrongly decided these cases by expanding *Blystone*'s holding through "a schoolyard game of telephone." O.B. at 127. This argument

misconstrues the holding of *Riley* and the Sixth Amendment right to trial autonomy. *Id.* at 127–31.

As stated previously, this Court correctly held in *Riley* that the Supreme Court expressly rejected an Eighth Amendment claim that a sentencing statute was unconstitutional where it required the mitigation to outweigh the aggravation and the defendant waived mitigation. *See Blystone*, 494 U.S. at 303. *Riley* made the same challenge to Arizona's sentencing scheme, making *Blystone* directly applicable. *Riley*, 248 Ariz. at 199, ¶ 193.

Montoya argues the court misconstrued the two separate arguments made in *Riley's* opening brief, that A.R.S. § 13–752(G) violated the Eighth Amendment by preventing the jury from considering mitigation if the defendant waived it, and that the trial erred in allowing him to waive mitigation in violation of the Sixth Amendment. O.B. at 128. Although this Court did not expressly address the second argument, it did hold that even accepting that the Eighth Amendment's right to individualized sentencing overcomes a defendant's right Sixth Amendment right to self-representation that he "failed to provide any persuasive arguments … that juries are constitutionally required to consider all mitigating evidence, even if that means presenting such evidence over the defendant's objections." *Riley*, 248 Ariz. at 201, ¶ 200. This Court then outlined its holdings allowing a defendant to waive mitigation. *Id.*

Montoya contends this Court has never addressed whether a defendant's decision to waive mitigation is fundamental, meaning he retains the right, or strategic, meaning the decision belongs to counsel. O.B. at 129–31. In *State v. Kayer*, 194 Ariz. 423 (1999), the defendant argued that the trial court improperly allowed him to control the mitigation presentation because Arizona case law did not list the presentation of mitigation as a fundamental decision within the exclusive control of the defendant. 194 Ariz. at 436, ¶¶ 43–44. This Court rejected that argument, holding its previous decisions did not provide an exclusive list of fundamental decisions within the control of the defendant. *Id.* at ¶ 45. This Court also rejected the defendant's claim that the attorney should exclusively control the presentation of mitigation, holding it would create an anomaly between an unrepresented defendant who has exclusive control over mitigation and "a defendant [who] accepts counsel, [but] he would have no input on what mitigating factors to offer." *Id.* at 436–37, ¶ 45. Rather than create this anomaly, Arizona case law "allows the defendant the freedom … to … potentially limit the mitigation evidence that is offered." *Id.* at 437, ¶ 46. *Kayer* directly rebuts Montoya's argument and remains the law in Arizona.

X. Montoya's waiver does not have the appearance of impropriety.

Montoya argues in the alternative that the trial court erred in accepting his waiver because the waiver has the potential to cause a "public perception of

impropriety and unfairness." O.B. at 131. He relies on *Indiana v. Edwards*, 554 U.S. 164 (2008), a case where the trial court denied a defendant's request to represent himself at trial because the trial court found that, while he was competent to stand trial, he was not competent to represent himself. 554 U.S. at 167–69. The Court held that a State may refuse a defendant's request to represent himself when the defendant lacks the mental capacity to do so. *Id.* at 174–77. As one of the reasons to support this holding, the Court explained that a criminal conviction where a defendant with severe mental health problems represents himself would not "appear fair to all who observe them." *Id.* at 177 (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)).

Montoya does not challenge his competence to waive mitigation or whether he made a knowing, intelligent, and voluntary waiver. This Court's case law clearly permits a defendant to waive mitigation when he is competent to do so and the waiver is made knowingly, intelligently, and voluntarily. *Hausner*, 230 Ariz. at 86, ¶ 122. Thus, *Edwards* does not apply and the trial court did not err in accepting the waiver.

VI

THE VICTIM IMPACT STATEMENTS WERE PROPER.

Montoya argues the victim impact evidence improperly made "repeated references to the defendant and the crime." O.B. at 133. He contends the trial court

erred in declining to review the impact statements before the penalty phase. *Id.* As shown below, this claim lacks merit.

I. Facts and Procedural History.

On February 10, 2022, the State asked if the court would like to review the victim impact statements before the jury heard them. R.T. 2/10/22, at 21. The court declined, stating that it would not review them unless there was a problem. *Id.* The defense stated that they didn't have an objection to the court reviewing the statements and trusted the State would inform the victim about permissible victim impact statements. *Id.* at 22.

Before the start of the penalty phase, the defense filed a motion to require the State to disclose the victim impact evidence and to preclude the State from presenting four areas of the impact evidence: (1) the impact of the victim's death on people who are is not an immediate family member; (2) that the defendant knew or could reasonably determine the impact the murder would have on the victim's family; (3) emotional testimony; and (4) any testimony about other offenses. R.O.A. 345 at 2. At the conclusion of the motion, Montoya requested the court to order the State to disclose the victim impact statements to the court and defense for review. *Id.* at 6. The trial court denied the motion, holding the defendant did not have a right to disclosure of the statements themselves, but the State should

disclose any other documents used for the victim impact testimony, such as photographs. R.O.A. 362 at 2; R.T. 3/3/22, at 6.

After the State rested, the victims provided victim impact evidence, telling the jury who the victim was and how her death had impacted them personally. R.T. 4/6/22, at 61–84. The defense did not object during any portion of the victim impact testimony. *See id.* The trial court instructed the jury that the victim's relatives made statements about "the personal characteristics and uniqueness of the victim and the impact of the murder on the victim's family. You may consider this information to the extent that it rebuts mitigation." R.T. 4/11/22, at 25.

II. Standard of Review.

This Court reviews a trial court's admission of victim-impact evidence for an abuse of discretion. *See State v. Garza*, 216 Ariz. 56, 69, ¶ 60 (2007). This Court reviews constitutional issues de novo. *Moody*, 208 Ariz. at 445, ¶ 62.

III. Argument.

"Arizona law generally allows victim impact evidence during the penalty phase to rebut mitigation." *State v. Gallardo*, 225 Ariz. 560, 567, ¶ 25 (2010) (citing Ariz. Const. art. II, § 2.1(A)(4) and A.R.S. § 13-752(R)); *see also* Ariz. R. Crim. P. 19.1(e). "Admissibility of victim impact statements does not depend on the particular mitigation evidence presented by the defendant." *Gallardo*, 225 Ariz. at 567, ¶ 28. "Victim impact evidence should not be allowed, however, if it is so

unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 567, ¶ 25 (quotations omitted). "Additionally, a victim may not recommend a particular sentence." *Prince*, 226 Ariz. at 534, ¶ 65.

For a time, however, victim-impact evidence was inadmissible in any form. In *Booth v. Maryland*, 482 U.S. 496 (1987), the Supreme Court recognized three categories of victim-impact evidence in a death-penalty case: "(1) statements regarding the deceased's personal characteristics; (2) statements regarding the impact of the crime on the victims' family; and (3) the victims' 'family members characterizations and opinions about the crime, the defendant, and the appropriate sentence.'" *Lynn*, 205 Ariz. at 189, ¶ 9 (quoting *Payne*, 501 U.S. at 830 n.2 (characterizing *Booth*)). The Supreme Court found all three categories inadmissible under the Eighth Amendment because it believed victim-impact evidence served only to inflame a jury. *Booth*, 482 U.S. at 509.

Four years later, the Court overruled *Booth* in part. The Court concluded that testimony from a victim's family about the harm a defendant's actions caused may be relevant and admissible at sentencing. *Payne*, 501 U.S. at 827–30 & n.2. The Court held the Due Process Clause of the Fourteenth Amendment "provides a mechanism for relief" when evidence is introduced that is "so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825. But because the victim's family in *Payne* had not offered opinions or characterizations about the crime or

the defendant, the Court did not address whether such evidence was admissible. *Id.* at 829 n.2; *see also Lynn*, 205 Ariz. at 190–91, ¶¶ 12–13; *State v. Gulbrandson*, 184 Ariz. 46, 66 (1995). Accordingly, the Court did not overrule that portion of its prior opinion.

Montoya contends the trial court erred in allowing prejudicial statements about him during the victim impact testimony. O.B. at 138. The alleged improper comments about him are as follows:

- "Even the ***worst kind of person*** knows the difference between right and wrong."[R.T. 4/6/22, at 72]
- "At times it seems like the only person in this – ***the only person remembered in this court is the defendant***, a focus on him." [*Id.* at 68]
- "But even with her doors locked, ***the bad guy*** still managed to get her." [*Id.* at 73]
- "To this day, ***I refuse to say the defendant's name. He took dignity from my daughter, and now I refuse to even acknowledge him***. [*Id.* at 76]

O.B. at 134–35 (emphasis in original). These remarks were not unduly prejudicial. *See State v. Rose*, 231 Ariz. 500, 513, ¶ 57 (2013) (victim's description of defendant as "cop killer" not fundamental error).

He also argues that the victims impermissibly commented on the circumstances of the offense. The alleged improper comments are listed below:

- "[My dad] told me that I need to start praying because they found a body in her home and it had ***not been able to be ID'd***

because of how decomposed the body was. At this point my heart sunk." [R.T. 4/6/22, at 66]

- "We often wondered what her last moments on Earth were like. ***It was admitted she was threatened with a hammer and a knife and Spike was killed in front of her – or was Spike killed in front of her while she was still alive***. We don't know. ***Simply gruesome***. We have no idea what her last moments were like. We can only assume they were tragic based on what we know. This is very heartbreaking to her friends and her family. This ***brutal murder*** continues to torment us all." [*Id.* at 82]

- "As I sit in my living room, I look at a flag that was given to me at [A.R.'s] funeral. The thing freaks me out because there are two stars looking out at it – looking out of the plastic. I see them as her eyes looking up saying, 'Someone please save me.' ***I see her lying in her bed with her hands bound, looking up, pleading somebody please help me***. And it makes me cry every time." [*Id.* at 74]

- "[T]his ***brutal murder*** of my sister has caused me a lot of trauma." [*Id.* at 68]

- "...[M]ost of her personal belongings were gone, very sad to see ***her belongings seemed to vanish during this horrific event***." [*Id.* at 82]

O.B. at 134–35 (emphasis in original). These statements are proper victim impact evidence. The statutory victims described how the circumstances of the murder impacted them, *i.e.*, the body of [A.R.] was so badly decomposed that identification at the scene was impossible, R.T. 4/6/22, at 66; wondering whether Montoya smothered the beloved dog before or after the victim died, *id.* at 79; picturing the victim on the bed, with her hands handcuffed behind her back asking

for help, *id.* at 74; and commenting on how sad it was that Montoya removed all of the victim's possessions out of her house, *id.* at 82. These statements, although emotional, provided the jury with an understanding of the harm caused by the defendant's actions and were not unduly prejudicial. *See Bush*, 244 Ariz. at 594, ¶ 82 (holding the description of the offense from the victim's perspective was not unduly prejudicial); *Burns*, 237 Ariz. at 30, ¶ 141 (describing the victim's last moments was not unduly prejudicial); and *Cota*, 229 Ariz. at 150, ¶¶ 69–72 (telling the jury the victims' bodies were "mutilated" and "tortured" was permissible).

Even if the trial court erred in admitting the evidence, any error is harmless beyond a reasonable doubt. The jury was well aware of the circumstances of the victim's murder through Montoya's guilty plea and the State's case. Montoya pled guilty to the indictment and the aggravators, including that the murder was committed in "an especially cruel manner" and was "especially heinous." R.O.A. 242 at 5; R.T. 5/14/21, at 5–50. The State presented evidence providing more detail of the offense that included: testimony on the victim's State of decomposition, R.T. 4/4/22, at 22–60; that she was so badly decomposed that they needed dental records to identify her, *id.* at 26; the use of handcuffs and a belt to restrain her arms and legs, *id.* at 29–31, 34, 37–38; the 14 blows she received from the hammer, *id.* at 80; and that Montoya killed one dog around the time of the murder. R.T. 3/30/22, at 132. The admitted aggravation and the circumstances of the offense

clearly outweighed Montoya's limited mitigation of acceptance of responsibility and substance abuse. Thus, even if it were error to not review the victim impact statements before trial, any error was harmless beyond a reasonable doubt.

VII

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE DEFINITION OF THE ESPECIALLY HEINOUS, CRUEL, OR DEPRAVED AGGRAVATING CIRCUMSTANCE.

Montoya argues the trial court committed fundamental error by not instructing the jury that it could only weigh the cruelty aggravator once. O.B. at 140–45. The trial court's instructions and the State's closing argument clarified that the especially heinous, cruel and depraved aggravating circumstance was only one aggravating circumstance. Thus, Montoya's claim lacks merit.

I. Standard of Review.

This Court reviews jury instructions the defendant did not object to at trial for fundamental and prejudicial error. *State v. Fierro*, 254 Ariz. 35, 41, ¶ 20 (2022).

II. Facts and Procedural History.

As part of his guilty plea, Montoya admitted both prongs of the especially heinous, cruel, or depraved aggravating circumstance. R.O.A. 242, at 5. He admitted that A.R. "endured physical and/or mental pain, distress or anguish prior

to her death" and that the murder was heinous or depraved because of his needless mutilation of A.R.'s body. *Id.*

Before finalizing the jury instructions, the court asked if the parties requested any additions or modifications to the proposed instructions. R.T. 4/7/22, at 4. The State requested the jury instructions include the two aggravators and their definitions. *Id.* at 5. The defense also requested the jury instructions include listing the proposed mitigation and the definition of mitigation. *Id.* at 6–8. The court informed the parties it was inclined to deny both requests because the preliminary instructions still applied. *Id.* at 6.

The final jury instructions told the jury that the defendant had admitted two aggravating circumstances, "[t]he murder was committed in an especially cruel or heinous manner; and … the defendant has been convicted of a serious offense." R.T. 4/11/22, at 21. The instructions informed the jury that "especially cruel focuses on the victim's pain and suffering" and "especially heinous is used to describe the defendant's state of mind by looking to the defendant's words and actions at or near the time of the offense. A murder is especially heinous if it is hatefully or shockingly evil, in other words, grossly bad." *Id.* at 22. The defense did not object to these definitions. The trial court informed the jury that Montoya admitted "the murder was committed in an especially cruel manner" and he "admitted the murder was especially heinous." *Id.* at 21. The instructions also told

the jury that the "attorneys' remarks, statements, and arguments are not evidence but are intended to help you understand the evidence and apply the law." *Id.* at 24.

During its closing argument, the State clarified the especially cruel, heinous or depraved aggravator by telling the jury "that just because there are two components of this aggravator proven does not mean this constitutes more than one aggravating factor. This is just one aggravating factor." *Id.* at 87. The State pointed out that the presence of both prongs of the aggravator goes to the value and weight the jury should give the aggravator during deliberations. *Id.* Later, the State reminded the jury "we're still talking about one aggravating factor. There's just two components, the cruelty and the heinousness." *Id.* at 98.

III. Argument.

"We presume that the jurors followed the court's instructions." *Newell*, 212 Ariz. at 403, ¶ 68. "Appellate courts do not evaluate jury instructions out of context. Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions." *Murray*, 250 Ariz. at 553, ¶ 37 (quoting *State v. Bruggeman*, 161 Ariz. 508, 510 (App. 1989)). "[A]lthough arguments of counsel generally carry less weight with a jury than do instructions from the court, in some trials, the arguments of counsel can cure or obviate instructional ambiguity or error." *State v. Felix*, 237 Ariz. 280, 285, ¶ 18 (App. 2015) (internal citations and quotations omitted).

Montoya argues that the especially cruel, heinous or depraved capital aggravating circumstance instruction given during his penalty phase did not instruct the jury that they could only weigh the aggravator once, which he claims invalidates his death sentence. O.B. at 143–45. His contention ignores the State's closing argument where it clearly told the jury not to weigh the aggravator more than once. His claim lacks merit.

The trial court informed the jury that Montoya admitted two aggravators, the prior serious offense aggravator and the especially heinous, cruel and depraved aggravator. R.T. 3/28/22, at 19; R.T. 4/11/22, at 21. It provided definitions for each of the aggravating circumstances. 3/28/22 at 20–21; R.T. 4/11/22, at 22–23. The State helped define the aggravation for the jury by explaining the especially cruel, heinous or depraved aggravator has two prongs but is only one aggravator. R.T. 4/11/22, at 87–88. The presences of both the prongs went to the weight and value of the aggravator when the jury began deliberations. *Id.* The State rectified any potential confusion about the especially cruel, heinous or depraved aggravator by clarifying that it is a single aggravator during closing argument. Montoya has not shown error, much less fundamental, prejudicial error.

VIII

MONTOYA MADE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF HIS RIGHTS DURING HIS CHANGE OF PLEA.

Montoya argues his change of plea was not made knowingly, intelligently and voluntarily. O.B. at 149. He contends the trial court should have informed him that by pleading guilty to the noncapital counts he would waive his ability to challenge the performance of his first post-conviction counsel in a subsequent petition for post-conviction relief. *Id.* at 149–54. He claims the trial court's failure to inform him of this rendered his guilty pleas unknowing, unintelligent, and involuntary. *Id.* at 155–58. This claim misconstrues Arizona law and lacks merit.

I. Facts and Procedural History.

On March 19, 2021, Montoya's counsel informed the court that he wished to plead to the indictment, admit some of the aggravators alleged by the State, and waive mitigation. R.T. 3/19/21, at 4. At this hearing, the court ordered Montoya to submit to a mental health evaluation and set the next hearing on a potential change of plea for May 14, 2021. R.O.A. 217 at 2.

Prior to the hearing, both experts submitted reports to the court finding Montoya was competent to plead to the indictment and to waive mitigation. R.O.A. 242 at 2. Based on these finding, the trial court found Montoya was competent to waive the presentation of mitigating circumstances and to plead guilty. R.T. 5/14/21, at 4–5. At the change of plea hearing, the trial court went over the plea

colloquy with Montoya. The court informed Montoya of the sentencing ranges for the non-capital offenses. *Id.* at 9–11, 20–22. The court also ensured Montoya had not taken any drugs or alcohol that would affect his ability to understand the change of plea. *Id.* at 15. Montoya also stated that no one promised anything or threatened him in order to change his plea. *Id.* Montoya spoke with his attorneys about the possible sentencing ranges for the non-capital offenses and the potential pros or cons of pleading guilty. *Id.* at 28.

The court went over the constitutional rights Montoya would waive if he pled guilty, including: the presumption of innocence, the State proving his guilt beyond a reasonable doubt, the right to cross-examine the State's witnesses and to call witnesses in his own defense, the right to testify, and the right to remain silent. *Id.* at 13. Montoya stated he understood those rights and that he was giving them up by pleading guilty. *Id.* at 13–14. The trial court also advised Montoya that he was giving up his right to a direct appeal for the non-capital counts, leaving post-conviction relief as his only avenue for appellate review. *Id.* at 14. Montoya did not object to this statement and did not have any questions about the voluntariness of the plea. *Id.* at 28. After the full plea colloquy, the court found Montoya's "pleas to be knowingly, intelligently and voluntarily made. There are factual bases for them. The pleas are accepted and entered of record." *Id.* at 28–29.

II. Standard of Review.

"The standard of review is whether the trial court abused its discretion in finding that the defendant waived his rights and entered into a plea agreement." *State v. Djerf*, 191 Ariz. 583, 594, ¶ 35 (1998). This Court reviews constitutional issues *de novo*. *Coleman*, 241 Ariz. at 192, ¶ 6. "Fundamental error review … applies when a defendant fails to object to alleged trial error." *Henderson*, 210 Ariz. at 567, ¶ 19. Montoya concedes he did not object and he must demonstrate fundamental error. O.B. at 148.

III. Argument.

Montoya contends the trial court erred by advising him that pleading guilty to the non-capital counts waived his right to direct appeal and those convictions could only be reviewed in a petition for post-conviction relief. O.B. 152–53. Montoya also argues the trial court erred in failing to advise him that his non-capital offenses are reviewed on direct appeal. O.B. 152–53. Although the trial court may have incorrectly informed Montoya that he was waiving direct appeal on his noncapital cases, this mistake does not amount to fundamental error.

A. The capital appellate process for a defendant who pleads guilty.

Generally, by pleading guilty, a non-capital defendant waives his right to appeal. A non-capital pleading defendant's first post-conviction petition "is the procedural equivalent of a first appeal." *Osterkamp v. Browning*, 226 Ariz. 485,

491–92, ¶ 24 (App. 2011) (citing *State v. Pruett*, 185 Ariz. 128, 131 (App. 1995)). "Therefore, because review and disposition of the PCR is the only constitutionally guaranteed appeal, an indigent pleading defendant is entitled to appointed counsel for the trial court PCR proceedings …." *State v. Smith*, 184 Ariz. 456, 458 (1996). "For pleading defendants, a timely second post-conviction proceeding raising a claim of ineffective assistance of Rule 32 counsel in the first post-conviction proceeding is the procedural equivalent of a first post-conviction proceeding commenced by a non-pleading defendant who wishes to raise a claim of ineffective assistance of appellate counsel." *Osterkamp*, 226 Ariz. at 491–92, ¶ 24.

When a defendant receives a death sentence, however, the superior court clerk must file a notice of appeal in this Court. Ariz. R. Crim. P. 31.2(b). "That notice constitutes a notice of appeal by the defendant with respect to all judgments entered and sentences imposed in that case." *Id.* "The rules addressing capital cases … do not distinguish between capital defendants who plead and those who are convicted after trial. … Thus, regardless of any plea, this Court automatically reviews a death sentence." *State v. Ovante*, 231 Ariz. 180, 184, ¶ 9 (2013). To avoid the unnecessary bifurcation of appellate review in capital cases by requiring the defendant to raise challenges to his plea agreement in post-conviction proceedings, "this Court will review the validity of a plea on direct appeal, before

it reviews the capital sentence." *Id.* at ¶ 10. Thus, a capital defendant may assert challenges to his noncapital and capital convictions and sentences on direct appeal.

B. Montoya does not have a right to the Rule 33 procedural process.

Montoya incorrectly claims the denial of the second of-right petition for post-conviction relief for pleading defendants denies him the right to effective counsel in his first petition for post-conviction relief. This "right" Montoya claims is not a right but a procedural process created to ensure a pleading defendant has the functional equivalent of appellate review of his convictions. Montoya, however, does not need a functional equivalent to an appeal because he has an automatic appeal with this Court, which is apparent from the currently pending appeal. Montoya could have challenged his non-capital convictions and sentences in this appeal but, other than this claim, has made the strategic decision not to. After his direct appeal, he will have his first petition for post-conviction relief. There he will have the opportunity to allege trial and *appellate* counsel were ineffective. Rule 33 does not create a new right, but is a different procedural process to protect the same rights that Montoya enjoys on appeal. It was not error, much less fundamental error, in omitting the inapplicable procedural process from the plea colloquy.

C. Montoya's plea agreement was valid.

Under the federal constitution, the trial court must inform a defendant that his guilty plea waives three rights: the right to be protected from self-incrimination; the right to a jury trial; and the ability to confront the defendant's accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). In Arizona, the trial court must advise a capital defendant of: (1) the nature of the offense; (2) the sentencing ranges and "any special conditions regarding sentencing parole, or commutations imposed by statute;" (3) the constitutional rights the defendant waives by pleading guilty; (4) the right to plead not guilty; and (5) the post-conviction process for reviewing the convictions for "a noncapital case." Ariz. R. Crim. P. 17.2(a). The trial court must ensure the defendant wishes to waive his constitutional rights and that the "the defendant's plea is voluntary and not the result of force, threats or promises." Ariz. R. Crim. P. 17.3(a). "The requirements of *Boykin* are met when it appears from a consideration of the entire record that the accused was aware that he was waiving [his constitutional] rights and it appears that it was a knowing and voluntary waiver." *Rose*, 231 Ariz. at 508, ¶ 31 (quoting *State v. Henry,* 114 Ariz. 494, 496 (1977)).

The trial court's colloquy with Montoya complied with the constitution and Arizona rules. The court advised Montoya of his constitutional rights and the sentencing ranges. R.T. 5/14/21, at 5–49. The constitution does not require the trial

court to advise and receive a waiver of a right to effective assistance of counsel in post-conviction proceedings. By pleading guilty, he did not waive a right to effective assistance in post-conviction proceedings.[16] Neither did he waive his right to effective assistance of appellate counsel in this direct appeal, as seen by appellate counsel filing the opening brief. The court made a factual finding that Montoya's plea to the indictment "was knowingly, intelligently and voluntarily made." *Id.* at 28.

D. The trial court did not err in advising Montoya on his post-conviction rights for his non-capital offenses.

An automatic appeal happens only "when a defendant has been *sentenced* to death." Ariz. R. Crim. P. 31.2(b) (emphasis added). If the jury had returned a life sentence, the notice of post-conviction rights would have been necessary and required under Rule 17.2. Ariz. R. Crim. P. 17.2(a)(5) (requiring the court to advise the defendant "in a noncapital case, the defendant's plea of guilty or no contest will waive the right to appellate court review of the proceedings on a direct appeal," limiting review to a Rule 33 petition). The application of the "noncapital"

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[16] There is a strong presumption that counsel's "conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Montoya's argument assumes his post-conviction counsel will be ineffective and that he could prove this in a subsequent post-conviction proceeding. This is pure speculation and runs counter to the presumption in *Strickland*.

portion of the rule requires the advisement on any noncapital offenses. Therefore, the trial court did not err in advising Montoya.

E. The trial court's alleged error in providing Montoya the Rule 17.2(a) advisement did not make the plea involuntary.

Montoya contends that the trial court incorrectly informed him that by pleading guilty to the noncapital offenses, he was waiving his right to appeal and the only review would be through a post-conviction hearing. O.B. at 152–53. He alleges the error was fundamental and caused him prejudice.

As stated previously, Montoya did not waive by pleading guilty his rights to effective assistance of either post-conviction counsel or appellate counsel. He has not waived his right to appeal, as seen by his opening brief. His plea could not have been involuntary based on the fact that he did not give up a right that he thought he had. Even if the trial court did err, Montoya has failed to establish that any purported error made his plea involuntary.

It is unclear how the trial court violated his due process rights by having his noncapital convictions reviewed on direct appeal rather than in a petition for post-conviction relief. Montoya has not shown that he would not have entered into the plea agreement had he known his noncapital convictions are reviewed on direct appeal rather than in a petition for post-conviction relief. Because Montoya cannot demonstrate that he was prejudiced by any alleged error, he is not entitled to relief.

CONCLUSION

For these reasons, the State respectfully requests that this Court affirm Montoya's convictions and sentences.

Respectfully submitted,

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