IN THE

SUPREME COURT OF THE UNITED STATES

Kevin Dunbar

Petitioner

-vs-

State of Arizona

Respondent

No.

APPENDIX

Appendix A - The Opinion, Jurisdiction of Arizona Supreme Court

Appendix B- The Opinion of Arizona Appeals Court, Div 2

Appendix C - Day One, Jury Trial, November 28, 2017 Transcripts

Appendix D - Sentencing Hearing Transcripts, 2-5-2018

Appendix E - Exhibit A - Affidavit

Exhibit B - Direct Indictment

APPENDIX

A

Supreme Court
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
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JANET JOHNSON
Clerk of the Court

December 16, 2020

RE: STATE OF ARIZONA v KEVIN DUNBAR
Arizona Supreme Court No. CR-20-0171-PR
Court of Appeals, Division Two No. 2 CA-CR 18-0064
Pima County Superior Court No. CR2015260-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 15, 2020, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Janet Johnson, Clerk

TO:
Michael O'Toole
Alexander M Taber
Robb P Holmes
Jeffrey P Handler
lg

APPENDIX

B

IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KEVIN DUNBAR,
Appellant.

No. 2 CA-CR 2018-0064
Filed April 29, 2020

Appeal from the Superior Court in Pima County
No. CR20152260001
The Honorable Richard S. Fields, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

James Fullin, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa concurred and Judge Eckerstrom specially concurred.

E P P I C H, Presiding Judge:

¶1 After a jury trial, Kevin Dunbar was convicted of attempted first-degree murder, aggravated assault with a deadly weapon, kidnapping, and possession of a deadly weapon by a prohibited possessor. He now appeals, contending he was denied the right to self-representation, insufficient evidence supported his kidnapping conviction, he was entitled to an *in camera* review of the victim's mental health records, and the trial court committed various errors in giving and rejecting certain jury instructions and at sentencing. We affirm Dunbar's convictions, but vacate his sentences and remand for resentencing on all counts because counts one, two, and five were improperly enhanced, counts two and three were improperly aggravated, and counts one and two were improperly imposed consecutively.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *See State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). Dunbar and R.W. were dating, and they lived together for a few weeks in R.W.'s condominium in Tucson. After R.W. ended the relationship and Dunbar had moved out, he repeatedly continued to contact her. When R.W. returned from work one day, she saw an unfamiliar car in her apartment complex. Rather than parking in her normal spot, she backed her car into a spot on the other side of the parking lot. As R.W. was collecting her belongings, she noticed Dunbar driving towards her.

¶3 After asking Dunbar what he was doing at the complex, R.W. got back into her car and telephoned 9-1-1. Meanwhile, Dunbar pulled his car in front of hers, blocking her escape. Dunbar approached the car and indicated he wanted to talk with R.W. She refused and told him she would not talk with him until he unblocked her car. Dunbar returned to his car and moved it slightly, but it continued to block R.W.'s. While Dunbar was back at his car, R.W. saw him doing something, but was unsure what it was. Dunbar returned to talk to R.W. and asked if she was mad at him and hated him; R.W. responded that she did. In response, Dunbar fired a gun multiple times into R.W.'s car hitting her in the arm, stomach, and thigh. Dunbar walked away toward his car and then turned around and fired another shot into the front windshield grazing R.W.'s head. Dunbar left the apartment complex in his car, which he had rented the day before, and tossed the gun he had used in a garbage can. The rental car was returned to a self-service location in Alabama, and the police arrested Dunbar three months later in New York.

¶4 A grand jury indicted Dunbar for attempted first-degree murder, possession of a deadly weapon by a prohibited possessor, kidnapping, and two counts of aggravated assault. A jury found him not guilty of one count of aggravated assault, but convicted him of the remaining counts. The trial court sentenced him to concurrent and consecutive terms of imprisonment totaling thirty-seven years, and Dunbar timely appealed. We have jurisdiction under A.R.S. §§ 13-4031 and 13-4033(A)(1).

Right to Self-Representation

¶5 Before trial, Dunbar elected to represent himself, and the trial court appointed an attorney to act in an advisory capacity after advising him of the seriousness of the charges and the dangers and disadvantages of self-representation. Dunbar filed several pretrial motions while representing himself and was granted multiple continuances to become familiar with his case and litigate his motions.

¶6 At a hearing almost a year after Dunbar elected to represent himself, his advisory attorney indicated Dunbar might want to be represented by an attorney. Dunbar agreed but then asked a question about special actions. The court accepted the attorney's suggestion to discuss Dunbar's representation at the next hearing, but asked the attorney to file a notice beforehand if Dunbar decided to have her represent him. At the next hearing, the advisory attorney asked Dunbar to clarify, on the record, whether he wanted her to take over as lead counsel.[1] Dunbar indicated he wanted her to represent him after he received the results of the special action he had filed. The court warned Dunbar "[w]e can't come to one hearing and say one thing and then change our mind and come back and do it differently." The court allowed Dunbar to represent himself, and after litigating some motions during that hearing, Dunbar claimed his right to represent himself was being infringed because he "never surrendered [his]

[1]At various times during the proceedings before the trial court the issue was characterized as to whether advisory counsel would be "lead" counsel. There being no indication that it was ever contemplated that Dunbar be represented by more than one attorney, we presume from the context this was meant to refer to the issue of whether Dunbar would be represented by counsel or represent himself. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (no constitutional right to hybrid representation).

Faretta rights."[2] The court clarified that Dunbar had previously surrendered his *Faretta* rights and then allowed Dunbar to continue to represent himself.

¶7 At the start of the next hearing, Dunbar's advisory attorney indicated it was her understanding that Dunbar wanted her to take over as lead counsel because two special actions he had filed had been decided. After addressing some of Dunbar's concerns, the court appointed the advisory attorney as lead counsel with no objection from Dunbar. After the advisory attorney discussed with the court the potential witness list for the defense, Dunbar interjected and said he had more concerns. The following exchange then occurred:

> [The Court]: Okay, well, those are matters that you'll need to talk with [your attorney] about. She's now lead counsel.
>
> [Dunbar]: She is not lead counsel.
>
> [The Court]: She is. I assure you, Mr. Dunbar, that she is.
>
> [Dunbar]: No, I do not render my rights.
>
> [The Court]: Well, two times you've told me differently.
>
> [Dunbar]: I didn't render my rights.
>
> [The Court]: Okay.
>
> . . . .
>
> [The Court]: We are about a month away from trial, Mr. Dunbar, and you have always agreed that when it comes to trial that you need to have somebody represent you, have you not?
>
> [Dunbar]: No, I—if I can address my issues. My issues were not addressed, and certain witness I will call that she won't. So, I'm not going to render my rights. That's why I called her

[2] *See Faretta v. California*, 422 U.S. 806, 817-19 (1975) (criminal defendant has constitutional right to defend himself).

> Monday and Friday and let her know that. She should check her voice mail.
>
> [The Court]: Okay, let me see counsel in chambers.

After a brief recess, the court asked Dunbar what his final answer was. Dunbar said he was "proceeding pro-se," and the court warned him, "I'm not going to do this dance with you again so you're going to have to live with your decision." Dunbar replied, "Yeah."

¶8 Less than a week later, Dunbar filed a motion, prepared by the advisory attorney and signed by her and Dunbar, waiving his right to self-representation and requesting re-appointment of counsel. The motion stated:

> Defendant has decided that he wishes to be represented by counsel going forward.
>
> As evidenced by his signature below, Mr. Dunbar understands and agrees to relinquish his right to represent himself until and through the trial currently scheduled for November 28, 2017. He further understands and agrees that the Court may not allow him to reassert his right to proceed in propria persona between now and the trial, or allow hybrid representation. Defendant acknowledges that this decision is not a result of force, threats, coercion or promises not contained in this document and that he agrees to be represented by undersigned counsel knowingly, intelligently and voluntarily.

The court granted the motion, appointed advisory counsel as lead counsel, and indicated it would not accept filings other than those filed by the attorney, including motions Dunbar had personally submitted after filing his waiver of self-representation.

¶9 On the morning of trial, before a jury had been empaneled, Dunbar attempted to raise another motion on his own behalf. The trial court told Dunbar it would not consider his pro se motions because he was represented by counsel. The following exchange occurred:

[Dunbar]: I'm represented by counsel?

[The Court]: You're represented by [an attorney] now.

[Dunbar]: I didn't put that on record yet.

. . . .

[The Court]: It is on record, your signature was included with the motion that I granted as of—

[Dunbar]: Well, I object to that, Your Honor.

[The Court]: Okay, noted. All right.

[Dunbar]: As a matter of fact, I want to go back.

[The Court]: I'm sorry?

[Dunbar]: I want to go back.

[The Court]: No, I'm not going to do that.

[Dunbar]: Well, I object to proceeding, Your Honor, my [*Faretta*] rights are being surrendered.

[The Court]: Your motions are over, Mr. Dunbar. All right, you guys ready for the jury?

[Dunbar]: No, I want to go back.

[The Prosecutor]: He wants to go back to the jail.

[The Court]: You want to go back to the jail now?

[Dunbar]: I have no place here. My rights are being forfeited.

[The Court]: Well, if you want to go back to the jail, I can't stop you. It's not a good idea.

> [Dunbar]: Well, Your Honor, I'm not being represented by . . . myself and my rights are being infringed on or surrender[ed], it's like I don't have a say in this process.

After further discussion, Dunbar decided to remain in the courtroom.

¶10 On appeal, Dunbar argues the trial court committed structural error by denying his request to represent himself on the morning of trial. Specifically, Dunbar claims the trial court was required to conduct a colloquy to ascertain whether he was making a valid waiver of the right to counsel because his waiver of right to counsel was timely and unequivocal. The denial of a defendant's motion for self-representation is reviewed for abuse of discretion, but the erroneous denial of self-representation at trial is structural error. *State v. McLemore*, 230 Ariz. 571, ¶ 15 (App. 2012). In the limited number of cases where structural error occurs, "we automatically reverse the guilty verdict entered." *State v. Ring*, 204 Ariz. 534, ¶ 45 (2003).

¶11 "The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and represent himself." *State v. Lamar*, 205 Ariz. 431, ¶ 22 (2003) (citing *Faretta v. California*, 422 U.S. 806, 836 (1975)). To invoke this right, a defendant must waive his or her right to counsel in a timely and unequivocal manner. *Id.* If a defendant makes a timely and unequivocal request to proceed pro se, the court ordinarily should grant that request if it finds it knowing, intelligent, and voluntary. *State v. Henry*, 189 Ariz. 542, 548 (1997). However, the right to self-representation is not unqualified and "must be balanced against the government's right to a 'fair trial conducted in a judicious, orderly fashion.'" *State v. Boggs*, 218 Ariz. 325, ¶ 59 (2008) (quoting *State v. De Nistor*, 143 Ariz. 407, 413 (1985)).

¶12 The state contends Dunbar's request was untimely. But where, as here, a request for self-representation is made before the jury is empaneled, it is timely. *See State v. Weaver*, 244 Ariz. 101, ¶ 10 (App. 2018). And even though in some circumstances a court may deny a timely motion for self-representation if made for purpose of delay, *see State v. Thompson*, 190 Ariz. 555, 557 (App. 1997), the record does not support such a finding here. Dunbar did not ask for a continuance on the morning of trial and the court did not ask Dunbar's reasons for requesting self-representation to determine whether the request was in bad faith. *See Weaver*, 244 Ariz. 101, ¶ 16 & n.3 (no delay found because trial court did not sufficiently develop

record to demonstrate defendant was unprepared to proceed and intended to delay trial).

¶13 Next, we consider whether Dunbar's request was unequivocal. Dunbar contends "[i]t does not matter that [he] previously waived his right to self-representation because he clearly reasserted it after he changed his mind."[3]

¶14 The requirement of an unequivocal request serves two purposes. First, it protects a defendant's right to be represented by counsel by ensuring a defendant does not inadvertently waive counsel while thinking aloud about the pros and cons of self-representation. *Henry*, 189 Ariz. at 548. Second, it "prevents a defendant from 'taking advantage of the mutual exclusivity of the rights to counsel and self-representation.'" *Id.* (quoting *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989)); *see also United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (unequivocal requirement prevents a defendant from manipulating the mutual exclusivity of the rights to counsel and self-representation); *United States v. Turner*, 897 F.3d 1084, 1104 (9th Cir. 2018) (finding defendant manipulated the proceedings by vacillating between asserting his right to self-representation and his right to counsel), *cert. denied*, 139 S. Ct. 1234 (2019). Allowing a defendant to proceed pro se on an equivocal request risks allowing a defendant to later claim that his right to counsel was improperly denied. *Henry*, 189 Ariz. at 548. There is "no constitutional rationale for placing trial courts in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules." *Meeks v. Craven*, 482 F.2d 465, 468 (9th Cir. 1973).

¶15 Whether a defendant makes an unequivocal request to self-representation when his previous position has persistently vacillated is a matter of first impression in this state. Other courts have found that a defendant shifting "back and forth in his position with respect to self-representation" before the jury is selected may be found to have "forfeited his right to self-representation by his vacillating positions." *See Stockton v. Commonwealth*, 402 S.E.2d 196, 202 (Va. 1991) (quoting *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir. 1976)); *cf. Turner*, 897 F.3d at 1103-05

[3]Dunbar does not argue that he did not knowingly, intelligently, and voluntarily waive his right to self-representation through the motion he filed. He only argues he should be entitled to change his mind.

(defendant waived his right to counsel by vacillating between asserting right to self-representation and right to counsel).

¶16 In *Stockton*, the court held that the defendant forfeited the right of self-representation because he shifted his position with respect to self-representation and his request was a delaying tactic. 402 S.E.2d at 202. Stockton initially wanted a firm to represent him, then he represented himself, then he changed his mind and retained the initial firm, and then he requested to represent himself during jury selection. *Id.* at 201. Similarly, in *Bennett*, the court held that the trial court correctly found that the defendant "forfeited his right to self-representation by his vacillating positions which continued until just six days before the case was set for trial," despite having been warned by the trial court. 539 F.2d at 50-51. The court held that Bennett's position on self-representation was equivocal and, thus the trial court could deny self-representation. *Id.* at 51. The decisions in these cases align with the view that the right to self-representation is less essential than the right to counsel. *See State v. Hanson*, 138 Ariz. 296, 300 (App. 1983) ("Self-representation does not further any fair trial interests and is protected solely out of respect for the defendant's personal autonomy."); *McLemore*, 230 Ariz. 571, ¶ 17 (right to counsel, unlike right to proceed pro se, attaches automatically, is self-executing and persists until affirmatively waived); *see also Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000) ("[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."); *Frazier-El*, 204 F.3d at 559 ("In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation.").

¶17 Here, Dunbar forfeited his right to self-representation through his vacillating positions. The trial court warned Dunbar that it was not going to allow him to continually change his mind—a warning Dunbar ignored. Less than one month before trial, Dunbar signed the motion waiving his right to proceed pro se and acknowledging that the court might not allow him to reassert that right. On the morning of trial, Dunbar denied having previously waived that right and attempted to reassert it. This behavior suggests Dunbar was manipulating the judicial proceedings by vacillating on his stance on self-representation.

¶18 Contrary to Dunbar's assertion, nothing in the record suggests that the trial court denied Dunbar's request to represent himself because his request was untimely. Rather, the record indicates the court

denied the request because of Dunbar's vacillating positions and signed waiver. Indeed, the court reminded Dunbar of the signed waiver in denying his request. Considering Dunbar's vacillation and signed waiver, the trial court was under no obligation to conduct another colloquy with Dunbar on the day of the trial to see if he could waive his right to counsel yet again. *See Hanson*, 138 Ariz. at 300; *cf. State v. Russell*, 175 Ariz. 529, 532 (App. 1993) (implying a finding of constitutional waiver of right to counsel despite a lack of colloquy because record as a whole supported waiver of counsel).

Evidence of Kidnapping

¶19 Next, Dunbar argues the state did not present sufficient evidence to support his kidnapping conviction, and the trial court erred in denying his motion for directed verdict under Rule 20, Ariz. R. Crim. P. A court must grant a motion for judgment of acquittal for an offense "if there is no substantial evidence to support a conviction." "On all such motions, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. West*, 226 Ariz. 559, ¶ 16 (2011) (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). We review the sufficiency of evidence to sustain a conviction de novo. *Id.* ¶ 15.

¶20 "A person commits kidnapping by knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony." A.R.S. § 13-1304(A)(3).[4] "'Restrain' means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13-1301(2). "Restraint is without consent if it is accompanied by . . . [p]hysical force, intimidation or deception . . . ." *Id.*

¶21 The evidence at trial was sufficient to sustain Dunbar's kidnapping conviction here. Dunbar parked his car in front of R.W.'s car, physically restricting her ability to leave the scene. The victim's response showed she did not consent to the restraint: in addition to asking Dunbar to move, she called 9-1-1. While Dunbar contends R.W. was not substantially restrained because she could have attempted to maneuver her

[4]Absent material revision since the relevant date, we cite the current version of statutes.

car around Dunbar's—the spaces surrounding her car were unoccupied—or fled the scene on foot, this argument is unpersuasive. The fact that R.W. arguably could have taken extraordinary measures to escape does not change the fact that she was confined. A reasonable jury could conclude Dunbar's actions substantially interfered with R.W.'s liberty if it concluded that Dunbar's placement of the car and refusal to move out of the way compelled R.W. to forgo the protection of her car and the chance to flee on foot, or navigate around his car. *See State v. Dutra*, 245 Ariz. 180, ¶ 19 (App. 2018) (finding sufficient evidence of confinement where defendant's threatening act compelled victim to forgo the chance to flee). And it could also conclude Dunbar used this confinement with the intent to inflict injury or aid in his commission of a felony, as it kept R.W. from fleeing before Dunbar approached her with a gun and shot her multiple times.

¶22 Dunbar contends the state improperly argued that two separate actions constituted kidnapping, the blocking of R.W.'s car and Dunbar's use of a gun, violating his double jeopardy rights. As the state points out, however, this argument materially misconstrues the prosecutor's argument. In closing, the prosecutor only argued Dunbar's use of the car was the required restraint. He never suggested an alternative theory of restraint as Dunbar contends.

Discovery

¶23 Next, Dunbar argues the trial court abused its discretion and denied him his due process rights when it refused to grant his request for R.W.'s medical records. Specifically, Dunbar claims the medical records were relevant for impeachment and to challenge the victim's identification of him as her assailant. Dunbar contends "[t]he court should have ordered an in camera inspection of the medical records to determine whether they contained exculpatory evidence that Dunbar was entitled to at trial."

¶24 Dunbar filed a pretrial motion requesting the court "subpoena [R.W.'s] mental health records from the state of Pennsylvania, Maryland, and Arizona and provide a copy to the defendant for impeachment of the victim['s] credibility" because R.W. has "a mental health history that extends over 15 years." In the motion, Dunbar alleged R.W. had been diagnosed with severe depression and bipolar disorder, had a family history of schizophrenia, "a history of not taking her medication, being paranoid and being delusional," and "a history of dishonesty." Dunbar claimed personal knowledge that R.W. did not take her medication often and "her mental conditions have her creating illusions" which may affect her "testimony and identification." At a hearing, the state argued

Dunbar had not made a showing of a need or relevance for the medical records and the state was not in possession of them. Dunbar argued the records were relevant for R.W.'s state of mind. The trial court denied the motion.

¶25 Generally, "[a] trial court has broad discretion over discovery matters, and we will not disturb its rulings on those matters absent an abuse of that discretion." *State v. Kellywood*, 246 Ariz. 45, ¶ 5 (App. 2018). However, to the extent a defendant "sets forth a constitutional claim in which he asserts that the information is necessary to his defense," we will conduct a de novo review. *State v. Connor*, 215 Ariz. 553, ¶ 6 (App. 2007). Under both the federal and Arizona constitutions, a defendant has a due process right to present a defense, including a right to effective cross-examination of witnesses at trial. *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 236 (App. 1992) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973) (right to present defense) and *Davis v. Alaska*, 415 U.S. 308 (1974) (right to effective cross-examination)). However, a defendant has no general constitutional right to pretrial discovery in a criminal case "[b]ecause the state is obliged by the constitution, case law, and the rules of criminal procedure to provide the defense with all exculpatory and other specified information in its possession." *Connor*, 215 Ariz. 553, ¶ 21; *see also State v. Tucker*, 157 Ariz. 433, 438 (1988) (State is only constitutionally required "to disclose exculpatory evidence that is material on the issue of guilt or punishment."). A prosecutor's obligation to disclose information not directly possessed or controlled by the prosecutor's office or staff is generally limited to information possessed or controlled by entities who have participated in the investigation or evaluation of the case. *See* Ariz. R. Crim. P. 15.1(f); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecutor has "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case").

¶26 Nevertheless, consistent with due process, a court may order additional information not in the possession of the state to be disclosed if the defendant demonstrates that "the defendant has a substantial need for the material or information to prepare the defendant's case" and "cannot obtain the substantial equivalent by other means without undue hardship." Ariz. R. Crim. P. 15.1(g)(1). In cases where a defendant requests the production of a victim's medical records, their request will almost inevitably clash with a victim's rights. *See* Ariz. Const. art. II, § 2.1(A)(5) (victim's constitutional right to refuse a discovery request); A.R.S. § 13-4062(4) (physician-patient privilege); A.R.S. § 32-2085(A) (psychologist-patient privilege). "[W]hen the defendant's constitutional right to due

process conflicts with the Victim's Bill of Rights in a direct manner . . . then due process is the superior right." *Roper*, 172 Ariz. at 236.

¶27 Victims may be compelled to produce medical records for *in camera* inspection if the defendant shows a "reasonable possibility that the information sought . . . include[s] information to which [he or] she [is] entitled as a matter of due process." *Kellywood*, 246 Ariz. 45, ¶ 8 (quoting *Connor*, 215 Ariz. 553, ¶ 10).[5] However, in light of the competing constitutional interests and statutory privileges, "the burden of demonstrating a 'reasonable possibility' is not insubstantial, and necessarily requires more than conclusory assertions or speculation on the part of the requesting party." *See id.* ¶ 9. Defendants must provide a "sufficiently specific basis to require that the victim provide medical records to the trial court for an in camera review." *Connor*, 215 Ariz. 553, ¶¶ 11, 23 (finding trial court did not deny defendant right to present full defense when defendant broadly requested complete disclosure of all of the victim's medical records). A trial court does not abuse its discretion in denying a wide-ranging request for the disclosure of the victim's medical records. *See id.* ¶ 24 ("The unlimited nature of this request provided a sufficient basis upon which the trial court could have denied the motion as presented without abusing its discretion."). In *Connor*, the defendant asked for "any and all medical treatment, counseling, psychological and/or psychiatric records" of the victim to "solidify the Defendant's position that the decedent was the initial aggressor." *Id.* ¶ 4. We found that the defendant's request was unlimited in nature because the defendant did not limit his request to information in the victim's medical records that would be necessary for his defense. *See id.* ¶¶ 23-24.[6]

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[5]Another panel of this court recently issued *R.S. v. Thompson*, 247 Ariz. 575 (App. 2019), imposing a higher burden for defendants to receive an *in camera* inspection of medical records. *See id.* ¶ 3 (holding that defendant must show "substantial probability" that information sought is necessary when seeking *in camera* review of privileged information). We need not address whether this higher burden applies, because Dunbar cannot meet the lesser showing required by the reasonable possibility test.

[6]Unlike Connor, who did not renew his motion on more specific grounds, Dunbar filed a motion for reconsideration, arguably asserting greater specificity. From the record it does not appear the trial court ruled on the motion, which had been filed three days before Dunbar signed the written waiver of his right to self-representation and agreeing to be represented by counsel. We need not address the court's failure to address

¶28 Here, Dunbar has not provided a sufficiently specific basis for requiring R.W. to produce her medical records. Dunbar's request was nothing more than a conclusory assertion that R.W.'s medical records could contain exculpatory information because Dunbar did not explain how the broad assertion that R.W. was "delusional" would support his misidentification defense. More importantly, at trial Dunbar abandoned his proposed claim of misidentification, instead arguing self-defense. He has offered no explanation as to how R.W.'s medical records would be relevant to the issue of whether his actions in shooting her were justified, and thus they bear no apparent relationship to the defense actually presented to the jury.

¶29 Furthermore, Dunbar requested all of R.W.'s mental health records spanning over fifteen years from three different states. Dunbar never alleged or showed that R.W.'s medical records were in the state's possession or control nor identified any specific agency or provider that treated R.W. Dunbar also did not limit his request to information necessary for a misidentification defense or that would be material to the victim's perception or recollection of the events at issue at trial.[7] Similar to *Connor*, the unlimited nature of Dunbar's request gave the trial court a sufficient reason to deny the motion without abusing its discretion. *See Connor*, 215 Ariz. 553, ¶ 24. Therefore, the trial court did not err in denying Dunbar's request for access to R.W.'s medical records.

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the motion in any event, in light of Dunbar's failure to raise the issue on appeal.

[7]Our specially concurring colleague asserts that we create "a nearly insurmountable obstacle to securing disclosure," but a defendant who makes broad requests for a victim's highly personal medical information must make at least some showing of how the requested evidence, even crediting the defendant's claims and speculation, would be relevant to his defense. *See State v. Sarullo*, 219 Ariz. 431, ¶¶ 19-21 (App. 2008) (acknowledging defendant's due process discovery rights but upholding trial court's refusal to order victim to produce medical records "for the years surrounding the [assault]" where insufficient showing her medication and counseling information was needed for his theory of defense); *Roper*, 172 Ariz. at 239 (requiring disclosure of victim's medical records if, *inter alia*, "necessary for impeachment of the victim relevant to the defense theory").

Jury Instructions

¶30 Dunbar additionally challenges the trial court's instruction of the jury, contending the court erred by giving a flight instruction and refusing one for attempted provocation manslaughter as a lesser-included offense of attempted first-degree murder. "A party is entitled to any jury instruction reasonably supported by the evidence." *State v. Burns*, 237 Ariz. 1, ¶ 48 (2015). We review a trial court's decision to give or refuse a jury instruction for abuse of discretion. *State v. Solis*, 236 Ariz. 285, ¶ 6 (App. 2014) (giving of instruction); *State v. Kiles*, 225 Ariz. 25, ¶ 27 (2009) (refusal of instruction).

¶31 "Leaving the scene is considered flight only if the manner of leaving suggests consciousness of guilt." *State v. Hunter*, 136 Ariz. 45, 48-49 (1983). "The inquiry focuses on 'whether [the defendant] voluntarily withdrew himself in order to avoid arrest or detention.'" *State v. Wilson*, 185 Ariz. 254, 257 (App. 1995) (alteration in *Wilson*) (quoting *State v. Salazar*, 112 Ariz. 355, 357 (1975)). Dunbar testified he left the scene because he "got nervous" after he saw an ambulance coming for R.W. After leaving, he disposed of the firearm he had used, drove to Alabama—a state outside the scope of his rental agreement—to return the car he was driving, and then traveled to New York and remained there until he was tracked down and apprehended almost three months later. These facts suggest an attempt to avoid arrest or detention and were sufficient to warrant a flight instruction.

¶32 Nor did the court err in declining to instruct the jury on attempted provocation manslaughter as a lesser-included offense of attempted first-degree murder. A person commits provocation manslaughter by "committing second degree murder . . . upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." A.R.S. § 13-1103(A)(2); *see also* A.R.S. §§ 13-1001 (attempt), 13-1104 (second-degree murder). "'Adequate provocation' means conduct or circumstances sufficient to deprive a reasonable person of self-control." A.R.S. § 13-1101(4). "[W]ords alone are not adequate provocation to justify reducing an intentional killing to manslaughter." *State v. Vickers*, 159 Ariz. 532, 542 (1989).

¶33 Dunbar's account of the events leading up to the shooting was largely consistent with the factual recitation above. But he also testified that when he went to move his car out of the way of R.W.'s, he "thought" R.W. had moved her car towards him and had struck his car. He stated he retrieved the gun and fired at R.W. because he felt she "was trying to hurt him or jam him in the door," saw her reaching for what he believed to be a

gun under her seat, and was "afraid for [his] life." Dunbar's testimony weighs against issuing an attempted provocation manslaughter instruction here. By his own account, the decision to fire at R.W. was not borne from a loss of self-control, but a fear of bodily injury. Although that claim could support a self-defense instruction—which Dunbar received—it does not support the instruction he now argues he was entitled to. We see nothing in the evidence presented that otherwise suggests the decision was made "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." § 13-1103(A)(2). Under these facts, the trial court did not err in denying Dunbar's requested instruction.

Sentencing

Enhanced Sentences

¶34 Dunbar argues his out-of-state convictions did not amount to a historical prior felony conviction under A.R.S. § 13-105(22), and the trial court therefore erred in sentencing him as a category two repetitive offender under A.R.S. § 13-703.

¶35 We review de novo whether a foreign felony conviction supports an enhanced sentence. *See State v. Ceasar*, 241 Ariz. 66, ¶ 11 (App. 2016). A person shall be sentenced as a category two repetitive offender if the person "stands convicted of a felony and has one historical prior felony conviction" or has been "convicted of three or more felony offenses that were not committed on the same occasion but . . . are not historical prior felony convictions." § 13-703(B).

¶36 A historical prior felony conviction generally includes "[a]ny felony conviction that is a third or more prior felony conviction." A.R.S. § 13-105(22)(d). However, "[a] person who has been convicted of a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony under the laws of this state is not subject to [§ 13-105(22)]." § 13-105(22)(f).

¶37 In 2012, the comparative element approach applicable to § 13-703 was abandoned by the legislature for *most* out-of-state convictions "to ensure that if a foreign conviction is considered a felony by the jurisdiction in which the offense was committed, that conviction would be considered a historical prior felony conviction." *State v. Johnson*, 240 Ariz. 402, ¶ 17 (App. 2016). However, the comparative element approach still applies to a felony weapons possession violation. *See* § 13-703(M) ("A person who has been convicted of a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony

under the laws of this state is not subject to this section."). The comparative element approach requires courts to determine that "the foreign conviction includes 'every element that would be required to prove an enumerated Arizona offense'" to be punishable. *State v. Crawford*, 214 Ariz. 129, ¶ 7 (2007) (quoting *State v. Ault*, 157 Ariz. 516, 521 (1988)). "A charging document or judgment of conviction may be used only to narrow the statutory basis of the foreign conviction, not to establish the conduct underlying it." *State v. Moran*, 232 Ariz. 528, ¶ 16 (App. 2013). If under any scenario it would have been legally possible for the defendant to have been convicted of the foreign offense but not the Arizona offense, then the foreign offense fails the comparative elements test. *See id.*

¶38 Here, the trial court sentenced Dunbar as a category two repetitive offender for counts one (attempted first-degree murder), two (possession of a deadly weapon by a prohibited possessor), and five (kidnapping) based on the belief that Dunbar's three previous convictions amounted to one prior historical felony conviction under § 13-105(22)(d). At a presentencing hearing, the trial court found beyond a reasonable doubt that Dunbar had been convicted of three prior felonies: (1) a 2007 federal conviction for false reporting; (2) a 2000 New York felony weapon possession conviction; and (3) a 1993 New York felony weapon possession conviction. Dunbar's charging documents and judgment of conviction showed he was convicted of violating New York Penal Law § 265.02(1) for the felony weapon possession convictions.

¶39 As the state concedes, while both offenses require possession of a deadly weapon, a person can be convicted of New York Penal Law § 265.02(1)[8] if they had previously been convicted of a misdemeanor, *see* New York Penal Law § 10.00(6), whereas in Arizona, a person cannot be convicted of weapons misconduct unless they had been previously convicted of a felony, *see* A.R.S. §§ 13-3102(A)(4), 13-3101(7)(b). We agree. Since the foreign offenses do not include every element that would be required to prove an enumerated Arizona offense, the two felony weapon possession convictions could not be used to enhance Dunbar's sentence under § 13-105(22)(d). Therefore, we vacate Dunbar's sentences for counts one, two, and five, and remand for resentencing on those counts.

[8]The elements of this offense have not materially changed since the offenses were committed in 1991 and 1998.

Aggravated Sentences

¶40 Dunbar argues the trial court improperly aggravated his sentences. The trial court sentenced Dunbar to the maximum sentence for all counts. The court found that the use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crimes was inherent in the jury verdicts and then listed various aggravating factors it considered for each count.

¶41 We review de novo whether a particular aggravating factor may be used by a court to aggravate a sentence. *State v. Tschilar*, 200 Ariz. 427, ¶ 32 (App. 2001). A trial court may impose a maximum prison term only if one or more statutory aggravating factors are found by the trier of fact or admitted by the defendant, except that an alleged prior felony conviction under A.R.S. § 13-701(D)(11) shall be found by the court. § 13-701(C). A statutory aggravating factor may also be implicitly found in the jury's verdict. *See State v. Martinez*, 210 Ariz. 578, ¶ 21 (2005) ("Under Arizona's sentencing scheme, once a jury implicitly or explicitly finds one aggravating factor, a defendant is exposed to a sentencing range that extends to the maximum punishment . . ."). Section 13-701(D) lists twenty-seven aggravating factors, including use or possession of a deadly weapon during the commission of the crime, emotional harm to victim, lying in wait, prior felony convictions within ten years preceding the offense date, and the so-called "catch-all" category, which permits consideration of any other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime. Once a statutory aggravating factor is found, the court may find by a preponderance of the evidence additional aggravating circumstances. *See Martinez*, 210 Ariz. 578, ¶ 26. However, a court cannot rely solely on the "catch-all" aggravator to increase a defendant's statutory maximum sentence because that provision is "patently vague." *See State v. Schmidt*, 220 Ariz. 563, ¶¶ 1, 9-10 (2009). Under Arizona law, the statutory maximum sentence in a case where no aggravating factors have been proven is the presumptive sentence. *Id.* ¶ 7.

¶42 With respect to count three (aggravated assault), the court found the following aggravating circumstances: prior overall criminal history, lying in wait, and emotional impact on the victim. As the state concedes, the jury did not find the lying in wait or emotional harm to the victim as aggravating circumstances and these aggravators were not implicit in the verdict or admitted by Dunbar. Therefore, we only need to determine whether Dunbar's sentence for count three could be aggravated

based on his prior felony convictions.[9] A prior felony conviction under § 13-701(D)(11) qualifies as a statutory aggravating factor if "[t]he defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense." A foreign conviction—a felony conviction committed outside the jurisdiction of this state—is considered a felony conviction under § 13-701(D)(11) if that offense would be punishable as a felony if committed in the state of Arizona. "In order to determine whether a foreign conviction would be a felony in Arizona, the test is whether it includes every element that would be required to prove an enumerated Arizona offense." *State v. Inzunza*, 234 Ariz. 78, ¶ 25 (App. 2014) (internal quotations omitted). "This comparative analysis focuses exclusively on the statutory elements of offenses and any relevant case law, as opposed to the factual basis of a conviction." *Id.*

¶43 Although the court found that Dunbar had been convicted of three felony offenses, only the 2007 federal conviction under 18 U.S.C. § 1001 fell within ten years of Dunbar's current offenses. As the state correctly concedes, a person can be convicted of 18 U.S.C. § 1001(a) for making a false statement or misrepresentation as long as they intended to make a false or fraudulent statement, *see United States v. Lange*, 528 F.2d 1280, 1288 (5th Cir. 1976), whereas in Arizona a person cannot be convicted of a felony offense for making a false statement to law enforcement without the state proving that defendant intended to "hinder the apprehension, prosecution, conviction or punishment of another for any felony," *see* A.R.S. § 13-2512; *see also* A.R.S. § 13-2907.01 (knowingly making a false statement to a state law enforcement agency is a Class 1 misdemeanor). Since the foreign offense does not include every element that would be required to prove an enumerated Arizona offense, it was not considered a prior felony under § 13-701(D)(11). Thus, none of Dunbar's prior felony convictions met the statutory requirements of § 13-701(D)(11) and the court therefore erred in sentencing Dunbar to the maximum sentence for count three.

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[9] Although the court referred to Dunbar's "prior overall criminal history" as an aggravating factor, it specifically listed Dunbar's three felony convictions in the minute entry, suggesting it was considering these offenses as prior felony convictions under § 13-701(D)(11). *See State v. Bonfiglio*, 231 Ariz. 371, ¶ 14 (2013) ("A statement that the prior conviction was a prerequisite for an aggravated sentence, even if the court did not rely upon it as its reason for aggravating the sentence, will inform the defendant of the court's rationale for imposing the sentence.").

¶44 With respect to counts one (attempted first-degree murder) and five (kidnapping), the court found, among other aggravating factors, use, threatened use, or possession of a deadly weapon. At trial, Dunbar admitted possessing the gun used during the commission of the offenses.[10] *See State v. Miranda-Cabrera*, 209 Ariz. 220, ¶ 29 (App. 2004) (finding facts admitted by defendant at trial constitute facts admitted by the defendant for sentence aggravation purposes); *Ring*, 204 Ariz. 534, ¶ 93 ("In cases in which a defendant stipulates, confesses or admits to facts sufficient to establish an aggravating circumstance, we will regard that factor as established."). Therefore, the use and possession of a deadly weapon could properly be applied as a statutory aggravating factor under § 13-701(D)(2) to expose Dunbar to a maximum sentence for counts one and five.[11]

¶45 With respect to count two (possession of a deadly weapon by a prohibited possessor), the court found the following aggravating circumstances: prior overall criminal history and emotional impact on the victim. As mentioned above, Dunbar's prior felony convictions did not meet the statutory requirements of § 13-701(D)(11) and the jury did not find nor was it implicit in the verdict that there was an emotional impact on the victim. Nor could the court consider the prior convictions under the "catch-all." *See Schmidt*, 220 Ariz. 563, ¶ 10 ("Use of the catch-all as the sole factor to increase a defendant's statutory maximum sentence violates due process."). The court thus erred in sentencing Dunbar to the maximum sentence for count two.

¶46 In sum, the court erred in aggravating counts two and three because there was no statutory aggravating factor found by the jury, admitted by defendant, or implicit in the verdict. Therefore, Dunbar was

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[10]According to Dunbar, he knew the gun used for the offenses was in his rental vehicle when he blocked R.W.'s car and he used the gun in self-defense to protect himself from R.W.

[11]After one statutory aggravating factor was found for counts one and five, the court could consider other aggravating factors upon finding them by a preponderance of the evidence. *See Martinez*, 210 Ariz. 578, ¶ 26. Although none of Dunbar's prior felony convictions met the statutory requirements of § 13-701(D)(11), these priors could be considered under the "catch-all" category. *See Schmidt*, 220 Ariz. 563, ¶ 11. The court could also find by a preponderance of the evidence that there was emotional harm to the victim and that Dunbar was lying in wait based on the testimony at trial.

not eligible for the maximum sentence on those counts and we remand for resentencing.

Consecutive Sentences

¶47 The trial court ordered Dunbar's prison sentence for count five (kidnapping) to run consecutively to count one (attempted first-degree murder). His sentence for count two (possession of a deadly weapon by a prohibited possessor) was also ordered to be served consecutively to count one. Dunbar argues these sentences violate A.R.S. § 13-116, which prohibits consecutive sentences for offenses arising from a single act.

¶48 We review de novo a trial court's decision to impose consecutive sentences under § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6 (App. 2006). "An act or omission . . . made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." § 13-116. To determine whether defendant's conduct constitutes a single act, which requires concurrent sentences, we apply the three-part test set out in *State v. Gordon*, 161 Ariz. 308, 315 (1989). *See State v. Bush*, 244 Ariz. 575, ¶ 90 (2018); *State v. Forde*, 233 Ariz. 543, ¶ 138 (2014).

¶49 First, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge" and if the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible. *Gordon*, 161 Ariz. at 315. The "ultimate charge [is] the one that is at the essence of the factual nexus and that will often be the most serious of the charges." *Id.* Second, we consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under [§ 13-116]." *Id.* Third, we consider "whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences." *Id.*

¶50 Here, both parties agree the ultimate crime is attempted first-degree murder, and the secondary crime is kidnapping. "A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person . . . [i]ntentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be." § 13-1001(A)(1). "A person commits first degree murder if . . . [i]ntending or knowing that the person's

conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation." § 13-1105(A)(1). "A person commits kidnapping by knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony." § 13-1304(A)(3).

¶51 First, if we subtract the evidence necessary to convict Dunbar for the attempted first-degree murder—intentionally or knowingly shooting R.W.—the remaining evidence supports the kidnapping charge in this case. The kidnapping charge required proof that Dunbar restricted R.W.'s movements without consent and without legal authority by confining R.W. with the intent to inflict physical injury. *See* § 13-1304(A)(3) (kidnapping); § 13-1301(2) (restraint). Therefore, once Dunbar formed the intent to inflict physical injury, refused to move his car out of R.W.'s path, and confined R.W., the crime of kidnapping was complete. *See State v. Viramontes*, 163 Ariz. 334, 339 (1990). Thus, under the first part of the *Gordon* test, Dunbar was eligible for consecutive sentences for kidnapping and attempted first-degree murder.

¶52 Second, it was not factually impossible for Dunbar to commit attempted murder without also committing kidnapping. Dunbar could have committed the attempted murder without kidnapping R.W. by, for example, parking next to her and shooting her without any restraint. Instead, Dunbar parked in front of her and restrained her movements by blocking her in. Third, Dunbar's act of kidnapping caused R.W. to suffer an additional risk of emotional harm not inherent to the attempted murder. Dunbar's restraint of the victim terrorized her to the point she called 9-1-1, showing that the restraint caused additional harm. Therefore, Dunbar did not commit a single act within the meaning of § 13-116 and the trial court did not err by imposing consecutive sentences for count one (attempted first-degree murder) and count five (kidnapping). *See State v. Carlson*, 237 Ariz. 381, ¶ 82 (2015) (holding consecutive sentences for first-degree murder and kidnapping was proper because it was possible to commit murder without kidnapping, kidnapping without murder, and the kidnapping created a risk of emotional and physical harm to victims in addition to harms caused by murder).

¶53 We reject Dunbar's claim that the trial court attempted to distinguish *Gordon* by finding that Dunbar completed two kidnappings. The court made no such finding and the case Dunbar cites, *State v. Jones*, 185 Ariz. 403 (App. 1995), is inapposite. In *Jones*, we found that a defendant could not be charged with two counts of kidnapping the same victim because the "continuous confinement of the victim until her escape did not

give rise to more than one count of kidnapping." *Id.* at 406. *Jones* is inapplicable here because Dunbar was not charged with two counts of kidnapping.

¶54 However, we reach a different conclusion regarding the consecutive sentences for count one (attempted first-degree murder) and count two (possession of a deadly weapon by a prohibited possessor). Even if we assume that consecutive sentences were permissible under the first part of *Gordon*, under the facts of this case, as the state concedes, it was factually impossible for Dunbar to shoot R.W. without also committing weapons misconduct because Dunbar is a prohibited possessor and the use of the gun would necessarily constitute weapons misconduct. *See State v. Carreon*, 210 Ariz. 54, ¶ 108 (2005) (finding second part of *Gordon* not met because defendant could not have attempted murder without also committing weapons misconduct). Additionally, R.W. did not suffer any additional risk of harm from the weapons misconduct beyond that inherent in the ultimate crime. We therefore instruct the trial court that consecutive sentences are inappropriate for counts one and two.

Disposition

¶55 We affirm Dunbar's convictions but vacate his sentences and remand for resentencing on all counts because counts one, two, and five were improperly enhanced and counts two and three were improperly aggravated. We also find the court erred in ordering counts one and two to run consecutively.

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

¶56 I agree fully with all segments of the majority opinion except one. My colleagues affirm the trial court's refusal to order disclosure, for an *in camera* review, of the victim's mental health records. Our opinion holds that Dunbar both failed to provide "a sufficiently specific basis" for seeking disclosure and failed to adequately limit the scope of that request. *Supra* ¶ 28.

¶57 I disagree that these were appropriate bases to deny the request. Although not verbose, Dunbar's pro se pleadings and in-court argument together articulate the logic for believing exculpatory information might have been found within the victim's mental health treatment records. Dunbar maintained, based on his prior history with R.W., that: (1) she suffers from major depression, schizophrenia, and bipolar disorder, which sometimes rendered her delusional; and (2) she had

not been consistently taking her medications to treat those disorders.[12] Such mental health conditions could influence the reliability of the victim's identification of him as the assailant and the accuracy of all features of her testimony against him. He asserted that those materials would therefore be important for effective cross-examination. Given this legitimate evidentiary concern and the logic of locating pertinent and reliable information surrounding R.W.'s mental health condition within her mental health treatment records,[13] I believe Dunbar demonstrated a reasonable possibility that those records might contain exculpatory information necessary for him to receive a fair trial.

¶58 It is unclear how Dunbar could have been more specific about what portion of R.W.'s mental health records might contain exculpatory information without already possessing them. By imposing elevated standards of specificity upon defendants who seek disclosure of information, we create a nearly insurmountable obstacle to securing disclosure: we suggest that a defendant must already know the contents of the requested documents to be entitled to discover those contents. We thereby risk crippling a defendant's due process right to acquire important exculpatory information.

¶59 As I observed in *Kellywood*, the "reasonable possibility" standard does not semantically suggest we have erected a difficult barrier to conduct this form of discovery, and we should resist applying that

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[12]The state did not challenge Dunbar's assertions that R.W. suffered from these forms of mental illness or that she received treatment for them "over fifteen years [in] three different states." *Supra* ¶ 29.

[13]On appeal, Dunbar loosely refers to his request as one for "medical records." But both the trial court record and the content of Dunbar's appellate briefs make clear that Dunbar has sought only the victim's mental health records. This distinguishes the instant case from *State v. Connor*, where we deemed the request inadequately specific, in part, because the defendant indiscriminately sought both the medical records and mental health records of the victim. 215 Ariz. 553, ¶ 24. There, we also emphasized that those records could not conceivably be used to cross-examine the deceased victim. *Id.* ¶ 27. Here, by contrast, the state called the victim as a witness, and the defendant specifically sought the mental health records to conduct an effective cross-examination of her. *See Roper*, 172 Ariz. at 240-41 (identifying due process interest in effective cross-examination as basis for requiring disclosure of victim's records).

standard as such. 246 Ariz. 45, ¶ 24 (Eckerstrom, C.J., dissenting); *see also R.S. v. Thompson*, 247 Ariz. 575, ¶ 23 (App. 2019) (acknowledging courts have applied more stringent standard than "reasonable possibility"). In assessing these requests, our trial courts should not overlook that a victim's privacy interests—in all but those portions of their records that are truly exculpatory—are fully protected by the requirement of *in camera* review. Given that protection, the due process right of a criminal defendant to acquire potentially exculpatory information substantially outweighs the entitlement of the state or victim to withhold such information from the trial judge's review.[14]

¶60 Although I would hold that the trial court erred in denying Dunbar's motion for disclosure, that error was ultimately irrelevant to the trial outcome. At trial, Dunbar did not assert that R.W. had misidentified him. Rather, he testified that he reflexively fired shots in her direction, without any specific intention to injure her, because he believed she was attempting to assault him with her car. That claim by Dunbar was rendered implausible by the other evidence in the case. Dunbar undisputedly fired numerous shots directly into R.W.'s windshield at close range, several of which struck R.W. He discharged those shots in two discrete time windows, allowing ample time for deliberation. Two neighbors each saw Dunbar fire the last of those shots after hearing the first flurry. Both testified that they saw Dunbar standing immediately in front of R.W.'s car and aim directly at her windshield. Neither testified that R.W.'s car was ever moving. By contrast, R.W.'s testimony conformed to the eyewitness evidence and was corroborated by the tape of her 9-1-1 call, which recorded the sounds of the entire shooting incident. Given this weight of evidence, the trial court's error in denying Dunbar's requests for disclosure was harmless beyond a reasonable doubt. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). I therefore concur with the disposition on appeal.

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[14] In many criminal cases, as here, the primary witness to the defendant's alleged actions is the alleged victim. In such cases, defense counsel must explore the reliability and credibility of the accuser in order to competently prepare for trial and cross-examination.

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

O R D E R

2 CA-CR 2018-0064
Department A
Pima County
Cause No. CR20152260001

RE: STATE OF ARIZONA v. KEVIN DUNBAR

Pursuant to Motion Request to Self-Representation of Direct Appeal,

ORDERED: Motion Request to Self-Representation of Direct Appeal is DENIED.

DATED: January 23, 2019

Jeffrey P. Handler
Clerk of the Court

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-20-0171-PR
Appellee,	)	
	)	Court of Appeals
v.	)	Division Two
	)	No. 2 CA-CR 18-0064
KEVIN DUNBAR,	)	
	)	Pima County
Appellant.	)	Superior Court
	)	No. CR20152260-001
	)	

FILED: 07/20/2020

O R D E R

On May 29, 2020, counsel for Appellant filed a Petition for Review. On July 10, 2020, Appellant Dunbar, Pro Se filed a "Motion for Leave of Court to File a Supplemental Petition for Review," "Motion for Pagination to Waive Restriction and Defects" and "Supplemental Petition for Review." Appellant has no right to hybrid representation and may not file pleadings on his own behalf while he is represented by counsel. *State v. Dixon*, 226 Ariz. 545, 553 ¶ 39 (2011). Therefore,

IT IS ORDERED denying Appellant Dunbar's pro se filings.

IT IS FURTHER ORDERED striking Appellant's July 10, 2020 pro se filings from the record.

DATED this 20th day of July, 2020.

/S/
JAMES P. BEENE
Duty Justice

APPENDIX

C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. KEVIN DUNBAR, Defendant.	2 CA-CR 2018-0064 CR-20152260

NOVEMBER 28, 2017

JURY TRIAL - DAY ONE

BEFORE: THE HONORABLE RICHARD S. FIELDS, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Barbara Smith, RPR
Certified Court Reporter 50249
Pima County, Arizona

PIMA COUNTY SUPERIOR COURT

A P P E A R A N C E S

On Behalf of the State:
Bruce Chalk

On Behalf of the Defendant:
Anne Elsberry

INDEX

THE COURT: CR-201522360, State of Arizona versus Kevin Dunbar.

MR. CHALK: Bruck Chalk for the State, Your Honor.

MS. ELSBERRY: Good morning, Anne Elsberry for Mr. Dunbar, present, in custody to my right, Your Honor.

THE COURT: And I understand Mr. Dunbar wants to say something?

THE DEFENDANT: Yes, Your Honor. I have a motion, Ms. Elsberry, it's a motion, you know, there was a criminal complaint filed and on March 11, 2015, and after I got arrested June 3, 2015, and there was an indictment filed June 11, 2015, and on the outcome of the criminal complaint, the only thing superceding -- supervening the criminal complaint is a supervening indictment, and without the supervening indictment I'm still entitled to a preliminary hearing. As of now, I have not received a supervening indictment, which makes me still entitle3d to a preliminary hearing, and the complaint is not followed by a superveneing indictment, it might be a violation of my due process, my equal protection, Article 2, Section --

THE COURT: Okay, Mr. Dunbar, you're now

represented by counsel, so, I'm not going to consider any motions on your behalf.

THE DEFENDANT: I'm represented by counsel?

THE COURT: You're represented by Ms. Elsberry now.

THE DEFENDANT: I didn't put that on record yet.

THE COURT: I'm sorry?

THE DEFENDANT: I have not put that on record yet.

THE COURT: It is on record, your signature was included with the motion that I granted as of --

THE DEFENDANT: Well, I object to that, Your Honor.

THE COURT: Okay, noted. All right.

THE DEFENDANT: As a matter of fact, I want to go back.

THE COURT: I'm sorry?

THE DEFENDANT: I want to go back.

THE COURT: No, I'm not going to do that.

THE DEFENDANT: Well, I object to proceeding, Your Honor, my Ferreta rights are being

surrendered.

THE COURT: Your motions are over, Mr. Dunbar. All right, you guys ready for the jury?

THE DEFENDANT: No, I want to go back.

MR. CHALK: He wants to go back to the jail.

THE COURT: You want to go back to the jail now?

THE DEFENDANT: I have no place here. My rights are being forfeited.

THE COURT: Well, if you want to go back to the jail, I can't stop you. It's not a good idea.

THE DEFENDANT: Well, Your Honor, I'm not being represented by my myself and my rights are being infringed on or surrender, it's like I don't have a say in this process.

THE COURT: Okay.

THE DEFENDANT: Same thing with my witnesses, I don't have a say in the process. I asked for witnesses a long time ago. I have no say in the process.

THE COURT: Okay.

THE DEFENDANT: I never got notice of hearings, I have not had the process, I'm being overthrown.

THE COURT: Okay. Ms. Elsberry, did you want to say anything at this point about him returning to the jail?

MS. ELSBERRY: Your Honor, well, I prefer that he be here because I think it's always important for somebody to be present for their own trial, it certainly is his right to not be present under the Constitution. So, I think that's a choice he gets to make for himself.

THE COURT: Okay, all right, well, if that's what you want to do Mr. Dunbar?

MS. ELSBERRY: You want to stay for today? I believe that Mr. Dunbar does wish to stay here.

THE COURT: Okay, all right.

THE DEFENDANT: I object to the proceedings.

(Whereupon jury voir dire, not being designated as part of the appeal pursuant to AZ Rules of Criminal Procedure, Rule 31.8(b)(2)(ii), is herein omitted.)

THE COURT: Okay, let's go back on the record in CR-20152260, State of Arizona versus Kevin Dunbar. Show the presence of Mr. Dunbar, counsel and the jury panel. All right, at this point in time the

clerk will call the names of the folks selected to try the case.

THE CLERK: Elisa Frank, Jessica Jankowski, Sheila Palazzolo, Thomas McNamara, Carole Harrison, Emily Leyva, Alfred Scionti, Candace Gardin, Todd Weber, Angela Dybas, Lona Claybourn, Veronica Escamilla, Samantha Potter and Richard Bishop.

THE COURT: All right, ladies and gentlemen, those of you who were not selected I want to thank you very much in all your efforts in coming down and being willing to serve. At this point in time I'm going to excuse you, ask you to check in very briefly on the first floor where you started out. And, once again, thank you very much. You are excused.

And the jury will please stand to be sworn.

(Whereupon the jury is sworn.)

THE COURT: Go ahead and have a seat, folks. I'm going to cover some preliminary instructions. You have a copy of those. You're free to look along or just listen, your preference.

Now that you've been sworn I will briefly tell you something about you duties as jurors and give you some instructions. At the end of the trial

I will give you more detailed instructions and those instructions will control your deliberations.

It will be your duty to decide the facts. You must decide the facts only from the evidence produced in court. You must not speculate or guess about any fact. You must not be influenced by sympathy or prejudice. You will hear the evidence, decide the facts and then apply those facts to the law that I will give you. That is how you will reach your verdict. In doing so you must follow that law, whether you agree with it or not.

You must not take anything I may say or do during the trial as indicating any opinion about the facts. You, and you alone, are the judges of the facts.

The State has charged the defendant with attempted first degree murder, aggravated assault with a deadly weapon or dangerous instrument, aggravated assault with serious physical injury, and kidnapping. The last three charges are alleged as domestic violence offenses. You must not think the defendant is guilty just because he has been charged with these crimes. The defendant has pled not guilty.

You'll decide what the facts are from the

evidence presented here in court. That evidence will consist of testimony of witnesses, any documents and other things received into evidence as exhibits, and any facts stipulated to by the parties, or which you are instructed to accept.

You'll decide the credibility and weight to be given to any evidence presented in the case, whether it be direct or circumstantial evidence. Direct evidence is a physical exhibit or the testimony of a witness who saw, heard, touched, smelled or otherwise actually perceived an event.

Circumstantial evidence is proof of a fact in which the existence of another fact may be inferred. You must determine the weight to be given to all the evidence without regard to whether it's direct or circumstantial.

In deciding the facts of this case you should consider what testimony to accept and what to reject. You may accept everything a witness says or part of it or none of it. In evaluating testimony you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such facts as the witness's ability to see or hear or know the things the witness testified to, the quality of the witness's memory,

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. KEVIN DUNBAR, Defendant.	2 CA-CR 2018-0064 CR-20152260

OCTOBER 24, 2017

PENDING MOTIONS

BEFORE: THE HONORABLE RICHARD S. FIELDS, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Barbara Smith, RPR
Certified Court Reporter 50249
Pima County, Arizona

PIMA COUNTY SUPERIOR COURT

A P P E A R A N C E S

On Behalf of the State:
Bruce Chalk

On Behalf of the Defendant:
Anne Elsberry

THE COURT: CR-20152260, State of Arizona versus Kevin Dunbar.

MR. CHALK: Bruce Chalk for the State, Your Honor.

THE DEFENDANT: Kevin Dunbar appearing pro-se.

MS. ELSBERRY: Anne Elsberry as advisory counsel, Your Honor.

THE COURT: Okay, and we had reset this hearing so that you'd have an opportunity to discuss various matters.

MS. ELSBERRY: And I think I can give sort of a house cleaning list here.

THE COURT: Okay.

MS. ELSBERRY: Mr. Dunbar and I met on Friday. It's my understanding that he does want to have me do the trial for him. There's a few things we need to do beforehand. The first one is that he wanted to make sure that he preserved any appellate issues regarding speedy trial. I'm under the impression that given the motions that he's filed and the Court's rulings on those, that they will be preserved for appeal on that.

THE COURT: That certainly would be my understanding.

MS. ELSBERRY: Right, and just to be clear, the -- Mr. Dunbar had filed two special actions. Those special actions were each, jurisdiction was denied by the Court of Appeals on Monday and Tuesday of last week on those.

My paralegal and I went through and made a spreadsheet of all the motions that Mr. Dunbar had filed so far and all the responses and the Court's orders on that. We did find one motion that I don't remember seeing an order from the Court on, and that was a motion to preclude in-court ID that was filed by Mr. Dunbar back on March 1, and responded to by the State on March 21 of this year. So, I think that's the only outstanding motion -- although I could be wrong on that.

THE COURT: I think that I talked about that under the aegis of the motion to preclude all in-court ID, and I think I indicated that as to nonvictim witnesses we would have to wait until we got to trial and try to anticipate whether or not there's going to be any in-court ID. Mr. Chalk, do you have a different recollection?

MR. CHALK: No, the victim herself can make an in-court ID based on what she saw, and the other witnesses who are in the apartment complex,

we're going to deal with them one at a time as they pop up, and if they should think that they can make one, we'll discuss it at that time.

THE COURT: All right, and try to take that up outside the presence of the jury?

MR. CHALK: Yeah.

MS. ELSBERRY: Okay. When I did my list I hadn't seen the minute entry but now that you mention it, I do remember you saying that. We had an issue about whether or not going we were going to depose the doctor and other medical personnel and be able to use that deposition at trial rather than calling them for trial. Mr. Dunbar does not agree to stipulate to a depo and then using the deposition. So, we're going to have to do an interview and have them subpoenaed for trial.

MR. CHALK: Is he going to waive his presence for the interview so we can go to Banner versus making them come down to the courthouse?

THE COURT: Where do you anticipate doing it?

MR. CHALK: They're all UMC doctors.

MS. ELSBERRY: If Mr. Dunbar gives -- relinquishes pro-se then it shouldn't be a problem with me going to Banner to do those interviews.

THE COURT: Okay.

THE DEFENDANT: This is a sticky situation because I left a message for you Friday. I don't know if you got the voice mail, and I still see that -- I still see a lot of issues that haven't been addressed that need to be addressed, and can you help me, I want to talk because I want everything on the record.

I mean, I understand, you know, from my personal opinion, and I understand we all have personal bias and things we do, and sometimes we favor certain things, favor different things, and I just feel I've been biased against in this situation here from so many reasons that is not complete because the case says if the rules is not find the facts or if that -- if it's not a complete issue the motion is never agreed on.

And some of the motions I filed, especially when the County Attorney respond, he said something about I filed before with no evidence, no proof that I filed them, and, for instance, when I filed a motion for probable cause, remand for probable cause, the County Attorney's response was that it was untimely because I filed it. So, you ruled that it was untimely because I filed it.

In my motion I consent that it was untimely. That wasn't even the issue. The issue was that it could be weighed by ineffective assistance of counsel, and the reason why the judge granted me ineffective assistance of counsel because he did not file timely motions. So, my issue was -- had nothing to do with timliness of the 12.9, so your ruling that it was untimely, that wasn't the issue in the motion.

I also filed a motion for insufficient charge of count three and four, and the County Attorney replied that duplicitous, and that motion had nothing to do with duplicitous. And then in support of his argument he used a Grand Jury documentation or Grand Jury orientation that was not part of mine. I don't know where that Grand Jury orientation, it look old, but it had to do with the 254th Grand Jury, but you ruled it was okay.

Also, the defendant filed a motion for several charges, and when he filed for several charges, the Supreme Court, the Appeal Court, and every other court --

THE COURT: Mr. Dunbar, I granted that motion.

THE DEFENDANT: No, you granted -- or bifurcate. So, all the court say that it cannot be

bifurcate unless we agree to stipulate that I was a prohibitted possessor, which I did not agree to stipulate. So, in his favor you granted the motion. Under bifurcate, but you grant on the motion to sever, but when I'm really filed that motion to sever you told me it was prejudice. When he applied it wasn't prejudice and you agreed there wasn't prejudice. There's a lot of issues that is not resolved. Not from one hearing other than the suppress hearing I had notice of the hearing, not one hearing. Was I advised, have I got notice, have I received information, have I seen most of them he never responded, I was unprepared and it's just a mess. If my hand wasn't cuffed I'd go in a whole bunch more issues that still remain.

Also, the fact that I filed a motion, because according to the Legal Defender's Office they were not going to interview or call my witnesses. The Sixth Amendment guarantee me the right to compel me -- I can't find it, call witnesses on my behalf. Well, the Sixth Amendment right is being violated in many ways, which violates my due process to both the US Constitution and Arizona Constitution.

I filed a motion for a new investigator February 23, as you know, because the investigator

said he's not going to investigate and he's not going to the crime scene. On March 6 you told me that you will review the motion and make a ruling on the motion.

I filed a motion to preclude in-court identification, a motion to locate, interview and subpoena witnesses, because the County Attorney -- or the Legal Defender's Office refused to do it, and you told me you're going to rule on the motions, but yet you didn't rule on my motions. But they fail to execute on the above request and suggest I go through the ccourts, that's to go through the court to get the witnesses.

They already told me, he told me he would go to the crime scene, he said he wasn't allowed to go to the crime scene nor interview certain witnesses. The Sixth Amendment to the US Constitution in Article 2, and Section 24 to the Arizona Constitution, provides the defendant have a right would have to process of obtaining witnesses in his favor. So far I have not been provided a process. That's State versus Colis (ph), State versus Roads.

In the above cases the Court had the jurisdiction to oversee make sure making the defendant receive his Sixth Amendment right of

obtaining his witness. Last week you told me that you have no say so and no control over obtaining witnesses and nothing you could do about it.

So, if you can't go in there and they can't go in there my rights is just being violated.

THE COURT: That's not what I said. What I said was I don't control the investigators hired by the Public Defender's office. That's totally a different situation than dealing with whether or not you can subpoena a witness. You can.

THE DEFENDANT: Well, the right to offer testimony, compel attendance and present evidence is guaranteed by the Sixth Amendment. So, you say about the witness, it says for rule 15.9 permits the trial court to appoint expert witness for indigent defendant. Due process requires the appointment of a expert witness for indigent defendant which says testimony is reasonably necessary to present adequate defense. You can see Jacob versus -- and, so, and I present a lot of -- the reason why I want the expert witness, and yet I'm supposed to be able to interview them before I formulate my decision or defense. I have had no chance to do that at all.

The rule was designed to give the defendant an opportunity to check the availability of

preclusion of expert witness and to call expert as his own and have the evidence examined by his own independent expert witness. I can't have it examined. How can I check the report? How can I allege a defense if I don't have the expert witness? I can't allege a defense if I never got my witness called, and this has been over a year and a half, these witnesses and expert witnesses, nothing happened yet. So, now it's upon me that I've supposed to have these rights.

And the State doesn't establish by way expert testimony then the defense is entitled as a matter of fundamental fairness used upon expert testimony, US versus Paseo (ph).

Now, I had submitted a request for expert testimony in February. Mr. Chalk replied back and he said he choose two expert witnesses that he put on his list, one was a medical doctor and one was the gun expert. So, I choose to counter by asking for the same expert witnesses.

Now, even if I choose to interview the medical examination, I don't know nothing about medical, so, I can't examine him. So, my question was to counter his by expert witness or somebody can sub me on those medical.

THE COURT: Okay, well, I denied the request for medical witness expert.

THE DEFENDANT: I understand.

THE COURT: I did leave in the Public Defender's hands whether or not they felt it was necessary to hire somebody to deal with the issue of ballistics, otherwise the requests were denied.

THE DEFENDANT: I understand.

MS. ELSBERRY: And, Your Honor, I've identified a potential ballistic expert so that we should be able to determine whether or not we'll need an expert, we'll use an expert --

THE COURT: Okay.

MS. ELSBERRY: -- shortly.

THE COURT: All right.

THE DEFENDANT: And, also, when I appeared in court on many occasions I felt I was wronged, because a lot of times, I told you on December 12 when I came to court I told you I wasn't prepared. I haven't had notice. Nothing told me it was going to be a hearing. I had no legal work with me. You sent me back. I'm coming back with four boxes all scattered of legal work that I was not prepared to do because I had no notice.

THE COURT: You had notice of the

hearing. Mr. Dunbar, we've been over this, and, frankly, I've got other matters on my calendar.

THE DEFENDANT: So, you're trying tell me -- all right, fine.

THE COURT: All right, so --

THE DEFENDANT: I wasn't done, but I understand.

THE COURT: All right, so, we are set for trial. Any reason why we shouldn't affirm that trial date today and show Ms. Elsberry as lead counsel? Okay, so ordered. Any other witnesses that were identified that need to be interviewed by the defense?

MS. ELSBERRY: Your Honor, I put together a 15.2 notice for -- that hasn't been filed with the Court. We're going to disclose, I think, three potential witnesses to the State, and, so, if the State is inclined they'll need to interview those three folks.

THE COURT: Okay.

THE DEFENDANT: Your Honor, for me, I see the interviews that Ms. Crawford did. I don't agree with the interviews, I don't consent to those interviews and there's more witnesses other than that that need to be interviewed that I would like to

call, but, like I said, I don't have the opportunity to review them. I don't know if I can call them. From which she told me that she interviewed, I don't see the interviews from the witnesses. I do not consent at all.

THE COURT: Okay, well, those are matters that you'll need to talk with Ms. Elsberry about. She's now lead counsel.

THE DEFENDANT: She is not lead counsel.

THE COURT: She is. I assure you, Mr. Dunbar, that she is.

THE DEFENDANT: No, I do not render my rights.

THE COURT: Well, two times you've told me differently.

THE DEFENDANT: I didn't render my rights.

THE COURT: Okay.

THE DEFENDANT: I did not render my rights, Your Honor, for the record.

THE COURT: Okay.

THE DEFENDANT: It has to be clear on the record.

THE COURT: We are about a month away from trial, Mr. Dunbar, and you have always agreed

that when it comes to trial that you need to have somebody represent you, have you not?

THE DEFENDANT: No, I -- if I can address my issues. My issues were not addressed, and certain witness I will call that she won't. So, I'm not going to render my rights. That's why I called her Monday and Friday and let her know that. She should check her voice mail.

THE COURT: Okay, let me see counsel in chambers.

(Whereupon the Court recesses.)

THE COURT: Mr. Dunbar, your final answer?

THE DEFENDANT: I'm proceeding pro-se.

THE COURT: All right. I'm not going to do this dance with you again so you're going to have to live with your decision.

THE DEFENDANT: Yeah.

THE COURT: All right, we have a trial date. Anything else that we need to take care of today?

MR. CHALK: No, I'll -- given his position I'll contact the Court about arranging for interviews here.

THE COURT: Okay.

THE DEFENDANT: And for the record, Ms. Crawford conducted I don't approve of.

THE COURT: I understand, that's about the fourth time you've made that record. but the problem is we can't do a rule 32 before the trial is over and that's an issue for a rule 32.

THE DEFENDANT: And in addition to witnesses I requested, trying to interview those, I want to interview them before I formulate my defense. For the record I did not interview my witnesses requested.

THE COURT: I haven't heard any requests.

THE DEFENDANT: Excuse me?

THE COURT: I haven't heard any requests.

THE DEFENDANT: Well, last week you said that you have no control over that, but I have a request for locate, interview and subpoena witnesses, because which I have nothing to do with it that I had to go through the court. So, I put a motion in in February, and to this date nothing.

THE COURT: If you want to request subpoenas that's something entirely different, Mr. Dunbar.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. KEVIN DUNBAR, Defendant.	2 CA-CR 2018-0064 CR-20152260

FEBRUARY 5, 2018

SENTENCING HEARING

BEFORE: THE HONORABLE RICHARD S. FIELDS, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Barbara Smith, RPR
Certified Court Reporter 50249
Pima County, Arizona

PIMA COUNTY SUPERIOR COURT

A P P E A R A N C E S

On Behalf of the State:

Bruce Chalk

On Behalf of the Defendant:

Anne Elseberry and Eric Erickson

THE COURT: CR-20152260, State of Arizona versus Kevin Dunbar.

MR. CHALK: Bruce Chalk for the State. Victim is present, Your Honor.

MS. ELSBERRY: Anne Elsberry for Mr. Dunbar, who is present, in custody, Your Honor.

MR. ERICKSON: Eric Erickson, co-counsel with Ms. Elsberry for Mr. Dunbar.

THE COURT: All right, counsel, be prepared, I've read the sentencing memorandum filed by Ms. Elsberry on Mr. Dunbar's behalf, and this morning the State's position on that. I do want to engage in some discussion of that, so, that's coming.

And this is the time set sentencing. Mr. Dunbar, your full name, please?

THE DEFENDANT: Kevin Dunbar.

THE COURT: And date of birth?

THE DEFENDANT: 3/21/66.

THE COURT: All right. In a previous jury trial there a was a determination of guilt relative to count one, attempted first degree murder, a nondangerous, repetitive offense with two or more priors, class two, this occurred March 10, 2005, violation of 13-1105; count two, a count of prohibited possessor, a repetitive offense, class

four, same date; count three, aggravated assault, deadly weapon/dangerous instrument, a class three, repetitive offense, same date; and, count five, kidnapping, domestic violence, repetitive offense, also a class three, 13-1304.

I've reviewed numerous letters forwarded to me on behalf of Mr. Dunbar, and the victim's letter, this morning. I have 978 days credit. I'm going to ask for the State's input, but I will indicate the Court's initial directions in this case, which were to impose a presumptive term on the attempted first degree murder, with a consecutive sentence on the prohibited possessor count, striving to reach about a 25 year sentence.

My attention was called to the Careon decision. In the Court's estimation in this case the prohibited possessor, I think, falls outside the Careon analysis, or that the holding in Careon (ph) is incorrect.

In this case, Mr. Dunbar indicated that he was aware of the fact that the firearm had been left in his vehicle by a friend. He carried that weapon throughout the day. He possessed and controlled it well before deciding to use it by attempting to take Ms. Williams' life, and thereby I think establishing

the possessing a deadly weapon is a separate and distinct act from using it to attempt to use it to take somebody's life, and that's why I believe consecutive sentencing on that count is appropriate.

The State's memorandum indicates correctly that the jury did find an aggravating factor under 13-701(D)(2), that being the use or possession of a deadly weapon inherent in its verdicts. And there are a number of other aggravating factors available and present and overall outweighing in every case any mitigation that's been submitted, and that includes lying in wait, the prior overall criminal history, and the emotional impact on the victim.

The Court is also aware that the aggravated assault count could reflect the way the shooting was carried out, which was -- the evidence showed that Mr. Dunbar first fired at one location outside the vehicle and then changed positions, went to the front and fired from there. Certainly the jury could have found that to be a separate act from the attempted first degree murder, but I don't feel comfortable relying on that.

The memorandum that you filed, Mr. Chalk, indicates that the State believes I can set sentence consecutively on the kidnapping count, and I'd like

you to address that issue if you would, and I'll hear from the State.

MR. CHALK: Actually, starting off with just the money stuff, I have a total to victim witness compensation of 3784.57, that was the latest receipt I got. We actually just received, on January 11 of this year, a bill from Mercy Gilbert Medical Center, and why they sent the Pima County Attorney's Office a medical bill, I don't know, but it's related to Ms. Williams and the second surgery she had to get to remove the other bullet, I believe.

So, we disclosed it -- we disclosed it quickly but we haven't had a chance to investigate it in terms of -- they have us down here as being responsible for 1196.66 and then Aetna paid 936.54, and they have a total bill on here of $12,248 from Mercy Gilbert, but with regard to this particular bill, I'd like some time, in terms of restitution, to figure out what they expect out of this. But the two numbers that I have are firm, the 3784.57 and the extradition of 3744.

I believe the case I cited in my memorandum talks about consecutive -- kidnapping can be consecutive. Essentially, what it says is there is additional harm that can arise from the kidnapping --

or from the other offense. So, if I walk up and choke someone, I'm committing a kidnapping, but it is completely what I'm doing, is choking her.

In this case the kidnapping occurs when the car pulls in front and blocks her in. Now, that didn't have to result in a shooting, and the shooting didn't have to result from the kidnapping. If he left his car in the other lot where he was and walked over when she backed in, there would have been no kidnapping. Shooting her -- there wouldn't have been a kidnapping at all. You can complete each offense separately.

So, in that circumstance the kidnapping is a distinct and separate harm from the aggravated assault and attempted murder, and I believe that that satisfies the case that I cited.

I did read the case the Court was mentioning the potential for a consecutive on the attempted murder/aggravated assault. In that particular case I think the perpetrator walked the victim to the door, stabbed her in the back a few times, and then after she didn't do what he wanted her to do, then turned her around and stabbed her in the heart and then found -- or stabbed her in the chest, and they found that was adequate to satisfy consecutive sentences on

the attempted murder and on the aggravated assault.

The Court's laid out that it's not comfortable using that as a factor in consecutive sentencing. If that's so, then that's the case, but I believe, certainly, the kidnapping allows -- the kidnapping charge in this count is separate and distinct from the aggravated assault, attempted murder, and allows for consecutive sentences.

My complete desire in this case is that he spend as long in prison as he can. He is going to be a threat forever to the victim. He's reflected a lifetime of criminality, and nothing about anything he's mentioned shows remorse, shows regret. There is nothing here that doesn't warrant an aggravated sentence in every respect. I mean, this was practically planned out -- it was an assassination attempt, that's what the attempted murder is. Premeditated, he walked up with the gun to shoot her and kill her, and that's what the jury found. And while I realize those are elements of the offense, there's plenty of stuff that the Court has noted, that warrants an aggravated sentence here.

You have the victim's letter and you saw her testify and about the impact that this has had on her, the changes she had to make in her entire life

as a result of this offense.

So, the State would ask for the aggravated sentence on the attempted murder, aggravated assault, aggravated sentence on the prohibited possessor, the the aggravated sentence on the kidnapping, and the attempted murder -- the attempted murder and aggravated assault consecutive, and everything else consecutive. Thank you.

THE COURT: All right. Ms. Elsberry?

MS. ELSBERRY: So, I'm going to start back towards the beginning here. The first thing is whether or not Mr. Dunbar is a category two, category three or category one offender.

Although Pretrial Services states that he is a category three offender, the pretrial statement writer obviously has that wrong. We're going to object to the presentence report and ask that it be amended to state correctly which category he is in. I think the State concedes the fact that he's not a category three offender.

When we had our priors trial, Judge, you found that there were three prior historical felonies, and those were the two weapons charges out of New York and then the Georgia federal conviction, for basically lying to law enforcement at that time.

However -- and I think we were all assuming at that time that Mr. Dunbar would therefore be a category two offender because of the three prior historicals.

However, on re-looking at ARS 13-1015.22, and I believe it's (F), those two gun charges out of New York may not be considered prior historical convictions in Arizona, because what the Arizona statute says is that for convictions that don't involve the actual display or use of a firearm, they -- it has to be what would be considered a felony in Arizona.

And as I note in my memo, it is unclear whether those two charges in New York would be considered felonies in Arizona, because it is a felony misuse of a weapon in New York just to have a weapon during any crime, whether or not it's a felony or a misdemeanor. It is illegal in New York to have more than three weapons with you. And if you remember when we were looking at the priors before, one of the convictions in that pen pack does state specifically which subsection of the New York statute that Mr. Dunbar had been alleged to have broken, and that was -- had a weapon with him during a felony -- during the commission of a crime. It doesn't say whether it was a felony or a misdemeanor. It just

says that he had had a felony.

The other prior in the pen pack doesn't even give us that. It just says that he was in violation of the New York statute, not which subsection of the statute, and so I don't believe the State has proven that those two weapons priors out of New York were felonies in Arizona, and therefore should be considered prior historical felonies.

If we don't -- if those two aren't what would be considered felonies in Arizona, they can't be prior historical felonies, we don't get to that magic number of three prior historical felonies, and therefore Mr. Dunbar would not be a category two offender, he would be a category one offender here.

Once the Court has decided which category he is in, while it doesn't matter for the aggravated assault because, of course, that's being -- would be sentenced under the first line of the dangerous nature crimes, we get to whether or not these should be concurrent. Of course, the aggravated assault and the attempted murder will be concurrent sentences. They are the same crime committed -- described in two separate ways.

Your Honor, I believe that the kidnapping likewise should be a concurrent sentence. If you

remember back to the closing arguments of our trial Mr. -- it was argued that the kidnapping began when he pulled out the gun. We had a lot of discussion about whether or not the victim could have left. We looked at a lot of pictures of where the car was. When we got to closing the State argued it doesn't matter whether she could have left or not, the minute he pulls out the gun she is being kidnapped, she's being prevented from leaving, and that's the kidnap in this case.

If that's the kidnap in the case then that is part and parcel with the aggravated assault and the attempted murder, and, therefore, under the Gordon Test these should be run concurrently. We know that the first two prongs of the test have been met. If look at the ultimate crime in this case, the attempted murder, the aggravated assault and the kidnapping are part and parcel of those.

And then the questions only becomes, did the kidnapping create further additional harm to the victim. In this case, the kidnap was in order to accomplish those two higher level crimes in this case, and it's our position that the sentencing for those -- for the kidnap should, therefore, be concurrent.

As far as the weapons misconduct, the prohibited possessor charge, I still believe that Careon is good law. I think that Careon tells us that he wouldn't -- you couldn't have -- you couldn't have the aggravated assault with the deadly weapon without the prohibited possessor, except for that these are all the same. There was no evidence, particularly, offered or any allegation made by the State that Mr. Dunbar had this gun prior to this crime, that there was any sort of other attempt to possess a weapon other than this particular crime.

THE COURT: Except for his own testimony.

MS. ELSBERRY: Agreed, Your Honor. It's not that -- it's not that Mr. Dunbar went out and obtained the gun. We have no evidence toward that. There was a gun in his vehicle.

THE COURT: And he knew it.

MS. ELSBERRY: But we would ask that all four of the counts be run concurrently.

And, finally, to deal with the aggravating factors, the dangerous nature certainly as to the aggravated assault is part of the ultimate crime, being sentenced, I believe, under that sentencing structure, I believe as well, that that is part and

parcel with the attempted murder here. I don't believe that those could be used as aggravating factors in this particular case. It's only, Your Honor --

THE COURT: As to what counts?

MS. ELSBERRY: As to the attempted murder and as to the aggravated assault.

THE COURT: What's your reason as to the attempted murder?

MS. ELSBERRY: Well, Your Honor, the dangerous nature is that he used a weapon, that's what gets us to dangerous nature here.

THE COURT: But the dangerous nature is only applicable to count three.

MS. ELSBERRY: I'm sorry, Your Honor?

THE COURT: The dangerous nature is only an element, let's say, in count three. In other words, you can carry out attempted first degree murder in a lot of ways.

MS. ELSBERRY: That is correct, but this particular attempted murder is carried out with a weapon, and so, that it is subsumed within that particular count.

I believe, Your Honor, as I've argued, that only the maximum sentences are appropriate -- are

allowable for Mr. Dunbar. The State -- the statute says that the State has to have alleged aggravating factors. The only aggravating factors the State alleged and proved were the dangerous nature and the DV. They didn't allege and they didn't prove harm to the victim.

If you look at 701 it says that the State has to -- or any of the catchall aggravators, the State has to have alleged them. The State hasn't alleged anything else as an aggravating factor. They only alleged those two things as aggravating factors.

THE COURT: Okay, did I just hear you just say that you felt the maximum was the --

MS. ELSBERRY: If the Court finds that the domestic violence is an aggravator, then the maximum is available, because you have to -- to be able to get to the maximum you have to have one aggravator. In order to get to the aggravated, you have to have two aggravators. So, the State has only alleged two, proven two, but that dangerous nature does not apply to the attempted murder or the aggravated assault.

Mr. Dunbar's belief is that the dangerous nature and the domestic violence were not alleged as aggravators but rather were alleged as elements of

the crime. I -- I want to preserve that as an issue for him. I'm not sure if I understand the distinction but I certainly want to preserve that issue for him.

THE COURT: Okay, but, of course, the jury did find those.

MS. ELSBERRY: The jury did find those, Your Honor, they were alleged and the jury did find them.

And, finally, Mr. Dunbar wanted to make clear -- for me to make clear that in addition to the errors that the presentence report writer made regarding which category he should be in, the presentence report writer made an ultimate conclusion regarding Mr. Dunbar's dangerousness to future intimate partners. His concern is, is that there is nothing to back up that allegation, that he was not interviewed regarding the crime itself, only -- because of his position for appeal, and, so, he'd like to have that sentence stricken.

THE COURT: Okay, I want to give you the last word, but in the meantime, Bruce, would you address the category two, category three issue?

MR. CHALK: Well, one of the issues I have with that is that I didn't do the priors trial,

so, I relied on Ms. Schwartz to inform me of what was happening.

One of the issues I have in the language I'm hearing, and as we're discussing about this, we say three prior historical felony convictions, and I'm concerned whether or not we're talking about -- and the sentencing minute entry reflects three prior historical convictions, but when I talked to Ms. Schwartz she said there's been -- you guys talked at the bench and you agreed that he was category two, and that it was the three prior felony convictions, which makes the third one a historical prior felony conviction, was what you guys had agreed to at the priors trial.

So, I mean, there really aren't three historical prior felony convictions. What was proven was three, what I'll call nonhistorical felony convictions, because I'm not sure about the fourth one that was ten years ago, but for the argument we'll say three nonhistorical prior convictions, which means that the most recent one becomes a historical prior conviction, according to the cases.

So, then he really is a category two offender, rather than a category three. If I recall his time in custody for like in the New York cases,

doesn't equate to however much time, it wasn't ten or 15 or 20 years or anything. So, there's nothing to eliminate that time for those, so, they're non-historicals, and when you do the three equals one, it is the most recent in time becomes the historical prior felony conviction.

MS. ELSBERRY: And I'd agree that when Ms. Schwartz was here that that's what we -- the structure that we were looking under. However, at that time we didn't discuss the fact that those two gun convictions out of New York may not be considered felonies for Arizona's purposes under 105.22(F).

THE COURT: Arguably.

MS. ELSBERRY: Arguably.

THE COURT: Okay.

MR. CHALK: Just so we're all clear on the record, my understanding of the range, he's looking at four and a half to 23 on the class two's, three and a quarter to 16 and a quarter on the class three's if it was a nondangerous offense, and a class four, two and quarter to seven and a half, the prohibited and on the aggravated assault I'm choosing the dangerous, which would be 5, 7 and a half, 15, and those priors don't matter because none of them are dangerous.

argument under 105.22(F) just so we can make a record?

THE COURT: Spell out your 105 argument.

MS. ELSBERRY: Okay, so, Your Honor, do you mind if I use your book here?

THE COURT: Go ahead. You're talking about the, not knowing if they're felonies back there?

MS. ELSBERRY: Exactly, Your Honor.

THE COURT: I'm quite confident they are.

MS. ELSBERRY: Because what the -- what the -- 105.22(F) states is that any offense committed outside the jurisdiction of this state that involves the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument for the intentional or knowing infliction of death or serious physical injury that was punishable by that jurisdiction as a felony can be considered a prior historical felony here.

However, and that's my own however, a person who has been convicted of a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony under the laws of the state is not subject to this

THE COURT: Okay.

MR. CHALK: And the argument about the dangerous nature doesn't apply to the attempted first degree I disagree with. It clearly the dangerous nature as an aggravator certainly applies to the attempted first degree murder. It's not part and parcel of the element of the offense.

tHE COURT: It's not an essential element.

MR. CHALK: Right.

MS. ELSBERRY: And, Your Honor, just that as an aggravator for count one was never alleged. It wasn't alleged -- it was not alleged as an aggravator, it certainly wasn't alleged as an aggravator 20 days prior to trial as evidence as required by rule 13.5.

MR. CHALK: Actually, there's cases that talk about aggravators, and there's been no decision ever made whether or not you have to file a written notice of -- a written notice of aggravators.

THE COURT: Okay, so, I'm going to adjust a new category two.

MS. ELSBERRY: Your Honor, when -- could you, either in your statement today or later on in a finding, let us know why you are rejecting the

paragraph, and this paragraph is for the prior historical felonies.

And we have nothing that shows that those two charges in New York would also be considered felonies here. All we know is that he was in possession of a weapon, in one of them we know that it was any crime, we don't know whether it was a felony or a misdemeanor, and in the other one we don't know which subsection he was charged with. And, frankly, to be charged with possession of a weapon in New York you -- there's all sorts of things, there's -- I want to say 25, there's about 25 different ways that you -- or 10 different ways that you can be charged with that, such as possessing a large capacity and ammunition feeding device, is a felony weapons offense in New York. Having your three weapons in your vehicle at one time is a felony weapons offense in New York.

THE COURT: Do we have the exhibits up here?

THE CLERK: No.

THE COURT: While she's working on that, let me indicate to counsel as to mitigation I have considered PTSD, mental health and family support. I do find them, but I find that they have low

mitigation value. The education training and accomplishments between his priors and this offense are not mitigating, because they almost aggravate under these circumstances. Mr. Dunbar had a second chance, had been working with people on altering their behavior based on his training and education. That counters any potential for rehabilitation or credit for mitigation. And I'll hear from Mr. Dunbar, if you're at that point, Anne.

MS. ELSBERRY: I am, Your Honor.

THE DEFENDANT: Good morning Your Honor.

THE COURT: Good morning.

THE DEFENDANT: I first want to say I only pray that if I have a opportunity to apologize to the victim, so I do want to tell the victim that I truly apologize for what she's going through, and I hope she finds in her heart, and God finds a way for to forgive me and to have a good life.

Secondly, I want to apologize to the Court and everybody in the Court. I'm not trying to downplay the situation or undermine it, because nobody deserves to have their life to be compromised, and as a God fearing guy, and I believe in God, I still mind making bad decisions, and I just wish I could take the decision and turn it into a positive.

aware of the case law. Let's look at the exhibits. Counsel want to come up and look at the exhibits? For the record, the sentence for the criminal possession weapon third was two and a half to five years, from a look at the Exhibit 3. The other offense for criminal possession of weapon third was three and a half to 7 years. I'll show that to counsel now.

MS. ELSBERRY: And, Your Honor, right there, so, this shows, if I read this correctly, it shows he was convicted under New York statute 265.02. And I think that's 1 on that one.

THE COURT: Right.

MS. ELSBERRY: The other one just says 265.02, but it doesn't give a subsection. The New York statute, 265.02.1, if such person commits the crime of criminal possession of a weapon in the fourth degree as defined in subsection, 1 through 5, if they've been convicted of any crime, or, and then 5(1), possesses a firearm and has previously been convicted of a felony or a class A misdemeanor.

THE COURT: At that time he had been convicted of a federal offense.

MS. ELSBERRY: No, the federal offense was the last offense. He had the 1991 New York

offense, 1998 New York offense. The federal offense didn't happen until 2007. So, he hadn't had that conviction yet.

MR. CHALK: He was alleged to have -- the prior is the felony attempt to conspiracy.

THE COURT: Okay, all right.

MR. CHALK: That was the previous conviction.

THE COURT: But the subsection is shown on that document, and it's the subsection .1.

MR. CHALK: 201, yeah.

THE COURT: All right, as to count two, the charge of prohibited possessor alleged to have occurred March 10, 2015, the same aggravators apply, and the Court will sentence you to six years in the Arizona State Prison notwithstanding the holding in Careon, I'm going to order that that run consecutive to the sentence in count one.

As to count three, aggravated assault, deadly weapon, dangerous instrument, repetitive, dangerous -- actually, that's dangerous, nonrepetitive, I will sentence you to 14 years in the Arizona State Prison, that will run concurrently with count one.

As to count five, same aggravators apply,

obviously, outweighing the mitigation, I'll sentence you to 18.5 years in the Arizona State Prison, and I will order that that run consecutive to count one.

I'll order that you pay the extradition fee of $3744, restitution to the -- I think it's the victim compensation fund, $3784.57. I will allow the State an additional 45 days relative to the new bill.

There are two $50 assessments required under the domestic violence statutes, and I'll impose those as well as the previously assessed attorneys fees.

THE DEFENDANT: Excuse me, Your Honor? Your Honor --

THE COURT: Hang on, Mr. Dunbar. I will direct the PSR will reflect the category two range for the purposes of Department of Correction's use. Okay, counsel, did you have something before I hear from Mr. Dunbar?

MS. ELSBERRY: Your Honor, I just wanted to make sure I was correct on the record that you made the finding that the kidnapping charge began before the attempted murder.

THE COURT: Right, our fact situation indicates that he pinned her car in before he even retrieved the weapon that was used to begin shooting.

THE DEFENDANT: Your Honor, kidnapping

is a continuous offense until you let the person go.

THE COURT: I'm sorry, I can't hear you, Mr. Dunbar.

THE DEFENDANT: The kidnapping is a continuing offense until you let the person go, and I believe that's State versus Williams. If the kidnap happened first, everything follows through as one offense. If the weapon was pulled first, then it becomes separate, but kidnapping, it says -- I mean, it's a lot of 2017 cases that kidnapping is a continuing offense, one continuing offense, until the victim is relieved of that holding.

THE COURT: Okay, well, I'm finding that there were separate acts committed here and sentencing accordingly.

THE DEFENDANT: So, it was kidnap, let her go, and then another kidnap?

THE COURT: All right, Mr. Dunbar, I will advise you that you've got a right to file an appeal.

THE DEFENDANT: I know that anyways.

THE COURT: You have the right to have an attorney represent you for that. If you can't afford one we'll appoint you one. If you can't afford transcripts we'll provide you with those at no

cost. You have to do it within 20 days or you lose that right.

THE DEFENDANT: Okay.

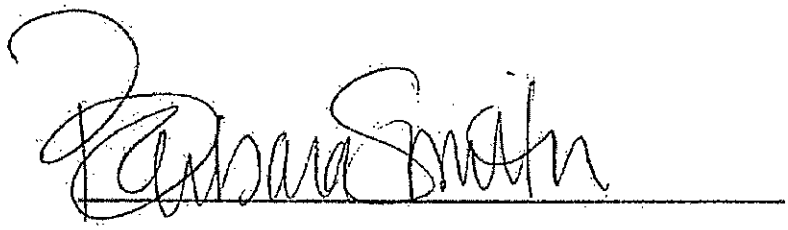
THE COURT: All right.

THE DEFENDANT: One more question? Can you clarify the aggravating factors?

REPORTER'S CERTIFICATE

STATE OF ARIZONA)
: ss
COUNTY OF PIMA)

I, Barbara Smith, do hereby certify that as an Official Court Reporter of Pima County, Arizona, I was present at the hearing of the foregoing entitled case; that while there I took down in shorthand all the oral testimony adduced and the proceedings had; that I have transcribed such shorthand into typewriting, and that the foregoing typewritten matter contains a full, true and correct transcript of my shorthand notes so taken by me as aforesaid.



Barbara Smith, CCR, 50249