App. 1 Decision Below

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

TIA LYN NICOLE SULU-KERR, *Appellant.*

No. 1 CA-CR 22-0565

FILED 01-25-2024

Appeal from the Superior Court in Yuma County
No. S1400CR202100038
The Honorable Brandon S. Kinsey, Judge (Retired)

AFFIRMED IN PART; VACATED IN PART; REMANDED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Andrew Reilly
Counsel for Appellee

Yuma County Public Defender's Office, Yuma
By Robert J. Trebilcock
Counsel for Appellant

OPINION

Presiding Judge D. Steven Williams delivered the Court's opinion, in which Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

WILLIAMS, Judge:

¶1 In Arizona, a person generally may avail herself of a self-defense justification as a defense to a Title 13 charge only if she acted with force *after* another's use of unlawful force. But an occupant of a vehicle facing a forceful entry or removal by another may respond with force even if the other's force is lawful and occurs during the occupant's commission of an unlawful act. Here, defendant Tia Sulu-Kerr appeals her convictions and sentences for leaving the scene of a fatal accident, theft of means of transportation, aggravated assault, and negligent homicide (a lesser included offense of manslaughter). Because the jury was not instructed on justification while in an occupied vehicle—preventing Sulu-Kerr from fully claiming justification for her actions—we vacate the aggravated assault and negligent homicide convictions and sentences, and remand for a new trial on those counts. We otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 After spending an evening together at a casino, Amber Rodriguez offered her housemate, Sulu-Kerr, and another friend, M.Y., the vehicle she had been using (a Ford Flex) to drive home. Rodriguez had stolen the Ford a month earlier from a friend's brother, J.B., who apparently did not report the Ford stolen after Rodriguez took it.

¶3 Sulu-Kerr left the casino shortly before dawn and drove, with M.Y. in the passenger seat, to a gas station. When they pulled up to a gas pump, J.B. and his brother, M.B., suddenly appeared and rushed the vehicle. J.B. ran to the open driver-side window and ordered Sulu-Kerr to "get out of the car," yelling it was "[his] car." Sulu-Kerr had never seen the men before and pulled forward, hitting M.B., who fell under the Ford and suffered a fatal head injury. Sulu-Kerr then drove away. She sent three text messages to Rodriguez in quick succession about what "went down at Circle K." She later told Rodriguez she "tried to take off" after a man "jumped in the window," frightened that he may kill her.

¶4 Police officers quickly located the Ford, traced it to Rodriguez, and questioned her about the incident. After speaking with officers, Rodriguez warned Sulu-Kerr that police were looking for the driver of "the hit and run" and "if she was still in Arizona . . . she should leave."

¶5 While trying to locate Sulu-Kerr, police spoke to her daughter. The daughter relayed Sulu-Kerr's account, telling an officer that two men had accosted Sulu-Kerr at a gas station, with one man ordering her to "get out of the car" and the other man "jump[ing] onto the hood" of the vehicle. According to the daughter, Sulu-Kerr admitted running over the second man as she "left the scene." She also acknowledged that police were looking for her, explaining she had not contacted law enforcement because she "was scared."

¶6 More than a month after the incident, Sulu-Kerr contacted the police and was interviewed. She denied knowing the Ford was stolen but admitted that Rodriguez had made statements indicating she did not rightfully possess the vehicle. When questioned about the gas station incident, Sulu-Kerr explained she was so focused on J.B. standing just outside her open window that she never looked at M.B., whom she could hear yelling back and forth with M.Y. Sulu-Kerr told police she believed J.B. was attempting to carjack them. Claiming she feared for her safety when she saw J.B. reach toward his pocket to possibly pull out a gun, Sulu-Kerr said that she put the vehicle in reverse, heard a loud noise as though someone had jumped on the hood, then put the vehicle into drive and drove off. Although she denied seeing it, Sulu-Kerr admitted she knew she ran over something when she drove away.

¶7 The State charged Sulu-Kerr with leaving the scene of a fatal accident, theft of means of transportation, aggravated assault, and manslaughter. At trial, defense counsel argued that Sulu-Kerr had acted in self-defense, not knowing the Ford was stolen and believing her safety was in jeopardy when she hit M.B. and drove away. Rodriguez testified that she "believe[d]" she told Sulu-Kerr the car was stolen but explained she could not clearly recall because of her substance use.[1] M.Y. testified that J.B. and M.B. "came out of nowhere" and that one or the other ordered him and Sulu-Kerr out of the vehicle, slammed the hood, "tried to open the door," reached into the vehicle through the open driver-side window, and then reached into a bag or backpack—at which point M.Y. put his head between his legs and Sulu-Kerr drove off. Acknowledging that he "felt something

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[1] Rodriguez pled guilty to stealing the Ford and was on probation for the conviction at the time of Sulu-Kerr's trial.

go underneath [the vehicle]" as Sulu-Kerr drove away, M.Y. testified that he told Sulu-Kerr to "go, keep going" because he "didn't want to hear them shots go off."

¶8 Surveillance video footage showed J.B. holding something in his hand and later showed him running toward the Ford.[2] Because of the camera angle, the video captured only some of the incident: (1) J.B. running toward the driver-side door, (2) M.B. rushing toward the front or passenger side of the vehicle, at which point he moved outside the camera's frame, and (3) Sulu-Kerr pulling away within a few seconds. No gun was found at the gas station.

¶9 Jurors found Sulu-Kerr guilty of the lesser-included offense of negligent homicide after failing to agree on the manslaughter charge. They otherwise found her guilty as charged on the remaining counts. The trial court sentenced Sulu-Kerr to concurrent and consecutive prison terms totaling 12.5 years.

¶10 Sulu-Kerr timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. Self-Defense as a Justification for Leaving the Scene of a Fatal Accident

¶11 Before trial, the State moved for a ruling, and corresponding jury instruction, that self-defense did not apply to the charges of leaving the scene of a fatal accident and theft of means of transportation. Sulu-Kerr agreed that self-defense did not justify the theft charge but argued jurors should consider whether it justified leaving the scene of a fatal accident. The trial court granted the State's motion and told the jurors that the instructions for self-defense applied only to the aggravated assault and manslaughter charges.

¶12 On appeal, Sulu-Kerr reasserts her argument that self-defense may justify conduct that would otherwise constitute leaving the scene of a fatal accident. Arizona law is contrary.

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[2] Video surveillance showed J.B. and M.B. using bolt cutters to break into a coin machine at a car wash next to the gas station before Sulu-Kerr arrived. The court precluded the video evidence at trial.

¶13 The legislature's authority "to define what constitutes a crime in this state . . . also extends, at least within constitutional bounds, to defenses." *State v. Holle*, 240 Ariz. 300, 302, ¶ 9 (2016); *see also State v. Bayardi*, 230 Ariz. 195, 198, ¶ 13 (App. 2012) ("Defenses to criminal charges under Arizona law are statutory.") (citing A.R.S. § 13-103(A)). The legislature has specified that the justification defenses set forth in Title 13—the criminal code—may be offered as "a defense in any prosecution for an offense *pursuant to this title*." A.R.S. § 13-401(B) (emphasis added). Leaving the scene of a fatal accident, A.R.S. § 28-661, falls not within Title 13 but within Title 28. As this court has previously held, the express language of A.R.S. § 13-401(B) limits justification defenses to Title 13 offenses. *State v. Fell*, 203 Ariz. 186, 189, ¶ 11 (App. 2002); *accord Bayardi*, 230 Ariz. at 200, ¶ 19. Nothing in A.R.S. § 28-661, or elsewhere in Title 28, suggests that self-defense may be offered to justify leaving the scene of a fatal accident. Because the limitation of self-defense to Title 13 offenses reflects a policy decision entrusted to the legislature, whether to extend justification to A.R.S. § 28-661 must be determined by the legislature, not the courts. *See State v. Gray*, 239 Ariz. 475, 480, ¶ 21 (2016).

¶14 Moreover, Sulu-Kerr has not shown that limiting self-defense to Title 13 crimes infringes her constitutional rights. Although she relies on federal and state constitutional provisions enshrining the right to bear arms as a basis for extending self-defense to charges falling under Title 28, *see* U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); Ariz. Const. art. 2, § 26 ("The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired . . . ."), she fails to explain how legislation criminalizing the use of force encroaches on the constitutional right to bear arms, *cf. Calderone v. City of Chicago*, 979 F.3d 1156, 1162–63 (7th Cir. 2020) (observing that carrying arms and using arms "are separate and distinct interests under the Second Amendment" and that U.S. Supreme Court precedent has not established a constitutional right to shoot someone in self-defense).

II. Defense of an Occupied Vehicle as a Justification to Aggravated Assault and Reckless Manslaughter[3]

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[3] After reviewing the appellate briefs and the trial court record, we ordered the parties to provide supplemental briefing addressing an issue indirectly referenced in their briefs—whether the trial court erred by failing to instruct the jurors on the defense of an occupied vehicle under A.R.S. § 13-418.

¶15 Sulu-Kerr argues the trial court erred by failing to instruct the jurors on the defense of an occupied vehicle justification under A.R.S. § 13-418. Asserting the instructions given "left the jury with an incorrect understanding of justification defenses," Sulu-Kerr contends the omission constituted fundamental, prejudicial error.

¶16 Before trial, Sulu-Kerr requested the jury be instructed on self-defense using several Revised Arizona Jury Instructions ("RAJI"). *See* RAJI (Crim.) Justification for Self-Defense 4.04, at 59-61; Justification for Self-Defense Physical Force 4.05, at 62-64; Justification for Defense of a Third Person 4.06, at 64-65 (5th ed. 2019). As noted, the State moved to preclude these self-defense justifications regarding the counts of leaving the scene of a fatal accident and theft of means of transportation, which the trial court granted. The State also requested a jury instruction for the defense of property under A.R.S. § 13-408 (justifying the "us[e] [of] physical force against another . . . to prevent what a reasonable person would believe is an attempt or commission by the other person of theft"), arguing Sulu-Kerr "[wa]s not justified in using physical force to stop" J.B. and M.B. from "trying to recover their vehicle." In response, Sulu-Kerr countered that J.B. and M.B. "were absolutely NOT entitled to use force to regain 'their perceived personal property.'"

¶17 During the settling of final jury instructions, the prosecutor withdrew the State's request for an instruction on the defense of property justification, pointing to his inability "to find" J.B. and present supporting testimony at trial. Defense counsel, for his part, reasserted his objection to the court's ruling precluding application of the self-defense instructions to the count of leaving the scene of a fatal accident but raised no other objection to the self-defense instructions as outlined by the trial court.

¶18 "We review de novo whether a trial court properly instructed the jury, and whether [the given] jury instructions properly state the law." *State v. Ewer*, 254 Ariz. 326, 329, ¶ 10 (2023) (internal quotations and citations omitted). In so doing, "[w]e consider the jury instructions as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision." *Id.* (internal quotation omitted).

¶19 Although Sulu-Kerr disputed the State's assertion that A.R.S. § 13-408 authorized J.B. and M.B. to forcefully take possession of the Ford, she did not request an instruction on the defense of an occupied vehicle justification or otherwise challenge the sufficiency of the given self-defense instructions. Because Sulu-Kerr failed to adequately raise a challenge to the omission of an instruction on the defense of an occupied vehicle under

A.R.S. § 13-418 in the trial court, we review her appellate challenge only for fundamental, prejudicial error. *See* Ariz. R. Crim. P. 21.3(b) (providing that "[a]ny objection to the court's giving or failing to give any instruction . . . must be made before the jury retires to consider its verdict. . . . If a party does not make a proper objection, appellate review may be limited"); *see also State v. Gendron*, 168 Ariz. 153, 154 (1991); *State v. Gallegos*, 178 Ariz. 1, 12 (1994) ("[A] trial judge's failure to give an instruction *sua sponte* provides grounds for reversal only if such failure is fundamental error.").

¶20 On fundamental error review, "the omission [of an instruction] must be evaluated in light of the totality of the circumstances," *Gendron*, 168 Ariz. at 155, and "[w]e will not reverse a conviction unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sierra-Cervantes*, 201 Ariz. 459, 462, ¶ 16 (App. 2001) (internal quotation and citation omitted). To prevail under the fundamental error standard, a defendant must show an error that "goes to the foundation of a case, takes away an essential right, or is so egregious that [the] defendant could not have received a fair trial." *State v. Murray*, 250 Ariz. 543, 548, ¶ 14 (2021) (internal quotation and citation omitted). Although the defendant bears the burden of persuasion at each step of the analysis, she "need only establish one prong to prove fundamental error exists." *Id.* at 548–50, ¶¶ 14, 20. "An error takes away an 'essential right' if it deprives the defendant of a constitutional or statutory right necessary to establish a viable defense or rebut the prosecution's case." *Id.* at 551, ¶ 24 (quotation and citation omitted). To establish prejudice, a defendant must show that "without the fundamental error, a reasonable jury . . . *could have* reached a different [verdict]." *Id.* at 548, ¶ 14 (internal quotation and citation omitted).

¶21 No error occurs when a trial court omits a particular instruction if the instructions given "fairly represent[] the applicable law." *State v. Axley*, 132 Ariz. 383, 392 (1982). But "the court has an independent duty to instruct on the law when the matter is vital to a proper consideration of the evidence, even if the particular instruction is not requested," *State v. Almaguer*, 232 Ariz. 190, 193, ¶ 5 (App. 2013), and the failure to do so constitutes fundamental error, *State v. Edmisten*, 220 Ariz. 517, 522, ¶ 11 (App. 2009) ("With regard to jury instructions, fundamental error occurs when the trial judge fails to instruct upon matters vital to a proper consideration of the evidence.") (internal quotation and citation omitted). Jury instructions must not "mislead[] the jury." *Ewer*, 254 Ariz. at 329, ¶ 11.

¶22 To resolve this issue, we examine the final jury instructions and the related statutes governing self-defense and justification, mindful

that "[j]ustification is not an affirmative defense that the defendant must prove." *State v. King*, 225 Ariz. 87, 89, ¶ 6 (2010). Rather, when a defendant presents any evidence of self-defense, the State must prove "beyond a reasonable doubt that the defendant did not act with justification." *Id.* (quoting A.R.S. § 13-205(A)).

¶23 The trial court provided the following instructions to the jury, in relevant part:

> 4.04 – [J]ustification for [S]elf[-][D]efense
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> A defendant is justified in using or threatening physical force in self[-]defense if the following two conditions existed:
>
> 1. A reasonable person in the situation would have believed that physical force was immediately necessary to protect against another's use or apparent[,] attempted[,] or threatened use of ***unlawful*** physical force; and[,]
>
> 2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the situation.
>
> . . .
>
> The threat or use of physical force is not justified:
>
> 1. In response to verbal provocation alone;
>
> 2. To resist an arrest that the defendant knew or should have known was being made by a peace officer or by a person acting in a peace officer's presence and at the peace officer's direction, whether the arrest was lawful or unlawful, unless the physical force used by the peace officer exceeded that allowed by law; or[,]
>
> 3. If the defendant provoked the other's use of *unlawful* physical force, unless:
>
> a. The defendant withdrew from the encounter or clearly communicated to the other person the defendant's intent to withdraw, reasonably believing that the defendant could not withdraw from the encounter; and[,]

b. The other person nevertheless continued or attempted to use ***unlawful*** physical force against the defendant.

. . .

4.05 – Justification For Self-Defense Physical Force

A defendant is justified in using or threatening deadly physical force in self-defense if the following two conditions existed:

1. A reasonable person in the situation would have believed that deadly physical force was immediately necessary to protect against another's use or apparent attempted or threatened use of *unlawful* deadly physical force; and[,]

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

. . .

A defendant has no duty to retreat before threatening or using deadly physical force in self-defense if the defendant:

1. *Had a legal right to be in the place* where the use or threatened deadly physical force in self-defense occurred; and[,]

2. *Was not engaged in an unlawful act at the time* when the use or threatened deadly physical force in self-defense occurred.

4.06 – Justification for Defense of a Third Person

A defendant is justified in using or threatening physical force in defense of a third person if the following two conditions existed:

1. A reasonable person in the situation would have believed that physical force was necessary to protect against another's use, attempted use, apparent attempted use, or

threatened use of *unlawful* physical force against a third person; and[,]

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

3. A defendant may use deadly physical force in defense of a third person only to protect against another's use, attempted use, apparent attempted use, or threatened use of deadly physical force.

(Emphasis added.)

¶24 Read together, these instructions told the jurors that a defendant is justified in using deadly physical force only if: (1) reasonably necessary to protect against another's use of *unlawful* physical force, and (2) the defendant either retreats (or conveys an intent to retreat) *or* has a legal right to be at the place *and* is not engaged in an unlawful act. Unlike the instructions given, which track A.R.S. §§ 13-404 to -406, the defense of an occupied vehicle justification under A.R.S. § 13-418 provides that:

A. *Notwithstanding any other provision* of this chapter, a person is *justified* in threatening to use or using physical force or *deadly physical force* against another person if the person reasonably believes himself or another person to be in imminent peril of death or serious physical injury and the *person against whom* the physical force or deadly physical force is threatened or used was in the process of unlawfully *or forcefully* entering, or had unlawfully or forcefully entered, a residential structure or occupied vehicle, or had removed *or was attempting to remove another person against the other person's will* from the residential structure or occupied vehicle.

B. A person has *no duty to retreat* before threatening or using physical force or deadly physical force pursuant to this section.

(Emphasis added.)

¶25 Unconstrained by any other Title 13 statute and broader in scope than A.R.S. §§ 13-404 through -406, A.R.S. § 13-418 justifies the use of

deadly physical force by the occupant of a vehicle against the threat of serious physical injury or death posed by a person in the process of forcefully entering the vehicle or attempting to remove the occupant from the vehicle, even if the other person's actions are not unlawful. Arizona case law "has long rejected" the argument that a self-defense instruction "adequately cover[s]" justification because the underlying statutes protect against separate harms. *See State v. Almeida*, 238 Ariz. 77, 81–83, ¶¶ 17–23 (App. 2015) (characterizing crime prevention justification as "more permissive" than self-defense). Under a theory of basic self-defense, a defendant may act only to protect herself or a third party against another's use of unlawful force, A.R.S. §§ 13-404 to -406, but under a theory of justification, there is no requirement of unlawful conduct; forceful conduct, alone, is sufficient. *See* A.R.S. § 13-418(A); *see also Almeida*, 238 Ariz. at 80–81, ¶ 13. In other words, "[i]t is of no import that a victim may have justifiably used or threatened force because the legality of the victim's conduct is immaterial to a justification analysis." *Ewer*, 254 Ariz. at 330, ¶ 19. Equally important, A.R.S. § 13-418, unlike its basic self-defense counterparts, A.R.S. §§ 13-404 to -406, imposes no duty on the occupant of a vehicle to retreat in the face of a forceful entry or removal, even if the forceful entry or removal occurs during the occupant's commission of an unlawful act.

¶26 To determine whether the "independent duty" to instruct jurors on all law "vital to a proper consideration of the evidence" compelled the trial court, *sua sponte*, to provide an instruction on the defense of an occupied vehicle justification, *Almaguer*, 232 Ariz. at 193, ¶ 5, we must view the trial evidence in Sulu-Kerr's favor, *Almeida*, 238 Ariz. at 80, ¶ 10 ("In assessing the propriety of the justification instruction, . . . we must view the evidence in the light most favorable to [the defendant]."). The evidence presented at trial favoring the defense, if believed, would allow a rational jury to conclude that J.B. and M.B. aggressively approached the Ford and, acting together, forcefully attempted to either enter the Ford or remove Sulu-Kerr from the vehicle.

¶27 The evidence would also allow a reasonable jury to find that Sulu-Kerr reasonably believed that driving forward to flee the gas station was immediately necessary to prevent serious physical harm to herself or M.Y. Because A.R.S. § 13-418 establishes a different and more permissive legal standard for evaluating Sulu-Kerr's conduct than that imposed under A.R.S. §§ 13-404 to -406, the trial evidence not only supported an instruction on the defense of an occupied vehicle justification, it compelled the inclusion of the instruction. "That the evidence of justification was fairly debatable and contradicted by other evidence is irrelevant." *Almeida*, 238

Ariz. 80, ¶ 11. Simply put, without an instruction on the defense of an occupied vehicle justification, the instructions given failed to inform the jury of the law vital to its proper consideration of the evidence.

¶28 Without citing any authority, the State argues that attempting to open a vehicle's door and reaching inside an open driver-side window while ordering the driver to get out and claiming ownership of the vehicle "cannot constitute the 'forcefully entering' required by the statute." We disagree.

¶29 The legislature did not define "forcefully," *see* A.R.S. §§ 13-105, -418, and had it intended to impose some heightened standard beyond physically attempting to access the interior of a vehicle and expel the occupant without the occupant's permission or acquiescence, it surely would have said so.

¶30 The State also argues that the evidence did not support a defense of an occupied vehicle instruction because M.B. was positioned at the front of the vehicle when Sulu-Kerr ran him over, and therefore could not have been forcefully attempting to enter the vehicle or remove her at the time. But the State's narrow focus on M.B.'s position when he was struck by the Ford fails to account for the uncontroverted evidence that J.B. and M.B. acted in concert. Without question, M.B. stood in front of the Ford when Sulu-Kerr drove forward, blocking her from leaving, while J.B., according to at least some evidence, attempted to open the driver-side door and reached inside the driver-side window. Because J.B. and M.B. acted together in attempting to forcefully take possession of the Ford, the defense of an occupied vehicle justification applied to Sulu-Kerr's conduct directed at both men. *Cf.* A.R.S. § 13-401 ("Even though a person is justified under this chapter in threatening or using physical force or deadly physical force against another, if in doing so such person recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person.").

¶31 The trial court committed fundamental error by failing to instruct on the defense of an occupied vehicle justification. Having found fundamental error, we must determine whether Sulu-Kerr suffered prejudice as a result.

¶32 To establish prejudice, a defendant must show that had the trial court provided proper instructions, "a reasonable jury could have plausibly and intelligently returned a different verdict." *Murray*, 250 Ariz.

at 552, ¶ 30 (internal quotation and citation omitted). "An erroneous jury instruction could lead an objective, reasonable jury to reach a different verdict if the error relates to the defense against the charge." *State v. Fierro*, 254 Ariz. 35, 42, ¶ 25 (2022). "[E]valuating prejudice . . . requires a court to examine the entire record—including jury instructions—*in context* with counsel's arguments." *Murray*, 250 Ariz. at 553, ¶ 37. In other words, "[a]ppellate courts do not evaluate jury instructions out of context. Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions." *State v. Bruggeman*, 161 Ariz. 508, 510 (App. 1989). While a prosecutor's closing argument may ameliorate an erroneous jury instruction by "clarif[ying] any possible misunderstanding," *id.*, it may also compound the prejudice of an erroneous instruction, *State v. Johnson*, 205 Ariz. 413, 417, 420, ¶¶ 11, 26 (App. 2003) (finding an "incomplete" instruction, "in conjunction with the closing arguments of counsel," warranted reversal).

¶33 During closing argument, the prosecutor repeatedly highlighted the jury instructions, arguing that Sulu-Kerr did not fear serious physical harm when she hit M.B. and drove away but instead felt concerned that she would be caught with a stolen vehicle.[4] The prosecutor also told the jurors that Sulu-Kerr had a duty to retreat:

> The question that you need to decide on [the aggravated assault and manslaughter counts] is was this self-defense? That is the main question. And many of you might put yourself in her shoes, and you're going to have to because that's what the instruction tells you to do, a reasonable person in that situation.
>
> So you might be thinking if I was driving my vehicle and if I pulled into the Circle K and it's about 4:00 in the morning, 4:50 in the morning, and two men come out of nowhere and approach me and start yelling at me and start banging on my vehicle, I'm gone. Many of you, if not all of you, probably would do that. I certainly would. What's different, though? The difference is this is not her vehicle. She's driving a stolen vehicle. So what's actually going on through her head? Is it

[4] At trial, Sulu-Kerr argued that the State failed to present evidence demonstrating she knew the Ford was stolen, but the jury rejected her argument, and she does not challenge the theft of means of transportation verdict on appeal.

> that I'm afraid for my life or is it I'm driving a stolen vehicle, and there's the owners?
>
> . . .
>
> A defendant has no duty to retreat before threatening or using deadly physical force if . . . they were not engaged in an unlawful act at the time. If you believe she knowingly was in possession of a stolen vehicle, that she is guilty of [theft of means of transportation], then she is committing an unlawful act at this time, in which case she had a duty to retreat. She had to choose to run before she chose to run him over.
>
> . . .
>
> The story doesn't match the evidence. Because it's a story. Lies that are needed to create a story.
>
> It's because the real reason this happened is because she was in a stolen vehicle. That's what the evidence shows, and that's what I present to you.
>
> And if you believe that I proved that beyond a reasonable doubt, then this wasn't self-defense. Because she wasn't afraid for her life. She was afraid of getting caught. I have to disprove that.
>
> If you find that the reason for the story is nonsense; that her actions showed that everything in this case shows you to know that she was in the stolen car and she knew and that's why she ran and that's why she did these things, then you should find her guilty on both aggravated assault and manslaughter.
>
> She had a duty to retreat. And she did not. Because of that, self-defense does not apply.

¶34 By asserting that Sulu-Kerr's possession of the stolen vehicle imposed upon her a duty to retreat and inviting the jurors to reject her claim of self-defense on that basis, the prosecutor both mischaracterized the law and compounded the prejudice from the incomplete statement of the law reflected in the given instructions. *Compare Fierro*, 254 Ariz. at 43, ¶ 31 (concluding no resulting prejudice from an erroneous jury instruction, partly reasoning that the prosecutor "did nothing to exploit" the

instruction). Because the prosecutor made these statements after quoting the instruction on when a defendant "has no duty to retreat," jurors likely interpreted his statements as accurately reflecting the law. *See Murray*, 250 Ariz. at 552, 554, ¶¶ 33, 39 (observing that the standard jury instruction that what lawyers say during closing arguments "is not evidence . . . but . . . may help you understand the law and the evidence" made jurors more likely to accept the prosecutor's misstatement of the law as a correct application of it). And in so doing, the prosecutor essentially relieved the State of the burden of proving Sulu-Kerr acted without justification for purposes of aggravated assault and reckless manslaughter.

¶35 Because Sulu-Kerr's primary, if not sole, defense against the aggravated assault and manslaughter charges was justification—that she reasonably fled the gas station after J.B. and M.B. rushed the Ford, and J.B. attempted to open the car door and reach inside the driver-side window while ordering her to get out—the prosecutor's erroneous statement that self-defense did "not apply" if jurors found her guilty of theft of means of transportation took away a right essential to her defense. *See State v. Escalante*, 245 Ariz. 135, 141, ¶ 19 (2018). Thus, in this case, "[t]he prosecutor did not merely misstate the [standard for a duty to retreat]; he provided the jury a logical roadmap to circumvent it while ostensibly following it." *Murray*, 250 Ariz. at 554, ¶ 39. Moreover, contrary to the State's argument, the record demonstrates that the incomplete instructions and closing argument influenced the jury's evaluation of the case. Specifically, during deliberations, the jury asked for a "definition of [r]etreat." *See Escalante*, 245 Ariz. at 144, ¶ 32 ("[A]ny questions posed by jurors during trial or deliberation may be pertinent in applying the [prejudice] standard objectively.").

¶36 Although the State contested Sulu-Kerr's self-defense claim, the trial evidence did not overwhelmingly negate it. Sulu-Kerr gave consistent accounts of what happened, and the fear she felt, when she spoke to Rodriguez, her daughter, and the police after the event. Surveillance video only partially captured the encounter, and J.B. did not testify at trial. In fact, the prosecutor acknowledged that if he "pulled into" a gas station at 4:00 in the morning "and two men [came] out of nowhere and approach[ed] [him] and start[ed] yelling at [him] and start[ed] banging on [his] vehicle," he "certainly would" take off.

¶37 Given the trial court's failure to instruct the jury on the law vital to its proper consideration of the evidence and the prosecutor's mischaracterization of the law during closing argument, a reasonable jury could have understood that an irrebuttable presumption existed such that

Sulu-Kerr necessarily acted without justification for purposes of aggravated assault and reckless manslaughter if she committed theft of means of transportation, no matter the other evidence. *See Norton v. Superior Court*, 171 Ariz. 155, 158 (App. 1992) ("Conclusive or irrebuttable presumptions unconstitutionally relieve the State of its burden of proof."); *see also State v. Abdi*, 226 Ariz. 361, 364-65, ¶¶ 11, 13 (App. 2011) (similar). But had the trial court properly instructed on the law vital to a proper consideration of the evidence, including the defense of an occupied vehicle justification under A.R.S. § 13-418, a reasonable jury could have plausibly and intelligently found Sulu-Kerr's conduct to be justified. *See Murray*, 250 Ariz. at 552–53, ¶¶ 31–34 (concluding that a reasonable jury could have reached a different result without the prosecutor's error because the error went to the foundation of the defense, which otherwise had considerable evidence to support it). Therefore, the omission of an instruction on the defense of an occupied vehicle justification constituted fundamental, prejudicial error, and we vacate the convictions for aggravated assault and negligent homicide accordingly.[5]

III. Instruction for Leaving the Scene of a Fatal Accident

¶38 Sulu-Kerr argues the trial court erred by instructing jurors that she could be found guilty of A.R.S. § 28-661, leaving the scene of a fatal accident, if she violated any of the requirements enumerated in A.R.S. § 28-663—which is a less serious crime standing alone and with which she was not separately charged. *Compare* A.R.S. § 28-661(C) (categorizing offense as class 2 or class 3 felony) *with* A.R.S. § 28-663(C), (D) (categorizing offense as misdemeanor or class 6 felony). Because Sulu-Kerr did not object

---

[5] Because we conclude the trial court failed to instruct the jury on all law vital to its proper consideration of the evidence and vacate the convictions for aggravated assault and negligent homicide on that basis, we need not address Sulu-Kerr's claims that: (1) the prosecutor improperly referenced her subjective motivation during closing argument, (2) the jury impermissibly returned inconsistent verdicts on the counts of aggravated assault and reckless manslaughter, and (3) the trial court erroneously ran her sentence for leaving the scene of a fatal accident consecutive to her sentences for aggravated assault and negligent homicide.

to the instruction, we review her claim only for fundamental error.[6] *See Escalante*, 245 Ariz. at 138, ¶ 1.

¶39 This claim raises an issue of statutory interpretation. We interpret statutes *de novo*, looking first at the text. *Holle*, 240 Ariz. at 302, ¶¶ 8, 11. We do not interpret statutory provisions in a vacuum but "in view of the entire text, considering the context and related statutes on the same subject." *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019). "When the text is clear and unambiguous, we apply the plain meaning and our inquiry ends." *State v. Burbey*, 243 Ariz. 145, 147, ¶ 7 (2017).

¶40 Under A.R.S. § 28-661(A),[7] a driver involved in a fatal accident has an affirmative duty to:

> 1. Immediately stop the vehicle at the scene of the accident or as close to the accident scene as possible but shall immediately return to the accident scene.
>
> 2. Remain at the scene of the accident until the driver has fulfilled the requirements of § 28-663.

A driver "who fails to stop or to comply with the requirements of § 28-663" is guilty of a class 2 or class 3 felony, depending on whether the driver caused the accident. A.R.S. § 28-661(C).

¶41 Section 28-663 requires that a driver involved in a fatal accident:

> 1. Give the driver's name and address and the registration number of the vehicle the driver is driving.
>
> 2. On request, exhibit the person's driver license to the person struck or the driver or occupants of or person attending a vehicle collided with.

---

[6] Sulu-Kerr argued she was entitled to a directed verdict on the charge of leaving the scene of an accident because the State could not prove she violated all three requirements of A.R.S. § 28-663. But she never objected to the court's jury instructions on leaving the scene of a fatal accident under A.R.S. § 28-661 or the requirements of A.R.S. § 28-663.

[7] We cite the current version of A.R.S. §§ 28-661 and -663. Although each statute has been amended since Sulu-Kerr committed the offense, the amendments do not affect our analysis.

> 3. Render reasonable assistance to a person injured in the accident, including making arrangements for the carrying of the person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the carrying is requested by the injured person.

A.R.S. § 28-663(A).

¶42 The trial court instructed jurors on the charge of leaving the scene of a fatal accident as follows:

> The crime of leaving the scene of an injury or fatal accident requires that the defendant:
>
> One, was driving a vehicle involved in an accident resulting in injury to or death of any person and, A, failed to immediately stop the vehicle at the scene of the accident, or as close to the accident scene as possible and immediately return to the accident scene; B, or failed to remain at the scene of the accident until the defendant fulfilled the duties required by law of a driver involved in an accident resulting in an injury or death.
>
> . . .
>
> The driver of a vehicle involved in an accident resulting in injury to or death of a person shall:
>
> One, give the driver's name and address and the registration number of the vehicle the driver was driving; and, two, on request, exhibit the person's driver's license to the person struck or the driver or occupants of or person attending a vehicle collided with; and, three, render reasonable assistance to a person injured in the accident, including making arrangements for the car[ry]ing of the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the car[ry]ing is requested by the injured person.

¶43 We discern no error in the trial court's instruction on leaving the scene of a fatal accident because the text of A.R.S. § 28-661 is unambiguous and the instruction accurately tracked it. Subsection (A) of the statute provides that a driver may be found guilty of A.R.S. § 28-661 if the driver either (1) failed to immediately stop or return to the accident

scene or (2) did not provide the information and assistance described in A.R.S. § 28-663.

¶44 Sulu-Kerr cites *State v. Powers*, 200 Ariz. 363 (2001), to support her contention that A.R.S. § 28-661 does not strictly incorporate the requirements of A.R.S. § 28-663. In *Powers*, our supreme court stated:

> Section 28-661 imposes an affirmative duty on a driver to remain "at the scene of the accident," not to render aid to victims or provide them with information. Although § 28-661(A)(2) requires the driver to remain at the scene "*until* the driver has fulfilled the requirements of § 28-663," (emphasis added), that clause only establishes when the duty to remain at the scene terminates.

Id. at 364, ¶ 8 (quotation omitted). But Sulu-Kerr's reliance on *Powers* is unavailing because it does not account for the above statement's context. *Powers* did not consider whether A.R.S. § 28-661 incorporates A.R.S. § 28-663. Rather, the case concerned whether a defendant could be charged with multiple counts of leaving the scene of an accident under A.R.S. § 28-661 if the defendant was involved in an accident that affected more than one victim. *Powers'* observation that A.R.S. § 28-661 does not impose a duty to "render aid to the victims or provide them with information" did not dissociate the requirements of A.R.S. § 28-663 from A.R.S. § 28-661 but emphasized that the plain language of A.R.S. § 28-661 focuses on an "accident" or "accident scene" rather than a "victim."

CONCLUSION

¶45 For the foregoing reasons, we affirm the convictions and sentences for theft of means of transportation and leaving the scene of a fatal accident. Because the jury was improperly instructed on justification, we vacate the convictions and sentences for aggravated assault and negligent homicide and remand the matter for a new trial on the underlying counts.

AMY M. WOOD • Clerk of the Court
FILED: TM

Supreme Court

STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

December 4, 2024

RE: STATE OF ARIZONA v TIA LYN NICOLE SULU-KERR
Arizona Supreme Court No. CR-24-0049-PR
Court of Appeals, Division One No. 1 CA-CR 22-0565
Yuma County Superior Court No. S1400CR202100038

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 3, 2024, in regard to the above-referenced cause:

ORDERED: State of Arizona's Petition for Review = DENIED.

FURTHER ORDERED: Petition for Review (Treated as Cross-Petition for Review) = DENIED.

FURTHER ORDERED: Pursuant to Rule 111(g) Rules of the Supreme Court, it is ordered depublishing the court of appeals opinion.

Tracie K. Lindeman, Clerk

TO:
Joshua D Bendor
Alice Jones
Andrew Reilly
Robert J Trebilcock
Amy M Wood
lg

App. 3 Arizona Court of Appeals, Division One Ordering Supplemental Briefing.

IN THE

COURT OF APPEALS

STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 10/11/2023
AMY M. WOOD,
CLERK
BY: MAO

STATE OF ARIZONA,	)	Court of Appeals
	)	Division One
Appellee,	)	No. 1 CA-CR 22-0565
	)	
v.	)	Yuma County
	)	Superior Court
TIA LYN NICOLE SULU-KERR,	)	No. S1400CR202100038
	)	
Appellant.	)	
	)	
	)	

ORDER FOR SUPPLEMENTAL BRIEFING

The court, Presiding Judge D. Steven Williams, Judge Samuel A. Thumma, and Judge Paul J. McMurdie, has reviewed the briefs and the record in this matter and has determined that supplemental briefing would be helpful for the resolution of this appeal. Accordingly, on its own motion,

IT IS ORDERED directing both parties to file simultaneous supplemental briefs addressing the following question: Was it fundamental error for the superior court not to instruct jurors on the law set forth in A.R.S. § 13-1418?

IT IS FURTHER ORDERED that the briefs shall be no longer than 5,000 words and shall be filed no later than 5:00 p.m. on October 26, 2023.

The supplemental briefs need not include a statement of facts, and the parties may reference relevant facts by referring to their previously submitted briefs.

_____/s/_____
D. Steven Williams, Presiding Judge

A copy of the foregoing
was sent to:

Andrew Reilly
Robert J Trebilcock
Jon R Smith

App. 4 Partial Transcript of Argument of Prosecutor's motion and trial Court's granting of non-standard jury instruction over objection regarding applicability of the justification of self-defense to the leaving the scene of a fatal accident charge in Count One of the Indictment

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. S1400CR202100038
	)	
TIA LYN NICOLE SULU KERR,	)	No. 1 CA-CR 22-0565
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE BRANDON S. KINSEY
JUDGE OF THE SUPERIOR COURT
DIVISION SIX, YUMA, ARIZONA

TRANSCRIPT OF PROCEEDINGS

May 26, 2022

9:04 a.m. - 10:15 a.m.

ORAL ARGUMENTS ON ALL PENDING MOTIONS

PREPARED BY:

Julie K. Knowlton, CR, RPR, CSR(CA)
Certified Reporter
AZ Certification No. 50138
Yuma County Superior Court

is probative, but it does go to the honesty of the witness if the witness is untruthful about the witness' location prior to the incident that occurred with the defendant in this case.

Okay. The jury instructions.

MR. DAVIS-SALSBURY: Yes. The State had requested two special jury instructions that will be nonstandard.

THE COURT: Okay.

MR. DAVIS-SALSBURY: Request number one is the motion to get an instruction that says you may consider the instructions for self-defense as to counts three and four alone. The State's argument for this, self-defense justifies the use of force. It allows someone to act when their life is in danger. In this case, counts one and two are fleeing the scene of a fatality and theft of means of transportation. They are not about unlawful use of force. They are about failing to report and remain at the scene and about knowingly possessing a stolen vehicle. Self-defense does not justify either of those acts.

I'm seeking this jury instruction so I can tell the jurors, with Court support, that they can only consider self-defense as to counts three and four.

THE COURT: Okay.

MR. DAVIS-SALSBURY: As for as the other instruction, I'm requesting jury instruction 4.08. That is the physical force justified in defense of property. And I'd like to change the language a bit so that, instead of saying "defendant," it says

physical they were. They never got in the vehicle. They never opened any of the doors. But they are allowed to use force to recover that vehicle, and I think that a jury should be instructed on that.

One consequence of that, however, self-defense is not justified in response to lawful physical force. If the victims were justified in trying to recover their vehicle, then the defendant is not justified in using physical force to stop them from doing that. That would be an argument for the jury to decide, but that would be a -- a consequence of that instruction.

THE COURT: Okay. Mr. Padilla.

MR. PADILLA: First of all, addressing the proffered instructions, I agree that, as to the theft of means, those defenses may not apply. However, as to the leaving the scene of an accident, self-defense is not limited to the use of a weapon, of a car, a gun, a two-by-four, a knife. It is an infinite number of possibilities that one can use to defend themselves.

In this case, my client and her passenger were approaching the Circle K to obtain gas. The car was really low on gas. As they were reaching the pumps, two men come out of the dark, 4:00 in the morning, running at them, screaming at them. One approaches my client, starts reaching through the door, never indicating anything about their purpose; simply get out of the car, go away. Likewise, on the other side, Mr. -- the decedent jumps on the car.

I cited to the Court a case that deals with use of -- I call it replevin, but recouping one's own property. It used to be that you could use force, some degree of force. Then it changed; you could not do it riotously. The case that I cite to the Court indicates you can regain or replevin -- replevy your property. However, you cannot commit an assault in the process. That's what the case stands for.

In this case, the minute they touched that vehicle, they committed an assault on my client; they committed an assault on Mr. Yount, the passenger in this car. They had every right to get away from that situation.

I am reminded of during the post-Rodney King trial, the L.A. version of that, of that truck driver that drove into the wrong neighborhood where they basically escorted him out of his semitruck 'cause he didn't want to hit anybody and they began to literally beat him to death. He was forever -- he was in a coma for -- for a period of time. And that's the scenario we have here, two individuals running in out of the dark, unbeknownst to my client who they are, what relationship they have to this vehicle whatsoever, and began banging on the car, reaching into the car, making demands that to my client appear unreasonable because she has no idea that the vehicle does not belong to Amber.

So we would ask the Court to -- again, assuming the evidence supports that. As the Court -- this Court is well

aware, recently this court -- not this particular judge, but this court was reversed on a failure to give an instruction asked for by the defense when there was at least evidence supporting that instruction, and that's -- if we cannot present the instruction of the scenario that would cause someone to try and leave a scene like this, then, obviously, we don't get that instruction. But we submit the evidence will show clearly that my client was being assaulted by two individuals; her passenger, whom she has a right to defend as well, was being assaulted by two individuals unknown to them in the middle -- not even the middle of the night, 4:00 in the morning in a somewhat -- not exactly desolate, but it's not the center of town location. If we don't make that showing, the Court would be perfectly justified in denying that instruction.

And, while we're at it, I haven't -- I didn't write this up, but two items strike me. As I interviewed -- and I've been -- one of my -- my interviews have been keyed on two key factors that are paramount in this case. One is did Mr. Beltran have any authority or any right to claim that vehicle at all? The singular statement we have of ownership is that "Suzanna Beltran was my wife." There is no evidence anywhere -- and I've asked for it from all the witnesses; I've asked for it from the State -- that they were actually married, and that makes a difference in one respect because Georgia, where this vehicle was registered, is a separate property state. It would not

necessarily inure to Mr. Beltran. Even if they were married, it would not inure to him if Miss Susanna Beltran had other children not with Mr. Beltran, at least by -- and it's -- probate is pretty uniform, but the laws of devolution, it would go to her children -- at least half of it would go to her children; the other half to Mr. Beltran if it was probated in Arizona. In Georgia, because it's separate property, generally all the separate property goes to the heirs of that individual.

So we have an issue here. We are assuming that he had a lawful right to it. We are assuming that Miss Beltran was, in fact, his wife and that it was, in fact, her vehicle. We know it was registered. But, again, the question is how many Suzanne Beltrans are there in the world? So there's a major assumption.

The other is the word "steal" or "theft." This case posits a very interesting question: Can you actually possess a vehicle that has not been reported stolen? Can you be charged with theft of that vehicle? So that raises another level of inquiry. That is, if it truly was John's -- or his wife's, first of all, does he have any ownership interest in -- in a separate property state. And, secondarily, it was never reported stolen. And as to that aspect, there are two stories.

The initial story is Mr. Beltran tells the police officers, "It was my car. It was stolen.

"Did you report it?

"Yeah, I did, about five weeks ago."

And the facts are that various agencies -- and yesterday when I had my -- well, recently, my last interview, my interview, I asked the officer did anyone check up to see if it had been stolen, and that officer believed he had -- he had personally not. But I asked him did he check with the adjoining agencies. That is Imperial Valley. And indicated they had; there's nothing there. I've asked the prosecution for a copy of that report. There is no such report made.

Later on, the story gets changed, "Well, we reported it in Michael's name," the decedent's name. Michael has no possessory interest at all whatsoever in this vehicle. Even if we assume that John was married to Suzanne, it would not inure that it would be his car.

So we are asking the Court to preclude the State from saying that this was a stolen vehicle because there is no evidence whatsoever that it, in fact, was stolen. It was never reported as stolen. The true owner, which we don't know who it is -- Mr. Beltran claims it was his wife, but they reported it in his brother's name. We have no evidence at all that he was ever married to a Suzanna Beltran. So even if it -- if they were married, again, Georgia, being a separate property state -- I don't think -- we've never even had any evidence that Miss Beltran actually died, as claimed by John Bel- -- Beltran. For all we know, he borrowed or was borrowing or his sister borrowed it, who then gave it -- there's Eva Rich. Then there's another

young lady. It's a very convoluted situation. But, nevertheless, there's no evidence to support the theft argument. There's no evidence to support the ownership argument. Before they can even get replevin, they need to show that they have a proprietary interest in that, and there is no such showing in this case. So it becomes a straight hit of assault by Mr. Beltran and the decedent on two individuals that are trying to get some gas.

So we would ask that the Court -- if we present the evidence that, in fact, they were being attacked, their only recourse was to leave. Unfortunately, in this case they used a vehicle. This Court has seen countless cases where they charge aggravated assault, use of a vehicle. And so we know that one can use virtually anything for self-defense. In this case, they were defending themselves. The best defense is to run. That's what they were doing. Unfortunately, this terrible accident happened, and here we are. But, again, there's no evidence to support ownership; there's no evidence to support theft; and there is a lot of evidence that says you cannot, by assaulting the person that has your property, seek replevin. That's Arizona law, Your Honor.

THE COURT: Mr. Davis-Salsbury.

MR. DAVIS-SALSBURY: The State is not seeking stipulations or any instructions on presumptions. The State is asking for jury instructions so the jury can decide on their own.

That includes whether the victims had any right to recover that vehicle, whether they're justified in trying to recover that vehicle or not. And the defense will be free to make any arguments they wish on that, present any evidence they wish on that in opposition, and go from there.

As far as the case that the defense relies on, that's *State v. Schaefer*, 163 Ariz. 626. That's a Division One Court of Appeals case. Recently Division Two, in *State v. Dansdill*, 246 Ariz. 593, indicated that the language relied upon is dicta. It is the legislature who decides justification to criminal liability. States have broad authority to define elements of a crime and to codify defenses to them, and the legislature in our state has codified this defense. It is applicable regardless of the dicta in the case relied upon by the defense.

As far as the question of whether there is any evidence the vehicle was stolen, Mr. (sic) Amber Rodriguez accepted a plea agreement indicating she had stolen the vehicle. Mrs. Kerr indicates in her interview that she knew Amber to be a hustler who loves hot cars; that she had asked her if the car was hot, meaning stolen; that she was told it was a friend of a friend of a friend's; that Miss Kerr indicated she did not believe it, in saying, "Really, Dude? That does not sound good," saying, "I don't want to know," and then later would ask, "Is that even yours?" And then she was told, if someone were to mob upon us, to get out of there.

Miss Kerr knew that the vehicle was being sought after, that people wanted it, that Amber was someone that stole vehicles, and had every reason to believe that this vehicle was stolen, particularly when John Beltran approached the vehicle and shouted, "That's my car." I expect this to be a hotly disputed issue where facts will be presented from both sides on whether the vehicle was stolen, whether the defendant knew it was stolen or not. I'm not asking for stipulations on that, but there's no reason to prevent me from saying so in my opening statement or in my closing, as that's my theory of the case. The defense is free to say otherwise in their theory of the case.

Regarding self-defense on count one, count one does not criminalize the use of force. That there was a fatality is an enhancement. It's a class three if someone's injured. It's a class two if there's a fatality. But the actual crime is not whether she killed someone or not. The crime is leaving the scene, failure to remain at the scene. It does not indicate force at all. Use of force is not justified for that.

Even if self-defense was justified in this case, she had a duty to contact the police as soon as she was reasonably safe. That could have been an hour later. That could have been as soon as she left the scene. Instead, she contacted her friend and indicated that shit went down at Circle K. She had a phone. She could have done this, but she did not. Self-defense does not apply to count one, a count that does not criminalize the use of

force.

THE COURT: All right. With regards to the self-defense instruction, the Court does find that counts one and two do not -- self-defense would not apply to those two counts. And so that jury instruction as requested by the State will be allowed.

As to the other jury instruction, I think I'm going -- which is 4.08 and the modification of 4.08, I will reserve judgment on that until the evidence has been presented in court -- or during trial, and then I'll make my decision as we're finalizing the final jury instructions. I think it's a little premature for me now without all the evidence being presented in -- in court for me to make a determination as to whether or not that is an appropriate jury instruction. So I will withhold my ruling on that for now.

Now, I have received -- so I think that's all the outstanding motions. Is that correct?

MR. DAVIS-SALSBURY: I think so.

THE COURT: Mr. Padilla.

MR. PADILLA: I think so, Your Honor. Is the Court gonna rule on my request to preclude the State from using the word "steal" on the vehicle?

THE COURT: Do you want to make argument on that now?

MR. PADILLA: Well, I thought I had, but let me say this: An allegation, especially one accusing of a theft, has to

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA, Plaintiff, vs. TIA LYN NICOLE SULU-KERR, Defendant.	)	No. S1400CR202100038 1 CA-CR 22-0565

BEFORE THE HONORABLE BRANDON S. KINSEY
JUDGE OF THE SUPERIOR COURT
DIVISION 6
YUMA, ARIZONA

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Jury Trial Day Five
(Instructions/Argument/Verdict)
June 16, 2022

PREPARED BY:

Dana Peabody, CR, RDR, CRR
Certified Reporter
AZ CCR 51009

would observe in the situation.

The distinction between manslaughter and negligent homicide is this: For manslaughter, the defendant must have been aware of a substantial risk and consciously disregarded the risk that her conduct would cause death.

Negligent homicide only requires that the defendant failed to recognize the risk.

"Justification For Self-Defense." A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:

One, a reasonable person in this situation would have believed that physical force was immediately necessary to protect against another's use or apparent, attempted, or threatened use of unlawful physical force; and, two, the defendant used or threatened no more physical force than what would have appeared necessary for a reasonable person in the situation.

A defendant must use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force.

Self-defense justifies the use or threat of physical force or deadly physical force only when the apparent danger continues and it ends when the apparent

danger ends.

The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of physical force is justified if a reasonable person in this situation would have reasonably believed that immediate physical danger appeared to be present.

Actual danger is not necessary to justify the use of physical force in self-defense.

You must decide whether a reasonable person in a similar situation would believe that physical force was immediately necessary to protect against another's use, attempted use, threatened use, apparent attempted use, or apparent threatened use of unlawful physical force or you must measure the defendant's belief against what a reasonable person in this situation would have believed.

The threat or use of physical force is not justified:

One, in response to verbal provocation alone; two, to resist an arrest that the defendant knew or should have known was being made by a peace officer or by a person acting in a peace officer's presence and at the peace officer's direction, whether the arrest was

lawful or unlawful, unless the physical force used by the peace officer exceeded that allowed by law; or, three, if the defendant provoked the other's use of unlawful physical force unless:

A, the defendant withdrew from the encounter or clearly communicated to the other person the defendant's intent to withdraw reasonably believing that the defendant could not withdraw from the encounter; and, B, the other person, nevertheless, continued or attempted to use unlawful physical force against the defendant.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification.

If the State fails to carry this burden, then you must find the defendant not guilty of the charge.

"Justification For Self-Defense Physical Force." A defendant is justified in using or threatening deadly physical force in self-defense if the following two conditions existed:

One, a reasonable person in the situation would have believed that deadly physical force was immediately necessary to protect against another's use, or apparent attempted or threatened use, of unlawful deadly physical force; and, two, the defendant used or threatened no more deadly physical force than would have appeared

necessary to a reasonable person in the situation.

A defendant may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force.

Self-defense justifies the use or threat of deadly physical force only while the apparent danger continues and it ends when the apparent danger ends.

The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of deadly physical force is justified if a reasonable person in this situation would have reasonably believed that immediate deadly physical danger appeared to be present.

Actual danger is not necessary to justify the use of deadly physical force in self-defense.

You must decide whether a reasonable person in a similar situation would believe that deadly physical force was immediately necessary to protect against another's use, attempted use, threatened use, apparent attempted use, or apparent threatened use of unlawful deadly physical force.

You must measure the defendant's belief against what a reasonable person in this situation would have

believed.

The defendant has no duty to retreat before threatening or using deadly physical force in self-defense if the defendant:

One, had a legal right to be in the place where the use or threatened deadly physical force and self-defense occurred; and, two, was not engaged in an unlawful act at the time when the use or threatened deadly physical force in self-defense occurred.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification.

If the State fails to carry this burden, then you must find the defendant not guilty of the charge.

"Justification For Defense of a Third Person." A defendant is justified in using or threatening physical force in defense of a third person if the following two conditions exists:

One, a reasonable person in the situation would have believed that physical force was necessary to protect against another's use, attempted use, apparent attempted use, or threatened use of unlawful physical force against a third person; and, two, the defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in this

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA, Plaintiff, vs. TIA LYN NICOLE SULU-KERR, Defendant.	)	No. S1400CR202100038 1 CA-CR 22-0565

BEFORE THE HONORABLE BRANDON S. KINSEY
JUDGE OF THE SUPERIOR COURT
DIVISION 6
YUMA, ARIZONA

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Jury Trial Day Five
(Instructions/Argument/Verdict)
June 16, 2022

PREPARED BY:

Dana Peabody, CR, RDR, CRR
Certified Reporter
AZ CCR 51009

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The distinction between manslaughter and negligent homicide is this: For manslaughter, the defendant must have been aware of a substantial risk and consciously disregarded the risk that her conduct would cause death.

Negligent homicide only requires that the defendant failed to recognize the risk.

"Justification For Self-Defense." A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:

One, a reasonable person in this situation would have believed that physical force was immediately necessary to protect against another's use or apparent, attempted, or threatened use of unlawful physical force; and, two, the defendant used or threatened no more physical force than what would have appeared necessary for a reasonable person in the situation.

A defendant must use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force.

Self-defense justifies the use or threat of physical force or deadly physical force only when the apparent danger continues and it ends when the apparent

danger ends.

The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of physical force is justified if a reasonable person in this situation would have reasonably believed that immediate physical danger appeared to be present.

Actual danger is not necessary to justify the use of physical force in self-defense.

You must decide whether a reasonable person in a similar situation would believe that physical force was immediately necessary to protect against another's use, attempted use, threatened use, apparent attempted use, or apparent threatened use of unlawful physical force or you must measure the defendant's belief against what a reasonable person in this situation would have believed.

The threat or use of physical force is not justified:

One, in response to verbal provocation alone; two, to resist an arrest that the defendant knew or should have known was being made by a peace officer or by a person acting in a peace officer's presence and at the peace officer's direction, whether the arrest was

lawful or unlawful, unless the physical force used by the peace officer exceeded that allowed by law; or, three, if the defendant provoked the other's use of unlawful physical force unless:

A, the defendant withdrew from the encounter or clearly communicated to the other person the defendant's intent to withdraw reasonably believing that the defendant could not withdraw from the encounter; and, B, the other person, nevertheless, continued or attempted to use unlawful physical force against the defendant.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification.

If the State fails to carry this burden, then you must find the defendant not guilty of the charge.

"Justification For Self-Defense Physical Force." A defendant is justified in using or threatening deadly physical force in self-defense if the following two conditions existed:

One, a reasonable person in the situation would have believed that deadly physical force was immediately necessary to protect against another's use, or apparent attempted or threatened use, of unlawful deadly physical force; and, two, the defendant used or threatened no more deadly physical force than would have appeared

necessary to a reasonable person in the situation.

A defendant may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force.

Self-defense justifies the use or threat of deadly physical force only while the apparent danger continues and it ends when the apparent danger ends.

The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of deadly physical force is justified if a reasonable person in this situation would have reasonably believed that immediate deadly physical danger appeared to be present.

Actual danger is not necessary to justify the use of deadly physical force in self-defense.

You must decide whether a reasonable person in a similar situation would believe that deadly physical force was immediately necessary to protect against another's use, attempted use, threatened use, apparent attempted use, or apparent threatened use of unlawful deadly physical force.

You must measure the defendant's belief against what a reasonable person in this situation would have

believed.

The defendant has no duty to retreat before threatening or using deadly physical force in self-defense if the defendant:

One, had a legal right to be in the place where the use or threatened deadly physical force and self-defense occurred; and, two, was not engaged in an unlawful act at the time when the use or threatened deadly physical force in self-defense occurred.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification.

If the State fails to carry this burden, then you must find the defendant not guilty of the charge.

"Justification For Defense of a Third Person." A defendant is justified in using or threatening physical force in defense of a third person if the following two conditions exists:

One, a reasonable person in the situation would have believed that physical force was necessary to protect against another's use, attempted use, apparent attempted use, or threatened use of unlawful physical force against a third person; and, two, the defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in this

situation; three, a defendant may use deadly physical force in defense of a third person only to protect against another's use, attempted use, apparent attempted use, or threatened use of deadly physical force.

Defense of a third person justifies the use or threat of physical force or deadly physical force only while the danger continues and it ends when the danger ends.

The force used may not be greater than reasonably necessary to defend against the danger.

Actual danger is not necessary to justify the use of physical force or deadly physical force in defense of a third person.

The use of physical force or deadly physical force is justified if a reasonable person in this situation would have reasonably believed that immediate physical danger appeared to be present.

You must decide whether a reasonable person in a similar situation would believe that:

One, physical force was necessary to protect against another's use, attempted use, apparent attempted use, or threatened use of unlawful physical force against a third person; two, deadly physical force is necessary to protect against another's use, attempted use, apparent attempted use, or threatened use of

unlawful physical force against a third person.

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification.

If the State fails to carry this burden, then you must find the defendant not guilty of the charge.

"Non-Standard Jury Instructions, Self-Defense." You may consider the instructions for self-defense as to Counts 3 and 4 alone.

Okay. Mr. Davis-Salsbury, are you prepared to give your closing arguments?

MR. DAVIS-SALSBURY: Yes.

THE COURT: You may proceed.

MR. DAVIS-SALSBURY: All right. So all that makes perfect sense, right?

I'm going to take time now to try and ease you through the next step of this process.

What happens after closing arguments is the judge is going to give you two more instructions, and you're going to go into the jury room, and you're going to have to make decisions in this case.

When you do, the first thing that's going to

App. 6 Petitioner's Opening Brief to the Arizona Court of Appeals

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, v. **TIA LYN SULU KERR,** Appellant.	No. 1 CA-CR 22-0565 Yuma County Superior Court No. S1400CR202100038

APPELLANT'S OPENING BRIEF

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Two: The trial court improperly instructed the jury that a violating her statutory duty to provide information and to render aid at an injury accident, alone, could allow a jury to convict Tia for her Failure to Remain at the Scene involving Death in A.R.S. §28-661.

Three: The jury returned inconsistent verdicts that were mutually exclusive.

Four: The Failure to Immediately Stop, the Aggravated Assault and Negligent Homicide statutes are considered one "act" and must be imposed concurrently with each other pursuant to A.R.S. §13-116.

Statement of Facts and Statement of the Case.

This tragic accident began with two adult brothers, Michael Beltran, the deceased, and John Beltran accosting the appellant, Tia Nicole Sulu Kerr, and her passenger, Michael Yount when Tia stopped at a Yuma Circle K to get gas at approximately 4:00 in the morning. This incident occurred on July, 22, 2020, within Yuma County, Arizona.

The deceased, Michael Beltran and his brother John had been burglarizing a self-serve car wash that was immediately west of the Circle K. They were breaking into the coin machines at the car wash by using bolt cutters. John saw the vehicle that Tia was driving as she pulled into the Circle K and he believed that it was the same one that had been taken from his sister by a friend of Tia's, Amber Rodriguez. Tia and John did not know each other.

In fact, the vehicle was the one that Ms. Rodriguez had taken while in Winterhaven, California, several weeks before this incident. (R.T. Day 2, p. 14, lns. 2-10). The registered owner of the Ford was John's deceased wife. Instead of calling the police or confirming that the vehicle was not in the occupant's ostensibly valid possession, the brothers decided to rush the vehicle and accost the driver and any occupant in an attempt to take the car by force or threats. John was by the driver's side and Michael at the passenger window.

Tia was startled by the sudden attack. She had not even been able to open her car door for gas before the brothers were at the doors, yelling and demanding that she surrender the vehicle. (R.T. Day 4, p. 21). Although the large bolt cutter was not in his hand, the victim, Michael, had some object that the passenger and Tia believed was a firearm or other weapon that threatened their lives. (R.T. Day 3,p. 61, lns. 10-11). Mr. Yount indicated that he was afraid for his life (R.T. Day 4, p. 22-23, lns. 14-7).

Tia accelerated the vehicle, although it was not known exactly how fast she was going. Michael Beltran, unfortunately, found himself underneath the vehicle and suffered a fatal head injury. (R.T. Day 3, page 40, lns. 19-24). Tia, who feared for her safety (R.T. Day 3, p. 61, lns. 10-11) and that of her passenger from the two Beltran brothers' actions did not stop at the scene or call 9-1-1. After approximately 30 days, Tia did contact the police at the police station and was interviewed about the accident. (R.T. Day 3, p. 56-57, lns. 17-5)

At trial, the State called Ms. Rodriguez to testify. She was facing her own charges for the theft of the vehicle, and her sentencing was scheduled for after the trial. (R.T. Day 2, p. 27, lns. 9-22). Ms. Rodrigues admitted that she loaned Tia the vehicle that day, and she testified that she thought she may have told Tia that the car was stolen. Ms. Rodriguez did admit that she was too far into her (addiction, sic) to remember that claim. (R.T. Day 2, p. 18, lns. 11-15). Ms. Rodriguez told the jury that Tia returned the Ford Flex to a gas station near Ms. Rodriguez's house and that she retrieved the vehicle at that gas station and drove it to the casino where it was later discovered. (R.T. Day 2, p. 20-22, lns. 25-1).

Ms. Rodriguez also claimed that she saw news articles regarding the accident and "believed" that she talked to Tia about them. (R.T. Day 2, p. 22, lns. 20-25). The State asked for and received permission from the trial court to show the jury the internet story regarding the incident in order to show that Tia knew about the incident but never reported her involvement until nearly a month later. (ROA 56).

Amber testified that Tia told her that she had tried to leave the area when she was accosted because she felt that her life was in danger. (R.T. Day 2, p 23, lns. 6-12). Tia texted Ms. Rodriguez that she got mobbed up and that someone jumped in the side of her vehicle. (R.T. Day 2, p. 27-28, lns. 23-14).

Joseph Coe, an employee at the Circle K, testified that he did not see anything himself, but authenticated the video footage from the store. Although he did not identify the item, he agreed that it looked like one of the brothers had something in his hand. (R.T. Day 2, p. 47, lns. 1-13).

The authorities found the car at a nearby casino and contacted Amber Rodriguez. (R.T. Day 3, p. 22-23, lns. 7-4). She admitted that taking the vehicle without permission. She did not know to whom the vehicle belonged but had arranged for a ride to California with her friend Eva Rich. Eva was the sister of John's deceased wife. (R.T. Day 2, p. 13-14, lns. 16-15).

Tia was eventually indicted for four crimes. (ROA 1). Count One was for failing to stop at the scene of an accident involving death in violation of A.R.S. §28-661. Count Two alleged that she controlled another's means of transportation having reason to know that it was stolen in violation of A.R.S. §13-1814(A)(5). Count Three alleged she committed aggravated assault against the victim by using a deadly weapon or dangerous instrument in violation of A.R.S. §13-1204(A)(2). The final count against Tia alleged she committed manslaughter for recklessly causing the death of Michael Beltran, in violation of A.R.S. §1103(A)(1).

Before trial, the State filed many pretrial motions. One of the motions asked for a special jury instruction that any justification of self-defense would not apply to the first

two counts for Failing to Remain at the Accident Scene and for Theft of the means of transportation. (ROA 41). The trial court granted those motions. (ROA 56).

On the fifth day of trial, the jury returned guilty verdicts on three of the original four counts. (ROA 78-80). For the fourth count, the jury could not reach a verdict of reckless manslaughter. It then convicted Tia for the lesser included crime of negligent homicide for that same act. (ROA 81). Before reaching its verdicts, the jury asked for the court to define the term "retreat." (ROA 86). The trial judge responded that the jury should use the ordinary and common meaning and not to do any research outside of the evidence.

On November 8th, 2022, the trial court pronounced Tia's sentence. (ROA 105). It imposed five years in prison for count one, "Leaving the scene of an Injury of Fatal Accident". She received 3.5 years for count two for the Theft of Means of Transportation. The Aggravated Assault charge in count three netted Tia 7.5 years in prison, where the Negligent Homicide charge resulted in six years in the Department of Corrections. Counts two through four were concurrent with each other, but consecutive to count one for Failing to Stop at the Accident Scene.

Tia timely filed this Notice of Appeal. (ROA 107).

Issue One: Tia was denied her justification of self-defense at trial in three ways. First, the prosecutor lessened his burden of proof by focusing the jury

on Tia's subjective motivations instead of using the objectively reasonable person standard. Second, the prosecutor incorrectly argued to the jury that Tia's engaging in a passive "unlawful act" gives her a duty to retreat before she can claim any justification for self-defense. Third, the court improperly limited self-defense to the aggravated assault and manslaughter charges.

A. The State improperly argued to the jury that Tia's subjective motivation for her actions must be for self-defense. The standard is objective applying the standard of a reasonable person. By arguing that any subjective reason invalidates an otherwise reasonable person;s reaction, the prosecutor violated Tia's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitutions, and Art. 2, §§ 4 and 24 of the Arizona Constitution.

Standard of Review Fundamental Error. If (*the defendant*) objected, we review for harmless error; if not, we review only for fundamental error. *State v. Gallardo* 225 Ariz.560, 568, ¶35 (2010). As part of fundamental error, unless the error is egregious, a defendant must show that ". . . without the prosecutor's mischaracterization of the reasonable-doubt standard, "'a reasonable jury could have plausibly and intelligently returned a different verdict.'" *State v. Murray*, 250 Ariz. 543, 550, ¶30 (2021).

1. The State committed error by telling the jury that Tia's subjective motives for driving away from the Circle K would negate any objective reasonable person standard.

The state improperly argued that Tia's subjective state of mind controlled whether she could avail herself of the justification of self-defense under A.R.S. §13-404. The prosecutor described a reasonable reaction that a reasonable juror, or even himself, might undertake after being accosted in the early morning hours by two strangers. Despite this objectively reasonable standard, the prosecutor argued it would not apply because Tia's subjective motive was to escape prosecution. He incorrectly told the jury to examine Tia's state of mind and not evaluate the evidence from an objectively reasonable person.

> And many of you might put yourself in her shoes, and you're going to have to because that's what the instruction tells you to do, **a reasonable person in that situation. So you might be thinking** if I was driving my vehicle and if I pulled into the Circle K and it's about 4:00 in the morning, 4:50 in the morning, and two men come out of nowhere and approach me and start yelling at me and start banging on my vehicle, **I'm gone. Many of you, if not all of you, probably would do that. I certainly would.** What's different, though? The difference is this is not her vehicle. **She's driving a stolen vehicle. So what's actually going**

on through her head? Is it that I'm afraid for my life or is it I'm driving a stolen vehicle, and there's the owners?

(R.T. Day 5, p. 46, lns. 12-25)

The State continued its theme that its two proposed rationales for Tia's action in driving away were mutually exclusive and that any other motive for driving negated Tia's justification of self-defense. In its last words to the jury in its closing, it told them the following,

> It's because the **real reason this happened is because she was in a stolen vehicle**. That's what the evidence shows, and that's what I present to you.
>
> And if you believe that I proved that beyond a reasonable doubt, then this wasn't self-defense. Because she wasn't afraid for her life. She was afraid of getting caught. I have to disprove that. If you find that the reason for the story is nonsense; that her actions showed that everything in this case shows you to know that **she was in the stolen car and she knew and that's why she ran and that's why she did these things, then you should find her guilty on both aggravated assault and manslaughter.**

(R.T. Day 4, p. 50-51, lns. 16-3).

Neither the prosecutor nor the court in its instructions ever clarified to the jury that self-defense does not rely on the subjective motive for a defendant's actions. *State v. King*, 225 Ariz. 87 (2010). In *King*, the Arizona Supreme Court made it clear that a defendant's "fear of imminent harm" does not need to be the sole motivation by Tia. *Id.*, at 90, ¶10 -12.

Even though not binding authority the Revised Arizona Jury Instructions cite *King* and specifically instruct the reader that ". . . (t)he court **rejected any instruction that suggest or requires** that a defendant's fear of imminent harm be the sole motivation for employing self-defense." RAJI (Criminal 5th), p.61.

This improper argument by the prosecutor constituted reversible error, even if there was no contemporaneous objection by Tia. First, this argument affected Tia's right to a fair trial. In suggesting to the jury that any other motivation other than self-defense would negate an otherwise valid justification, the prosecutor thereby lowered the objective standard of a reasonable person and lessened the state's burden to prove beyond a reasonable doubt that the justification did not apply. There was no jury instruction or other argument that corrected the improper impression that the prosecutor gave to the jury. (". . . We are unpersuaded that the court's admonition to the jury not to treat the lawyers' arguments as evidence has any prophylactic or curative value where the prosecutor's comments mischaracterize the law rather than the evidence." *Murray*, supra, at ¶39 (emphasis added).

2. The State's Argument was fundamental error as it went to the foundation of Tia's case, took away a right essential to her defense and was of such a magnitude that Tia could not have received a fair trial. *State v. Riley*, 248 Ariz. 154, 170, ¶24 (2020).

a. Error occurred from both the prosecutor's closing statements and the trial court's failure to adequately instruct the jury once the improper argument was made by the state.

As explained above, the prosecutor's closing argument was erroneous. However, the court was under its own obligation to instruct the jury regarding the proper interpretation of the law once the prosecutor lowered its own burden of proof. Courts may "instruct a jury. . . to minimize the risk that a jury will base its verdict on an erroneous legal assumption." *Id.*, at 179, ¶84. Here, the legal assumption that self-defense must be the sole motivator is an erroneous, the consideration for the jury is an objectively reasonable person.

b. The Error was Fundamental

Self-defense was the foundation of Tia's case. Reasonable doubt is a right essential to that defense. If the jury is not instructed or aware of the correct law on self-defense Tia could not receive a fair trial if the jury uses a standard less than

beyond a reasonable doubt when it considers whether the state proved that the justification defense was not valid. *Murray*, supra, at 546, ¶1.

c. This Error Resulted in Legal Prejudice

Further, Tia suffered prejudice from this improper argument by the prosecutor. The instructions by the court did not address the subjective motivation inaccuracy. *Id.*, at ¶¶ 26-28 and 34-39. It was not a passing comment by the state; the prosecutor directly told the jurors to set aside their beliefs as to the reasonableness of Tia's actions if Tia had any other motive for driving away from the Circle K. This focused the jury on Tia's subjective motivations and away from the required objective test. The only question for the jurors was whether Tia's actions were reasonable given the circumstances, not what were her actual subjective motives.

The jurors very reasonably could have ignored the self-defense argument because it felt that the primary subjective motive was for her to escape a committed crime, not whether her actions were objectively reasonable despite any subjective motive. There was a "'reasonable likelihood' that the 'misconduct could have affected the jury's verdict.'" *State v. Newell*, 212 Ariz. 389, 403 ¶67 (2006).

When a prosecutor lessened his burden of proof he took away one of the bedrock principles underlying the criminal justice system. *Murray,* supra, at ¶37. Both the

aggravated assault charge and the negligent homicide charge should be reversed and remanded for a new trial on this misstatement of the law of self-defense, alone.

B. The Prosecutor improperly told the jury that Tia could not utilize the self-defense justification because she first had a duty to retreat since she was "engaged in an unlawful act" at the time she struck the victim with the vehicle. This violated Tia's right to a fair trial under due process of the *Fourteenth Amendment* of the United States Constitution and Art. 2, §4 of the Arizona Constitution. Further, it violated her right to self-defense under both the *Second Amendment* to the United States Constitution and Art. 2, §26 of the Arizona Constitution.

Standard of Review: De novo. Interpreting rules, statutes, and constitutional provisions raises questions of law, which we review de novo.

State v. Hansen, 215 Ariz. 287, 289, ¶6 (2007).

The prosecutor incorrectly placed a burden on Tia to "retreat" before she could validly argue that she was justified in striking the victim with her car in self-defense. The prosecutor made the following argument to the jury in his closing argument.

> A defendant has no duty to retreat before threatening or using deadly physical force if . . . they were not engaged in an unlawful act at the time. If you believe she knowingly was in possession of a stolen

vehicle, that she is guilty of Count 2, then she is committing an unlawful act at this time, in which case she had a duty to retreat. She had to choose to run before she chose to run him over.

R.T. Day 5, p. 47, lns. 4-12.

Tia has not found any Arizona case directly addressing this part of the statute. However, when looking at all of the self-defense statutes in effect at the time of the incident indicates that the intent of the legislature is that "the unlawful act" should not apply to those acts which should not provoke the victim's immediate physical force.

Before the modern criminal code, Arizona law recognized a "claim of right" self-help defense. *Bauer v. State*, 45 Ariz. 358 (1935). This defense has been criticized in three Arizona Appellate decisions from both divisions. *State v. Lewis*, 121 Ariz. 155 (App. 1978); *State v. Schaefer*, 163 Ariz. 626 (App. 1990); *State v. Bonser*, 128 Ariz. 95 (1981). More recently, the Arizona Court of Appeals noted that the Arizona Supreme Court "'has not yet considered'" whether the earlier "claim of right" defense survived the enactment of the new criminal code. *State v. Dansdill*, 246 Ariz. 593, 600, ¶21 (2019).

Dansdill questioned whether a defendant's self-help remedy for perceived stolen property can be a defense to a robbery charge. *Id.*, at ¶21. But that case

recognized that the manner in which self-help remedies occur can violate other criminal statutes, regardless of whether a "robbery" occurred. ("(V)iolent efforts to collect a debt or one's own property, even if not robbery due to a lack of requisite intent, would still be punishable as assault crimes." *Id.*, at ¶21)).

Here, the self-defense statute in A.R.S. §13-404(B)(3) indicates the legislature's intent that passive crimes that do not immediately provoke the victim's threatened response are not the types of crimes which require a victim to first retreat before utilizing self-defense. That self-defense provision provides that physical force may not be used to justify self-defense if the defendant "provoked" the victim's response. Tia's mere presence sitting in a stolen vehicle that had long before been taken from any victim should not give a perceived victim the right to forcibly attempt to take back the vehicle. This should apply whether or not Tia knew the vehicle was stolen at the time.

If the state's argument was correct it would produce absurd and unintended results. For instance, under the prosecutor's argument, a trespasser in an abandoned residential property would be required to first retreat when confronted with deadly force by another trespasser. The prosecutor's argument could even apply to a situation where a defendant in a street encounter would be required to retreat merely because he or she simply possessed a personal use amount of an illegal substance.

The legislature's intent for this situation regarding retreat was best addressed in a different justification statute specifically addressing "car-jacking." A.R.S. §13-418 applies to occupied vehicles where there is a forcible attempt to enter it. This statute clearly indicates that there is no duty to retreat. A.R.S. §13-418(B). Even if this particular instruction was not offered to the court as part of its jury instruction request, the prosecutor should not be permitted to argue a position directly contrary to law.

> In evaluating the potential impact of a prosecutor's statements on a jury, we must be mindful that a prosecutor is the spokesperson for the state, an entity whose goal is to see justice done. For this reason, a prosecutor's remarks carry special prestige. *(citation omitted)* ((P)rosecutor's remarks "must be particularly scrutinized" as "`great potential for jury persuasion ... arises because the prosecutor's personal status and his role as a spokesman for the government tend to give what he says the ring of authenticity'" (quoting *Hall v. United States,* 419 F.2d 582, 583-84 (5th Cir. 1969))).

Dansdill, supra, at ¶31.

Further, as more fully developed elsewhere in this brief, an interpretation limiting the duty to retreat raises constitutional issues regarding

self-defense under the *Second Amendment* and Art. 2, §26 of the Arizona Constitution.

The error was fundamental and it prejudiced Tia. The jury clearly considered whether she had a duty to retreat as it asked for further instruction on what the definition of retreat entailed. (R.T. Day 5, p. 88, lns. 17-25). The prosecutor improperly lowered his burden of proof of proving that Tia's actions were not justified when he argued that Tia first had an affirmative duty to retreat from the encounter before she could utilize any self-defense justification because of her "unlawful act."

C. Self-defense is a legal justification to Leaving the Scene of an Injury Accident. The self-defense instruction should have been given to the jury to consider as a justification to the Leaving the Scene of an Injury Accident charge. The trial court's instruction that self-defense only applied to the aggravated assault and manslaughter charges violated Tia's right to a fair trial under the Fourteenth Amendment to the United States Constitution and Art. 2, §4 of the Arizona Constitution.

Standard of Proof: Harmless Error. Harmless error review . . . applies in cases in which the defendant properly objects to non-structural error. (citation omitted). A reviewing court will affirm a conviction despite the error if it is harmless, that is, if

the state, "in light of all of the evidence," can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict.

State v. Valverde, 220 Ariz. 582, 585, ¶11 (2009).

The State requested that the court instruct the jury that the justification of self-defense did not apply to the charge that Tia did not immediately stop at the accident scene. (ROA 41). The court granted the State's request. (R.T. Day 4, p. 39, lns. 2-6). The State erroneously but successfully argued to the trial court that since leaving the scene of an injury accident only involved the leaving of an accident scene self-defense would not apply to that charge. (R.T. Day 4, p. 38, lns. 12-18). Based on the trial court's ruling on this issue, Tia did not object to the jury instructions on self-defense. (R.T. Day 4, p. 69, lns. 18-25).

The court incorrectly assumed that the justification of self-defense does not apply to the leaving the scene of an injury accident because it does not apply to Title 28 traffic crimes. It did not cite any cases to support its position. Tia's research has shown that the justification of necessity under A.R.S. §13-417 purportedly does not apply to traffic laws, but that does not mean that the same analysis applies to the justification of self-defense. In *State v. Fell*, the court of appeals only held that the justification of *necessity* does not extend to Title 28 criminal charges. 203 Ariz. 186,

190, ¶14 (2002). However, for two separate reasons that ruling would not apply to this factual scenario where Tia alleged the justification of *self-defense*.

1. The necessity defense and self-defense are significantly different.

The necessity defense by its terms does not apply to offenses involving homicide or serious physical injury. A.R.S. §13-417(C). The self-defense justification does apply to those two results. It allows anyone, not just a driver, to justify otherwise illegal forceful conduct, even if serious injury or death results.

The *Fell* court rationalized that the phrase in A.R.S. §13-401(B) purporting to limit justification defenses to "this title" exclusively expressed a legislative intent to limit all of the justification defenses only to crimes encompassed in Title 13 statutes. It held that A.R.S. §13-401(B) overrode that of A.R.S. §13-102 (D). It further claimed that A.R.S. §13-102(D) did not apply to defenses outside of the criminal code because it did not involve construction or punishment. *Fell*, supra, at 188, ¶8. It made a conclusory statement of statutory interpretation in which it found that there was clear legislative intent to limit the reach of all justification defenses. *Id.*, at 221, ¶9.

However, there are two reasons why this analysis is wrong when applied to self-defense. First, the decision incorrectly found that justification defenses do not

implicate the construction of and punishment for offenses outside of Title 13 criminal offenses, to which A.R.S. §13-102 (D) applies. Justifications in Chapter 4 of Title 13 excuse an otherwise illegal act; thus, they implicitly involve both the construction and the punishment of criminal acts wherever in the Arizona Revised Statutes they are found, even if it does not do so directly. Relatedly, A.R.S. §13-401(B) does not expressly prohibit applying the defenses outside of the context of criminal acts in Title 13. For instance, can a driver speeding his pregnant wife to the hospital not invoke the necessity defense to a criminal speeding charge in Title 28?

Second, self-defense should not be limited to Title 13 offenses, especially when a mental state is involved. *Fell's* express holding only applied to a necessity defense in relation to a Driving Under the Influence Charge, a crime that has no mental state for its violation. Here, the leaving the scene of an injury accident involves knowledge of the injury which involves a conscious decision on whether the risk of staying outweighs the reward of leaving. *State v. Porras*, 125 Ariz. 490 (App. 1980). That is a different situation than a strict liability defense which prohibits placing the general public at risk of harm by a driver's decision.

2. Limiting the right to self-defense to only crimes contained in Title 13 infringes on Tia's individual right to defend herself embodied in the United States and Arizona Constitutions.

Another reason for not applying the *Fell* decision to a self-defense justification is self-defense's constitutional basis. The right to protect oneself is inherent in the United States Constitution, *Second Amendment*.

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in ((*District of Columbia v. Heller*), (554 U.S. 570 (2008)), we held that individual self-defense is "the *central component*" of the Second Amendment right.

McDonald v. City of Chicago, Ill, 561 U.S. 742, 758 (2010) (full citation added).

This right to self-defense is separately embodied in the Arizona Constitution in its right to bear arms provision.

> The right of the *individual citizen* to bear arms *in defense of himself or the State* shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

Arizona Constitution, Art. 2, §26

Fell did not address how the legislature would be able to infringe on constitutional rights that are embodied in the United States and Arizona

Constitutions. It is not clear, as asserted in *Fell*, that the legislature intended to limit A.R.S. §13-401(B) all justification defenses exclusively to crimes defined in Title 13.

Providing this limitation on the right to defend oneself because it only infringed on a traffic citation violates these federal and state constitutional protections. While this right is not absolute, there must be an appropriate balance between the citizen's rights and the "state's duty, under the police power to make reasonable regulations to protect the health, safety and welfare of its citizens. . . . ." *Dano v. Collins*, 166 Ariz. 322, 325 (1990).

Dano addressed the constitutionality of Arizona's then prohibition on individual citizens carrying concealed weapons. That decision was based on a law that the legislature subsequently changed and was issued long before the individual rights were expressly found in *Heller* and *McDonald*. The appropriate balance indicated by *Dano* is now weighted more heavily toward an individual's right to self-defense given the changes to Arizona citizens' rights to bear arms since *Heller* and *McDonald*. Any legislative attempts to limit that right must be skeptically analyzed in favor of the individual's right to defend oneself.

3. The crime charged for Leaving the Scene of an injury accident necessarily involves a physical accident to which self-defense may attach.

In order to violate the Failure to Stop at the Scene of an Injury Accident statute, the prohibition is not to immediately stop at the scene or as close as possible. A.R.S. § 28-661(A)(1). But criminal liability first depends on an act by a driver that results in an accident. Without an accident, none of the Title 28 requirements to stop, give information or render aid arise.

The prosecutor in his argument to the trial court mischaracterized the leaving the scene statute as not only involving the driver's leaving the accident scene but also failing to report the accident. He claimed that A.R.S. § 28-661criminalized not failing to remain at the scene but separately failing to call emergency dispatch at 9-1-1. As explained elsewhere in this brief, the driver's duty to remain only attaches to an accident, and if the driver felt threatened he or she can justify leaving the scene and not returning immediately. The State attempts to divorce the two acts, but the legality of the second (not stopping) depends on the occurrence of the first (an accident). Arizona self-defense statutes would attach to the failing to remain and they are not so limited to only apply within Title 13 crimes.

A second reason undercuts the *Fell* analysis. The legislature has given an indication that self-defense can apply to situations involving automobiles. After *Fell*, the legislature passed additional specific self-defense statutes that anticipated justification defenses being applied when an automobile is involved. Specifically, A.R.S. §13-418 and A.R.S. §13-419 both apply to occupied vehicles. The legislature

has at least undermined if not completely gutted the *Fell* analysis which found the legislature's clearl intention to limit the reach of all justification defenses In fact, the legislature specifically adopted a law that purportedly applies to this exact factual scenario; i.e. an apparent carjacking. A.R.S. §13-418. Limiting the justification of self-defense in this scenario appears directly contrary to more recent legislative intent. *Fell*, if not overruled, should at least be limited to the specific necessity defense at issue in that case.

Issue Two: The trial court improperly instructed the jury that by violating her statutory duties under A.R.S. §28-663 to provide information and to render aid at an injury accident, alone, could allow a jury to convict Tia for her Failure to Remain at the Scene involving Death in A.R.S. §28-661.

Standard of Review: Harmless Error. Reviewing courts consider alleged trial error under the harmless error standard when a defendant objects at trial and thereby preserves an issue for appeal (citations omitted). . . . Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence. (citation omitted).

State v. Henderson, 210 Ariz. 561, 566, ¶18 (2005).

Tia challenged the court's instruction regarding the elements of A.R.S. §28-663. She argued that all of the elements were required to meet that statute. The court and

ruled that failure to provide any one of those elements resulted in a violation of A.R.S. §28-663. (R.T. Day 4, p. 17, lns. 2-7). What the trial court failed to recognize is that while complying with A.R.S. §28-663 is described in A.R.S. §28-661, that information and rendering aid statute applies only for those who would otherwise not violate the leaving the accident statute if he or she immediately stopped or returned to the accident scene. That particular statute of A.R.S. §28-663 is only guidance under A.R.S. §28-661 for when a driver's obligation under A.R.S. §28-661 to immediately stop or immediately returns ends. *State v. Powers.* 200 Ariz. 363, ¶8 (2001). It is not an actual element of the crime of A.R.S. §28-661.

Tia's failure to exchange information, exhibit her driver's license or to render aid to the injured person was, at most, a violation of A.R.S. §28-663, not A.R.S. §28-661. Her duty to give information and assistance in A.R.S. §28-663 applies in situations described in A.R.S. §28-661. It gives separate penalties for any violation for failing to give information and render assistance. A.R.S. §28-663(C)(D). Tia could not be found in violation of A.R.S. §28-661 if she only violated the provisions of A.R.S. §28-663, contrary to the trial court's interpretation.

The only stand-alone charge *for Failure to Stop* was A.R.S. §28-661. The requirements in A.R.S. §28-663 are themselves a stand-alone crime; failure to comply with any or all the elements result in either a class 6 felony or a class 1

misdemeanor. But failing to comply with A.R.S. §28-663 alone is not sufficient for a violation of A.R.S. §28-661.

1. The court misinterpreted the law relating to Failing to Stop at the Scene of an Injury Accident.

The trial court described its interpretation of A.R.S. §28-663 when it jousted with Tia's attorney as to what complying with A.R.S. §28-663 required.

> The statute (A.R.S. §28-663) is not that she must do all of those three things or she will—can be found guilty of the offense of leaving the scene of the accident. It says that she shall do each one of those three things. **If she does not do any one of those three things, then she can be found criminally liable for failure to remain at the scene of the accident.**

R.T. Day 5, p. 7, lns. 10-17.

The only charge against Tia relating to her not remaining at the accident scene was for the Class 2 felony offense. She was never separately charged with failing to exchange information or to render aid under A.R.S. §28-663. The trial court was clearly referring to Tia's guilt under A.R.S. §28-661 for any violation of A.R.S. §28-663.

2. The trial court's jury instruction misled the jury into believing that the failure to comply with A.R.S. §28-663, by itself, was sufficient to convict her for violating A.R.S. §28-661.

The crime under A.R.S. §28-661 is complete when the driver does not act immediately. However, the court instructed the jury that Tia was guilty if she did not immediately stop or return to the accident scene *or* if she violated any requirement of A.R.S. §28-663. R.T. Day 5, p. 18-19, lns. 15-1. (See also ROA 77, p. 8). This is not the law. *Powers*, supra, at ¶8.

Additionally, the prosecutor did not remedy this inaccuracy. As noted below, he repeatedly referred to Tia's failure to call the police and render aid as if it were sufficient by itself to convict her of the crime of failing to stop at the accident scene.

The prosecutor's emphasis to the jury to convict Tia because she did not render aid inflamed the passions of the jury. It increased the likelihood that Tia would be convicted of the specifically charged felony of A.R.S. §28-661 instead of any appropriate lesser charge of A.R.S. §28-663(A)(3) to which the "rendering aid" applied. ("This statute is leaving the scene without calling anybody, without rendering assistance, with giving her information." (R.T. Day 5, p. 33, lns. 9-11)).

The prosecutor continued making this argument, arguing that Tia's failure to fulfill motorist duties under A.R.S. §28-663 was sufficient to convict Tia for

violating A.R.S. §28-661. In doing so he inflamed the passions of the jury to an irrelevant non-element of the charge.

> But she had to do something else too. She had to fulfill the duties required by law.
>
> Now, what are those duties? Those are the ones that are down here. The duty to give information and assistance. She has to do three things: She has to give her name, address, and registration number. Shed didn't do that. She left. She drove away. She never called 9-1-1, she never flagged anybody down, she never did anything.
>
> What she did was she texted her friend. What she did was she left this man to die and left his brother seeing him laying on the ground with the hole in his head bleeding out with brain and bone visible. She left him to contact 9-1-1. . . .

(R.T. Day 5, p. 34, lns. 4-17).

Even analyzed under fundamental error, this erroneous jury instruction prejudiced Tia. The jury was led to believe that Tia's failure to call the police; hours, days or weeks later, and her failure to not attempt to render aid at the scene, was sufficient to find her guilty for failing to stop at the accident scene, not for failing to provide information. Because of the word "or" in the jury instruction it is impossible

to know if the jury convicted Tia because she did not immediately stop, for which she argued that she had a valid excuse under 28-661(A), or because she did not report her personal information or render aid. The error was certainly not harmless, and it would constitute prejudicial fundamental error, as well.

Issue Three: The aggravated assault charge must be dismissed as a matter of law because it was the result of a mutually exclusive verdict with the negligent homicide charge.

Standard of Review: De novo. "Because petitioners could not be indicted for first degree murder of a fetus *as a matter of law*, we hold that the trial court erred in refusing to dismiss this count as to both petitioners."

Vo v. Superior Court, 172 Ariz. 195, 206 (1992)(emphasis added).

The jury verdict finding Tia guilty of aggravated assault required, at a minimum, a state of mind of "reckless" conduct for the underlying assault. A.R.S. §13-1204(A), A.R.S. §13-1203(A)(1). Tia was additionally charged with manslaughter which, likewise, requires a mental state of "reckless" conduct. The jury specifically found that it could not reach a unanimous verdict on Tia's reckless state of mind for the manslaughter charge. (R.T., Day 5, p.94, lns. 3-6). It then convicted her of manslaughter's lesser included offense of negligent homicide (R.T., Day 4, p. 94, lns. 7-9), which required the lesser mental state of negligence. *State v. Fisher*, 141

Ariz. 227, 247-248 (1984). The jury convicted her for the aggravated assault charge (R.T. Day 5, p. 93, lns. 19-21). To find her guilty of this charge, at a minimum her state of mind had to be at least reckless, which was the same state of mind that it could not reach in the manslaughter count.

Generally, Arizona does not prohibit inconsistent verdicts. *Gusler v. Wilkinson*, 199 Ariz. 391, 396, ¶25 (2001). However, the United States Supreme Court, while agreeing with that principle, indicated that inconsistent verdicts may be impermissible under one particular circumstance; *mutually exclusive verdicts*. *United States v. Powell*, 469 U.S. 57, fn.8 ("Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, *where a guilty verdict on one count logically excludes a finding of guilt on the other*.")(emphasis added).

The *Powell* Court cited *United States v. Daigle*, 149 F.Supp 409 (D.C. 1957), as a potential example of mutually exclusive verdicts. *Daigle* made the point that while inconsistent verdicts are permissible, the critical question is whether the *evidence* supports the verdict.

> Where inconsistent verdicts of conviction and acquittal are returned, it has been said: "While the verdict as to each count must be consistent in itself, the verdicts on the several counts need not be consistent with each

other. *The question * * * is* not whether the verdict of guilty * * * is consistent with the verdict of acquittal on the other counts. It is *whether it is consistent with the evidence,* that is whether the evidence supports the verdict, and this is true even though the inconsistency can be explained upon no rational considerations."

Id., at 413-414 (citations omitted)(emphasis added).

Here, the jury specifically found that it could not reach a verdict regarding the manslaughter charge, which required the mental state of recklessness. The only difference between manslaughter and negligent homicide is the mental state of recklessness versus negligence. *State v. Walton*, 133 Ariz. 282, 291 (App. 1982). The facts supporting the crime of aggravated assault, as discussed more fully in the consecutive sentencing part of the brief, required at least a finding of a reckless mental state. Therefore, the aggravated assault count which required the higher mental state of reckless conduct should be vacated as not consistent with the verdict on the manslaughter charge. See *US v. Maury,* 695 F.3d 227 (3rd Cir. 2012). (. . . (A) defendant may only challenge dual guilty verdicts that are inherently and fundamentally at odds with one another. Or, to put it differently, a conviction as to one of the crimes must negate an element of the other.")(emphasis added).

In *State v. Hansen*, an Arizona jury inconsistently found that defendant not guilty of the misdemeanor crime of assault, yet found him guilty of aggravated assault based on that same misdemeanor. This was not addressed at the time by the trial judge, who later granted the defendant's motion for a mistrial based on this inconsistency. When the verdict is inconsistent within one count, the court of appeals upheld that grant of the defendant's mistrial motion for mistrial. 237 Ariz. 61 (2015).

This case presents the opportunity for Arizona appellate courts to confirm the law on "inconsistent verdicts." Normally inconsistent verdicts are allowed. However, if it is clear that a jury could not decide on a reckless state of mind for one charge of one act, yet decides a negligent state of mind on a lesser-included crime, that same jury may not then convict a defendant on that higher mental state to a related charge involving the same act with the same individual. These verdicts are mutually exclusive. Upholding the conviction for the higher mental state would violate the due process clause of the United States Constitution in the *Fourteenth* and *Fifth Amendments*, as well as Art. 2, §4 of the Arizona Constitution. It violates double jeopardy and collateral estoppel in that the finding of negligent homicide prevents a subsequent prosecution for manslaughter, despite the fact that there was no actual verdict on the manslaughter charge. (*State v. Martin*, 247 Ariz. 101, 104,

¶12 (2019). United States Constitution, *Fifth Amendment*; Arizona Constitution, Art.2, §10).

Issue Four: The Court entered an illegal sentence when it ran the Failing to Stop at the Scene of an Injury Accident charge of A.R.S. § 28-661 consecutively with both the Aggravated Charge and the Negligent Homicide Charge. A.R.S. §13-116 requires concurrent sentences because these were the same act for sentencing purposes.

Standard of Review: De novo. We review *de novo* a trial court's decision to impose consecutive sentences in accordance with A.R.S. §13-116. *State v. Urquidez*, 213 Ariz. 50, 52 ¶6 (App. 2006)

In Arizona a defendant cannot be punished with consecutive sentences if that one act violates more than one law. A.R.S. §13-116 sets forth the applicable statute.

> An act or omission which is 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. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other, to the extent the Constitution of the United States or of this state require.

(Emphasis added).

More importantly, consecutive sentences would violate both the United States and Arizona Constitutions. United States Constitution, *Fifth Amendment and Fourteenth Amendment*; Ariz. Const. Art. 2, § 10.

In order to determine if A.R.S. §13-116 is violated the particular facts of each case must be scrutinized to determine if the accused committed a "single act." *State v. Siddle*, 202 Ariz. 512, 517, ¶17 (App. 2002). The Arizona Supreme Court set forth the following analysis for Arizona courts to use to determine if consecutive sentences are authorized.

> (Courts must consider)... the facts of each crime separately, subtracting from the factual transaction the **evidence necessary to convict on the ultimate charge**—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will **then consider** whether, given **the entire "transaction,"** 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 A.R.S. § 13-116. We will **then 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.

State v. Gordon, 161 Ariz. 308, n.5 (1989)(emphasis added).

The factual nexus are the charges involving the leaving the scene of an injury accident, the aggravated assault charge and the negligent homicide charges. If this incident is considered a "single transaction", then A.R.S. §13-116 prohibits consecutive sentences regardless of the legislature's attempt to mandate consecutive sentences in A.R.S. 28-661(E).

Gordon involved a case where the defendant was convicted of a sexual assault, kidnapping and burglary. The trial court sentenced him consecutively on the sexual assault to the burglary and kidnapping charges. Gordon had entered the victim's residence and then committed the sexual assault. The Arizona Supreme Court compared the sexual assault case and the burglary and found that although an identical elements test would allow consecutive sentences under the particular facts of that case the defendant ". . . could not have committed the kidnapping and sexual assault without also committing the burglary." *Id.*, at 315. The Court then concluded that because the victim suffered no additional risk of harm other than the inherent

commission of a sexual assault, consecutive sentences for those sentences were improper. *Id.*, at 315.

The *Gordon* Court used the same analysis for the sexual assault and kidnapping charge. Despite passing the identical elements test, where the sexual assault could not have occurred without the physical restraint of kidnapping under that set of facts, consecutive sentences for the sexual assault and kidnapping charges were improper. *Id.*, 315. However, when examining the next factor, the Court found that consecutive sentences between these two counts were appropriate because the manner in which Gordon restrained his victim by hitting her with his fists and strangling her increased her risk of harm. *Id.,* at 315-316.

A. Comparing Aggravated Assault and Leaving the Scene of an injury accident on these set of facts requires concurrent sentences.

The elements of the charges of the "entire 'transaction'" as applied to the aggravated assault and leaving the scene of an injury accident do not pass the *Blockberger* same elements test. 284 U.S. 299 (1932). But that does not end the *Gordon* inquiry. The individual facts of the case show that this "entire transaction" was a single act leading to both charges. Aggravated assault requires an assault done intentionally, knowingly or recklessly, which caused a physical injury and (as was

charged against Tia) involved the use of a deadly weapon or dangerous instrument. A.R.S. §13-1204(A)(2); 13-1203(A)(1).

To be convicted for leaving the scene of an injury accident the accused must be driving a vehicle, be involved in an accident where a physical injury or death resulted and the accused driver failed to immediately stop or immediately return to scene of the accident. A.R.S. §28-661.

Here, the ultimate crime is the aggravated assault charge. It is a class 2 felony offense. Using *Gordon's* analysis, the evidence presented at trial showed that the crime of aggravated assault could not have occurred without Tia driving the vehicle, being involved in an accident by striking the victim with that vehicle and causing an injury to him (death qualifies as a physical injury). *State v. Gordon*, 161 Ariz. 308, fn 1 (1989); citing *Kirkpatrick v. State*, 747 S.W.2d 521 (1988). The car was a deadly weapon because of the manner in which it was used. *Gordon*, supra., p. 315. The responsibility for remaining at the accident scene, *under these facts*, could only occur if an aggravated assault first occurred before the leaving accident scene component of the crime arose.

Next, a consecutive sentence is prohibited because the victim's risk of harm did not increase after the accident by Tia's failure to immediately stop her vehicle. The decedent's injuries were not exacerbated by Tia's leaving. Emergency

personnel were immediately summoned. (R.T. Day 2, p.32-33, lns. 19-17). Several bystanders, including the victim's brother, were at the scene and rendered what little aid to the decedent was possible. (R.T. Day 2, p. 126-128, lns. 11-7). No evidence at trial showed that Tia's presence at the scene would have positively altered the medical outcome in any way; the victim would still have died from his injuries. Therefore, the facts indicated that this was one act for sentencing purposes, subject to A.R.S. §116. The aggravated assault charge and the leaving the scene charge can only be sentenced as concurrent with each other based on the actual facts of this entire incident.

B. Negligent Homicide and Failure to Remain at the Scene of an Injury Accident is one act for sentencing purposes of A.R.S. §116.

A similar analysis prohibits consecutive sentences between the negligent homicide and the leaving the scene of an injury accident. To be convicted of negligent homicide involving a motor vehicle, the driver must cause the death of another person, fail to recognize the substantial and unjustifiable risk of causing that death and that the failure to perceive that risk was a gross deviation from a reasonable person. A.R.S. §13-1102(A).

Again, comparing negligent homicide to the leaving the scene of the accident, it is apparent that the particular facts show that this was one act for sentencing

purposes. The leaving the scene of an injury accident is predicated on there being some contact, i.e. an "accident", to give rise to the driver's duty to remain at the scene. Tia's failure to recognize the risk as a gross deviation from a reasonable person, along with the actual contact with the victim causing his death, show that the leaving the scene charge could not occur without the negligent homicide. Without the accident, then the leaving of Circle K was not illegal because Tia had no duty to remain. This suggests that it is one crime for sentencing. Next, as argued above, Tia's leaving the scene did not impact the ultimate outcome which prevents consecutive sentences for these charges.

Therefore, while Tia could be punished for all of the charges, they could only be concurrent with each other because they were all "one act" under A.R.S. §116.

Conclusion

The aggravated assault charge should be dismissed as it is a mutually exclusive inconsistent verdict with the negligent homicide charge, found after the jury deadlocked on the issue of recklessness. Otherwise, the Aggravated Assault charge and the negligent homicide verdicts should be reversed and remanded for a new trial because there were several violations of Tia's right to assert her justification defense of self-defense. The Failure to Immediately Return to the Fatal Accident scene should be reversed and remanded for a new trial because the court did not adequately

instruct the jury that any violation for failing to provide information under A.R.S. §28-663, alone, does not constitute a violation of A.R.S. §28-661, and the prosecutor mislead the jury that it could convict Tia on this basis. Finally, any sentences regarding the Aggravated Assault, Negligent Homicide and Failing to Remain at the Fatal Accident scene must be concurrent with each other as they are considered "one act" for sentencing purposes under A.R.S. §13-116.

Submitted this 3rd day of May, 2023.

/s/

Robert Trebilcock
Deputy Public Defender
Attorney for Appellant

App. 7 Court of Appeals, Division One, Order for Supplemental Briefing

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,	)	Court of Appeals
	)	Division One
Appellee,	)	No. 1 CA-CR 22-0565
	)	
v.	)	Yuma County
	)	Superior Court
TIA LYN NICOLE SULU-KERR,	)	No. S1400CR202100038
	)	
Appellant.	)	
	)	
	)	

ORDER FOR SUPPLEMENTAL BRIEFING

The court, Presiding Judge D. Steven Williams, Judge Samuel A. Thumma, and Judge Paul J. McMurdie, has reviewed the briefs and the record in this matter and has determined that supplemental briefing would be helpful for the resolution of this appeal. Accordingly, on its own motion,

IT IS ORDERED directing both parties to file simultaneous supplemental briefs addressing the following question: Was it fundamental error for the superior court not to instruct jurors on the law set forth in A.R.S. § 13-1418?

IT IS FURTHER ORDERED that the briefs shall be no longer than 5,000 words and shall be filed no later than 5:00 p.m. on October 26, 2023.

The supplemental briefs need not include a statement of facts, and the parties may reference relevant facts by referring to their previously submitted briefs.

_____/s/_____
D. Steven Williams, Presiding Judge

A copy of the foregoing
was sent to:

Andrew Reilly
Robert J Trebilcock
Jon R Smith

App. 8 Court of Appeals Order Denying Motion To Reconsider

IN THE

COURT OF APPEALS

STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	Court of Appeals
	)	Division One
Appellee,	)	No. 1 CA-CR 22-0565
	)	
v.	)	Yuma County
	)	Superior Court
TIA LYN NICOLE SULU-KERR,	)	No. S1400CR202100038
	)	
Appellant.	)	
	)	
	)	

ORDER DENYING MOTION TO RECONSIDER

This Court, Presiding Judge D. Steven Williams, Judge Samuel A. Thumma, and Judge Paul J. McMurdie participating, has reviewed and considered Appellant's motion to reconsider filed February 14, 2024.

IT IS ORDERED denying Appellant's motion.

/s/
D. Steven Williams, Presiding Judge

A copy of the foregoing
was sent to:

Andrew Reilly
Robert J Trebilcock

App. 9 Motion to Delay Issuing Mandate/
Order Granting Motion

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DIVISION ONE
FILED: 12/10/2024
AMY M. WOOD,
CLERK
BY: AMI

STATE OF ARIZONA,	)	Court of Appeals
	)	Division One
Appellee,	)	No. 1 CA-CR 22-0565
	)	
v.	)	Yuma County
	)	Superior Court
TIA LYN NICOLE SULU-KERR,	)	No. S1400CR202100038
	)	
Appellant.	)	
	)	
	)	

ORDER GRANTING MOTION TO STAY MANDATE

This Court, Presiding Judge D. Steven Williams, Judge Samuel A. Thumma, and Judge Paul J. McMurdie participating, has reviewed and considered Appellant's motion to stay the mandate of this matter noting the State does not oppose.

IT IS ORDERED granting a stay until March 3, 2025, at which time a mandate will issue unless otherwise ordered by this Court.

____/s/_____
D. Steven Williams, Presiding Judge

A copy of the foregoing
was sent to:

Andrew Reilly
Robert J Trebilcock

App. 10 Partial transcript of Prosecutor's closing argument to the jury.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA, Plaintiff, vs. TIA LYN NICOLE SULU-KERR, Defendant.	)	No. S1400CR202100038 1 CA-CR 22-0565

BEFORE THE HONORABLE BRANDON S. KINSEY
JUDGE OF THE SUPERIOR COURT
DIVISION 6
YUMA, ARIZONA

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Jury Trial Day Five
(Instructions/Argument/Verdict)
June 16, 2022

PREPARED BY:

Dana Peabody, CR, RDR, CRR
Certified Reporter
AZ CCR 51009

to Count 4. Manslaughter. Caused the death of another person and was aware and showed a conscious disregard for a substantial and unjustifiable risk of death.

She caused the death. She's aware, of course, that when you run somebody over, you could cause death. And she was aware of that when she did that; that she disregarded that risk and did it anyway.

But that's not the ultimate question on these two counts. Because that part is obvious. The question that you need to decide on Counts 3 and 4 is was this self-defense? That is the main question. And many of you might put yourself in her shoes, and you're going to have to because that's what the instruction tells you to do, a reasonable person in that situation.

So you might be thinking if I was driving my vehicle and if I pulled into the Circle K and it's about 4:00 in the morning, 4:50 in the morning, and two men come out of nowhere and approach me and start yelling at me and start banging on my vehicle, I'm gone. Many of you, if not all of you, probably would do that. I certainly would. What's different, though? The difference is this is not her vehicle. She's driving a stolen vehicle. So what's actually going on through her head? Is it that I'm afraid for my life or is it I'm driving a stolen vehicle, and there's the owners?

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, v. **TIA LYN NICOLE SULU KERR,** Appellant.	No. 1 CA-CR 22-0565 Yuma County Superior Court No. S1400CR202100038

MOTION TO RECONSIDER

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Telephone (928) 817-4600

Pursuant to the Arizona Rules of Criminal Procedure, Rule 31.20(a), Tia requests that this court reconsider its opinion that the self-defense statutes contained in A.R.S. Title 13, Chapter 4 do not apply to criminal charges under Title 28. This Court's Opinion contained an erroneous determination of law. Further, Tia's claim that the prosecutor improperly argued her subjective intent to the jury regarding self-defense is likely to recur at trial and is appropriate to be decided in this appeal to promote judicial economy.

I. Limiting self-defense exclusively to crimes in Title 13 violates Tia's inherent right of self-defense that is embodied in the United States Constitution's Second Amendment and Art. 2, §26 of the Arizona Constitution.

This Court asserted that Tia did not ". . . explain how legislation *criminalizing the use of force* encroaches on the constitutional right to bear arms." (Opinion, ¶14). Tia does not complain about the legislature's making injury hit-and-run statutes a crime; she complains that limiting her inherent right of self-defense to only crimes under Title 13 infringes on her federal and state constitutional rights. If the right to self-defense is inherent in any criminal prosecution then any legislative attempt that prevents that defense is unconstitutional.

In support of its conclusion limiting the right to self-defense, this Court mistakenly relied on a civil case from the federal Seventh Circuit. That Court would

probably have reached a different result if the most recent United States Supreme Court Opinion regarding the Second Amendment had been decided. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 8 (2022).

Additionally, that Court relied on Justice Stevens' dissenting opinion for a proposition that is contrary to the majority opinions in both *District of Columbia v. Heller* (554 U.S. 570, 599 (2008) and *New York State Rifle & Pistol Assn., Inc. v. Bruen*, as well as the plurality opinion in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). This Court's Opinion did not address any of these Supreme Court decisions, nor did it discuss the Arizona opinion that she cited. Further, this Opinion did not discuss whether Arizona's specific constitutional provision regarding the right to bear arms would grant greater protection than the federal constitution for the right to self-defense, regardless of whether a firearm was used.

Second, this Court did not address Tia's argument that *State v. Fell*, which limited the necessity defense to criminal statutes only, addressed a different concern from Tia's claim of self-defense and is, thus, inapplicable in this case. Tia confronted *Fell* directly, offering reasons why it would not apply to this situation. Further, Tia argued that *Fell's* analysis and conclusion regarding legislative intent was directly contradicted by subsequent legislative enactments of the right to self-defense in the car-jacking statute. That additional statute was the basis of this Court's Opinion that reversed the aggravated assault and manslaughter convictions.

A. Both the United States Constitution's Second Amendment and the Arizona Constitution in Art. 2, §26 protect the fundamental inherent right to defend oneself regardless of the manner used.

The United States Constitution through the Fourteenth Amendment incorporates the application of the Second Amendment to the states and makes any legislation that infringes on that right unconstitutional.

In both *District of Columbia v. Heller* (554 U.S. 570, 599 (2008)) and *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 8 (2022), the majority opinions both confirmed that ". . . individual right of self-defense is "the central component' of the Second Amendment right." (see and *New York State Rifle & Pistol Assn., Inc., supra*, at 2118). The Supreme Court in those opinions *never* distinguished between carrying guns and using guns as separate interests, as was asserted in the cited case of *Calderone v. City of Chicago*, 979 F.3d 1156 (7th Cir. 2020). *Calderone* involved a civil suit involving qualified immunity for city officials firing an employee for discharging a weapon. It seemed to draw a nonsensical conclusion that while Calderone was entitled to carry a weapon for self-defense, he was not allowed to use it, even after the criminal case's judicial decision that upheld his right to use it in self-defense. *Id.*, at 1162. That court was only concerned with the Second Amendment in a narrow *civil* context and it was issued before *New York State Rifle and Pistol Assn, Inc.* (". . . *(E)xisting precedent* did not establish whether

Calderone's shooting of Garcia was constitutionally protected." *Calderone*, supra, at 1163 (emphasis added)). The decision on whether the use of the weapon was justified *criminally* had already been decided in Calderone's favor.

Additionally, *Calderone* cited for its authority the *dissent* from Justice Stevens in *Heller*. *Calderone*, supra, at 1162. The majority opinions in *Heller* and *New York State Rifle and Pistol Assn., Inc.* both disavowed Justice Stevens' assertion that ". . . there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution." *Heller*, supra, 2822. In fact, it appears that even Justice Stevens would agree under the facts of this case and the *Heller* decision that the fundamental right of self-defense applies, even if the Second Amendment does not.

> . . . (I)f a State were to try to *deprive its residents of any reasonable means of defending themselves* from imminent physical threats, *or* to deny persons *any ability to assert self-defense in response to criminal prosecution*, that might pose a significant constitutional problem."

McDonald, supra, 3106 (dissenting opinion) (emphasis added).

Here, there is no question that the prosecution of Tia under Title 28 was a criminal prosecution. This Court's decision is contrary to both the cited majority opinions

from the United States Supreme Court, and even Justice Stevens' dicta comments from *McDonald*.

This is significant because the Fourteenth Amendment incorporates the Second Amendment and applies it to the individual states. (*New York State Rifle & Pistol Assn., Inc.*, supra, at 2122. "We . . . now hold, consistent with *Heller* and *McDonald,* that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."). Any attempt by the Arizona legislature to limit self-defense outside of Title 13 to other criminal statutes violates the federal Second and Fourteenth constitutional amendments. As this Court recognized in this decision, "The legislature's authority "to define what constitutes a crime in this state . . . also extends, at least within constitutional bounds, to defenses." *State v. Holle,* 240 Ariz. 300, 302, ¶ 9 (2016) (*emphasis added*). Here, the legislature's definition clearly violated federal constitutional bounds. This issue was erroneously decided based on federal constitutional analysis.

B. The Arizona Constitution, Art. 2, §26 provides independent protection of an individual's right to self-defense.

This Court recognized, but did not discuss, Tia's reliance on the Arizona Constitution for her right of self-defense. Although the federal case law is clear, Arizona provides a separate provision that protects the right of self-defense. (Art. 2,

§26). Arizona has a long-standing history of protecting the right of individuals to protect themselves, which predates the Arizona Constitution. (See, e.g., *Foster v. Territory*, 6 Ariz. 240 (1899); *Bryant v. Territory*, 12 Ariz. 165 (1909) (the right of self-defense *is a right recognized by statute*, and the conditions under which it may be asserted to make the homicide justifiable are well settled. (emphasis added)); *State v. Jackson*, 94 Ariz. 117 (1963) ("Before an act may cause forfeiture of the *fundamental right of self-defense* it must be willingly and knowingly calculated to lead to conflict." (emphasis added))).

The State of Washington has an identically worded right to bear arms provision in its state constitution (Washington Constitution, Art. I, §24 (see *State v. Jorgenson*, 312 P.3d 960, 963 ¶12 (Wash. 2013)). The Washington Supreme Court found ". . . firearm rights guaranteed by the Washington Constitution are distinct from those guaranteed by the United States Constitution." *Id.*, at 963, ¶13. In fact, *Jorgenson* counseled its courts to review state constitutional grounds before turning to federal law. *Id.*, at ¶11.

Similarly, using the factors that the Washington Supreme Court used in *Jorgenson*, the Arizona Constitution delineates distinct rights in addition to the federal constitution. As *Jorgenson* noted, the grant is to individuals for "... the defense of himself" and is a "... necessary and inseparable part of the right in itself." *Id.*, at ¶14. Arizona would make a similar analysis. "It is axiomatic, as a matter of

constitutional or statutory interpretation, that where different language is used in different provisions, we must infer that a different meaning was intended." *State v. Hernandez*, 244 Ariz. 1, 7, ¶29 (2018) (Bollick concurring).

C. This decision in this case incorrectly extended *State v. Fell*, 203 Ariz. 186 (2002), to exclude the right of self-defense in non-A.R.S. Title 13 crimes.

1. Under this Court's construction *Fell* would be unconstitutional as violating the inherent fundamental right to self-defense in both the federal and Arizona constitutions.

One basic tenet of statutory construction is for appellate courts to avoid construing statutes to render them unconstitutional. "(W)hen conducting (statutory construction analysis), '[w]e . . . 'avoid interpretations that unnecessarily implicate constitutional concerns . . . .'" *State v. Brearcliffe*, 254 Ariz. 579, 585, ¶22 (2023); *accord McMichael-Gombar v. Phx.Civ.Serv.Bd.*, 538 P.3d 1032, 1039 ¶23 (Ariz. 2023).

Here, this Court's decision implicates the inherent right to self-defense under the Second Amendment and Art. 2, §26, as argued above. *Fell* was decided before seminal cases from the United States Supreme Court made clear that the right to self-defense is inherent in the Second Amendment and that it exists outside of the home.

Heller and *New York State Rifle & Pistol Assn., Inc.*, *supra*. If *Fell* intended to limit the right of self-defense because it was a "traffic" crime, then it would violate the current binding authority of the United States Supreme Court and should be overruled on that basis, alone.

2. *Fell* can be interpreted to avoid an unconstitutional "implication" between the statute and both the federal and state constitutional right to self-defense.

As Tia proposed in her brief to this Court, *Fell* can be limited to the defense of necessity. This was the express holding of *Fell*. *Id.*, 187, ¶1. Tia is unaware of any United States Supreme Court case that has evaluated the defense of necessity under the guise of the inherent right of self-defense. However, early Arizona law has discussed necessity in the context of self-defense (*Carter v. State*, 18 Ariz. 369, 375 (1916), "The right of self-defense may be tersely stated as the law of necessity."; *Morgan v. Territory*, 7 Ariz. 224 (1901), "The right of self-defense is primarily based upon necessity. . . ."). However, there is no apparent modern decisions from this state that make that same assertion. Therefore, limiting *Fell* to its stated holding of the justification of necessity potentially removes the constitutional infirmity raised by Tia.

3. The *Fell* decision results in an absurd and illogical result.

Assuming that a person has a reasonable objective fear of death or serious physical injury, or believes the same for the defense of a third person, it should make no difference if that person uses a gun or a motor vehicle to protect himself or herself or others. The law of self-defense does not favor one weapon over another. Yet, Tia would have been better, under the result of this case, of shooting the alleged victim, rather than trying to use her vehicle to leave the scene at a low rate of speed and thereby lessening the potential severity of any lethal force. The right to self-defense is inherent in the United States through the Second Amendment and the manner and means one uses does not matter.

4. The holding in *Fell* violated Arizona's long-expressed doctrine of determining which actor actually is the cause of a crime that occurred.

Unless the accused is the one who actually caused the conduct that put him or her in danger (A.R.S. §13-404(3)) an accused has the right to put the State to proving beyond a reasonable doubt that he or she was not justified in using self-defense. The justification of self-defense is basically a law of causation of a crime.

The current formulation of causation is contained in A.R.S. §13-203 (A) and (B) with the stated these following elements.

A. Conduct is the cause of a result when both of the following exist:

1. But for the conduct the result in question would not have occurred.

2. The relationship between the conduct and result satisfies any additional causal requirements imposed by the statute defining the offense.

This formulation is inconsistent with early Arizona decisions regarding self-defense which did not limit the justification to situations only in the criminal code. Under this modern definition the additional causal elements for self-defense must be imposed in the statue that defines it. Here, that would be A.R.S. §§28-661, 13-401(B) and 13-418. Arizona courts have held that the limitation in A.R.S. §13-401(B) limits all Chapter 4 defenses to only the criminal code in Title 13. *State v. Bayardi*, 230 Ariz. 195, 200, ¶19 (App. 2012). This conflicts with Tia's traditional inherent right regarding self-defense. Who "caused" the accident is a matter for the jury as the result is harsher under ARS §28-661(C) if the driver is the one who actually "caused" the accident.

The justification of self-defense in early Arizona law was part and parcel of "cause." It can be expressed in this way; an accused has no right to threaten or use violence and if he or she does then that person is the cause of a crime. However, if the accused was objectively reasonable in believing that the other person caused him or her to reasonably and objectively believe that force was necessary, then it is the other person who caused the use of force, and the accused was not the "cause" of the crime. However, if the other person was reacting to the actions of the accused, which

then caused him or her to threaten the accused with violence, then the accused is, again, the one who "caused" the crime.

This idea was expressed in the early Arizona case of *Nelson v. State*. There, the Arizona Supreme Court discussed a homicide where the defendant was not permitted to offer evidence that he shot the deceased after the deceased made earlier verbal threats that day while possessing a gun. The Arizona Supreme Court reversed and made the following observation.

> The commission of the homicide by the defendant was not merely proven by other witnesses in this case, but was admitted by the defendant. Under such a state of facts, *the law above quoted permits the defendant the privilege of offering evidence of the circumstances surrounding the transaction tending to show . . . that the homicide was justifiable or excusable.* The accused contends that the homicide was justifiable, because it was committed by the accused in the necessary defense of his person, in resisting an attempt of the deceased to murder the accused, or to do accused a great bodily injury by shooting him. . . *The vital question was: Which of the principals was the aggressor – which fired the first shot?. . . . To reject such evidence, tending to place before the jury all the circumstances surrounding the transaction,*

was equivalent to denying to the accused, after he had admitted the commission of the homicide, the right of proving circumstances of mitigation, or that justified or excused his act. . . ."

16 Ariz. 165, 168-169 (1914).

In Tia's case, the jury found that she "caused" the accident (ROA 78) even though there was no instruction or definition given to the jury that defined "cause." By granting the State's motion to prevent her from arguing self-defense to this particular charge, the trial court removed her constitutional right to offer the "circumstances" of the act in order to put the State to its constitutional of proof beyond a reasonable doubt of disproving self-defense. It took away a viable justification defense inherent in both the federal constitution and the traditional and modern Arizona statutes and constitutional provisions. This violated Tia's rights to due process under the United States Constitution's Fourteenth Amendment and Art. 2, §4 of the Arizona Constitution.

In an opinion issued yesterday, this Court underscored both the need for a causation instruction so that the jury was not left adrift on the central issue of whether the accident was "caused" by the two men rushing and jumping onto Tia's car while seemingly armed with a deadly weapon. In *State v. Hon. Gordon (James Owen, real party in interest)*, Cause No. 1 CA-SA 23-0162, filed 2/13/24, this Court was confronted by a fact pattern in which the traffic statute criminalized a

stop sign violation when a failure to stop caused the fatal traffic accident. A.R.S. §28-672. In *Gordon*, the offending motorist claimed the failure to stop did not cause the *accident* since the *collision* occurred before the vehicles entered the intersection. The statute at issue in *Gordon*, like the statute before this court, employs the term "accident" and not the term "collision." This distinction led this Court to observe "... we conclude that an 'accident' means the entirety of an occurrence that results from a common initiating event... *Id.* page 5, ¶15 (citing *Nield v. State*, 677 N.E.2d 79, 82 (Ind. App. 1997). As applied to Tia's case, that means that the failure to instruct the jury on causation coupled with the trial court's ruling that self-defense may not be used in a Title 28 prosecution entirely deprived Tia of her constitutional right to a fair trial.

II. **The issue of whether the State violated Tia's rights by arguing her subjective reasons for self-defense is a matter that is likely to recur at trial and should be decided by this Court before any new trial takes place.**

This Court's Opinion declined to address Tia's argument that the State improperly argued to the jury that subjectively Tia did not have a legitimate self-defense claim because she was merely attempting to avoid apprehension for the vehicle-theft charge. (Opinion, ¶37, n. 5). Potential trial issues following a reversal and remand that are likely to recur are appropriate to decide in the initial appeal.

State v. Wilson, 253 Ariz. 191, 199, ¶29 (App. 2022); *State v. May*, 210 Ariz. 452, 453, ¶1 (App. 2005). The *May* Court, in exercising its discretion, made the following statement.

> . . . (B)ecause that evidence was significant and prejudicial, we reverse his conviction on that ground. We also preliminarily address a suppression issue because it is likely to recur on remand.

Deciding this issue now promotes judicial economy by negating the need to re-litigate this particular issue should it recur at the subsequent trial or in any later appeal.

Conclusion

Wherefore, this Court should exercise its discretion and reconsider its opinion in part one of this case and reverse the Tia's conviction for leaving the scene of an injury accident. Further, the Court should decide the issue that it declined to address for the prosecutor's argument to the jury regarding Tia's subjective intent relating to self-defense.

Respectfully submitted this 14th day of February, 2024.

/s/
Robert Trebilcock
Attorney for Appellant

App. 12 Petitioner's Notice of Defenses.

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

STATE OF ARIZONA, **Plaintiff,** **vs.** **TIA KERR,** **Defendant.**	**Case No. S1400CR202100038** **NOTICE OF DEFENSES** Hon Brandon S. Kinsey Division 6

Defendant, **TIA KERR**, by and through undersigned counsel, respectfully by and through undersigned counsel, and pursuant to *Rule 15.2, Arizona Rules of Criminal Procedure,* (hereinafter *ARCrP*), and hereby discloses the following:

I. DEFENSES

The defendant gives notice that he/she may assert the following defenses:

1. Insufficiency of evidence
2. No criminal intent
3. Consent
4. Lack of culpable mens rea
5. Justification *ARS 13-404* - Self-Defense
6. Justification *ARS 13-406* - Defense of Third Person
7. Justification *ARS 13-418* - Use of force in Defense of Occupied Vehicle

II. WITNESSES

Any and all individuals named or referred to in the preliminary hearing transcripts and/or grand jury transcripts and/or police department reports or in any of the state's disclosure and/or

those named in Defendant's Pre-Trial Statement. Defense counsel will supplement the witness list with detail as soon as the information becomes available.

III. EXHIBITS

The defense reserves the right to introduce into evidence all those exhibits which have been disclosed and listed in the police reports which have been provided to the defense. The defendant requests complete discovery.

IV. EXPERTS

The defense reserves the right to call any experts which may have been used in this case to examine evidence seized by the police. Counsel may contact an expert and will disclose the same and his/her opinion, if any, in advance of trial if, defendant is going to retain an expert for trial.

V. SUPPLEMENT

The defense reserves the right to supplement this Notice as additional witnesses and/or exhibits become known.

VI. BRADY MATERIAL

Defense requests disclosure pursuant to *Brady v Maryland*, 373 US 83 (1963) that may be applicable to any of the state's witnesses.

VII. GIGLIO MATERIAL

Defense requests disclosure pursuant to *Giglio v US*, 405 US 150, 92 SCt 763, 31 LEd2nd 104 (1972), [1] that may be applicable to any of the state's witnesses.

RESPECTFULLY SUBMITTED this 18th day of March, 2022.

/s/
Messr José S. Padilla, Esq

1. "The government, (aka the state), has a duty to "turn over to the defense in discovery *all* **material** information casting a shadow on a government, (state's), witness's credibility." *US v Blanco*, 392 F3rd 382, 397 (CA9 2004).

Deputy Public Defender

Copy of the foregoing delivered
this 18th day of March, 2022, to:

Hon. Brandon S. Kinsey
Judge of the Superior Court
In and for Yuma County

Messr Joshua Davis, Esq.,
Deputy County Attorney
In and For Yuma County

By: ____/JSP