PHOENIX MUNICIPAL COURT

APPLICATION FOR JUDICIAL OFFICE

Applications may be completed and printed with this on-line form. Some questions allow limited response space. If additional space is needed, attachments may be added. Applications must be typed. PLEASE NOTE: The Rules of Procedure for the Judicial Selection Advisory Board for the City of Phoenix Municipal Court provide for public access to this application as follows:

Judicial Selection Advisory Board Rules of Procedure, Rule 8(D) provides:

Except as provided in subsection (2) below, information provided to the bard by the applicant or by a third-party shall be presumed to be available to the public.

(1) The following shall be available to the public:

(a) The applicant's name, occupation, employer, relevant work history, any other information provided in response to section I of the application form, and any supplemental materials submitted by the applicant relating to Section I of the application form;

(b) Any information that is specifically authorized for release by the source of that information.

(2) The following information shall remain confidential throughout the application and appointment process until destroyed pursuant to the applicable Municipal Court document retention schedule.

(a) The applicant's home address, information regarding applicant's family, and all other information that is provided to the board in response to questions contained in Section II of the application form;

(b) Information provided in writing or orally to the board by third-parties regarding an applicant, and the third party's identity, unless the third-party specifically states in writing that the information may be made public;

(c) Notes of the individual board members that are generated for personal use only and not published to other members of the board;

(d) Any information that is provided to a member of the board after a promise of confidentiality is properly extended to the source by that board member pursuant to rule 9(B) or 10(B) of these rules;

(e) Any information obtained by or submitted to the board that is made confidential by other provisions of law.

SECTION I – Public Information		
Last Name	**First Name**	**MI**
Mulleneaux	Christine	E

How many years have you resided in Arizona immediately preceding this application? 29

Have you had at least five years practice of law? Yes If no, describe what equivalent legal experience you have.

Arizona State Bar Number	**Date of Admission**
[redacted]	12/16/1997

Schools Attended (preparatory, college and law)	**Dates: mm/dd/yy**	**Degree**
Western Michigan University	From: 1986 Through: 1990	B.S.
Thomas M. Cooley Law School	From: 1993 Through: 1996	J.D.
	From: Through:	
	From: Through:	
	From: Through:	

1) Indicate major and minor fields of study.

Western Michigan University. Bachelor of Science in Criminal Justice and Psychology.

2) Indicate college and law school extracurricular activities.

Western Michigan University. Bachelor of Science in Criminal Justice and Psychology.
Participated in campus organizations and volunteer activities.

Thomas M. Cooley Law School. J.D.
Involved in moot court exercises, student bar activities, and practical legal training opportunities. In addition, I worked full time at an all-male correctional institution, supporting myself through law school while gaining firsthand experience with the criminal justice system.

3) Indicate all bar admissions, numbers, and dates.

State Bar of Arizona. [redacted] Admitted December 16, 1997.

4) If you have been certified as a specialist by the Arizona State Bar, identify specialty.

N/A

5) Explain if you have been denied admission to any State Bar.

I was not successful on my first attempt at the Arizona State Bar Examination. I subsequently passed and was admitted to the State Bar of Arizona on December 16, 1997, and I have remained an active member in good standing since that time.

6) Current Job Title	Employer	Date(s) of Employment
Phoenix Municipal Court Judge	City of Phoenix	From:11/19/2025 Through: Present

7) Describe chronologically, providing dates, your law practice and relevant experience following your graduation from law school, specifically indicating the following:

A. If you have served as a judge, indicate the court(s) and dates of service.

Phoenix Municipal Court Judge. November 2025 – Present.
Maricopa County Superior Court Commissioner. March 2008 – October 2024.

B. If you have served as a clerk to a judge, indicate the name of the judge, the court, and the dates.

N/A

C. If you practiced alone, indicate the addresses and dates.

25473 N. 73rd Avenue, Peoria, Arizona 85083. September 2003-March 2008.

D. Provide the names, addresses and dates of law firms or law offices, companies, governmental agencies, or other organizations for which you have been employed, and describe the nature of that employment.

01/1998 - 07/1998	La Paz County Attorney's Office - Prosecutor
07/1998 - 11/1999	Pinal County Attorney's Office - Prosecutor
11/1999 - 07/2000	Arizona Attorney General's Office - Prosecutor
07/2000 - 07/2001	Douglas & Cox, PLC - Associate Civil Litigator
07/2001 - 08/2003	Edythe H. Kelly & Associates - Associate Civil Litigator
09/2003 - 03/2008	Christine E. Mulleneaux, PLLC - Sole Practitioner
03/2008 - 10/2024	Maricopa County Superior Court Commissioner

E. Describe the types of major clients you have served and mention areas of law in which you have specialized or focused. Give details of any service you have provided in a fiduciary capacity.

Throughout my legal career I have served the public in the administration of criminal justice. As a prosecutor, I represented the State of Arizona in the prosecution of felony and misdemeanor offenses, working closely with law enforcement and victims while evaluating investigations, making charging decisions, and litigating cases in court. I later served a judicial officer in the Maricopa County Superior Court and currently serve as a Judge of the Phoenix Municipal Court. Presiding over a high-volume docket that includes DUI, domestic violence, protective order matters, and other offenses that directly impact public safety and community wellbeing.

In my judicial role I serve in a fiduciary capacity to the public by safeguarding the integrity of the court and ensuring that proceedings are fair, efficient, and grounded in the rule of law. My work requires careful stewardship of public trust while balancing the constitutional rights of defendants with accountability and safety for victims and the community. Through thousands of cases, I have worked closely with attorneys, law enforcement, and court staff to ensure consistent, thoughtful decision-making and the effective administration of justice

8) Indicate your frequency of appearances in court as a lawyer:

Describe the nature of your appearances, giving dates, court names, and the nature of the proceedings.

Prosecutor - La Paz County, Pinal County, Maricopa County, City of Phoenix (1998-2000 & 2024-2025)
Appeared regularly in superior, justice and municipal courts, handling misdemeanor and felony prosecutions. Responsibilities included charging decisions, pretrial conferences, motion practice, trials, and sentencing advocacy.

Civil Litigation Attorney - Insurance Defense (2000-2003)
Represented clients in civil litigation matters including insurance defense. Appeared in Maricopa County Superior Court for motion hearings, discovery disputes, settlement conferences, and civil trials.

Sole Practitioner (2003-2008)
Maintained a private proactive handling criminal, civil, juvenile, and family law matters in Maricopa County Superior Court. Appeared in contested hearings, bench trials, settlement conferences, and evidentiary proceedings across multiple areas of law.

Commissioner, Maricopa County Superior Court (2008-2024)
Presided over criminal, civil, family, and juvenile dockets. Managed high-volume calendars, conducted jury and bench trials, ruled on motions and evidentiary issues, and issued final orders in a wide variety of proceedings.

Judge, Phoenix Municipal Court (2025 – Present)
Preside over a high-volume docket that includes DUI, domestic violence, protective order matters, and other offenses that directly impact public safety and community wellbeing.

A. Indicate the percentage of these appearances between the listed court types.

Federal Courts	State Courts 80%	Justice Courts 10%
City Courts 10%	Administrative Boards or Commissions	

B. Indicate the percentage of your litigation practice.

Civil 50%	Criminal 50%	Traffic	Administrative

C. State the number of cases you tried to verdict or judgment (rather than settled), for each of the following:

Sole Counsel 100	Chief Counsel	Associate Counsel

D. What percentage of these trials was:

Jury 30%	Non-Jury 70%

E. Describe not more than five significant litigated matters in which you participated and give the citations, if reported. Give a capsule summary of the substance of each matter and a succinct statement of the particular significance. Please identify the party or parties whom you represented; describe the nature of your participation in the matter; and the final disposition. Please state, as to each matter: 1) the date of the matter; 2) the name of the court and the judge before whom the matter was presented; and 3) the names and addresses of counsel for the other parties.

1)
12/19/2024 City of Phoenix Municipal Court Hon. Thomas Parascandola
Defense Attorney: Noel Rascon - 2N. Central Ave., 18th FL, Suite 1800, Phoenix AZ 85004
State v Chavon Burley #20248001381
The Defendant committed domestic violence aggravated assault when she stabbed her ex-girlfriend with a pair of kitchen scissors during a physical altercation inside of the victim's apartment. This case is significant because it was a felony turndown case from the county and the victim had been attacked by the Defendant on two other occasions. I was able to secure the conviction and argue successfully restitution on behalf of the victim.

2)
11/19/2024 City of Phoenix Municipal Court Hon. Laura Lowery
Defense Attorney: David L. Anderson – P.O.Box 20501, Mesa AZ 85277
State v. Ansar Yunus #100718501
The Defendant committed the crime of solicitating prostitution when he made an agreement with an undercover police officer to pay $100 for sexual intercourse. The Defendant claimed to only speak Rohingya and was, therefore, unable to commit the crime. At trial, I was able to prove that the Defendant also spoke English by presenting items found in his wallet that requires mastery of the English language and secured the conviction.

3)
08/14/2025 City of Phoenix Municipal Court. Hon. Tina Solomon
Defense Attorney: Benjamin C. Green - 4808 N. 22nd St., Suite 200, Phoenix, AZ 85016
State v. Bryan Reitmeier #100753322
The Defendant committed the crime of assault when he punched his daughter's ex-boyfriend. Intoxicated ex-boyfriend damaged daughter's apartment and threatened her with a gun. Daughter then called father. Ex-boyfriend was also charged with threatening and intimidating and criminal damage. The matters resolved with a misdemeanor compromise as all parties were equally at fault.

4)
08/14/2025 City of Phoenix Municipal Court. Hon. Tina Solomon
Defense Attorney: Benjamin C. Green - 4808 N. 22nd St., Suite 200, Phoenix, AZ 85016
State v. Bryan Reitmeier #100753322
The Defendant committed the crime of assault when he punched his daughter's ex-boyfriend. Intoxicated ex-boyfriend damaged daughter's apartment and threatened her with a gun. Daughter then called father. Ex-boyfriend was also charged with threatening and intimidating and criminal damage. The matters resolved with a misdemeanor compromise as all parties were equally at fault.

5)
08/25/2025 City of Phoenix Municipal Court Hon. Alex Navidad
Defense Attorney: Diana L. Braaten. - 2487 S. Gilbert Road, Suite 106-250, Gilbert AZ 85295
State v. Benjamin Hernandez #100814523
The Defendant committed the crime of theft when he consumed $44.05 worth of food at a Denny's Restaurant and passed all points of sale without paying. The Defendant had 12 prior theft related convictions and served minimal jail. The jury found the Defendant guilty. I successfully argued for 152 days in jail on the probation violation and an addition 90 days in jail on the theft.

9) Describe any significant arbitration, mediation, or litigation experience not discussed above.

One significant litigation experience involved presiding over a contested evidentiary hearing in a criminal case where the admissibility of key evidence was vigorously challenged by both parties. The matter required extensive legal argument regarding constitutional protections, evidentiary rule, and the reliability of the evidence. I carefully evaluated the legal authorities and factual record, ruled on multiple evidentiary objections, and ensured the proceeding remained structured and respectful while the attorneys fully presented their arguments.

The experience was significant because the rulings directly shaped the course of the case and required balancing the constitutional rights of the defendant with the fair and orderly administration of justice. It reinforced the importance of clear reasoning on the record, thoughtful decision-making under pressure, and maintain the confidence of the litigants and counsel that the court is impartial, prepared, and committed to the rule of law.

10) If you are or have been a judge, describe not more than five significant cases you have tried, or opinions you have written. For opinions, give the citations if the opinions were reported as well as citations to any appellate review of such opinions. Finally, please attach copies of the opinions, to include any appellate review of those opinions.

1. State of Arizona v. Matthew Aaron Dutra. - No.1 CA-CR 17-0168
   Court of Appeals, Division One - Published Opinion
   Kidnapping conviction and sentence affirmed. Established law that kidnapping may occur based on a restraint of a person for 30 seconds and compelled movement of five steps. Defendant was sentenced to life in prison.

2. Donna Johanson, et al. v. Nicholas Casavelli, et al. - No.1 CA-CV 24-0320
   Court of Appeals, Division One - Memorandum Decision
   Civil award of over $1.2 million in damages affirmed on a twelve-count complaint against the Defendant who was declared a vexatious litigant that spanned over a period of seven years.

3. State of Arizona v. Jay Alan Bonke - No.1 CA-CR 17-0130
   Court of Appeals, Division One - Memorandum Decision
   Trafficking in Stolen Property conviction and sentence affirmed due to proper rulings on the admission of evidence.

4. State of Arizona v. Elizabeth Haley Brown - No.1 CA-CR 14-0567
   Court of Appeals, Division One -Memorandum Decision
   Dismissal of Defendant's Petition for Post-Conviction Relief was affirmed as Defendant failed to present a colorable claim of ineffective assistance of counsel.

5. State of Arizona v. Hussein Mohamed Ali - No. 1 CA-CR 12-0191
   Court of Appeals, Division One - Memorandum Decision
   Possession or Use of Dangerous Drugs conviction and sentence affirmed, holding the trial court did not abuse its discretion in denying Defendant's Rule 20 motion and submitting the matter to the jury.

11) Please describe your experience in the following areas:

A. Managerial Skills

My managerial approach is grounded in preparation, clear communication, and accountability. As a judge, I manage a high-volume docket while coordinating closely with clerks, prosecutors, defense counsel, and court staff to ensure proceedings run efficiently and respectfully. I focus on maintaining structure in the courtroom, making timely decisions, and creating an environment where all participants understand expectations and the court's process function smoothly.

I also emphasize collaboration and continuous improvement. Effective court management requires listening to staff and stakeholders, identifying operational challenges, and implementing practical solutions that improve efficiency without compromising fairness. My goal is to lead the way that promotes professionalism, consistency, and public confidence in the administration of justice.

B. Supervisory Skills

My supervisory experience has been developed through managing courtroom operations and working closely with clerks, court staff, attorneys, and law enforcement to ensure proceedings run efficiently and professionally. As a judge, I oversee a high-volume docket and coordinate with courtroom personnel to maintain organization, clear communication, and adherence to court procedures. This requires setting expectations, ensuring accountability, and supporting staff so that the courtroom operates smoothly and respectfully. I approach supervision through collaboration and consistency. I value clear direction, professionalism, and mutual respect, and I work to create an environment where staff feel supported while maintain high standards of performance while maintaining the integrity and public trust essential to the judicial system.

C. Budget

My experience with budget matters comes primarily through managing court resources within a public-sector environment where efficiency and fiscal responsibility are essential. As a judge, I work closely with court administration and staff to ensure that courtroom operations are conducted efficiently and that available resources are used effectively. This includes being mindful of scheduling, staffing needs, and the operational practices that affect the court's overall workload and expenditures. I also understand the importance of responsible stewardship of public funds. Courts must balance limited resources with the need to provide fair and timely access to justice. I approach these issues with an emphasis on efficiency, thoughtful planning, and collaboration with court leadership to identify practical solutions that improve operations while respecting budget constraints.

D. Personnel

My personnel experience comes from overseeing courtroom operations and working closely with clerks, court staff, attorneys, and law enforcement to ensure proceedings run efficiently and professionally. I emphasize clear communication, organization, and setting expectations so that courtroom operations function smoothly and staff understand their roles and responsibilities. I believe effective leadership requires collaboration, professionalism, and accountability. By fostering a respectful and structured environment and addressing issues proactively, I support court staff in performing their roles effectively while ensuring the court operates efficiently and maintains public trust.

12) Have you ever been engaged in any occupation, business, or profession other than the practice of law or holding judicial office? Yes If yes, please provide details, including dates.

I was a licensed real estate agent with Western Traditions Realty. 2001-2003

13) Are you now, or have you ever been an officer or director or otherwise engaged in the management of any business enterprise? No If yes, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties, and the terms of your service.

N/A

14) Is it your intention to resign such position and withdraw from any participation in the management of any of such enterprises if you are appointed? Yes If no, please explain.

Yes.

15) Have you ever been sued by a client or a party? No If yes, give details, including dates.

N/A

16) Have you published any legal or other books or articles? No If yes, please list them, giving the citations and dates.

N/A

17) Are you in compliance with the continuing legal education requirements applicable to you? If yes, list the courses and dates of attendance for the last two (2) years.

04/26/2024 - Criminal Year Seminar
02/06/2025 - Ethics Cafe Series: Revised Ethics Rules for Government Lawyers
04/03/2025 - APAAC - On Demand - DUI Prosecution Forensic Scientist Direct Examination
04/11/2025 - Criminal Year Seminar
05/08/2025 - Forfeiture By Wrongdoing
06/18/2025 - Windows on Impairment: The Eyes Say it All
06/25/2025 - APAAC Keynote Address- 2025 Annual Prosecutor's Office
06/26/2025 - Search & Seizure & Confessions Update
06/26/2025 - Talking to a Jury: Are you getting Through?
06/26/2025 - Visual Trial Skills: A Primer
06/27/2025 - Leading the Way to Safer Streets: Annual DUI Legal Updates, Tips and Reminders
06/27/2025 - Public Lawyers Ethical Rules
01/26/2026-01/30/2026 – New Judge Orientation
02/09/2026-0/2/13/2026 – New Judge Orientation

18) Have you taught any courses on law or lectured at bar associations, conferences, law school forums, or continuing legal education seminars? No If yes, please describe by providing the name of the course, the subject matter, the date and the place.

N/A

19) List any honors, prizes, awards, or other forms of recognition which you have received.

N/A

20) List any public offices held and dates.

N/A

21) List memberships and activities in professional organizations, including offices held and dates.

State Bar of Arizona - Member (Active in Good Standing)
U.S. District Court, District of Arizona - Admitted Member (Active in Good Standing)
Licensed Arizona Real Estate Agent (Inactive)

***Optional*: List memberships and activities in civic organizations, including offices held.**

State Bar of Arizona - Member
Arizona Humane Society - Supporter/Volunteer
St. Jude's Children's Research Hospital - Supporter

22) List vocational interests and hobbies.

Outside of my professional responsibilities, I have a strong interest in health and fitness and spend much of my time engaged in strength training and wellness activities. I value discipline, focus and resilience that fitness requires, and those qualities carry over into my professional life.

I am also active in my community and have volunteered with such organizations as the Humane Society and various domestic violence shelters. My personal life is grounded in faith, and I enjoy learning about different cultures and perspectives through travel and community engagement. These interests provide balance and help keep me grounded in my work serving the public

23) Has any complaint of professional misconduct ever been filed, in any jurisdiction, where any form of disciplinary action has been taken against you? No If yes, when and where? How was it resolved?

N/A

24) Have you ever been convicted of any misdemeanor or felony, or violation of the Uniform Code of Military Justice in the United States, or any foreign country? No If yes, when and where? How was it resolved?

N/A

25) Phoenix City Code ("P.C.C."), Section 2-96(C)(3) provides that merit shall be the primary consideration for the Judicial Selection Advisory Board in making recommendations to the City Council for appointment to judicial office. Under P.C.C. § 2-96(C)(3) and consistent with the Arizona Constitution (*see* AZ Const. Art. 6 § 37(C)), the Judicial Selection Advisory Board has the duty to consider the diversity of the City's population. Please provide any information about yourself (*e.g.*, your heritage, background, life experiences, etc.) that you believe is relevant to this consideration.

I am a white female and a practicing Catholic, which has grounded me in a tradition of service, compassion, and respect for human dignity. I also have Ashkenazi Jewish heritage in my background, which has given me an appreciation for minority faith traditions and the importance of cultural and religious diversity in shaping community values.

I have been an active member of the Arizona Bar since 1997 and bring nearly three decades of legal experience, including more than sixteen years as a judicial officer. I have worked closely with victims, defendants, and families from across Phoenix's diverse population, deepening my commitment to impartiality and fairness. In addition, my role as the primary caregiver for my elderly mother has strengthened my patience, empathy, and understanding of the challenges many families in our city face. These experiences together shape my perspective and commitment to serve the community with insight, compassion, and fairness. I approach my role with the understanding that public trust in the judiciary depends on fairness, professionalism, and respect for every person who enters the court.

26) Include any further information relative to your candidacy or qualifications that you wish to transmit to the Judicial Selection Advisory Board at this time.

I am deeply committed to the fair and effective administration of justice and to maintaining the public's trust in the courts. Through my experience as both a prosecutor and judicial officer, I have developed a strong understanding of the responsibilities of the bench and the importance of thoughtful, impartial decision-making.

If selected ad Chief Presiding Judge, I would focus on supporting judicial officers and court staff, promoting efficient and consistent court operations, and ensuring that the Phoenix Municipal Court continues to serve the community with professionalism, integrity, and respect for the rule of law.

Question #10 attachments

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

MATTHEW AARON DUTRA, *Appellant.*

No. 1 CA-CR 17-0168
FILED 7-31-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-005832-001
The Honorable Christine E. Mulleneaux, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michelle Hogan
Counsel for Appellee

Janelle A. Mc Eachern, Attorney at Law, Chandler
By Janelle A. Mc Eachern
Counsel for Appellant

OPINION

Judge Diane M. Johnsen delivered the opinion of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Maria Elena Cruz joined.

J O H N S E N, Judge:

¶1 We address in this case a kidnapping conviction based on a restraint of no more than 30 seconds and compelled movement of a mere five steps. Based on the broad language of the statute and case authorities construing it, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Matthew Aaron Dutra entered a sandwich shop and walked to the end of the counter, where he stood face-to-face with a 16-year-old employee stationed across the counter at the cash register. Brandishing a stun gun, he activated its electric arc and demanded that the employee give him "the money." In response, the employee took three steps back from the counter, but stopped short of a doorway that led into a closed employee-only area directly behind her. Then, in response to Dutra's command and use of the stun gun, she took two steps forward and reached for the cash register. With the register open, Dutra grabbed for some of the bills in the drawer, and the employee handed him the rest. A security video showed that Dutra left the store within 30 seconds of confronting the employee.

¶3 A man sitting in his car in front of the restaurant saw Dutra as he fled on foot. The man lost sight of Dutra as he ran toward the street, but then he heard screeching tires. Police received separate reports of an armed robbery and a hit-and-run accident. Officers found Dutra injured, lying in the street not far from the restaurant. He was wearing clothing resembling that worn by the figure in the security video, and police found a stun gun nearby him on the street. At the hospital, authorities discovered cash in Dutra's pocket in the same denominations taken from the restaurant.

¶4 A grand jury indicted Dutra on charges of armed robbery, a Class 2 felony; aggravated assault, a Class 3 felony; and kidnapping, a Class 2 felony. At the close of the State's case-in-chief, Dutra moved for a directed verdict on the kidnapping charge, arguing the State had presented no evidence he restrained the victim as required by the kidnapping statute. The State countered that Dutra used a threat of force and commands to restrain the victim by confining her behind the counter and then compelling her to move forward and open the cash drawer. The court denied the motion, stating:

> I do find that [the victim] was – that she in this particular situation that she was interfered with substantially. Her person – her personal liberty. She wasn't free to move.

¶5 The jury convicted Dutra of each of the charged offenses. Because armed robbery, kidnapping and aggravated assault involving the threatening exhibition of a dangerous instrument are violent or aggravated felonies within the meaning of Arizona Revised Statutes ("A.R.S.") section 13-706(F) (2018), and because Dutra had two prior convictions for felonies within the same category and committed on different occasions within the prior 15 years, the court imposed three concurrent mandatory sentences of life in prison with no possibility of release for 35 years. *See* A.R.S. § 13-706(B), (F)(2) (enumerating aggravated offenses).[1]

¶6 Dutra timely appealed, and his counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), after searching the record on appeal and finding no arguable, non-frivolous question of law. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530 (App. 1999). Dutra was given the opportunity to file a supplemental brief but did not do so. Counsel then asked this court to search the record for fundamental error.

¶7 After reviewing the entire record, we requested supplemental briefing under *Penson v. Ohio*, 488 U.S. 75 (1988), about whether the evidence supported Dutra's kidnapping conviction. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2018), 13-4031 (2018) and -4033(A)(1) (2018).

DISCUSSION

A. Sufficiency of the Evidence Supporting the Kidnapping Conviction.

¶8 Under Arizona Rule of Criminal Procedure 20(a)(1), the superior court must enter judgment for the defense "if there is no substantial evidence" to support conviction. We review a superior court's denial of a Rule 20 motion *de novo*. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011) (quoting *State v. Bible*, 175 Ariz. 549, 595 (1993)). The question is whether, "viewing the evidence in the light most favorable to the

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[1] Absent material revision after the date of an alleged offense, we cite the current version of a statute or rule.

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *West*, 226 Ariz. at 562, ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). We review the court's interpretation of statutes *de novo*. *State v. Pena*, 235 Ariz. 277, 279, ¶ 5 (2014).

¶9 Arizona's kidnapping statute took its current form in 1978 when the legislature overhauled the state's criminal code. *See* A.R.S. § 13-1304 (2018); H.B. 2054, 33d Leg., 1st Reg. Sess., Ariz. Laws 1977, Ch. 142, § 62 (eff. Oct. 1, 1978). The statute defines kidnapping as, *inter alia*, "knowingly restraining another person with the intent to . . . aid in the commission of a felony." A.R.S. § 13-1304(A)(3). Further, "'[r]estrain' means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13-1301(2) (2018).

¶10 Read together, the current statutes require proof that a defendant *substantially* interfered with the victim's liberty. That word distinguishes the current version of the statute from the pre-1978 version, which as relevant here, applied to one "who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain."[2]

¶11 Arizona's criminal code does not define "substantially," but our supreme court has interpreted "substantial" in another criminal statute to mean "considerable." *Pena*, 235 Ariz. at 279, ¶ 6 (citing American Heritage Dictionary 817 (5th ed. 2012)). At issue in that case was a statute defining aggravated assault as, *inter alia*, an assault causing a victim "temporary but substantial disfigurement." *Id.* at ¶ 4 (quoting A.R.S. § 13-1204(A)(3) (2018)). The court concluded that to determine whether an injury was substantially disfiguring, a jury would need to "tak[e] into

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[2] The prior statute stated, "A person, except in the case of a minor by the parent, who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains any individual for ransom, reward, pecuniary benefit . . . or to commit extortion or robbery, or to exact from relatives of such person or from any other person any money or valuable thing . . . or a person who aids or abets any such conduct, is guilty of a felony." A.R.S. § 13-492(A) (1974); *see also* S.B. 1127, 31st Leg., 2d Reg. Sess., Ariz. Laws 1974, Ch. 110, § 1. Although the post-1978 kidnapping statute has been amended on several occasions, the provisions relevant to the issues here have remained substantially unchanged.

account multiple factors - such as the injury's seriousness, location, duration, and visibility to others." *Pena*, 235 Ariz. at 280, ¶ 11. Applying the same reasoning here, whether a defendant's restraint of a victim "substantially" or "considerably" interferes with the victim's liberty turns on the facts, including the distance the defendant moved the victim and the length of time the victim was confined.

¶12 The statutory definition of restraint, however, does not require a defendant to have moved the victim any minimum distance or confined the victim for any minimum period of time, as long as the restraint substantially interfered with the victim's liberty. In this respect, our legislature departed from the Model Penal Code § 212.1, under which a person is guilty of kidnapping if, with requisite intent, "he unlawfully removes another . . . a *substantial distance* from the vicinity where he is found, or if unlawfully confines another *for a substantial* period in a place of isolation." (Emphasis added.)

¶13 Under the text of the statute, the manner of the restraint also may be relevant, including the means by which the defendant moved or confined the victim (i.e., by words, threatening act or actual physical restraint). *See, e.g., State v. Ring*, 131 Ariz. 374, 375-76 (1982) (victims bound with chains and dog leashes); *State v. Latham*, 223 Ariz. 70, 72, ¶ 5 (App. 2009) (defendant compelled victim to drive to bank and return with cash by threatening harm to victim's spouse); *State v. Lewis*, 169 Ariz. 4, 5 (App. 1991) (victims bound with ropes); *State v. Linden*, 136 Ariz. 129, 132 (App. 1983) (victims' arms bound behind their backs). When the defendant restrained the victim by "moving such person from one place to another," *see* § 13-1301(2), the nature of the place to which the defendant moved the victim - e.g., whether the victim was moved to an insecure or remote or secluded place, rendering speedy rescue less likely - also may be relevant. *See, e.g., State v. Noble*, 152 Ariz. 284, 284-85 (1987) (victim dragged into bushes); *Lewis*, 169 Ariz. at 5 (victims driven to secluded, isolated area).

¶14 It is clear also that kidnapping in Arizona does not require restraint beyond that necessary to accomplish the associated crime. *See State v. Viramontes*, 163 Ariz. 334, 339 (1990) ("Kidnapping is often incidental to the commission of a more serious crime."); *State v. Gordon*, 161 Ariz. 308, 314-15 (1989) (noting Arizona rejects rule imposed by other states that one who moves a victim in the course of committing a robbery does not commit kidnapping if the movement did not substantially increase victim's risk of harm). Indeed, former Judge Gerber, a member of the commission that drafted the 1978 criminal code and who had criticized the prior kidnapping statute as being "so loosely defined as to include even momentary

detentions in the course of committing other crimes," acknowledged that the post-1978 kidnapping statute still "embraces almost every armed robbery offense." *See* Rudy J. Gerber & John F. Foreman, *Arizona's Criminal Law: The Critical Need for Comprehensive Revision*, 18 Ariz. L. Rev. 63, 80 (1976) (first quote); Rudolph J. Gerber, *Arizona's New Criminal Code: An Overview and a Critique*, 1977 Ariz. St. L.J. 483, 512 (second).[3]

¶15 Nonetheless, the statute requires something substantial about the nature of the interference with the victim's liberty to support a kidnapping conviction. The State does not cite, and we have not found, any Arizona case affirming a kidnapping conviction based on facts like those here. Dutra did not order the employee to do anything that required her to take more than a couple of steps. He did not tie her up or use physical force to restrain her. There is no evidence he even made physical contact with her, although their hands might have touched briefly when she handed him the money from the cash register. And, to the extent Dutra's threatening use of the stun gun effectively restrained the employee from running out the back door, she was "confined" in the small area behind the counter for less than 30 seconds.

¶16 States with kidnapping statutes similar to ours have reached different conclusions about the magnitude of restraint necessary to support a kidnapping conviction. Some states requiring "substantial" interference with the victim's liberty have held or implied that a temporary restraint involving very little movement may satisfy the requirement. *See State v. Salamon*, 949 A.2d 1092, 1120 (Conn. 2007) ("state is not required to establish any minimum period of confinement or degree of movement"); *Hines v.*

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3 Some older Arizona authorities suggest that, to the contrary, only "acts superfluous to the robbery may be separately charged" as a kidnapping. *See, e.g., State v. Williams*, 111 Ariz. 222, 225 (1974); *State v. Soders*, 106 Ariz. 79, 80-81 (1970). But these cases applied a statute that no longer exists. Before the 1978 overhaul of the criminal code, A.R.S. § 13-1641 (1956) provided that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under *either, but in no event under more than one*." (Emphasis added.) Under that statute, if acts that would support a kidnapping conviction also would support a robbery conviction, the defendant could not be convicted of both offenses. But § 13-1641 was replaced in 1978 by A.R.S. § 13-116 (2018), which allows a defendant to be convicted of both offenses as long as consecutive sentences are not imposed. *See* H.B. 2054, 33d Leg., 1st Reg. Sess., Ariz. Laws 1977, Ch. 142, § 41 (eff. Oct. 1, 1978); *Gordon*, 161 Ariz. at 315.

State, 75 S.W.3d 444, 447 (Tex. Crim. App. 2002) (rejecting contention that "to 'interfere substantially' requires more than temporary confinement or slight movement"). The facts here might support a kidnapping conviction under these authorities.

¶17 Other states have interpreted similar statutory language to impose requirements that might render the facts here insufficient to support a conviction. The defendant in *State v. Wollent*, 111 P.3d 1131, 1132 (Or. 2005), for example, grabbed the victim by her hair, pulled her out of bed and dragged her 15 to 20 feet to the next room, where he struck her. In an appeal from his convictions for assault and kidnapping, the Oregon Supreme Court reversed the latter conviction, holding that "in order for the interference to be substantial, a defendant must intend either to move the victim a 'substantial distance' or to confine the victim for a 'substantial period of time.'" *Id.* at 1134. *But see State v. Douglas*, 125 P.3d 751, 752-54 (Or. App. 2005) (affirming conviction after defendant forced victims to walk at gunpoint from the curb to inside a bar). And in *State v. White*, 362 S.W.3d 559, 562-63, 581 (Tenn. 2012), the court stated that Tennessee's kidnapping statute "would seem to necessarily include a time or distance component" and was "not intended to criminalize trivial restraints." *Id.* at 576. But Oregon, Tennessee and most other states do not allow a kidnapping conviction based on a restraint that is merely incidental to another offense. Because Arizona cases have rejected that limiting principle, other states' decisions are not particularly helpful in construing the Arizona statute.

¶18 As for the Arizona caselaw, we must acknowledge *dictum* by our supreme court that "because the kidnapping statutes require only confinement without consent or legal authority, a defendant cannot commit child molestation, sexual assault, or robbery without also committing a kidnapping." *Noble*, 152 Ariz. at 287 n.2. Neither the facts of *Noble* nor the court's remark have much application here. As noted above, the defendant in *Noble* dragged the victim from the street "into nearby bushes," assaulted her, then, after completing the assault, walked with her for a few blocks before releasing her. *Id.* at 284-85. The supreme court concluded the superior court did not err by imposing consecutive sentences because the defendant restrained the victim both before and after completing the assault. *Id.* at 287. In the quoted footnote, the court did not analyze the language in § 13-1301(2), nor did it acknowledge that the restraint required for a kidnapping must "interfere[] substantially with [the victim's] liberty." *See* A.R.S. § 13-1301(2).

¶19 Guided by the text of the kidnaping statute and the relevant Arizona authorities, the issue is whether the evidence was sufficient to

show that Dutra substantially interfered with the employee's liberty. Based on the record presented here, the jury - which was properly instructed on the definitions of kidnapping and restraint - reasonably could have convicted Dutra if it concluded that his demand that the employee give him the money in the cash register, along with his activation of the stun gun, compelled her to forgo the chance to flee out the back of the restaurant and instead remain in his presence at the counter. The period of confinement, though brief, was effectively absolute because it was mandated by Dutra's threatening act and verbal command. When restraint is accomplished by word or deed that threatens serious injury or death, even if the compelled movement is not far or the compelled confinement is not lengthy, the restraint may be substantial. On these facts, we cannot say that as a matter of law, Dutra did not "interfere substantially" with the teenage employee's liberty.

B. Other Matters.

¶20 In all other respects, the record reflects Dutra received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present or waived his presence at all critical stages. The court held appropriate pretrial hearings.

¶21 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict Dutra of all the charged offenses. The jury was properly comprised of 12 members. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report, addressed its contents during the sentencing hearing and imposed legal sentences for the crimes of which Dutra was convicted.

CONCLUSION

¶22 We have reviewed the entire record for reversible error. We hold the evidence supported Dutra's kidnapping conviction and, finding no other arguable issues, we affirm his other convictions and all the sentences imposed. *See Leon*, 104 Ariz. at 300.

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

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DONNA JOHANSON, et al., *Plaintiffs/Appellees,*

v.

NICHOLAS CASAVELLI, et al., *Defendants/Appellants.*

No. 1 CA-CV 24-0320

FILED 06-05-2025

Appeal from the Superior Court in Maricopa County
No. CV2017-055490
The Honorable Christine E. Mulleneaux, Judge *Pro Tempore* (Retired)

AFFIRMED

COUNSEL

Provident Law, PLLC, Scottsdale
By Bryan L. Eastin & Christopher J. Charles
Counsel for Plaintiffs/Appellees

Nicholas Casavelli & Nicolina Castelli, Sun City
Defendants/Appellants

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the Court's decision, in which Presiding Judge Anni Hill Foster and Judge Michael J. Brown joined.

McMURDIE, Judge:

¶1 Defendants Nicholas Casavelli and Nicolina Castelli ("Casavellis") appeal after a jury and bench verdict for Donna Johanson and the estate of Gary Johanson ("Johansons").[1] We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 This case spans seven years of litigation, a previous appeal to this court, a parallel claim in the federal courts, and an unsuccessful petition for *certiorari* to the Supreme Court. *See Johanson v. Casavelli*, 1 CA-CV 21-0207, 2022 WL 453812 (Ariz. App. Feb. 15, 2022) (mem. decision); *Casavelli v. Johanson*, CV-20-00497-PHX-JAT, 2020 WL 7643170 (D. Ariz. Dec. 23, 2020), *aff'd*, 21-15051 & 21-16268, 2022 WL 4115495 (9th Cir. Sept. 9, 2022), *cert denied*, 143 S. Ct. 594 (2023). The relevant facts are as follows.

¶3 In 2017, the Johansons sued the Casavellis for claims related to property ownership and financial matters, as well as the Casavellis' work as agents for the Johansons, which included managing, maintaining, and selling their single-family rental properties. After three and a half years of extensive litigation, the court found the Casavellis to be vexatious litigants. The Casavellis appealed the order, which we vacated in part and remanded, limiting the order to only the pending litigation. *Johanson*, 1 CA-CV 21-0207, at *4, ¶¶ 17, 19. The Casavellis unsuccessfully petitioned the Supreme Court for *certiorari* on their vexatious-litigant designation. *Casavelli*, 143 S. Ct. 594.

¶4 The superior court revised its vexatious-litigant designation on remand, precluding the Casavellis from filing new documents without the court's authorization in this case. By all indications in the record, the Casavellis flouted this designation and continued to file numerous documents. That said, the litigation continued toward trial, with a last-minute trial continuance after the Johansons' counsel contracted COVID a week before the trial date. Just after the court rescheduled the trial, it ruled that the jury would only hear the Johansons' fraud and consumer fraud claims, and the remaining claims would be presented to the bench.

¶5 Two weeks before the revised trial date, the assigned judge notified the parties of a scheduling conflict with the trial. The judge notified

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[1] Gary Johanson passed away during the litigation and his estate was substituted in his place.

the parties that the court intended to assign Commissioner Christine Mulleneaux to preside over the case in his stead and asked the parties to provide notice if they intended to move for a change of judge by 9:00 a.m. the following morning. The Casavellis filed a response but did not express an intent to move for a change of judge. As a result, the case was reassigned to the Commissioner, who presided over a six-day jury trial on the scheduled date.

¶6 On the trial's third day, apparently because of Nicholas Casavelli's health issues, the Casavellis left the courtroom. They remained absent from the rest of the trial despite the court authorizing them to appear remotely. The jury returned a verdict in favor of the Johansons on the fraud counts and the jointly disputed quiet title claim. Afterward, the judge ruled on the remaining claims, finding for the Johansons on all claims except those for unjust enrichment, equitable mortgage, accounting, and declaratory judgment. The court awarded the Johansons over $1.2 million in damages. The court also awarded about $425,000 in attorney's fees plus double damages of $5,000 under Arizona Revised Statutes ("A.R.S.") § 12-349(A)(3) for unreasonably expanding or delaying the proceedings.

¶7 On March 28, 2024, the court entered a judgment under Arizona Rules of Civil Procedure ("Civil Rule") 54(b), resolving all matters tried before the bench and the jury. The court issued a judgment under Civil Rule 54(c) six days later. The Casavellis appealed.

DISCUSSION

A. This Court Has Jurisdiction to Consider the Casavellis' Arguments.

¶8 The Johansons argue that we lack jurisdiction over most of the claims raised by the Casavellis because they failed to include all relevant judgments in their notice of appeal. The notice of appeal only lists the Civil Rule 54(c) judgment entered on April 3, 2024 ("April 3rd Judgment"), which exclusively ruled on the Casavellis' Request for Emergency Stay (Post-Trial Motion). The remaining issues in the case were finalized in the Civil Rule 54(b) judgment entered six days earlier ("March 28th Judgment"), six days before the Casavellis filed their notice of appeal.

¶9 Although we may not "read into [a notice of appeal] something that is not there," *Baker v. Emmerson*, 153 Ariz. 4, 8 (App. 1986), "[w]e liberally construe notices of appeal if the result is neither misleading nor prejudicial to the appellees involved," *Gutierrez v. Gutierrez*, 193 Ariz. 343, 350, ¶ 30 (App. 1998) (quotation omitted). The April 3rd Judgment

appealed by the Casavellis mentions the court's March 28th Judgment within the order. The Casavellis argue before this court that they intended to appeal all matters included in the March 28th Judgment, understanding them to only be appealable after the entry of the April 3rd Judgment. "[W]here the record discloses an appellant's intent to appeal from a judgment . . . the notice of appeal should be construed as sufficient so long as the defect has neither misled nor prejudiced an opposing party." *Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, 576, ¶ 16 (App. 2015) (quotation omitted).

¶10 The Johansons fail to show prejudice or that they were misled. As early as six weeks after the notice of appeal, the Casavellis, in their case management statement, noticed their intent to pursue claims other than those finalized in the April 3rd Judgment. The Johansons had nearly six months between the first notice of the Casavellis' intended scope of appeal and the filing of their answering brief, and they responded to the claims within their brief. Additionally, the Casavellis' appeal of the matters in the March 28th Judgment was timely. *See* ARCAP 8(d) (The failure of an appellant "to perform an act other than the timely filing of a notice of appeal . . . does not affect the appellate court's jurisdiction."). Because we liberally construe a notice of appeal and there is no prejudice to the Johansons evident in the record, we determine that we have jurisdiction to hear all matters raised by the Casavellis under A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

B. Still, the Casavellis Waived Numerous Claims.

¶11 Simply because we have jurisdiction to consider the arguments raised by the Casavellis does not mean we will consider their arguments if they fail to show their merit. An appellant waives claims if he or she fails to provide significant arguments on the issues, supporting legal authorities, or citations to the record. *See* ARCAP 13(a)(7)(A); *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62 (App. 2009). The Casavellis present a legion of arguments that lack meaningful support from the record and fail to provide citations to legal authorities. We hold the Casavellis have waived these claims. The same is true for claims that provided legal authority but lacked sufficient citations to the record.

¶12 In addition, the Casavellis raise claims ruled on by the superior court without alleging any error by that court. We affirm the court's rulings on these issues without further consideration. *See Guard v. County of Maricopa*, 14 Ariz. App. 187, 188-89 (1971) (When the appellants

fail to meet their burden of proving the superior court erred, we must affirm.).

¶13 We now review the remaining claims to determine their merits. If our review determines that the Casavellis have presented no claim of error, we will also hold those claims waived.

C. **The Johansons Had Standing to Pursue Their Claims.**

¶14 We review *de novo* the Casavellis' argument that the Johansons lacked standing to bring their claims. *See City of Tucson v. Pima County*, 199 Ariz. 509, 514, ¶ 10 (App. 2001). Arizona does not adhere to the case or controversy requirement observed in federal courts. *Republican Nat'l Comm. v. Fontes*, ___ Ariz. ___, ___, ¶ 10, 566 P.3d 984, 989 (App. 2025). Instead, standing raises questions of "prudential or judicial restraint." *Id.* (quotation omitted). Still, Arizona courts generally require a party to possess standing to proceed with an action. *Sears v. Hull*, 192 Ariz. 65, 71, ¶ 24 (1998).

¶15 The Casavellis claim A.R.S. § 29-3502(A)(3) prohibits the Johansons from bringing suit because an LLC assigned the Johansons their rights to these claims. The argument lacks merit. A transferable interest, as used in this statute, is "the right . . . to receive *distributions* from a limited liability company." A.R.S. § 29-3102(29) (emphasis added). Section 29-3502 is inapplicable here because, stated more accurately, the question the Casavellis present is whether an LLC may assign its *claims*, not its distributions, to members of the LLC. The general rule in Arizona is that claims, except those arising from personal injury, can be assigned to another party unless the legislature specifies otherwise. *Webb v. Gittlen*, 217 Ariz. 363, 366, ¶ 13 (2008). The Casavellis point to no legal authority other than A.R.S. § 12-2234 (which we hold waived for failure to allege error in the superior court's ruling) and A.R.S. § 29-3502 (which does not apply) to show error. Nor do the Casavellis explain which claims were assigned to the Johansons rather than brought in their personal capacity. Thus, we conclude any issues with the Johansons' standing are waived.

D. **The Superior Court Did Not Err by Assigning a Commissioner to Preside Over the Trial.**

¶16 We review *de novo* the Casavellis' argument that the superior court violated Arizona Rule of the Supreme Court 96(e) by assigning Commissioner Mulleneaux to preside over the trial. *See In re Est. of de Escandon*, 215 Ariz. 247, 249, ¶ 7 (App. 2007) (We review judicial authority to hear a case *de novo*.).

¶17 While the Casavellis are correct that a commissioner lacks the authority to conduct a trial without the written stipulation of the parties, *see* Ariz. R. Sup. Ct. 96(a), (e), Commissioner Mulleneaux was a judge *pro tempore* when she conducted the trial, *see* Arizona Supreme Court Pro Tempore Order No. 2023-20 (June 19, 2023); Ariz. R. Evid. 201(b)(2) ("The court may judicially notice a fact that . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). A judge *pro tempore* has "the same authority as a full-time regularly seated superior court judge," so Commissioner Mulleneaux could preside over trial. *Vera v. Rogers*, 246 Ariz. 30, 35, ¶ 19, n.5 (App. 2018) (citing Ariz. Const. art. 6, § 31).

¶18 Next, the Casavellis argue that the superior court violated the time limits established in Civil Rule 42.1 by requesting the parties file any motion for a change of judge by the next day. The plain language of Civil Rule 42.1(c) does not establish time allotments the superior court must afford litigants before proceeding in the litigation. *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 7 (App. 2009) (The plain language of a rule is "the best and most reliable index of [the rule's] meaning." (alteration in original) (quotation omitted)); Ariz. R. Civ. P. 42.1(c) ("A party is precluded from obtaining a change of judge as a matter of right unless it files a timely notice."). Indeed, the rule explicitly includes timeframes that change under various scenarios, such as after the court of appeals issues a mandate or when the parties receive a shortened notice of an assignment. *See* Ariz. R. Civ. P. 42.1(c)(3), (4). The rule's construct suggests the times established in it are intended to be a timeframe for filing, not a pause on litigation.

¶19 But, more importantly, the Casavellis cannot show any error arising from this matter. A peremptory change of judge is a "matter of grace under the [Civil] Rules," *Hickox v. Superior Court*, 19 Ariz. App. 195, 198 (1973), which carries no prejudice that can be shown on appeal, *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223-24 (1996). To consider the Casavellis' argument at this point would convert this matter of grace into a "trump card," which could destroy the validity of a proceeding. *See id.* If the Casavellis believed they had an issue with a peremptory change of judge, the only appropriate vehicle for review was a special action petition. *See id.*

¶20 Finally, the superior court correctly sent the Casavellis' change of judge requests to the presiding civil judge, complying with A.R.S. § 12-409(A)'s requirement that a different judge consider a motion for a change of judge for cause.

¶21 The superior court did not err in appointing Commissioner Mulleneaux or in its handling of the change-of-judge motions.

E. The Court Correctly Determined It Would Resolve the Equitable Claims.

¶22 We review *de novo* whether a party is entitled to a jury trial on a given claim. *Williams v. King*, 248 Ariz. 311, 315, ¶ 12 (App. 2020). Here, we hold that the superior court did not err by ruling on some claims without a jury trial.

¶23 There is no right to a jury trial on actions considered equitable when Arizona adopted its constitution. *In re Est. of Newman*, 219 Ariz. 260, 273-74, ¶¶ 53, 55-56 (App. 2008). Nor is there a right to a jury trial on statutory claims that did not exist at common law before statehood, except when the statute expressly provides otherwise. *Id.* at 272, ¶ 45.

¶24 Of the claims not submitted to the jury, the court ruled on the claims for financial exploitation of a vulnerable adult under A.R.S. Title 46, Chapter 4; undue influence; constructive fraud and constructive trust; breach of fiduciary duty; equitable mortgage; an accounting; and declaratory judgment.

¶25 Claims under Arizona's Vulnerable Adult Statute or for breach of fiduciary duty are not entitled to a jury trial. *Newman*, 219 Ariz. at 273-74, ¶¶ 48, 57. And many of the bench claims arise from equity. *See Schornick v. Schornick*, 25 Ariz. 563, 564-65 (1923) (undue influence); *Raestle v. Whitson*, 119 Ariz. 524, 526 (1978) (constructive trust); *Span v. Maricopa County Treasurer*, 246 Ariz. 222, 227, ¶ 15 (App. 2019) (unjust enrichment); *Mollohan v. Christy*, 80 Ariz. 141, 142 (1956) (accounting). The only two claims that could require a jury trial are constructive fraud and declaratory judgment. But constructive fraud arises from a breach of a legal or equitable duty, and the breach alleged here—breach of fiduciary duty—is equitable. *Taeger v. Cath. Fam. & Cmty. Servs.*, 196 Ariz. 285, 289, ¶ 9 (App. 1999) (defining constructive fraud); *Newman*, 219 Ariz. at 274, ¶ 57 (no right to a jury trial for breach of fiduciary duty cases). And a declaratory judgment request does not create a cause of action but is a relief from an established cause of action. *See Ansley v. Banner Health Network*, 248 Ariz. 143, 151, ¶ 31 (2020) (The Declaratory Judgment Act does not create a private right of action.); *see also Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp. 2d 755, 770 (D. Ariz. 2012) ("A declaratory judgment action is a remedy for an underlying cause of action; it is not a separate cause of action . . . ."). Thus, there is no error, and we affirm the result of the bench trial.

F. The Superior Court Complied with Our Instructions for the Vexatious-Litigant Designation.

¶26 The Casavellis contend that the superior court violated our mandate on remand from their designation as vexatious litigants by prohibiting them from filing any documents during litigation. *See Johanson*, 1 CA-CV 21-0207, at *4, ¶¶ 17, 19. We will not disturb a court's ruling finding a vexatious litigant absent an abuse of discretion. *Contreras v. Bourke*, 258 Ariz. 223, 291, ¶ 21 (App. 2024) (review granted in part Jan. 7, 2025).

¶27 The Casavellis' argument lacks merit. They misquote the language from the superior court, which ordered that the Casavellis "may not file any new pleading, motion or other document *in this case* without prior leave of the Court." (Emphasis added.). The court's order complies with our instructions. *See Johanson*, 1 CA-CV 21-0207, at *4, ¶ 17 ("[W]e affirm the pre-filing restrictions in the vexatious-litigant order to the extent they apply to the current case and plaintiffs but vacate the portion of the order as it applies to any broader pre-filing restrictions."). And the record shows that the Casavellis continued to file motions after the court revised its vexatious-litigant order, belying their claim that they were precluded from filing motions during the litigation.

¶28 The Casavellis also claim, for a second time on an appeal, that the superior court held the original hearing on the vexatious-litigant motion a day earlier than scheduled. While we ruled on this issue in their previous appeal, *Johanson*, 1 CA-CV 21-0207, at *2, ¶¶ 8-10, they present other evidence that we did not consider during that appeal, *see id.* at ¶ 9, n.2.[2] The new evidence fails to change our conclusion. The superior court filed a *nunc pro tunc* order amending the minute entry date from the date alleged by the Casavellis to the date of the scheduled hearing. The Casavellis point to the hearing exhibits being marked on the day they allege, but the record shows the evidence was admitted on the scheduled day of the hearing.

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[2] While the law-of-the-case doctrine could apply in this case, we may still reconsider questions resolved at an earlier stage, "especially where a substantial change has occurred in the evidence." *Sholes v. Fernando*, 228 Ariz. 455, 458-59, ¶ 8 (App. 2011). Because the Casavellis present new evidence that was not considered, and because the resolution is the same, we analyze this argument on its merits.

¶29 Additionally, in the minute entry from the day of the hearing, the superior court noted the plaintiffs' exhibits were marked before the start of the hearing. As in their previous appeal, the Casavellis fail to rebut the presumption of regularity. *See State v. Hyde*, 186 Ariz. 252, 269 (1996) (A party must present "sufficient evidence" to overcome a presumption of regularity.).[3]

¶30 The record supports our previous holding that the Casavellis had proper notice of the hearing. *See Johanson*, 1 CA-CV 21-0207, at *2, ¶¶ 8-9. We affirm the superior court's changes to the vexatious-litigant order and reaffirm that the Casavellis had sufficient notice and opportunity to oppose the order.

G. The Casavellis Waived Their Fraud Claims.

¶31 The Casavellis raise multiple allegations that the Johansons' counsel committed fraud upon the court. As we have explained:

> Fraud on the court is a variety of extrinsic fraud. The doctrine may allow relief when, by fraud, a party has prevented a real contest before the court of the subject matter of the suit, or, put differently, has committed some intentional act or conduct that has prevented the unsuccessful party from having a fair submission of the controversy. The court has the power to set aside a judgment when a party obtains a judgment by concealing material facts and suppressing the truth with the intent to mislead the court.

Alvarado v. Thomson, 240 Ariz. 12, 16, ¶ 17 (App. 2016) (quotation omitted) (cleaned up).

¶32 The Casavellis allege fraud both during the trial and in post-trial motions, but they failed to provide transcripts of the trial or specify where the fraud occurred in the post-trial motions. *See State ex rel. Brnovich v. Miller*, 245 Ariz. 323, 324, ¶ 5, n.1 (App. 2018) (An appellant must provide transcripts for us to consider the issues raised.). Thus, these claims are waived. *See id.* They allege fraud based on the use of a different trust

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[3] The Casavellis contend, for the first time in their reply brief, that the superior court failed to make substantive findings of the "frivolous or harassing nature of appellants' actions," as required by Arizona caselaw. Issues raised for the first time in a reply brief are waived. *See Ramos v. Nichols*, 252 Ariz. 519, 523, ¶ 11 (App. 2022).

name in a legal document, but they fail to explain the legal significance of their claim or even to validate the existence of the trust they allege the Johansons used. This claim is also waived.

¶33 Finally, the Casavellis allege that discrepancies with the timestamp on the jury verdict reveal a scheme by the court to replace the jury verdict with one in favor of the Johansons. The Casavellis fail to rebut the presumption of regularity with any evidence supporting the alleged scheme. *See Hyde*, 186 Ariz. at 269 (A party must present "sufficient evidence" to overcome a presumption of regularity.).

H. The Casavellis Were Afforded Due Process.

¶34 The Casavellis argue they were denied due process through each claim they raise on appeal. "The touchstone of due process under both the Arizona and federal constitutions is fundamental fairness," *State v. Melendez*, 172 Ariz. 68, 71 (1992), manifested by "the opportunity to be heard at a meaningful time and in a meaningful manner," *Samiuddin v. Nothwehr*, 243 Ariz. 204, 211, ¶ 20 (2017) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). It requires "that parties have an adequate opportunity to present factual and legal claims fully." *In re Guardianship of A.K.*, 258 Ariz. 336, 343, ¶ 18 (App. 2024). The Casavellis had a trial after six years of litigation, voluminous motions, and several appeals. They had a six-day trial on the issues, and when a medical emergency arose, they were allowed to appear remotely. We see no error in the superior court's actions throughout the litigation and no due process violations.

I. The Casavellis' Remaining Claims Fail.

¶35 The Casavellis challenge the sufficiency of the evidence presented at trial. When reviewing a jury verdict, we view the evidence in the light most favorable to upholding the verdict and will affirm if "substantial evidence was presented to permit reasonable persons to reach the decision reached by the jury." *Mealey v. Arndt*, 206 Ariz. 218, 221, ¶ 12 (App. 2003). The Casavellis, however, failed to provide trial transcripts, rendering their claim unreviewable and waived. *See Miller*, 245 Ariz. at 324, ¶ 5, n.1 (An appellant must provide transcripts.).

¶36 The Casavellis also object to the Johansons' use of demonstrative exhibits at the trial, but they failed to object. Their failure to object waived any argument on appeal. *See Sheehan v. Pima County*, 135 Ariz. 235, 240 (App. 1982) (Objections to testimony are waived by the failure to object at trial.); *Woyton v. Ward*, 247 Ariz. 529, 534, ¶ 16 (App. 2019) (Issues not raised before the trial court are waived.).

¶37 There is no support for the Casavellis' claim that Civil Rule 47 requires the court to provide each party with the written jury questionnaire. Instead, the rule requires the court to provide "the prospective jurors' *responses* to the case-specific written questionnaires" to the parties. Ariz. R. Civ. P. 47(b)(3) (emphasis added). The court did not err by distributing the answers to the questionnaire.

¶38 The Casavellis misstate the preclusive effect of a denied motion for summary judgment. "[I]f there is the slightest doubt as to whether a factual issue remains in dispute, the granting of summary judgment is erroneous and the doubt must be resolved in favor of a trial on the merits." *Brown v. Sears, Roebuck & Co.*, 136 Ariz. 556, 562 (App. 1983). A denied motion for summary judgment is not a resolution on the merits because a trial must resolve any factual doubt. The court did not err by allowing the Johansons to continue litigating claims that were denied on a motion for summary judgment.

¶39 The Casavellis do not show when the court dismissed the award of fees from the order to show cause, and they misread our previous order, which held the question of the fees judgment was not appealable rather than improperly decided. They have waived any argument on the fees.

¶40 The Casavellis contend the court erred by granting an emergency trial continuance because the Johansons' counsel contracted COVID days before the trial. They argue that the court ruled without providing them with notice and without the court being fully briefed on the issue. Yet the Casavellis objected on the same day as the Johansons' motion to continue, setting out their argument for proceeding to trial. There is no merit to their claim.

¶41 The Casavellis fail to allege why the court's omission of the jury from the trial video violates Civil Rule 47, thereby waiving this argument. Furthermore, on the record before us, the Casavellis participated in jury selection and received identifying information sufficient to enable their participation. We cannot say the court breached Civil Rule 47(b)(1). Nor do the Casavellis point to any other authority granting them the right to identifying information on the empaneled jury. We discern no error in the jury selection process.

¶42 The Casavellis provide no compelling evidence of a member of the court staff reading deposition testimony at trial. While the record does show a deposition being read, it is not by the individual the Casavellis

claim. Further, Civil Rule 32(c) explicitly allows this presentation. They have waived their argument on this issue.

¶43 "[T]he public has a constitutional and common law right of access to observe court proceedings." *Ridenour v. Schwartz*, 179 Ariz. 1, 3 (1994) (citing Ariz. Const. art. 2, § 11 & art. 6, § 17). Against this backdrop, we reject the Casavellis' argument that the court livestreaming their trial violated privacy laws and their rights.

¶44 The Casavellis' claims of being members of an LLC lack merit. They fail to point to any records showing their addition as members in compliance with A.R.S. § 29-3401(C). Instead, they rely only on a document appointing Nicholas Casavelli to sign on behalf of the LLC. On its face, this document authorizes Nicholas Casavelli as an agent, not a member. With no other record support, the Casavellis failed to show their membership.

ATTORNEY'S FEES AND COSTS

¶45 The Johansons request their attorney's fees on appeal under A.R.S. § 12-349(A). Per our discretion, we award the fees pending compliance with ARCAP 21, having found no meritorious arguments from the Casavellis and considering the numerous motions and issues raised before this court. *See* A.R.S. § 12-349(A)(3) (A court must assess reasonable attorney's fees if the attorney or party "unreasonably expands or delays the proceedings."). This case exemplifies a party expanding the litigation by filing and raising voluminous motions and issues, many of which have been previously raised and rejected, thereby expanding the litigation beyond what is necessary to resolve the action. As the prevailing party, the Johansons are also awarded their costs under A.R.S. § 12-341 upon compliance with ARCAP 21.

CONCLUSION

¶46 We affirm.

MATTHEW J. MARTIN • Clerk of the Court
FILED: JR

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

JAY ALAN BONKE, *Appellant.*

No. 1 CA-CR 17-0130
FILED 4-3-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-102027-001
The Honorable Christine E. Mulleneaux, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

MayesTelles PLLC, Phoenix
By David P. Lish, Mark H. Mendoza
Counsel for Appellant

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Kent E. Cattani joined.

PERKINS, Judge:

¶1 Jay Alan Bonke appeals his convictions and sentences for trafficking in stolen property. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

¶3 Bonke invited a man to be his roommate in April 2016, but did not add his name to the lease. One Friday night in August 2016, the roommate arrived home and found the apartment management had changed the locks and placed an eviction notice on the door.

¶4 The following Monday the apartment manager retrieved the roommate's passport and birth certificate from his bedroom, but did not allow him to enter the apartment because he was not on the lease. While retrieving the documents, the manager took photographs of the roommate's room.

¶5 The apartment management allowed Bonke to enter unsupervised and retrieve his belongings on several occasions. Twenty-one days after changing the locks, the manager allowed the roommate to enter the apartment and recover his personal property. While unlocking the door for the roommate, the manager stated, "I'm going to be honest with you, some of your stuff is missing." The roommate noted his television, sound bar, video game console, and computer were gone. His watch and tower fan were also missing.

¶6 The roommate alerted the police that his items had been stolen. The manager took photographs of the room and provided them and the earlier photographs to the investigating officer. The officer included descriptions of the photographs as well as the photographs themselves in his report.

¶7 After learning that Bonke had pawned the watch, television, sound bar, and video game console, the State charged him with trafficking in stolen property.

¶8 The State disclosed the police report with the attached photographs to Bonke in a timely manner, including a photograph later marked as Exhibit 18. Two days before trial, the prosecutor enlarged Exhibit 18 from a 4x6 photograph to 8x10 and lightened it, revealing greater details. The State did not provide Bonke a copy of the enhanced photograph until the morning of the second day of trial. The State introduced the enhanced photograph in evidence as Exhibit 13.

¶9 Before trial began, Bonke made an oral motion *in limine* to preclude mention of the missing computer and tower fan because the State had not charged him with trafficking those items. He argued that allowing the jury to hear allegations of additional uncharged misconduct would be unduly prejudicial. The trial court granted the motion *in limine*.

¶10 Evidence at trial included pawnshop receipts and surveillance footage of Bonke pawning the watch, television, sound bar, and video game console. Bonke admitted to pawning the four items. He claimed all of the items belonged to him and testified the roommate had given him the watch.

¶11 The jury found Bonke guilty of three counts of trafficking in stolen property. The trial court sentenced Bonke to mitigated concurrent terms of imprisonment, the longest of which was 3.25 years.

¶12 Bonke timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(1) (2018), 13-4031 (2018), 13-4033(A)(1) (2018), and Article 6, Section 9, of the Arizona Constitution.

DISCUSSION

I. Motion for Mistrial

¶13 Bonke argues the trial court erred by denying two motions for mistrial he made based on: (1) the State's failure to disclose the enhanced photograph marked as Exhibit 13; and (2) the roommate's testimony regarding an uncharged missing item in violation of the order granting Bonke's motion *in limine*.

¶14 We review the denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32 (2000). Because "a mistrial

is the most dramatic remedy for trial error," it should be granted "only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262 (1983). In evaluating whether a mistrial is warranted, the trial court "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Jones*, 197 Ariz. at 304, ¶ 32.

A. Enhanced Photograph

¶15 The State is required to provide the defense with a "list of all documents, photographs, and other tangible objects that the State intends to use at trial." Ariz. R. Crim. P. 15.1(b)(5). The purpose of Rule 15.1 is "to give full notification of each side's case-in-chief so as to avoid unnecessary delay and surprise at trial." *State v. Armstrong*, 208 Ariz. 345, 353, ¶ 38 (2004) (quoting *State v. Dodds*, 112 Ariz. 100, 102 (1975)). All disclosure must be completed at least seven days before trial unless otherwise permitted. Ariz. R. Crim. P. 15.6(c). If a party seeks to introduce evidence that was not disclosed at least seven days before trial, the party must file a motion, supported by affidavit, seeking an extension. Ariz. R. Crim. P. 15.6(d).

¶16 We review the trial court's assessment of the adequacy of disclosure under Rule 15.1 for an abuse of discretion. *State v. Roque*, 213 Ariz. 193, 205, ¶ 21 (2006), *disagreed with on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254, 267, ¶ 14 (2017).

¶17 Bonke argues the State should have disclosed Exhibit 13, which was an enlarged and lightened version of the photograph previously disclosed, seven days before trial because it revealed details not visible in Exhibit 18.

¶18 However, the timely-disclosed police report described and included the original photograph, and both the description and the original photograph contained the details visible in Exhibit 13. Additionally, Bonke's counsel interviewed the apartment manager who took the photograph regarding the contents of the photograph. Thus, the State did not untimely disclose Exhibit 13 because Bonke and his counsel already knew its contents.

¶19 Under these facts, the trial court did not abuse its discretion by denying Bonke's motion for a mistrial based on a failure to separately disclose the enhanced photograph.

B. Witness Testimony

¶20 "When unsolicited prejudicial testimony has been admitted, the trial court must decide whether the remarks call attention to information that the jurors would not be justified in considering for their verdict, and whether the jurors in a particular case were influenced by the remarks." *Jones*, 197 Ariz. at 304, ¶ 32. "When the witness unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error." *Id.* (emphasis omitted); *see also State v. Stuard*, 176 Ariz. 589, 602 (1993) (finding the trial court's instructions mitigated any potential prejudice created by unsolicited testimony).

¶21 Here, we need only address prejudice. The jury heard the roommate make five brief references to a missing computer. Bonke failed to object to either of the first two references, which came when the roommate was listing a handful of items he found missing from his bedroom. The third and fourth references were in quick succession, when the roommate was identifying missing items depicted in a photograph of his bedroom. Defense counsel objected at that point, prompting a bench conference, after which the trial court admonished the roommate and told the jury:

> Jurors, you are to disregard any statements with regard to a missing computer.
>
> He's not been charged with a missing computer. You're to disregard that testimony at this time.

¶22 Bonke claims the trial court's use of the phrase "at this time" impliedly allowed the jury to consider the roommate's testimony about the missing computer at a later time—specifically, during deliberations. However, given the trial court's frequent use of the phrase "at this time" during the trial, it is highly unlikely the jury ascribed it special meaning in this particular instance.

¶23 Notwithstanding the admonition, the roommate made one more reference to a computer in recounting a conversation he had with Bonke after the items went missing, but it is not clear from his testimony he was referring to the same computer as in the earlier references. Defense counsel again failed to object. Finally, when the roommate was asked on cross-examination whether he gave police the serial numbers of the missing items, he responded, "Just for my—I can't mention items that are missing, right. That he wasn't charged with?"

¶24 The roommate's references to the computer were brief, and the State did not mention the computer during opening or closing arguments. Moreover, defense counsel failed to object to several of the references. Finally, any potential prejudice from the statements was mitigated by the trial court's curative instruction to the jury to disregard the testimony. *See Stuard*, 176 Ariz. at 602. We presume a jury follows instructions unless the record indicates otherwise. *Payne*, 233 Ariz. at 518, ¶ 151. Therefore, the trial court did not abuse its discretion by denying Bonke's motion for mistrial based on the roommate's references to the missing computer.

II. Alleged Prosecutorial Misconduct

¶25 Bonke argues the prosecutor's failure to prevent the roommate from testifying in violation of the preclusion order, along with the failure to disclose the enhanced photograph, constitute prosecutorial misconduct warranting a new trial.

¶26 To prevail on a claim of prosecutorial misconduct, the defendant must demonstrate the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998). "[T]he denial of due process is a denial of 'fundamental fairness, shocking to the universal sense of justice.'" *State v. Velasco*, 165 Ariz. 480, 487 (1990) (quoting *Oshrin v. Coulter*, 142 Ariz. 109, 111, (1984)).

¶27 A conviction will be reversed for prosecutorial misconduct only if (1) misconduct occurred and (2) "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45 (2005). Absent an abuse of discretion, we defer to "the trial court's determination whether prosecutorial misconduct is so prejudicial as to require a new trial." *State v. Smith*, 182 Ariz. 113, 116 (App. 1995). Additionally, the Arizona Supreme Court has expressed great reluctance "to reverse a conviction on grounds of prosecutorial misconduct as a method to deter such future conduct." *State v. Towery*, 186 Ariz. 168, 185 (1996).

¶28 Bonke contends the prosecutor committed misconduct by failing to instruct the roommate to refrain from mentioning the missing computer while testifying. In response, the State argues that at the time the roommate testified, there was no clear ruling from the trial court precluding such testimony. On the first day of trial, the trial court granted Bonke's oral

motion *in limine* to preclude any mention of the computer and the tower fan since they were not at issue. The next day, Bonke asked the court for permission to question the roommate about the tower fan, which the court granted. The prosecutor then asked to allow discussion of all items missing from the roommate's bedroom. The trial court heard argument about the issue, but did not rule at that time because the jury was coming in. Later, the trial court concluded the prosecutor may not have understood that the previously-granted motion *in limine* remained in place. Moreover, the trial court acknowledged that the discussion when revisiting Bonke's motion *in limine* could have confused the prosecutor. On this record, Bonke has not established the prosecutor committed misconduct by failing to instruct the roommate to refrain from mentioning the computer.

¶29 Furthermore, even assuming misconduct, Bonke has not demonstrated resulting prejudice. The State offered a wealth of evidence to show Bonke committed the charged crimes, including the surveillance footage of Bonke at the pawn shop, the pawn shop receipts, the testimony of both the pawn shop employee and the roommate, and Bonke's own testimony.

¶30 Under these circumstances, the roommate's limited (and unsolicited) statements over five half-days of trial, particularly as limited by the court's curative instruction, do not demonstrate a denial of due process or shock "the universal sense of justice." *Velasco*, 165 Ariz. at 487.

¶31 Bonke also claims the State's nondisclosure of the enhanced photograph amounted to prosecutorial misconduct. Because the trial court did not err in finding that the prosecutor adequately disclosed the contents of the photograph, the prosecutor's actions regarding the enhanced photograph did not amount to prosecutorial misconduct.

CONCLUSION

¶32 For the foregoing reasons, we affirm Bonke's convictions and sentences.

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

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent,*

v.

ELIZABETH HALEY BROWN, *Petitioner.*

No. 1 CA-CR 14-0567 PRPC
FILED 10-13-2016

Petition for Review from the Superior Court in Maricopa County
No. CR2011-162716-001
The Honorable Christine E. Mulleneaux, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Amanda M. Parker
Counsel for Respondent

Elizabeth Haley Brown, Goodyear
Petitioner

MEMORANDUM DECISION

Judge John C. Gemmill[1] delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Lawrence F. Winthrop joined.

GEMMILL, Judge:

¶1 Petitioner Elizabeth Haley Brown petitions this court for review of the dismissal of her petition for post-conviction relief. We have considered the petition for review and, for the following reasons, grant review but deny relief.

¶2 A jury convicted Brown of possession or use of dangerous drugs and possession of drug paraphernalia. The trial court sentenced Brown to an aggregate term of ten years' imprisonment and we affirmed her convictions and sentences on direct appeal. Brown now seeks review of the summary dismissal of her first petition for post-conviction relief. We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c) and Arizona Revised Statutes section 13-4239(C) (2010).

¶3 The petition for review properly presents two issues. Brown's trial counsel filed a motion to suppress the drugs and drug paraphernalia seized from Brown during a search incident to her arrest for a traffic violation. Brown argues counsel was ineffective when he failed to include an argument that the search was too invasive. Brown further argues her counsel was ineffective when he failed to inform her of the date and time of the suppression hearing early enough to allow her to arrange for witnesses to attend and testify.

¶4 To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a

[1] The Honorable John C. Gemmill, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

probability sufficient to undermine confidence in the outcome." *Id.* Finally, strategic choices of counsel "are virtually unchallengeable." *Strickland*, 466 U.S. at 690-691.

¶5 We grant review but deny relief. Regarding the motion to suppress, Brown's counsel argued in his motion that the search incident to the arrest was illegal because there was no probable cause for the arrest. Decisions regarding which grounds to allege in a motion to suppress are matters of trial strategy. Unsuccessful yet valid determinations of trial strategy are not ineffective assistance of counsel. *See State v. Valdez*, 160 Ariz. 9, 15 (1989). Further, to show prejudice from counsel's failure to file a motion to suppress, a defendant must also show there is a reasonable likelihood the trial court would have granted the motion. *State v. Berryman*, 178 Ariz. 617, 622 (App. 1994) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). Brown has failed to show there is a reasonable likelihood the trial court would have granted a motion to suppress based on Brown's subjective belief that the search was too invasive because a female police officer asked her to remove her bra from under her shirt as she stood on the side of a public street while two male officers stood nearby. Brown cites no authority in her petition for review that provides such circumstances warrant suppression of the evidence. For these reasons, Brown has failed to present a colorable claim of ineffective assistance based on the failure to argue additional grounds in the motion to suppress.

¶6 Regarding the alleged failure to timely inform Brown of the date and time of the suppression hearing, Brown was present in the courtroom with her counsel when the trial court set the date and time of the hearing. Therefore, Brown has failed to present a colorable claim of ineffective assistance based on the failure to timely inform her of the date and time of the hearing.

¶7 While the petition for review presents a number of additional issues, including many new claims of ineffective assistance of counsel, Brown did not raise those issues in the petition for post-conviction relief she filed below. A petition for review may not present issues not first presented to the trial court. *State v. Ramirez*, 126 Ariz. 464, 467 (App. 1980); *State v. Wagstaff*, 161 Ariz. 66, 71 (App. 1988); *State v. Bortz*, 169 Ariz. 575, 577 (App. 1991); Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶8 We grant review but deny relief.

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 12-0191
	DEPARTMENT D
v.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
HUSSEIN MOHAMED ALI, Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-110503-001

The Honorable Christine E. Mulleneaux, Commissioner

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Andrew Reilly, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Jeffrey L. Force, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Hussein Mohamed Ali (defendant) appeals his conviction for possession or use of the dangerous drug cathine (aka khat).

For the reasons set forth below, we affirm defendant's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Police Officers Daniel Safsten and Matthew Rundell observed defendant make an illegal left-hand turn on July 12, 2009 at 12:08 a.m. Officer Safsten had to brake in order to avoid a collision, and he immediately went in pursuit of defendant and initiated a traffic stop. While explaining the traffic violation and citation to defendant, Officer Safsten observed prominent abnormalities in the color and appearance of defendant's eyes that matched the characteristics of an individual that had recently ingested cathine from khat leaves.[1] Officer Safsten told defendant he was free to go, but asked defendant for permission to search the vehicle. Defendant opened his door, exited the vehicle, and consented to the search. Officer Safsten immediately noticed dried green flecks and small stems all over the floorboard and seat that made him suspect there was khat in the vehicle.[2] When he did not find any khat, Officer Safsten asked defendant if he had any khat in the car, which defendant denied. Officer Safsten asked defendant to

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[1] Cathine is a central nervous system stimulant very similar to methamphetamines. The plant is grown in East Africa and the Arabian peninsula. *United States v. Hussein*, 351 F.3d 9, 11 (1st Cir. 2003).

[2] Typically, khat users will chew on khat leaves and spit out the excess plant material.

open his mouth, and Officer Safsten noticed a strong green thick film on defendant's tongue and green flecks throughout his mouth.[3] Based on Officer Safsten's experience, he recognized these characteristics as a result of recent consumption of khat.

¶3 Officer Safsten returned to the vehicle and continued the search. He found a plastic baggie partially concealed underneath the steering column of the vehicle that contained a green, leafy substance that Officer Safsten recognized as khat. When Officer Safsten pulled out the baggie, defendant "looked down, he put his hand on his face, and shook his head." Officer Safsten read defendant his Miranda warnings, and defendant stated he understood his rights and voluntarily agreed to speak with the officer. Defendant denied that the substance was khat, and instead stated it was something called "gaboa" that he got from a friend in Africa. A scientific analysis of the contents of the baggie confirmed the baggie contained 35.6 grams of cathine.

¶4 Defendant was charged with one count of possession or use of dangerous drugs, a class 4 felony. At trial, defense counsel made an Arizona Rule of Criminal Procedure 20 motion for acquittal arguing that the state did not present evidence that defendant knew the substance he possessed was actually cathine.

[3] Khat use leaves behind a thick green film on the user's tongue, and small, flaky pieces of khat get stuck in the user's teeth and mouth.

The court denied the motion. Defendant did not testify. In closing arguments, the prosecutor stated:

> As far as knowingly, it's important to note that the last sentence under that definition does not require any knowledge of the unlawfulness of the act or omission. You don't have to know - you don't have to be convinced that the defendant knew the substance was, in fact, khat and that it was illegal. You simply have to believe that he knowingly had it, that he knew that he had possessed that substance that was found in his car.
>
> . . . .
>
> Even if you want to give the defendant the benefit of the doubt and believe that he didn't know that it was khat and that it was illegal, once again, just look back in your jury instructions for knowingly. That's not a requirement. It's just that he knowingly possessed that substance. That substance happens to be illegal in Arizona. Because he knowingly possessed it, he's guilty.

The jury instructions defined possession of dangerous drugs as follows:

> A person commits possession or use of a dangerous drug requires proof of the following:
>
> 1. The defendant knowingly possessed/used a dangerous drug *and*
>
> 2. The substance was in fact a dangerous drug. In Arizona, Cathine is classified as a dangerous drug.
>
> You cannot find the defendant guilty of possession of dangerous drugs unless you find that the State proved each element of

possession of dangerous drugs beyond a reasonable doubt.

. . . .

"Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

¶5 The jury found defendant guilty as charged. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-120.21 (2003).

DISCUSSION

¶6 On appeal, defendant argues the trial court erred in denying his Rule 20 motion because there was insufficient evidence that he knew the substance he possessed was an illegal dangerous drug. Defendant concedes that the state presented sufficient evidence of constructive possession of the baggie and its contents, and that the state did not have the burden to prove that defendant knew the baggie contained the specific drug khat or cathine.

¶7 We review the court's denial of a Rule 20 motion for an abuse of discretion. *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001). We will reverse a conviction only if there is a complete lack of substantial evidence to

support the charge. *See id.; see also* Ariz. R. Crim. P. 20(a). Substantial evidence is evidence that a reasonable jury could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999). In determining whether a court abused its discretion in denying a Rule 20 motion, we view the evidence in the light most favorable to upholding the verdict. *State v. Gillies*, 135 Ariz. 500, 506, 662 P.2d 1007, 1013 (1983). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007) (quoting *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996)).

¶8 We test the sufficiency of the evidence "against the statutorily required elements of the offense." *State v. Pena*, 209 Ariz. 503, 505, ¶ 8, 104 P.3d 873, 875 (App. 2005). To survive defendant's Rule 20 motion, the state had to present substantial evidence that defendant knowingly possessed or used a dangerous drug. *See* A.R.S. § 13-3407(A)(1) (2010); *cf. State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994) (state not required to prove that defendant knew which particular drug defined under our laws as a "dangerous" drug or "narcotic" drug he knew he possessed). Thus, the prosecutor incorrectly limited

the issue to whether defendant knowingly possessed the baggie, when the state is actually required to show knowledge of the nature of the substance. The element of knowledge can be proven by evidence showing that the defendant was aware of the high probability that the package contained an illicit drug and that he acted with a conscious purpose to avoid learning the true nature of the substance. *See State v. Diaz*, 166 Ariz. 442, 445, 803 P.2d 435, 438, *vacated in part on other grounds*, 168 Ariz. 363, 813 P.2d 728 (1991).

¶9 The evidence at trial was that the baggie in defendant's possession contained the dangerous drug cathine. *See* A.R.S. § 13-3401(6)(b)(iv) (2010). Defendant contends that the only evidence of his knowledge of the nature of the substance was that he denied it was khat and instead called it "gaboa." However, the jury was not compelled to accept his self-exculpating statement to the police as true. *Cf. State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App. 1995) (jury was free to disbelieve a defendant's uncontroverted testimony at trial and find him guilty of the offense charged); *State v. Carrillo*, 128 Ariz. 468, 470, 626 P.2d 1100, 1102 (App. 1980) (jury could reasonably disbelieve defendant's testimony and infer from the evidence that defendant committed the charged offense). A criminal defendant's exculpatory "self-serving statements" made to a police officer are "highly suspect."

State v. Barger, 167 Ariz. 563, 566, 810 P.2d 191, 194 (App. 1990) (citation omitted). Moreover, the state was not required to disprove every hypothesis of innocence. *State v. Bullock*, 26 Ariz. App. 149, 153, 546 P.2d 1158, 1162 (1976).

¶10 Furthermore, the record establishes that there was substantial evidence from which the jury could have inferred that defendant knew he possessed illicit drugs. Paramount among these was defendant's reaction when Officer Safsten pulled the baggie out of the vehicle. Defendant looked down, put his hand on his face, and shook his head. This response denotes a guilty conscience, a feeling of getting "caught in the act," rather than the reaction of someone who thinks he merely possesses something similar to chewing tobacco. Also included is the odd location of the baggie in the vehicle. If defendant thought he only possessed an innocuous drug, it seems strange that he would take the effort to conceal it in the steering column of the vehicle. In addition, although khat is not as well known as other drugs, defendant never asked what khat was nor what exactly Officer Safsten was looking for. Also compelling was that defendant knew how to use the drug. *See Hussein*, 351 F.3d at 18-20 (knowing possession of a controlled substance when a defendant claims a lack of knowledge of the identity of the drug possessed can be proven by his awareness of the drug's intended use). The physical indicators of khat use, with the stems and

flakes strewn all over the seat and floorboard of the car, matched common behaviors of khat use. Finally, the state showed defendant admitted to receiving the contents of the baggie from a friend in Africa, where khat is openly and regularly chewed for its stimulating qualities.

¶11 Based on the totality of this circumstantial evidence, reasonable jurors could have inferred that defendant knew that the baggie contained an illicit drug. Whether a defendant acts "knowingly and intentionally" is a judgment of his credibility for the jury to make. *State v. Fierro*, 220 Ariz. 337, 339, ¶¶ 8-9, 206 P.3d 786, 788 (App. 2008). Any confusion concerning the concept of knowledge, raised by the prosecutor's statements, was cured by the trial court's instructions to the jury. *State v. Marvin*, 124 Ariz. 555, 557, 606 P.2d 406, 408 (1980). The trial court in this case did not abuse its discretion in denying defendant's Rule 20 motion and submitting this matter to the jury.

CONCLUSION

¶12 For the foregoing reasons, we affirm defendant's conviction and sentence.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Presiding Judge

/s/
DONN KESSLER, Judge