

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 30 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0286
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JIMMY DEWAYNE WAYMIRE,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072359

Honorable Gus Aragon, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
Attorneys for Appellee

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ESPINOSA, Presiding Judge.

¶1 After a seven-day jury trial, Jimmy Waymire was convicted of kidnapping, armed robbery, and first-degree murder. He was sentenced to concurrent prison terms, including a life term of imprisonment with the possibility of parole after twenty-five years. Waymire raises a number of issues on appeal, but none warrants reversal.

Factual and Procedural Background

¶2 We construe the facts in the light most favorable to sustaining Waymire's convictions and sentences. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶ 2, 218 P.3d 1069, 1074 (App. 2009). At about 2:00 a.m. one day in June 2007, Tucson Police officers responded to a 9-1-1 call about a disturbance and went to an apartment complex after neighbors reported sounds of a fight and screaming coming from one of the second-floor units. As officers reached the second-floor landing, they encountered Waymire leaving an apartment. The officers noticed what appeared to be blood on his arm and that he was carrying a wallet with an exterior transparent identification pocket displaying a driver's license belonging to someone else.¹ Waymire appeared agitated, and when the officers attempted to detain him, he broke free and fled on foot. After unsuccessfully pursuing Waymire, the officers returned to the apartment, where they discovered a bloody pair of scissors on the landing that had not been there before the struggle.

¶3 Upon entering the apartment Waymire had left, the officers found R. dead on the floor in a pool of blood. R.'s hands had been bound behind him with an electrical

¹The wallet had car keys attached to it and it was later determined it belonged to the victim, R.

cord that extended up and wrapped around his neck. He also appeared to have been stabbed in the face. The medical examiner subsequently determined that the cause of death was strangulation with the electrical cord, but that the stab wounds were a contributing factor and had been inflicted with the scissors recovered on the landing. Testing revealed the presence of DNA² consistent with R.'s and Waymire's on both the scissors and ligature.

¶4 While police officers searched for him, Waymire hid on the roof of a nearby apartment complex and telephoned his wife from R.'s cellular telephone, telling her he was in trouble and needed a ride. Waymire's wife called the police, and he was arrested shortly thereafter.

Discussion

Competency

¶5 Waymire first contends the trial court erred in finding him competent to stand trial, in violation of his constitutional due process rights. *See Pate v. Robinson*, 383 U.S. 375, 378 (1966) (forcing incompetent defendant to stand trial violation of due process); *see also* Ariz. R. Crim. P. 11.1 (“A person shall not be tried . . . while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense”). We review a trial court's competency determination for an abuse of discretion. *State v. Glassel*, 211 Ariz. 33, ¶ 27, 116 P.3d 1193, 1204 (2005). To find a defendant competent, a trial court must

²Deoxyribonucleic acid.

first find the defendant understands the nature of the proceedings and is able to assist in the preparation of a defense. *Id.* ¶ 19. Waymire does not appear to seriously contend he was unable to understand the proceedings, but maintains he was incompetent because he was unable to assist in his own defense.³ The trial court considered Waymire's competency on several occasions during the course of his trial and we evaluate each separately.⁴

First Competency Proceeding

¶6 Before trial, defense counsel filed a motion pursuant to Rule 11.2, Ariz. R. Crim. P., seeking a psychological evaluation of Waymire to determine whether he was competent. The trial court appointed both a psychologist and a psychiatrist to examine him pursuant to Rule 11.3, and conducted a competency hearing pursuant to Rule 11.5. The psychiatrist testified at the hearing that Waymire was competent to stand trial, but the psychologist disagreed. Both testified Waymire suffered from various mental health disorders, but disagreed as to their diagnoses and his ability to assist in his own defense.

³To the extent Waymire may be asserting he was unable to understand the proceedings, this argument is not clear from his briefs. Moreover, such an assertion would be meritless in light of the fact that both experts testified at the competency hearing that Waymire accurately understood the purposes of a trial and the roles of its participants. Additionally, the record reflects he was able to communicate clearly to the judge his wishes regarding different aspects of the trial.

⁴Although Waymire contends generally the trial court erred in finding him competent to stand trial, he does not distinguish between the court's denial of a motion for a hearing on competency and its finding him competent following a hearing. Accordingly, in our review of these proceedings, we have attempted to identify the relevant Rule 11 provision and consider the applicable authorities to apply to the trial court's rulings.

The psychologist determined Waymire had a “generalized anxiety disorder” that would cause him, as a coping mechanism, to “tr[y] . . . to get out of his mind,” thus preventing him from assisting in his own defense. The psychiatrist, however, testified that Waymire was competent and able to “rationally and meaningfully assist” his counsel, opining this was not even a “close call.” After hearing this testimony, observing Waymire’s behavior, and listening to several audio tapes of Waymire’s telephone calls from jail, the court found him competent.

¶7 Waymire argues the trial court abused its discretion because there was no evidence directly refuting the psychologist’s opinion that his anxiety would render him incompetent inside the courtroom as opposed to other environments.⁵ But a trial court is not bound by the competency determinations of any expert. *See Bishop v. Superior Court*, 150 Ariz. 404, 409, 724 P.2d 23, 28 (1986) (determination of competency “always and exclusively” question for trial court). Moreover, contrary to Waymire’s assertion, the psychiatrist did consider whether he was capable of assisting his attorneys, testifying that he could assist by having “meaningful, rational” discussions both before and during trial. Moreover, the psychologist conceded Waymire had stated he would alert his attorneys if a witness made a false statement during trial.

⁵Waymire seems to suggest the trial court was required to make separate findings with respect to his competency to assist in the courtroom and outside the courtroom. He has cited no authority, however, nor are we aware of any, requiring such bifurcated rulings.

¶8 Based on this testimony the trial court reasonably could find Waymire competent. The psychiatrist testified he had performed hundreds of competency evaluations, and the court could infer the psychiatrist was cognizant of the in-court aspects of a defendant’s assisting counsel in his own defense. Additionally, the court noted that the recorded telephone conversations reflect that Waymire cogently and rationally discussed aspects of his case, including “his assessment of the quality of his legal representation.”⁶ Accordingly, because reasonable evidence supported its determination, we cannot say the trial court erred in finding Waymire competent to stand trial. *See Glassel*, 211 Ariz. 33, ¶ 28, 116 P.3d 1193, 1204 (no abuse of discretion even if different fact finder might have resolved competency issue differently); *State v. Arnoldi*, 176 Ariz. 236, 239, 860 P.2d 503, 506 (App. 1993) (appellate court will not reweigh competency evidence).

Second Competency Proceeding

¶9 A few days before trial was scheduled to begin, Waymire’s attorneys reported that his mental health appeared to be deteriorating and requested another competency evaluation. The trial court ordered a psychologist on staff at the jail to evaluate Waymire and conducted a hearing the morning of the first day of trial. This psychologist diagnosed Waymire with “generalized anxiety disorder,” which she described as “excessive anxiety, worry, tension, [and] nervousness” that “tends to inhibit

⁶After Waymire filed a motion for reconsideration of this ruling, including with it additional recorded telephone calls, the trial court expressly “re-evaluated all of the evidence and issues” and reached the same conclusion.

one[']s life” and “interferes with occupational functioning.” She did not, however, offer an opinion on his competence, acknowledging she was not an expert in competency. She also testified that Waymire had advised her their discussions had to be approved by his attorney before they could proceed, and that he was “consistently logical, coherent[,] and goal-directed.” In denying Waymire’s Rule 11 motion for further competency evaluation, the trial court expressly considered this testimony as well as jail records, prior evaluations, and its own observations of Waymire’s behavior in court, which the court characterized as not “abnormal . . . other than he seemed reserved and perhaps nervous.”⁷

¶10 A trial court is required to order a psychological examination of a defendant only if there are reasonable grounds to question whether the defendant is competent. *See State v. Kuhs*, 223 Ariz. 376, ¶ 13, 224 P.3d 192, 196 (2010). And when the court has presided over an initial Rule 11 proceeding, it does not abuse its discretion by considering evidence presented at that hearing when it denies a subsequent Rule 11 motion. *See id.* ¶ 16; *State v. Moody*, 208 Ariz. 424, ¶ 48, 94 P.3d 1119, 1138 (2004) (“[I]f a defendant has already been adjudicated competent, the court must be permitted to

⁷Waymire repeatedly asserts that the trial court erroneously focused on his ability to comprehend the proceedings and failed to address his inability to assist in his own defense. This claim is not supported by the record, which reflects the court had many opportunities to observe him in the courtroom and denied several of his Rule 11 motions after finding he was behaving competently. Waymire also asserts the trial court’s ruling was based on its belief his “anxiety disorder was feigned.” Although the state repeatedly implied that Waymire’s illness was fabricated, the court did not adopt this conclusion, but rather accepted that Waymire’s mental illness, including the later diagnosis of agoraphobia was a plausible explanation for the fact that Waymire’s in-court behavior was incongruent with his more cogent and normal behavior in the jail.

rely on the record supporting that previous adjudication.”). Although the jail psychologist’s testimony together with the testimony of the psychologist who had initially evaluated Waymire arguably supported a finding that he was incompetent, it was for the trial court, not this court, to weigh the evidence and make that determination. *See Glassel*, 211 Ariz. 33, ¶ 28, 116 P.3d at 1204. Moreover, the court was not required to rule consistently with this psychologist’s testimony, rather it was entitled to consider that evidence together with its own observations of Waymire. *See Moody*, 208 Ariz. 424, ¶ 48, 94 P.3d at 1138. Accordingly, we cannot say the trial court erred in denying Waymire’s second Rule 11 motion, which was made the morning of trial.

Third Competency Proceeding

¶11 After the conclusion of the second day of trial, defense counsel renewed the Rule 11 motion, noting Waymire had spent the day with his head down on the defense table drawing. The trial court denied the motion, finding Waymire was voluntarily refusing to participate and pay attention. The only new evidence of incompetence was Waymire’s in-court behavior, which the trial court had been able to observe. Thus, the court relied on its own perceptions and observations, as informed by the previous competency hearings and evidence, and did not abuse its discretion in denying the motion. *See Moody*, 208 Ariz. 424, ¶ 48, 94 P.3d at 1138.

Fourth Competency Proceeding

¶12 Following a meeting with defense counsel on the second day of trial,⁸ the trial court permitted yet another psychological evaluation. The next day, Waymire’s counsel again renewed the Rule 11 motion, advising that the evaluating psychologist would testify Waymire suffered not only from anxiety, but agoraphobia, which impaired his ability to assist his defense inside a courtroom. The court declined to stay the proceedings, but scheduled another hearing. In the meantime, Waymire chose to absent himself from the courtroom whenever possible.⁹

¶13 At the fourth competency proceeding, the new psychologist offered a “split clinical opinion,” testifying Waymire was competent outside the courtroom, but his agoraphobia rendered him incompetent in court. The psychologist then suggested a number of possible accommodations that could help counteract the effects of Waymire’s anxiety and agoraphobia, including allowing him to view the trial from outside the courtroom and perhaps employing a “comfort buddy” to help him remain calm.

⁸Waymire’s counsel requested and the trial court granted, over the state’s objection, an ex parte proceeding to discuss with the judge information he had learned in privileged and confidential discussions with Waymire.

⁹After Waymire advised the trial court he did not wish to be present, the court required him to attend the proceedings only when his presence was necessary for identification purposes. His attorneys, however, contended he was incompetent to voluntarily absent himself, an argument Waymire raises again on appeal. As already noted, however, the trial court did not err in adjudicating him competent prior to this decision; accordingly, we consider his absences voluntary.

¶14 The trial court acknowledged the agoraphobia diagnosis as the “first plausible” explanation for Waymire’s behavior, which was markedly cogent outside the courtroom, yet appeared compromised inside. Nevertheless, the court did not reverse its earlier rulings. To help Waymire participate more fully in his defense, the court moved the trial to a courtroom equipped with a separate media room from which Waymire could observe the proceedings and communicate with his attorneys via headset. Despite these accommodations, Waymire continued to absent himself from the proceedings.¹⁰

¶15 Waymire argues the trial court abused its discretion in not granting his Rule 11 motion despite the agoraphobia diagnosis. But it is well established that a mental illness does not necessarily render a defendant incompetent to stand trial. Ariz. R. Crim. P. 11.1; *see also Moody*, 208 Ariz. 424, ¶ 56, 94 P.3d at 1139; *State v. Evans*, 125 Ariz. 401, 403, 610 P.2d 35, 37 (1980). And the logical implication of Waymire’s argument would render any agoraphobic defendant incompetent to stand trial regardless of how lucid he or she was inside or outside the courtroom. Although the record reflects the court appeared to credit the agoraphobia diagnosis, it does not show that it considered the diagnosis anything more than an explanation of the behaviors it had already observed but

¹⁰Waymire contends, as he did below, that the accommodation would not have been adequate because the guards in the media room would have interfered with his ability to make confidential statements to his attorneys. This issue appears to be moot, however, because Waymire refused to utilize this accommodation, absenting himself and obviating all in-trial communication with his attorneys, both confidential and otherwise. Moreover, because the court offered the media room as a courtesy to encourage him to attend trial and not as a tool to render him competent, Waymire was not required to utilize it and could have chosen to stay in the courtroom, where he could communicate more directly with his attorneys.

did not believe rose to the level of incompetence. That the court utilized some of the psychologist's suggestions does not establish the court erred in finding Waymire competent, only that it exercised its discretion to better enable a competent defendant with mental health challenges to participate in his trial. *See State v. Sucharew*, 205 Ariz. 16, ¶ 6, 66 P.3d 59, 64 (App. 2003) (trial court has broad discretion in conduct of trial); *see also State v. Melendez*, 135 Ariz. 390, 392-93, 661 P.2d 654, 656-57 (App. 1982) (trial court did not abuse discretion in allowing child victim to testify via videotape when psychologist opined she might become uncommunicative before a jury).

¶16 Accordingly, the trial court did not abuse its discretion when it denied Waymire's fourth Rule 11 motion.¹¹ As noted previously, the court was not required to disregard competency evidence already introduced, including the psychiatrist's opinion that Waymire would be competent to assist his attorneys both inside and outside the courtroom, *see Moody*, 208 Ariz. 424, ¶ 48, 94 P.3d at 1138 (trial court entitled to rely on findings from previous proceedings), and its own continuing observations of Waymire's courtroom behavior and interactions with counsel and others, *see Bishop*, 150 Ariz. at 409, 724 P.2d at 28 (trial court entitled to rely on its own observations).¹²

¹¹Waymire raises a number of other issues predicated on his contention that he was incompetent. Given our conclusion the trial court did not abuse its discretion in finding him competent, we need not address those issues.

¹²We acknowledge this appeal may suggest the question of what exactly it means to be able to assist in one's own defense. Waymire contends, and we do not disagree, that the opportunity to assist by being physically present at trial is a critical part of this right. But no party has briefed this issue or directed us to any authority quantifying the

Jury Questions

¶17 Waymire next contends the trial court erred when it answered three questions the jury submitted regarding kidnapping and armed robbery. He also claims the court erred when it denied his motion for a new trial on the same grounds. We review a trial court's response to a jury question for an abuse of discretion, *see State v. Fernandez*, 216 Ariz. 545, ¶ 8, 169 P.3d 641, 644 (App. 2007), *cert. denied*, ___ U.S. ___, 129 S. Ct. 460 (2008), and its denial of a motion for a new trial under the same standard, *see State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003). Similarly, we determine de novo whether the trial court's instructions correctly stated the law. *See State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997).

Kidnapping

¶18 During its deliberations, the jury sent a note to the trial court asking, "Is it still considered kidnapping if someone is conscious or unconscious?" and "[I]f the victim is unconscious[,] is that placing the unconscious person in reasonable fear of immediate physical injury[?]." After discussion with counsel, the trial court instructed the jury as follows:

"Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is

level of assistance a defendant must be capable of providing at trial, nor is answering this question necessary for resolving the issues on appeal. We therefore do not address it.

accomplished by physical force, intimidation, or deception.^{13]}

See A.R.S. § 13-1301(2). Defense counsel agreed the jury’s question would be “covered pretty much by the first clause in [the restraint] instruction,” but expressed concern that giving the additional instruction could prompt other questions and could “place too much weight on one instruction to the exclusion of [the others].”

¶19 Waymire now argues the trial court should have told the jury that an unconscious victim could not be kidnapped, and that the restraint instruction it gave was misleading and nonresponsive. Acknowledging he did not make this argument below, he contends the instruction amounted to fundamental, reversible error. *See State v. Lucero*, 223 Ariz. 129, ¶ 16, 220 P.3d 249, 255 (App. 2009) (appellant’s acquiescence to court’s answer of jury question preserves review only for fundamental error). But we see no error, much less fundamental error. By answering the jury’s question as Waymire now suggests, the trial court would have impermissibly commented on the evidence, *see* Ariz. Const. art. VI, § 27, and such an answer would have been incorrect as a matter of law. Contrary to Waymire’s assertions, the kidnap of an unconscious victim is not a legal impossibility. *See* A.R.S. § 13-1304(A) (victim’s state of mind only an element of kidnapping under § 13-1304(A)(4)); *see also State v. Bernal*, 148 Ariz. 149, 149-50, 713 P.2d 811, 811-12 (App. 1985) (defendant committed kidnap by abducting unconscious

¹³The court indicated that initially omitting the restraint instruction was an oversight, saying that if either party had requested it or if the court had “thought of it,” the instruction would have been given earlier.

person and killing her before she regained consciousness).¹⁴ Similarly, the restraint instruction was not erroneous. Because restraint is an element of the offense of kidnapping, *see* § 13-1304(A), it was appropriate for the trial court to instruct the jury on its definition. *Cf. State v. Fish*, 222 Ariz. 109, ¶¶ 56-57, 213 P.3d 258, 275-76 (App. 2009) (trial court’s failure to instruct on elements of offenses may constitute reversible error). Whether this instruction answered the jury’s questions completely or not, the instruction was not incorrect and could not have confused the jury or prejudiced Waymire.

Armed Robbery

¶20 The jury also asked whether “it [is] considered armed robbery or robbery in general if the victim was already dead or unconscious.” Although Waymire argued that armed robbery of a dead or unconscious person is a “legal impossibility,” the trial court declined to further instruct the jury on armed robbery. We review the trial court’s decision whether to respond to a jury question for an abuse of discretion. *See State v. Ramirez*, 178 Ariz. 116, 126, 871 P.2d 237, 247 (1994).

¹⁴It appears Waymire’s faulty argument is derived from the trial court’s arguably incomplete kidnapping instruction. Waymire was charged with committing kidnapping by restraining R. “with the intent to inflict death, physical injury or a sexual offense . . . , . . . to . . . aid in the commission of a felony *or* to place him . . . in reasonable apprehension of imminent physical injury.” (Emphasis added.) *See* § 13-1304(A)(3), (4). Although both alternative means were listed in the charges submitted to the jury with its instructions, the kidnapping instruction that the court gave described only kidnapping by the latter means. Neither the state nor Waymire called the court’s attention to this at trial.

¶21 Citing *State v. Lopez*, 158 Ariz. 258, 762 P.2d 545 (1988), Waymire maintains the trial court erred by not instructing the jury that a dead or unconscious person cannot be the victim of an armed robbery. But Waymire glosses over *Lopez*'s holding. There, the defendant stole a murder victim's property to prevent the victim's identification and to aid in his own escape. *Id.* at 264, 762 P.2d at 551. In reversing his conviction for felony murder, which had been supported by the underlying crime of armed robbery, our supreme court distinguished theft from robbery. It explained that for the offense of robbery, the intent to take a victim's property must motivate a defendant's use or threat of force, but deciding to take a person's property after the use of violence or intimidation has ended constitutes theft. *Id.* Accordingly, robbery does not turn on the consciousness of the victim, but upon the intent of the defendant. As the state correctly points out, to instruct the jury as Waymire suggested would have been an incorrect statement of the law. *See id.* (defendant not immunized from robbery conviction by killing victim); *see also State v. Comer*, 165 Ariz. 413, 421, 799 P.2d 333, 341 (1990) (robbery may be proved when use of deadly force precedes taking of property so long as use of force is accompanied with intent to take property).

¶22 Here, the jury had already received instructions properly explaining that robbery involves the threat or use of force "with the intent to coerce surrender of . . . property." Because the jury had before it instructions clearly and correctly providing the answer to its question, the trial court was not required to further instruct it. *See State v. Cox*, 214 Ariz. 518, ¶ 17, 155 P.3d 357, 361 (App. 2007) (trial court need not give

proposed jury instruction when substance covered by other instructions), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007). Accordingly, the court did not abuse its discretion by refusing to instruct the jury further on armed robbery.

Sufficiency of Evidence

¶23 Waymire next argues his convictions for armed robbery and kidnapping were not supported by substantial evidence. At trial, he moved for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing the state had not presented sufficient evidence to support guilty verdicts on either charge. The court denied this motion and we review its decision de novo. *See State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). “If reasonable minds could differ as to whether the properly admitted evidence, and the inferences therefrom, prove all elements of the offense, a motion for acquittal should not be granted.” *Id.*

Armed Robbery

¶24 In his opening brief, Waymire relies on *Lopez* and asserts, “[t]he record is devoid of evidence that [he] took anything from [R.]’s immediate presence, and/or against his will.” As we have already noted, however, *Lopez* turned on a narrow set of facts. Our supreme court later explained that *Lopez* mandated reversal because there was *no* evidence that would support an inference of robbery; the perpetrators had attempted to destroy or discard all of the victim’s property in an effort to prevent the victim’s identification and separate themselves from the crime. *See State v. Greene*, 192 Ariz. 431, ¶ 14, 967 P.2d 106, 112 (1998). In contrast, when circumstantial evidence exists,

such as when a defendant takes items he needs or desires and makes use of them, a jury may infer a motivation to take property by use of force. *See id.* (felony murder conviction upheld when evidence showed defendant needed money, did not have a vehicle, and began using victim's credit cards shortly after murder); *see also State v. Anderson*, 197 Ariz. 314, ¶ 28, 4 P.3d 369, 380 (2000) (*Lopez* requires reversal when theft is “formulated only in contemplation of the repercussions of the murder”).

¶25 Although the jury arguably could have concluded Waymire stole from R. only as an afterthought, the possibility of this inference does not require reversal of his conviction. *See Anderson*, 197 Ariz. 314, ¶ 28, 4 P.3d at 380 (conviction upheld when jury “could also reach the opposite conclusion”). Unlike the defendant in *Lopez*, who dumped the victim's body in a canal, burned his car, and threw his wallet in an alley trash can, 158 Ariz. at 261, 762 P.2d at 548, Waymire did nothing that demonstrated he intended to conceal R.'s identity; rather, he abandoned the body in an apartment where it would be found and quickly identified. Similarly, Waymire made no attempt to discard the property he had stolen from R., despite having had the opportunity to do so when he fled. Rather, like the defendant in *Greene*, he stole from the victim things he did not have: a cellular telephone and the keys to a car in addition to a wallet containing money. He also used some of the property shortly after the killing, employing R.'s cell phone to call his wife. Additionally, when he was apprehended, he was still in possession of R.'s property, unlike the defendant in *Lopez*. Accordingly, the jury reasonably could infer Waymire had intended to take R.'s property when he used force against him.

¶26 Waymire also appears to argue there was no evidence he had been armed because certain evidence suggested he was not an intruder and the scissors and electrical cord were already in the apartment. But forced or unlawful entry is not an element of robbery. *See* A.R.S. § 13-1902; *see also*, *State v. Gerlaugh*, 144 Ariz. 449, 453-54, 698 P.2d 694, 698-99 (1985) (hitchhiker committed armed robbery against driver who had invited him into vehicle). The jury was not required to find Waymire had had the intent to rob R. when he first entered the apartment. Indeed, the evidence would have supported a finding that Waymire was an invited guest who, once inside the apartment, decided to rob R., using items in the apartment to force the victim to surrender his property.

Kidnapping

¶27 Waymire similarly argues the state did not present sufficient evidence to support a kidnapping conviction. To the extent we understand his somewhat rambling argument, it appears Waymire disputes the state proved he had the specific intent required to commit kidnapping. Again, he focuses on § 13-1304(A)(4), kidnapping with the intent to place a person in reasonable apprehension of imminent physical injury. However, despite some evidence R. could have been unconscious at the time Waymire strangled and stabbed him, the jury could also infer he was conscious during the attack,¹⁵ apprehending the cut of the scissors as Waymire stabbed his face and apprehending his

¹⁵The medical examiner noted there was a bruise on R.'s forehead and testified it was possible he had been rendered unconscious prior to his death. However, the medical examiner could not say when this injury occurred or even if it did render him unconscious.

own impending death as Waymire tightened the cord around his neck. Indeed, the fighting and screams neighbors reported hearing was evidence of such apprehension.

¶28 Moreover, as explained in our discussion of the jury’s questions, *see supra* ¶ 19 and n.14, this was not the only means of committing the offense of kidnapping as charged. Based on R.’s strangulation and the mutilation of his face, the jury readily could have concluded that when Waymire bound him, he intended to physically harm or kill him, satisfying the element of intent in § 13-1304(A)(3). Contrary to Waymire’s assertion that he could not have been convicted based on this theory because the trial court had not specifically instructed the jury on it, this charge was, in fact, included in the jury’s instructions. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) (we presume juries follow court’s instructions). And the applicable terms, “death” and “physical injury,” were sufficiently self-explanatory¹⁶ that the trial court was not required to explain them.¹⁷ *See State v. Dann*, 220 Ariz. 351, ¶ 88, 207 P.3d 604, 621 (2009) (juries may apply ordinary and usual meaning of words used in jury instruction), *cert. denied*, ___ U.S. ___, 130 S. Ct. 466 (2009).

¹⁶Waymire makes much of the trial court’s failure to define “felony” for the purposes of § 13-1304(A)(3). But the state presented overwhelming evidence of physical injury and death, which needed no further explanation. The only other crime the state attempted to prove was armed robbery, which is also a felony and would satisfy the statute.

¹⁷Waymire also contends, fleetingly, that because R. had been strangled, the restraint element of kidnapping was the actual murder, thus merging with felony murder and preventing his conviction of both crimes. This ignores that R.’s hands had been tied behind his back. The jury could properly conclude that this constituted an act of restraint separate from the strangling and stabbing.

Lesser-Included Offense Instructions

¶29 Waymire next contends the trial court committed fundamental, reversible error when it instructed the jury on the elements of kidnapping and robbery, but failed to give instructions on the lesser-included offenses of unlawful imprisonment and theft. Although a defendant is entitled to a jury instruction on any theory or defense supported by evidence at trial, *see* Ariz. R. Crim. P. 23.3, he is not entitled to an instruction on a lesser-included offense if the evidence does not support it, *see State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). And when a defendant fails to request an instruction on a lesser-included offense in a non-capital case, the court is not required to issue an instruction sua sponte unless its failure to do so would amount to fundamental error. *See State v. Whittle*, 156 Ariz. 405, 406-07, 752 P.2d 494, 495-96 (1988). “The fact that a jury could disbelieve all the evidence of the greater charge in a given case except the elements of the lesser does not necessarily require an instruction on the lesser.” *Bolton*, 182 Ariz. at 309, 896 P.2d at 849.

Unlawful Imprisonment

¶30 Waymire did not request an instruction on unlawful imprisonment, but now contends the trial court’s failure to give one sua sponte was fundamental error. We disagree. “Unlawful imprisonment may be a lesser included offense of kidnapping.” *Id.* Both require an element of restraint, *see* A.R.S. §§ 13-1303(A), 13-1304(A), but kidnapping adds to that restraint an additional element of intent. The trial court specifically instructed the jury that restraint occurs when a person’s movement is

restricted without his consent. To find Waymire guilty of either unlawful imprisonment or kidnapping, the jury was first required to conclude that R. had been bound against his will. But, to find Waymire guilty of unlawful imprisonment rather than kidnapping, the jury would have had to conclude that although Waymire had bound R. against his will, he had no intention of harming him or causing him to fear harm when he repeatedly stabbed him in the face with scissors and asphyxiated him. Such a finding would be inconsistent with the evidence and contrary to logic. *See State v. Price*, 218 Ariz. 311, ¶¶ 21-23, 183 P.3d 1279, 1284-85 (App. 2008) (upholding refusal of lesser-included offense instruction where only disputed element would bar conviction on lesser as well as greater offense).

¶31 Additionally, unlawful imprisonment would have been contrary to Waymire's defense, which consisted of a mistaken identity argument and nothing more than occasional hints that R.'s death was the accidental result of consensual sexual activity. *See Bolton*, 182 Ariz. at 310, 896 P.2d at 850 (lesser-included offense instruction not warranted when not supported by theories of either state or defense). If the jury were to believe either defense, it could not have convicted Waymire of *either* kidnapping *or* unlawful imprisonment because it could not have found the requisite element of restraint.

Theft

¶32 Similarly, the trial court did not commit reversible error in denying Waymire's request for an instruction on theft as a lesser-included offense of armed robbery. At the outset, neither Waymire nor the state has acknowledged that his

argument on appeal is somewhat different from what he urged below. In the trial court, Waymire had argued he was entitled to a theft instruction because “[y]ou cannot have a robbery from a deceased person” because there is no use of force. In support of this theory, he claimed there was a gap in time between the disturbance witnesses reported and the police officers’ discovery of Waymire on the landing, which he suggested would imply R. was already dead when Waymire took his property. He contended this theory of the case would support a conviction for theft but not robbery.

¶33 The state opposed the instruction, arguing the evidence did not support simple theft because it was clear that force had been used against R. The trial court agreed with the state and rejected Waymire’s theory. *See Comer*, 165 Ariz. at 421, 799 P.2d at 341 (for robbery, use of deadly force may precede taking of property). After announcing its ruling, however, the court gave Waymire the opportunity to make a record on the issue of theft, which he declined to do. The court further advised Waymire that he was free to argue the evidence established he had committed the offense of theft, but not robbery.

¶34 Waymire now insists “the evidence overwhelmingly supports a theft but not a robbery,” but does not explain why, merely asserting generally there was no proof “that the force coexisted with the intent to take any property.” This argument is not precisely the same one Waymire made below, in which he relied on a time lag theory not supported by the evidence. He now alludes to evidence he did not argue below in support of his theory that the trial court erred in refusing a theft instruction. Because his argument has

changed on appeal, we review the court's ruling for fundamental error. *See State v. Freeland*, 176 Ariz. 544, 549 & n.4, 863 P.2d 263, 268 & n.4 (App. 1993) (new version of argument raised for first time on appeal subject to fundamental error review). Error is fundamental when it takes from a defendant a right essential to his or her defense and is of such magnitude that he or she could not have received a fair trial. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶35 Theft is a lesser-included offense of armed robbery, *see State v. McNair*, 141 Ariz. 475, 482, 687 P.2d 1230, 1237 (1984), and Waymire would have been entitled to an instruction on it if it were supported by the evidence, *see Bolton*, 182 Ariz. at 309-10, 896 P.2d at 849-50. A trial court, however, need only instruct the jury on theft when the jury could rationally fail to find the element that distinguishes robbery from theft. *Cf. State v. Valenzuela*, 194 Ariz. 404, ¶ 13, 984 P.2d 12, 15 (1999) (reversing conviction when jury could have reasonably failed to find distinguishing element of greater offense).

¶36 We agree with the state that the evidence did not appear to support an instruction on simple theft. By way of illustration, Waymire's closing argument to the jury was predicated on a theory of mistaken identity and the existence of an unknown real killer who had escaped before Waymire took R.'s property, a theme he referred to throughout the trial. But he expressly disavowed this theory when jury instructions were discussed. Rather, Waymire asked the trial court to instruct on simple theft based solely on the alleged gap in time between the fighting and the theft. But the trial court found there was no significant amount of time between the reported disturbance and the

discovery of Waymire on the landing, a finding Waymire did not dispute then or now on appeal. Thus, Waymire's contention that a lesser-included theft instruction was warranted hinged on his strained interpretation of the evidence, which evidence actually suggested a near-concurrent use of force and taking of property. And Waymire failed to develop any theory that the intent to steal had arisen only after he had used force. Therefore, we would be reluctant to conclude the trial court erred in determining a theft instruction was not supported by the evidence.

¶37 We need not decide, however, whether failing to instruct the jury on simple theft would have been error because, even assuming the trial court erred, such error cannot be characterized as fundamental. As noted above, for an error to be deemed "fundamental," it must take from the defendant a right essential to his defense. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. On appeal Waymire does not identify any specific evidence that would support a theft instruction, other than alluding to some indications that his encounter with Waymire initially could have been consensual. But his defense at trial was largely predicated on a theory of mistaken identity and that the real killer was someone else who had escaped. During closing argument, Waymire briefly addressed the difference between robbery and theft, arguing "[i]f someone panics because someone is dead and grabs their stuff" an armed robbery did not occur, and concluding that simple theft "[q]uite possibly" occurred here. But this discussion was in the context of his insinuation that R., who Waymire attempted to portray as promiscuous, had been killed by a sexual partner and that Waymire had subsequently happened upon

the body and stole from it.¹⁸ Failing to give a theft instruction based on this speculative and fleeting theory could not have prejudiced Waymire. The state presented evidence Waymire’s DNA was on both the ligature and the scissors, establishing he did not just happen upon an already dead victim. Moreover, as discussed above, the jury had found Waymire guilty of kidnapping, indicating it disbelieved his argument that his restraint of R. had been consensual. *See Bolton*, 182 Ariz. at 310, 896 P.2d at 850 (failure to give lesser-included offense instruction contrary to defendant’s trial theory not error). Any error the trial court may have committed did not amount to fundamental error and, thus, does not warrant reversal.

Juror Misconduct

¶38 Waymire next argues the trial court erred in denying his motion for a new trial after he presented evidence that the evening after the jury had rendered its verdict, one of the jurors had viewed a memorial “webpage” on the Internet dedicated to R.¹⁹ The juror posted a note on the webpage that she had been a member of the jury and now that

¹⁸Defense counsel argued at length that another person, ostensibly the real killer, had been present the night of R.’s death. He then discussed the crimes committed, consistently arguing that “someone” had restrained R. and that “someone” had stolen from him. Given the extensive discussion of a third party and counsel’s unwillingness to offer any discrete theories explaining Waymire’s possession of the victim’s property, it is uncertain what counsel intended the jury to conclude Waymire, as opposed to the unidentified third person, may have done. And to the extent Waymire now suggests he and R. had had a sexual encounter, a crime scene detective testified that R.’s body showed no physical evidence of sexual activity the night he died.

¹⁹The parties disagree whether the trial court had jurisdiction to address this motion. We need not resolve this dispute, however, because it is clear it did not err in denying it.

the admonition had been lifted, she would be willing to answer questions about the trial. Waymire asked the trial court to subpoena this juror's Internet records so he could determine whether she had been accessing the page during the trial. The court denied the motion, finding Waymire had not made a sufficient showing of juror misconduct to warrant further action. "We review a trial court's decision to investigate allegations of juror misconduct for abuse of discretion." *State v. Davolt*, 207 Ariz. 191, ¶ 56, 84 P.3d 456, 472 (2004).

¶39 We agree with Waymire that if this juror accessed the webpage during the trial, that conduct might have been improper and prejudicial. But Waymire did not present any evidence this juror actually engaged in any misconduct during the trial. Nor has Waymire persuaded us the trial court erred by refusing his request to subpoena the juror's personal computer records. We cannot say the trial court abused its discretion by declining to invade a juror's privacy based on mere speculation that she might have engaged in misconduct during trial in light of her permissible post-trial conduct. The jurors had been cautioned and this juror's post-trial comment specifically referred to the admonition, demonstrating she was cognizant of the trial court's order not to independently investigate or talk about the case. We presume juries follow their instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). Accordingly, the trial court did not err.

Felony Murder

¶40 Waymire next contends Arizona’s felony murder statute is unconstitutional because it negates the element of mens rea to commit first-degree murder. As the state points out, our supreme court has repeatedly rejected this argument. *See State v. Herrera*, 176 Ariz. 21, 30, 859 P.2d 131, 140 (1993); *State v. McLoughlin*, 139 Ariz. 481, 485, 679 P.2d 504, 508 (1984); *State v. Celaya*, 135 Ariz. 248, 255, 660 P.2d 849, 856 (1983). We have no authority to overrule our supreme court. *See Lucero*, 223 Ariz. 129, ¶ 24, 220 P.3d at 257.²⁰

Restitution

¶41 Finally, Waymire claims the trial court lacked statutory authority to order him to pay \$5,000 to the Pima County Crime Victim Compensation Fund (PCCVCF), and thereby fundamentally erred. Although he did not object below, he is entitled to a review for fundamental error and the imposition of an illegal sentence is fundamental error. *See State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009). We interpret statutes de novo and rely on their plain language as the best indicator of the legislature’s intent. *State v. Streck*, 221 Ariz. 306, ¶¶ 3, 7, 211 P.3d 1290, 1291 (App. 2009).

²⁰We note that we granted two requests to exceed word count on briefs filed by Waymire’s counsel in this case. We are perplexed that despite stating she could not adequately present Waymire’s appellate arguments within the space allotted by the Rules of Criminal Procedure, counsel devoted over two pages to a meritless argument that our supreme court has routinely rejected. Notwithstanding editing and paring issues throughout, omitting this unnecessary argument would be an obvious step towards complying with court rules.

¶42 Waymire contends that a county crime victim compensation fund may contain only money distributed pursuant to A.R.S. § 12-286(D) and a trial court may not order direct payment into such a fund. He argues that because PCCVCF was created by A.R.S. § 11-538(A), it may only be funded by way of § 12-286(D), which states that the statewide victim compensation fund allocates to county funds, such as PCCVCF, the fund interest money received in trust.²¹ The state responds that § 11-538(A) is not the only statute governing victim compensation funds and argues A.R.S. § 41-2407(A) established the victim compensation and assistance fund, which is administered by the Arizona Criminal Justice Commission (ACJC). The ACJC, in turn, has designated the county attorneys in each county as the operating units to administer these funds, which are received from a variety of sources, including direct payments from those convicted. The state urges us to read all these statutes together and harmoniously, *see State v. Buhman*, 181 Ariz. 52, 55, 887 P.2d 582, 585 (App. 1994), to conclude that because the PCCVCF is a part of the compensation and assistance fund established in § 41-2407, it may receive payments from any source, including defendants. It also urges us to accept that § 11-538 specifically deals with the interest on these funds without limiting the PCCVCF's overall source of funding.

²¹We note this reading of the statute would severely limit the ability of county attorneys to compensate the victims of crime by restricting their funding merely to the interest on a state trust fund. We avoid absurd readings of statutes, *see State v. Young*, 223 Ariz. 447, ¶ 26, 224 P.3d 944, 950 (App. 2010), and aim to construe victim compensation statutes consistently with the legislative intent to compensate victims as fully as possible for their losses, *see State v. Ramos*, 155 Ariz. 468, 471, 747 P.2d 629, 632 (App. 1987).

¶43 We agree with the state’s ultimate position that the Pima County Superior Court has jurisdiction to order the direct payment of restitution into the PCCVCF, but its authority to do so bears some additional explanation. In administering the state’s Crime Victim Compensation Fund, ACJC appoints “operational units,” which are defined in its administrative rules as “public or private agenc[ies] authorized by [ACJC] to receive, evaluate, and present to the Board a claim.” Ariz. Admin. Code R10-4-101(24). These operational units manage crime victim compensation in Arizona jurisdictions. *See* Ariz. Admin. Code R10-4-102(B) (commission designates one operational unit in each jurisdiction to receive an allocation from state fund each year); Ariz. Admin. Code R10-4-104 (requirements for designation as operational unit); Ariz. Admin. Code R10-4-101(1), (2), (24) (operational units responsible for compensating victims). The various county attorneys have been designated as operational units by the ACJC, and the administrative code anticipates the independent generation of compensation funds based on criminal restitution imposed in each county. *See* Ariz. Admin. Code R10-4-102(G) (“Funds collected by an operational unit through subrogation or restitution may be retained by the operational unit”); *see also* A.R.S. § 12-116.01 (describing additional assessments in addition to monetary criminal penalties imposed by trial courts). That these operational units also receive, by statute, funding from the state, specifically accumulated interest from the state compensation fund trust, *see* § 11-538, is

immaterial to their independent abilities to generate compensation through direct fines imposed by county trial courts.

¶44 The legislature has delegated to ACJC the responsibility for compensating Arizona crime victims and ACJC has promulgated administrative rules and designated operational units, including PCCVCF, to manage this task. Because the administrative code implicitly permits the direct payment of funds to an operational unit, the trial court did not err in requiring Waymire to pay into PCCVCF.²²

Disposition

¶45 Finding no reversible error, Waymire's convictions and the sentences imposed are affirmed.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

²²To the extent Waymire's reply brief suggests he disagrees with the legitimacy of the rules promulgated by the ACJC, he has not presented an argument challenging the administrative body's rulemaking authority. Accordingly, we will not raise this issue sua sponte.

