ARIZONA COURT OF APPEALS

DIVISION TWO

STATE OF ARIZONA, Appellee, v. PORFIRIO MEDINA, Appellant.	2 CA–CR 2017-0035 PIMA County Superior Court No. CR–20161982-001

APPELLEE'S ANSWERING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion by precluding Appellant's necessity defense as untimely disclosed?[1]

2. Did the trial court abuse its discretion by refusing to provide the jury with Appellant's proposed instruction on the necessity defense?

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[1] This argument answers Appellant's Argument One and Two because the issues are related and arise from the same factual background.

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STATEMENT OF THE CASE

¶ 1 Appellant was charged on May 6, 2016, with possession of a deadly weapon by a prohibited possessor, a class 4 felony, in violation of A.R.S. 13–3102(A). (R.O.A., Item 1.) The State also alleged that, at the time of the charged offense, he had several prior felony convictions and was on probation or parole. (R.O.A., Items 2, 3.)

¶ 2 Appellant was arraigned on May 13 and appointed counsel. (R.O.A., Item 15.) The State's list of potential witnesses and exhibits was disclosed May 31 and supplemented on September 21. (R.O.A., Items 21, 24.) At a June 28 status conference, trial was set for October 26, but, on October 12, the parties stipulated to, and the court granted, a continuance to November 8, 2016. (R.O.A., Items 22, 23, 28.)

¶ 3 At the time of the continuance, defense counsel had still not disclosed either witnesses or defenses, in violation of Arizona Rule of Criminal Procedure 15.2(d), which requires defense disclosure no later than 40 days after arraignment or 10 days after the State's disclosure, whichever occurs first. On October 26, defense counsel disclosed a list of defenses, which included, in relevant part, self-defense, necessity, and justification. (R.O.A., Item 31.) Because the validity of such defenses was not apparent from the record, the pros-

ecutor immediately "request[ed] more detailed disclosure of the defense," specifically, the "basis for the necessity defense." (R.O.A., Item 37.)

¶ 4 In response, defense counsel, on November 1, a week before trial, disclosed as a witness the name and birthdate of Appellant's fiancée, Veronica Duarte. (R.O.A., Item 35) The prosecutor interviewed Duarte on November 4, two court days before the start of trial. (R.T. 11/8/16 (a.m.), at 9.) Although a transcript of Duarte's interview was not presented to the trial court and is not in the record on appeal, the parties below agreed that she would have testified that, before Appellant's arrest, she had informed him of a threat she had received which she believed had been directed at him. (R.O.A., Items 31, 37.)

¶ 5 The prosecutor moved to preclude the necessity defense, arguing it had been untimely disclosed and Appellant had been neither faced with an imminent threat nor lacking a reasonable alternative course of action, as required to justify his conduct under the necessity defense. (R.O.A., Item 37.) *See* A.R.S. § 13–417 (necessity defense). The motion was argued the morning of trial; neither party called witnesses. (R.T. 11/8/16 (a.m.), at 8–12.)

¶ 6 Following argument, the trial court exercised its discretion and granted the State's motion, finding that the necessity defense had been untimely disclosed. (*Id*., at 11–12.) Consequently, at trial, Appellant was precluded from presenting witnesses, including Duarte, to testify regarding the defense and the

jury was not instructed on the necessity defense. (R.T. 11/8/16 (afternoon session), at 39.)

¶ 7 At trial, the State's evidence showed that Appellant was standing at a bus stop on South Sixth Avenue when South Tucson Police Detective Zormeier recognized him as a "parole absconder." (R.T. 11/18/16 (afternoon session), at 29–31.) The detective, who positively identified Appellant at trial, approached him and asked his name. (*Id*., at 31.) Appellant answered, "Porfirio." (*Id*.) When the detective asked if his last name was "Medina," Appellant said yes. (*Id*.) As the detective detained him for the parole violation, Appellant volunteered that he had a handgun in his waistband, which the detective confiscated. (*Id*., at 32.) The gun was a loaded Ruger P90. (*Id*., at 33.) The parties stipulated, and the trial court so informed the jury, that, at the time of his arrest, Appellant had been convicted of a felony and that his right to possess or carry a firearm had not been restored. (*Id*., at 42.)

¶ 8 Appellant was the lone defense witness. (R.T. 11/8/16 (afternoon session), at 43.) He confirmed the essentials of Detective Zormeier's testimony about the arrest; he also admitted he had been released in Maricopa County but had violated the terms of his release by moving to Pima County without informing his parole officer. (*Id*., at 44–46.) He said he had moved to start a

family and to get away from "prison politics," which had included association with the Mexican Mafia. (*Id*., at 47.)

¶ 9 A jury found Appellant guilty as charged, and it also found he had committed the offense while on probation or parole. (R.O.A., Items 52, 53, 57; R.T. 11/8/16 (afternoon session), at 66, 84.) The trial court subsequently found Appellant had three prior felony convictions. (R.O.A., Item 59; R.T. 11/28/16, at 10–11.) Appellant received a presumptive prison sentence of 10 years. (R.O.A., Item 66; R.T. 11/3/17, at 6–7.) On January 20, 2017, Appellant filed a timely notice of appeal. (R.O.A., Item 67.) This Court has jurisdiction under Arizona Constitution Article VI, Section 9, and Arizona Revised Statutes §§ 12–120.21(A)(1), 13–4031, and –4033(A).

ARGUMENTS

I

THE TRIAL COURT DID NOT ERR BY SANCTIONING APPELLANT FOR FAILING TO COMPLY WITH THE RULES OF CRIMINAL PROCEDURE.

¶ 10 Appellant sought to raise a necessity defense at trial, supported by testimony from Veronica Duarte. (R.O.A., Items 31, 35.) But Appellant waited until two weeks before trial to give notice of the defense and until the eve of trial to provide the State with the substance of Duarte's proposed testimony, contrary to the Rule of Criminal Procedure. As a result, the trial court exercised its sound discretion to preclude the defense as untimely. Appellant now claims that the trial court erred. (O.B., at 13.) It did not. Appellant failed to follow the rules. Moreover, Duarte's proposed testimony, to the extent that it can be described from the record, is legally insufficient to establish a necessity defense. This Court therefore should uphold the trial court's ruling to preclude the defense and affirm.

A. STANDARD OF REVIEW.

¶ 11 The decision whether to impose sanctions for discovery violations, and the choice of sanctions to impose, are matters that are well within the sound discretion of the trial court. *State v. Dumaine*, 162 Ariz. 392, 406 (1989); *see State v. Meza*, 203 Ariz. 50, ¶ 19 (App. 2002) (trial court has great discretion

whether to impose sanctions and how severe a sanction to impose). Likewise, the trial court's decision to preclude evidence as a result of a discovery violation is reviewed for an abuse of discretion. *State v. Burns*, 237 Ariz. 1, ¶ 91 (2015). In reviewing such rulings, this Court "grant[s] considerable deference to the trial court's perspective and judgment." *Meza*, 203 Ariz. 50, ¶ 19. Indeed, "[i]n reviewing a trial court's choice and imposition of sanctions under Arizona Rule of Criminal Procedure 15.7, [an appellate court should] find an abuse of discretion *only when no reasonable judge* would have reached the same result under the circumstances." *State v. Naranjo*, 234 Ariz. 233, ¶ 29 (2015) (quotation marks omitted) (emphasis added).

B. THE DISCLOSURE RULES.

¶ 12 Arizona Rule of Criminal Procedure 15 governs pretrial discovery in criminal cases. Our supreme court has described the rule's "underlying principle" as "adequate notification to the opposition of one's case-in-chief in return for reciprocal discovery so that undue delay and surprise may be avoided at trial by both sides." *State v. Dorow*, 116 Ariz. 294, 295 (1977). To be effective, the rule "must be applied with equal force to both the prosecution and the defendant." *Id*.

¶ 13 Under Rule 15.2(b), a defendant is required to disclose in writing "all defenses as to which the defendant intends to introduce evidence at trial" and

all witnesses whom he intends to call at trial in support of each listed defense. Such notice, unless otherwise ordered by the court, must be provided "40 days after arraignment or within 10 days after the prosecutor's disclosure," whichever occurs first. The defendant, moreover, has "continuing duties" and must "made additional disclosure, seasonably, whenever new or different information subject to disclosure is discovered." Ariz. R. Crim. P. 15.6(a). If the defendant decides that "additional disclosure may be forthcoming within 30 days of trial," he must "immediately notify both the court and the other parties of the circumstances and when the disclosure will be available." Ariz. R. Crim. P. 15.6(b).

¶ 14 In addition, unless otherwise permitted, "all disclosure" required by Rule 15 "shall be completed at least seven days prior to trial." Ariz. R. Crim. P. 15.6(c). A party that seeks to use "material and information" not disclosed at least seven days before trial must "obtain leave of the court, supported by affidavit, to extend the time for disclosure and use the material or information." *Id.* "If the court finds that the material or information could not have been discovered or disclosed earlier even with due diligence and the material or information was disclosed immediately upon its discovery, the court shall grant a reasonable extension to complete the disclosure and grant leave to use the material or information." *Id.* But without such a finding, "the court may either

deny leave or grant a reasonable extension to complete the disclosure and leave to use the material or information," and, if granted, "the court may impose any sanction other than preclusion or dismissal listed in Rule 15.7." *Id*. If the defendant fails to comply with his discovery obligations, the trial court has the discretion to impose sanctions, including "[p]recluding or limiting the calling of a witness, use of evidence or argument in support of or in opposition to a charge or defense." Ariz. R. Crim. P. 15.7(a)(1).

The Supreme Court repeatedly has upheld as constitutional similar notice-of-defense requirements, holding they "[d]o not violate the Constitution … because a criminal trial is not a poker game in which players enjoy an absolute right always to conceal their cards until played." *Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (quotation marks omitted). Indeed, "notice requirements" are "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Id*., at 150–51 (quotation marks omitted). They also serve "legitimate state interests in protecting against surprise, harassment, and undue delay." *Id*., at 151. Notice requirements, moreover, are so important to the fair resolution of a criminal trial that the "[f]ailure to comply with" them "may in some cases justify even the severe sanction of preclusion." *Id*.

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C. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY PRECLUDING APPELLANT'S DEFENSE AND WITNESS FOR UNTIMELY DISCLOSURE.

¶ 15 In this case, Appellant failed to comply with Rule 15. He did not even make a disclosure statement until October 26, when he provided merely a list of defenses. (R.O.A., Item 31.) This was two weeks before trial and well beyond the "40 days after arraignment or within 10 days of the prosecutor's disclosure," as Rule 15.2(d) requires. On receipt of the disclosure, the prosecutor immediately sought additional, clarifying information. (R.O.A., Item 37.) On November 1, a week before trial, Appellant gave notice that he intended to call Duarte as a witness. (R.O.A., Item 35.) The prosecutor, however, had no precise knowledge of the substance of Duarte's proposed testimony until she interviewed Duarte on November 4, two court days before the start of trial. (R.T. 11/8/16 (a.m.), at 9–10.) Under these extreme circumstances, the trial court was within its sound discretion in granting the motion to preclude the necessity defense based on untimely disclosure. *See State v. Goudeau*, 239 Ariz. 421, ¶ 167 (2016) (holding the trial court did not abuse its discretion in precluding third-party culpability evidence on the ground that it was untimely disclosed).

¶ 16 Appellant does not contest his disclosure was untimely under Rule 15. But he argues that preclusion was improper because the trial court made the decision to preclude without considering the factors listed in *State v. Smith*, 123 Ariz. 243, 252 (1979), such as how vital the witness is to the case, whether the

State was surprised, whether the discovery violation was motivated by bad faith, and other relevant circumstances. *Id*. (O.B., at 16–17.) *See also Burns*, 237 Ariz. at 23, ¶ 91 (listing *Smith* factors). Although the trial court did not make a record of the considerations listed in *Smith*, this Court must presume the trial court knew the law and applied it in making its decision. *State v. Lee*, 189 Ariz. 608, 616 (1997). These factors weigh heavily in favor of preclusion.

1. Importance of the evidence to the case.

¶ 17 Because Duarte's proposed testimony did not establish the necessity defense, its importance to Appellant's case was nil. The defense of necessity is a justification defense. A.R.S. § 13–417(A). Conduct that would otherwise constitute an offense is justified by necessity "if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid *imminent* public or private injury greater than the injury that might reasonably result from the person's own conduct." A.R.S. § 13–417(A) (emphasis added). Nothing in the record, however, shows that Duarte had information that Appellant faced imminent injury.

¶ 18 At the hearing on the State's motion to preclude, the substance of Duarte's proposed testimony was described only in counsels' oral and written arguments. According to the prosecutor, "nothing" in her interview with Duarte "showed imminence." (R.T. 11/8/16 (a.m.), at 8–9.) Defense counsel disa-

greed with the prosecutor but provided no countervailing details. Counsel merely stated that Duarte had "information about a threat she had received that she believed was directed at" Appellant. (R.O.A., Item 37.) And though Duarte, not Appellant, had received the unspecified threat "less than a month before" Appellant's arrest (R.O.A., Item 37), defense counsel promised that Appellant, not Duarte, would "provide facts [at trial] about the imminence of the threat," thus further diminishing Duarte's significance to the defense. (R.T. 11/8/16 (a.m.), at 9.).

¶ 19 To preserve his claim for appeal, Appellant should have objected to the perceived limitation to his defense and made an offer of proof as to what the precluded testimony would have been. *See* Ariz. R. Evid. 103(a) (stating that to preserve a "claim [of] error in a ruling to admit or exclude evidence," a party must either state a specific objection or "inform the court of [the evidence's] substance by an offer of proof," unless the grounds of the objection or the substance of the evidence was "apparent from the context"); *State v. Towery*, 186 Ariz. 168, 179 (1996) ("When an objection to the introduction of evidence has been sustained, an offer of proof showing the evidence's relevance and admissibility is ordinarily required to assert error on appeal.").

¶ 20 Without an offer of proof, it is impossible for this Court to determine the relevancy of this testimony or any constitutional implications—"An offer

of proof is critical because it permits the trial judge to reevaluate his decision in light of the actual evidence to be offered [] and to permit the reviewing court to determine if the exclusion affected the substantial rights of the party offering it." *State v. Hernandez*, 232 Ariz. 313, 322, ¶ 42 (2013) (internal quotation omitted). For this reason, this Court cannot evaluate whether error occurred. *See Towery*, 186 Ariz. at 179 (determining that, because the defendant did not make an offer of proof about what a witness's "testimony would have shown," it was "impossible to evaluate whether the trial judge unfairly limited Defendant's cross-examination of [the witness]"); *State v. Gulbrandson*, 184 Ariz. 46, 59, (1995) ("Defendant did not properly preserve this issue for appeal because his counsel failed to make an offer of proof" regarding the precluded expert testimony.); *State v. Kaiser*, 109 Ariz. 244, 246 (1973) ("As a general rule evidence cannot be reviewed on appeal in the absence of an offer of proof showing that the excluded evidence would be admissible and relevant.").

¶ 21 Thus, this Court need go no further because considering whether the precluded testimony had any theoretical relevance invites speculation. *Foulk v. Kotz*, 138 Ariz. 159, 162 (App. 1983) ("It would be idle speculation for either the trial court or our court to consider [the Rule 608(b)] issue further" because the party below did not make an appropriate "offer of proof"); *cf. State v. Zuck*, 134 Ariz. 509, 513 (1982) ("Where matters are not included in the record on

appeal, the missing portions of the record will be presumed to support the action of the trial court.").

¶ 22 And, based on the evidence that is in the record and the short discussion by counsel at the motion hearing, the necessity defense does not apply. Although Appellant told Detective Zormeier at the time of arrest that he "was in fear of his life," (R.T. 11/8/16 a.m.), at 10), which suggested he had reason to fear he may *at some point* be the target of an attack, he never made an offer of proof that an attempted attack or injury was imminent. "Imminent" means "ready to take place," "near at hand," "hanging threateningly over one's head." Merriam–Webster's Third New International Dictionary 1130 (1986). *See State v. Dominguez*, 236 Ariz. 226, ¶ 4 (App. 2014) (construing "imminent" as "about to occur"). Thus, even if Duarte had received a threat meant for Appellant, there is no evidence in the record of a time or place of any potentially approaching attack. At trial, Appellant testified he had been involved in "prison politics" associated with the Mexican Mafia and had moved out of Maricopa County to avoid further involvement (R.T. 11/8/16 (afternoon session), at 47), but the pretrial offer of proof contained no evidence that he had reason to believe an attack was imminent. Nothing in the record suggests the nature of the threat or when it might be carried out. At most, Duarte or Appellant might have testified that Appellant carried a weapon from a generalized fear of the

people with whom he had associated with in prison. Such testimony, however, falls well short of establishing the imminence necessary for a necessity defense.

¶ 23 In addition, Appellant had reasonable, legal alternatives to violating the law prohibiting the possession of a weapon. *See State v. Belcher*, 146 Ariz. 380, 381–82 (App. 1985) (concluding evidence did not support necessity defense instruction when "Appellant had a number of other options available to him."). Appellant did not attempt to inform his parole officer or the police of the threat. He did not even mention it to Detective Zormeier at the time of his arrest. Instead, Appellant chose the unnecessary and unreasonable option of obtaining and carrying a prohibited weapon with him, apparently at all times, since no evidence shows he faced a potential threat at the bus stop. In fact, no evidence shows that he began to carry the weapon *after*, and as a result of, the threat made to Duarte.

2. Surprise to the State.

¶ 24 This factor weighs heavily in favor of the State. Because the defense of necessity is a justification defense, A.R.S. § 13–417(A), Appellant did not bear the burden of proving it. Although "a defendant shall prove any affirmative defense raised by a preponderance of the evidence," A.R.S. § 13–205(A), justification defenses, like necessity, are not affirmative defenses. *Id.; see*

A.R.S. § 13–103(B). "If evidence of justification . . . is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification." A.R.S. § 13–205(A).

¶ 25 While Appellant argues the State suffered no prejudice because the prosecutor interviewed Duarte before trial (O.B., at 20), he ignores the fact that his failure to comply with Rule 15 denied the State the opportunity to disprove his necessity defense. If Appellant had timely disclosed it, the State could have investigated the threat, perhaps by looking more closely into (1) the nature of the threat, (2) Duarte's background, and (3) Appellant's involvement in the "politics" of the Mexican Mafia. An expert witness in gang or prison behavior might have been necessary. But none of that investigation was possible two court days before trial, when Duarte was finally interviewed.

¶ 26 This clear prejudice to the State distinguishes this case from *State v. Zuck*, 134 Ariz. at 514, and *State v. Torres*, 27 Ariz. App. 556, 558–59 (1976), on which Appellant relies. (O.B., at 18.) In *Zuck*, the State disclosed its chief witness two days before trial, but the defendant failed to prove prejudice on appeal because he had refused the trial court's invitation to move for a continuance, and he apparently had not moved to preclude the witness. 134 Ariz. at 514. Likewise, in *Torres*, the defendant was not prejudiced by the State's disclosure of a witness during trial because the court granted the defendant a con-

tinuance to interview the witness. 27 Ariz. App. at 558. Further, the trial court found the prosecutor had complied with the requirements of Rule 15.6 as to continuing disclosure, and the only prejudice defendant alleged on appeal was that he had not had time to procure an impeaching witness on a collateral matter. *Id*. In sum, Appellant's failure to provide the State with timely notice that he would raise a necessity defense significantly prejudiced the State.

3. Whether the discovery violation was motivated by bad faith.

¶ 27 The trial court did not expressly consider this factor, but the factor alone is not dispositive. *See Burns*, 237 Ariz. at 24, ¶ 95 (trial court did not abuse discretion by precluding evidence for discovery violation, even though there was no indication of bad faith). The witnesses supporting Appellant's proposed defense were himself and his fiancée, Duarte. Though defense counsel disclosed the defense and Duarte soon after learning of Duarte's proposed testimony, the trial court rightly observed that Appellant himself was responsible for the untimely disclosure because the "defense is based on information that was particularly within [Appellant's] knowledge." (R.T. 11/8/16 (a.m.), at 11–12.) Even though no bad faith is attributable to defense counsel, Appellant's failure to timely disclose the grounds of his alleged defense to counsel was particularly egregious.

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4. Other factors.

¶ 28 A final factor should be considered. Appellant never asked for a continuance. Rule 15.6(d) provides a procedure for seeking pretrial continuance following late discovery. Appellant never took advantage of the procedure. He cannot now complain that the trial court should have continued the trial. In sum, the *Smith* factors supported the trial court's decision to preclude the necessity defense and Duarte's testimony.

5. Any hypothetical error was harmless and not structural.

¶ 29 As discussed, the trial court did not err by precluding Appellant from raising an untimely disclosed necessity defense. But assuming it did, the error was harmless, and not structural, as Appellant separately argues.[2] "No cause shall be reversed for technical error in pleadings or in proceedings when upon the whole case it shall appear that substantial justice has been done." Ariz. Const. art. VI, § 27. When trial error occurs, it is reviewed for harmlessness. *State v. Ring*, 204 Ariz. 534, ¶ 45 (2003).

¶ 30 By contrast, "structural error" requires automatic reversal. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–08 (2017) (noting that the defining feature of structural error is that it "affect[s] the framework within which the

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[2] This discussion answers Appellant's Argument One, in which he separately argues that this Court should review for "structural error." (O.B., at 4.)

trial proceeds," rather than being "simply an error in the trial process itself." The relatively few instances of structural error include a biased trial judge, complete denial of defense counsel, defective reasonable doubt instructions, and denial of a public trial. *See Ring*, 204 Ariz. 534, ¶ 46.

¶ 31 In this case, the trial court precluded Appellant from presenting a necessity defense. Appellant does not argue that the ruling constituted structural error *per se*; rather, he contends that alleged defects in the State's motion to preclude deprived the court of the "subject matter jurisdiction" to rule on it.[3] Thus, since the court lacked subject matter jurisdiction to rule on the motion, its ruling must be reviewed for structural error. This argument has no basis in law or fact. According to Appellant, the court lacked jurisdiction to impose a sanction under Arizona Rule of Criminal Procedure 15.7 because the State's motion to preclude failed to comply with the rule's certification requirement. *See* Ariz. R. Crim. P. 15.7(b); (O.B, at 4.)

¶ 32 But it is the rule itself, not a party's compliance with it, that gives the court its authority to impose sanctions for Rule 15 discovery violations, including "[p]recluding a party from calling a witness, offering evidence or raising a

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[3] "'Subject matter jurisdiction' refers to a court's statutory or constitutional power to hear and determine a particular type of case." *State v. Maldonado*, 223 Ariz. 309, 311, ¶ 14 (2010). It is obvious that the trial court had subject matter jurisdiction over this case. *See* Ariz. Const. art. 6, § 14(4).

defense not disclosed." Ariz. R. Crim. P. 15.7(a)(4). *See State v. Delgado*, 174 Ariz. 252, 256 (App. 1993) (finding in Rule 15.7 court's authority to impose sanctions). The court is not deprived of authority that originates in the rule [and ultimately, in the Arizona Constitution] merely because of alleged defects in a party's motion for sanctions.

¶ 33 In any event, the certification requirement applies only when the parties are unable to satisfactorily resolve a discovery dispute. But here the dispute was successfully resolved; the defense disclosed its defense and witness, albeit far after the deadline for making timely disclosure. The State's motion, therefore, was not to compel discovery or to otherwise sanction the defense for *failing* to disclose, as contemplated by Rule 15.7(a); rather, the State moved to preclude the defense for *untimely* disclosure and for lack of evidence. (R.O.A., Item 37.) If the trial court's ruling was error at all, it was plainly trial error, and it is thus reviewed for harmlessness. *See State v. Wargo*, 145 Ariz. 589, 589–90 (App. 1985) (preclusion based on untimely disclosure was error, but harmless).

¶ 34 Similarly, any error in the court's ruling was not structural because it allegedly deprived Appellant of raising a complete defense. (O.B., at 13.) Appellant had every opportunity to present a complete defense. He simply needed to raise it in a timely way, and, at the very least, provide sufficient evidence to

support it. The fact that Appellant did not do either of these things is not grounds for reversal. "The accused, as is required of the State, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 Ariz. 284, 302 (1973).

¶ 35 Ultimately, the facts of the case demonstrate that any error was harmless. The State presented overwhelming evidence of Appellant's guilt. He was caught red-handed, in knowing possession of a weapon that by law he was not permitted to possess. Appellant's proposed necessity defense would not have undermined the State's case because he had not been faced with an imminent threat nor did he lack a reasonable, alternative course of action, as required to justify his conduct. Section 13–417. Thus, no reasonable juror would have credited the defense and acquitted Appellant. As a result, any hypothetical error in precluding the untimely disclosed defense was harmless. *See State v. Davolt*, 207 Ariz. 191, ¶ 64 (2004) ("Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict.").

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO INSTRUCT THE JURY ON THE NECESSITY DEFENSE.

¶ 36 Appellant argues that the trial court erred by not providing the jury with his proposed instruction on the necessity defense. (O.B., at 24; R.O.A., Item 43.) As discussed in Section I, the court acted within its discretion by precluding the defense pretrial. Thus, this Court need not reach this issue; in fact, it is impossible to review it because, by virtue of the pretrial ruling precluding the defense, no evidence for the defense could have been presented at trial. And without such evidence, there was no ground for the trial court to instruct on it. A party is entitled to such instruction upon the "slightest evidence" of justification, but "the instruction need not be given 'unless it is reasonably and clearly supported by the evidence.'" *State v. Vassell*, 238 Ariz. 281, ¶ 9 (App. 2015), quoting *State v. Ruggiero*, 211 Ariz. 262, ¶ 10 (App. 2005); *see also State v. Carson*, 241 Ariz. 775, ¶ 19 (App. 2017) ("[I]f there is no evidence for a necessary aspect of a prima facie case of justification, then there is not the slightest evidence of justification."). Because there was no evidence (in the pretrial offer of proof) that Appellant faced "imminent" injury, there was not the slightest evidence to support instructing the jury on the necessity defense.

¶ 37 Again, this Court does not need to reach this issue because the necessity defense was precluded *pretrial*. No evidence for the defense, and thus for the instruction, could have been presented at trial because the defense itself had been precluded before the trial began.

A. STANDARD OF REVIEW.

¶ 38 This Court reviews a court's decision to deny a requested jury instruction for an abuse of discretion. *State v. Hurley*, 197 Ariz. 400, ¶ 9 (App. 2000). *See State v. Johnson*, 108 Ariz. 42, 43 (1972) (instruction required if the evidence "in the slightest degree tends to" show justification). This Court does not weigh the evidence or resolve conflicts in it; rather, this Court decides whether the record provides evidence upon which the jury could rationally sustain the defense. *State v. Almeida*, 238 Ariz. 77, ¶ 9 (App. 2015). "The slightest *evidence*—not merely an inference making an argument possible—is required because speculation cannot substitute for evidence." *Vassell*, 238 Ariz. 281, ¶ 9.

B. THE INSTRUCTION WAS POINTLESS, GIVEN THE PRETRIAL PRECLUSION RULING.

¶ 39 This argument is essentially answered *supra*, in Section I, but summarized here. The defense of necessity is a justification defense. A.R.S. § 13–417(A). Conduct that would otherwise constitute an offense is justified by necessity "if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or

private injury greater than the injury that might reasonably result from the person's own conduct." A.R.S. § 13–417(A).

¶ 40 At the hearing on the State's motion to preclude, Appellant failed to present even the slightest evidence supporting the defense of necessity. Although Appellant argued the evidence, including his own testimony, would suggest he had reason to fear he may *at some point* be the target of an assault, he presented no evidence that an attempted attack or injury was imminent. (R.O.A., Item 44; R.T. 11/8/16 a.m.), at 9–11.) On appeal, Appellant seems to argue that the court should have waited until it heard the evidence at trial, but the preclusion ruling was for a disclosure violation, and Appellant needed to make an offer of proof about why the evidence was necessary. This is why it was appropriate for a pre-trial ruling. In any event, as already discussed, the offer of proof was itself insufficient.

¶ 41 As discussed, Appellant also had reasonable, legal alternatives to violating the law prohibiting the possession of a weapon. He could have reported the threat to the police or to his parole officer. Appellant made no attempt to do either. In fact, he waited several months even to apprise defense counsel of the alleged threat. Further, there was no evidence that Appellant began to carry his gun *after* the threat allegedly made to Duarte.

¶ 42 In sum, this Court need not reach this issue if it upholds the trial court's ruling to preclude the necessity defense. Pretrial, Appellant did not present the slightest evidence (in his offer of proof) to warrant the defense, much less an instruction on it. Because no evidence supported the necessity defense, the jury instruction for the defense was pointless, and the trial court did not abuse its discretion by refusing to provide it.

CONCLUSION

¶ 43 Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm Appellant's judgement and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

TWO COPIES of this Brief were deposited for mailing this 19th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13, Arizona Rules of Criminal Procedure, undersigned counsel certifies that this brief is double spaced, uses a 14-point proportionately spaced typeface, and contains 5,531 words.

s/JONATHAN BASS