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Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0940
)
Appellee,)
) DEPARTMENT A
v.)
) **MEMORANDUM DECISION**
STEVE GERALD BARGER,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007794-001-DT

The Honorable Sherry K. Stephens, Judge

AFFIRMED

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by Kent E. Cattani, Chief Counsel,
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T I M M E R, Judge

¶1 Craig and Kristie lived in a trailer in Phoenix. On
April 12, 2009, Kristie drove to a police substation and told

officers a man had been shot at the trailer and buried in the yard. Several officers drove to the trailer and saw Craig and appellant Steve Gerald Barger "digging up something in the front yard of the [trailer]," which was later revealed to be the body of victim Gregorio. Gregorio had been shot at close range in the neck and head area. The police eventually arrested Barger, and the State charged him with one count of second-degree murder, a class 1 dangerous felony, and one count of abandonment or concealment of a dead body, a class 5 felony.

¶2 On August 13, 2010, the jury found Barger guilty of both offenses as charged. The trial court subsequently sentenced Barger to concurrent presumptive prison terms. Barger appeals, arguing the trial court committed reversible error by (1) denying his motion for judgment of acquittal pursuant to Arizona Rule of Criminal Procedure ("Rule") 20 on the second-degree murder charge, (2) failing to instruct the jury sua sponte on manslaughter as a lesser-included offense of the second-degree murder charge, and (3) failing to order a new trial sua sponte in light of prosecutorial misconduct. For the reasons that follow, we disagree and therefore affirm.

DISCUSSION

I. Denial of Rule 20 motion

¶3 To secure a conviction for second-degree murder, the State was required to prove beyond a reasonable doubt that

Barger, without premeditation, (1) intentionally caused Gregorio's death, (2) caused Gregorio's death while knowing his conduct would cause death or serious physical injury, or (3) under circumstances manifesting extreme indifference to human life, recklessly engaged in conduct that created a grave risk of death to Gregorio and thereby caused his death. Ariz. Rev. Stat. ("A.R.S.") § 13-1104(A) (West 2012).¹ After the State rested, Barger moved for a judgment of acquittal on this charge, arguing the State had failed to present sufficient evidence to support any alternative element. The trial court denied the motion, ruling the jury should decide whether the evidence established the charge.

¶4 The trial court properly denied the Rule 20 motion unless no substantial evidence warranted a conviction. *State v. Hall*, 204 Ariz. 442, 454, ¶ 49, 65 P.3d 90, 102 (2003). Substantial evidence is evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87, 84 P.3d 456, 477 (2004). If reasonable persons could fairly debate whether evidence supports a particular fact, that evidence is "substantial." *Id.*

¹ Absent material revisions after the date of an alleged offense, we cite to a statute's current version.

¶15 When determining the sufficiency of the evidence underlying a trial court's Rule 20 ruling, we view the evidence in the light most favorable to sustaining the verdict and resolve all inferences against the defendant. *Id.* The issue is "whether, [based] on the evidence presented, rational factfinders could find guilt beyond a reasonable doubt." *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999). We review the court's ruling for an abuse of discretion. *State v. Lychwick*, 222 Ariz. 604, 606, ¶ 7, 218 P.3d 1061, 1063 (App. 2009).

¶16 The evidence adduced at trial established the following events: About a week before April 12, 2009, Craig's friend "Wild" appeared at the trailer attempting to flee from Barger. Barger and Gregorio showed up and confronted Wild behind the trailer, but Wild managed to get away.

¶17 Barger and Gregorio did not leave but remained uninvited at the trailer for four or five days awaiting Wild's return so they could harm him for purportedly molesting Barger's son. Barger grew increasingly upset over the ensuing days when they could not locate Wild and frightened Craig with boasts Barger was the son of the president of Hell's Angels coupled with repeated comments that "someone was going to have to pay."

¶18 On the morning of April 10, while Craig, Barger and Gregorio were inside the trailer, Barger repeated several times

"somebody needs to take me to him or somebody is going to pay." While Craig was in the bathroom, Barger and Gregorio were "right around the corner." Gregorio had a shotgun that belonged to Craig. Barger suddenly took the shotgun from Gregorio, pointed it at Gregorio's face, and shot him; Gregorio fell to the floor, dead. Barger then stated "shut up and let's get out of here," and he and Craig drove around for twenty minutes before returning to the trailer.

¶19 When Kristie returned home after work that day, she found the gate to the fence that surrounded the trailer "locked up tight." Craig eventually came out, he was "very pissed off" and told her she needed to leave. Kristie told him she had nowhere to go, and Craig informed her that, if she went inside the trailer, she "need[ed] to keep [her] mouth shut" and "don't react to anything [she] saw and just sit down and be quiet." Kristie sat outside the trailer for a few hours, and while she was sitting there Barger came outside and told her "my partner got really drunk and real belligerent and I'm not sorry for what I did." When she eventually entered the trailer, Kristie saw Gregorio's body lying "propped up against the kitchen counter where the cabinets are." Craig said, "yes, he's dead." At some point, Kristie asked Craig what happened, and he told her that Barger "walked in and blew [Gregorio] away." Later, however, Craig also told her that "[Gregorio] had been . . . really

drunk, had been . . . cleaning or playing with the shotgun, and it went off." Craig also informed Kristie that "[Barger] had taken pictures of him with [Gregorio's body] so [Craig] wouldn't be able to do anything about it" and that he thought he "would be next."

¶10 Craig testified that, after several hours had passed and it was dark, Barger stated if somebody did not "clean up this mess," he was going to have to call "some of his people to take care of it" or "going to have to kill somebody else." With Barger's help, Craig dug a hole near the trailer, and he and Barger dragged the body out of the trailer and buried it. Sometime later, Barger left the trailer with the shotgun, which Craig had rinsed clean of blood; Barger returned to the trailer later without it. Police never found the shotgun.

¶11 Kristie and Craig spent the night away from the trailer hoping Barger would eventually leave. On April 12, after Barger still had not left, Kristie called Phoenix Police and asked them to remove Barger from the trailer. When a police officer arrived, Craig was "kind of hesitant" and unsure about "what direction he wanted to go with things." Barger informed the officer his father owned the trailer, that he and Craig were "roommates" and would work out their problems, that Kristie was the real problem, but that, now that she was gone, "they would be able to resolve their differences." Unlike Craig, Barger's

manner was "confident . . . direct[], affirmative[.];" and the officer left, thinking the altercation was a "civil matter between roommates."

¶12 Kristie also left but later phoned Craig and informed him she planned to tell the police everything. Craig said "he understood[,] to go ahead and do it." After Kristie reported the shooting, several officers drove to the trailer, saw Craig and Barger digging up Gregorio's body, and ordered the two men at gunpoint to raise their hands. Craig immediately complied, but Barger walked toward the police, took off his shirt and yelled, "Hells Angels for life," before police took him into custody. Inside the trailer, officers found blood on cabinets underneath the kitchen sink and bloody towels as well as numerous live shotgun shells.

¶13 When a detective interviewed Barger after his arrest, he denied anyone had been shot or killed and denied the existence of a buried body at the trailer.² In an initial interview on April 12, Craig repeatedly maintained that Gregorio had either committed suicide or shot himself accidentally with the shotgun. In a subsequent interview approximately two weeks later, Craig admitted he saw Barger shoot and kill Gregorio.

² In fact, Barger asked if the police were sure that they had not just dug up a "root."

¶14 A medical examiner testified that based on the circumstances, Gregorio's death was a homicide. He conceded, however, that the evidence was consistent with a suicide and possibly an accidental shooting. According to defense expert Dr. Karen Griest, a forensic pathologist, Gregorio's wound was consistent with a suicide or possibly an accidental shooting. But she admitted on cross-examination the evidence was also consistent with a homicide.

¶15 Barger contends the trial court abused its discretion by denying his Rule 20 motion because (1) the testimony "was all over the place," (2) Craig changed his rendition of what happened several times, (3) the expert medical opinions vacillated about whether Gregorio's death was a homicide, a suicide, or an accident, and (4) only circumstantial evidence supported the State's contention his death was homicide. We disagree.

¶16 Barger correctly points out that Craig changed his version of events multiple times. According to Kristie, Craig related Barger had killed Gregorio. But Craig initially told police Gregorio had committed suicide. Later, he told police he had seen Barger shoot Gregorio. At trial, after entering into a plea agreement with the State on a charge of abandonment or concealment of a body, he admitted telling police in his second interview that he had seen Barger shoot the victim but claimed

he was confused at the time.³ It was for the jury, however, to assess Craig's credibility and decide which version of events occurred. *State v. Canez*, 202 Ariz. 133, 149, ¶ 39, 42 P.3d 564, 580 (2002). When taken together with Kristie's testimony that Barger told her he was "not sorry for what [he] did," Barger's denial that anyone had died, despite the visibility of Gregorio's body when Craig and Barger were discovered by police digging in the spot, evidence that Barger had disposed of the shotgun, and evidence that Craig was motivated to lie because he was fearful of Barger, the jury had substantial evidence before it to conclude Barger killed Gregorio. *State v. Just*, 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983) (concluding court has no discretion to enter a judgment of acquittal if reasonable minds could differ on inferences to be drawn from the evidence). The expert testimony suggesting Gregorio's death was the result of suicide or accident did not diminish the strength of this evidence because both experts also acknowledged the evidence was consistent with a conclusion that someone killed Gregorio.

¶17 In sum, substantial evidence supported a conclusion that Barger shot Gregorio. Therefore, the trial court did not

³ Although Barger suggests the State suborned perjury by placing Craig on the stand despite the fact it was aware he had changed his story, this argument lacks merit. It is well established the State may impeach its own witness through prior inconsistent statements. *State v. Robinson*, 165 Ariz. 51, 58, 796 P.2d 853, 860 (1990); Ariz. R. Evid. 607.

abuse its discretion by denying the Rule 20 motion and submitting the matter to the jury. *Lychwick*, 222 Ariz. at 606, ¶ 7, 218 P.3d at 1063.

II. Lesser included instruction

¶18 Barger next argues the trial court erred by failing to instruct the jury on the lesser-included offense of manslaughter.⁴ Because Barger did not raise this argument to the trial court, he has waived it absent fundamental error. *State v. Schaaf*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991). To gain relief, he must prove error occurred, the error was fundamental, and he was prejudiced by the error. *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 23-24, 26, 115 P.3d 601, 608 (2005). Error is considered fundamental if it reaches the foundation of the defendant's case or removes an essential right to the defense. *State v. McGann*, 132 Ariz. 296, 298, 645 P.2d 811, 813 (1982) (citation omitted). To determine whether error is fundamental, "we look to the entire record and to the totality of the circumstances." *State v. Hughes*, 193 Ariz. 72, 86, ¶ 62, 969 P.2d 1184, 1198 (1998).

⁴ As pertinent in this case, "A person commits manslaughter by: 1. Recklessly causing the death of another person; or 2. Committing second degree murder as defined in § 13-1104, subsection A upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim" A.R.S. § 13-1103.

¶19 Even assuming the evidence supported an instruction for manslaughter, the court's failure to give the instruction did not deprive Barger of a right essential to his defense. From the outset, Barger's defense at trial was that Gregorio had shot himself either accidentally or on purpose; Barger denied shooting Gregorio. Because an instruction on manslaughter was not essential to Barger's all-or-nothing defense, he was not deprived of a fair trial, and the trial court did not commit fundamental error by failing to give the instruction sua sponte. See *State v. Bearup*, 221 Ariz. 163, 168, ¶ 23, 211 P.2d 684, 689 (2009) (stating that a lesser-included offense instruction is only appropriate when the facts support giving the instruction.)

III. Prosecutorial misconduct

¶20 Barger finally argues the prosecutor engaged in several instances of misconduct that deprived him of a fair trial. Because he did not raise this issue to the trial court, we review only for fundamental error. *Schaaf*, 169 Ariz. at 327, 819 P.2d at 913.

¶21 We will reverse for prosecutorial misconduct only if misconduct is present and "a reasonable likelihood exists [] the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004). In addition, reversal is only required if misconduct is "so pronounced and persistent

that it permeates the entire atmosphere of the trial." *State v. Rosas-Hernandez*, 202 Ariz. 212, 218-19, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002) (quoting *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)). We look to "whether the misconduct affected the jury's ability to fairly assess the evidence." *Id.* (citing *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995)). With these principles in mind, we consider Barger's arguments.

¶22 Barger first argues the prosecutor knowingly used false evidence because he presented Craig as a witness despite Craig's differing version of events and the prosecutor's acknowledgement he did not know what Craig would say during his testimony. For the reasons previously explained, *see supra* n.3, we reject this contention.

¶23 Barger next argues the prosecutor "vouched" for Craig when he stated in his opening statement:

After this case is done, ladies and gentlemen, you will see that despite what Craig [] initially told the police, whatever he testifies to in court, he saw [Barger] kill [Gregorio].

Prosecutors may argue all reasonable inferences from the evidence but cannot make insinuations that are not supported by the evidence. *Hughes*, 193 Ariz. at 85-86, ¶ 59, 969 P.2d at 1197-98. Two forms of impermissible vouching exist: (1) when the prosecutor places the prestige of the government behind its

witness, usually by personal assurances of a witness's truthfulness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony. *State v. Doerr*, 193 Ariz. 56, 62, ¶ 24, 969 P.2d 1168, 1174 (1998); *State v. Dunlap*, 187 Ariz. 441, 462, 930 P.2d 518, 539 (App. 1996). The prosecutor's opening statement did neither. The prosecutor merely pointed out that the jury would hear different version of events related by Craig and communicated his expectation the evidence would show that Craig's statements implicating Barger were accurate. See *State v. Morris*, 215 Ariz. 324, 336, ¶ 51, 160 P.3d 203, 215 (2007) (holding prosecutors have wide latitude in presenting their arguments to the jury). But even assuming the prosecutor engaged in vouching, Barger fails to persuade us this error so "permeat[ed] the entire atmosphere of the trial" that he was denied a fair trial. *Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191 (citation omitted).

¶24 Finally, Barger asserts the prosecutor engaged in misconduct by stating in his opening statement that Barger "cast a spell" on Craig and Gregorio and by arguing in closing that Barger had "use[d] magic" to compel the police to leave the first time an officer came to the trailer on April 12, 2009. Barger contends these statements constitute misconduct because "there was zero evidence" at trial that Barger either "casted

spells or used magic [sic]" or "threatened" to cast a spell on someone, and these statements were therefore solely "calculated to inflame the passions of the jurors" and deprived him of a fair trial. This argument is entirely without merit.

¶25 It is obvious the prosecutor's statements were not intended to be taken literally. References to "spells" and "magic" were merely euphemisms for the level of persuasiveness that Barger was able to exert over Craig and the officer who initially responded to the trailer. The comments fall within the very wide latitude given prosecutorial argument and do not constitute misconduct. *Morris*, 215 Ariz. at 336, ¶ 51, 160 P.3d at 215.

CONCLUSION

¶26 For the foregoing reasons, we affirm Barger's convictions and sentences.

/s/

Ann A. Scott Timmer, Judge

CONCURRING:

/s/

Philip Hall, Presiding Judge

/s/

Donn Kessler, Judge