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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/11/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0314
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
ROBERT THOMAS PLEICKHARDT,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-157077-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 Robert Thomas Pleickhardt appeals his convictions and sentences for two counts of second-degree burglary and one count

each of theft, aggravated robbery, kidnapping and first-degree felony murder. Pleickhardt argues the superior court erred when it denied his motion to sever; he also argues the Arizona felony-murder statute and the *Portillo* reasonable-doubt instruction are unconstitutional. For the reasons that follow, we affirm Pleickhardt's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Pleickhardt robbed two elderly men he believed were prostitution clients of his girlfriend ("Girlfriend").¹ He robbed RH shortly before one o'clock in the afternoon one day. RH was in his late seventies and was an admitted client of Girlfriend. RH had arranged for Girlfriend and Pleickhardt to come to his home so that he could watch them engage in sexual acts. Shortly after Girlfriend and Pleickhardt finished their performance, Pleickhardt struck RH from behind and knocked him to the ground. Pleickhardt then struck RH on the head repeatedly and kicked him repeatedly. Pleickhardt took RH's money and credit cards and beat him further in an effort to force RH to divulge his PIN number.

¶3 The second victim, DE, was 61 years old. Pleickhardt robbed DE the evening of the same day he robbed and beat RH.

¹ "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

While Pleickhardt believed DE was a client of Girlfriend's, there was no independent evidence of that fact. Pleickhardt did assert, however, that he mentioned Girlfriend's name to DE to gain his confidence and permission to enter the house. DE was found dead, bound face down on the floor immediately behind his front door. His wallet and other items were missing. There were signs of a struggle; DE suffered blunt-force trauma to his head and face and his blood had soaked through the rug on which he was found. The cause of death was positional asphyxia due to the manner in which he was tied and placed on the floor. Pleickhardt used one of DE's credit cards later that same evening and used another several times later. Officers found personal property of DE's in Pleickhardt's wallet, in the car Pleickhardt was driving, in an apartment in which Pleickhardt recently stayed and in Girlfriend's purse.

¶14 The State charged Pleickhardt with second-degree burglary and aggravated robbery for the incident involving RH. It charged Pleickhardt with theft, second-degree burglary, kidnapping and first-degree felony murder for the incident involving DE. A jury convicted Pleickhardt as charged and the superior court sentenced Pleickhardt to an aggregate term of natural life plus 11.25 years' imprisonment.

¶15 We have jurisdiction of Pleickhardt's appeal pursuant to Article 6, Section 9, of the Arizona Constitution,

and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012), 13-4031 (West 2012) and 13-4033 (West 2012).²

DISCUSSION

A. Denial of the Motion to Sever.

¶16 Prior to trial, Pleickhardt moved to sever the counts involving RH from the counts involving DE. The superior court denied the motion, holding that evidence of the offenses would be admissible in separate trials and that the danger of unfair prejudice did not outweigh the probative value of the evidence.

¶17 Pleickhardt argues on appeal that the superior court erred when it denied his motion to sever. Pleickhardt, however, failed to renew his motion during trial. If the court denies a defendant's pretrial motion to sever, the defendant must renew the motion at or before the close of the evidence. If he does not renew his motion, he waives the right to severance. Ariz. R. Crim. P. 13.4(c); *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996).

¶18 Because Pleickhardt failed to renew his motion to sever, we review the court's denial of his motion only for fundamental error. *Laird*, 186 Ariz. at 206, 920 P.2d at 772. "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case,

² Absent material revisions after the date of an alleged offense, we cite a statute's current version.

takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even if a defendant establishes fundamental error, the defendant also must demonstrate the error was prejudicial. *Id.* at ¶ 26. We review the decision to grant or deny a motion to sever based on the information before the superior court at the time the court made its ruling. See *State v. Blackman*, 201 Ariz. 527, 537, ¶ 39, 38 P.3d 1192, 1202 (App. 2002).

¶19 Arizona Rule of Criminal Procedure 13.3(a) allows offenses to be joined if they:

(1) Are of the same or similar character; or

(2) Are based on the same conduct or are otherwise connected together in their commission; or

(3) Are alleged to have been a part of a common scheme or plan.

Offenses must be severed if they are joined only by virtue of their same or similar character under Rule 13.3(a)(1) and evidence of one offense would not be admissible in a trial of the other. Ariz. R. Crim. P. 13.4(b). Otherwise, offenses must be severed on a defendant's motion when "necessary to promote a fair determination of [] guilt or innocence." Ariz. R. Crim. P. 13.4(a).

¶10 The State argued the charges need not be severed because they properly were joined pursuant to Rule 13.3(a)(3) as parts of a common scheme or plan. The superior court addressed the severance request as if the charges were joined pursuant to Rule 13.3(a)(1) (same or similar character). It denied Pleickhardt's motion to sever because it concluded evidence concerning each incident would be admissible in trial of the other pursuant to Arizona Rule of Evidence 404(b).

¶11 Whether offenses properly are joined as parts of a common scheme or plan pursuant to Rule 13.3(a)(3) presents the same question as whether evidence of various offenses is admissible to show a plan pursuant to Rule 404(b). See *State v. Ives*, 187 Ariz. 102, 109, 927 P.2d 762, 769 (1996) (definitions of "plan" used in Rule 404(b) and "common scheme or plan" in Rule 13.3(a)(3) are coextensive) (citing *State v. Hanson*, 138 Ariz. 296, 302, 674 P.2d 850, 856 (App. 1983)).

¶12 The State's theory was that Pleickhardt planned to rob Girlfriend's elderly clients, to gain access to the victims through their acquaintance with Girlfriend, to rob them and then to rely on their likely reluctance to report to police that they had been robbed by the boyfriend of the prostitute they frequented. Accordingly, evidence of each offense would be admissible to prove Pleickhardt had a common plan to commit the other. While the superior court did not expressly deny the

motion to sever on this basis, we may affirm its decision on any basis supported by the record. *State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987).

¶13 Moreover, as the superior court concluded, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Further, the court instructed the jury that it must address and decide each charge separately based on the evidence applicable to that count, uninfluenced by its decision on any other count. "Juries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

¶14 Finally, as to possible prejudice from the denial of the motion to sever, Pleickhardt asserts only, "The jury may have accumulated the evidence on the separate alleged crimes to find guilt, when if considered separately, it would not have so found. Furthermore, the jury may have experienced latent feelings of hostility engendered by the charge of several crimes as opposed to singularly related charges." There is nothing in the record to suggest either possibility occurred. "We will not reverse a conviction based on speculation or unsupported inference." *State v. Diaz*, 223 Ariz. 358, 361, ¶ 13, 224 P.3d 174, 177 (2010).

B. The Constitutionality of the Felony-Murder Statute.

¶15 Pleickhardt argues A.R.S. § 13-1105(A)(2) (West 2012), the Arizona felony-murder statute, is unconstitutional because it “violates a fundamental principle: it provides liability for first-degree murder whether or not the person intended to kill.” Pleickhardt further argues, “The felony murder statute is unconstitutional, *per se*, under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution because it is contrary to the fundamental value that criminal liability should be measured by the defendant’s *mens rea* and because it imposes the same criminal liability for an unintended murder as a premeditated one.”

¶16 Our supreme court has rejected these arguments:

[T]he *mens rea* necessary to satisfy the premeditation element of first-degree [felony] murder is supplied by the specific intent required for the [relevant underlying] felony. We reject [the] claim that this is unconstitutional. It is not unconstitutional for the Arizona Legislature to mandate that an individual who causes the death of another while seeking to accomplish one of several enumerated felonies, each of which requires a showing of intent and/or knowledge for conviction, be subject to the same criminal charges and punishment as a person who causes the death of another person with premeditation.

State v. McLoughlin, 139 Ariz. 481, 485-86, 679 P.2d 504, 508-09 (1984).

¶17 When the supreme court addressed this same issue nine years later in another case, the court concluded, "We reaffirm our holding in *McLoughlin*. Arizona's felony murder rule is not unconstitutional." *State v. Herrera*, 176 Ariz. 21, 30, 859 P.2d 131, 140 (1993). "We are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *Myers v. Reeb*, 190 Ariz. 341, 342, 947 P.2d 915, 916 (App. 1997) (quoting *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993)).

C. The *Portillo* Instruction.

¶18 The superior court instructed the jury on the concept of reasonable doubt pursuant to *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). Pleickhardt argues the *Portillo* instruction should be "abandoned." Our supreme court has mandated that the reasonable doubt instruction contained in *Portillo* be given in every criminal case. *Id.*; *State v. Van Adams*, 194 Ariz. 408, 418, ¶ 30, 984 P.2d 16, 26 (1999). Again, we are bound by decisions of the Arizona Supreme Court. "Whether prior decisions of the Arizona Supreme Court are to be disaffirmed is a question for that court." *Myers*, 190 Ariz. at 342, 947 P.2d at 916 (quoting *City of Phoenix*, 177 Ariz. at 378, 868 P.2d at 961).

CONCLUSION

¶19 We affirm Pleickhardt's convictions and sentences.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
JON W. THOMPSON, Judge