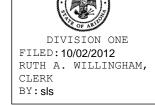
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111©; ARCAP 28©; Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS STATE OF ARIZONA DIVISION ONE



STATE OF ARIZONA,)	No. 1 CA-CR 11-0681
	Appellee,)	DEPARTMENT C
V.)	MEMORANDUM DECISION
BRADLEY HUGH TOCKER,)	(Not for Publication - Rule 111, Rules of the
BRADLEI HUGH TOCKER,)	Arizona Supreme Court)
	Appellant.)	
)	
)	
		_)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005795-001

The Honorable Samuel A. Thumma, Judge

AFFIRMED

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

Law Office of Nicole Farnum
By Nicole T. Farnum
Attorney for Appellant

Bradley Hugh Tocker,
Appellant

Phoenix
Florence

¶1 Bradley Hugh Tocker timely appeals his convictions for first degree murder, fraudulent schemes and artifices, theft of means of transportation, and misconduct involving weapons in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1105, -2310, -1814, and -3102. Pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record, found no arguable question of law, and asked that we review the record for fundamental error. See State v. Richardson, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Tocker filed a supplemental brief in propria persona. On appeal, we view the evidence in the light most favorable to sustaining the conviction. State v. Tison, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), cert. denied, 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

- In September 2006, William McGrath was assaulted in his home. McGrath's attacker was sentenced to prison. McGrath renovated his home after the attack and hired Tocker to assist with projects at that residence and another house he was remodeling ("Solano house").
- ¶3 In early 2009, Tocker moved his mother into a care facility and paid her expenses. Tocker fell behind on two mortgages ("Chase" and "HSBC"), and the banks sought to

foreclose. Tocker asked his sister for financial help with their mother's care, but she was unable to contribute.

- Around August 2009, McGrath learned his attacker would soon be released from prison. He was nervous about the release and spoke with friends and family about moving away or buying a gun for protection. Ultimately, McGrath decided to remain in Arizona and "deal with the release." He enhanced security at his home, including having a locksmith rekey every door on August 18.
- On August 18 and 19, Tocker used his cell phone to call McGrath's home and cell phone multiple times. The last time Tocker called McGrath was a 28-minute call to his home at 7:36 p.m. on August 19. Later that night, one of McGrath's neighbors was awakened by the sound of two gunshots. After that date, the neighbor no longer heard McGrath's dog, who typically barked a lot.
- Around the middle of August, McGrath's friends and family grew concerned when he uncharacteristically failed to return phone calls. His cousin left a message on McGrath's home phone, threatening to "send somebody" if McGrath did not return his calls. The cousin received a "weird[]" e-mail response from McGrath's e-mail address, stating that McGrath had suddenly decided to leave Phoenix and would get in touch once settled. The cousin called McGrath's brother, B.M., who had also been

unable to reach McGrath. The next day, B.M. received a message from McGrath's e-mail address, explaining that he had decided to "get the hell out of phx," had "closed the house up," and had "arranged to have some work done" while he was gone. The message stated McGrath might "go back to pittsburg [sic] for awhile" and that he had a dentist appointment on "wen."

¶7 On August 25, Tocker rented a storage unit to store a vehicle. He put his own lock on the unit, which faced McDowell Road. Tocker provided his e-mail address and driver's license, which the facility copied for its files.

McGrath's financial adviser, with whom McGrath was scheduled to meet that day. The person said he was not feeling well and wanted to "talk on the phone or reschedule the appointment."

The message included a "new" cell phone number ("Boost mobile phone") for D.B. to return the call. The voice on the message was "obviously" not McGrath's. D.B. called the Boost mobile phone and talked with a person identifying himself as McGrath.

D.B. arranged to call that person later in the day, hoping McGrath would attend their 1:00 meeting.

¹ D.B. had been McGrath's financial adviser since 2007, had spoken with him a dozen times over the years, and testified that McGrath had a "very distinctive voice."

- When McGrath failed to appear, D.B. asked the police to check on him. Officers reported that "everything seemed to be in place" at McGrath's home. D.B. also reviewed McGrath's accounts and saw a "recent pattern of larger withdrawals more frequently" than normal and large checks that had recently cleared. Bank personnel pulled three checks -- one written August 18 to a locksmith and two written subsequently to Tocker for \$12,000 and \$4200 -- and compared the signature to McGrath's signature card. The signature on the locksmith check matched, but the signatures on the checks to Tocker did not. The bank froze McGrath's account.
- The next day, D.B. noticed that the restrictions on McGrath's account had been removed. He also had a voicemail message from the person claiming to be McGrath, asking him to call McGrath's cell phone number. Bank security pulled photographs of persons conducting the suspicious transactions. Tocker was seen cashing his two checks and withdrawing money from McGrath's accounts via ATM. The bank froze Tocker's account.
- ¶11 On August 28, D.B. called McGrath's cell phone. A person with a hoarse voice answered and claimed to be McGrath. "McGrath" expressed concern that he was locked out of his accounts. When D.B. explained the suspicious account activity, the man said he had asked "somebody else" to write and sign the

checks and had given his PIN number "to his friend to use the ATM." When D.B. explained that McGrath needed to present identification at a branch office to release the accounts, the man said he was driving "from San Diego going to Mexico" and "didn't know if he had time" to stop at a bank. Bank security made a similar call to McGrath's cell phone. The man who answered complained that bank security was "spending too much time and work on this investigation" and stated he did not have time to stop at a bank to unfreeze his accounts.

- McGrath's house. They found the interior "neat and orderly," but there were no signs of McGrath, his dog, or his gold Toyota Tacoma. On September 2, officers met with Tocker and advised him they could subpoen his cell phone records. Tocker gave them the key to McGrath's house, and officers conducted a more thorough search. They impounded a pillow with a blood stain, a razor, and a toothbrush. Inside the master bedroom closet, officers found the bags McGrath typically used when he travelled. In the kitchen sink, they found a knife with fresh peanut butter on it.
- ¶13 On September 7, someone went online and changed the contact e-mail address and phone number ("AT&T cell") on one of McGrath's investment accounts. The financial institution froze the account. On September 14, 15, and 16, three calls were made

from the AT&T cell to the financial institution's call center.

The financial institution recorded the calls and gave them to police.

That same day, someone used the AT&T cell to call D.T., a scrap metal collector, seeking to sell a Toyota Tacoma truck stored at the same facility where Tocker rented a unit. On September 8, D.T. met the seller² at the storage facility and purchased a stripped "gold, tan" Toyota Tacoma truck that was basically a "rolling chassis." The storage facility manager saw two men loading a "[1]ight colored truck" onto a tow truck in the vicinity of Tocker's storage unit. The next day, the lock on Tocker's unit had been removed. The "rolling chassis" was later identified as McGrath's vehicle.

Placetives reviewed McGrath's financial records and saw an unusual charge on his credit card ("Zappos charge") and unusual withdrawals and transfers beginning August 18, including a \$9000 transfer to a Chase account belonging to Tocker's mother and a \$7000 transfer to "HSBC Mortgage." Officers arrested Tocker on October 15 and impounded his cell phone and his size 9.5 shoes. Officers conducted a warranted search of Tocker's residence and handed out missing person fliers throughout the

 $^{^2}$ D.T. did not identify the seller from a photo lineup. He also did not recall the number of the storage unit, but remembered that it faced McDowell Road.

³ McGrath wore size 8 shoes.

neighborhood. From Tocker's house, officers impounded, inter alia, three computers; a gambling card and slips, \$2901 in cash, Tocker's Arizona driver's license, a Boost mobile phone pamphlet, two Western Union receipts showing that Tocker wired money to Chase Home Finance; and size 9.5 shoes and clothing matching the Zappos order charged to McGrath's credit card and mailed to the Solano residence.

- ¶16 Officers also impounded and searched Tocker's vehicle. Inside, they found a 45 caliber "ELD bullet," a September 18 bank receipt documenting an \$8200 deposit into Tocker's account, and a September 23 receipt documenting a "trash deposit" at a Phoenix solid waste disposal site.
- After seeing a missing person flier, Tocker's next door neighbor told police that he saw Tocker, McGrath, and McGrath's vehicle in Tocker's driveway on "August 17th or 18th." Thereafter, the neighbor heard "loud clanging and banging for about three days" from Tocker's residence. He then saw car parts in the garbage behind Tocker's house identical in color to McGrath's vehicle. Another person gave officers car parts that he collected around the middle of August from the alley directly behind Tocker's house. Among the parts was a cigarette butt with DNA matching DNA taken from the razor at McGrath's home. The cigarette was the same brand McGrath smoked.

- ¶18 Officers processed McGrath's house as a crime scene. They collected potential evidence and sprayed chemicals to search for "cleaned-up blood." They found indicators of a "heavy concentration" of blood in certain areas. Contractors found plastic bags in the attic of the Solano home that included:
 - A shipping box addressed to Tocker's mother that contained a Glock 45 handgun with blood evidence matching DNA from the razor and bloody pillowcase found in McGrath's house, several magazines, clips, and 45 caliber "ELD brand" bullets;
 - The AT&T cell, Boost mobile phone, and McGrath's cell phone;
 - A Gateway computer box with a registration number matching one taken from Tocker's residence;
 - McGrath's financial records, including purchases and investments back to 1995, and his checkbook and register dating back to 2006;
 - Accounts opened in McGrath's name after August 19, 2009;
 - A handwritten list of McGrath's accounts, user names, and passwords;
 - A personal address book listing McGrath's friends and colleagues;

- McGrath's wallet, including his driver's license, vehicle insurance card, and the credit card used to make the Zappos purchase;
- McGrath's personal calendar, noting, among other things, his appointment with D.B. and a dentist.
- Tocker was indicted for first degree murder ("count 1"), fraudulent schemes and artifices ("count 2"), theft of means of transportation ("count 3"), and misconduct involving weapons ("count 4"). A 12-day jury trial ensued. At the conclusion of the State's case-in-chief, Tocker moved for a judgment of acquittal on all counts pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"). The motion was denied. Tocker presented two witnesses. The jury deliberated and found Tocker guilty of all four counts and determined that count 1 was a dangerous offense.
- ¶20 Tocker was sentenced to natural life for count 1, a presumptive term of 5 years for count 2, a presumptive term of 3.5 years for count 3, and a presumptive term of 2.5 years for count 4. The sentences were ordered to run concurrently, with 715 days' presentence incarceration credit for count 2, and 580 days for each of the remaining counts.

DISCUSSION

¶21 We have read and considered the briefs submitted by Tocker and his counsel and have reviewed the entire record.

Leon, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentences imposed were within the statutory range. Tocker was present at all critical phases of the proceedings and was represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

¶22 In his supplemental brief, Tocker identifies five issues, which we address in turn.

I. Severance of Count 4

- Misconduct involving weapons occurs when a person carries a firearm while a prohibited possessor. A.R.S. §§ 13-3101(A)(1), -3102(A)(4). A prohibited possessor is a person who has been convicted of a felony and whose civil right to possess or carry a gun has not been restored. A.R.S. § 13-3101(7)(b).
- Prior to trial, Tocker asked the court to sever count 4, which occurred in June 2008 when Tocker purchased the Glock, from the other counts that occurred in 2009. Tocker claimed prejudice if the offenses were tried together because the jury could infer a prior felony conviction from the fact that he was a prohibited possessor. The State responded that the Glock was the murder weapon and that judicial economy favored prosecution

of all four counts together because the same evidence would be admitted in both trials. The State agreed to present a sanitized version of Tocker's prior felony conviction and to a jury instruction about the proper use of that information. The court ruled it would be a "waste of judicial resources to . . . have a separate trial to determine whether or not [Tocker] possessed the gun" and denied the motion to sever. Tocker re-urged the motion immediately before trial, but it was denied on the same grounds.

- Separate offenses may be joined in an indictment if they are "based on the same conduct or are otherwise connected together in their commission." Rule 13.3(a)(2). "Offenses are considered otherwise connected when 'the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps;' 'where most of the evidence admissible in proof of one offense [is] also admissible in proof of the other;' or 'where there [are] common elements of proof in the joined offenses." State v. Garland, 191 Ariz. 213, 216-17, ¶ 14, 953 P.2d 1266, 1269-70 (App. 1998) (citation omitted).
- The State sought to connect Tocker to the Glock allegedly used to kill McGrath. To do so, it offered the testimony of J.S., who explained he had placed an ad to sell the Glock in 2008 and received an e-mail inquiry from Tocker, who purchased it on June 23, 2008. J.S. kept the e-mail and a copy

of the sales receipt and a copy of Tocker's driver's license information to document the sale. That same evidence would be necessary to prove that Tocker possessed a firearm while a prohibited possessor. If count 4 was severed from the other counts, the State would have to present the same evidence in both trials. Moreover, we discern no prejudice from trying all four counts together. The parties stipulated only that Tocker had a prior felony conviction, and the court instructed the jury on the proper use of that information. We presume the jury followed its instruction. State v. Newell, 212 Ariz. 389, 403, ¶ 69, 132 P.3d 833, 847 (2006).

Tocker contends the gun could not be the murder weapon because "there was no body and no cause of death." But as we explain below, sufficient evidence was presented at trial for reasonable jurors to conclude that a murder did occur and that the Glock was the murder weapon.

II. Jury Selection

¶28 At the conclusion of the first day of voir dire, 12 jurors and 2 alternates were selected, and the panel was excused until the next day. That evening, one of the jurors wrote to the court, expressing concerns about the trial schedule and her

⁴ At the time of trial, McGrath's body had not been found. Prior to sentencing, though, Tocker told officers where to find McGrath's body, which he admitted disposing of, while continuing to deny the murder.

ability to pay attention to the proceedings. After discussing with the court how to proceed, Tocker agreed that the "best option" was to dismiss the juror and question an additional 10 potential jurors, with each side having one peremptory strike. The court conducted a colloquy with Tocker and concluded he had made a "knowing, intelligent and voluntary decision." The court then conducted the additional voir dire, and 15 jurors were sworn.

Tocker contends on appeal that he "would have chosen to start over" with jury selection, but his lawyer convinced him "it would be pointless not to agree with the irregular selection of the jury." The record, though, establishes that the court fully explained available options, including beginning anew with a completely new jury, and Tocker made the ultimate decision. The court also ascertained that Tocker had an opportunity to discuss the options with counsel and that he had not been coerced or promised anything before deciding to proceed with new panel members. We find no reversible error in the trial court's handling of jury selection.

III. Prosecution Witness

¶30 Tocker contends his sister should not have testified for the prosecution because his conversations with her were "private," as she had his power of attorney. A power of attorney is an instrument granting someone the authority to act

as an agent or to transact business for another. Black's Law Dictionary 147, 1290 (9th ed. 2009). The attorney-client privilege extends only to communications made by a client in confidence for the purpose of obtaining legal advice. Alexander v. Superior Court (D'Angelo), 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984) (citations omitted). No such privilege existed between Tocker and his sister.

IV. Rule 20 Motion

¶31 Tocker claims the court erred in denying his Rule 20 motion regarding counts 1 and 4. A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Rule 20. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." State v. Mathers, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." State v. Soto-Fong, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996). "In reviewing the sufficiency of the evidence, we resolve all conflicts in the evidence against defendant." State v. Bustamante, 229 Ariz. 256, 258, ¶ 5, 274 P.3d 526, 528 (App. 2012).

A. Premeditated Murder

- Tocker contends the State presented no evidence he caused anyone's death or "had any motive or premeditation to hurt or kill the victim." First degree murder occurs when a defendant, intending or knowing that his conduct will cause death, causes the death of another with premeditation. A.R.S. § 13-1105(A)(1). "Premeditation means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection." A.R.S. § 13-1101(1). A murder conviction may be based on circumstantial evidence. Martin v. State, 22 Ariz. 275, 279, 196 P. 673, 675 (1921).
- The State produced sufficient evidence from which a reasonable juror could find, beyond a reasonable doubt, that Tocker intentionally and with premeditation killed McGrath. Tocker was in a financial bind, and McGrath had significant financial resources. Tocker had access to McGrath's house. A neighbor heard gunshots in the middle of the night on August 18, and officers found significant amounts of blood in McGrath's home. Beginning around the middle of August, McGrath's friends and family were unable to reach him. Money was transferred from his accounts into accounts associated with Tocker. Two large checks were payable to Tocker, but a forensic document examiner

testified that McGrath did not sign those checks. Phone calls relating to financial transactions on McGrath's accounts were recorded, and a forensic acoustics expert identified the voice "with a very, very high degree of scientific certainty" as belonging to Tocker.

Tocker lived alone. Computers taken from his home revealed internet searches for how to murder someone and dispose of the body. The computers had also been used to access McGrath's e-mail and financial accounts, as well as to place the Zappos order. The State proved that Tocker used the abbreviation "wen" and misspelled "pittsburg," as did the writer of the August e-mail to B.M. Clothing and shoes matching the Zappos order were found in Tocker's home.

Inside two bags at the Solano home where Tocker worked, officers found the Glock purchased from J.S. with McGrath's blood on it, an "ELD" bullet like the one found in Tocker's vehicle, McGrath's financial records, a list of his computer accounts and passwords, a computer box matching a computer found inside Tocker's home, credit cards and financial accounts created in McGrath's name after August 19, and the AT&T cell, Boost mobile phone, and McGrath's cell phone. The Boost

⁵ The searches included: "if-you-killed-somebody-how-would-you-dispose-of-the-body-without-getting-caught," "kill without being caught," "[h]ow to murder someone and get away with it," "quick murder" and "getting-rid-of-dead-animal-smell."

mobile phone was a pre-paid account opened on August 25, 2009, by "Bill McGraff." Tocker's credit card records showed a charge to Boost mobile on August 25, 2009. Phone records proved McGrath's cell phone never left Phoenix, though a person using that phone and identifying himself as McGrath told D.B. he was in California. Phone records also demonstrated the AT&T cell, Tocker's mobile phone, and McGrath's cell phone all utilized the same cell towers near Tocker's home and the Solano house, but not near McGrath's home.

- The State also presented evidence of premeditation. "An act is premeditated if the perpetrator had time after forming the intent to kill to reflect on what he was about to do." State v. Ovind, 186 Ariz. 475, 477, 924 P.2d 479, 481 (App. 1996). "The time for reflection need not be long." Id. But the "evidence, whether direct or circumstantial, must convince a jury beyond a reasonable doubt that the defendant actually reflected." State v. Thompson, 204 Ariz. 471, 479, ¶ 31, 65 P.3d 420, 428 (2003).
- ¶37 Tocker's sister testified that her brother's financial situation was not good around "June, July 2009" and that he asked for money and was "angry" when she could not provide it. Computers from Tocker's home contained "hundreds of pages" of internet searches including how to murder and how to hide a body. Although the exact date of the searches could not be

determined, a computer expert testified that some occurred "on or about" August 17.

B. Count 4

granted because J.S. could not identify him at trial, and the Glock was not found in his possession. J.S., however, kept records of the sales transaction, including an e-mail from Tocker's e-mail address in response to the ad for the Glock, and a copy of Tocker's driver's license as the purchaser. The Glock was found in the attic of the Solano home -- a place where Tocker worked -- in a mailing box addressed to Tocker's mother. To the extent Tocker takes issue with the interpretation of evidence presented at trial, the credibility of witnesses and the weight to be given their testimony are issues for the jury. Bustamante, 229 Ariz. at 258, ¶ 5, 274 P.3d at 528.

V. Ineffective Assistance of Counsel

¶39 We do not address Tocker's suggestion that he received ineffective assistance of counsel. See State v. Spreitz, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (claims of ineffective assistance of counsel must be brought in Rule 32 proceedings and will not be considered on direct appeal).

CONCLUSION

¶40 We affirm Tocker's conviction and sentence. Counsel's obligations pertaining to Tocker's representation in this appeal

have ended. Counsel need do nothing more than inform Tocker of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. State v. Shattuck, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Tocker shall have 30 days from the date of this decision to proceed, if he desires, with an in propria persona motion for reconsideration or petition for review.

/s/				
MARGARET	Н.	DOWNIE,	Judge	

CONCURRING:

<u>/s/</u>				
MICHAEL	J.	BROWN,	Presiding	Judge

/s/
RANDALL M. HOWE, Judge