DIVISION ONE
FILED: 02/02/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-1009
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
JAMES EDWARD DAVOLT, II, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR9800-1243

The Honorable Robert R. Moon, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

David Goldberg — Ft. Collins, CO
Attorney for Appellant

W I N T H R O P, Judge

¶1 James Edward Davolt, II ("Appellant") appeals from consecutive life sentences imposed by the superior court

following our remand for resentencing on Appellant's two first degree murder convictions. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Appellant was convicted on April 20, 2000, of two counts of first degree murder for the killings of N.Z. and E.Z. and on the related offenses of burglary in the first degree, theft, arson of an occupied structure, and theft of means of transportation. After a sentencing hearing on October 6, 2000, the Honorable Steven F. Conn sentenced Appellant to death on the murder counts and imposed consecutive sentences on the non-capital counts.

¶3 Appellant had an automatic direct appeal to the Arizona Supreme Court. *State v. Davolt*, 207 Ariz. 191, 84 P.3d 456 (2004). The facts of the case are set forth in detail in the supreme court's opinion. The court affirmed Appellant's convictions, but remanded the matter to the trial court to "determine whether, at the time of the offense, Davolt possessed moral responsibility and culpability sufficient to render him eligible for the death penalty." *Id.* at 217, ¶ 114, 84 P.3d at 482. The court also vacated the sentences on the non-capital counts "by reason of the trial court's failure to consider age

as a statutory mitigating factor" and remanded the matter for resentencing. *Id.* at ¶ 115.[1]

¶4 Prior to resentencing, the Supreme Court of the United States decided *Roper v. Simmons,* 543 U.S. 551 (2005). In *Roper,* the Court held that the Eighth and Fourteenth Amendments to the United States Constitution prohibited the imposition of the death penalty on an offender who was under the age of eighteen when the crime or crimes were committed. *Id.* at 578.

¶5 On remand, Judge Conn held a resentencing hearing on October 28, 2005. He found several aggravating factors and found age as a mitigating factor. On the murder counts, Judge Conn imposed consecutive natural life sentences without the possibility of release on any basis. The court resentenced Appellant on the four non-capital counts, those sentences to run concurrently with each other, and imposed the natural life sentence on Count One. Pursuant to an order of the trial court, Appellant filed a notice of delayed appeal from his two natural life sentences.

¶6 We reversed the natural life sentences and remanded for resentencing based on our determination that, during the October 28, 2006 hearing, Judge Conn improperly referenced the

[1] Appellant was sixteen years old and a junior in high school when the offenses were committed. *Davolt*, 207 Ariz. at 200, ¶ 8, 84 P.3d at 465.

original sentencing hearing. *State v. Davolt*, 1 CA-CR 05-1205 (Ariz. App. July 24, 2007) (decision order). We specifically noted that Appellant "was entitled to be resentenced by an impartial magistrate who would, without regard to any prior sentencing hearing, review the evidence and weigh the aggravating and mitigating factors before imposing any sentences." *Id*.

¶7 The Honorable Robert R. Moon held a resentencing hearing on October 30, 2008. Before the hearing, Judge Moon reviewed the record and the transcripts from the trial and the previous sentencing hearings. Neither party intended to introduce evidence of aggravating or mitigating factors additional to those found by Judge Conn, although Appellant personally addressed the court and recounted his troubled childhood and subsequent productivity while in prison.[2] Judge Moon reweighed the aggravating and mitigating factors previously found by Judge Conn and, pursuant to Arizona Revised Statutes ("A.R.S.") section 13-703,[3] sentenced Appellant to life

[2] Appellant also introduced a letter he wrote to the deputy warden expressing his desire to become an education aide.

[3] Effective January 1, 2009, section 13-703 was renumbered to A.R.S. § 13-751. *See* 2008 Ariz. Sess. Laws, ch. 301, § 38. All references to the statute are to the version that existed November 23-26, 1998, the alleged dates of the murders. *See* 1993 Ariz. Sess. Laws, ch. 153, § 1 (1st Reg. Sess.).

imprisonment with the possibility of parole after 25 years for the murder of N.Z., to be served consecutively to the natural life sentence for the murder of E.Z. This timely appeal followed, and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (Supp. 2008).

ANALYSIS

¶8 Appellant raises several arguments on appeal challenging the resentencing procedures employed by Judge Moon and the consecutive sentences imposed on the two murder counts. We review for an abuse of discretion and will reverse only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing. *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003); *see also State v. Sproule*, 188 Ariz. 439, 440, 937 P.2d 361, 362 (App. 1996) (reviewing natural life sentence for abuse of discretion). We address each issue in turn.

A. Proceedings on Remand

¶9 Appellant first contends Judge Moon refused to review the record and independently determine whether the State proved the alleged aggravating circumstances. Rather, Appellant claims Judge Moon "simply accept[ed] Judge Conn's findings of fact and

conclusions of law" thereby resulting in a violation of Appellant's "right to an independent *de novo* resentencing proceeding." We reject this argument.

¶10 First, the transcript from the October 30, 2006 hearing belies Appellant's characterization of Judge Moon's level of engagement with the record. Rather than "simply accepting" Judge Conn's findings regarding aggravating and mitigating factors, Judge Moon relied on the record to find evidentiary support, or lack thereof, to support those previous findings. It is true that Judge Moon expressed his agreement with some of Judge Conn's findings, but the record reflects Judge Moon independently found and weighed the relevant factors, and he notably did so in a manner more favorable to Appellant than did Judge Conn.

¶11 Second, our mandate for resentencing did not require a new evidentiary hearing as Appellant suggests.[4] Rather, we ordered the matter be reassigned to a different judge to review the evidence and weigh the aggravating and mitigating factors before imposing sentences. The record reflects compliance with

[4] Appellant does not on appeal, nor did he at resentencing on October 30, 2008, explain what additional mitigating evidence he would have presented. Indeed, despite Appellant's statement to the contrary, the record reflects Judge Moon did consider Appellant's allocution and the related letter Appellant submitted.

this order. Although Judge Moon did review the transcripts from the previous sentencing hearings, he specifically noted for the record that "there's no effect on me from Judge Conn's comments." Further, to the extent Appellant argues Judge Moon was not "fair, impartial and free from bias or prejudice," the record is completely devoid of any support for such a contention. Indeed, our review of the hearing transcript reveals Judge Moon properly shaped his discretion with respect to sentencing by considering and finding § 13-703(F) factors, which in turn, facilitates our review. *See infra* ¶¶ 27-35; *State v. Fell*, 210 Ariz. 554, 559, ¶¶ 17-18, 115 P.3d 594, 599 (2005); *see also State v. Williams*, 220 Ariz. 331, 332-33, ¶¶ 1, 5, 206 P.3d 780, 781-82 (App. 2008) (affirming resentencing of defendant convicted of first degree murder to natural life even though trial court did not make specific findings on aggravating or mitigating factors).

¶12 For the foregoing reasons, we discern no abuse of discretion in the process Judge Moon utilized to determine Appellant's sentences.[5]

---

[5] To the extent Appellant sufficiently argues on appeal that the October 30, 2008 resentencing hearing violated his constitutional rights, Ariz. R. Crim. P. 31.13(c)(1)(vi), he did not raise any purported constitutional violation below. Accordingly, we would normally review for fundamental error. *See State v. Williams*, 220 Ariz. at 334, ¶ 8, 206 P.3d at 783

B. Cruel and Unusual Punishment

¶13 Appellant next argues that imposition of a natural life sentence on a juvenile offender is cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article 2, Section 15, of the Arizona Constitution.[6] Appellant claims that because he was sixteen years old when he committed the offenses, was immature, and had an abusive and dysfunctional childhood, the sentence is grossly disproportionate to the murder of E.Z.

¶14 The State responds that Appellant failed to raise the constitutional issue below and forfeited his right to obtain appellate relief absent fundamental error. However, the record indicates that defense counsel argued at the first resentencing hearing that a life sentence without the possibility of parole for juveniles violates the Eighth and Fourteenth Amendments to the United States Constitution. Waiver aside, we find no constitutional violation.

(citing cases). However, because Appellant does not argue that any purported constitutional violation amounts to fundamental error that prejudiced him, we consider this argument waived and do not address it. *See id.* at ¶ 10.

[6] Arizona's provision against cruel and unusual punishment is interpreted as being coterminous with the provision in the Federal Constitution. *State v. Long,* 207 Ariz. 140, 144, ¶ 21 n.2, 83 P.3d 618, 622 n.2 (App. 2004).

¶15 "The Eighth Amendment to the United States Constitution and its corollary, Article 2, Section 15 of the Arizona Constitution prohibit punishments that are cruel and unusual." *State v. Davis,* 206 Ariz. 377, 381, ¶ 13, 79 P.3d 64, 68 (2003). "The Eighth Amendment may be applied to lengthy sentences of incarceration in non-capital cases." *Long,* 207 Ariz. at 145, ¶ 22, 83 P.3d at 623 (citing *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003)). "However, successful challenges to the proportionality of particular sentences are exceedingly rare." *Long*, 207 Ariz. at 145, ¶ 22, 83 P.3d at 623 (citing *Solem v. Helm,* 463 U.S. 277, 289-90 (1983), *overruled on other grounds by Harmelin v. Michigan*, 501 U.S. 957, 965 (1991)). Thus, a sentence violates the Eighth Amendment only if it is "'so severe as to shock the conscience of society'". *Davis,* 206 Ariz. at 388, ¶ 49, 79 P.3d at 75 (citation omitted).

¶16 In conducting an analysis under the Eighth Amendment, "the reviewing court should examine the crime, and, if the sentence imposed is so severe that it appears grossly disproportionate to the offense, the court must carefully examine the facts of the case and the circumstances of the offender to see whether the sentence is cruel and unusual." *Id.* at 384, ¶ 34, 79 P.3d at 71. "Once an inference of gross disproportionality has been found, the Supreme Court suggests

that a reviewing court validate that impression by conducting an intra- and inter-jurisdictional analysis." *Id.* at 385, ¶ 38, 79 P.3d at 72. Such analysis considers "the sentences the state imposes on other crimes and the sentences other states impose for the same crime." *State v. Berger*, 212 Ariz. 473, 476, ¶ 12, 134 P.3d 378, 381 (2006).

¶17 The Supreme Court of the United States "has noted that noncapital sentences are subject only to a 'narrow proportionality principle' that prohibits sentences that are 'grossly disproportionate' to the crime." *Id*. at 475, ¶ 10, 134 P.3d at 380 (citations omitted). In determining gross disproportionality, a court compares "the gravity of the offense [and] the harshness of the penalty." *Id.* at 476, ¶ 12, 134 P.3d at 381 (quoting *Ewing v. California*, 538 U.S. 11, 28 (2003)). "In comparing the gravity of the offense to the harshness of the penalty, courts must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences." *Berger*, 212 Ariz. at 476, ¶ 13, 134 P.3d at 381.

¶18 In this case, comparing the gravity of E.Z.'s murder with the harshness of the penalty, we find no inference of gross disproportionality. Appellant terrorized and then brutally murdered two elderly, vulnerable individuals. The evidence

showed Appellant, who admittedly is highly intelligent, committed the murders and the related serious felonies in a cold-blooded and calculated manner.

¶19 The murder of E.Z. was especially horrific because she was conscious for several minutes after sustaining a blow to the head and being manually strangled, and the evidence suggested she was alive for one to two days after she must have known of her husband's death, during which time Appellant physically restrained her and forced her to assist him in obtaining money from her and N.Z.'s bank account. *Davolt*, 207 Ariz. at 199-201, ¶¶ 5-6, 18, 20, 84 P.3d at 464-66. Given the nature of the offense, imposition of a natural life sentence does not create an inference that the penalty is grossly disproportionate to the crime. Because of this conclusion, we need not go further and conduct an intra- and inter-jurisdictional analysis on this issue. *See Berger,* 212 Ariz. at 482-83, ¶¶ 50, 51, 134 P.3d at 387-88 (no gross disproportionality in twenty consecutive ten-year sentences for 20 counts of possession of child pornography so no further analysis required).

¶20 Appellant argues that a natural life sentence as opposed to a life sentence with the possibility of parole after twenty five years is cruel and unusual because it "forbid[s] [Appellant] from ever convincing a parole board that he has

repented and evolved into someone who can live in society." He also claims that juvenile offenders are in a special class because they are immature and not as morally accountable as adults. *See Roper*, 543 U.S. at 569-70 (invalidating death penalty for juveniles convicted of homicide in part because youthful offenders have "an underdeveloped sense of responsibility," are more vulnerable and are impetuous and reckless).

¶21 We disagree and find Appellant's reliance on *Roper* unavailing. In a recent opinion, this court addressed the issue of whether the imposition of a natural life sentence on a juvenile offender violates the Eighth Amendment to the United States Constitution. *See State v. Pierce*, 1 CA-CR 08-0715, 2010 WL 199261 (Ariz. App. Jan. 21, 2010). In *Pierce*, Arizona joined other jurisdictions in refusing to extend the reasoning of *Roper v. Simmons* to natural life sentences for juvenile offenders convicted of murder. *Id.; see Roper*, 543 U.S. 551; *see also, e.g., State v. Allen*, 958 A.2d 1214, 1231-36 (Conn. 2008); *Wallace v. State*, 956 A.2d 630, 640-41 (Del. 2008); *State v. Craig,* 944 So.2d 660, 662-63 (La. App. 2006).

¶22 We conclude Appellant's natural life sentence does not constitute cruel and unusual punishment and does not violate the federal or state constitutions.

C. Right to Jury Determination of Aggravating Factors

¶23 Appellant claims that he was entitled under the Sixth Amendment to have a jury find the aggravating factors beyond a reasonable doubt to determine whether he should receive a natural life sentence or life with the possibility of release. He claims that failure to do so violates *Blakely v. Washington,* 542 U.S. 296 (2004). This argument fails.

¶24 In *State v. Fell,* 210 Ariz. at 558-60, ¶¶ 15, 19, 115 P.3d at 598-600, the Arizona Supreme Court held that under the statutory sentencing scheme authorizing imposition of life to natural life sentences set forth in A.R.S. § 13-703, "the Sixth Amendment does not require that a jury find an aggravating circumstance before a natural life sentence is imposed." Appellant argues that *Fell* was wrongly decided because it conflicts with *Blakely* and Arizona case law. However, we need not consider these arguments because, as Appellant recognizes, this court "is bound by the decisions of the Arizona Supreme Court and has no authority to overrule, modify or disregard those decisions." *State v. Cecil,* 201 Ariz. 454, 457, ¶ 14, 36 P.3d 1224, 1227 (App. 2001). We find no error.

D. Sufficiency of Evidence Supporting Aggravating Factors

¶25 Appellant argues there was insufficient evidence to support the trial court's findings of the following aggravating

factors with respect to the murder of E.Z.: (1) the murder was committed for pecuniary gain; (2) the murder was especially heinous or depraved; (3) the victim was elderly; and (4) there were multiple homicides committed during one continuous course of criminal conduct. We reject Appellant's argument.

¶26 First, unlike imposition of a death sentence, the trial court was not required to make any specific findings of aggravating factors under A.R.S. § 13-703 to support imposing a natural life sentence. *Fell,* 210 Ariz. at 559-60, ¶¶ 17-18, 115 P.3d at 599-600. Second, contrary to Appellant's claim that the State was required to prove the aggravating factors beyond a reasonable doubt, "[i]n non-capital cases, aggravators need only be supported by reasonable evidence." *State v. Viramontes,* 204 Ariz. 360, 362, ¶ 14, 64 P.3d 188, 190 (2003). All of the aggravators used by the trial court were proper. Further, based on this record, there was reasonable evidence to support the court's findings on the aggravating factors.

¶27 The court found that Appellant murdered E.Z. "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." *See* A.R.S. § 13-703(F)(5). Pecuniary gain is an aggravating factor "if the expectation of pecuniary gain is a motive, cause, or impetus for the murder and not merely a result of the murder." *State v. Hyde,* 186 Ariz.

252, 280, 921 P.2d 655, 683 (1996). The record supports the court's finding that Appellant's motive for the murders was to obtain cash and property, including a vehicle, from the victims. *See Davolt*, 207 Ariz. at 199-201, ¶¶ 4-6, 10-15, 84 P.3d at 464-66.

¶28 The court found that the murder was committed in an especially cruel, heinous, or depraved manner. *See* A.R.S. § 13-703(F)(6). Only one of these elements needs to be proven to establish this aggravator. *State v. Medina*, 193 Ariz. 504, 513, ¶ 33, 975 P.2d 94, 103 (1999). The court referred to the victims as "helpless, vulnerable 80-plus-year-old people" and noted the "horrific [senseless, and vicious] nature of the killing, the strangulation after she must have known that her husband was dead . . . ." The court went on:

> the only way I can think to describe what happened [after the attack and murder of N.Z.] was that [Appellant] jumped into an abyss that separates most humans from the kind of savage beast that's capable of doing what he did next. Because he became, at least for those next few hours or days, a vicious, sadistic, calculating, premeditating, and even post-meditating killer and by post-meditating, I mean after the deed was done, planned out a way to burn up and destroy any trace evidence he might have left behind of his identity and perhaps to even hide the fact that these people had been murdered as opposed to just having died in a fire.

¶29 To prove the "especially cruel" prong of the (F)(6) aggravator, the State must show the Appellant knew or should have known the victim would experience mental anguish or physical pain and that the victim was conscious during some of the violence. *State v. Tucker*, 215 Ariz. 298, 321, ¶ 100, 160 P.3d 177, 200 (2007). "Mental anguish" refers to a victim's uncertainty about her ultimate fate or knowledge that a loved one has been killed. *Medina*, 193 Ariz. at 513, ¶ 34, 975 P.2d at 103; *State v. Djerf*, 191 Ariz. 583, 595, ¶ 45, 959 P.2d 1274, 1286 (1998). In determining whether a murder is committed in an especially heinous or depraved manner, the court may consider factors such as "gratuitous violence," "senselessness" of the murders and "helplessness" of the victim. *State v. Schackhart,* 190 Ariz. 238, 249, 947 P.2d 315, 326 (1997).

¶30 Although only one element is required to prove the (F)(6) aggravator, all elements were present in this case. The reasonable evidence shows E.Z. was an arthritic elderly woman who required a walker to get around her house. E.Z. was conscious while Appellant manually strangled her and beat her head against the floor one to two days after Appellant killed her husband and left his body in the kitchen. After killing N.Z., Appellant bound E.Z.'s wrists with duct tape and took her to the bank where he unsuccessfully attempted to withdraw money

from E.Z.'s account. The nature of E.Z.'s murder evidenced cruel, gratuitous and senseless violence against a helpless victim.

¶31 As to the victims' ages, the evidence was undisputed that both victims were "seventy years of age or older." *See* A.R.S. § 13-703(F)(9).

¶32 Finally, the court considered the aggravating circumstance of "multiple homicides." *See* A.R.S. § 13-703(F)(8). This factor requires the court to find there was a temporal, spatial and motivational relationship between the homicides and that the murders were a part of "one continuous course of criminal conduct." *Tucker,* 215 Ariz. at 321, ¶ 104, 160 P.3d at 200 (citation omitted). Judge Moon found the motivational and spatial connections of the murders to be adequately established, but noted, "[T]he temporal relationship of this case probably stretches the circumstance to its limit . . . ." Accordingly, Judge Moon gave this aggravator little weight. Thus, even if this factor was "struck" as requested by Appellant, we are convinced Judge Moon would have nonetheless imposed a natural life sentence for the murder of E.Z. *See State v. Ojeda,* 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989) (noting no remand necessary where record clearly shows that

sentence would have been the same even without consideration of improper factors).[7]

¶33 In sum, we find no error on this issue. The court was not required to find any aggravating factors to impose the natural life sentence for E.Z.'s murder. And even if there were such a requirement, the aggravating factors found by the court were supported by reasonable evidence.

E. Imposition of Consecutive Sentences

¶34 Appellant claims that the trial court abused its discretion in imposing consecutive sentences because there were two victims. He claims the judge presumed that consecutive sentences were mandated under A.R.S. § 13-708[8] and claims the judge applied a "mechanical rule" rather than exercising his discretion on this issue. He also claims that although the

---

[7] Indeed, before imposing the sentences, Judge Moon noted, "Weighing all of these circumstances together, it's my opinion and finding that it would be legally incorrect and foolhardy and unjust to consider and impose sentences that might make the defendant eligible for parole in 25 calendar years." When he subsequently imposed the natural life sentence, Judge Moon referred to all the aggravating factors he found, but focused on the "horrific nature of [E.Z.'s] killing, the strangulation after she must have known that her husband was dead . . ." as outweighing the mitigating circumstances.

[8] Effective January 1, 2009, § 13-708 was renumbered A.R.S. § 13-711(A). 2008 Ariz. Sess. Laws, ch. 301, §§ 119, 120 (2nd Reg. Sess.). Because Appellant was sentenced before the statute was renumbered, and the parties also refer to the statute that was then in effect, we similarly refer to § 13-708.

murders were separate, they were part of a spree and therefore concurrent sentences are more appropriate. We disagree.

¶35 Under A.R.S. § 13-708, if a judge fails to indicate whether sentences are consecutive or concurrent, the statute acts as "default designation" that the sentences are consecutive. *State v. Garza,* 192 Ariz. 171, 174-75, ¶ 12, 962 P.2d 898, 901-02 (1998). However, the statute does not create a presumption for consecutive sentences and the court has discretion to impose concurrent sentences so long as it sets forth reasons for doing so. *Id.* at 174-75, ¶ 12, 962 P.2d at 901-02.

¶36 It is clear from the record that the court did not apply a mechanical rule in imposing consecutive sentences. Rather, Judge Moon exercised his discretion and stated he intended to impose consecutive sentences rather than concurrent sentences on the murder counts because:

> [I]f on appeal the natural life sentence is stricken and 25 to life is imposed . . . it should still be a consecutive sentence because of the additional harm and horror and lack of basis to feel that the defendant can be rehabilitated to the point where he would never be a risk to this type of behavior again.

¶37 Because there were multiple victims and multiple offenses, the trial court did not abuse its discretion in

finding that imposition of consecutive sentences was appropriate. *State v. Ward,* 200 Ariz. 387, 389, ¶¶ 6-7, 26 P.3d 1158, 1160 (App. 2001) (trial court acted within discretion in finding that consecutive sentences would be appropriate for two counts of aggravated assault committed against two separate victims). Furthermore, consecutive sentences may be imposed under § 13-708 for separate offenses even if committed on the same occasion or during the same episode. *State v. Williams,* 182 Ariz. 548, 560-61, 898 P.2d 497, 509-10 (App. 1995). We find no error.

CONCLUSION

¶38 For the foregoing reasons, we affirm Appellant's consecutive life and natural life sentences imposed for his two first degree murder convictions.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PETER B. SWANN, Presiding Judge

_____/S/_____
MICHAEL J. BROWN, Judge