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



DIVISION ONE
FILED: 05/31/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 08-1064
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MARK STEPHEN MERILA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006197-001 DT

The Honorable Christopher T. Whitten, Judge

AFFIRMED

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

Yvette C. Gray, Court Appointed Counsel Phoenix
Attorney for Appellant

S W A N N, Judge

¶1 Mark Stephen Merila appeals his convictions and sentences for two counts each of first degree murder and kidnapping.

¶2 Merila's counsel has filed a brief in accordance with

Anders v. California, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after a search of the entire record on appeal, she finds no arguable ground for reversal. This court granted Merila an opportunity to file a supplemental brief, and he has not done so. Counsel now requests that we search the record for fundamental error. See *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A), 13-4031 and -4033. Because we find no reversible error, we affirm Merila's convictions and sentences.

FACTS AND PROCEDURAL HISTORY¹

¶13 The offenses occurred sometime on or between August 24, 1984, to August 27, 1984. The offenses involved two female victims - "K," who was sixteen at the time of the incident, and "E," who was fourteen. The night of August 24, K's mother took K to E's family's apartment to spend the night. Once K arrived at E's apartment, however, E told her mother she and K were going back to K's residence. The victims left E's apartment and were never seen alive again.

¹ We construe the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We resolve any evidentiary conflicts in favor of sustaining the verdict and do not weigh the evidence, as that is the jury's function. *Id.*

¶14 Approximately two days later, during the night of August 26-27, Merila rode with his then-girlfriend as she drove down State Route 87. They eventually turned off the highway onto a dirt road. As they drove down the dirt road into the desert, Merila told his girlfriend to stop and back up but did not tell her why. As she backed up, the body of one of the victims was illuminated by the vehicle's headlights. Merila and his girlfriend left the scene immediately. As she pulled back onto State Route 87, Merila's girlfriend committed a traffic violation directly in front of a passing law enforcement officer. During the subsequent traffic stop, Merila's girlfriend wanted to tell the deputy what she had just seen, but Merila instructed her not to. The deputy gave Merila's girlfriend a warning and allowed them to leave.

¶15 Merila and his girlfriend then drove to the home of Merila's sister and brother-in-law and told him what they had seen. Thinking the two may have actually seen a living person in need of aid, Merila's sister and brother-in-law convinced Merila's girlfriend to contact the sheriff's department immediately. When Merila's girlfriend and sister left to contact the sheriff, Merila refused to go with them and left on his own. Merila instructed his girlfriend not to tell the sheriff he was with her when they saw the body. Merila later avoided his apartment once he learned his girlfriend provided

their address to the sheriff.

¶16 The victims' bodies were found in the desert early in the morning of August 27 when Merila's girlfriend took a sheriff's deputy to the scene. K was found lying face up and nude except for a shirt and bra which had been pushed up over her breasts. E was found a short distance away face down and completely nude. Both bodies were in advanced stages of decomposition. The victims' clothing and personal effects were scattered around the scene. A rock found near E's head had what appeared to be blood on it. DNA obtained from that substance matched E's DNA. DNA obtained from a bloody rag at the scene also matched E's DNA. There was evidence which indicated the victims had been dragged at some point.

¶17 No conclusions were made as to the cause of death of either victim after their autopsies in 1984. After further investigation described below, the victims' remains were exhumed for additional forensic examination in 2006. It was determined that E suffered various injuries near the time of her death. E had several fractures to the bones on both sides of her nose and a fractured "nasal spine," five broken ribs, a fractured cheek bone and several chipped teeth. It was estimated E suffered one to three blows to the face. K also suffered various injuries near the time of her death. K had a skull fracture, bruises to the scalp and back and several bruised ribs. The skull fracture

was due to the application of "significant" force to the back of her head.

¶18 After these second autopsies, the cause of death for E was determined to be "homicidal assault" and the manner of death was determined to be homicide. While the medical examiner noted the homicidal assault included impacts to E's head and torso, she could not exclude the possibility that other "methods" of assault were used in the assault that resulted in E's death. The cause of death of K was also determined to be homicidal assault and the manner of death homicide.

¶19 The medical examiner noted the cause of death was not necessarily the "mechanism" of death of either victim. The medical examiner determined both victims were homicide victims and that both had sustained blunt force impact injuries. She could not, however, determine the actual mechanism(s) of their deaths. The medical examiner testified she listed "homicidal assault" as the cause of death for both victims because she did not know the full extent of the assaults due to the conditions of the victims' bodies. She further believed it was possible the victims died of strangulation or were smothered. Finally, based on the condition of the victims' bodies, the evidence at the scene and the fact that one victim was completely naked and the other was nearly naked, the medical examiner believed there was a "sexual component" to each homicide.

¶10 With the passage of time, the case became a "cold case." As the science of DNA advanced, DNA testing and analysis were conducted at various times over the subsequent years. In 2002, spermatozoa and male DNA from two different men were found on the underpants of both victims - one male DNA source for each victim. A sample of Merila's DNA was obtained in 2006. Shortly thereafter, it was determined that Merila's DNA matched DNA found on K's underpants.²

¶11 Merila was charged with two counts of first degree murder, two counts of kidnapping, two counts of sexual conduct with a minor and one count each of sexual assault and molestation of a child. He was charged as both a principal and an accomplice.³ After a sixteen-day jury trial, the jury found Merila guilty of two counts each of first degree murder and kidnapping.⁴ Merila was sentenced to life imprisonment with a possibility of release after twenty-five years for each count of first degree murder and an aggravated term of twenty-one years' imprisonment for each count of kidnapping. The sentences for the offenses in which E was the victim were ordered to run

² As of the time of trial, there had been no arrest based on the second DNA profile.

³ Merila was charged under theories of both premeditated and felony murder.

⁴ The trial court granted Merila's motion for judgment of acquittal on all other counts.

concurrently, as were the sentences for the offenses in which K was the victim. The sentences for the offenses involving E, however, were ordered to run consecutively to the sentences for the offenses involving K. Merila was given 634 days of presentence incarceration credit and ordered to pay \$5,708.74 in restitution.

DISCUSSION

¶12 The evidence cited above was more than sufficient to support Merila's convictions for the first degree murder and kidnapping of both victims. The jury was properly instructed regarding the elements of each offense as charged. The jury was instructed that a person commits first degree premeditated murder if that person intentionally or knowingly causes the death of another person and does so with premeditation. See A.R.S. § 13-1105(A)(1).⁵ The jury was instructed that a person commits first degree felony murder if while in the course of and in furtherance of committing or attempting to commit kidnapping, sexual conduct with a minor, sexual assault (victim K only) or molestation of a child (victim E only), that person causes the death of any person. See A.R.S. § 13-1105(A)(2). The elements of each of those sexual offenses were also provided to the jury.

¶13 Regarding kidnapping, the jury was instructed that a

⁵ Unless otherwise indicated, we cite to the current version of the statute that defines a particular offense because it has not changed in any substantive manner material to this case.

person commits kidnapping if that person knowingly restrains another person with the intent to inflict death, physical injury or a sexual offense on the victim or to aid in the commission of any felony. See A.R.S. § 13-1304(A)(3). Further, "restrain" was properly defined as meaning to restrict a person's movements without consent or without legal authority and in a manner that interferes substantially with that person's liberty by either moving the person from one place to another or by confining the person. See A.R.S. § 13-1301(2). The jury was also instructed that restraint is without consent if it is accomplished by physical force, intimidation or deception. Importantly for this case, restraint is without consent if it is *accomplished by any means, including acquiescence, if the victim is less than eighteen years old.* *Id.* We also note the infliction of severe physical injury can constitute "restraint" for purposes of kidnapping. *State v. Greene*, 182 Ariz. 576, 582, 898 P.2d 954, 960 (1995). Finally, the jury was properly instructed regarding accomplice liability.

¶14 The evidence cited above was more than sufficient to permit a reasonable jury to find beyond a reasonable doubt that Merila was guilty of the premeditated and/or felony murders of K and E, whether acting as a principal or an accomplice. Likewise, the evidence was more than sufficient to permit a reasonable jury to find beyond a reasonable doubt that Merila

kidnapped K and E, again whether acting as a principal or an accomplice. While much of the evidence was circumstantial, "Arizona law makes no distinction between circumstantial and direct evidence." *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). A conviction may be proven by circumstantial evidence alone. *State v. Burton*, 144 Ariz. 248, 252, 697 P.2d 331, 335 (1985).

CONCLUSION

¶15 We have read and considered counsel's brief and have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Merila was represented by counsel at all stages of the proceedings, the sentences imposed were within the statutory limits, and the evidence was sufficient evidence to permit the jury to find beyond a reasonable doubt that Merila committed the offenses.

¶16 After the filing of this decision, counsel's obligations pertaining to Merila's representation in this appeal have ended. Counsel need do no more than inform Merila of the status of the appeal and of Merila's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

On the court's own motion, Merila has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona*.

¶17 Accordingly, we affirm Merila's convictions and sentences.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

PATRICK IRVINE, Judge

/s/

MAURICE PORTLEY, Judge