DIVISION ONE
FILED: 05-27-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0272
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
MANUEL MYER FRAIJO,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR-002006-1517

The Honorable Ralph M. Hess, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Craig Soland, Assistant Attorney General
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

DeRienzo & Williams, P.L.L.C. — Prescott
By Craig Williams
Attorneys for Appellant

D O W N I E, Judge

¶1 Manuel Myer Fraijo appeals his convictions and sentences. For the following reasons, we affirm Fraijo's convictions and his sentence for armed robbery. We modify his

sentence on the murder convictions to one term of imprisonment for natural life.

FACTUAL AND PROCEDURAL HISTORY

¶2 "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, 436-37, ¶ 12, 967 P.2d 106, 111-12 (1998) (citation omitted). We do not, however, weigh the evidence; that is the function of the jury. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶3 On the night in question, the victim left his home after an argument with his wife. He took $3000 from their safe and went to a nearby bar. Most of the money consisted of $100 bills. The victim paid for his first drink with a $100 bill and left the change on the bar. The bartender took money from the change as the victim continued to buy drinks for himself and others.

¶4 Fraijo and a man later charged as a codefendant ("Codefendant") arrived at the bar later that night. Codefendant used a wheelchair. The victim, Fraijo, and Codefendant appeared to know each other. The three men generally stayed together that evening, and the victim and Fraijo bought drinks for each other. The victim later paid for drinks with a second $100 bill. At one point, the three men

left the bar. While the victim apparently never went back inside, the bartender gave Fraijo approximately $80 in change that belonged to the victim after Fraijo re-entered the bar and said the three men were leaving. Fraijo and Codefendant were seen exiting the bar shortly before 2:00 a.m.

¶5 The next morning, the victim's body was found in the parking lot behind the bar. He had bled to death after sustaining forty-three “cutting injuries, stabbing and incised wounds” to his chest, neck, torso, forehead, scalp, hands and forearms. Nineteen of the wounds were described as defensive. Two $100 bills were found near the victim's body. The cushion from Codefendant's wheelchair was found near the victim.

¶6 Sometime after leaving the bar that night, Fraijo and Codefendant went to another person’s home. Fraijo described to those present how he had stabbed someone that night and how the person made “gurgling” sounds after he stabbed them in the neck. $100 bills were placed on a blanket on the floor of the garage of the residence. Many of the bills appeared to have blood on them. Fraijo handed some of the bills to other people in the garage. Fraijo's vehicle was moved into the garage; a knife and more $100 bills were removed. Fraijo drove with others to another location, where they discarded the knife.

¶7 Fraijo later drove to the home of Codefendant's girlfriend, where he attempted to remove blood from the interior

of his vehicle. Fraijo told Codefendant's girlfriend he had stabbed someone at the bar that night and had injured his hand. Fraijo also told her the victim had approximately $1500. Fraijo later checked into a motel and paid with a $100 bill.

¶8 Fraijo was arrested at the motel. The knife was recovered. Six $100 bills were located in Fraijo's vehicle. The victim's blood was found on the knife and in Fraijo's vehicle.

¶9 Fraijo was charged with first degree murder and armed robbery. The State alleged theories of premeditated murder and felony murder in separate counts. The State sought the death penalty. Codefendant was charged with theft and hindering prosecution; he ultimately pled guilty to hindering prosecution.

¶10 The jury found Fraijo guilty of premeditated murder, felony murder, and armed robbery after an eleven-day jury trial.[1] After an additional six-day aggravation and penalty phase, the jury determined Fraijo should not be sentenced to death, but should receive life imprisonment. The trial court sentenced Fraijo to imprisonment for natural life for both counts of murder and an aggravated term of twenty-one years for armed robbery. The sentences were ordered to run concurrently.

[1] Fraijo does not contest the sufficiency of the evidence to support his convictions.

¶11 Fraijo timely appealed. We have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2003), 13-4031 (2010) and 13-4033 (2010).[2]

1. The Trial Court's Consideration of Sentencing Factors

¶12 Fraijo contends the trial court erred by considering aggravating factors beyond his prior convictions in deciding whether to impose natural life or life with a possibility of parole.[3] He argues that considering aggravating factors not found by the jury violated *Blakely v. Washington*, in which the Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. 296, 301 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).[4]

¶13 The trial court found the following aggravating factors: significant criminal history; the value of the property taken; emotional harm to the victim's family; the

---

[2] We cite to the current version of statutes when no revisions material to this decision have occurred.

[3] Because Fraijo presents this issue solely in the context of the sentences for murder, we do not address the sentence imposed for armed robbery.

[4] Fraijo does not contest the existence or use of his prior felony convictions. The existence of prior convictions may be determined by the trial court and need not be submitted to the jury. *Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 301.

presence of an accomplice; and Fraijo's "character and background," which demonstrated he was "incapable of rehabilitation." The sole aggravating factor found by the jury was that Fraijo was convicted of a serious offense, either preparatory or completed. However, this finding was made as part of the jury's determination of whether to impose death. *See* A.R.S. § 13-703(F)(2)(2006)(one factor to be considered in determining whether to impose death is whether the defendant has been or was previously convicted of a serious offense, whether preparatory or completed). The trial court did not identify this factor as one it considered in imposing natural life.

¶14 We find no error. First, a sentence of natural life for first degree murder is not an aggravated sentence. A trial court may impose a sentence of natural life for first-degree murder based solely on the facts reflected in the jury's verdict. *State v. Fell*, 210 Ariz. 554, 557-58, ¶ 11, 115 P.3d 594, 597-98 (2005). There is no requirement that any aggravating circumstances be found before natural life may be imposed. *Id.* at 560, ¶ 19, 115 P.3d at 600. When consideration of aggravating factors does not result in a sentence greater than that which the court was entitled to impose "based on 'the facts reflected in the jury verdict or admitted by the defendant,' the sentence imposed does not violate the Sixth Amendment." *State v. Miranda-Cabrera*, 209 Ariz. 220, 227, ¶ 32,

99 P.3d 35, 42 (App. 2004) (quoting *Blakely*, 542 U.S. at 303). Therefore, *Blakely* is inapplicable.

¶15 Second, even assuming *arguendo* that aggravating factors must exist before a sentence of natural life is appropriate, there would be no error. Once a single aggravating factor has been properly established, a sentencing court may find and consider additional aggravating factors. *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005). Because Fraijo's prior convictions were established, the trial court could find and consider additional factors without requiring the jury to determine their existence.

¶16 As part of his argument on this issue, Fraijo makes several additional claims, none of which were raised below. A failure to raise an issue at trial waives all but fundamental error. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, 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 fundamental error is established, a defendant must also demonstrate that the error was prejudicial. *Id*. at ¶ 26.

¶17 Fraijo argues the trial court failed to properly consider each mitigating factor submitted. He further contends the court was required to sentence him to life with a possibility of parole after twenty-five years because the mitigating factors outweighed the aggravating factors.

¶18 We find no error, fundamental or otherwise. First, as noted above, the trial court could impose a sentence of natural life regardless of any mitigating or aggravating factors. Second, a court need not find mitigating factors simply because evidence is presented, but is only required to consider them. *State v. Jenkins*, 193 Ariz. 115, 121, ¶ 25, 970 P.2d 947, 953 (App. 1998) (citation omitted). The record reflects that the trial court considered the mitigating factors submitted. "The trial court has the discretion to weigh aggravating and mitigating factors." *State v. Harvey*, 193 Ariz. 472, 477, ¶ 24, 974 P.2d 451, 456 (App. 1998) (citation omitted). The court did not abuse its discretion in concluding that the information presented warranted a sentence of natural life.

¶19 Fraijo further argues the court improperly relied on the "taking property" factor identified in A.R.S. § 13-702 (C)(3) (2006) because it is the same as the "pecuniary gain" factor identified in A.R.S. § 13-702(C)(6), which the jury rejected. *See* A.R.S. § 13-702(C)(3) (if the offense involves the taking of property, the value of the property taken shall be

considered as an aggravating circumstance); A.R.S. § 13-702(C)(6) (pecuniary gain). We will not question the wisdom, necessity, or soundness of policy of legislative enactments. *Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 79, 927 P.2d 340, 345 (App. 1996) (citation omitted); *Vo v. Superior Court (Ariz.)*, 172 Ariz. 195, 205, 836 P.2d 408, 418 (App. 1992) (citation omitted). If there is any purpose related to public health, safety or welfare which a statute could serve, we will not question its wisdom. *State v. McInelly*, 146 Ariz. 161, 163, 704 P.2d 291, 293 (App. 1985) (citation omitted). The legislature has determined these two aggravating factors are to be considered separately. The trial court did not err in considering the "taking property" factor identified in A.R.S. § 13-703(C)(3) as an aggravating factor, even though the jury rejected pecuniary gain as an aggravating factor.

¶20 Finally, Fraijo argues A.R.S. § 13-703.01(Q) (2006) is unconstitutional in light of *Blakely*. That section provides, in relevant part, that once the jury opts for a life sentence rather than the death penalty, the trial court shall determine whether to impose natural life or life with a possibility of parole. A.R.S. § 13-703.01(Q).

¶21 We find no error, fundamental or otherwise. As noted above, the court could impose a sentence of natural life based solely on the facts reflected in the jury's verdict. *Fell*, 210

Ariz. at 557-58, ¶ 11, 115 P.3d at 597-98; *Miranda-Cabrera*, 209 Ariz. at 227, ¶ 32, 99 P.3d at 42. *Blakely* is inapplicable. Further, we have previously determined that Arizona's criminal sentencing scheme was not rendered unconstitutional by *Blakely*. *See State v. Conn (Tinnell)*, 209 Ariz. 195, 197, ¶¶ 6-7, 98 P.3d 881, 883 (App. 2004); *Aragon v. Wilkinson*, 209 Ariz. 61, 66, ¶ 15, 97 P.3d 886, 891 (App. 2004).

2. Admission of Photographs

¶22 Fraijo next claims the trial court erred by admitting photographs of the victim taken at the scene and during the autopsy. He argues the photographs lacked probative value and were admitted solely to inflame the jury.

¶23 In ruling on Fraijo's motion to preclude photographs of the victim, the trial court found that the photos were relevant and, individually, would not incite passion, were not inflammatory, unduly gruesome, or unduly prejudicial, and were "as clinically sterile as possible." However, the court concluded that admission of *all* of the State's photographs risked being unduly prejudicial as cumulative. It thus limited the number of photographs that could be introduced.

¶24 We review the admission of photographs for an abuse of discretion. *State v. Montano*, 204 Ariz. 413, 425, ¶ 55, 65 P.3d 61, 73 (2003). In determining whether a trial court erred, we examine "the photograph's relevance, its tendency to inflame the

jury, and its probative value compared to its potential to cause unfair prejudice." *State v. Hampton*, 213 Ariz. 167, 173, ¶ 17, 140 P.3d 950, 956 (2006) (citation omitted).

¶25 In a murder trial, photos may be relevant "to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the homicide was committed." *State v. Anderson*, 210 Ariz. 327, 339-40, ¶ 39, 111 P.3d 369, 381-82 (2005) (citation omitted). Relevant photographs are admissible, even if they may tend to prejudice the jury against the defendant. *State v. Bocharski*, 200 Ariz. 50, 55, ¶ 21, 22 P.3d 43, 48 (2001) (citation omitted). Photos are admissible even where, as here, a defendant does not contest issues such as time or location of death, the cause or manner of death, the nature of the injuries inflicted, or how those injuries resulted in death. "Even if a defendant does not contest certain issues, photographs are still admissible if relevant because the 'burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'" *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996) (citations omitted). Finally, "[t]here is nothing sanitary about murder, and there is nothing in Rule

403, Ariz. R. Evid., that requires a trial judge to make it so." *State v. Rienhardt*, 190 Ariz. 579, 584, 951 P.2d 454, 459 (1997). "The state 'cannot be compelled to try its case in a sterile setting.'" *Bocharski*, 200 Ariz. at 56, ¶ 25, 22 P.3d at 49 (citation omitted).

¶26 The photographs at issue were relevant to show, among other things, the location and condition of the victim's body, the location of other evidence at the scene in relation to the victim, the nature and extent of the victim's injuries, the defensive nature of some of those injuries, the violence and duration of the attack, and to corroborate and give context to testimony. While some of the photos are unpleasant, none are unduly inflammatory or otherwise unfairly prejudicial. That being said, even gruesome or inflammatory photographs are admissible as long as they are not introduced for the sole purpose of inflaming the jury. *Morris*, 215 Ariz. at 339, ¶ 70, 160 P.3d at 218. Nothing in the record suggests these photos were admitted for that impermissible purpose. The trial court did not err by admitting the challenged photographs.[5]

[5] Fraijo also argues the court should not have allowed the State to display the photographs on an overhead projector and that the photographs were displayed too many times and/or for too long. He cites no authority requiring a trial court to *sua sponte* restrict the manner in which properly admitted evidence is displayed during trial, and we are aware of none.

3. Restrictions on Voir Dire

¶27 Fraijo also contends the court "unduly restricted his voir dire." He does not, however, identify any restrictions placed on voir dire, questions he was not allowed to ask, or issues he was not allowed to explore. He does not claim that objectionable jurors were selected. He does not contend the jury ultimately seated was biased or prejudiced. He does not identify any objections he made to the jury selection process or discuss how the voir dire was allegedly insufficient. Finally, Fraijo identifies no prejudice.[6]

¶28 "[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised." *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). The failure to properly argue a claim on appeal constitutes abandonment and waiver of that claim. *See id.; State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). Due to Fraijo's failure to identify how voir dire was "unduly restricted" during the five-day jury selection process or how he was prejudiced thereby, we decline to address this issue.

[6] The single reference to any restriction on voir dire contained in the opening brief concerns jurors' opinions regarding the death penalty. Because Fraijo did not receive the death penalty, he suffered no prejudice from any alleged restriction in this regard.

4. The Failure to Give a *Willits* Instruction

¶29 Fraijo argues the trial court erred by refusing to instruct the jury pursuant to *State v. Willits,* 96 Ariz. 184, 191, 393 P.2d 274, 279 (1964). During the testimony of a detective, a photograph of the victim's wallet was admitted into evidence. The detective described how the victim was identified through a driver's license found in the wallet. The wallet itself and its contents were not introduced into evidence. Fraijo sought a *Willits* instruction, arguing the State lost, destroyed or failed to preserve the wallet and/or its contents. He further argued the contents were potentially exculpatory. The trial court refused to give the instruction because there was no indication that the State lost, destroyed, or failed to preserve the evidence.

¶30 We review the refusal to give a *Willits* instruction for an abuse of discretion. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999) (citation omitted). "A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant." *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) (citation omitted). However, such an instruction is not required merely because a more thorough or exhaustive investigation could have been undertaken by the State. *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) (citation omitted). Before a *Willits*

instruction is proper, a defendant must prove that the State failed to preserve material, accessible evidence that might tend to exonerate him. *Id.* The defendant must also demonstrate that prejudice resulted from the failure to preserve the evidence. *Id.* There is no abuse of discretion in refusing to give a *Willits* instruction if the defendant fails to establish the evidence would have had a tendency to exonerate him. *Id*. (citation omitted).

¶31 There is no evidence that the State lost, destroyed or otherwise failed to preserve the wallet or its contents. The record merely shows the State did not offer this evidence at trial. Nothing indicates the wallet or its contents would have tended to exonerate Fraijo. We will not find an abuse of discretion in refusing to give a *Willits* instruction when the theory in support of the instruction is purely speculative. *See State v. Torres,* 162 Ariz. 70, 76, 781 P.2d 47, 53 (App. 1989) (no abuse of discretion when defendant failed to show fingerprints that could have been obtained would have tended to exonerate him); *State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988) (no error in refusing *Willits* instruction where nothing but speculation suggested the number on destroyed piece of paper was not the defendant's license plate number); *State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (no error in declining *Willits* instruction when claim that contents

of destroyed files would tend to exonerate defendant was speculative). "Speculation [regarding whether destroyed evidence may have been exculpatory] is not the stuff out of which constitutional error is made." *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993).

5. The Disparity in Sentences

¶32 Finally, Fraijo argues the trial court failed to consider as a mitigating factor the disparity between Codefendant's seven-year sentence and his natural life sentence.[7] He contends the court should have considered this factor and, in turn, given him life with a possibility of parole after twenty-five years. Because Fraijo did not raise this issue below, we review only for fundamental error. *Gendron*, 168 Ariz. at 154, 812 P.2d at 627 (citations omitted).

¶33 Although a disparity in sentences between codefendants can be a mitigating factor for sentencing purposes, *State v. Kayer*, 194 Ariz. 423, 439, ¶ 57, 984 P.2d 31, 47 (1999) (citations omitted), Fraijo never submitted the alleged disparity to the trial court for its consideration. It was not identified in Fraijo's sentencing memorandum, referenced during the punishment phase of trial, or mentioned at sentencing. We

[7] Documentation of Codefendant's sentence is not included in the record on appeal. However, Fraijo attached a copy of the sentencing minute entry to his opening brief, and the State does not contest its accuracy.

will not find error in the trial court's failure to consider, let alone find, a mitigating factor that was never suggested before sentencing.

¶34 Moreover, although a disparity in sentences between codefendants can be a mitigating factor, only an "unexplained disparity" is significant. *State v. Ellison*, 213 Ariz. 116, 140, ¶ 105, 140 P.3d 899, 923 (2006) (citation omitted). *See also Kayer*, 194 Ariz. at 439, ¶ 57, 984 P.2d at 47. Here, the disparity in sentences is easily explained. Codefendant pled guilty to hindering prosecution, a class 3 felony. *See* A.R.S. § 13-2512 (2006). Fraijo was convicted of first degree murder, a class 1 felony. *See* A.R.S. § 13-1105(A)(2006).

6. The Imposition of Two Life Sentences

¶35 The first degree murder of one victim is a single offense, regardless of whether the theory of conviction was premeditated murder or felony murder. This is because premeditated murder and felony murder "are simply two forms of first degree murder." *State v. Tucker*, 205 Ariz. 157, 167, ¶ 50, 68 P.3d 110, 120 (2003) (citation omitted). *See also State v. Schad*, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989). Because there was a single offense with a single victim, Fraijo cannot be sentenced to two separate terms of imprisonment for the murder. He can, however, be convicted of first degree murder of a single victim under theories of both premeditated

murder and felony murder. *See State v. Dann*, 205 Ariz. 557, 576, ¶ 76, 74 P.3d 231, 250 (2003) (affirming two separate convictions for the premeditated murder and felony murder of a single victim).

¶36 While this issue was not raised by either party, we choose not to ignore it. We affirm Fraijo's conviction for first degree murder under the alternative theories of premeditated first degree murder and felony murder. However, we vacate one of the concurrent life sentences and affirm the other natural life sentence.

CONCLUSION

¶37 For the foregoing reasons, we affirm Fraijo's convictions and his sentence for armed robbery. We modify his sentence on the murder convictions to one term of imprisonment for natural life.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PETER B. SWANN, Judge