DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0282
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
JOSHUA COULTER,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-150738-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Theresa M. Armendarez, P.L.C. — Phoenix
by Theresa M. Armendarez
Attorneys for Appellant

T I M M E R, Chief Judge

¶1 Joshua Coulter appeals his convictions and sentences for second-degree murder and aggravated assault, both dangerous offenses. He argues the trial court abused its discretion in denying his motion to sever trial of drug charges from the murder and assault charges, in denying his motion to preclude evidence offered to impeach his testimony, and in providing a flight or concealment of evidence instruction over his objection. He also argues the evidence was insufficient to support his convictions. For the reasons that follow, we disagree and therefore affirm.

¶2 A grand jury indicted Coulter on charges of first-degree murder, possession of marijuana for sale, possession of narcotics for sale, and aggravated assault. The evidence at trial showed[1] that Coulter was sitting on a bench drinking a beer and listening to music at a Glendale elementary schoolyard the night of August 5, 2007. G.C., M.C., and a mutual friend went to the schoolyard at about 10 p.m. to a jungle gym about seventy yards from where Coulter was sitting and shared two grams of cocaine. G.C.'s friend left to go home because he had a curfew, and G.C. and his brother approached Coulter to chat. The group

[1] We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

talked for several minutes before another friend of G.C.'s who had joined the group, became concerned because Coulter appeared "real nervous," "sketchy," agitated, "not normal," and his eyes were "pretty big." M.C. also noticed that Coulter started acting "a little skittish," apparently seeing people who were not there. When the friend saw Coulter pull a .38 caliber handgun out of his pocket and walk behind him two or three times, he left the schoolyard and biked home.

¶3 Within minutes of the friend leaving the schoolyard, Coulter asked 16-year-old G.C. if he was "strapped," or carrying a gun. When G.C. responded that he was not, Coulter shot him in the chest. The hollow-point bullet penetrated G.C.'s liver, his inferior vena cava, and his diaphragm, causing internal bleeding and death. Coulter fired a second shot at M.C. M.C. last saw Coulter walking fast, "kind of trotting," from the scene.

¶4 On or near the bench where Coulter had been sitting, police found his wallet, an empty beer can, some compact disc cases with his prints on them, and marijuana and cocaine residue. A backpack with items linked to Coulter was found the next day near the school. The backpack contained a portable drug scale, some baggies, nearly a pound of marijuana, and nearly eleven grams of cocaine. Police discovered that Coulter had purchased a Smith and Wesson .38 special two months earlier, and they found .38 caliber hollow-point bullets in his bedroom,

but they never recovered the weapon.

¶5 The jury convicted Coulter of second-degree murder and aggravated assault, finding both to be dangerous offenses, but acquitted him of the drug charges. The jury found the existence of three aggravating factors for each conviction. The judge sentenced Coulter to an aggravated term of twenty-two years in prison for second-degree murder, and an aggravated term of twelve and one-half years in prison for aggravated assault, the terms to be served concurrently. Coulter timely appealed.

1. Motion to sever

¶6 Coulter argues first the trial court abused its discretion in denying his motion to sever trial of the murder and aggravated assault charges from the drug charges, reasoning the drug evidence would not have been admissible at his trial for the murder and aggravated assault charges, and severance was necessary to promote a fair determination of his guilt or innocence.[2] Before trial, the State informed the court that it did not object to severance of the drug charges as long as the court permitted it to offer evidence of the cocaine and marijuana in the backpack linked to Coulter and the drug residue

[2] Coulter has waived the constitutional claims presented because he summarily raises these claims for the first time on appeal. *State v. Logan*, 200 Ariz. 564, 565 n.1, ¶ 4, 30 P.3d 631, 632 n.1 (2001). Regardless, we reject these claims for the reasons stated in this decision.

on the bench to support its theory that Coulter had been using drugs before the shooting as a possible explanation for the otherwise unprovoked shooting. The judge denied Coulter's pre-trial motion to sever and his renewed motion to sever during trial in each case without comment.

¶7 Joinder and severance are governed by Arizona Rules of Criminal Procedure ("Ariz. R. Crim. P.") 13.3 and 13.4. Offenses may be joined in pertinent part if they "are based on the same conduct or are otherwise connected together in their commission." Ariz. R. Crim. P. 13.3(a)(2). Offenses are considered otherwise connected together in their commission 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, 217, ¶14, 953 P.2d 1266, 1270 (App. 1998) (quoting *State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985) (internal quotation marks omitted).[3] When,

[3] Coulter misplaces his reliance on *Garland* for the proposition that consolidation is improper unless the evidence of the other crime is admissible under Rule 404(b) of the Arizona Rules of Evidence ("Rule 404(b)"). It is only if the judge errs in denying severance that we look, for purposes of determining if the error was harmless, to whether the evidence of the other crimes was otherwise admissible under Rule 404(b). *See Garland*, 191 Ariz. at 216, ¶ 9, 953 P.2d at 1269.

however, it "is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on the motion of a party, order . . . severance." Ariz. R. Crim. P. 13.4(a). We will not reverse on the basis of the trial court's denial of a motion to sever absent a clear abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003).

¶8 We find no such abuse of discretion in this case. The drug and shooting offenses were "otherwise connected together in their commission" because the evidence suggested that Coulter had ingested cocaine and marijuana shortly before shooting G.C. and M.C., and then discarded the backpack full of drugs as he ran from the scene. Ariz. R. Crim. P. 13.3(a). The drugs linked to Coulter were independently relevant to the shooting offenses, not to show Coulter's character as a drug dealer or his tendency toward criminality,[4] but to support the State's theory that Coulter was high on drugs at the time, and that was why he inexplicably shot G.C. without provocation. The discarded backpack full of drugs also linked Coulter to the scene of the shooting and his flight, further confirming his

[4] The relevance of this evidence under these facts distinguishes it from the case on which Coulter relies, *State v. Torres*, 162 Ariz. 70, 781 P.2d 47 (App. 1989). *See id.* at 72-74, 781 P.2d at 49-51 (holding that defendant's prior drug use was inadmissible propensity evidence in possession case, in light of his defense that he had not possessed the drugs).

identity as the shooter. Coulter's reliance on *State v. Curiel*, 130 Ariz. 176, 634 P.2d 988 (App. 1981) is misplaced. In *Curiel*, we found that the trial court erred in failing to sever trial of drug and theft charges whose only connection was that the crimes were committed on the same day, and both came to light as the result of the search of the same automobile. *See id.* at 184, 634 P.2d at 996. The evidence in this case instead shows that the offenses arose out of a series of connected acts that were intertwined in their commission, and the evidence to prove the separate offenses was overlapping. These offenses thus were properly joined for trial under Rule 13.3(a)(2).

¶9 We find no merit in Coulter's argument that severance was nevertheless necessary to promote a fair determination of his guilt or innocence pursuant to Rule 13.4(a), based on the premise that the jury might have convicted him of the shooting offenses only because it also had before it the drug evidence and charges. "When a defendant challenges a denial of severance on appeal, he must demonstrate compelling prejudice against which the trial court was unable to protect." *Prince*, 204 Ariz. at 159, ¶ 13, 61 P.3d at 453 (citations and internal quotation marks omitted). "[A] defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *Id.* at 160, ¶ 17, 61 P.3d at 454 (citation

omitted). Such was the case here. The jury is presumed to have followed these instructions. *See State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Both the prosecutor and Coulter's counsel emphasized this instruction in their closing arguments. In this case, moreover, one can presume the jury did consider the offenses separately because it acquitted Coulter of the drug charges, but convicted him of the shootings. Under such circumstances, the trial court's refusal to sever the charges neither jeopardized defendant's right to a fair trial nor prejudiced him, as necessary for reversal on this ground.

2. Motion to preclude impeachment evidence

¶10 Coulter next argues the trial court abused its discretion and reversibly erred in denying his motion to preclude the State's proffered use of his prior conduct to impeach his testimony at trial. The State had filed a Rule 404(b) notice that it intended to impeach Coulter's credibility on his claim of self-defense if he testified at trial, with evidence that he had also claimed self-defense when he killed a drug dealer in 2006, although in that case, he had immediately flagged down police, produced the weapon, and gave a detailed statement. The State argued the fact that Coulter's claim of self-defense in the prior case was successful in avoiding any charges might show why Coulter had decided to claim self-defense in this case after initially fleeing the scene, ditching the

weapon, and denying all involvement. The trial court denied Coulter's motion to preclude the impeachment evidence, finding it would fit under Rule 404(b)'s exception to preclusion "for other purposes." Coulter did not testify, nor did the State introduce the proffered evidence at trial. Coulter argues on appeal, as he had explained at trial, that he decided not to testify in large part because of the court's ruling that the State could impeach his testimony with evidence of his prior claim of self-defense in a shooting death.

¶11 By failing to testify, Coulter failed to preserve his claim of error. The policy reasons behind the long-established rule that a defendant who chooses not to testify cannot claim error in a ruling allowing him to be impeached with his prior conviction apply with equal force to a ruling on the use of Rule 404(b) evidence to impeach a defendant's testimony. *See State v. Smyers,* 207 Ariz. 314, 316-18, ¶¶ 5-15, 86 P.3d 370, 372-74 (2004) (and cases cited therein).

¶12 This rule was first adopted in Arizona in a case in which defendant argued, as Coulter argues here, that the denial of his motion to preclude "prevented him from taking the witness stand and testifying on his own behalf." *See Smyers,* 207 Ariz. at 316, ¶ 6, 86 P.3d at 372 (citing *State v. Barker*, 94 Ariz. 383, 385, 385 P.2d 516, 517 (1963)). The court rejected this argument as based on assumptions about what might take place at

trial, and held that a defendant would have to testify in order to preserve this claim of error. *Barker*, 94 Ariz. at 386, 385 P.2d at 518*; see also State v. Allie,* 147 Ariz. 320, 327, 710 P.2d 430, 437 (1985) (reiterating the "well-settled" rule). The United States Supreme Court adopted the same rule more than twenty years later in *Luce v. United States*, 469 U.S. 38 (1984). Our supreme court has since extended the rule to encompass the use for impeachment purposes of involuntary statements, *see State v. Gonzales*, 181 Ariz. 502, 512, 892 P.2d 838, 848 (1995), and statements obtained in violation o*f Miranda. See State v. Conner*, 163 Ariz. 97, 102-03, 787 P.2d 948, 953-54 (1990). We have recently extended the rule to encompass impeachment of character witnesses who failed to testify. *State v. Romar*, 221 Ariz. 342, 344-46, ¶¶ 5-9, 212 P.3d 34, 36-38 (App. 2009) (applying rule to pretrial rulings on the permissible scope of cross-examination of defendant's character witnesses).

¶13 The policy reasons behind this rule, outlined in *Smyers,* 207 Ariz. at 316, ¶¶ 8-9, 86 P.3d at 372 (citing *Luce,* 469 U.S. at 41-43), apply equally to bar Coulter from urging error in the judge's ruling allowing use of the Rule 404(b) evidence to impeach his testimony if he chose to testify. *See United States v. Hall*, 312 F.3d 1250, 1256-58 (11th Cir. 2002) (agreeing with "other circuits [that] have held that *Luce* applies to *in limine* evidentiary decisions under Rule 404(b)");

United States v. Johnson, 767 F.2d 1259, 1270 (8th Cir. 1985) ("Although *Luce* was decided under Fed. R. Evid. 609(a)(1), its logic applies with equal force to motions under Rule 404"). In the absence of Coulter's testimony, we are left to speculate how he might have testified, whether the prosecutor might have decided to impeach him with the proffered evidence, how the judge might finally have ruled, and whether any error in admission of the evidence could be harmless. *See Smyers,* 207 Ariz. at 316, ¶¶ 8-9, 86 P.3d at 372. On these facts, we hold that Coulter failed to preserve his claim of error, and we decline to consider it.

3. Jury instruction on flight or concealment

¶14 Coulter next argues the trial court abused its discretion by instructing the jury on flight or concealment of evidence over his objection. Coulter contends the failure to recover a weapon was not an indication that it was concealed, and insufficient testimony suggested he ran from the scene. The State is entitled to a flight or concealment instruction if it is supported by the evidence. *State v. Grijalva,* 137 Ariz. 10, 15, 667 P.2d 1336, 1341 (App. 1983)*, superseded by statute on other grounds as stated in State v. Cons,* 208 Ariz. 409, 413, ¶ 9, 94 P.3d 609, 613 (App. 2004). A flight instruction is improper merely based on evidence that the suspect simply left the scene; it is proper "only when the defendant's conduct

manifests a consciousness of guilt." *State v. Speers*, 209 Ariz. 125, 132-33, ¶¶ 27-31, 98 P.3d 560, 567-68 (App. 2004) (holding that presence of passport printout and flight itinerary in defendant's backpack did not rise to the level warranting flight instruction under the facts of that case). The test "requires that the court be able to reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *Id.* at 132, ¶ 28, 98 P.3d at 567 (citation and internal quotation marks omitted). We review the trial court's decision to give a jury instruction over objection for abuse of discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003).

¶15 We find no such abuse of discretion. The only surviving witness to the shooting testified that afterward, he saw Coulter walking fast, almost running, from the scene. The evidence showed that Coulter left the scene in such a hurry that he left behind his wallet as well as some compact discs on a bench. This evidence was sufficient to suggest the consciousness of guilt that warranted a flight instruction. *See State v. Lujan,* 124 Ariz. 365, 371, 604 P.2d 629, 635 (1979) ("We hold that where the evidence indicates that defendant and his accomplices ran away from the scene of a stabbing immediately after it occurred, an instruction on flight was not erroneous."). One could also reasonably infer from the evidence

that Coulter had discarded or concealed the .38 caliber Smith and Wesson he had purchased two months earlier and used as the murder weapon, and had discarded a backpack full of drugs in a retention basin on his way home. Under these circumstances, we find no abuse of discretion by the judge giving the flight or concealment instruction.

4. Sufficiency of evidence

¶16 Coulter finally argues that insufficient evidence supported his convictions because the evidence showed that he acted in self-defense, and that the cocaine ingested by G.C. shortly before he was shot adversely affected his treatment. We find no merit in Coulter's argument.

¶17 In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). The evidence was undisputed that Coulter shot and killed G.C. immediately after G.C. told Coulter he was not armed. The testimony and evidence also showed that G.C. did not have a weapon, or anything that might have looked like a weapon

in his black mesh-type shorts and t-shirt. A friend of G.C. and M.C. testified that they believed they were behaving normally, but Coulter was acting nervous, weird, and not normal.

¶18 Coulter's argument in closing that he acted in self-defense turned on the jury disbelieving the witnesses' version of events and speculating that Coulter feared for his life because the school yard was dark and secluded, he was alone, G.C. and M.C. were "very likely aggressive" because of their recent cocaine consumption, G.C. "went to pull his gun," and Coulter's intent in shooting G.C. "was to ward off an attack." Credibility determinations are for the fact-finder, however, not this court. *See State v. Dickens,* 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996). On this record, the State offered more than sufficient evidence to prove that Coulter did not act in self-defense when he shot G.C. The medical examiner additionally testified that G.C. died as a result of the gunshot wound, and that although the cocaine he ingested may have caused him to die seconds sooner because it would make the blood pump faster, he did not die of a cocaine overdose. On this record, more than sufficient evidence supported the convictions.

CONCLUSION

¶19 For the foregoing reasons, we affirm Coulter's convictions and sentences.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Patrick Irvine, Presiding Judge

/s/
John C. Gemmill, Judge