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



DIVISION ONE  
FILED: 06/05/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 10-0185  
)  
) DEPARTMENT B  
Appellee, )  
) **MEMORANDUM DECISION**  
)  
v. )  
) (Not for Publication -  
JASON EMERY VASQUEZ, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2006-048421-002 DT

The Honorable Roland J. Steinle, III

**CONVICTIONS AND SENTENCES AFFIRMED**

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Appellant

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**J O H N S E N**, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), by Jason Emery Vasquez following Vasquez's conviction of first-degree murder, a Class 1 dangerous felony; kidnapping, a Class 2 dangerous felony; and conspiracy to commit first-degree murder, a Class 1 felony. Vasquez's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error. In addition, Vasquez filed a supplemental brief raising several issues, which we address below. After reviewing the entire record, we affirm Vasquez's convictions and sentences.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Police responded to reports of gunshots in Glendale at about 9 p.m. one night.<sup>1</sup> When they arrived at the scene, they found the victim on the side of the road, deceased. The victim had sustained multiple gunshot wounds, three from a .380 caliber

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<sup>1</sup> Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Vasquez. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

gun and one from a shotgun. The medical examiner characterized the death as a homicide. Vasquez was charged with first-degree murder, kidnapping and conspiracy to commit first-degree murder. The State sought the death penalty on the first-degree murder charge.

¶3 At an 18-day trial, the State presented evidence that Murray Gibbs, a father-figure to Vasquez, ordered Vasquez and Adam Elmore to kill the victim for failing to pay a debt. According to two witnesses, Vasquez confessed to placing the victim in a truck, taking him to a second location and shooting him.

¶4 The jury unanimously found Vasquez guilty on all counts, but was unable to agree on whether to impose life imprisonment or the death penalty. Rather than retry the penalty phase of the case, the State stipulated with Vasquez to imposition of a life sentence without the possibility of parole on the first-degree murder conviction.<sup>2</sup> The superior court imposed that sentence and also sentenced Vasquez to the presumptive term of 10.5 years for the kidnapping and life with the possibility of parole for the conspiracy conviction. The

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<sup>2</sup> Before sentencing, the court appropriately advised Vasquez that by stipulating to life without parole for the first-degree murder conviction, he retained his right to appeal the underlying conviction but gave up his right to appeal the sentence. See Ariz. R. Crim. P. 17.2.

court ordered all three sentences to be served concurrently, with 1,397 days' presentence incarceration credit granted against the kidnapping and conspiracy sentences.

¶15 Vasquez timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033 (West 2012).<sup>3</sup>

## DISCUSSION

### A. Issues Raised by Vasquez.

#### 1. Sufficiency of the evidence.

¶16 Vasquez first argues insufficient evidence supported his convictions. At trial, Vasquez's counsel moved for a judgment of acquittal on all three counts, and the superior court denied the motion.

¶17 Under Arizona Rule of Criminal Procedure 20, a defendant may move for a judgment of acquittal before the verdict if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). We review the superior court's denial of a Rule 20 motion for abuse of discretion and will reverse only when "there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001).

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<sup>3</sup> Absent material revision after the date of an alleged offense, we cite a statute's current version.

"Substantial evidence is more than a mere scintilla and 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) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)).

¶18 The evidence recounted above was sufficient to support Vasquez's convictions. Vasquez argues, however, that some witnesses gave false, contradictory and unreliable testimony. "The question of the credibility of the witnesses' testimony is for the jury, not for this court." *State v. Payne*, 7 Ariz. App. 43, 44-45, 436 P.2d 137, 138-39 (1968); see also *State v. Baker*, 26 Ariz. App. 255, 258, 547 P.2d 1055, 1058 (1976) (weight of the testimony and credibility of witnesses are issues for jury to determine). The defense had an opportunity to cross-examine each witness and expose any bias or motivation to lie. See *State v. Rivera*, 210 Ariz. 188, 190, ¶ 11, 109 P.3d 83, 85 (2005). The jury heard each witness testify and was able to evaluate his or her veracity. To the extent there was contradictory evidence, on review, we resolve any conflicts against Vasquez. See *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). For these reasons, we must conclude that sufficient evidence supported Vasquez's convictions.

**2. Admissibility of Vasquez's poetry.**

¶9 Vasquez next argues the court erred by allowing in evidence several poems he wrote that seem to describe the murder. Prior to trial, Vasquez filed a motion *in limine* to preclude these poems and other writings he had left at the home of his estranged wife, K.V., arguing the documents were not relevant under Arizona Rule of Evidence 401. At trial, Vasquez renewed his objection to the admission of redacted versions of the poems, specifically challenging whether the State could establish foundation. The court denied the motion and found the poems "relevant as to knowledge, intent, who actually was the one that shot." The court permitted the State to establish foundation through K.V.'s testimony. During her testimony, the defense renewed its objection to the foundation for the poems. The court affirmed its previous rulings pursuant to Arizona Rule of Evidence 901(b)(2) and overruled the objection, but permitted defense counsel to *voir dire* K.V. about foundational matters.

¶10 We review the superior court's rulings on admissibility of evidence for an abuse of discretion. *State v. Daniel*, 169 Ariz. 73, 74, 817 P.2d 18, 19 (App. 1991). Under Arizona Rule of Evidence 401, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the

evidence" and "the fact is of consequence in determining the action."

¶11 The poems describe a shooting factually similar to the murder in Vasquez's case and thereby support the State's contention that Vasquez was the primary shooter. The court thus did not abuse its discretion in finding the poems were relevant.

¶12 Under Arizona Rule of Evidence 901, a written document may be authenticated by a nonexpert's opinion of the handwriting. The nonexpert must give an opinion "that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation." Ariz. R. Evid. 901(b)(2). K.V. testified she was married to Vasquez and had known him for many years, that she recognized his handwriting and that all the poems at issue were in his handwriting. During the defense's *voir dire*, K.V. further testified she watched Vasquez writing the poems. The superior court did not abuse its discretion in finding this was sufficient foundation for admitting the poems.

### **3. Admissibility of statements under Rule 403.**

¶13 Vasquez further argues that certain witnesses' statements should not have been admitted because they were "highly prejudicial." We construe this argument to be that, although relevant, the statements should not have been admitted

because their probative value was "substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403. "Evidence is unfairly prejudicial only when it has an undue tendency to suggest a decision on an improper basis such as emotion, sympathy, or horror." *State v. Connor*, 215 Ariz. 553, 564, ¶ 39, 161 P.3d 596, 607 (App. 2007) (quotations omitted). The superior court has broad discretion in making this determination because it "is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice." *Id.*

¶14 Vasquez first objects to a statement by witness B.P. that the day before the murder, Vasquez told him "they were going to beat [the victim] down." The defense objected to the statement on the grounds that it was "highly prejudicial." The superior court overruled the objection, finding under Rule 403 that the statement was probative to "the issue of identity of whether or not Mr. Vasquez was the one that was involved in the homicide," and its "probative value is not outweighed by prejudice." Because the probative value of the statement was not substantially outweighed by the danger of unfair prejudice, we cannot say the superior court abused its discretion in making this finding.



¶15 Second, Vasquez objects on the same grounds to a statement by the arresting officer that Vasquez had an outstanding felony warrant. The court sustained defense counsel's objection to this testimony and ordered the statement stricken, but denied the defense's motion for a mistrial. In the final jury instructions, the court specifically instructed the jury that it must not consider any evidence the court ordered stricken. Under the circumstances, including the other evidence against Vasquez in the record, we cannot conclude Vasquez was unfairly prejudiced by the reference to the warrant.

**4. Defense motion to continue.**

¶16 Vasquez next argues the superior court abused its discretion by denying a defense motion to continue the trial date because the mitigation investigation was not complete. Ruling on a motion to continue rests "within the sound discretion of the trial court, and as such will not be disturbed on appeal absent a clear showing of abuse of discretion and resulting prejudice to defendant." *State v. Greenawalt*, 128 Ariz. 150, 161, 624 P.2d 828, 839 (1981); see also *State v. Williams*, 144 Ariz. 433, 441, 698 P.2d 678, 686 (1985). The record does not demonstrate that the superior court abused its discretion in denying the motion. Nor does Vasquez explain how

he might have been prejudiced by the denial, particularly given the jury's failure to impose the death penalty.

**5. Jury instructions on evaluating testimony.**

¶17 Vasquez next objects to a portion of the preliminary jury instructions regarding evaluating testimony. The court gave the following instruction:

In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such factors as the witness's ability to see, hear, or know the things the witness testified about, the quality of the witness's memory, the witness's manner while testifying, whether the witness has any motive, bias, or prejudice, whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence, and the reasonableness of the witness's testimony when considered in the light of the other evidence.

¶18 Vasquez does not identify what portion of this instruction he finds objectionable, nor does he explain his contention. We see no error.

**6. State's closing argument.**

¶19 Lastly, Vasquez argues the prosecutor improperly argued in closing that Vasquez left Gibbs's trailer with the handgun on the day of the murder. The prosecutor said:

But I would submit to you that the evidence suggests an inference can be made that Jason left with Adam [Elmore] with the handgun at that time when it was concealed

on his person so no one was able to see it. And the reason why you can make that inference is Adam had the bigger gun, and Murray [Gibbs] made sure that the gun was concealed before Adam left the trailer.

¶20 "Counsel is permitted considerable latitude in closing argument, including the right to draw reasonable inferences from the evidence." *State v. Morgan*, 128 Ariz. 362, 370, 625 P.2d 951, 959 (App. 1981). The evidence presented at trial tied Gibbs to both the handgun and the shotgun. In a confession to K.V., Vasquez stated that he fired the handgun, and, at least initially, Elmore fired the shotgun. It is thus a reasonable inference that if Elmore left the trailer carrying the concealed shotgun, Vasquez left the trailer carrying the handgun. The prosecutor's argument therefore was not improper.

#### **B. Fundamental Error Review.**

¶21 The record reflects Vasquez received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings.

¶22 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of 12 members. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury

returned a unanimous verdict, which was confirmed by juror polling. The court imposed legal sentences for the crimes of which Vasquez was convicted.

#### CONCLUSION

¶123 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶124 After the filing of this decision, defense counsel's obligations pertaining to Vasquez's representation in this appeal have ended. Defense counsel need do no more than inform Vasquez of the outcome of this appeal and his future options, unless, upon review, counsel finds "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, Vasquez has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Vasquez has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/

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DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/

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DONN KESSLER, Judge

/s/

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LAWRENCE F. WINTHROP, Chief Judge