DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0833
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
DANIEL BUENO, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-124043-002DT

The Honorable Glenn M. Davis, Judge

AFFIRMED

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

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By Neal W. Bassett — Phoenix
Attorneys for Appellant

G E M M I L L, Judge

¶1 Daniel Bueno appeals his convictions and sentences for three counts of murder in the first degree, one count of attempted murder in the first degree, one count of burglary, and

four counts of kidnapping, all dangerous offenses. Bueno seeks a new trial arguing the trial court clerk's reading of the full indictment during *voir dire* was unnecessary and prejudicial to Bueno. For the following reasons, we affirm Bueno's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Miles*, 211 Ariz. 475, 476, ¶ 2, 123 P.3d 669, 670 (App. 2005). With this principle in mind, the following facts were revealed at trial.

¶3 On April 15, 2008, the victims returned home after going to the bank. The two male victims entered the home while the two female victims waited inside the car. The males did not return to the car once they went inside the home. A perpetrator walked outside, forced the females out of the car and into the home, and tied them up with cables. Two men fatally shot the two male victims and one female victim. The other female victim was shot in the head and left for dead but she survived.

¶4 A week after the shootings, a witness stated in a video recorded police interview that she overheard Bueno discuss the shootings when a news story came on the television reporting about the incident. The witness overheard Bueno say: "man how did she get away"; "I am the one that did it"; "I shot em' in

the head"; and he didn't understand "how she could've survived."

¶5 During *voir dire*, the trial court clerk read the entire indictment to the prospective jurors. The clerk read all charges set forth by the grand jury in the indictment and also informed the jury that Bueno plead not guilty to each count. Following jury selection, the trial court gave the jury several preliminary instructions including that the formal charges read by the clerk were not evidence, Bueno was entitled to the presumption of innocence, and Bueno's plea was not guilty. At the conclusion of the evidence, Bueno was convicted on all counts and thereafter sentenced to prison.

¶6 Bueno timely appeals, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2003), 13-4031 (2010), and 13-4033(A) (2010).[1]

ANALYSIS

¶7 Bueno argues that his convictions must be reversed because the reading of the indictment aloud to the jury was excessively long (approximately ten minutes), and the words "death," "deadly," "murder," "dangerous," or "firearm" spoken numerous times during the reading eviscerated any presumption of Bueno's innocence for the crimes charged. Bueno contends that

[1] We cite to the current versions of applicable statutes when no revisions material to this decision have occurred since the incidents herein.

the trial court should have either: (1) not read the indictment at all (because it is deemed harmless error if an indictment is not read); or (2) provided an "abbreviated" reading of the indictment to the jury. We find no reversible error.

¶8 Bueno concedes that he failed to object to the reading of the full indictment at trial and he agrees our standard of review on appeal is only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (stating when there is no objection at trial, appellate review is limited to fundamental error only).

¶9 Pursuant to *Henderson*, fundamental error analysis requires Bueno to prove that (1) the trial court erred; (2) the error was fundamental (the error was of "such magnitude that the defendant could not possibly have received a fair trial") (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984); and (3) reading the full indictment to the jury prejudiced him. (citing *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993). 210 Ariz. at 567, 568, ¶¶ 19, 26, 115 P.3d at 607, 608. We begin, therefore, with the question whether the trial court erred in allowing the complete indictment to be read to the jury.

¶10 The rules of criminal procedure, promulgated by our supreme court, describe the conduct and the order of proceedings at trial. *See* Ariz. R. Crim. P. 19.1(a) ("Rule(s)").

Specifically, "[t]he trial shall proceed in the following order unless otherwise directed by the court: [] The indictment, information or complaint shall be read and the plea of the defendant stated." Rule 19.1(a)(1). "The reading of the indictment serves two purposes: it ensures that the accused is informed of the charges against him, and it ensures that the jury is informed of the precise terms of the particular charge against the accused." *McIlroy v. State*, 188 S.W.3d 789, 793 (Tex. Crim. App. 2006); *see also State v. Chapman*, 110 Ariz. 268, 269, 517 P.2d 1264, 1265 (1974) (citing *Ussery v. Territory*, 4 Ariz. 177, 178, 36 P.35, 35 (1894) and stating that reading the indictment informs the jury of the charges facing the defendant).

¶11 The Arizona Supreme Court in *State v. Cornell*, 179 Ariz. 314, 320, 878 P.2d 1352, 1358 (1994), addressed a similar issue. In *Cornell*, the defendant claimed fundamental error when the clerk read the indictment to the jury because the language of the indictment included "the grand jurors . . . accuse" Cornell of the following charges. *Id.* Cornell argued that his due process rights were violated because the jury heard that another group, the grand jury, determined that there was evidence of Cornell's guilt and therefore, the jury was no longer capable of impartiality due to the reading of the indictment. *Id.* The supreme court concluded that "[i]t was not

error, fundamental or otherwise, to read the indictment to the jury." *Id.* (relying on Rule 19.1(a)(1)).

¶12 Furthermore, in *Cornell* the supreme court cited *State v. Amaya-Ruiz*, 166 Ariz. 152, 174, 800 P.2d 1260, 1282 (1990), to explain that it had previously rejected similar arguments arising from reading an indictment to a jury. *Cornell*, 179 Ariz. at 320, 878 P.2d at 1358. In *Amaya-Ruiz*, the defendant asserted that the indictment contained "prejudicial surplusage" with the words "true bill" and the signature of the grand jury foreman. 166 Ariz. at 174, 800 P.2d at 1282. Both the *Amaya-Ruiz* and *Cornell* courts relied on *United States v. Ramirez*, 710 F.2d 535, 545 (9th Cir. 1983), for the proposition that a cautionary trial court instruction sufficiently negates any assertion of prejudice concerning the reading of an indictment. *See Cornell*, 179 Ariz. at 320, 878 P.2d at 1358; *Amaya-Ruiz*, 166 Ariz. at 174, 800 P.2d at 1282.

¶13 In this case, Bueno was a beneficiary of the trial court's cautionary instructions to the jury. The trial court instructed the jury that "[e]very defendant is presumed by law to be innocent." The trial court also stated the following during preliminary instructions to the jury:

> You had the charges read, the formal charges read to you a few minutes ago. The Defendant has pled not guilty to the charges against him.

> Those charges are not evidence against the Defendant. You must not think the Defendant is guilty just because of the charges. The Defendant has pled not guilty and that plea of not guilty means that the State must prove every part of any charge beyond a reasonable doubt.

¶14 Although the trial court did not specifically caution the jury concerning the indictment at the conclusion of the case, it did provide final instructions concerning Bueno's charges. After summarizing charges for the jury at the close of trial, the trial court further instructed the jury: "A charge is not evidence against the defendant. You must not think a defendant is guilty just because of a charge. The defendant has pled not guilty. This plea of not guilty means that the State must prove each element of the charges beyond a reasonable doubt."

¶15 Bueno supports his argument that the reading of the full indictment fostered jury prejudice against him with *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 956 (Pa. 1982), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). Obviously, a Pennsylvania opinion is not binding on us and, in any event, *Zettlemoyer* is distinguishable and not persuasive here.[2]

[2] The Pennsylvania Supreme Court in dicta stated: "It is certainly conceivable that the reading of a 'loaded' indictment, i.e., one drafted with full disclosure of gory and/or inflammatory factual details, could so inflame the jury that the

¶16 Because Rule 19.1(a)(1) authorizes the reading of the indictment and our supreme court has rejected challenges similar to Bueno's argument here, the trial court did not err. The court was following the rules of procedure and the indictment included language from our criminal statutes describing the charges. We have reviewed the transcript of the reading of the indictment and do not find the reading to be inappropriate.

CONCLUSION

¶17 For these reasons, we determine that the court did not commit error, ordinary or fundamental, in directing the clerk to read this indictment in its entirety to the jury. We affirm Bueno's sentences and convictions.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
PHILIP HALL, Judge

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possibility of prejudice would outweigh the evidentiary value of reading the indictments." *Id.* n.21. However, the Pennsylvania court concluded that "the neutral and unimpassioned reading of the indictments [and] the immediate clarifying instruction by the court" was proper court procedure which lacked error. *Id.* Bueno acknowledges that none of the information in the indictment here was gory.