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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ISMAEL PADILLA-CONTRERAS, Appellant.	)	2 CA-CR 2011-0004 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083427001

Honorable Howard Hantman, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Ismael Padilla-Contreras was convicted after a jury trial of two counts of first-degree felony murder, attempted first-degree murder, and aggravated assault. The trial court sentenced him to natural life prison terms for the murders with concurrent prison terms of 10.5 years for attempted murder and 7.5 years for aggravated assault. On appeal, Padilla-Contreras asserts the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P., arguing that the state had not proven a sufficient basis for felony murder because there was insufficient evidence that marijuana had been transferred or that the murders had been committed to further that transfer.

¶2 "On appeal, we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In April 2008, Padilla-Contreras and another man known as "Flaco" traveled to Tucson from Phoenix to purchase marijuana. After Flaco and Padilla-Contreras met D. and the victims, R., P., and O., at a restaurant, R. and Padilla-Contreras discussed the "deal." D. then gave his truck keys to one of the men, who drove the truck away and returned after thirty to forty minutes. When the man returned with the truck, there was an odor of marijuana and a blanket in the back seat that had not been there before. D. then left in the truck after receiving directions from another man, C., by telephone "to where [he was] supposed to go," an address in southeast Tucson.

¶3 Padilla-Contreras, Flaco, and the victims then left in O.'s car. O. was driving, with Flaco sitting directly behind him. R. and P. sat in the rear seat and Padilla-

Contreras sat in the passenger seat. As they drove, Padilla-Contreras announced, "This is as far as you go." O. then heard gunshots from the backseat and saw "flashes" in his rearview mirror. Padilla-Contreras produced a gun, and shot O. three times as O. attempted to reach for Padilla-Contreras's arm. Padilla-Contreras and Flaco then fled. Although O. survived his injuries, R. and P. died from gunshot wounds.

¶4 Meanwhile, while D. was driving the truck to the address he had been given, C. redirected him to a house at a different address and, when he arrived there, he saw Flaco. D. was instructed to leave his truck at the house. When he retrieved it the following day, the blanket and odor of marijuana were gone. Padilla-Contreras later was located and questioned by police detectives. Padilla-Contreras acknowledged he had been in the vehicle with Flaco and the victims but claimed he had fled when the shooting started. He admitted he had come to Tucson to participate in a marijuana purchase and was to drive the marijuana back to Phoenix. He also stated he and Flaco had accompanied the victims to provide "collateral," because the marijuana had not yet been paid for. Padilla-Contreras denied being aware of any plan to rob the victims.

¶5 The jury was instructed on the elements of first-degree felony murder pursuant to A.R.S. § 13-1105(A)(2), which provides, in relevant part, that a person is guilty of first-degree murder if that person "commits or attempts to commit . . . marijuana offenses under [A.R.S. § 13-3405(A)(4)] . . . and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person." "A death is 'in furtherance' when it results 'from any action taken to facilitate the accomplishment of the [predicate] felony.'" *State v. Lacy*, 187 Ariz. 340,

350, 929 P.2d 1288, 1298 (1996), *quoting State v. Herrera*, 176 Ariz. 21, 29, 859 P.2d 131, 139 (1993). Section 13-3405(A)(4) prohibits the "[t]ransport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer marijuana." And, relevant here, an attempt occurs when a person, "acting with the kind of culpability otherwise required for commission of an offense," "[i]ntentionally does . . . anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense." A.R.S. § 13-1001(A)(2).

¶6 Padilla-Contreras argues the trial court erred in denying his Rule 20 motion because there was insufficient evidence of either an attempted or completed transfer of marijuana because no witness testified there was, in fact, marijuana present. We review a trial court's decision on a Rule 20 motion de novo, viewing the evidence in the light most favorable to upholding the verdict. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). A court does not err in denying a Rule 20 motion if "'viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

¶7 Padilla is mistaken that the state had to prove marijuana was present to demonstrate the murders were committed in furtherance of an attempt to transfer

marijuana. The authority Padilla-Contreras cites does not stand for that proposition.[1] It is axiomatic that an attempted crime is incomplete—an attempted crime requires only an intent to commit the crime and some conduct in furtherance of that intent. § 13-1001(A)(2). And, as the state correctly points out, factual impossibility is not a defense to attempt. *State v. McElroy*, 128 Ariz. 315, 317, 625 P.2d 904, 906 (1981); *State v. Carlisle*, 198 Ariz. 203, ¶ 17, 8 P.3d 391, 396 (App. 2000). Thus, even assuming there was insufficient evidence that a transfer of marijuana actually occurred, it is sufficient that Padilla-Contreras believed he was participating in the transfer of marijuana and took steps in furtherance of that crime. *See McElroy*, 128 Ariz. at 317, 625 P.2d at 906 (intent to possess dangerous drugs coupled with "conduct toward the commission of [that] crime" sufficient when defendant mistakenly believed pills were dangerous drug).

¶8 Padilla-Contreras additionally argues the murders occurred before any transfer or attempted transfer of the marijuana and, therefore, they did not occur "in furtherance" of that crime pursuant to § 13-1105(A)(2). But the law is clear that felony murder occurs when the homicide made it possible for the defendant to commit the underlying crime.[2] *See Lacy*, 187 Ariz. at 350, 929 P.2d at 1298 (felony murder exists

[1]Padilla-Contreras cites *State v. Arce*, 107 Ariz. 156, 483 P.2d 1395 (1971) and *State v. Cota*, 191 Ariz. 380, 956 P.2d 507 (1998), neither of which address the attempted transfer of marijuana or other illegal substances.

[2]Padilla-Contreras asserts the state should have pursued a theory of first-degree murder based on accomplice liability instead of a felony murder theory. But he cites no authority suggesting those theories are mutually exclusive or the state must pursue a particular theory at trial. *Cf. State v. Hankins*, 141 Ariz. 217, 221, 686 P.2d 740, 744 (1984) ("It is clearly within the sound discretion of the prosecutor to determine whether to file charges and which charges to file.")

where murder "made it possible for [defendant] to steal"). And we reject Padilla-Contreras's argument that *Lacy* reasonably may be read to require that the predicate felony occur before the homicides—instead, that case makes clear that a homicide intended to make the offense possible constitutes felony murder. *Id.*

¶9 In any event, there is no question the jury could conclude Padilla-Contreras and Flaco were engaged in an attempt to transfer marijuana when P. and R. were murdered. And, based on Padilla-Conteras's admission that the marijuana had not yet been paid for when the murders occurred and his statement to the victims immediately before the shootings that "[t]his is as far as you go," a jury readily could surmise the killings were performed to facilitate that transfer, to wit, to allow Padilla-Contreras and Flaco to obtain the marijuana without paying for it.

¶10 For the reasons stated, Padilla-Contreras's convictions and sentences are affirmed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge