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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. TIARON GERMAINE ROSS, Appellant.	)	2 CA-CR 2011-0123 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090383001

Honorable Richard D. Nichols, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Craig W. Soland — Phoenix
Attorneys for Appellee

Emily Danies — Tucson
Attorney for Appellant

K E L L Y, Judge.

¶1 Following a jury trial, appellant Tiaron Ross was convicted of second-degree murder. He was sentenced to sixteen years in prison. On appeal, he argues that the trial court erred by denying his motion for a judgment of acquittal as to second-degree

murder, by not giving two jury instructions, and by denying his motion for a new trial. Additionally, Ross asserts the prosecutor committed misconduct during closing argument. For the reasons that follow, we affirm.

Background

¶2 We view the facts in the light most favorable to upholding the conviction. *State v. Sprang*, 227 Ariz. 10, ¶ 2, 251 P.3d 389, 390 (App. 2011). In 2003, Ross and the victim, D.H., were standing in the front yard of the house where Ross lived. Following an argument, both Ross and D.H. drew their guns. Many shots were fired. Ross shot D.H. six times; he died at the hospital. Ross was not injured.

¶3 Nearly six years later, Ross was indicted for first-degree murder. During trial, Ross moved for a judgment of acquittal. The trial court granted his motion as to the first-degree murder charge but allowed the trial to proceed on the lesser-included offenses. Ross asserted the justification defenses of self-defense and crime prevention. The jury ultimately found him guilty of second-degree murder. Following the pronouncement of his sentence, Ross filed this appeal.

Discussion

Motion for Judgment of Acquittal

¶4 Ross claims the trial court erred in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. We review de novo a trial court's decision on a Rule 20 motion. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶5 A motion for judgment of acquittal should be granted only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt," *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996), and it "may be either circumstantial or direct," *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). "If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury." *State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds by State v. Alvarez*, 213 Ariz. 467, 143 P.3d 668 (App. 2006).

¶6 Ross contends the state failed to present substantial evidence to prove that he had not acted with justification. But the state presented evidence suggesting that Ross did not assert self-defense until he was confronted with confirmation that his DNA was found on the murder weapon.[1] In an interview with a police officer shortly after the shooting, Ross maintained he had been inside the house at the time shots were fired. In a subsequent interview with police more than five years later, Ross again stated he did not kill D.H. It was not until after the DNA evidence became available that Ross first asserted self-defense.

[1]On appeal, Ross mentions the justification of "crime prevention" only in conjunction with his self-defense argument, claiming that "[d]efending himself would also be an act to prevent the commission of a crime against [the other people on the premises]." To the extent he intended this to be considered as a separate issue, it is waived for insufficient argument. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review).

¶7 The state also presented evidence that Ross may have been the first to arm himself and the first to fire his weapon. A witness testified that just before the shooting began, Ross had gone back inside the house briefly and had come back out with a gun. She also stated she had not seen a gun in the victim's possession at the time Ross went inside. Another witness, one of Ross's former neighbors, testified he had looked out the window of his home after hearing two gunshots and saw the victim, looking panicked or anxious, shoot four rounds. Only four shell casings from a .45 caliber weapon—the type used by the victim—were found at the scene of the shooting.[2] Because the state presented evidence from which reasonable minds could differ over whether Ross had acted in self-defense, the trial court did not err in denying Ross's motion for a judgment of acquittal. *See id.*

Jury Instructions

¶8 Ross next argues the trial court erred by failing sua sponte to instruct the jury "on the lesser included offense of manslaughter." But, although Ross now argues the instruction was required, he objected below to an instruction "on any theory of manslaughter." Therefore, any error in the failure to give a manslaughter instruction was invited. *See State v. Lucero*, 223 Ariz. 129, ¶ 20, 220 P.3d 249, 256 (App. 2009) ("expressly requesting the superior court not to give a lesser-included offense instruction amounts to invited error"). And, when a defendant invites error, he waives the right to challenge it on appeal. *See State v. Logan*, 200 Ariz. 564, ¶¶ 8-9, 30 P.3d 631, 632-33 (2001). Consequently, Ross has waived the issue, and we do not address it further.

[2]Ross had a nine-millimeter weapon.

¶9 Ross next argues the trial court erred by refusing to give an instruction "on the law of being a prohibited possessor." We review a court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004). A defendant is entitled to a jury instruction "on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). But, "[a] defendant is not entitled to an instruction on an uncharged offense that does not qualify as a lesser-included offense, even if he might have been charged [with] or convicted of the offense." *State v. Gonzalez*, 221 Ariz. 82, ¶ 8, 210 P.3d 1253, 1255 (App. 2009).

¶10 Ross requested the trial court give a jury instruction, based on the language of A.R.S. § 13-3101(A)(7)(b), defining the term "prohibited possessor." Ross claimed the instruction was necessary because he had presented evidence that, at the time of the shooting, it was illegal for him to possess a firearm and this was "part of the reason" he initially denied involvement. The court declined to give the instruction, but it gave Ross permission to argue this point to the jury and further stated that if the state raised any dispute, it would consider giving the instruction.[3]

¶11 Ross argues the trial court erred in refusing to give the instruction because the jury could have ignored his argument on the subject as "mere prattle" and an instruction would have "bolster[ed] his credibility." But, because Ross was not charged with possession of a firearm as a prohibited possessor, he was not entitled to a jury

[3]During closing argument Ross repeatedly asserted that he was prohibited from possessing a firearm. The state did not challenge these assertions.

instruction on that offense. *See Gonzalez*, 221 Ariz. 82, ¶ 8, 210 P.3d at 1255. Accordingly, the court did not abuse its discretion in rejecting the instruction. *See Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d at 1162.

Motion for New Trial

¶12 Ross further argues the trial court erred by denying his motion for a new trial. In his motion, Ross's counsel claimed he had "made a serious mistake in not requesting extensive voir dire of the jury panel on the issue of the [January 8, 2011] shootings" in Tucson in which six people were killed and thirteen others were injured. Ross maintains that the trial court erred by not fulfilling its "duty to sua sponte conduct extensive voir dire to clarify . . . each juror's objectivity." The state asserts this issue was not adequately preserved for appeal and, therefore, we should review only for fundamental error. But even assuming, without deciding, that the issue was preserved, we find no error.

¶13 Ross contends the "pretrial publicity" regarding these shootings necessarily impacted the jury panel and necessitated further inquiry on the part of the trial court. But the three cases he cites in support all deal with pretrial publicity about the underlying offense, not publicity about an unrelated event. *See State v. Atwood*, 171 Ariz. 576, 602, 832 P.2d 593, 619 (1992), *disapproved of on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001); *State v. Befford*, 157 Ariz. 37, 39, 754 P.2d 1141, 1143 (1988); *State v. LaGrand*, 153 Ariz. 21, 33-34, 734 P.2d 563, 575-76 (1987). Ross cites no authority, and we are aware of none, to support his assertion that the

publicity from an entirely separate incident imposes a duty on a judge to conduct a more extensive voir dire. Consequently, Ross's claim of error fails.

Prosecutorial Misconduct

¶14 In his conclusion, Ross appears to raise a fifth argument, asserting that the prosecutor committed misconduct during closing argument by making a comment that "had no basis in the evidence." But, as Ross acknowledges, he did not raise this issue in the trial court. He therefore has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Furthermore, because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Disposition

¶15 Ross's conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge