FILED BY CLERK
AUG 31 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARCO ANTHONY GLASER, Appellant.	2 CA-CR 2011-0125 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072697

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and Alan L. Amann — Tucson
Attorneys for Appellee

Nicole Farnum — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Marco Glaser was convicted of two counts of first-degree murder and three counts of aggravated assault with a deadly weapon or dangerous

instrument. The trial court sentenced him to two consecutive terms of natural life in prison and three terms of 7.5 years' imprisonment to run concurrently with each other but consecutively to the natural-life terms. On appeal, Glaser argues the evidence of premeditation was insufficient to support his first-degree-murder convictions and the court erroneously admitted certain impeachment testimony. For the reasons that follow, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict[s] and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). Late one night in July 2007, Glaser was having drinks at a nightclub in Tucson with his friend Brian B. and Brian's girlfriend, Guadalupe D. ("Lupita"). They were joined by two of Brian's other friends, Josue G. and Miguel G. As it neared closing time, the head of security informed Brian that Glaser was drunk and needed to leave, and all five left the club around 1:45 a.m. after purchasing a bottle of tequila from the bar.

¶3 In the parking lot, the group got into separate vehicles. Josue and Miguel had arranged for a friend, Cecelia V., to drive them to Brian's house where they would rejoin the others and continue drinking in Brian's hot tub. Brian, Lupita, and Glaser drove together in a different car. At approximately 2:30 a.m., Cecelia, Josue, and Miguel arrived at Brian's house. They saw a car that did not belong to Brian parked in front of the house, and Glaser was standing near the car "covered in blood" on one side of his

body. Glaser was holding a gun, which he raised and pointed at them. Cecelia quickly reversed the car and drove away.

¶4 Cecelia stopped the car a short distance from Brian's house to calm herself, and the car from Brian's house sped past them. Cecelia followed the car briefly to attempt to record the license plate number but stopped when prompted by Josue and Miguel and drove back to Brian's house. No one answered the door, and when they called Brian's cell phone, they found it in the bushes with blood on it. They decided to report the incident to police, but rather than call 9-1-1, they drove to a west side substation of the Tucson Police Department, stopping on the way to buy water for Josue and Miguel, who were still drunk. They arrived at the substation shortly after 3:00 a.m., reported the incident to officers, and gave them Brian's phone.

¶5 Police officers went to Brian's home, and upon entering found nothing amiss inside. When they investigated the garage, however, they found Brian dead in the passenger seat of a car. In the car, they also found blood, bullet fragments, and a gun holster that had been damaged at the base where the gun barrel would rest.[1]

¶6 Meanwhile, near the time officers arrived at Brian's house, a group of people discovered a woman lying face down on the pavement in a pool of blood in the parking lot of a retail store. One witness determined the woman was dead and another called 9-1-1. The police, who were searching for Lupita based on Cecelia, Josue, and

[1]Lab testing of deoxyribonucleic acid (DNA) on the gun holster revealed a "minor [DNA] profile" that was consistent with Glaser's known profile but of insufficient quality to establish an exclusive match to Glaser's DNA.

Miguel's report, recognized that the two scenes were likely connected, and the woman eventually was identified as Lupita. Officers obtained video surveillance footage, which showed that a car had entered the parking lot and parked at 2:06 a.m. There were four flashes in rapid succession, after which the driver exited the car and crawled away, and another person exited from the passenger's side and shot the driver. The shooter then sat in the driver's seat, paused briefly, fired another shot, and drove away.[2]

¶7 Neither Josue nor Miguel could remember Glaser's name, and none of the three witnesses was able to identify him in a photo lineup.[3] However, detectives classified him as a person of interest based on information obtained from Brian's cell phone and obtained a search warrant for his apartment, where they seized a box and paperwork for a Ruger SP-101 five-shot revolver. Records indicated police previously had seized this gun from Glaser in connection with an unrelated incident but it had been returned to him a month before the murders. Information was released to the media and other law-enforcement agencies that Glaser was a person of interest, and a few days later, he was apprehended while entering the United States from Mexico under a false name.

¶8 Glaser was charged with two counts of first-degree murder and three counts of aggravated assault with a deadly weapon or dangerous instrument. After a first trial

[2]Glaser contends the surveillance video shows there were only five shots fired, not six. We have reviewed the video and determined there is footage from which the jury could find a sixth shot had been fired. Viewing the evidence in a light most favorable to sustaining the verdict, *see Klokic*, 219 Ariz. 241, n.1, 196 P.3d at 845 n.1, we conclude the jury reasonably could have inferred that Glaser had reloaded his five-round revolver in the intermittent pause and then fired a sixth shot.

[3]At trial, however, the witnesses did identify Glaser as the man they had been with at the nightclub and also as the man who later had pointed a gun at them.

ended in a mistrial because the jury was unable to reach a verdict, Glaser was convicted and sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Premeditation

¶9 Glaser first argues there was insufficient evidence of premeditation to convict him of either count of first-degree murder and therefore the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. The question of sufficiency of the evidence "is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). In evaluating a Rule 20 ruling, "'the relevant question is whether, after 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). Thus, if reasonable persons "'may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'" *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004), *quoting State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996).

¶10 To sustain Glaser's conviction of first-degree murder, the record must reflect substantial evidence he intended or knew his conduct would cause Brian's and Lupita's deaths, he actually caused their deaths, and he did so with premeditation. *See*

A.R.S. § 13-1105(A)(1).[4] Glaser concedes, and we agree, the evidence was sufficient to establish that he caused the deaths and that he intended to do so. He challenges only the sufficiency of the evidence that he premeditated the murders.

¶11 Under the statutory definition:

> "Premeditation" means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

A.R.S. § 13-1101(1). Our supreme court has interpreted this definition to require the state to prove actual reflection, but has held it may do so by either direct or circumstantial evidence. *State v. Thompson*, 204 Ariz. 471, ¶¶ 29-31, 65 P.3d 420, 427-28 (2003).

¶12 As to Lupita, a reasonable jury could find that Glaser premeditated her murder based on evidence that he got out of the car after shooting her once through the side, walked over to her as she attempted to crawl away, and shot her in the back of the head. *See State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995) (reflection proved when defendants shot victims in back of head, "execution style," while they lay on their

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[4]Section 13-1105(A)(1) reads, in relevant part:

> A. A person commits first degree murder if:
>
> 1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person . . . , with premeditation . . . .

Although the statute has been amended since Glaser was charged in 2007, the portions relevant to his case were not affected. *See* 2009 Ariz. Sess. Laws, ch. 130, § 1; 2008 Ariz. Sess. Laws, ch. 301, § 51.

stomachs). And, as the *Thompson* court recognized, although not a proxy for premeditation "the mere passage of time suggests that a defendant premeditated—and the state might be able to convince a jury to make that inference." 204 Ariz. 471, ¶¶ 29, 33, 65 P.3d at 427, 429. The manner of the killing, coupled with the amount of time it took Glaser to exit the vehicle, walk over to where Lupita lay on the ground, and shoot her in the head, were sufficient to allow the jury to infer that he premeditated her murder. Because reasonable persons could accept this evidence as sufficient to support a conclusion beyond a reasonable doubt that Glaser had actually reflected on his intent to kill Lupita, *see West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, the trial court properly denied his motion for a judgment of acquittal on the charge of Lupita's murder.

¶13 There also was substantial evidence that Glaser premeditated Brian's murder. Brian was shot twice in the head: once in the left cheek and once in the forehead. The precise placement of the latter shot—a contact shot delivered near the center of Brian's forehead—was enough to allow the jury to conclude it was fired as the result of a deliberate choice preceded by reflection. *See Murray*, 184 Ariz. at 32, 906 P.2d at 565. Moreover, the jury reasonably could infer that the shot to Brian's forehead was the sixth and last shot Glaser fired before he drove away, a shot that was preceded by a nearly twenty-second pause after he reentered the vehicle. As with Lupita, the placement of the shot, coupled with the passage of sufficient time to permit reflection, constituted sufficient evidence to allow the jury to reasonably conclude that Glaser premeditated Brian's murder. The trial court therefore properly denied the motion for a judgment of acquittal as to the charge of Brian's murder.

Margie's Testimony

¶14 Glaser next argues the trial court erroneously allowed his sister, Margie Romero, to testify to statements made by his girlfriend, Blanca Martinez, which repeated incriminating statements previously made by Glaser. After Blanca denied that Glaser had made any incriminating statements and also denied repeating such statements, Margie refuted this and testified that Blanca had in fact repeated the statements to her. We review a trial court's rulings on the admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶15 As an initial matter, we reject Glaser's characterization of these statements as "hearsay within hearsay," *see* Ariz. R. Evid. 805, because neither part of the combined statements was in fact hearsay. Glaser's statement to Blanca was nonhearsay because it was offered by the state against Glaser. *See* Ariz. R. Evid. 801(d)(2)(A) (statement not hearsay if offered by opposing party against party-declarant). And Blanca's repetition of Glaser's statement also was nonhearsay because it was offered as a prior inconsistent statement to impeach her testimony at trial. *See* Ariz. R. Evid. 801(d)(1)(A) (statement not hearsay if declarant testifies and is subject to cross-examination and statement is inconsistent with declarant's testimony). Thus Margie's testimony was categorically nonhearsay and did not need to fit within an exception to the hearsay rule.

¶16 Nevertheless, impeachment evidence may be inadmissible even if it does not implicate the hearsay rule. When prior inconsistent statements do more than merely impeach the declarant's testimony but also relate directly to the guilt of the defendant, our supreme court has recognized that "the possibility of prejudice is inordinately high

and the reliability of the statement requires resolution of a swearing contest between the declarant and the person to whom the statement was allegedly made." *State v. Cruz*, 128 Ariz. 538, 540, 627 P.2d 689, 691 (1981). To limit the need for such a resolution, the *Cruz* court postulated that "[e]ven though an out-of-court statement may be used to cast doubt on a witness' credibility, when it contains the dual purpose of tending to prove a defendant's guilt, it should not be admitted." *Id.*

¶17 But a year later, the supreme court limited *Cruz*'s holding, noting that it rested on Rules 102 and 403, Ariz. R. Evid., and emphasizing that the "principal concern must focus on the danger of unfair prejudice when the impeaching testimony is used for substantive purposes." *State v. Allred*, 134 Ariz. 274, 277-78, 655 P.2d 1326, 1329-30 (1982). The court then set forth five factors to be considered, among others, when determining whether such a danger exists:

> 1) the witness being impeached denies making the impeaching statement, and
>
> 2) the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or
>
> 3) there are other factors affecting the reliability of the impeaching witness, such as age or mental capacity, [or]
>
> 4) the true purpose of the offer is substantive use of the statement rather than impeachment of the witness, [or]
>
> 5) the impeachment testimony is the only evidence of guilt.

Id. at 277, 655 P.2d at 1329. In articulating this test, the court left open the possibility that other, unenumerated factors might also demonstrate unfair prejudice. *Id.*

¶18 Applying the framework set forth above, we find no error in the trial court's admission of Margie's testimony. The first and prerequisite factor is clearly met here: Blanca denied making the statements in question. Second, Margie is Glaser's sister; thus, any personal interest she had in the outcome of the trial would have weighed in his favor,[5] and the statements she offered to impeach Blanca's testimony were directly contrary to that interest. Glaser suggests Margie had an ulterior interest in improving her relationship with her mother that may have led her to offer false evidence against her brother, but this is belied by her testimony that she was testifying because the state had subpoenaed her and she was "[v]ery much" in "an uncomfortable position." We thus find the argument unpersuasive and further find no evidence in the record that Margie had an interest in testifying falsely against her brother, unlike the impeaching witness in *Cruz*, who was the victim's girlfriend. 128 Ariz. at 539, 627 P.2d at 690.

¶19 Third, as Glaser concedes, no evidence suggests Margie was an unreliable witness in terms of age or mental capacity or that there were other factors that might undermine the reliability of her testimony. And fourth, although the state concedes that the statements "had a clear substantive purpose," they nonetheless also had important impeachment value, namely the rebuttal of Blanca's testimony that she lacked knowledge of how the murders had been committed and that she had not spoken of the murders with Margie. Thus, we cannot say the "true purpose" of the offer was purely substantive. *Allred*, 134 Ariz. at 277, 655 P.2d at 1329.

[5]When asked whether she loved her brother, for example, she responded, "I do love my brother."

¶20 Finally, as Glaser again concedes, the impeachment testimony was not the only evidence of guilt. The great weight of the evidence pointed to Glaser as the killer in this case, including, among other things, that he was alone with the victims around the time of their deaths, he was seen "covered in blood" by three witnesses at Brian's house immediately after the killings, and he traveled to Mexico shortly after the murders and used a false identity to attempt to reenter the United States. Thus the admission of the testimony did not offend the *Allred* test, and we accordingly find no abuse of the trial court's discretion.

Disposition

¶21 For the foregoing reasons, Glaser's convictions and sentences are affirmed.

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

CONCURRING:

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

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