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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Appellee, v. JUREL DION ROBERSON, Appellant.	)	2 CA-CR 2011-0224 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101872001

Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Jonathan Bass
Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Lisa M. Hise
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Jurel Roberson appeals his convictions for second-degree murder, drive-by shooting, three counts of aggravated assault, and possession of a deadly weapon by a prohibited possessor. He argues the trial court erred by failing to sua sponte instruct the

jury on manslaughter pursuant to A.R.S. § 13-1103(A)(2) as a lesser-included offense of first-degree murder and by denying his motion to continue the trial. We affirm.

¶2 We view the facts in the light most favorable to upholding the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In November 2007, G., J., and R. arrived at a Tucson nightclub. Roberson was also at the club. At some point in the evening, Roberson spoke with G., who had a brief sexual relationship with a woman with whom Roberson had an "open" relationship, telling him to "treat her well." G., J., and R. left together to drive to a restaurant. The driver, J., saw Roberson driving another car and keeping pace with them. J. changed lanes and accelerated, but Roberson pulled alongside the car and fired several shots into it. A bullet hit R., lacerating his carotid artery and killing him. J. was struck in the cheek by a bullet, but G. was not injured.

¶3 Roberson was arrested and charged with first-degree murder, drive-by shooting, three counts of aggravated assault, and prohibited possession of a deadly weapon. At trial, Roberson testified that, although he did not recognize anyone in the victim's car, he had believed it might contain individuals with whom he had fought at the same nightclub a few weeks earlier. He claimed he had felt threatened by the way the other car changed lanes and varied its speed, and he had opened fire when he saw someone reach for what he believed to be a gun. The jury found Roberson guilty of second-degree murder as a lesser-included offense of first-degree murder, and guilty of the other charged offenses. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling twenty-two years.

¶4 Roberson first argues the trial court was required to instruct the jury on manslaughter pursuant to § 13-1103(A)(2), which provides that a person is guilty of manslaughter if he or she commits second-degree murder "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." Although Roberson acknowledges he did not request that instruction, he contends the court's failure to give the instruction sua sponte is fundamental error. *See State v. Finch*, 202 Ariz. 410, ¶ 19, 46 P.3d 421, 426 (2002) ("If a party fails to object to an error or omission in a jury instruction, we review only for fundamental error.").

¶5 A trial court's failure to give a jury instruction sua sponte on a lesser-included offense may be fundamental error in some scenarios. *State v. Fiihr*, 221 Ariz. 135, ¶ 9, 211 P.3d 13, 15 (App. 2008). A defendant is entitled to a jury instruction on a lesser-included offense if the "'greater offense cannot be committed without necessarily committing the lesser offense,'" and the "jury reasonably could find that only the elements of a lesser offense have been proved." *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006), *quoting State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980).

¶6 Sudden quarrel or heat-of-passion manslaughter upon adequate provocation requires proof of "a different circumstance" than second-degree murder. *Peak v. Acuña*, 203 Ariz. 83, ¶ 6, 50 P.3d 833, 834 (2002). To be entitled to an instruction on manslaughter under § 13-1103(A)(2), the evidence must be such that the jurors reasonably could find that a defendant committed the offense "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." Section 13-1101(4), A.R.S., defines "adequate provocation" as "conduct or circumstances sufficient to

deprive a reasonable person of self-control." We view the evidence in the light most favorable to the proponent of the instruction. *State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010).

¶7 Roberson points to evidence he claims supports an inference he had been provoked by G. or J., but Roberson identifies no evidence suggesting he was provoked by R., the person he killed. Even assuming arguendo that the doctrine of transferred intent applies to manslaughter under § 13-1103(A)(2),[1] and that the evidence warranted the instruction, we conclude any error was not fundamental.

¶8 The omission of a required instruction is fundamental error only if it "impedes the defendant's ability to present his defense." *State v. Valenzuela*, 194 Ariz. 404, ¶ 15, 984 P.2d 12, 15 (1999). "Failure to instruct properly or completely impedes a theory of defense when specific intent has become a key component, or 'battleground,' of the case, but no instruction concerning it is given by the trial judge." *Id.*, *quoting State v. Evans*, 109 Ariz. 491, 493, 512 P.2d 1225, 1227 (1973). Roberson's sole defense at trial was that he had acted in self-defense, believing the individuals in the vehicle, whom he claimed not to have recognized, intended to harm him. This defense is inconsistent with a finding he had been provoked by either G. or J. such that a reasonable person in his

[1]The jury was instructed on the doctrine of transferred intent as codified in A.R.S. § 13-203(B). Relevant here, § 13-203(B)(1) provides that: "If intentionally causing a particular result is an element of an offense, and the actual result is not within the intention or contemplation of the person, that element is established if . . . [t]he actual result differs from that intended or contemplated only in the respect that a different person . . . is injured." But, because § 13-1103(A)(2) requires provocation to be "by the victim," it is not clear whether the doctrine applies to heat-of-passion manslaughter. As noted above, because any error was not fundamental, we need not decide this question.

situation would have been deprived of self-control. *See* § 13-1101(4), 13-1103(A)(2). Indeed, Roberson insisted in his closing argument that "[h]e wasn't inflamed . . . [and] wasn't . . . in a state of mind where heat of passion or anything was coming up." Roberson is correct that, had he chosen to do so, he could have presented inconsistent defenses. *See State v. McPhaul*, 174 Ariz. 561, 564, 851 P.2d 860, 863 (App. 1992) (only entrapment precludes inconsistent defenses). But he cites no authority, and we find none, suggesting the omission of an unrequested instruction is fundamental error when that instruction is inconsistent with the defendant's chosen defense. And, in any event, Roberson has cited no authority, and we find none, suggesting that his discussion with G. at the nightclub or J.'s driving could constitute adequate provocation as contemplated by § 13-1101(4).

¶9 Roberson next argues the trial court erred in denying his motion to continue the trial. "The granting of a continuance is within the discretion of the trial court, and its decision will only be disturbed upon a showing of a clear abuse of such discretion and prejudice to defendant." *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). The prejudice to the defendant must be "substantial[]." *State v. Barreras*, 181 Ariz. 516, 520, 892 P.2d 852, 856 (1995).

¶10 On March 31, 2011, approximately one month before trial, Roberson moved to continue it for an unspecified amount of time, claiming he needed additional time to interview witnesses and to locate and interview an unnamed "vital witness." At the April 18 hearing on that motion, Roberson acknowledged the "vital witness" had been located and interviewed and another interview had been scheduled. He nonetheless

requested the trial be continued to permit him to investigate any leads that could arise from those interviews. The state noted that the recent interview was consistent with the statements that witness had made to police in 2007, and that there had been difficulties in scheduling several trial witnesses. The trial court denied the motion, affirming the May 3 trial date but stating it would "re-hear" the motion to continue on April 27 "[i]f there are further difficulties."

¶11 Roberson moved for reconsideration, again contending several interviews had not yet been scheduled and a recent interview had "resulted in numerous claims that need to be investigated." At a hearing on that motion on April 27, Roberson asked the trial court to continue the trial until "mid June" to permit him to complete the interviews and further investigate. The court denied Roberson's motion for reconsideration, but nonetheless continued the trial from May 3 to May 10.

¶12 Even assuming the trial court abused its discretion in denying his motion to continue, Roberson has not established resulting prejudice. Although Roberson's counsel desired a longer continuance, he was granted an additional week to prepare for trial. Roberson did not seek another continuance, nor did he inform the court that he did not, in fact, adequately complete his investigation or trial preparation. Roberson points to his claim below that he needed time to investigate individuals who allegedly had threatened him before the shooting "to explain [his] state of mind at the time of the incident," and suggested that "one of these men might be willing to come forward." But, to establish prejudice, Roberson must do more than claim a witness might have testified and that witness's testimony might have bolstered his defense. *See State v. Bishop*, 137 Ariz. 5, 9,

667 P.2d 1331, 1335 (App. 1983) (rejecting claim court erred in denying continuance to obtain witness absent "real showing that the witness would have furnished testimony that would have altered the outcome of the case"). Nor does Roberson identify anything else in the record suggesting his defense had been compromised. *See State v. Amarillas*, 141 Ariz. 620, 622, 688 P.2d 628, 630 (1984) (no prejudice in denial of continuance absent "evidence of lack of preparation, [or] of ineffective assistance of counsel").

¶13 For the reasons stated, we affirm Roberson's convictions and sentences.

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

CONCURRING:

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

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