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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. MARCO ANTONIO CHAVEZ, Appellant.	)	2 CA-CR 2010-0263 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064385

Honorable Richard D. Nichols, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Marco Chavez appeals from his multiple felony convictions, all arising from his burglary of a Tucson home. He maintains the trial court erred in denying his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., because there was insufficient evidence of premeditation to sustain his first-degree murder conviction and in denying his motion to suppress his statement to police because his waiver of rights was involuntary. Finding no error, we affirm.

Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In November 2006, Chavez kicked open the door of a Tucson home to burglarize it. At some point during the burglary, the homeowner, M., returned home and Chavez shot him in the face with a .357 Magnum. The bullet lodged in M.'s brain, causing damage that would have stopped him from moving more than one or two steps after he was hit. Chavez continued to take things from the house and started a fire in it. He fled in M.'s car and drove to Nogales.

¶3 In Nogales, Chavez went to the home of a friend, Daniel Tellez, with whom he had lived a few months before. He gave Tellez a television set and a basket of clothing from M.'s car. Unbeknownst to Tellez, he left M.'s car and other items from the burglary in Tellez's garage. After Tellez discovered the items in the garage and told Chavez to remove them, the two took a second television Chavez had stolen from M.'s home to Chavez's house in Tellez's truck. Along the way, Tellez failed to stop at a stop sign and officers, who had been watching Tellez's home, stopped Tellez's truck,

ultimately arresting the two. During a search of Chavez's and Tellez's homes, officers discovered various items from M.'s home and other items, including a pair of shoes that matched an imprint taken from M.'s front door and had M.'s blood on them.

¶4 Chavez was charged with first-degree murder, arson of an occupied structure, first-degree burglary, theft of a means of transportation, and theft by control. He was convicted on all counts, but the jury was unable to agree whether he should receive the death penalty or life in prison. The state thereafter withdrew its request for the death penalty and the trial court imposed a natural-life prison sentence, along with other consecutive, aggravated prison terms totaling eighty-eight years. This appeal followed.

Discussion

I. Premeditation

¶5 Chavez first contends the trial court erred in denying his motion for judgment of acquittal, made on the grounds the state had presented insufficient evidence of premeditation. "We review the trial court's ruling on a motion for judgment of acquittal for an abuse of discretion." *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *Id.* "If reasonable persons could differ as to whether the evidence establishes a fact in issue, then the evidence is substantial." *Id.* "In determining the sufficiency of the evidence to withstand a Rule 20 motion, we view the evidence in a light most favorable

to sustaining the verdict." *Id.* And a criminal conviction "may rest solely on circumstantial proof." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985).

¶6 Chavez filed a motion for judgment of acquittal pursuant to Rule 20 and the trial court heard argument on the motion on the last day of the guilt phase of Chavez's trial. Chavez argued, as he does on appeal, that the state presented insufficient evidence of premeditation to sustain a conviction for first-degree murder. The trial court denied the motion, concluding:

> [T]he circumstantial evidence supports a finding that the burglar was armed with a loaded pistol prior to committing the burglary.
>
> By being so armed, the burglar was preparing himself for the eventuality that when he was in the residence, the home owner could interrupt the burglary. And the burglar was prepared to either escape or shoot the person who interrupted the burglar.
>
> Second, the burglar was in the residence prior to the home owner interrupting the burglary. The trier of fact could find that the burglar either saw or heard the home owner come in, and at that time had an opportunity to decide whether or not to flee or kill the home owner.

Chavez renewed the motion at the close of the state's case and the court denied it again.

¶7 As an initial matter, we note that the jury did not unanimously agree whether Chavez had premeditated the murder, *see* A.R.S. § 13-1105(A)(1), or whether he had killed the victim in the course of a felony, *see* § 13-1105(A)(2); accordingly, if evidence was insufficient as to either theory, Chavez is entitled to reversal of his murder conviction. *See State v. Detrich*, 178 Ariz. 380, 383-84, 873 P.2d 1302, 1305-06 (1994) (if guilty verdict based in part on felony murder theory and underlying felony reversed,

murder conviction must be reversed); *cf. State v. Anderson*, 210 Ariz. 327, ¶ 59, 111 P.3d 369, 385 (2005) (court need not consider sufficiency of evidence supporting felony murder when jury returns separate guilty verdict for premeditated murder). Chavez argues only that the evidence was insufficient to sustain his conviction on a premeditation theory. We conclude sufficient evidence was presented to sustain Chavez's conviction under that theory.

¶8 The evidence of premeditation was entirely circumstantial and was as follows: (1) Chavez prepared for the burglary by arming himself with a loaded handgun; (2) Chavez shot M. from a distance of two to three feet away, permitting the inference he had an opportunity to aim and fire, rather than shooting M. during a struggle; (3) Chavez completed the burglary after he shot M., permitting the inference he had planned to use the handgun if necessary to complete the burglary; (4) M.'s injuries were such that he likely died in the immediate area where he was shot and his body was found—the master bedroom at the back of the house—allowing the inference that Chavez had the option to flee rather than shoot M. but elected to shoot; (4) M. was shot in the face, permitting the inference Chavez aimed to kill rather than disable M.; and (5) Chavez told Tellez that he had been in a struggle with a man in Tucson and had "knocked him out" and that he "had to do what he had to do."

¶9 Chavez first argues that a finding of premeditation cannot be premised solely upon possession, or use of, a gun in the killing. *Citing* 40A Am. Jur. 2D *Homicide* § 448 (2010), the state concedes that "premeditation may not be inferred solely from the

use of a deadly weapon."[1] But, as the state also argues, "there is more here than the mere use of a deadly weapon." "[T]he inference of premeditation may be shown by additional circumstances, such as . . . the defendant's conduct before and after the killing, or the striking of the lethal blow after the deceased was rendered helpless." *Id.* In this case, the state presented evidence that Chavez continued his burglary of the home after M.'s death. And, the jurors reasonably could have inferred that Chavez had shot M. after he was "rendered helpless" from his statement to Tellez that he had "knocked . . . out" the man in Tucson.[2]

¶10 In his reply, Chavez also argues that the evidence M. was shot from a distance of at least two or three feet was not probative of premeditation. He argues that based on injuries to his face and hand and the presence of pruning shears in the house, the jurors could have concluded there had been a struggle.[3] He maintains that a distance of

[1]We note, however, that none of the cases Chavez cites involve the commission of a burglary with a weapon. And we cannot agree with his characterization of his taking a weapon to burglarize a home as equivalent to a citizen carrying a weapon for protection on a day-to-day basis. Chavez directs us to no evidence in the record that he routinely carried a weapon or any other evidence that would bar an inference that he had acquired the gun for purposes of the burglary, conduct which is probative of premeditation. *See State v. Thompson*, 204 Ariz. 471, ¶ 31, 65 P.3d 420, 428 (2003) (acquisition of weapon before killing may be circumstantial evidence of premeditation).

[2]On cross-examination, Tellez expressed some confusion as to whether Chavez had said he "knocked him out or off." But, in his direct testimony he said Chavez had said "knocked him out."

[3]Chavez's work supervisor testified Chavez had told her the black eye resulted from boxing with a friend. He told the detective who interviewed him his brother had given him the black eye and that a cut on his hand was from his childhood. He also told Tellez that he had gotten the black eye while in Mexico. Thus, the jury could have

two or three feet "is arms length, the distance needed to level a gun and fire it" if Chavez shot M. during a struggle. He asserts that "nothing in the record . . . suggest[s] that any meaningful period of time elapsed between the burglar being struck and the shooting of the victim." And that "it is equally logical to assume that the burglar shot reflexively out of fear for his life."

¶11 First, we note that the fact that jurors could have drawn the inferences Chavez suggests does not foreclose a finding of sufficient evidence of premeditation. The jury could just as easily have drawn contrary inferences and concluded that Chavez's shooting M. at a distance, even a small one, had given him at least a brief time to reflect and then decide to kill M. *See State v. Thompson*, 204 Ariz. 471, ¶¶ 29, 31, 65 P.3d 420, 427-28 (2003) (passage of time is not itself premeditation or proxy for it, but is circumstantial evidence of premeditation). Thus, because "'reasonable minds could differ on the inferences to be drawn from the evidence,' which we construe in favor of upholding the trial court's ruling, the motion for judgment of acquittal" was properly denied. *State v. Molina*, 211 Ariz. 130, ¶ 8, 118 P.3d 1094, 1097 (App. 2005), *quoting State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003); *see also State v. Landrigan*, 176 Ariz. 1, 5, 859 P.2d 111, 115 (1993) ("Since reasonable minds could differ on the inferences to be drawn, the trial judge properly denied the Rule 20 motion.").

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rationally rejected the idea of a struggle between M. and Chavez entirely on the basis of evidence that Chavez had sustained the injuries elsewhere.

¶12 Likewise, that Chavez may have acted out of fear for his own life does not mean he did not act with premeditation. *See State v. Dickey*, 125 Ariz. 163, 169, 608 P.2d 302, 309 (1980). Additionally, in conjunction with the distance from which M. was shot, the fact that Chavez shot M. in the head with a .357 Magnum was also circumstantial evidence of premeditation upon which the jury could have relied. *See id.* (deadly nature of weapon allows inference of "intent to kill"); *see also State v. Hutton*, 143 Ariz. 386, 389, 694 P.2d 216, 219 (1985) (wounds in areas sure to cause death evidence of premeditation).

¶13 Chavez also maintains "[t]here was no evidence introduced at trial from which it could be deduced that the burglar 'saw or heard the homeowner come in,'" as the trial court suggested in its ruling on his motion. But, as noted above, even if the evidence was also suggestive "of a scenario in which the homeowner encountered the burglar in a rear bedroom," as Chavez suggests, a contrary inference and denial of the Rule 20 motion thereon is not foreclosed. *Molina*, 211 Ariz. 130, ¶ 8, 118 P.3d at 1097. And, in any event, as discussed above, other evidence was sufficient to support a finding of premeditation. Although the court cited Chavez's opportunity to flee as a basis for its ruling on the Rule 20 motion, we are not limited on review to considering only the evidence cited by the trial court and may affirm its ruling on any ground.[4] *See State v.*

[4]Although the state makes no argument on the point, we also note that the fire investigator testified it was possible M. had been "barely alive and . . . on his way to being deceased" when Chavez started a fire in the bedroom where M. was lying on the floor. Likewise, the forensic pathologist testified M. had taken "a few breaths" in the fire before he died. Although M.'s cause of death was the gunshot wound to his head, jurors could have considered Chavez's failure to get aid for M. and decision to leave him to die

Eastlack, 180 Ariz. 243, 258-59, 883 P.2d 999, 1014-15 (1994) ("On appeal, 'the question of the sufficiency of the evidence to sustain the verdict . . . is . . . determined . . . by a consideration of all the evidence presented in the case.'"), *quoting State v. Marchesano*, 162 Ariz. 308, 312, 783 P.2d 247, 251 (App. 1989) *disapproved on other grounds by State v. Phillips*, 202 Ariz. 427, n. 4, 46 P.3d 1048, 1058 n. 4 (2002); *State v. Aguilar*, 218 Ariz. 25, ¶ 22, 178 P.3d 497, 503 (App. 2008) ("[W]e can uphold the court's ruling if it was legally correct on any ground . . . .").

II. Waiver of rights

¶14 Chavez also maintains the trial court erred in denying his motion to suppress his statement to police detectives because although a detective had given him the warning required by *Miranda*,[5] he had not "knowingly waived his right to remain silent."[6] We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion, considering the evidence in the light most favorable to upholding the court's decision. *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991).

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in the fire if not already dead as circumstantial evidence of premeditation. *Cf. Lamb v. State*, 532 So. 2d. 1051, 1053 (Fla. 1988) (refusal to call ambulance for victim after leaving scene evidence of premeditation).

[5]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[6]As the state points out, "[t]he voluntariness of a *Miranda* waiver and the voluntariness of the statement . . . are separate issues." *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *State v. Tapia*, 159 Ariz. 284, 286, 767 P.2d 5, 7 (1988) ("Voluntariness and *Miranda* violations are two separate inquiries."). In his opening brief, Chavez argues only that his *Miranda* waiver was involuntary and does not address the voluntariness of his statement itself. He contends otherwise in his reply brief, but his arguments there focus on the voluntariness of his waiver of rights as well.

We consider only the evidence presented at the suppression hearing. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996).

¶15 After Chavez and Tellez were arrested, Chavez was taken to the Nogales Police Department and told that Tucson police officers wanted to talk to him. While waiting at the police department, Chavez began to feel ill as a result of his liver cirrhosis. He was taken to the hospital, treated with morphine, and released. He was prescribed Vicodin at the hospital, and five tablets of the drug were given to the detective who had accompanied him. Back at the police department, at approximately three o'clock in the morning, Tucson police detectives began interrogating Chavez. The detectives read Chavez the warnings set forth in *Miranda* and he agreed to waive his rights and speak to them. Chavez denied any involvement in a burglary in Tucson.

¶16 Chavez maintains his waiver of rights was involuntary because (1) he was interrogated in the middle of the night, (2) he was in pain as a result of his cirrhosis during the interrogation, (3) he was medicated with morphine, and (4) the interrogating detective "deliberately misle[]d" him. A defendant may waive the rights set forth in the *Miranda* warning provided the waiver is voluntary, knowing, and intelligent. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). To be knowing and intelligent, a waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*; *see also State v. Rivera*, 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987). To determine whether Chavez's waiver here was knowing and intelligent, we look to the totality of the circumstances surrounding it, including his "'background, experience and conduct.'" *See Rivera*, 152 Ariz. at 513, 733

P.2d at 1096, *quoting State v. Montes*, 136 Ariz. 491, 495, 667 P.2d 191, 195 (1983). "[A]n effective waiver must be both *cognitive* and free from compulsion. Defendant must have understood his rights, intended to waive them and the decision must not have been compelled by governmental impropriety." *State v. Carrillo*, 156 Ariz. 125, 135 n.15, 750 P.2d 883, 893 n.15 (1988).

¶17 First, nothing in the record suggests Chavez was unable to understand his rights or his waiver of them. When the detective who interrogated Chavez asked him if he understood his rights, he answered, "Yes." Later in the interrogation Chavez told the detective he had been given "a dose of morphine" and felt "kinda slow[]." But, when she asked if he understood what she was saying, he said, "Yes, yes" and assured her he was not having trouble understanding. Likewise, at the suppression hearing, the detective testified that although Chavez had "seemed maybe tired," he had not appeared "to be ill or in pain" and his answers to questions had been appropriate. In a defense counsel interview introduced at the hearing, Chavez's doctor stated that the morphine would have had an effect at the time of the interrogation approximately two and a half hours after it was given. But, he also stated that by that time, it would be unusual for the medication to cause confusion and it would "be in the system at . . . a very low degree." Chavez did not testify at the hearing and has not directed us to any evidence at the hearing to support his assertion that he did not understand his rights as a result of the hour or the medication. *See* Ariz. R. Crim. P. 31.13(c)(1)(iv) (brief must contain statement of facts with appropriate citation to the record). In any event, that Chavez may have been impaired would go to whether he was susceptible to police coercion, but would not alone render

his waiver involuntary. *Cf. State v. Smith*, 193 Ariz. 452, ¶ 14, 974 P.2d 431, 436 (1999) ("When evaluating coercion, the defendant's physical and mental states are relevant to determine susceptibility to coercion, but alone are not enough to render a statement involuntary.").

¶18 Chavez's waiver therefore being cognitive, we turn to "an objective evaluation of the police officer's conduct." *Carrillo*, 156 Ariz. at 135, 750 P.2d at 893. "'The sole concern of the fifth amendment, on which *Miranda* was based, is governmental coercion.'" *Id.*, *quoting Colorado v. Connelly*, 479 U.S. 157, 170 (1986). Thus, the "voluntariness of a waiver . . . depend[s] on the absence of police overreaching." *Connelly*, 479 U.S. at 170. Chavez maintains the interrogating detective misled him in a manner that rendered his waiver involuntary, but the record does not support his argument.

¶19 During the interrogation, Chavez asked the detective if she was "from Metro." She responded affirmatively. Before Chavez's question, the detective had told him she was "from Tucson" and "wanted to talk to [him] about some things that are going on up there and some things that you and [Tellez] might know about." At the suppression hearing, the detective testified she had not known what Chavez meant by "Metro," and had thought perhaps it was just referring "to the city police." She stated that she knew there had been "an assignment called Metro which dealt with drugs, but that was years ago" and that she had not been "trying to refer to" that. Chavez has not directed us to any evidence in the record supporting his assertion that he believed "Metro" referred to such an agency. *See* Ariz. R. Crim. P. 31.13(c)(1)(iv). And, the

detective told Chavez she was investigating a situation involving items stolen in Tucson during the interrogation.

¶20 Chavez relies on the Supreme Court's decision in *Fare v. Michael C.*, for the proposition that the police are required to inform a defendant about what offense they are investigating. 442 U.S. 707, 726 (1979). But, that court has specifically held that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Colorado v. Spring*, 479 U.S. 564, 577 (1987). The defendant in *Spring* alleged that, by failing "to inform him of the potential subjects of interrogation," the police had engaged in the type of "trickery and deception condemned in *Miranda*," thereby rendering his waiver of rights involuntary. The court stated it had "never held that mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of *Miranda* rights." *Spring*, 479 U.S. at 576. And, although the court noted that it had previously invalidated *Miranda* waivers where police had made "affirmative misrepresentations,"[7] it noted the lack of "coercion" by the interrogating officers in Spring's case. *Id.* at 575-76. Even accepting arguendo that the detective's answer to Chavez's question about "Metro" here constituted more than the "mere silence" discussed in *Spring*, we cannot say that it rose to the level of "coercion." *Id.* at 575-76.

[7]The court gave examples of this type of misrepresentation as well, including situations in which interrogators informed a suspect that she would lose state aid for her child or that a friend would lose his job as a police officer if the suspect failed to cooperate.

¶21 Furthermore, we agree with the state that any possible error in this regard would be harmless. As noted above, Chavez denied any involvement in the crime during the interrogation. And, although some of his statements to police were contradicted by other evidence at trial, the evidence of Chavez's guilt, including his possession of M.'s property and the presence of M.'s blood on Chavez's shoes, rendered any error in this regard harmless.[8] *Cf. State v. Flores*, 201 Ariz. 239, ¶ 7, 33 P.3d 1177, 1179 (App. 2001) (any error as to voluntariness of statements harmless when "none of those statements constituted a confession in the ordinary sense" and overwhelming evidence of guilt). In sum, because the trial court did not abuse its discretion in determining that Chavez had understood his rights and had intentionally waived them and that the interrogating officer had not overreached or coerced Chavez's waiver of his rights, it properly denied his motion to suppress.

Disposition

¶22 Chavez's convictions and sentences are affirmed.

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

CONCURRING:

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

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

[8]As the state points out, nothing in Chavez's statement bolstered the state's case in regard to premeditation.