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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. RODNEY LAVON KIRK, JR. Appellant.	2 CA-CR 2010-0230 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093988001

Honorable John S. Leonardo, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Rodney Kirk was convicted of manslaughter, and the trial court sentenced him to a partially mitigated sentence of eight years' imprisonment. Kirk

argues there was insufficient evidence supporting his conviction and contends the court erred by refusing a jury instruction, allowing the music for a memorial video to be heard at sentencing, improperly considering aggravating factors, and instructing the jury on reasonable doubt. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). In October 2009, Kirk and his girlfriend, K.S., went to dinner at Kirk's mother's house. Kirk brought with him a handgun that K.S. recently had given him as a birthday present. Shortly after the couple left the home, Kirk returned, saying K.S. had been shot. K.S. later died from a gunshot wound to her chest.

¶3 Kirk told responding officers the gun had discharged accidentally after he had dropped it while preparing to buckle his seatbelt, and that the gun was loaded and there had been a bullet in the chamber. He also said he had fired the gun over a hundred times, was familiar with the gun, and knew how to tell when there was a bullet in the chamber.

¶4 A forensics firearms expert examined and tested the gun and determined it was in working order and highly unlikely to fire if dropped. In addition, the autopsy revealed K.S. had died from a "contact range gunshot wound," meaning the muzzle of the gun had been pressed against her when it was fired. When detectives confronted Kirk with the autopsy results, he said he and K.S. had been "playing" and he had pulled the

trigger and shot her. He also said there was not supposed to have been a bullet in the chamber and he did not check before pulling the trigger.

¶5 Kirk was charged with one count of second-degree murder, and a jury convicted him of the lesser offense of reckless manslaughter. He was sentenced as outlined above. We have jurisdiction over Kirk's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Sufficiency of the Evidence

¶6 Kirk first argues there was insufficient evidence supporting his manslaughter conviction. "Every conviction must be based on 'substantial evidence.'" *State v. Miles*, 211 Ariz. 475, ¶ 23, 123 P.3d 669, 675 (App. 2005), *quoting* Ariz. R. Crim. P. 20(a). That is "'proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). On appeal, we evaluate the evidence in the light most favorable to upholding the verdict and will reverse a conviction for insufficient evidence "'only if there is a complete absence of probative facts'" to support the jury's conclusion. *Id.*, *quoting State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000).

¶7 In order to sustain Kirk's conviction for reckless manslaughter, there must be substantial evidence he was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that his actions would result in the victim's death and had grossly deviated from the standard of conduct a reasonable person in the same situation would

observe. A.R.S. § 13-105(10)(c) (definition of "recklessly"); *see also* A.R.S. § 13-1103(A)(1) (manslaughter committed by "[r]ecklessly causing the death of another person"). We must determine "whether the evidence required for a finding of criminal recklessness existed in sufficient quantity so that any rational trier of fact could so find beyond a reasonable doubt." *In re William G.*, 192 Ariz. 208, 212, 963 P.2d 287, 291 (App. 1997). "[A]bsent a person's outright admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances." *Id.* at 213, 963 P.2d at 292.

¶8 Kirk contends the evidence "did not show that [he] recklessly caused K[.S.]'s death" and "[n]othing contradicted his claim that the shooting was accidental." In support of his argument, he points to evidence he only recently had obtained the gun and, at the time of the shooting, his mother was in the process of enrolling him in a firearms course because she was concerned he needed more safety training. He further claims that, although he "showed familiarity with some of the pistol's safety features when he spoke to detectives, he did not mention or show any awareness of the rules of firearm[] safety," and he contends his lack of knowledge about "safety rules" meant he could have been "careless [when] handling a firearm, but [c]ould not [have] consciously disregard[ed] a risk."

¶9 The record, however, reflects substantial evidence that Kirk was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that his actions would result in K.S.'s death. § 13-105(10)(c). Contrary to his characterization on appeal that the gun "accidentally discharged," Kirk admitted to a detective that he had held the gun

against K.S. and then pulled the trigger. And although he argues it was "obvious . . . he did not have adequate training or understanding of how to handle a firearm properly," Kirk admitted to the detective he had fired the gun over a hundred times and knew how to tell if it had a bullet in the chamber. On the night of the incident, he also admitted knowing the gun was loaded and had a bullet in the chamber. Further, when the autopsy revealed that the gun had been touching K.S.'s chest when it was fired, Kirk retracted his initial claim that the gun had discharged when it fell from his hand and instead maintained he and K.S. had been "playing" and he had pulled the trigger without first checking the chamber.

¶10 From this evidence, the jury reasonably could infer that Kirk had been aware of and disregarded the substantial and unjustifiable risk that his actions would result in K.S.'s death and that those actions constituted a gross deviation from conduct a reasonable person would observe in a similar situation. *See State v. McGill*, 213 Ariz. 147, ¶ 19, 140 P.3d 930, 936 (2006) (when defendant started fire in small building and thought one apartment unoccupied, reasonable jury could find defendant aware of and consciously disregarded substantial and unjustifiable risk apartment occupied, placing occupant at substantial risk of imminent death or physical injury); *State v. Jansing*, 186 Ariz. 63, 68-69, 918 P.2d 1081, 1086-87 (App. 1996) (defendant who "consume[d] the equivalent of ten beers, operate[d] a vehicle, and then deliberately fail[ed] to stop at a stop sign" aware of and consciously disregarded substantial and unjustifiable risk her actions could cause death), *overruled on other grounds by State v. Bass*, 198 Ariz. 571, 12 P.3d 796 (2000); *cf. State v. Nieto*, 186 Ariz. 449, 453, 456, 924 P.2d 453, 457, 460

(App. 1996) (affirming second-degree murder conviction where defendant fired shotgun at another vehicle; defendant "was familiar with guns and their danger" and "[c]learly. . . had knowledge of the risk involved in his behavior"). Here, there was substantial evidence from which a rational juror could conclude beyond a reasonable doubt that Kirk had acted recklessly.

Jury Instructions Concerning Range of Potential Sentences

¶11 Kirk next argues the trial court erred in denying his motion to have the jury instructed on the range of possible sentences he could receive if convicted. He contends this denial violated his rights to due process and a fair trial. "We will not disturb a trial court's decision to refuse a jury instruction absent a clear abuse of its discretion, but review de novo whether the proffered instruction correctly stated the law." *State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004) (citation omitted).

¶12 Both the United States and Arizona Supreme Courts have held that juries generally should be instructed not to consider a defendant's possible sentence during deliberations. *See Shannon v. United States*, 512 U.S. 573, 579 (1994); *State v. Koch*, 138 Ariz. 99, 105, 673 P.2d 297, 303 (1983).[1] As the Supreme Court has explained,

> The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor . . . between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence . . . . Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover,

[1]An exception to this rule applies when juries have sentencing responsibilities, such as in capital trials. *See Shannon*, 512 U.S. at 579 n.4.

> providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.

Shannon, 512 U.S. at 579.

¶13 Acknowledging this authority, Kirk presents a number of theories as to why the trial court nevertheless erred, contending the proscription against informing juries "needs to be reconsidered now that juries have a sentencing function under *Blakely v. Washington*, [54]2 U.S. 296 (2004)," and sentencing information would "enhance [jurors'] ability to act as fact finder" because "withhold[ing] such information shields the jury from critical information and eviscerates [its] ability to render a finding of fact that is premised on full and complete information." He further argues that because "the rule against considering the punishment is ostensibly for the defendant's benefit, if he wishes for the jury to be informed on the range of sentencing, the court should do so, because there is no constitutional or statutory prohibition against providing the jury with this information."

¶14 None of these theories has merit. Although juries do make factual findings concerning issues that relate to sentencing, this does not mean their role as fact-finder has changed. Juries continue to "consider[] the evidence presented during the trial, deliberate[] thereon and determine[] the factual issues raised by the case." *State v. Tims*, 143 Ariz. 196, 198, 693 P.2d 333, 335 (1985). Accordingly, it remains true that "[t]o allow the jury to consider the possible punishment would be to allow them to base their decision on sympathy, passion or prejudice." *State v. Olsen*, 157 Ariz. 603, 608, 760

P.2d 603, 608 (App. 1988); *see also Shannon*, 512 U.S. at 579 (because jury's function limited to "find[ing] the facts," information about sentencing "irrelevant" and may improperly influence jury's fact-finding or otherwise create confusion); *Tims*, 143 Ariz. at 198, 693 P.2d at 335 (jury "should not be concerned with the possible sentences that the trial judge could impose, and such matters should not affect its deliberations and determination of guilt or innocence").

¶15 Moreover, as the Supreme Court has explained, "Whether the instruction works to the advantage or disadvantage of a defendant is . . . beside the point. Our central concern here is that the inevitable result of such an instruction would be to draw the jury's attention toward the very thing—the possible consequences of its verdict—it should ignore." *Shannon*, 512 U.S. at 586; *see also Olsen*, 157 Ariz. at 608, 760 P.2d at 608 (allowing jury to consider possible punishment would allow decision based on sympathy, passion or prejudice). Both this court and our supreme court have rejected similar arguments. *See, e.g.*, *Tims*, 143 Ariz. at 197-98, 693 P.2d at 334-35 (affirming refusal to allow defense counsel to voir dire jury regarding life imprisonment sentence associated with charged crime); *Olsen*, 157 Ariz. at 608-09, 760 P.2d at 608-09 (affirming denial of defendant's request to instruct jury regarding consequences of finding of dangerousness).

¶16 Finally, as the state points out, this court is not free to disregard our supreme court's holdings on this issue. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003) (court of appeals bound by our supreme court's decisions).

Accordingly, we conclude the trial court did not abuse its discretion in denying Kirk's motion to inform the jury of the potential range of sentences.

Memorial Video Music

¶17 Kirk next argues the trial court erred by allowing the music accompanying a memorial video, shown at sentencing at K.S.'s family's request, to be heard. Kirk had filed a motion to preclude the video's music, arguing it was "well beyond the boundary of what is permitted" and had "no purpose other than to appeal to emotion." The court denied his motion but also instructed that the music be kept "low." We review the court's ruling for an abuse of discretion. *Cf. State v. Dann*, 220 Ariz. 351, ¶¶ 66, 117, 207 P.3d 604, 618, 625 (2009) (rulings on admission of evidence reviewed for abuse of discretion).

¶18 Kirk maintains the music "bore no relationship to the crime or the effect of the crime on the victim's family," was not evidence or otherwise probative, and "contributed an unfair emotional impact." He further argues the music "clearly had an impact on the trial court" because it found the impact of the death on the family was an aggravating factor, and he points to the trial court's statement, "I think that K[.S.] would be very proud of the loving commemoration that her family has demonstrated in her memory here this morning."

¶19 We agree with the state, however, that we must presume the trial court did not consider the music in sentencing Kirk because "we presume the trial judge will ignore irrelevant information" concerning sentencing. *State v. Mann*, 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997). And the cases upon which Kirk relies concern instances where the

jury was involved in sentencing, as opposed to the judge. *See Kelly v. California*, ___ U.S. ___, 129 S. Ct. 564 (2008) (denying petitions for certiorari in two capital cases where juries shown video memorials dedicated to victims); *Payne v. Tennessee*, 501 U.S. 808, 816 (1991) (victim impact evidence presented to jury during capital-case sentencing). Moreover, K.S.'s brother addressed the court at length concerning the impact her death has had on the family in both practical and emotional terms; therefore, as the state suggests, the court's "finding of the emotional impact of the crime on the family is supported by more than the music in the memorial video." Although Kirk argues the court should have precluded the music if it "was going to ignore the music in reaching its sentencing decision," the court was not required to do so. Accordingly, Kirk has failed to demonstrate any reversible error.

Aggravating Factors

¶20 Kirk contends the trial court erred when it considered his five misdemeanor convictions as an aggravating factor because "no evidence was presented to prove the[m] or that they complied with Sixth Amendment requirements, and [because he] did not admit them." He further maintains that, "[b]ecause the evidence was insufficient to prove the prior misdemeanor convictions, the court was unable to consider the impact on the victim's family as an aggravating factor absent a jury finding," requiring that we vacate and remand his sentence.

¶21 Although the state introduced no evidence of Kirk's prior misdemeanor convictions, that information was contained in the presentence report and in Kirk's confidential criminal history, to which he did not object. *See State v. Watton*, 164 Ariz.

323, 327, 793 P.2d 80, 84 (1990) (noting "primary source of information at sentencing usually is the presentence report" and holding defendant has duty to challenge "unreliable or inaccurate" information in report); *State v. Marquez*, 127 Ariz. 3, 6-7, 617 P.2d 787, 790-91 (App. 1980) (finding no abuse of discretion in court's consideration of presentence report information obtained from law enforcement records; defendant waived any challenge by failing to object). In addition, when the trial court found Kirk's five prior misdemeanors to be an aggravating factor at sentencing, Kirk again did not object or otherwise raise this issue. Therefore, because Kirk failed to bring the matter to the court's attention, we review it only for fundamental, prejudicial error. *See State v. Miller*, 215 Ariz. 40, ¶ 10, 156 P.3d 1145, 1148 (App. 2007).[2]

¶22 We need not dwell on this issue because even assuming, arguendo, there was fundamental error, Kirk has not met his burden of demonstrating prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005) (defendant must establish both fundamental error and prejudice to qualify for relief). Kirk has failed to

[2]Although Kirk contends he adequately raised this issue with the trial court based on a statement in his sentencing memorandum that there were no aggravating factors, the record demonstrates he failed to file an objection to the presentence report, raise the issue at sentencing, or otherwise bring the issue to the court's attention. *See State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy."); *State v. Detrich*, 188 Ariz. 57, 64, 932 P.2d 1328, 1335 (1997) (purpose of raising objections "is the need to bring to the attention of the trial judge the specific activity (or lack of activity) complained of so that the judge may effect an immediate remedy"). Notably, Kirk's sentencing memorandum includes his criminal history as a mitigating factor: "Kirk earned an early termination of probation and designation of his prior credit-card-fraud conviction as a misdemeanor and restoration of his rights including the right to carry a firearm."

meet this burden because he "does not suggest that he was not convicted of the [misdemeanors] at issue or that the state would have been unable to produce the necessary documentary evidence if he had timely objected to the form of the evidence presented." *Miller*, 215 Ariz. 40, ¶ 13, 156 P.3d at 1149. Because Kirk has failed to articulate how the error prejudiced him, he has not carried his burden under our standard for fundamental error review. *See id.*[3]

Reasonable Doubt Instruction

¶23 In his final argument, Kirk contends the trial court's use of the jury instruction on reasonable doubt from *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), "relieved the state of its constitutional burden of proof, resulting in structural error." Our supreme court has rejected similar challenges to the *Portillo* instruction, *see, e.g.*, *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003), and we are bound to follow our supreme court's decisions, *Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d at 1009. Accordingly, we do not address this argument further.

[3]Consequently, we need not address Kirk's argument that the trial court incorrectly considered the impact on K.S.'s family as an aggravating factor, nor need we consider the state's argument that Kirk could not show prejudice because he received a partially mitigated sentence.

Disposition

¶24 For the foregoing reasons, Kirk's conviction and sentence are affirmed.

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

CONCURRING:

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

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