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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 2/26/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 08-0781
) 1 CA-CR 09-0090
Appellee,) (Consolidated)
)
v.) DEPARTMENT B
)
RICHIE LEE CARVER,) **MEMORANDUM DECISION**
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006369-002 DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
William Scott Simon, Assistant Attorney General
Attorneys for Appellee

Sharmila Roy Laveen
Attorney for Appellant

H O W E, Judge

¶1 Richie Lee Carver appeals his convictions for burglary
in the first degree, aggravated assault, murder in the first

degree, and misconduct involving weapons. Carver argues that the trial court erred in: (1) admitting his codefendant's hearsay statements; (2) permitting the prosecutor to call a witness "for the sole purpose of impeaching" the witness with prior inconsistent statements; and (3) precluding Carver from presenting third-party culpability evidence. We affirm for the following reasons.

FACTS AND PROCEDURAL HISTORY

¶12 We view the evidence in the light most favorable to sustaining the jury's convictions and resolve all reasonable inferences against Carver. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). In December 2006, Carver moved out of a house that he had shared with one of the victims, Ryan. On December 23, 2006, Carver and his father, Larry, went to the house to retrieve some property that he had left behind and to confront Ryan about a rumor that Ryan had "pistol whipped" them.

¶13 Ryan and his girlfriend Heather were sitting on the couch watching television when Carver and Larry arrived at the back door. Not anticipating any problems, Ryan opened the door. Carver pulled out a revolver, pointed it at Ryan's head, and

shot him in the face.¹ Ryan immediately fell to the floor and, as he tried to get up, thought he was shot in the head a second time before he lost consciousness. When Ryan did not come home for Christmas on December 25, his mother called the police. Officers arrived at Ryan's home and, after receiving no response from their repeated knocks, peered inside and observed a body and blood on the couch. Thereafter, they entered the home and found Heather dead on the couch in the living room of the house. The medical examiner determined that Heather died of a gunshot wound to her head and that the time of death was "a few days before" the police discovered her body.

¶4 Police interviewed Ryan, not realizing that he had suffered a bullet wound to the head. Ryan appeared disoriented and confused, and claimed that he had been shot by Carver. Police then observed a small hole on the side of Ryan's nose and realized that Ryan had suffered a gunshot wound and called paramedics.

¶5 The State subsequently charged Carver and Larry as accomplices, with burglary in the first degree, a Class 2 dangerous felony (Count 1); aggravated assault, a Class 3 dangerous felony (Count 2); murder in the first degree, a

¹ A bullet entered the left side of Ryan's face, and a bullet fragment lodged in his left temporal lobe, behind the left eye and in front of the left ear, resulting in brain swelling necessitating surgery. Ryan survived the attack.

Class 1 dangerous felony (Count 3); theft, a Class 5 felony (Count 4); and misconduct involving weapons (prohibited possession) a Class 5 felony (Count 5).² After Carver's arrest, Cheryl, Carver's mother and Larry's wife, contacted the Phoenix Police Department and two police detectives interviewed her. Cheryl's friend, Brenda, was present during the interview. Cheryl told the detectives that Carver and Larry left her house together on December 23, between 8:00 p.m. and 9:00 p.m. to go to the victims' house and check on some property and also "to talk about a pistol whipping incident." When they returned, Larry told her, "I've just f---ed up, I killed two people, and I gotta get out of here." Cheryl said that Carver was standing "right there" while Larry made the statement. Cheryl also told police that Larry asked her to gather the .22 ammunition from a desk drawer so that he could "get it out of the house." Larry then left alone "almost immediately" for California. Cheryl informed the police that the gun they seized during their search of her house was not the murder weapon.

¶16 At trial, the State offered in evidence Cheryl's statements to the detectives about Larry's confession. Over Carver's hearsay objections, the trial court admitted the evidence. When the State called Cheryl as a witness, however,

² After the trial court granted Carver's motion to sever Larry's case, the prosecutor dismissed Larry's case without prejudice.

she testified that she (1) "did not remember" making those statements during her interview or (2) had "lied" to the detectives because her relationship with Larry was "very rocky," and she wanted to see Larry go to prison and "be rid of him."

¶17 The State sought to impeach Cheryl with her statements from the interview. Carver objected arguing only that the statements were inadmissible hearsay. The trial court found that Cheryl's statements were admissible as prior inconsistent statements and specifically found that Cheryl's loss of memory was not genuine but feigned. The court also permitted the detectives and Brenda to testify about Cheryl's statements to the detectives.

¶18 Carver presented an alibi/mistaken identity defense at trial. His mother and sister testified that he was at home in bed at the time of the shooting. Carver himself testified that he never went to the victims' house on the night of the shooting, and that he neither owned nor carried a gun at that time. During the trial, Carver also submitted an offer of proof for a third-party culpability defense. The offer of proof was based on defense counsel's interviews with other residents at the house who acknowledged that Heather had a prior boyfriend, named "Boze," who was jealous of Ryan, and that Ryan was worried about him. Based on these interviews, defense counsel argued that Boze posed "a theoretical threat to Ryan," and that Carver

should be allowed to question Ryan and the other residents on the stand "to develop this third party defense."

¶19 Ryan testified at an evidentiary hearing on this issue. After considering the evidence presented, the trial court precluded any evidence or testimony about Boze, finding no support for it in the record, that not "enough [was] there to make this relevant," and the probative value of the evidence was outweighed by the possibility of opening the door to jury speculation and confusion.

¶10 The jury acquitted Carver of theft (Count 4), but found him guilty as charged of all remaining counts. The trial court sentenced Carver to life without the possibility of parole for murder (Count 3) and to presumptive prison terms for Counts 1, 2 and 5.³

¶11 Carver timely appeals. We have jurisdiction over his appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and -4033 (West 2013).⁴

DISCUSSION

¶12 Carver argues that the trial court erred in allowing evidence of Larry's incriminating statements to Cheryl. Carver

³ The court held a separate restitution hearing from which defendant does not appeal.

⁴ We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

contends that the evidence was inadmissible as a "statement against interest" because the State did not meet the "threshold showing . . . that Larry was unavailable [as a witness.]" Because Carver did not raise this specific objection at trial, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Moody*, 208 Ariz. 424, 441, ¶ 39, 94 P.3d 1119, 1136 (2004) (holding that an objection must state specific grounds to preserve an issue for appeal); *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993) ("[A]n objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds.") (citation omitted).

¶13 Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. To prevail, the defendant has the burden to establish both that fundamental error exists and that the error caused him prejudice. *Id.* at ¶ 20. Carver has not met his burden of establishing fundamental error.

¶14 A statement against interest is admissible as a hearsay exception under Arizona Rule of Evidence ("Rule")

804(b)(3), if the declarant is unavailable, the statement subjects the declarant to criminal liability, and corroborating circumstances exist that establish the trustworthiness of the statement. *State v. LaGrand*, 153 Ariz. 21, 27, 734 P.2d 563, 569 (1987). Carver challenges only the court's finding that Larry was an unavailable witness.

¶15 Larry was an unavailable witness because the circumstances showed that he would have invoked his Fifth Amendment privilege if called to testify. See *State v. Lopez*, 159 Ariz. 52, 54, 764 P.2d 1111, 1113 (1988); *LaGrand*, 153 Ariz. at 27, 734 P.2d at 569 ("A declarant need not expressly assert the privilege if his unavailability is 'patent' and assertion of the privilege is a mere formality."). Although Carver argues that he was not being prosecuted for the murder because the prosecutor had dismissed Larry's case, the dismissal was voluntary and without prejudice, so the State could have refiled charges at any time. Because Larry continued to face a realistic threat of criminal prosecution, nothing suggests that he would have waived his Fifth Amendment rights and subjected himself to criminal liability by testifying. See *Wohlstrom v. Buchanan*, 180 Ariz. 389, 391 n.2, 884 P.2d 687, 689 n.2 (1994). We thus find no error, much less fundamental error.

¶16 Carver next argues that the trial court erred by allowing the State to call Cheryl as a witness because the

State's sole purpose was to impeach her with her prior inconsistent statements. Again, we review for fundamental error because Carver did not raise this specific objection at trial. See *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶17 In Arizona, a party may impeach its own witness with the witness's prior inconsistent statements. See Ariz. R. Evid. 607 ("Any party, including the party that called the witness, may attack the witness's credibility."); *State v. Robinson*, 165 Ariz. 51, 58, 796 P.2d 853, 860 (1990) (impeachment of witness by state permissible even if witness called by state). Furthermore, a jury may consider the prior inconsistent statements as both impeachment and substantive evidence. *State v. Mills*, 196 Ariz. 269, 274, ¶ 21, 995 P.2d 705, 710 (App. 1999) (citation omitted). In *State v. Allred*, 134 Ariz. 274, 277-78, 655 P.2d 1326, 1329-30 (1982), our supreme court held that impeachment testimony may also be used for substantive purposes if the following non-exclusive factors outweigh the danger of unfair prejudice: (1) the witness being impeached denies making the impeaching statement; (2) the witness presenting the impeaching statement has an interest in the proceedings and nothing corroborates that the statement was made; (3) the presence of other factors affecting the reliability of the impeaching witness, such as age or mental capacity; (4) the true purpose of the offer is substantive use

of the statement rather than impeachment of the witness; (5) the impeachment testimony is the only evidence of guilt. As with any evidence, the evidence must also be balanced against Rule 403 issues of prejudice, confusion, or misleading the jury. *Id.* at 277-78, 655 P.2d at 1329-30.

¶18 The trial court correctly determined that Cheryl's statements were admissible based on the *Allred* factors. Cheryl never denied making the statements to the detectives. Rather, she testified that she either did not remember making them or that she outright lied to police in her interview. No evidence shows that the detectives or Brenda had a personal interest in the outcome of the case. The detectives were not "interested witnesses" simply because they were involved in the investigation. *State v. Miller*, 187 Ariz. 254, 258, 928 P.2d 678, 682 (App. 1996). The fact that the police tape-recorded Cheryl's interview and that Brenda was present for the interview corroborated that Cheryl made the statements. The results of the autopsy of Heather's body and the crime scene evidence also corroborated Cheryl's statements about the murder.⁵ Because other

⁵ The autopsy of Heather's body indicated that the murder occurred on December 23, as Cheryl stated, and not December 25, as the detectives initially assumed. Fragments of .22 caliber ammunition recovered during the autopsy and at the crime scene corroborate Cheryl's implication that Larry used a .22 caliber weapon at the murder.

evidence implicated Larry in the murder, Cheryl's testimony was not the only substantive evidence of Carver's guilt.

¶19 Moreover, the State offered the statements not as substantive evidence of guilt, but to truly impeach Cheryl's trial testimony. The trial court permitted the impeachment after it determined that Cheryl feigned loss of memory about having made the statements. Ariz. R. Evid. 607; *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). Under these circumstances, the trial court committed no error, let alone fundamental error, in permitting the State to call Cheryl as a witness and to impeach her with those statements.

¶20 Carver claims that the trial court erroneously precluded him from questioning Ryan about his third-party culpability theory involving "Boze," whom Carver alleges might have been jealous of the victim's relationship. We review a trial court's ruling on the admissibility of evidence of third-party culpability for an abuse of discretion. *State v. Dann*, 205 Ariz. 557, 568, ¶ 30, 74 P.3d 231, 242 (2003). A defendant may not "in the guise of a third-party culpability defense, simply 'throw strands of speculation on the wall and see if any of them will stick.'" *State v. Machado*, 226 Ariz. 281, 284 n.2, ¶ 16, 246 P.3d 632, 635 n.2 (2011) (citation omitted). To be "relevant" the evidence need only "tend to create a reasonable doubt as to the defendant's guilt." *Dann*, 205 Ariz. at 568,

¶ 33, 74 P.3d at 242. Therefore, a trial court may exclude third-party culpability evidence if the evidence offers only "a possible ground of suspicion against another," *State v. Prion*, 203 Ariz. 157, 161, ¶ 21, 52 P.3d 189, 193 (2002), or if the dangers of unfair prejudice, confusion, or otherwise misleading the jury outweighs the probative value under Rule 403. *Machado*, 226 Ariz. at 284 n.2, ¶ 16, 246 P.3d at 635 n.2.

¶21 At best, Carver's evidence offered only a "possible ground" for suspicion against Boze, but nothing that tended to create a reasonable doubt regarding Carver's own guilt. By defense counsel's own avowal, he had only "the jealousy aspect" and "no other tangible evidence connecting [Boze] to the crime scene." The excerpts of the witness interviews, which the trial court reviewed, established only that Boze was Heather's former boyfriend, and suggested that Ryan was concerned that Boze *might* be jealous so he asked his friends not to tell Boze about his relationship with Heather. Ryan testified, however, that Boze dated Heather "a long, long time ago"; that they were "all still friends"; and that, even if Boze was jealous of their relationship, it was not "in that type of way." On these facts, Carver's evidence amounted to mere suspicion against a former boyfriend. Therefore, the trial court did not abuse its discretion in finding that the possibility that the jury would

