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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0001
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOSE PRECIALIANO QUINTERO,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-031287-001 DT

The Honorable Michael W. Kemp, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Defendant Jose Preciliano Quintero appeals his convictions and sentences for kidnapping, sexual abuse, and first-degree felony murder. This case comes to us as an appeal

under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defendant's appellate counsel has searched the record on appeal, found no arguable, non-frivolous question of law, and asks us to review the record for fundamental error. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but he did not do so.

¶2 We have searched the record for fundamental error and find none. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

I. PRETRIAL PROCEEDINGS

¶3 In December 2008, Defendant was indicted for kidnapping, sexual assault, and first-degree felony murder.¹ Defendant was arraigned and entered a not guilty plea. He proposed plea offers, but the state declined to extend those offers.

¶4 Before trial, Defendant moved for a voluntariness hearing and the suppression of his statements to law enforcement. The court denied the motion after receiving a

¹ The indictment charged first-degree murder as either premeditated murder or in the alternative felony murder, but the state ultimately dismissed the premeditated murder charge and proceeded only on the felony murder charge.

transcript of Defendant's interrogation and holding a hearing at which the parties stipulated to the admission of a video recording of the interrogation. The matter then proceeded to a jury trial.

II. TRIAL

A. The State's Case in Chief

¶15 At trial, the state presented evidence of the following facts.

¶16 On December 13, 2008, two truckers parked their semi-trailer truck at a Phoenix fast-food restaurant to buy lunch. As they parked, an unknown man approached them and asked to borrow a cell phone, explaining that there was a dead body in an empty lot nearby. The truckers refused the man's request but then saw a different man run from the lot across the street while jumping and waving his arms. The truckers entered the lot, saw the victim's corpse, and began trying to flag down help.

¶17 When police arrived at the scene, they saw that the victim appeared to have been dead for at least twelve hours and saw that her nude body was extremely battered and bloody -- she had multiple abrasions and her face was "unrecognizable." A pair of bloody dentures and various articles of bloody clothes were scattered nearby. The clothes included a pair of pants with dirt marks consistent with being dragged, and there were

long, clear drag marks in the dirt near the edge of the lot. Police also found footprints near the drag marks and near the victim's body. The pattern of the footprints appeared to match marks on the victim's body.

¶18 Police processed the crime scene, obtained the truckers' identification information, and interviewed and took shoe impressions from the man the truckers saw run from the lot. A medical examiner performed an autopsy and discovered that the victim died from multiple blunt force traumas that caused extensive external and internal injuries. The medical examiner opined that the victim's manner of death was homicide, and that her injuries and the patterned marks on her body were consistent with being kicked or stomped.

¶19 Acting on an anonymous tip, police arrested and interrogated sixteen-year-old Defendant. At trial, the jury viewed a video recording of the interrogation. At the start of the interrogation, a detective read from a form to advise Defendant of his rights under *Miranda* and of his right to have a parent or guardian present during questioning, and Defendant indicated that he understood those rights and agreed to waive them.

¶10 During the interrogation, Defendant confessed that he attacked the victim after she approached him outside his house and called him a racial epithet. Defendant confessed that he

hit the victim several times and then pulled her hair to force her across the street and into the lot, continuing to hit her along the way. In the lot, Defendant hit, kicked, and stomped on the victim. Defendant estimated that he stomped on the victim about fifty times, on her stomach, chest, and throat. He began to walk away at one point but then returned to continue the beating. During the beating, the victim removed her clothes in an attempt to convince Defendant to stop, and Defendant used a stick to poke at her body. Defendant stated that he thought he used the stick to touch the victim's face and also stuck it in her genitals. Afterwards, he dialed 911 to get help for the victim but then immediately hung up because he was scared. He returned to his home, cleaned his shoes, and threw away his pants and shirt. Defendant's brother told police that Defendant also asked him to retrieve a cell phone from the lot.

¶11 Police took Defendant's shoes and found that they were stained with the victim's blood. They also found bloodstained socks at Defendant's home. A comparison analysis showed that Defendant's shoes matched some of the footprints in the dirt at the crime scene and could not be excluded as a source of the patterned marks on the victim's body.

B. Defendant's Motions for a Judgment of Acquittal

¶12 At the conclusion of the state's case in chief, Defendant moved for a judgment of acquittal on several theories.

First, he challenged the constitutionality of the statute defining the kidnapping charge. He next argued that there could be no conviction for felony murder because the alleged kidnapping was part of the same act as the murder, and he argued that there was no *corpus delicti* to support the sexual assault charge. He finally argued that judgments of acquittal were warranted because the state had not offered an in-court identification of Defendant.

¶13 The court denied Defendant's motions. With respect to Defendant's argument that there had been no in-court identification, the court allowed the state to briefly reopen its case so that a detective could confirm that the arrestee in the videotape of the interrogation played for the jury was Defendant. Defendant presented no evidence, and counsel gave closing arguments.

C. Defendant's Motions for a Mistrial

¶14 During the state's closing argument, the prosecutor described, both verbally and in a visual aide, the substance of the anonymous-tipster call that led police to Defendant. Because the court had previously ruled this information inadmissible, Defendant moved for a mistrial. The court declined to grant a mistrial, reasoning that the error was ameliorated by the physical evidence and Defendant's confession to police. The court did however instruct the jury to disregard

the improper references. Defendant then made a second motion for mistrial based on the prosecutor's characterization of the victim in the closing argument. The court denied this motion as well.

D. Jury Instructions and Verdicts

¶15 At Defendant's request, the jury was instructed on unlawful imprisonment as a lesser-included offense of kidnapping and was instructed on sexual abuse as a lesser-included offense of sexual assault. After considering the evidence, the jury found Defendant guilty of kidnapping, felony murder, and the lesser-included sexual abuse offense. With respect to the kidnapping, the jury found that Defendant intentionally and knowingly inflicted physical injury upon the victim. The jury also found that several aggravators had been proven.

III. *POSTTRIAL PROCEEDINGS*

A. Defendant's Motion for a New Trial

¶16 Before sentencing, Defendant moved for a new trial. Defendant argued that the prosecutor's references in closing argument to inadmissible evidence constituted prosecutorial misconduct. He also argued that her characterization of the video recording of the interrogation (to which characterization he did not object at trial) constituted prosecutorial misconduct. After a hearing, the court denied Defendant's motion.

B. Sentencing and Appeal

¶17 The court entered judgment on the jury's verdicts and sentenced Defendant to consecutive prison terms of 21 years for the kidnapping, life with the possibility of parole after 25 years for the murder, and 2.5 years for the sexual abuse. Defendant was credited with 722 days of presentence incarceration on the kidnapping sentence.

¶18 Defendant timely appeals his convictions and sentences. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶19 The record reveals no fundamental error. The state properly prosecuted Defendant in the same manner as an adult pursuant to A.R.S. § 13-1501(A)(1). Defendant was present and represented by counsel at all critical stages. The record of voir dire does not demonstrate the empanelment of any biased jurors, and the jury was properly comprised of twelve jurors and two alternates. See Ariz. R. Crim. P. 18.1(a); A.R.S. § 21-102(A). As discussed below, the court did not commit fundamental error by denying Defendant's various motions, and sufficient evidence supported his convictions.

I. DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS TO POLICE

¶120 The superior court did not commit fundamental error by denying Defendant's motion to suppress his statements to police. The court held a hearing and reviewed the transcript and the recording of Defendant's interrogation. The record supports the finding that Defendant's confession was voluntary, and the jury was properly instructed on voluntariness at trial. See *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986); *State v. Doody*, 187 Ariz. 363, 371, 930 P.2d 440, 448 (App. 1996). The record also supports the finding that Defendant was adequately advised of his juvenile *Miranda* rights and knowingly and intelligently waived those rights. See *Doody*, 187 Ariz. at 372, 930 P.2d at 449.

II. DEFENDANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL

¶121 The superior court did not commit fundamental error by denying Defendant's various motions for a judgment of acquittal. First, the court did not commit fundamental error by finding that Arizona's kidnapping statute is constitutional. Second, there was sufficient evidence that the kidnapping and the murder were not the same act. Third, the court did not commit fundamental error by finding that there was *corpus delicti* to support the sexual offense because the posture and nudity of the victim's body was sufficient to create a reasonable inference of independent evidence corroborating Defendant's confession. See

State v. Morgan, 204 Ariz. 166, 170, ¶ 15, 61 P.3d 460 (App. 2002). Finally, the court did not commit fundamental error by allowing the state to briefly reopen its case to allow an in-court identification of Defendant because there is no indication of bad faith by the state or prejudice to Defendant. See *State v. Walton*, 159 Ariz. 571, 582, 769 P.2d 1017, 1028 (1989).

III. SUFFICIENT EVIDENCE SUPPORTED DEFENDANT'S CONVICTIONS.

¶22 The state presented evidence sufficient to support Defendant's convictions. The state presented evidence that Defendant restrained the victim with the intent to harm her by dragging her from the street into the lot, where he beat her. The evidence was sufficient to support Defendant's conviction for kidnapping under A.R.S. § 13-1304(A)(3). The state also presented evidence that in the course of and in furtherance of the kidnapping, the victim was killed. The evidence was sufficient to support Defendant's conviction for felony murder under A.R.S. § 13-1105(A)(2). Finally, the state presented evidence that the victim was found nude in the lot, and Defendant confessed to having used a stick to touch her genitals. The evidence was sufficient to support Defendant's conviction for sexual abuse under A.R.S. § 13-1404.

¶23 We note that the jury was instructed on sexual abuse as a lesser-included offense of sexual assault at Defendant's request, on the grounds that the jury could reasonably find that

Defendant's manipulation of the victim's genitals with the stick was a touching only and not a penetration. Sexual assault requires "sexual intercourse" or "oral sexual contact." A.R.S. § 13-1406(A). "Sexual intercourse" is "penetration into the penis, vulva or anus . . . or masturbatory contact with the penis or vulva," and "oral sexual contact" is "oral contact with the penis, vulva, or anus." A.R.S. § 13-1401(1), (3). Sexual abuse, by contrast, requires "sexual contact." A.R.S. § 13-1404(A). "Sexual contact" is "touching, fondling or manipulating of any part of the genitals, anus or female breast." A.R.S. § 13-1401(2).

¶24 Applying these definitions, all of which were provided to the jury in the jury instructions, sexual abuse based on sexual contact with the female breast is not a necessarily included offense of sexual assault. This bears mention here because the indictment neither cited the sexual abuse statute nor alleged that Defendant touched the victim's breast, but during deliberations, the jury submitted the following question to the court: "Is the stomping of a bare breast considered sexual contact?" Defendant did not object to the court's response telling the jury to refer to their instructions.

¶25 The jury found Defendant not guilty of sexual assault but found him guilty of sexual abuse. The jury's question about whether "the stomping of a bare breast" satisfies the contact

required for sexual abuse raises the possibility that the sexual abuse conviction was based on the evidence that Defendant's beating of the victim included stomping on her upper torso -- a completely separate theory than the theory concerning the stick that the state pursued at trial, and a theory about which Defendant had no notice. But because Defendant himself affirmatively requested the instruction on sexual abuse as a lesser-included offense, he invited any such error and waived the opportunity to challenge it on appeal. *State v. Lucero*, 223 Ariz. 129, 136, ¶¶ 19-21, 220 P.3d 249, 256 (App. 2009); *State v. Logan*, 200 Ariz. 564, 565-66, ¶¶ 8-9, 30 P.3d 631, 632-33 (2001). Additionally, though we could imagine a colorable argument on appeal had the issue arisen as trial error rather than invited error, we note that there was sufficient evidence to support Defendant's conviction of sexual abuse based on the state's theory concerning the stick.

IV. DEFENDANT'S MOTIONS FOR A MISTRIAL

¶126 The superior court did not commit fundamental error by denying Defendant's motions for a mistrial. Defendant's motions were based on the prosecutor's closing-argument references to inadmissible evidence and her characterization of the victim. Mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State*

v. Dann, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). Here, the prosecutor's references to inadmissible evidence were brief, described what the jury could have reasonably inferred from the admissible evidence, and were addressed by a limiting instruction. Further, we find nothing inappropriate in the prosecutor's characterization of the victim.

V. DEFENDANT'S MOTION FOR A NEW TRIAL

¶27 The superior court did not commit fundamental error by denying Defendant's motion for a new trial. Defendant's motion alleged prosecutorial misconduct. Prosecutorial misconduct means improper and prejudicial conduct that is "not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." *Pool v. Superior Court (State)*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To justify reversal, prosecutorial misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted). Here, the record is sufficient to support a finding of no misconduct. The prosecutor explained that her references

to inadmissible evidence were based on an unintentional, good-faith mistake, and we find nothing inappropriate in her characterization of the interrogation recording. Further, even if the references to inadmissible evidence were the product of misconduct, they did not clearly permeate the entire atmosphere of the trial. They were brief, and they were specifically addressed by a limiting instruction.

VI. THE COURT IMPOSED LEGAL SENTENCES.

¶128 The court imposed legal sentences on Defendant's convictions and did not err by ordering that the sentences be served consecutively. See Ariz. R. Crim. P. 26.13 (allowing consecutive sentences for multiple offenses); *State v. Martinez*, 218 Ariz. 421, 439, 189 P.3d 348, 366 (2008) (consecutive sentences for felony murder and predicate felony do not violate double jeopardy). The court also properly credited Defendant with 722 days of presentence incarceration.

CONCLUSION

¶129 We have reviewed the record for fundamental error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Defendant's convictions and sentences.

¶130 Defense counsel's obligations pertaining to this appeal have come to an end. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review

to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant has thirty days from the date of this decision to file a petition for review *in propria persona*. See Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has thirty days from the date of this decision in which to file a motion for reconsideration.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge