

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

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



DIVISION ONE
FILED: 10/11/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0669
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
CARLOS ANTHONY BARRERAS-RATCLIFF,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Coconino County

Cause No. S0300CR201000600

The Honorable Jacqueline Hatch, Judge

AFFIRMED AS MODIFIED

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T I M M E R, Presiding Judge

¶1 Carlos Anthony Barreras-Ratcliff appeals his conviction and sentence for manslaughter. He argues the trial court committed reversible error by instructing the jury on

heat-of-passion manslaughter as a lesser-included offense of first-degree murder and by not giving him full credit for presentence incarceration. For reasons that follow, we affirm Barreras-Ratcliff's conviction but modify his sentence to increase the credit for presentence incarceration to 411 days.

BACKGROUND

¶2 The State charged Barreras-Ratcliff with premeditated first-degree murder in the death of his girlfriend.¹ Upon trial to a jury, the trial court determined that the evidence supported instructions on lesser-included offenses and instructed on second-degree murder, reckless and heat-of-passion manslaughter, and negligent homicide. The jury found Barreras-Ratcliff not guilty of first- and second-degree murder, but guilty of manslaughter.

¶3 After finding an allegation of prior convictions to be proven, the trial court sentenced Barreras-Ratcliff as a repetitive offender to an aggravated term of twenty-five years' imprisonment with credit for 340 days of presentence incarceration. Barreras-Ratcliff timely appealed.

¹ The facts of the crime are not relevant to the issues raised on appeal.

DISCUSSION

A. Lesser-included offense instruction

¶14 Barreras-Ratcliff claims the trial court erred in instructing the jury on heat-of-passion manslaughter, arguing this form of manslaughter is not a lesser-included offense of first-degree murder. As a result, Barreras-Ratcliff asserts, it is possible the jury convicted him of an uncharged offense in violation of his constitutional due process right to notice.²

¶15 A charge of first-degree murder includes all lesser-included offenses, thereby putting a defendant on notice of the potential conviction for a lesser-included offense. *State v. Hutton*, 143 Ariz. 386, 390, 694 P.2d 216, 220 (1985); see also Ariz. R. Crim. P. 13.2(c) ("Specification of an offense in an indictment, information, or complaint shall constitute a charge of that offense and of all offenses necessarily included therein."). Whether an offense is a lesser-included offense of the charged offense is a question of law we review de novo. *State v. Cheramie*, 218 Ariz. 447, 448, ¶ 8, 189 P.3d 374, 375 (2008).

¶16 A person commits the offense of heat-of-passion manslaughter by "[c]ommitting second degree murder . . . upon a

² The guilty verdict returned by the jury did not specify the form of manslaughter committed by Barreras-Ratcliff. As a result, it is unknown whether the jury found him guilty of reckless manslaughter or heat-of-passion manslaughter.

sudden quarrel or heat of passion resulting from adequate provocation by the victim." Ariz. Rev. Stat. ("A.R.S.") § 13-1103(A)(2) (West 2012).³ Our supreme court has repeatedly recognized heat-of-passion manslaughter as a lesser-included offense of first-degree murder. See, e.g., *State v. Gipson*, 229 Ariz. 484, 487, ¶ 17, 277 P.3d 189, 192 (2012); *State v. Gomez*, 211 Ariz. 494, 501, ¶ 30, 123 P.3d 1131, 1138 (2005); *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989); *State v. Doss*, 116 Ariz. 156, 162, 568 P.2d 1054, 1060 (1977). Thus, in a first-degree murder case, the trial court must instruct on heat-of-passion manslaughter when the evidence supports the giving of the instruction and it is requested by a party. *State v. Hurley*, 197 Ariz. 400, 403, ¶ 13, 4 P.3d 455, 458 (2000); see also *Vickers*, 159 Ariz. at 542, 768 P.2d at 1187 ("A defendant is entitled to a manslaughter instruction if the evidence establishes that the homicide was committed in the heat of passion aroused by adequate provocation.").

¶17 Barreras-Ratcliff does not contend the evidence fails to support a conviction for heat-of-passion manslaughter. Rather, he argues only that heat-of-passion manslaughter is not a lesser-included offense of first-degree murder. Given that we are bound by the decisions of our supreme court recognizing

³ Absent material revisions after the date of an alleged offense, we cite a statute's current version.

heat-of-passion manslaughter as a lesser-included offense of first-degree murder, we reject Barreras-Ratcliff's argument. See *State v. Sullivan*, 205 Ariz. 285, 288, ¶ 15, 69 P.3d 1006, 1009 (App. 2003) (noting "we are constrained by the decisions of our supreme court and are not permitted 'to overrule, modify, or disregard them'" (citation omitted)).

¶8 Barreras-Ratcliff's reliance on *Peak v. Acuna*, 203 Ariz. 83, 50 P.3d 833 (2002), for the principle that heat-of-passion manslaughter is not a lesser-included offense of first-degree murder is misplaced. The *Peak* court addressed only whether double jeopardy principles barred a retrial on a charge of second-degree murder when the defendant had been acquitted on manslaughter at her first trial. *Id.* at 84, ¶ 5, 50 P.3d at 834. And *Peak*, although acknowledging the "unusual" relationship between second-degree murder and heat-of-passion manslaughter, implicitly confirms that heat-of-passion manslaughter is a "lesser offense" of the "greater offense" of second-degree murder. *Id.* at ¶ 6.

¶9 Furthermore, since *Peak* was decided, our supreme court has continued to recognize heat-of-passion manslaughter as a lesser-included offense of first-degree murder. For example, in *Gipson*, our supreme court upheld a conviction for heat-of-passion manslaughter in a first-degree murder case, rejecting an argument that the trial court erred by sua sponte instructing on

this “lesser included offense” when both the State and the defendant objected to the instruction. 229 Ariz. at 487, ¶ 17, 277 P.3d at 192. Additional post-*Peak* decisions recognizing heat-of-passion manslaughter as a lesser-included offense of first-degree murder include *State v. Patterson*, ___ Ariz. ___, ___, ¶ 27, 283 P.3d 1, 7 (2012), and *State v. Gomez*, 211 Ariz. 494, 501, ¶ 30, 123 P.3d 1131, 1138 (2005). Thus, the trial court did not err in instructing on heat-of-passion manslaughter as a lesser-included offense in the instant case.

B. Presentence incarceration credit

¶10 Barreras-Ratcliff also argues the trial court erred by failing to give full credit for his presentence incarceration. Because Barreras-Ratcliff did not raise this matter in the trial court, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). The State concedes the existence of fundamental error, and we agree.

¶11 “All time actually spent in custody pursuant to an offense until the prisoner is sentenced . . . shall be credited against the term of imprisonment. . . .” A.R.S. § 13-712(B) (West 2012). The trial court granted Barreras-Ratcliff credit for 340 days of presentence incarceration credit; we conclude, however, that he was entitled to 411 days of presentence incarceration credit. The trial court’s failure to grant full credit for presentence incarceration constitutes fundamental

error. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). Accordingly, pursuant to A.R.S. § 13-4037(A) (West 2012), we modify Barreras-Ratcliff's sentence to reflect credit for 411 days of presentence incarceration.

CONCLUSION

¶12 For the foregoing reasons, we affirm Barreras-Ratcliff's conviction but modify his sentence by increasing the credit for presentence incarceration to 411 days.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
John C. Gemmill, Judge

/s/
Margaret H. Downie, Judge