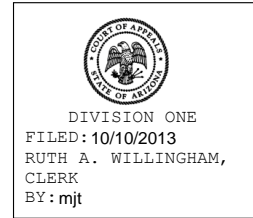


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 12-0266
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CHRISTOPHER MYLES SANTOME,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-153957-001

The Honorable Samuel A. Thumma, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
William Scott Simon, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Christopher Myles Santome appeals his conviction and sentence for second degree murder. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On April 12, 2010, the body of J.D. ("Victim") was discovered in a yard at a Peoria trailer park. Initially, police focused their investigation on J.G. and his wife, A.D.¹, who were friends and neighbors of Victim's. Neighbors advised officers that A.D. and Victim had been romantically involved.

¶3 D.F. is Santome's "cousin-in-law," though D.F. described Santome as being more like a brother. D.F. initially denied any knowledge of the crime, but later admitted to officers that he had witnessed Santome stabbing Victim.

¶4 Santome disclosed his intent to assert, *inter alia*, a "third party defense." The State moved to preclude a defense that "an unspecified third party" had committed the murder based on "vague suspicions that another person or persons had opportunity, motive, or ability to commit the crime." According to the State, Santome had nothing but "wholly unsupported accusations" suggesting any third party had committed the crime. In opposing the State's motion, Santome cited inconsistent statements allegedly made by J.G. and A.D. that he argued could

¹ At trial, A.D. used her husband's surname. However, the majority of the record supports referring to her as A.D.

establish motive or bias; multiple statements by D.F., each "gradually adding more details"; and actions by D.F. that could "complete the story and either lend or discredit [D.F.'s] version of what happened." At oral argument on the State's motion, the following colloquy occurred:

THE COURT: Is the evidence or the line of question that you outline in your response, it seems to me that was in the nature of cross-examination as opposed to in the nature of trying to point to a specific person as the more appropriate defendant?

DEFENSE COUNSEL: I believe so. I think that's correct.

Defense counsel further clarified that Santome was not intending to "say that, you know, this person killed him or this other person killed him."

¶15 The trial court ruled that the evidence Santome had outlined in his response could be used for cross-examination purposes. It provisionally granted the State's motion to preclude a third party culpability defense, subject to reconsideration should Santome discover new information. The court drew a distinction between evidence used for witness impeachment, which it ruled was permissible, and raising "unfounded suspicions" or "throw[ing] strands of speculation on the wall [to] see if any of them will stick."

¶16 At trial, A.D. testified that she was close friends with Victim, she would sometimes sneak out at night to be with

him, and Victim kissed her a few months before the murder but that she "wasn't cool with it." A.D. stated she was with Victim the day of the murder; that she and J.G. argued that day, and that she, J.G., and Victim were together the night of the murder. A.D. also testified that she and J.G. argued frequently and that she would sometimes leave him voice mail messages after arguments.

¶7 Defense counsel sought to question A.D. about a May 2 voice mail message she left on J.G.'s phone that said, "fucking murderer." Defense counsel argued the State had opened the door to this evidence by asking J.G. whether he was jealous of the relationship between his wife and Victim.² Counsel argued the voice mail message was relevant to a third party culpability defense because J.G. had been a suspect at one point and A.D.'s relationship with Victim offered a motive for J.G. to commit the murder. But defense counsel also avowed that A.D. had said that she left the voice mail message for her husband because she knew he "was a suspect at the time and she wanted to essentially kind of anger him" -- *not* because A.D. believed her husband had actually killed Victim. The trial court reaffirmed its earlier ruling and precluded use of the voice mail message to establish third party culpability.

² J.G. testified on cross-examination that he had no reason to be jealous of Victim and had no problems with him.

¶18 Before closing arguments, defense counsel filed a "Motion to Allow Jury Instruction and Argument Regarding Third-Party Culpability." The motion stated, in pertinent part:

The Court has ruled that during closing arguments, undersigned counsel is permitted to argue that the State has not met their burden of proof and suggest that the evidence has shown that there could have been others who may have committed the offense. However, undersigned counsel is not allowed to argue that Mr. Santome did not commit the offense, but "Person X" did. "Person X" refers to specific witnesses or persons involved in the case.

The court ruled that it did not intend to so restrict Santome's closing argument, stating:

What I have not allowed [Santome] to do is to introduce affirmative evidence that a specific person did this offense other than the Defendant. That was based on my finding that you just didn't make a showing required to allow that to occur. I do think it is fair in closing in the context of arguing that the State has not met its burden, if that's your argument, to argue that others could have done this and to name them by name.

¶19 The jury found Santome guilty, and he was sentenced to 20 years in prison. Santome timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A).

DISCUSSION

¶10 "The admissibility of third party culpability evidence is reviewed under an abuse of discretion standard." *State v.*

Prion, 203 Ariz. 157, 161, ¶ 21, 52 P.3d 189, 193 (2002). A defendant may "attempt to show that another person committed the crime for which he is charged, but it remains in the trial court's discretion to exclude the evidence if it offers only a possible ground of suspicion against another." *Id.* (internal citation omitted).

¶11 Arizona Rules of Evidence 401, 402, and 403 "set forth the proper test for determining the admissibility of third-party culpability evidence." *State v. Gibson*, 202 Ariz. 321, 324, ¶ 19, 44 P.3d 1001, 1004 (2002). "The proper focus in determining relevancy is the effect the evidence has upon the *defendant's* culpability. To be relevant, the evidence need only *tend* to create a reasonable doubt as to the defendant's guilt." *Id.* at ¶ 16. However, evidence of "trivial probative value" or evidence raising only "vague grounds of suspicion" is properly excluded. *State v. Bigger*, 227 Ariz. 196, 209, ¶ 43, 254 P.3d 1142, 1155 (App. 2011).

¶12 The trial court applied the proper legal standards here, stating that "evidence of a third party's culpability is neither relevant nor subject to analysis under [Rule] 403, unless it tends to create a reasonable doubt that the defendant committed the offense." Santome's only developed argument on appeal relates to the exclusion of A.D.'s voice mail message for her husband stating, "fucking murderer." The defense argued

below that this message supported a third party culpability defense because J.G. was a suspect at one point, and A.D.'s relationship with Victim offered a motive for J.G. to commit the murder. The trial court ruled that probing the relationship between A.D. and Victim was "fair game" and permitted the defense to ask A.D. whether her husband had been a suspect, but it precluded use of the voice mail message to claim that J.G. was the perpetrator.

¶13 We find no abuse of discretion. First, the message at issue was hearsay. Santome was attempting to introduce A.D.'s statement so that he could argue J.G. was in fact the murderer. The voice mail message was thus being offered for the truth of the matter asserted.³ See Ariz. R. Evid. 801(c) (Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.).

¶14 More fundamentally, the voice mail message did not tend to create a reasonable doubt as to Santome's guilt. The only proffered evidence before the court was that A.D. left the message merely to anger her husband -- not because she believed he had committed the murder. "A defendant is not entitled to

³ Although the trial court did not rule on this basis, we will affirm its evidentiary rulings if they are correct for any reason. See *State v. Sardo*, 112 Ariz. 509, 515, 543 P.2d 1138, 1144 (1975) (trial court's judgment will be affirmed if legally correct, even if it is based on wrong reasons).

raise unfounded suspicions or to simply throw strands of speculation on the wall and see if any of them will stick." *Bigger*, 227 Ariz. at 208, ¶ 42, 254 P.3d at 1154 (internal quotation omitted).

¶15 The thin reed of Santome's third party culpability defense stands in stark contrast to cases where appellate courts have found error in precluding such a defense. In *Prion*, for example, the Arizona Supreme Court held that the trial court should have permitted evidence suggesting that a third party -- John Mazure -- committed the murder, describing the proffered evidence as follows:

[Mazure] was a co-worker of [the victim's] . . . ; he was disciplined for sexually harassing female co-workers on the job; he tried to conceal his discipline from the police; he attempted to rape one of his female co-workers at his apartment after work; he had a violent temper and bit a woman's nose during a fight; he rented a new apartment on the day of [the victim's] disappearance; that new apartment was close to both the New Orleans nightclub and the location at which [the victim's] car was found; he was working at the New Orleans on the night [the victim] disappeared; he denied that fact when questioned by the police; one of the doormen at the New Orleans said [the victim] was let in to the bar that night specifically to see him; and finally, he appeared at work the next morning after [the victim's] disappearance so disheveled and disoriented that he was fired. He was also considered a suspect early in the investigation

203 Ariz. at 161-62, ¶¶ 23, 26, 52 P.3d at 193-94; see also *Winfield v. United States*, 676 A.2d 1 (D.C. 1996) (detailing specific facts tending to suggest third party had committed the murder), cited with approval in *Gibson*, 202 Ariz. at 323, 44 P.3d at 1003.

¶16 Santome has failed to adequately develop an argument about rulings regarding a receipt for A.D.'s wedding ring found in Victim's wallet. Merely mentioning an argument, as Santome does, is insufficient.⁴ Opening briefs must present significant arguments, supported by authority, setting forth the appellant's position on the issues raised. The failure to so argue a claim usually constitutes abandonment and waiver of that claim. *State v. Moody*, 208 Ariz. 424, 453 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004); see also *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

¶17 Moreover, our review of Santome's record citations reveals no error. A.D. testified at trial that she and Victim were in her car on the day of the murder, the receipt for the

⁴ The opening brief merely asserts that the receipt's location was "directly tied" to A.D., J.G., and Victim. The State does not address this issue in its answering brief, perhaps because no clear argument was raised. Santome did not file a reply brief.

wedding ring was on the floor, and Victim was "playing with" it while they talked. The jury also heard detectives testify about a receipt found in Victim's wallet from a store at Arrowhead Mall. Before defense counsel cross-examined Detective Balsom about the receipt, the State objected, arguing further questions were irrelevant based on the ruling regarding third party culpability. Defense counsel responded that additional questions were relevant to show "how the investigation started," and the court permitted this line of questioning.

¶18 Finally, our conclusion that the trial court acted within its discretion is supported by the fact that it permitted defense counsel to argue in closing that the State had failed to carry its burden of proof and that other individuals had committed the murder. And in his opening brief, Santome concedes that "the jury heard most of the evidence which supported a third-party argument."

CONCLUSION

¶19 For the reasons stated, we affirm Santome's conviction and sentence.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
JON W. THOMPSON, Judge