DIVISION ONE
FILED: 03/28/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0308
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
GABRIEL MARTIN RAYOS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-111299-001

The Honorable Jeanne M. Garcia, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Droban & Company, PC — Anthem
by Kerrie M. Droban
Attorneys for Appellant

G E M M I L L, Presiding Judge

¶1 Gabriel Martin Rayos appeals his convictions and sentences for first-degree murder and aggravated assault. Rayos argues the trial court erred in admitting a letter without

proper foundation and in allowing the prosecution to amend the indictment mid-trial to change its theory of aggravated assault. For the reasons that follow, we affirm.

¶2 A grand jury indicted Rayos on charges of first-degree murder of Armando L. and aggravated assault causing physical injury to Jose V. The charges arise from a shooting at about 2:30 a.m. in the parking lot of a west Phoenix strip club.[1] The evidence at trial showed that Rayos fired a gun at Armando eight times, killing him, and then, while struggling with Jose, pointed the gun at him, causing Jose to fear being shot.

¶3 Rayos testified that he shot Armando because he heard someone yell, "[h]e's got a gun," and he saw Armando reach under his shirt. He denied intentionally pointing the gun at Jose. The jury convicted Rayos of first-degree murder and aggravated assault. The judge sentenced him to life with possibility of parole after twenty-five years on the murder conviction and to fifteen years on the aggravated assault conviction, to be served consecutively. Rayos filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

[1] The indictment also charged Rayos with misconduct involving weapons, an offense severed for trial from the murder and assault charges. Rayos subsequently pled guilty to the misconduct charge, and the judge sentenced him to ten years on that offense, to be served concurrently with the other sentences in this case.

¶4 Rayos argues that the trial court erred in admitting a copy of a letter he "purportedly authored" threatening witnesses. The letter, found in a trash can outside Rayos's jail cell, was signed with his nickname, "Droopy." The letter suggested that Armando's ex-wife, an eyewitness, could be persuaded to change her statement and testify that Rayos was not the shooter; that Jose should be located on Facebook because he is "snitching like crazy"; that a third witness, Ashley, could be paid to change her testimony – "My family will pitch in for that"; and that a fourth witness, Selena, needed to testify that the murder weapon, "the gun with the brown handle," was not his gun. A detention officer testified that he believed that Rayos was trying to pass the letter to another inmate, who had requested that the trash can be brought to his cell.

¶5 The trial court denied Rayos's pretrial motion to preclude admission of the copy, reasoning that the contents of the letter itself supplied sufficient foundation. At trial, the court admitted a redacted copy of the letter following the detention officer's testimony that he copied the letter after discovering it in the trash can outside Rayos's jail cell and the handwriting analyst's testimony that similarities between known samples of Rayos's handwriting and the copy of the letter led him to conclude that Rayos had probably authored it.

¶6 Rayos argues that the State had not laid adequate foundation for the admission of the letter. He claims that no one witnessed him putting the letter in the trash can. He further argues that because the prison officials failed to preserve the original letter, the handwriting expert had to work with a "poor copy" that left him opining only that Rayos "probably" authored the letter. Under these circumstances, he argues, Rule 1003 of the Arizona Rules of Evidence precluded admission of the copy, because "there was a 'genuine question as to the original [letter's] authenticity'" and "'other circumstances supporting its admissibility' were suspect."

¶7 Adequate foundation may be provided by "evidence sufficient to support a finding that the item is what the proponent claims it is," such as by "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Ariz. R. Evid. 901(a), (b)(4). "Whether a party has laid sufficient foundation for the admission of evidence is within the sound discretion of the trial court, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. George*, 206 Ariz. 436, 446, ¶ 28, 79 P.3d 1050, 1060 (App. 2003).

¶8 We find no abuse of discretion by the court in admitting the letter. The signature on the letter, the

circumstances of its discovery, its content, and the handwriting expert's opinion that Rayos probably authored it constituted persuasive evidence that Rayos had written the letter. The fact that the letter was a "poor copy" of the original, limiting to some extent the handwriting expert's ability to compare it with Rayos's writing, went to the weight of the evidence, not its admissibility. *See George*, 206 Ariz. at 446, ¶ 31, 79 P.3d at 1060. Moreover, Rayos subsequently admitted on the witness stand that he had in fact written the letter, curing any conceivable problem with foundation. Rayos has, in short, failed to raise any genuine question about the letter's authenticity or identify any circumstances that persuade us that it was unfair to admit the copy. On this issue, we conclude that the trial court did not abuse its discretion and no reversible error occurred.

¶9 Rayos also argues that the trial court erred by permitting the prosecution to amend the indictment mid-trial to change the theory of assault. After the State rested, the State moved to amend the indictment to change the aggravated assault charge from causing physical injury to Jose, to causing Jose reasonable apprehension of imminent physical injury. Over Rayos's objection, the court granted the motion finding that Rayos had notice that this was the type of aggravated assault the State alleged and intended to prove.

¶10 The State concedes that the court violated Rule 13.5(b) of the Arizona Rules of Criminal Procedure in amending the aggravated assault offense mid-trial from physical injury assault to reasonable apprehension assault. Because Rayos objected to the amendment, to avoid reversal the State must show that the error was harmless beyond a reasonable doubt. *State v. Freeney*, 223 Ariz. 110, 114, ¶ 26, 219 P.3d 1039, 1043 (2009). In determining whether the error was harmless, we look at "whether the amendment somehow prejudice[d] the defendant's 'litigation strategy, trial preparation, examination of witnesses or argument.'" *State v. Lehr,* 227 Ariz. 140, 154, ¶ 70, 254 P.3d 379, 393 (2011) (quoting *Freeney*, 223 Ariz. at 115, ¶ 28, 219 P.3d at 1044).

¶11 The State has met its burden in this case to prove the error was harmless. Rayos had actual notice that the State was alleging and intending to prove reasonable apprehension assault long before trial: in the case-management plan filed by the State ten months before trial, during the settlement conference four months before trial, and from the State's pretrial statements filed in the month before trial. During *voir dire*, the State's pretrial statement alleging reasonable apprehension assault was read to the prospective jurors, and the judge later noted that this was "with [defense counsel's] consent." In her opening statement, moreover, the prosecutor told the jury that

the evidence would show that "the defendant committed aggravated assault when he pointed the handgun at the face of Jose [], placing him in fear that he, too, would be shot." After the judge allowed the amendment, Rayos did not request a recess or a continuance to allow him to prepare a new defense, nor did he ask to recall Jose to cross-examine him on the reasonable apprehension assault charge.

¶12 On appeal, Rayos fails to identify any way in which the amendment actually prejudiced his litigation strategy, trial preparation, examination of witnesses, or argument. On this record, we find that the State has met its burden to show that the amendment to change the theory of assault was harmless beyond a reasonable doubt.

¶13 For the foregoing reasons, we affirm Rayos's convictions and sentences.

/s/
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JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Judge

/s/
_____
DONN KESSLER, Judge