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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



DIVISION ONE
FILED: 6/6/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

STATE OF ARIZONA,) NO. 1 CA-CR 12-0324
)
Appellee,) DEPARTMENT D
)
v.) MEMORANDUM DECISION
)
CORION KENTRAIL BABERS,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-007840-001

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Acting Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

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By Frances J. Gray, Deputy Legal Advocate
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G E M M I L L, Judge

¶1 Defendant Corion Babers appeals from his convictions and sentences. Babers' counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v.*

Leon, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Babers was afforded the opportunity to file a *pro se* supplemental brief, and he has done so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001). The facts from the trial record are as follows.

¶3 Douglas and his adult son, Matt, went to a shooting range together on August 24, 2009. At that time, Douglas was physically strong and healthy. The next day, family members discovered Douglas's dead body in the front entry hall of his home.

¶4 Police determined that Douglas's Discover Card had been used at a nearby Chevron gas station on the evening of August 24, 2009, shortly after 9:00 p.m. The gas station surveillance video showed the time period at which Robert Pleickhardt pumped gas into his car matched the time when Douglas's Discover Card was used at the same gas station. The

surveillance video also showed Kathleen Madden exit the rear, driver's side door of the car Pleickhardt was driving, walk toward the Chevron store, pause for a moment as if talking to someone in the car, and then purchase Newport cigarettes inside the store with loose change. Although police distributed still photographs from the Chevron gas station video to identify and locate Pleickhardt and Madden, the details of Douglas's death were not disclosed.

¶15 On August 29, the police arrested Pleickhardt and Madden as they left an apartment belonging to Pleickhardt's stepdaughter, Destiney Vahle. Following a search, numerous items of Douglas's property were recovered from Pleickhardt and Madden's car and from Vahle's apartment. Although Madden purchased Newport cigarettes at the gas station after the home invasion, neither she nor Pleickhardt had any Newport cigarettes in their possession or property.

¶16 On August 29, 2009, Detective Smith conducted a recorded interview with Vahle. Vahle acted surprised when Detective Smith informed her that Pleickhardt and Madden had been arrested for homicide. Although Vahle was questioned regarding the identity of a third perpetrator, Vahle initially denied having knowledge of a third person. On August 30, however, Vahle admitted to Detective Smith that on the evening of August 24, her boyfriend told her that he, Pleickhardt, and

Madden were going to "hit a lick," which means to rob someone for drugs or money. All three left her apartment together and when they returned, her boyfriend told her that "sh** went bad;" that Pleickhardt hit "the dude" repeatedly, beating him and demanding money; and that the victim might be dead because he had no pulse. During this interview, Vahle falsely identified photographs of an innocent man, Corion Cooper, as her boyfriend.

¶7 Later that day, Vahle's aunt, Tracie Gall, convinced her to contact the police and admit Babers was her boyfriend. Although Vahle admitted to the detectives that she had lied about the identity of her boyfriend, she did not recant her account of what her boyfriend told her about the home invasion.

¶8 The police located and arrested Babers as he left his mother's house on August 30, 2009. During an execution of a search warrant at Babers' mother's house, an empty Newport cigarette box was recovered from the kitchen trash, a second Newport cigarette box was recovered from the recycling bin, and a Newport cigarette was recovered in Babers' bedroom.

¶9 On August 31, Vahle recounted to Gall further information regarding the home invasion. Vahle told Gall that Pleickhardt and Madden dropped Babers off at her apartment after the home invasion, and he spent the night at Vahle's apartment. She noted that Babers' socks and house shoes were covered with stickers when he returned that night. Babers told her that

Pleickhardt gained entry to the house by telling Douglas that he had a flat tire and needed to use the phone. Once inside, Pleickhardt demanded money. Babers, who was concealed, entered after several minutes to find Pleickhardt and Douglas fighting; Douglas subsequently fell down. Babers expressed to Vahle his anger at Madden, who left while he and Pleickhardt were in the victim's house, causing them to walk for about ten minutes before she showed up again.

¶10 In evaluating the evidence connecting Babers to the scene of the murder, a series of shoe prints with no discernible pattern were identified, consistent with the house shoes worn by Babers that night, in the great room and around the couch at Douglas's house. Babers' fingerprints, however, were not identified to any of the latent prints recovered from the scene. His DNA was not present on any of the items tested. Also, the police did not find any of Douglas's property, or any of the items purchased with Douglas's credit card in Babers' mother's house or in Babers' possession.

¶11 Further evidence did connect Pleickhardt to the murder. Pleickhardt's palm print was recovered at Douglas's house and his DNA was found on a cord used to bind Douglas. Also, Douglas's blood was identified on the shirt Pleickhardt was wearing in the gas station video.

¶12 After Babers' arrest, Vahle accepted multiple

telephone calls from Babers and visited him at the jail on numerous occasions, initially listing herself as his cousin and later as his fiancé. On September 13, 2009, Babers and Vahle discussed the fact that Vahle would be called as a State's witness and what she needed to do about it. Although she was personally served with a subpoena and ordered by the court to appear for Babers' trial, Vahle failed to appear for the trial, causing the case to be dismissed without prejudice on August 18, 2011. Vahle was charged and convicted of hindering the prosecutions of Pleickhardt and Babers.

¶13 At trial, Vahle maintained that her statements to the police in August 2009 describing what Appellant told her about the home invasion were lies. Vahle testified that she lied to the police because she was afraid that she would get into trouble. She further testified that this was the first time she had given a statement to a detective and then testified at trial that her former statements were untrue. At that time, the State impeached Vahle with evidence from a trial in 2006 involving Vahle's former boyfriend when she similarly recanted her statements to police claiming she had lied because of her fear that she would get in trouble.

¶14 After the jury trial and deliberations, the jury convicted Babers on all charges, including burglary in the second degree, a class 3 felony, kidnapping, a class 2 felony,

first degree murder, a class 1 felony, theft, a class 1 misdemeanor, and tampering with a witness, a class 6 felony. The court sentenced Babers to a prison term amounting to natural life. The court ordered all counts to be served concurrently, except tampering with a witness, which was ordered to be served consecutively.

¶15 Babers timely appeals, and we have jurisdiction under Arizona Constitution Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).¹

DISCUSSION

¶16 Babers filed a supplemental brief raising four primary issues, including: (1) ineffective assistance of counsel, (2) improper jury instructions, (3) prosecutorial misconduct, and (4) request for additional deoxyribonucleic acid (DNA) testing of trial evidence.

Ineffective Assistance of Counsel

¶17 Babers claims his trial attorney failed to preserve the testimony of two alibi witnesses, Vahle and Gall. In doing so, Babers contends that an ineffective assistance of counsel claim is viable under the Sixth and Fourteenth Amendments to the United States Constitution. Babers further claims his attorney

¹ We cite to the current versions of statutes when no revisions material to this decision have occurred since the date of the alleged offenses.

was ineffective because the attorney did not inform Babers of his intention to file a brief in compliance with *Anders*, 386 U.S. 738 (1967), and *Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), before this court.

¶18 The Arizona Supreme Court addressed the application of an ineffective assistance of counsel claim on direct appeal in *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). The Court stated:

We endeavor today to clarify this issue for trial courts and practitioners. Accordingly, we reiterate that ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit. There will be no preclusive effect under Rule 32 by the mere raising of such issues. The appellate court simply will not address them. This ensures criminal defendants a timely and orderly opportunity to litigate ineffectiveness claims and, we believe, promotes judicial economy by disallowing piecemeal litigation.

Therefore, an ineffective assistance of counsel claim is not appropriate in this direct appeal, and we need not address this issue. This ineffective assistance of counsel claim must be brought, instead, in a Rule 32 proceeding.

Improper Jury Instructions

¶19 Babers alleges the superior court committed fundamental error by failing sua sponte to instruct the jury on the affirmative defenses of entrapment and duress. See A.R.S.

§§ 13-206 (2010) and 13-412 (2010). Because Babers did not request these instructions, and he raises these issues for the first time on appeal, we review only for fundamental error. See *State v. Nordstrom*, 200 Ariz. 229, 253, ¶ 81, 25 P.3d 717, 741 (2001), abrogated on other grounds by *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). It is fundamental error for the trial court to fail to instruct on matters vital to proper consideration of the evidence "even if not requested by the defense." *State v. Johnson*, 205 Ariz. 413, 417, ¶ 11, 72 P.3d 343, 347 (App. 2003) (citation omitted). But, "[i]t is a rare case where the omission of an instruction without objection constitutes fundamental error." *State v. Marchesano*, 162 Ariz. 308, 316, 783 P.2d 247, 255 (App. 1989) (lack of sua sponte instruction not fundamental error), disapproved of on other grounds by *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002).

¶20 Although "a defendant is entitled to a justification instruction if it is supported by the slightest evidence," *State v. Ruggiero*, 211 Ariz. 262, 264, ¶ 10, 120 P.3d 690, 692 (App. 2005) (citation omitted), one should not be given unless "reasonably and clearly supported by the evidence." *Id.* (citation omitted).

¶21 Duress is defined in A.R.S. § 13-412(A):

Conduct which would otherwise constitute an

offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

¶22 Nothing in the record suggests any "threat or use of immediate physical force" against Babers occurred in connection with the crimes charged. Therefore, the affirmative defense of duress is unavailable to Babers and the lack of a corresponding jury instruction did not constitute fundamental error.

¶23 Babers also argues that the conviction should be overturned as a product of entrapment. To claim entrapment, however, Babers is required to admit the substantive elements of the crime charged. A.R.S. § 13-206(A). By refusing to admit the substantive elements of all of his charged crimes including burglary, kidnapping, felony murder, theft, or tampering with a witness at trial, Babers rendered the defense of entrapment unavailable. See *State v. Nilsen*, 134 Ariz. 431, 432, 657 P.2d 419, 420 (1983) ("Our cases have consistently held that to avail himself of the defense of entrapment, a defendant must admit all the elements of the offense."). Therefore, no fundamental error occurred regarding the lack of an entrapment instruction.

Prosecutorial Misconduct

¶24 We also review Babers' claims of prosecutorial

misconduct for fundamental error because Babers did not object below. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). "Prosecutorial misconduct 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 [the prosecutor] pursues for any improper purpose with indifference to a significant resulting danger of mistrial." *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quotation and internal punctuation omitted). "To warrant reversal, the prosecutorial misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006) (quotation and internal punctuation omitted).

¶25 Babers makes a general claim that the prosecutor improperly threatened to take Vahle's kids away from her if she did not cooperate. On appeal, however, Babers fails to support this contention in the record nor does he point out any specific instance when this occurred. Therefore, even after our independent review, we do not find the actions of the prosecutor constitute fundamental error.

Additional DNA Testing

¶26 Babers requested, for the first time in his

supplemental brief, that additional DNA testing be performed on the evidence with "a new, more accurate test." Babers claims that the "new" DNA test "can discover DNA in previously tested samples." He contends these results "may reveal that the blood did not come from Babers" and will suggest "that another person committed the murder." Although this request is unavailable in this appeal, Babers may consider filing a post-conviction relief request pursuant to A.R.S. § 13-4240 (2010).

The Court's Independent Review of the Record for Fundamental Error

¶27 Having considered defense counsel's brief and examined the record for reversible error, *see Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The evidence presented supports the conviction and the sentence imposed falls within the range permitted by law. As far as the record reveals, Babers was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶28 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Babers of the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to

the Arizona Supreme Court by petition for review. Babers has 30 days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶29 The convictions and sentences are affirmed.

/s/

JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

DONN KESSLER, Judge