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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



DIVISION ONE
FILED: 10/17/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 12-0762
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
SAMUEL YAZZIE WEBB,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-157140-001

The Honorable Joseph C. Kreamer, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
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Attorneys for Appellant

W I N T H R O P, Judge

¶1 Samuel Yazzie Webb was convicted by a jury of second degree murder, a class 1 felony and domestic violence offense, in regards to the death of his stepbrother. The victim was

found dead with his throat slashed after last being seen with Webb the previous evening. On appeal, Webb contends the trial court erred by dismissing a juror and by giving an improper jury instruction. For reasons that follow, we affirm.

DISCUSSION

A. *Dismissal of Juror*

¶2 Webb argues that the trial court erred by dismissing Juror 9 during trial. The juror was dismissed after informing the trial court that he realized while listening to testimony that he was "quite familiar with the murder scene and the surrounding area." In dismissing the juror, the trial court expressed concern that Juror 9 had a "greater universe of knowledge than everyone else of the scene." Webb claims the dismissal of Juror 9 violated his right to a fair and impartial jury because there was no valid basis for dismissing this juror.

¶3 Although a defendant in a criminal case is entitled to a fair and impartial jury, he is not entitled to any particular jury. *State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978). Thus, if the record does not affirmatively establish that dismissal of a juror resulted in a biased jury, we will not reverse. *Id.*; see also *Kinsey v. State*, 49 Ariz. 201, 209-10, 65 P.2d 1141, 1145 (1937) ("The exclusion of a juror by the court, even though erroneous, is of itself never a ground for reversal, for the defendant is not entitled to have his case

tried by any particular juror, but merely by twelve who are properly qualified and impartial.”). Webb has not directed this court to any evidence that the jury that decided his case was not fair or impartial, nor has our review of the record disclosed any such evidence. Accordingly, regardless of whether the juror’s familiarity with the murder scene provided a valid basis for dismissal, Webb is not entitled to reversal.

¶4 Webb’s reliance on *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), in claiming the juror’s dismissal was reversible error, is misplaced. In *Symington*, the Ninth Circuit held that the district court committed reversible error in dismissing a juror during deliberations after finding that the juror was either “unwilling or unable to deliberate” because the record evidenced a reasonable possibility the impetus for the juror’s dismissal stemmed from her views on sufficiency of the State’s case. *Id.* at 1088. The decision in *Symington* was based on the rule that “[a] court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence.” *Id.* at 1085 (quoting *United State v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1978)). As the Ninth Circuit observed, “The reason for this prohibition is clear: ‘To remove a juror because he is unpersuaded by the Government’s case is to deny the defendant

his right to a unanimous verdict.'" *Id.* (quoting *United States v. Thomas*, 116 F.3d 606, 621 (2d Cir. 1997)).

¶15 Here, Juror 9 was not dismissed during deliberations based on doubts the juror had regarding the sufficiency of the State's case. Indeed, when the juror was dismissed, the State had not even completed presentation of its case and the jury had been instructed not to form any final opinions about any fact or the outcome of the case until all the evidence had been presented. Furthermore, unlike in *Symington*, the trial court's remarks in dismissing the juror indicate that the impetus for the dismissal was not the juror's views on the sufficiency of the State's case but rather concern that the juror's prior knowledge about the murder scene might improperly figure into his deliberations, notwithstanding the instruction that jurors must decide the facts only from evidence presented in court. In the absence of any showing that the jury that decided this case was not fair or impartial, there was no reversible error by the trial court in dismissing the juror. *Arnett*, 119 Ariz. at 50, 579 P.2d at 554.

B. Instruction on Concealment of Evidence

¶16 Webb also argues that the trial court erred in giving the following jury instruction:

Concealing evidence after a crime has been committed does not by itself prove guilt. You may consider any evidence of the

defendant's concealment of evidence, together with all the other evidence in the case.

¶7 Because Webb failed to object to this instruction at trial, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); see also Ariz. R. Crim. P. 21.3 ("No party may assign as error on appeal the court's giving . . . any instruction . . . unless the party objects thereto before the jury retires to consider its verdict"). To prevail under this standard of review, a defendant must prove both that fundamental error exists and that the error caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶8 Webb contends the instruction was error because it was not supported by the evidence. A concealment instruction is proper so long as the evidence demonstrates consciousness of guilt. See *State v. Cutright*, 196 Ariz. 567, 570, ¶ 12, 2 P.3d 657, 660 (App. 1999) ("The key inquiry is whether the defendant engaged in some type of eluding behavior designed to camouflage his participation in a crime, thus manifesting a consciousness of guilt."), *disapproved on other grounds by State v. Miranda*, 200 Ariz. 67, 22 P.3d 506 (2001). Whether such an instruction should be given "is determined by the facts in a particular case." *State v. Speers*, 209 Ariz. 125, 132, ¶ 27, 98 P.3d 560, 567 (App. 2004) (citation omitted). We review a trial court's

decision to give a particular jury instruction for abuse of discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003).

¶9 In the instant case, Webb testified that the morning after the murder he changed out of the clothes and shoes he had been wearing and threw them away. Due to the bloody nature of the murder, the trial court could reasonably conclude that Webb's conduct in permanently disposing of his clothing following the murder would support an inference of consciousness of guilt. Although Webb testified that he threw away his clothes and shoes for reasons unrelated to the murder, a defendant's alternative explanation for his behavior does not preclude an instruction on evidence that manifests consciousness of guilt. See *State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199 (1983) (upholding flight instruction notwithstanding defendant's explanation for fleeing the scene). The trial court did not abuse its discretion in giving the concealment of evidence instruction.

¶10 Moreover, even if the trial court had erred in giving the instruction, Webb is unable to meet his burden of showing he was prejudiced. The instruction was phrased permissively; the jury was instructed that they "may" consider any evidence of concealment and further informed that the concealing of evidence does not itself prove guilt. On this record, Webb's claim that

the "jury might have acquitted" if not for this instruction is pure speculation. "Speculative prejudice is insufficient under fundamental error review." *State v. Martin*, 225 Ariz. 162, 166, ¶ 15, 235 P.3d 1045, 1049 (App. 2010).

CONCLUSION

¶11 Based on the foregoing, we affirm Webb's conviction and sentence.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
MARGARET H. DOWNIE, Judge

_____/S/_____
JON W. THOMPSON, Judge