IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LOUIS HUGH PLUNKETT, *Appellant*.

No. 1 CA-CR 15-0161
FILED 5-26-2016

Appeal from the Superior Court in Mohave County
No. S8015CR201401248
The Honorable Rick A. Williams, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Myles A. Braccio
Counsel for Appellee

Mohave County Legal Defender's Office, Kingman
By Eric Devany
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Margaret H. Downie delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Donn Kessler joined.

D O W N I E, Judge:

¶1 Louis Hugh Plunkett appeals his convictions for first degree murder, fraudulent schemes and artifices, and tampering with physical evidence. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Plunkett was charged with first degree murder, fraudulent schemes and artifices, forgery, and tampering with physical evidence after M.B. was discovered dead in her swimming pool. Plunkett lived with M.B. and was the sole beneficiary of a trust established in her will, as well as the sole beneficiary of M.B.'s two retirement accounts and a life insurance policy. M.B. died of multiple blunt force injuries to the head and neck. Manual strangulation was also a contributing factor.

¶3 During the ensuing jury trial, the court granted Plunkett's motion for judgment of acquittal as to the forgery count. The jury found Plunkett guilty of the remaining counts. Plunkett was sentenced to consecutive terms: imprisonment for natural life for first degree murder, eight years' imprisonment for fraudulent schemes and artifices, and nine months' imprisonment for tampering with physical evidence. Plunkett timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033.

DISCUSSION

I. Waiver of Counsel

¶4 Plunkett argues the trial court erred by accepting his waiver of his right to counsel and by permitting him to represent himself at trial. We review the trial court's decision for an abuse of discretion. *See State v. Boggs*, 218 Ariz. 325, 338, ¶ 61 (2008).

¶5 Plunkett filed a motion to represent himself approximately three weeks before trial. The court conducted a hearing on the motion and engaged Plunkett in an extensive colloquy. The court advised Plunkett that he had the right to an attorney and to appointed counsel if he could not afford legal representation. Plunkett responded that he understood. The court further advised Plunkett that an attorney could be of significant assistance and that there were "serious dangers and disadvantages to representing yourself." Plunkett responded that he had a much better chance of "getting the facts to the jury and to the Court on [his] own." Plunkett stated he was ready for trial "right now."

¶6 The court noted that Plunkett presented "very well" and seemed to be "highly intelligent," but emphasized the gravity of the case. It reminded Plunkett he was charged with first degree murder and that, if convicted, the sentence ranged from imprisonment for life with a possibility of parole after 25 years to imprisonment for natural life. The court urged Plunkett to use counsel for that reason alone. It also reminded Plunkett that his case was complex due to the number of witnesses and exhibits, the intricacies of the trial, jury selection, examination of witnesses, and the need to anticipate evidence and prepare rebuttal evidence.

¶7 Plunkett responded that he understood "the magnitude" of the case and everything the court had told him. He still believed he could do a better job than counsel. The court cautioned Plunkett that he would have sole responsibility for presenting legal defenses, preparing for trial, filing and arguing motions, examining and cross-examining witnesses, and giving an opening statement and closing argument. The court also stated that Plunkett would be held to the same standard as an attorney, including knowledge of courtroom procedure, the law, and the rules of evidence and procedure. Plunkett responded that he still wanted to represent himself and was ready for trial. He stated that he had "thought long and hard about this," that his waiver of counsel was voluntary and of his own volition, and that it was not the result of force or threats. The court advised Plunkett that he could change his mind at any time during the proceedings, and the court would appoint counsel.

¶8 Plunkett then signed a written waiver of counsel. In the waiver, Plunkett acknowledged the charges against him and the potential "severe punishment" he faced. He further acknowledged various rights that the court had previously explained. The court granted Plunkett's motion to represent himself and appointed advisory counsel.

¶9 A defendant has a constitutional right to waive counsel and represent himself. *State v. Moody*, 192 Ariz. 505, 509, ¶ 22 (1998). "[W]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). "A prospective pro se litigant must understand (1) the nature of the charges against him, (2) the dangers and disadvantages of self-representation, and (3) the possible punishment upon conviction." *State v. Dann*, 220 Ariz. 351, 360, ¶ 24 (2009).

¶10 A defendant "need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation." *Faretta v. California*, 422 U.S. 806, 835 (1975). In fact, a defendant's "technical legal knowledge" is not relevant in determining whether a waiver of counsel is knowing and intelligent. *Id*. at 836. Finally, while a trial court must warn a defendant of the dangers and disadvantages of self-representation, "it is not reversible error to fail to warn of every possible strategic consideration." *State v. Cornell*, 179 Ariz. 314, 324 (1994). The trial court's warnings need only be sufficient to put a defendant on notice that self-representation is not advisable. *Id*.

¶11 The trial court here thoroughly advised Plunkett of his rights and of the dangers of self-representation and ensured that his waiver was voluntary, knowing, and intelligent. Under these circumstances, the court did not abuse its discretion in granting Plunkett's motion to represent himself.

II. Cross-Examination of Detective

¶12 Plunkett next contends the trial court erroneously denied him an opportunity to cross-examine a detective about a laboratory report. We disagree.

¶13 During cross-examination, the case-agent detective testified he was aware that investigators took samples of carpet from M.B.'s home. The detective had no other knowledge about the carpet samples. Plunkett asked if he had seen a laboratory report regarding tests performed on the carpet samples. The detective said he had not. When Plunkett sought to cross-examine the detective about the contents of the lab report, the State objected on hearsay grounds. Plunkett conceded that he was attempting to introduce the contents of the report through the detective. The court

sustained the hearsay objection. The court advised Plunkett he could ask the detective about materials sent for testing, but that the results of any testing were hearsay. Plunkett responded, "Okay. Fair enough." Plunkett never argued that the report or its contents were *not* hearsay, and he offered no theory of admissibility. Although the lab report had previously been marked as an exhibit, the State did not offer it into evidence, and Plunkett made no offer of proof regarding it.

¶14 Plunkett argues for the first time on appeal that the report was not hearsay under Arizona Rule of Evidence 801(d)(2)(B) and (C). We will not consider an evidentiary theory raised for the first time on appeal. *State v. Spreitz*, 190 Ariz. 129, 145 (1997). Therefore, we review the evidentiary issue only for fundamental error. "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24 (2005). Even if a defendant establishes fundamental error, he must still demonstrate that the error was prejudicial. *Id*. at ¶ 26.

¶15 We find no error, fundamental or otherwise. The report and its contents were hearsay. The detective did not prepare the report, had no knowledge of its contents, and had never even seen the report. The detective would have done nothing more than read the contents of a report he knew nothing about into evidence. Moreover, Plunkett offered no foundation for the report and could not do so through a witness who did not author the report, had never seen it, and had no knowledge of its contents.

¶16 Finally, Plunkett has not demonstrated the requisite prejudice. Because the report is not in the record, and no offer of proof was made regarding it, there is nothing to suggest that the report would have assisted the defense.

III. Evidence of Threat to Kill M.B.

¶17 Plunkett contends the court erred by admitting evidence that he threatened to kill M.B. before her death. A friend of M.B.'s had visited the home several weeks before M.B.'s death. She and M.B. discussed who would care for their pets if anything happened to them. When M.B. stated that Plunkett would care for her dog, the friend asked what would happen if Plunkett were not around. Plunkett responded, "That'll never happen." When asked what he meant, Plunkett answered, "If you ever left me, I'd have to kill you." When the friend followed up on this comment, Plunkett

stated, "I'd rather spend the rest of my life in jail than live without her." The friend believed Plunkett was serious and expressed concern. M.B. responded that Plunkett had never said anything like that before and that he would never harm her.

¶18 Plunkett moved *in limine* to preclude this evidence. He argued that the statements were hearsay and that the danger of unfair prejudice substantially outweighed any probative value of the evidence. He did not, however, explain what the unfair prejudice was. He also did not argue that the evidence was irrelevant. At a hearing regarding his motion, Plunkett argued the conversation never occurred, but if it did, he was not serious.

¶19 The trial court denied the motion *in limine*. It ruled that the statements were relevant to the issue of whether Plunkett committed premeditated murder and concluded that Plunkett's statements were not hearsay because they were the statements of an opposing party. The court further ruled that the statements of M.B. and the friend were not hearsay because they were not testimonial and/or not offered to prove the truth of the matter asserted, but were instead offered to show the effect on the listener and to provide context for Plunkett's statements. Finally, the court found the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

¶20 We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167 (1990). "The ultimate test of admissibility of a prior statement is whether that statement is relevant for a permissible purpose." *State v. Dickey*, 125 Ariz. 163, 167 (1980). "The test of relevance is whether the evidence tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*. A trial court may, however, exclude relevant evidence pursuant to Rule 403 if the danger of unfair prejudice substantially outweighs the probative value. *State v. Schurz*, 176 Ariz. 46, 52 (1993). "Unfair prejudice means an undue tendency to suggest decision on an improper basis . . . such as emotion, sympathy or horror." *Id*. A trial court has "considerable discretion" in determining whether unfair prejudice substantially outweighs the probative value of evidence. *State v. Gilfillan*, 196 Ariz. 396, 405, ¶ 29 (App. 2000).

¶21 We find no abuse of discretion. Plunkett's statements were relevant to the issue of whether he intentionally or knowingly caused M.B.'s death and whether he did so with premeditation. *See* A.R.S. § 13-1105(A) (elements of first degree murder). The statements were also evidence of a

state of mind in which Plunkett could conceive of a reason to kill M.B., as well as evidence of an actual malicious state of mind. *See State v. Wood*, 180 Ariz. 53, 62 (1994); *see also State v. Moore*, 111 Ariz. 355, 356 (1974). Whether Plunkett made the statements in jest was a matter for the jury. "That such admissions are also subject to conflicting inferences compatible with innocence does not affect their admissibility." *State v. Updike*, 151 Ariz. 433, 434 (App. 1986). That the evidence was prejudicial if the jury believed Plunkett was serious is certain. But the issue is not whether the evidence was, in Plunkett's words, "extremely" or "highly" prejudicial, but whether it was *unfairly* prejudicial. As noted *supra*, evidence is *unfairly* prejudicial if it suggests a finding of guilt based on an improper basis, such as emotion, sympathy or horror. *Schurz*, 176 Ariz. at 52. There is nothing suggesting that the challenged evidence caused the jury to render its decision on an improper basis.

CONCLUSION

¶22 For the foregoing reasons, we affirm Plunkett's convictions and sentences.