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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JACK BATES RIDER, III, *Appellant*.

No. 1 CA-CR 16-0522
FILED 6-29-2017

Appeal from the Superior Court in Yavapai County
No. V1300CR201280534
The Honorable Joseph C. Butner, III, Judge *Pro Tem* (Retired)

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Terry M. Crist, III
Counsel for Appellee

C. Kenneth Ray, II, PLLC, Prescott
By C. Kenneth Ray, II
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Margaret H. Downie delivered the decision of the Court, in which Judge Kenton D. Jones and Judge Donn Kessler joined.

D O W N I E, Judge:

¶1 Jack Bates Rider, III, appeals his conviction and sentence for second-degree murder. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Rider worked for R.F., and the two men were also friends. After R.F. began a relationship with the victim, Rider advised R.F. that he did not like her. Nonetheless, on July 19, 2007, Rider accompanied R.F. and the victim to Beasley Flats to explore archeological sites. Before long, R.F. felt ill and asked to leave. Rider and the victim were "getting along" unusually well, though, and he did not want to disrupt their possibly budding friendship. The group drove to a spot along the Verde River, where R.F. sat on the edge of the water while Rider and the victim floated on the river.

¶3 R.F. heard a splash and then a commotion. He saw Rider holding the victim "in a headlock" and pressing her head under the water. The victim was "fighting for her life" and "trying to get out." R.F. yelled at Rider to "let her go," but he did not comply. R.F. ran to his vehicle, retrieved his cell phone, called 9-1-1, and reported that the victim was drowning. By the time R.F. returned, Rider had pulled the victim from the water. Rider claimed he had attempted CPR.

¶4 When emergency responders arrived, the victim was pronounced dead. Police officers questioned Rider, who advised that he heard a splash downriver and did not realize the victim was submerged until he saw her body surface. R.F. suffered a panic attack and was treated by medical personnel at the scene. R.F. declined medical transport, and he and Rider drove home. Rider chastised R.F. for calling the police and explained he "could have hid [the victim] under the rocks." Rider also said

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[1] We view the facts in the light most favorable to sustaining the verdict. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

R.F. "was part of it now" because he did not tell the police what had really happened. When R.F. asked why he killed the victim, Rider responded that she was a drug addict and a poor mother who was "just trying to get money" from R.F. Rider also said the victim was "coming between [their] friendship."

¶5 The following week, R.F. called a detective several times to inquire about the status of the investigation. During those calls, R.F. was asked to describe what he had witnessed, and he never suggested the victim had been murdered. After an autopsy was performed and the medical examiner determined the drowning was an accident, the police closed their investigation.

¶6 Over time, R.F. and Rider stopped communicating with each other. In 2012, R.F. was prosecuted for unrelated criminal charges. During that proceeding, R.F. told the police that he had information about a murder and recounted the events of July 19, 2007. At officers' request, R.F. reached out to Rider through social media. Once they reconnected, R.F. initiated several confrontation calls. During those calls, R.F. repeatedly referred to the victim's death as a murder, and Rider never directly challenged that characterization. Rider also gave several incriminating responses: (1) after Rider complained about his ex-wife, R.F. stated, "it sounds like you drowned the wrong [] person," and Rider laughed; (2) when R.F. asked why he killed the victim, Rider responded, "I don't remember . . . I have all that shit blocked out of my head" and explained he was not troubled by the death because he was "borderline psychopathic"; and (3) when pressed to provide an explanation for the drowning, Rider responded, "That's something we would have to talk face-to-face about. Not something I'd talk over the phone about."

¶7 The police returned to the drowning site and took measurements, determining the river did not exceed a depth of three feet. Officers questioned how the five-foot-tall victim could have accidentally drowned in such shallow water and asked medical examiner Mark Fischione, M.D., to review the autopsy report. Based on his review, Dr. Fischione amended the manner of death to homicide.

¶8 In November 2012, Rider was charged with one count of premeditated first-degree murder. The State also alleged aggravating factors.

¶9 Medical examiner Philip Keen, M.D., testified at trial about his July 2007 autopsy. He explained that the victim sustained an abrasion

and contusion on her forehead that was consistent with having fallen on a rock. Concluding this injury was sufficient to render her unconscious, and noting the absence of any defensive wounds or other trauma, Dr. Keen determined the cause of death was drowning and the manner of death was accidental. Dr. Keen opined that it was unlikely a person could force someone under water for a sufficient period to cause death without leaving marks or injuries on the body.

¶10 Dr. Fischione testified that the injury to the victim's forehead was superficial and insufficient to render her unconscious. Because the victim was otherwise in excellent health and not impaired, Dr. Fischione opined that she would not have drowned in such shallow water absent an external force preventing her from standing upright. He believed the manner of death was homicide. Dr. Fischione also concluded CPR was not performed on the victim.

¶11 The jury found Rider not guilty of first-degree murder but guilty of second-degree murder. The jury found one aggravating factor (harm to the victim's immediate family), and Rider was sentenced to an aggravated term of 18 years' imprisonment. Rider timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. Lesser-Included Offense Instruction

¶12 Rider contends the trial court improperly instructed jurors on the lesser-included offense of second-degree murder. We disagree.

¶13 While settling jury instructions, defense counsel questioned whether second-degree murder was "a necessary legally obligated lesser-included offense." The court responded that the trial evidence suggested a lack of premeditation, and thus, instructing on the lesser-included offense of second-degree murder was necessary. Defense counsel objected, asserting the instruction would undermine the defense that the victim accidentally drowned. The court overruled the objection.

¶14 We review the giving of a particular jury instruction for an abuse of discretion. *State v. Sprang*, 227 Ariz. 10, 12, ¶ 5 (App. 2011). The court may instruct the jury on any lesser-included offense supported by the evidence. *State v. Gipson*, 229 Ariz. 484, 487, ¶ 17 (2012). In determining whether evidence justifies a lesser-included offense instruction, we consider "whether the jury could rationally fail to find the distinguishing

element of the greater offense." *Sprang*, 227 Ariz. at 12, ¶ 7. Stated differently, a lesser-included offense instruction is warranted when reasonable jurors could find that: (1) the State failed to prove an element of the greater offense; and (2) the evidence is sufficient to support a conviction on the lesser offense. *State v. Wall*, 212 Ariz. 1, 4, ¶ 18 (2006).

¶15 "Second-degree murder is a lesser-included offense of premeditated first-degree murder, the difference between the two being premeditation." *Sprang*, 227 Ariz. at 12, ¶ 6. A second-degree murder instruction is appropriate "when a reasonable construction of the evidence tends to show a lack of premeditation." *Id*. In other words, a second-degree murder instruction is proper when a "jury could rationally conclude" that an intentional and knowing killing was not preceded by "any length of time to permit reflection." *Id*. at ¶¶ 6–7; *see also* A.R.S. § 13-1101(1) (premeditation defined).

¶16 Reasonable jurors could have found a lack of premeditation. Although R.F. testified Rider disliked the victim, he also explained that she and Rider were getting along well during their outing. R.F. saw them happily floating down the river just moments before seeing Rider holding the victim's head underwater. In cross-examining R.F., defense counsel repeatedly characterized the incident between Rider and the victim as a "fight," and R.F. did not challenge that characterization. And when moving for a judgment of acquittal, defense counsel argued:

> [T]here is absolutely no evidence that would support that this was in any way planned even for a short period of time and not an instant effect of a sudden quarrel or heat of passion even if you were to take everything that [R.F.] stated. In fact, I believe it would support the exact opposite: the fact that he said that they were getting along; the fact that he said he was shocked and surprised to see this; that would actually be evidence that would support the argument the other way and would not support any finding of premeditation.

Based on the trial evidence, jurors could rationally conclude Rider did not reflect before intentionally and knowingly drowning the victim, warranting the second-degree murder instruction.

¶17 Although Rider contends the instruction "materially and substantially compromised his defense," the record reflects that he fully presented his theory that the drowning was an accident, and that defense was equally viable against a charge of second-degree murder. Likewise,

Rider's claim that he had no notice he would be required to defend against a second-degree murder charge is without merit. A "defendant is on notice from the beginning of the proceedings against him that the jury may be asked to consider any lesser included offenses supported by the trial evidence." *Gipson*, 229 Ariz. at 486–87, ¶ 14.

¶18 The trial court did not abuse its discretion by instructing jurors regarding second-degree murder.

II. Instructions on "Mere Presence" and "Absence of Other Participant"

¶19 Rider also contends the court improperly instructed jurors on "mere presence" and "absence of other participant." He argues the instructions were not supported by the evidence, undermined his defense, and constituted a judicial comment on the evidence, essentially informing jurors that the victim's death "was the result of criminal misconduct."

¶20 After R.F. testified, the State called the detective who coordinated the confrontation calls. He explained that R.F. received no benefit or leniency by cooperating with the murder investigation, and the confrontation calls were played for the jury. At the close of the detective's testimony, a juror submitted a question asking why R.F. was not prosecuted as an accomplice. The court did not read the question, and the prosecutor suggested the court instruct jurors "not to consider the absence of another participant."

¶21 In settling final jury instructions, Rider objected to an "absence of other participant" instruction, arguing it could confuse jurors and undermine the defense theory that no crime was committed. The court disagreed, reasoning that the instruction was appropriate because of the juror question about R.F. acting as an accomplice. Without such an instruction, the court found, the "jury could conclude [that R.F.] didn't get charged because he was given a sweet deal for testifying against [Rider]."

¶22 Rider also objected to a "mere presence" instruction, arguing it was unsupported by the evidence and undermined his defense. The State also objected to the instruction, explaining that the victim either drowned accidentally or Rider committed a crime against her, but in either scenario, Rider was not "just there" while a crime was committed. Reasoning that at least one juror believed R.F. had "some complicity" and noting the juror might also believe R.F. committed the crime and Rider was "merely present," the court overruled both objections and instructed jurors, in relevant part:

> You must consider all these instructions. Do not pick out one instruction or part of one and ignore the others. As you determine the facts, however, you may find that some instructions no longer apply. You must then consider the instructions that do apply together with the facts as you have determined them.
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> . . . .
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> Mere Presence. Guilt cannot be established by the defendant's mere presence at a crime scene, mere association with another person at a crime scene or mere knowledge that a crime is being committed. The fact that the defendant may have been present or knew that a crime was being committed does not in and of itself make the defendant guilty of the crime charged. One who is merely present is a passive observer who lacked criminal intent and did not participate in the crime.
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> Absence of other participant. The only matter for you to determine is whether the State has proved the defendant guilty beyond a reasonable doubt. The defendant's guilt or innocence is not affected by the fact that another person or persons might have participated or cooperated in the crime and is not on trial now. You should not guess about the reason any other person is absent from the courtroom.

¶23 If jurors appear confused about a legal issue, and the matter is not adequately addressed by other instructions, the trial court may, in its discretion, offer additional guidance regarding "the relevant legal criteria." *State v. Ramirez*, 178 Ariz. 116, 126 (1994). Here, one juror's question suggested a belief that R.F. was culpable for the murder. Although the record lacks any evidence suggesting R.F. killed the victim or assisted in her killing, the court acted within its discretion by providing additional instructions. The "absence of other participant" and "mere presence" instructions clarified that jurors should not consider the possible culpability of any other person and should not convict Rider if they determined he was only present while a crime was committed.

¶24 Rider argues the instructions effectively informed jurors that the victim's death was the result of a criminal act, but the court also expressly instructed the jury to disregard any portion of the instructions that were contrary to their factual findings. *See State v. Cannon*, 148 Ariz.

72, 80 (1985) ("Challenges to jury instructions are evaluated in light of all of the instructions given."). We presume jurors follow their instructions, *State v. Dann*, 205 Ariz. 557, 570, ¶ 46 (2003), and Rider has not rebutted this presumption.

¶25 The trial court did not abuse its discretion by giving the challenged instructions.

III. Dr. Fischione's Testimony

¶26 Rider contends the court improperly admitted expert opinion testimony by Dr. Fischione and that his testimony "was not based upon scientific, technical or other specialized knowledge," but was simply "speculative opinion" that improperly "t[old] the Jury how to decide the case." He also contends the testimony was unfairly prejudicial.

¶27 Before trial, Rider moved to preclude Dr. Fischione's testimony under Arizona Rules of Evidence ("Rule") 702 and 403. At a two-day evidentiary hearing held on the motion, Dr. Keen and Dr. Fischione testified. Consistent with his autopsy report, Dr. Keen opined that the single abrasion to the victim's forehead could have rendered her "temporarily unconscious." Nonetheless, he acknowledged homicide was "a possibility" and stated that if he were evaluating the manner of death anew, he would "probably" conclude it was "undetermined." Considering the same abrasion, Dr. Fischione opined that the injury was insufficient to incapacitate. Accordingly, he concluded the manner of death was homicide. The trial court determined Dr. Fischione was qualified to render expert opinion testimony under Rule 702. Finding that his opinion was based on independent review of the autopsy report and specialized medical knowledge regarding the nature and severity of injuries, the court ruled Dr. Fischione's testimony did not invade the province of the jury and was not unfairly prejudicial.

¶28 We review the admission of expert testimony for an abuse of discretion. *State v. Sosnowicz*, 229 Ariz. 90, 94, ¶ 15 (App. 2012). We view "the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Ortiz*, 238 Ariz. 329, 333, ¶ 5 (App. 2015).

¶29 Under Rule 702, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if such testimony "will help the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony may embrace "an ultimate issue to be decided by the trier of fact if the

testimony is otherwise admissible." *Sosnowicz*, 229 Ariz. at 95, ¶ 17. Nonetheless, "witnesses are not permitted as experts on how juries should decide cases." *Id.*

¶30 If a medical examiner's opinion about the manner of death "is based largely on the testimony of lay witnesses whose credibility the jury can determine without the aid of expert testimony," the opinion is generally inadmissible. *Id.* at 97–98, ¶ 26. If, on the other hand, the medical examiner's opinion regarding the manner of death is based primarily on his or her evaluation of the victim's body, it "will frequently assist the jury in understanding the evidence" and is therefore "ordinarily" admissible. *Id.*

¶31 Rider does not dispute that Dr. Fischione's education, training, and experience qualify him to render expert opinions about the manner of death. He instead argues Dr. Fischione engaged in speculation rather than relying on his specialized knowledge, and further contends Dr. Fischione invaded the province of the jury. The record does not support these contentions.

¶32 Although he did not criticize how Dr. Keen conducted the autopsy, Dr. Fischione reached a different conclusion about the abrasion to the victim's head and did not believe it was "enough to incapacitate her." Dr. Fischione described the injury as a "simple small little abrasion" because there was no deep trauma, no swelling around the brain, no bleeding near the brain, no fractures, and only a "superficial sluffing of the top layer of the skin." He explained that the minor nature of the injury and the lack of any incapacitating substance in the victim's body led him to conclude an external force caused her to drown. Thus, contrary to Rider's characterization, Dr. Fischione's opinion was not mere speculation, but was grounded in his medical assessment of the victim's injury, her overall health, and the absence of any incapacitating substances in her body. Rider correctly notes that this testimony embraced an ultimate issue to be decided by the jury — namely, whether the drowning was accidental, but Dr. Fischione did not opine about how the jury should decide the case. That is, he did not suggest Rider drowned the victim and offered only a medical, not a legal opinion, that the drowning was the result of a criminal act.[2]

¶33 We also disagree with Rider's assertion that Dr. Fischione's testimony was inadmissible under Rule 403. Rule 403 provides that relevant evidence may be excluded if its probative value is substantially

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[2] Dr. Keen explained at trial that the manner of death designation is a medical finding, not a legal conclusion.

outweighed by the danger of unfair prejudice. Here, Dr. Fischione's testimony contradicted Rider's defense, but it did not suggest that jurors should decide the matter on an improper basis. *See State v. Mott*, 187 Ariz. 536, 545 (1997) ("Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.").

¶34 The court did not abuse its discretion by admitting Dr. Fischione's testimony.

IV. Admission of Confrontation Call and Police Interrogation Recordings

¶35 Rider contends the court improperly admitted audio recordings of the confrontation calls and a video recording of his police interrogation. He argues the evidence was irrelevant and unfairly prejudicial. Because Rider did not object to this evidence in the trial court, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19–20 (2005).

¶36 Relevant evidence is admissible unless it is otherwise precluded by the federal or state constitution, an applicable statute, or rule. Ariz. R. Evid. 402. Evidence is relevant if it has "any tendency" to make a fact of consequence in determining the action "more or less probable than it would be without the evidence." Ariz. R. Evid. 401. Nonetheless, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 403.

¶37 Rider argues the recordings were irrelevant because he never made any "admission or confession." We disagree. During the confrontation calls, Rider never challenged R.F.'s repeated characterizations of the victim's drowning as a murder. *See State v. Atwood*, 171 Ariz. 576, 636 (1992) (explaining that a defendant who failed to deny a third-party's accusation "adopted that statement as his own"), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229 (2001); *see also* Rule 801(d)(2)(A). When R.F. asked why he killed the victim, Rider initially stated he could not answer because he had blocked it out of his mind, later stating he would only discuss his reasons in person. In response to R.F.'s claim that the murder tormented him, Rider responded that he was unaffected because he was "borderline psychopathic." When R.F. stated the police had reopened the investigation and would probably confront him with evidence, Rider said he would react as expected if shown autopsy photographs. During his police interview, and consistent with his

statements to R.F., Rider told officers he was haunted by the victim's death and expressed dismay when presented with photographs of her body.

¶38 Because Rider's statements tend to show he intentionally drowned the victim, the recordings were relevant. And although the evidence undermined Rider's defense, it did not suggest that jurors decide the matter on an improper basis. *See Mott*, 187 Ariz. at 545. The trial court did not err, much less commit fundamental, prejudicial error, by admitting the recordings.

V. Denial of Motion for New Trial

¶39 Rider contends the court improperly denied his motion for new trial because the verdict was contrary to the weight of the evidence. We review a ruling on a motion for new trial based on the weight of the evidence for an abuse of discretion. *State v. Parker*, 231 Ariz. 391, 408, ¶ 74 (2013). "A motion for new trial should be granted only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime." *Id.*

¶40 A person commits second-degree murder if, without premeditation, he intentionally causes the death of another person. A.R.S. § 13-1104(A)(1). The record contains substantial evidence to support Rider's conviction. First, R.F. testified that he saw Rider hold the victim underwater while she struggled to free herself. Second, Dr. Fischione testified that the cause of death was drowning and the manner of death was homicide. Third, Rider effectively admitted drowning the victim during the confrontation calls. Under these circumstances, the trial court did not abuse its discretion by denying Rider's motion for new trial.

CONCLUSION

¶41 For the foregoing reasons, we affirm Rider's conviction and sentence.

AMY M. WOOD • Clerk of the Court
FILED: AA