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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ANDRES FLORES GALINDO, *Appellant*.

No. 1 CA-CR 16-0899
FILED 11-28-2017

Appeal from the Superior Court in Yuma County
No. S1400CR201401309
The Honorable John N. Nelson, Judge, *Retired*
The Honorable David M. Haws, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General, Phoenix
By Eliza C. Ybarra
Counsel for Appellee

Yuma County Public Defender, Yuma
By Michael A. Breeze
Counsel for Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Thomas C. Kleinschmidt joined.¹

T H O M P S O N, Judge:

¶1 Andres Flores Galindo (defendant) appeals from his convictions for first degree murder, aggravated assault, and tampering with physical evidence. For the following reasons, we vacate the trial court's imposition of duplicate fees but otherwise affirm defendant's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY²

¶2 Late on the evening of March 21, 2013, defendant, the victim Christal F., and five other individuals, Jose Jiminez, Ramon Ramirez, Jorge Rios, Brandi Michalski and Amanda M. met up in a motel suite in Yuma to smoke methamphetamine. Jiminez was the leader of the group, and Christal was his girlfriend, or "hina." Jiminez, Ramirez, and defendant were associated with the Mexican Mafia, an "umbrella" gang organization. Defendant and Ramirez were members of the Soma street gang and Jiminez was a member of the Mesa Varrio Locos street gang. At some point that evening, after Jiminez went into a bedroom to have sex with Amanda, Christal left the motel suite without Jiminez's permission. When Jiminez came out of the bedroom, he noticed that Christal was gone. Jiminez ran outside, found Christal, and began dragging her back to the motel room. He let her go when he realized there were other motel guests outside.

¹ The Honorable Thomas C. Kleinschmidt, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against defendant. *See State v. Nihiser*, 191 Ariz. 199, 201 (App. 1997) (citation omitted).

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Christal went to the motel lobby to wait for a ride. Everyone else left the motel.

¶3 A few hours later, Ramirez returned by himself to the motel suite. Shortly after that, Christal knocked on the door and Ramirez let her in. They fell asleep in the same bed. Subsequently, the rest of the group returned and found Christal and Ramirez in bed together. Jiminez began berating and slapping Christal. Defendant yelled at Ramirez for sleeping with his “homey’s hina,” and suggested tying Ramirez up with the cord from an iron. Jiminez told defendant, “Nah, he’s cool . . . it’s this bitch . . . that’s doing everything, not him.”

¶4 Jiminez told Christal that she had to “do a job for him” before he would let her go. The group got into a black Escalade, which was driven by Jiminez. Jiminez dropped Brandi and Amanda off at a trailer park and drove out of town with Christal, defendant, Ramirez, and Rios.

¶5 After the group had been driving around for a while, defendant stated, “Fuck it, just pull over right here, let’s just get it over with,” and Jiminez pulled over. Jiminez ordered Christal out of the car and asked for defendant’s gun. Rios and Ramirez remained in the car. Jiminez pointed the gun at Christal’s head and shot twice but missed. Christal started screaming. Jiminez got an M-1 assault rifle out of the car, ordered Christal to turn around, and shot her in the back multiple times until the rifle jammed. Christal fell to her knees. Jiminez pulled out a 9mm handgun and shot her nine more times. She fell forward and continued screaming. Jiminez told defendant “shut the bitch up, just fucking kill her.” Defendant shot Christal five or six times with a .380 until she stopped screaming.

¶6 Defendant and Jiminez got back into the car, picked up Brandi and Amanda, and dropped Ramirez off. The group went driving around Yuma. At 7:30 in the morning, Jiminez crashed the Escalade into a parked car and then drove into an alley where he parked. He told defendant to grab the guns, and everyone fled. Police found a shotgun and rifle in a dumpster near the alley. Christal’s lifeless body was found outside of a citrus grove with sixteen entrance gunshot wounds and numerous grazing and exit wounds. Casings near her body matched the weapons retrieved from the dumpster.

¶7 The state charged defendant with one count of first degree murder (premeditated or in the alternative, felony murder) (count 1), one count of aggravated assault with a deadly weapon or dangerous instrument (count 2), one count of tampering with physical evidence (count 3), and

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three counts of misconduct involving weapons (counts 4-6). The state agreed to sever counts 4-6, and the court did so. Defendant pled guilty to one count of misconduct involving weapons (amended count 6) and was only tried on counts 1-3. After a trial, the jury found defendant guilty of first degree murder³, aggravated assault, and tampering with physical evidence. The trial court sentenced defendant to natural life for count 1, 7.5 years for aggravated assault, and one year for tampering with physical evidence. The court ordered the one-year sentence to be served concurrently with the 7.5-year sentence, and ordered those sentences to be served consecutively to the life sentence. The trial court sentenced defendant to 4.5 years for misconduct involving weapons, to be served concurrently with counts 1-3. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2016), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

¶8 Defendant raises three issues on appeal. First, he argues that the trial court abused its discretion by permitting a gang expert to testify for the state. Second, defendant argues that the trial court abused its discretion by admitting gruesome photographs of the victim. Finally, defendant argues that the trial court erred by imposing duplicate fees during his sentencing.

A. Gang Expert Testimony

¶9 Defendant argues that the trial court should have precluded the state's gang expert, Sergeant Valenzuela, from testifying. He claims that Sergeant Valenzuela's testimony was "untethered to facts related by lay witnesses," constituted improper profile evidence or vouching, and violated the Arizona Rules of Evidence. We review a trial court's admission of evidence for an abuse of discretion, which can include errors of law, and review the interpretation of court rules de novo. *State v. Haskie*, 242 Ariz. 582, 585, ¶ 11 (2017) (citations omitted).

1. Relevant Facts

¶10 In December 2015, the state filed an amended indictment alleging that defendant committed the charged offenses with the intent to promote, further, or assist a criminal street gang. Shortly thereafter, defendant filed a motion in limine to preclude the state from introducing

³ All twelve jurors agreed that defendant was guilty of felony murder; ten jurors also believed he was guilty of premeditated first degree murder.

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any evidence related to gang affiliation concerning any of the witnesses in the case. Defendant argued that gang membership was not relevant, and even if it was, it was unduly prejudicial and inflammatory. The state responded, arguing that the evidence was relevant and necessary to explain why defendant, Jiminez and the others were associating with one another on the night Christal was murdered, why Jiminez was upset with Christal but not Ramirez, his “homie,” and why Jiminez was able to control defendant’s actions. In March 2016, defendant filed an amended motion in limine seeking to preclude any evidence of gang affiliation, including evidence of defendant’s gang name or moniker, “Demon.” In his reply to the state’s response, defendant further argued that the court should preclude photographs of his gang-related tattoos.

¶11 The trial court held a hearing on the motions, heard testimony from Sergeant Valenzuela, and ruled that Valenzuela would be permitted to testify about gang activity. The court found that there “isn’t any question” as to Sergeant Valenzuela’s expertise⁴, that he was qualified to testify about how status and respect work in gang culture, and that “the jury would be entitled to know because . . . that would be of assistance to them in deciding whether or not this killing did take place because of those unwritten rules” The court further ruled that 1) testimony about why defendant’s gang moniker was “Demon” would not be allowed, 2) the name “Demon” could not be used gratuitously by the state even if witnesses used the name to identify defendant, and 3) testimony about the connection between prison and the Mexican Mafia by any witness would not be permitted.

¶12 At trial, Sergeant Valenzuela testified that he had been with the Yuma Police Department (YPD) for ten years, and that from 2010-2012 he worked in the YPD gang unit. Prior to working for YPD, he worked for the Somerton Police Department, where he also investigated crimes committed by Soma gang members. Valenzuela explained that “all [of] the Mexican street gangs or Hispanic street gangs in the city of Yuma are sureño street gangs,” and the sureño street gangs “all show loyalty to the Mexican Mafia,” an “umbrella organization.” Sergeant Valenzuela testified about common gang tattoos and defendant’s gang tattoos, and why they indicated to Valenzuela that defendant was a member of Soma and also affiliated with the Mexican Mafia. Valenzuela testified that the Mexican Mafia did not permit female members and that “[w]omen are looked at as

⁴ Besides his on the job experience investigating gangs, Sergeant Valenzuela had spent numerous hours attending gang conferences in both Arizona and California.

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lower than men. It is a misogynistic mentality where men are at one level and women are below them. Women are looked at as either a tool or as property." Further, within the Mexican Mafia and street gang culture, "women are expected to . . . obey or to be controlled, and a lack of your ability to be able to control your woman . . . in this culture . . . shows weakness."

¶13 The prosecutor asked Valenzuela whether there were "power differentials and organizational structures" within Soma and Mexican Mafia. He answered in the affirmative:

There absolutely are, and one of the ways that you can tell . . . who's in charge, if you see a group of people you can look and see their behavior and be able to identify a particular power structure, and one of the ways you can do that is the person that is telling other people what to do is showing that they have some status over those other individuals and then, of course, if those people then obey that command . . . they are then accepting that power differential. In other words, you don't tell somebody who is superior to you what to do. In this culture, the superior person will then tell the subordinate what to do.

The prosecutor then asked Valenzuela, "If a superior member of the Arizona Mexican Mafia or Soma is perceived as being weak by subordinate members, in your skill, training, and experience, what's a situation like that?" Valenzuela answered:

Weakness is very dangerous in this culture. If you show any drop in status, any weakness, then you will become victimized. And so what happens is . . . if somebody disrespects you, then you have a choice to make and you . . . can act in a certain way, for example, [if] you retaliate . . . successfully, then you're able to maintain or increase your status. But if somebody disrespects you and you do not retaliate or show some use of force or basically do something about that, then you lose status. And as you lose status, the likelihood of you

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becoming victimized in this very competitive and us versus them . . . hierarchy . . . then you're gonna become a victim.

On cross-examination, defense counsel asked Sergeant Valenzuela how the "gang structure" applied to defendant, Jiminez, and Ramirez. Valenzuela replied:

Well, you can see by the way that they interact with each other that there is a hierarchy in the relationship. When one gang member tells another gang member what to do, he is showing his status over that gang member. When the . . . subordinate gang member complies with what he's being told or asked to do, then he is showing that he is obeying the superior gang member or the person that is in charge. And so in this case, when you have [defendant] wanting to harm Ramirez but Jose Jimenez doesn't allow him to . . . and Jiminez is telling him no, he's cool, I don't got beef with that guy, you see the power structure there. You see . . . that Jose Jiminez is the one in charge of that situation and that [defendant] is not. The mere fact that [defendant] has a problem with Jose Jimenez also talks about the gang structure or the gang relation in that situation, because [defendant] is absolutely irate that his brother [Jiminez] was disrespected in this manner by having a fellow brother found in bed. And so that's why in that situation . . . you have Ramirez . . . being the lowest in that power structure.

At the end of the case, the trial court gave the jury a limiting instruction regarding expert witnesses:

A witness qualified as an expert by education or experience may state opinions on matters in that witness' field of expertise and may also state reasons for those opinions. Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may

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accept it or reject it in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness' qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

2. Analysis

¶14 Expert testimony is admissible if it “will help the trier of fact to understand the evidence or to determine a fact in issue.” Ariz. R. Evid. 702(a). “Profile evidence tends to show that a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity.” *State v. Ketchner*, 236 Ariz. 262, 264, ¶ 15 (2014) (citations omitted). The state may not offer profile evidence as proof of a defendant's guilt, “because of the risk that a defendant will be convicted not for what he did but for what others are doing.” *Haskie*, 242 Ariz. at 586, ¶ 15 (citation and internal quotation omitted). Like all evidence, expert testimony must be relevant to be admissible. Ariz. R. Evid. 402. “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action.” Ariz. R. Evid. 401. Relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Ariz. R. Evid. 403. “Deciding whether expert testimony will aid the jury and balancing the usefulness of expert testimony against the danger of unfair prejudice are generally fact-bound inquiries uniquely within the competence of the trial court.” *State v. Moran*, 151 Ariz. 378, 381 (1986) (citations omitted).

¶15 Sergeant Valenzeula's testimony was relevant because it explained why defendant would kill Christal on Jimenez's orders and explained the power dynamics of the group. The testimony helped establish defendant's motive for murder. See *State v. Hunter*, 136 Ariz. 45, 50 (1983) (“[I]t is well settled that in a murder prosecution the presence . . . of motive is relevant.”). It was not offered as improper profile evidence because the testimony about gang membership was not offered as substantive proof of defendant's guilt, but to show why each of those present conducted themselves as they did within the gang's group dynamic. Nor did Sergeant Valenzuela's testimony constitute impermissible “vouching” by the state.

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¶16 Defendant argues that the trial court should have excluded the testimony under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice. However, the trial court placed limitations on Sergeant Valenzuela’s testimony to avoid unfair prejudice to defendant—Valenzuela was not permitted to explain that the Mexican Mafia was a prison gang or testify that defendant had been to prison, and the state was not allowed to speculate about defendant’s gang moniker or use it gratuitously.

¶17 Defendant further argues that the testimony violated Rule 404(b) because it was character evidence. Under Rule 404(b), “evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” However, such evidence may be “admissible for other purposes, such as proof of motive” Sergeant Valenzuela’s testimony provided a motive for defendant’s behavior and was therefore admissible. We find no abuse of discretion.

B. Photographs of the Victim

¶18 At trial, defendant stipulated to the introduction into evidence of more than fifty autopsy photographs of the victim during the medical examiner’s testimony. Defendant now argues on appeal that the autopsy photos (specifically, the state’s exhibits 82, 86-90, 94, 100, 105, 122-145 and 148-167) had little, if any, evidentiary value and were so gruesome that their admission could have had no other purpose than inflaming the jury.⁵ Because defendant failed to object to the admission of the autopsy photographs, we review for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). To prevail under fundamental error review, a defendant must show both that fundamental error exists and that the error caused the defendant prejudice. *Id.* at ¶ 20. Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not have possibly received a fair trial.” *Id.* at ¶ 19 (internal quotation omitted). The burden of persuasion is on the defendant. *Id.*

¶19 “We look to three factors to determine whether the trial judge erred in admitting . . . photographs: ‘the photograph’s relevance, it’s

⁵ Defendant also complains about crime scene photographs of the victim but does not specify which crime scene photographs the trial court should have sua sponte excluded. He has therefore waived his argument as to the crime scene photographs. *See State v. Kiles*, 222 Ariz. 25, 33, ¶ 36 (2009).

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tendency to inflame the jury, and its probative value compared to its potential to cause unfair prejudice.” *State v. Morris*, 215 Ariz. 324, 339, ¶ 69 (2007). Photographs of a deceased victim may be admitted “to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state’s theory of how and why the homicide was committed.” *State v. Chapple*, 135 Ariz. 281, 288 (1983) (citation omitted); *see also Morris*, 215 Ariz. at 339, ¶ 70. Gruesome photographs may be admitted, but if they were admitted for the sole purpose of inflaming the jury, we will reverse. *Morris*, 215 Ariz. at 339, ¶ 70 (citation omitted).

¶20 We find no fundamental error. The autopsy photographs were relevant. *See State v. Spreitz*, 190 Ariz. 129, 142 (1997) (photographs of the deceased victim in a murder case are relevant to assist the jury in understanding an issue because the fact and cause of death are always relevant in a murder prosecution). The photographs were introduced during the medical examiner’s testimony about each of the victim’s numerous gunshot wounds. Although the photographs are gruesome, we do not find that their admission in this case denied defendant a fair trial.

C. Duplicate Fees

¶21 Finally, defendant argues that he was twice ordered to pay attorneys’ fees of \$750 under the same cause number and twice ordered to pay a \$40 superior court enhancement fee, due to the severance of counts 4-6 from counts 1-3 and the resulting separate sentencing hearings. The state concedes that duplicate fees were imposed erroneously. We therefore vacate the \$750 attorneys’ fees and \$40 enhancement fee imposed by the Honorable John N. Nelson on November 17, 2016 during defendant’s sentencing for counts 1-3. The fees imposed by the Honorable David M. Haws on November 16, 2016 shall remain in effect.

CONCLUSION

¶22 For the foregoing reasons, we vacate the trial court’s

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imposition of duplicate fees but otherwise affirm defendant's convictions and sentences.



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