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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

MACARIO LOPEZ, *Appellant*.

No. 1 CA-CR 16-0458
FILED 3-22-2018

Appeal from the Superior Court in Maricopa County
No. CR2011-007597-001
The Honorable Sherry K. Stephens, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza Ybarra
Counsel for Appellee

Maricopa County Legal Defender's Office, Phoenix
By Cynthia D. Beck
Counsel for Appellant

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Peter B. Swann joined.

B E E N E, Judge:

¶1 Macario Lopez appeals his convictions and sentences for first-degree murder and burglary in the first degree. For the following reasons, we affirm.

BACKGROUND[1]

¶2 On October 26, 2009, the victim failed to pick up her children from their after-school childcare program. The victim's estranged husband, M.G., learned the children were stranded at their childcare facility and, unable to reach the victim by phone, he picked them up and notified the victim's sister, V.N. Concerned by the victim's uncharacteristic behavior, V.N. alerted her mother, S.N., who in turn drove to the victim's apartment.

¶3 Once she arrived at the apartment complex, S.N. spotted the victim's car parked "right in front." S.N. then knocked on the victim's front door and windows, but to no avail. Peering through one of the windows, S.N. saw that a light was on, as well as a television, though no one appeared to be inside. Thinking that the victim may be elsewhere on the premises, S.N. searched the apartment complex and spoke with the victim's neighbors, but did not learn of the victim's whereabouts. Eventually, she contacted the police and requested a welfare check.

¶4 When responding officers arrived, an apartment employee unlocked the victim's front door and the officers proceeded inside. Within moments of entry, the officers discovered the victim's lifeless body on her bathroom floor. Covered in blood, the victim had been stabbed numerous times and had several defensive wounds on her hands and forearms.

¶5 During the ensuing investigation, criminalists recovered DNA from under the victim's fingernails and blood from the bathroom vanity. Subsequent testing revealed that two people contributed to the

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

DNA and blood mixtures, the victim and Lopez, the victim's former boyfriend.

¶6 The State then charged Lopez with first-degree murder (Count 1) and first-degree burglary (Count 2). The State also alleged aggravating circumstances and noticed its intent to seek the death penalty.

¶7 At trial, defense counsel conceded that Lopez "caused" the victim's death. He argued, however, that Lopez did not premeditate or otherwise intentionally kill the victim.

¶8 After a sixteen-day trial, the jury found Lopez guilty as charged, unanimously finding he committed both premeditated and felony murder and concluding the burglary was a dangerous offense. During the aggravation and penalty phases, the jury also found multiple aggravating factors and determined Lopez should be sentenced to life imprisonment. The superior court sentenced Lopez to a term of natural life on Count 1 and a concurrent term of ten and one-half years' imprisonment on Count 2. Lopez timely appealed, and 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. Alleged Notice Violation

¶9 Lopez contends his constitutional right to notice of the charges against him was violated when the superior court allowed the State to use aggravated assault as the underlying felony for the burglary charge. Specifically, he asserts the State provided notice of only one predicate felony for the burglary, namely, the victim's murder.

¶10 As set forth in the indictment, the State charged Lopez with: (1) first-degree murder, alleging he (a) acted with premeditation when he intentionally or knowingly caused the victim's death and/or (b) caused the victim's death while committing burglary in the first degree; and (2) burglary in the first degree, alleging he entered or remained unlawfully in the victim's residence with the intent to commit a theft or any felony therein. Citing the grand jury transcripts, which do not include any explicit reference to aggravated assault, Lopez argues he had no notice of the State's intent to use aggravated assault as the underlying felony for the burglary until the day after opening statements, during the following sidebar exchange:

> Defense Counsel: What's your theory of the felony murder? Tell us now.
>
> Prosecutor: Did you read the jury instructions I proposed? The felony is assault. Aggravated assault with a knife.
>
> Defense Counsel: The murder.
>
> Prosecutor: Yeah, that is the underlying felony for the burglary.

¶11 Six days after this discussion, defense counsel moved to preclude the State from using aggravated assault as the predicate offense for the burglary, arguing the State had failed to provide constitutionally-mandated notice of the charges alleged. The State responded that it had noticed its intent to prove aggravated assault through its allegations that Lopez repeatedly stabbed the victim with a knife as well as its requested jury instructions, which included definitions of assault and aggravated assault and were submitted three days before jury selection commenced and more than five weeks before opening statements.

¶12 The superior court denied Lopez's motion, concluding the State had provided adequate notice and defense counsel had sufficient opportunity to defend against the "underlying accusations." Lopez then moved for a mistrial based on the alleged notice violation, which the superior court denied, noting Lopez had failed to establish how "more notice would have changed the way his case was presented to the jury."

¶13 We review constitutional issues and purely legal issues *de novo*. *State v. Moore*, 222 Ariz. 1, 12, ¶ 51 (2009). The federal and state constitutions, due process, and the governing rules "require that a defendant be given notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." *Id.* (internal quotation omitted); *see also* U.S. Const. amend. VI (conferring the right of the accused in a criminal prosecution "to be informed of the nature and cause of the accusation"); Ariz. Const. art. 2, § 24 (conferring the right of the accused in a criminal prosecution "to demand the nature and cause of the accusation against him"); Ariz. R. Crim. P. 13.1(a) (providing that an indictment or information shall be "a plain, concise statement of the facts sufficiently definite to inform the defendant of a charged offense").

¶14 When burglary "is the predicate for felony murder," the State "should identify before trial the particular felony that will be used to define burglary[.]" *Moore*, 222 Ariz. at 12-13, ¶ 55. Nonetheless, the State's "failure

to specify the predicate felony before trial will not be reversible error if the defendant otherwise has notice and an opportunity to respond to the accusations." *Id.*

¶15 Given the jury's unanimous verdicts for both premeditated first-degree murder and felony murder, in this case, we need not determine whether Lopez had notice and an opportunity to respond to the accusations because, even if the State failed to provide constitutionally-adequate notice, any error would be harmless. *See State v. Anthony*, 218 Ariz. 439, 446, ¶ 39 (2008) ("Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.") (internal quotation omitted); *see also State v. Martinez*, 218 Ariz. 421, 427, ¶ 22 (2008) ("[T]his Court need not consider a challenge to the sufficiency of the evidence of felony murder when the jury also returns a separate verdict of guilt for premeditated murder."). Therefore, we find no reversible error.

II. Admission of Evidence Regarding Deleted Text Messages

¶16 Lopez contends the superior court improperly admitted testimonial evidence regarding several text messages. Because the recipients deleted the text messages, he argues the content of the messages was inadmissible hearsay, unduly prejudicial, and lacking in foundation.

¶17 After the jury was impaneled, the State filed a memorandum "urg[ing]" the court to allow the victim's sisters to testify regarding text messages they each received from Lopez two days before the murder. In response, Lopez moved to preclude any testimony regarding the contents of the deleted text messages. The superior court heard argument on the dual motions and denied Lopez's motion to preclude, reasoning the text messages were admissible and akin to "phone calls."

¶18 At trial, the victims' sisters, V.N. and J.N., testified that they, M.G., and the victim attended a party together two nights before the murder. At some point that evening, J.N. received a text from Lopez, stating: "Tell [the victim] she [expletive] up and it's on now." Moments later, V.N. received an identical text from Lopez. In response, V.N. texted Lopez, explaining she did not know anything about a dispute between him and the victim and did not want to be involved. Shortly thereafter, V.N. received another text from Lopez, stating: "you're a [expletive] trick." When asked how they ascertained that Lopez had sent the texts, V.N. and J.N. explained that they had programed his name and number in their cell phones and that they had shown each other their respective texts. On the

evening of the murder, V.N. and J.N. informed police officers regarding the text messages they received from Lopez, but each woman had already deleted the texts from her phone, failing to recognize the significance of the texts until after learning of the victim's murder.

¶19 We review a superior court's evidentiary ruling for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006). "Absent a clear abuse of discretion, we will not second-guess a superior court's ruling on the admissibility or relevance of evidence." *State v. Rodriguez*, 186 Ariz. 240, 250 (1996).

A. Foundation

¶20 Lopez contends the text messages could not be authenticated and lacked sufficient foundation because the State did not prove he sent the messages.

¶21 "[A]s a condition precedent to admissibility," a party seeking to introduce evidence must produce proof "sufficient to support a finding that the matter in question is what its proponent claims." *State v. George*, 206 Ariz. 436, 446, ¶ 30 (App. 2003) (citing Ariz. R. Evid. 901(a)). "[T]his standard is satisfied if the evidence can be identified by its distinctive characteristics taken in conjunction with the circumstances of the case." *Id.* (citing Ariz. R. Evid. 901(b)(4)).

¶22 The authentication requirement of Rule 901 may be satisfied by circumstantial evidence. *State v. Best*, 146 Ariz. 1, 2 (App. 1985). Indeed, a party may rely solely upon circumstantial and corroborating evidence to establish authenticity. *See State v. Lavers*, 168 Ariz. 376, 388 (1991).

¶23 In ruling on admissibility, "the question for the trial judge is not whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic." *State v. Wooten*, 193 Ariz. 357, 368, ¶ 57 (App. 1998). Accordingly, "foundation is sufficient when supported by '[t]estimony that a matter is what it is claimed to be.'" *State v. Damper*, 223 Ariz. 572, 576-77, ¶ 18 (App. 2010) (quoting Ariz. R. Evid. 901(b)(1)). Once the evidence is admitted, the opponent may still contest its authenticity, but the weight to be given the evidence becomes a question for the trier of fact. *State v. Irving*, 165 Ariz. 219, 223 (App. 1990).

¶24 Applying these principles here, sufficient evidence existed to properly authenticate the text messages. J.N. and V.N. testified that they identified Lopez as the sender of the text messages based on their

programming of his name and number in their respective cell phones. *See Damper*, 223 Ariz. at 577, ¶ 19 (concluding sufficient evidence authenticated a text message when the recipient testified "she had saved [the sender's] cell-phone number in her own cell phone, denominated by a nickname, and that when the text message at issue arrived . . ., her phone displayed that nickname as the sender of the message"). Each woman received a text message from Lopez and contemporaneously shared the message with the other. In addition, V.N. responded to the initial threatening message, and received another text, again recognized by her phone as having been sent from Lopez, though this time the content was a personal attack. Given these facts, the superior court did not abuse its discretion by finding the witnesses' identification testimony provided sufficient circumstantial and corroborating evidence that a jury could reasonably conclude the texts were sent from Lopez, and that Lopez's challenges to the authenticity of the texts went to their weight rather than their admissibility.

B. Hearsay

¶25 Lopez next argues that the text messages constituted inadmissible hearsay. In denying Lopez's motion to preclude, the superior court found that the text messages were statements by a party opponent and therefore not hearsay.

¶26 In general, an out-of-court statement offered to prove the truth of the matter asserted is inadmissible unless grounded in a hearsay exception. Ariz. R. Evid. 801(c); 802. "To be admissible, a court must find that the out-of-court statement fits within one of the many exceptions to the rule against hearsay." *State v. Tucker*, 205 Ariz. 157, 165, ¶ 41 (2003). Pursuant to Rule 801(d)(2)(A), a statement offered against an opposing party is not hearsay if "made by the party in an individual or representative capacity."

¶27 Because the text messages were properly authenticated as personally sent by Lopez, and the State was offering the text messages against him, they qualified as statements by a party opponent. Therefore, the superior court did not abuse its discretion by admitting the text messages as non-hearsay.

C. Undue Prejudice

¶28 Finally, Lopez contends that even if the text messages were otherwise admissible, the superior court abused its discretion by admitting them because their prejudicial effect substantially outweighed their probative value.

¶29 In general, all "[r]elevant evidence is admissible." 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.

¶30 In this case, Lopez's claim that the texts were inadmissible under Rule 403 is not supported by the record. As Lopez concedes, the "content of the deleted texts formed part of the basis of the State's claim of premeditation," and they were therefore of significant probative value. Although the text messages undermined Lopez's defense, they did not suggest that the jury 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."). Therefore, the superior court did not abuse its discretion by finding that the probative value of the text messages outweighed any attendant prejudice.

CONCLUSION

¶31 For the reasons set forth, we affirm Lopez's convictions and sentences.

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