IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LASHAWN YOUNG JOHNSON, *Appellant*.

No. 1 CA-CR 18-0735
FILED 2-11-2020

Appeal from the Superior Court in Maricopa County
No. CR2017-002885-001
The Honorable David O. Cunanan, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael Valenzuela
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Scott L. Boncoskey
Counsel for Appellant

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Diane M. Johnsen joined.

M O R S E, Judge:

¶1 LaShawn Johnson asks us to reverse his conviction for first-degree murder due to the admission of allegedly involuntary statements and alleged prosecutorial misconduct. In the alternative, Johnson asks us to hold that his mandatory life sentence is unconstitutional under both the United States Constitution and the Arizona Constitution. We affirm both his conviction and his mandatory life sentence.

FACTS[1] AND PROCEDURAL BACKGROUND

¶2 In 2016, Johnson used a pseudonymous online dating profile to meet the victim, a 24-year-old woman. Within a month, Johnson and the victim exchanged phone numbers and were regularly texting each other. In his texts, Johnson told the victim that he was interested in finding a "healthy st[ea]dy relationship" and that he hadn't been with anyone in "years and a half." None of this was true, as Johnson was living with his girlfriend, whom he had met on the same dating website just over a year before. He was also married, again having met his wife on that same website. Eventually, Johnson felt comfortable enough to invite the victim to his home, assertedly to grab some dinner, drink wine, and watch movies on Netflix. Johnson carefully timed the meeting to ensure the victim would not arrive until after his girlfriend left home for work. The victim's cell phone was later tracked to a cell tower near Johnson's residence. At about 10:32 p.m. she called a pizza delivery restaurant. Around the same time, a text was sent from her phone to her mother saying that she was "smashed" and that she would be spending the night at a co-worker's house. Immediately thereafter, another message was sent from the victim's phone to her mother reading: "She lives. Not smashed. Lives. LMAO." No other

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[1] We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against the defendant. *State v. Harm*, 236 Ariz. 402, 404 n.2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

communication was sent from the victim's cell phone that night and, at 8:01 a.m. the following day, the victim's cell phone was apparently powered off.

¶3 Meanwhile, at around 4:00 a.m. the morning after the arranged meeting, Johnson called his cell phone carrier to change his number. The company's call center was not yet open, so Johnson called back two hours later and successfully changed his number. Johnson's girlfriend returned home at some point later that morning and did not notice anything amiss, except that one of the photos in the house had been flipped upside down. When she asked Johnson what had happened, he responded that he must have bumped into it without noticing.

¶4 At about 11:00 a.m., Johnson told his girlfriend that he would be leaving for a landscaping job. Johnson's girlfriend expected Johnson to return in time to attend a medical appointment with her. Johnson did not return in time for the appointment and failed to answer his girlfriend's calls and text messages. At 7:00 p.m., Johnson finally contacted his girlfriend and said he needed to be picked up at a gas station in Tonopah, about fifty miles from where they lived. Johnson apologized for missing the medical appointment, but gave no explanation for his absence. His girlfriend noted that he did not appear to have done any landscaping work that day.

¶5 A few weeks later, Johnson uncharacteristically asked his girlfriend if she wanted to go on a hike in Tonopah. Once there, Johnson directed his girlfriend to a specific dirt pathway that he wanted to hike. Eventually, as the two were walking along the path, Johnson walked off the trail to relieve himself and called out to his girlfriend that he had found a burned-out car. Johnson warned his girlfriend not to touch the vehicle, and she walked back to the trail, where she could not see Johnson. Johnson remained alone with the burned vehicle for a few minutes, then returned to his girlfriend. Shortly after this excursion, Johnson turned himself in to the police on active warrants unrelated to this case.

¶6 In investigating the victim's disappearance, the police quickly identified Johnson as a potential suspect. After obtaining a warrant, the police searched Johnson's home and found the victim's blood on a bed frame, a table in the kitchen, and the kitchen wall. Police also found evidence that Johnson had attempted to clean up any trace of the victim's blood. Police questioned Johnson's girlfriend, and her statements led them to discover the burned vehicle in Tonopah and the victim's body, which they found in a shallow grave nearby.

¶7 Johnson, who remained jailed on unrelated charges, was twice interviewed by police. During his initial interview, Johnson claimed that he and the victim had never met in person and denied knowing anything about the victim's disappearance. In fact, Johnson denied that he lived in Phoenix, saying, instead, that he lived in Tucson.

¶8 Following that first interview, Johnson made a call to his girlfriend, recorded on the jailhouse line, and confided that he and the victim had actually met. He stated that the victim had never entered their apartment, but that he had met her in a park. He was adamant that the victim had never set foot in the apartment.

¶9 After discovering the victim's body, police again interviewed Johnson. This interview, conducted at the Maricopa County Sheriff's Office, was video recorded. During the interview, Johnson did not confess to committing the murder, but suggested that he had information that could lead the police to the true killer, a friend he only knew by the nickname of "Chicago." The interview continued for approximately six hours, culminating in the detectives asking if Johnson "would be willing to write an apology letter for what he had done to the family[.]" He agreed, and wrote a series of apology letters in which he stated such things as: "I am LaShawn Johnson wouldn't kohw how. To say how sorry I am Just Hope yall forgive me for waht I have [unintelligible]" and "[i]t has [unintelligible] to be come a [unintelligible] I am raelly sorry for take some one you love[.]" [errors in original].[2]

¶10 Johnson later made a call to his wife on a recorded jailhouse line in which he stated that he "let the liquor control [him]" and "just made a big mistake." Explaining what had happened, he said without further detail that he "was drinking [and] it was an accident." He continued by saying, "I wish it never got to that point, but it got to that point. […] I just made a bad choice in life." He noted that he "was drinking and [expletive] just went to the left."

¶11 Johnson was charged with a number of crimes, including first-degree murder. His trial lasted approximately three weeks. At trial, Johnson stipulated to the admission of two hours of redacted excerpts of

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[2] Some of the quoted language has been marked through in pen but is still legible.

his second video-recorded interview with police.[3] When the State moved to admit the apology letters Johnson had written at the conclusion of that interview, Johnson did not object.

¶12 Johnson took the stand at trial and tried to explain discrepancies in his prior statements about the victim's disappearance and murder. He claimed his prior statements had been lies to cover for the true murderer, his girlfriend, who he said became enraged when she found him at home with another woman. He further explained that his apology letters were earnestly written, but that they were meant to reflect his remorse for helping his girlfriend clean up the crime scene and for hiding the victim's body.

¶13 The jury convicted Johnson of first-degree premeditated murder, theft of means of transportation, arson of a structure or property, and abandonment or concealment of a dead body. Johnson received a mandatory natural life sentence for the murder, 3.5 years for the theft, 2.5 years for the arson, and 1.5 years for the concealment of the body. Johnson timely appealed his conviction of first-degree premeditated murder, declining to appeal his other convictions. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

DISCUSSION

¶14 Johnson argues that his conviction should be reversed due to prosecutorial misconduct and the admission of evidence that violated his rights under the Fifth Amendment to the United States Constitution. Additionally, Johnson argues that if we affirm his conviction, we should nonetheless hold that his mandatory life sentence is unconstitutional. We address each argument in turn.

I. Prosecutorial Misconduct.

¶15 Johnson argues that statements by the prosecutor in closing argument constituted prosecutorial misconduct. As Johnson objected to the alleged misconduct at trial, we review for harmless error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005). "We will reverse a conviction for prosecutorial misconduct if (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the

[3] The total video lasted "upwards of six hours," and the other four hours of redacted footage were not submitted into evidence.

jury's verdict, thereby denying [the] defendant a fair trial." *State v. Velazquez*, 216 Ariz. 300, 311, ¶ 45 (2007) (citation omitted).

¶16 Here, Johnson argues the prosecutor committed prosecutorial misconduct in closing by discussing facts not based in evidence. Specifically, Johnson takes issue with the following statement:

> They get into the bedroom. The defendant takes [the victim] into the bedroom. Then he lies and says that the TV in the living room doesn't have Netflix. So they need to - - they need to sit in the bedroom. He gets [the victim] into that bedroom.

¶17 Johnson asserts that the suggestion he lied to lure the victim into the bedroom constituted prosecutorial misconduct, as his credibility was key to the case and the statement in question was unsupported by any evidence.

¶18 In reviewing the record, we have found no evidence to support the prosecutor's statement. We therefore assume that Johnson has shown that misconduct is indeed present and turn our attention to the second step of the analysis. *Valezquez*, 216 Ariz. at 311, ¶ 45.

¶19 There is no reasonable likelihood that the prosecutor's statement affected the jury's verdict. First, the trial court instructed the jury that attorneys' arguments were not evidence and later, in response to an objection made by Johnson's counsel during the State's closing, specifically instructed the jury that they were to "determine what facts have or have not been presented or what weight to give to those." Second, Johnson's argument that the above-quoted statement was prejudicial is belied by the fact that the jury heard substantial additional evidence that undermined Johnson's credibility. Johnson had lied to his wife, his girlfriend and the police, and his explanations of his involvement in the death of the victim continually changed. In a record replete with evidence that Johnson lied, we cannot find any reversible error in suggesting Johnson told one additional lie. As a result, even if the prosecutor committed misconduct by making the statement, it was harmless.

II. The Videotaped Interview and Johnson's Apology Letters.

¶20 Johnson, for the first time on appeal, argues that the admission of his videotaped interview with police and the apology letters he wrote at the end of that interview violated his Fifth Amendment rights.

¶21 Because Johnson did not contest the admission of the interview or letters in the superior court, we would usually review for fundamental error. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018); *see also State v. Bush*, 244 Ariz. 575, 588, ¶ 51 (2018) (defendant who does not object at trial to admission of statements to police "forfeit[s] any argument that his confession was involuntary"). When a defendant fails to challenge the admissibility of his statements by filing a motion to suppress, however, he waives the issue on appeal. *See State v. Tison*, 129 Ariz. 526, 535-36 (1981) (declining to address argument under *Miranda v. Arizona*, 384 U.S. 436 (1966) raised on appeal where defendant only challenged voluntariness in the trial court). "The preclusion of issues applies to constitutional objections as well as statutory objections[.]" *Tison*, 129 Ariz. at 535. We recognize that Arizona courts have, as a matter of discretion, reviewed suppression issues for fundamental error. *State v. Newell*, 212 Ariz. 389, 398, ¶ 34 (2006) (noting that courts "may" review a suppression argument raised for the first time on appeal for fundamental error). But we have only a portion of the videotaped interview and, because Johnson stipulated to the admission of that portion, the parties did not develop a complete record. In this light, we lack evidence and context from which we could conduct fundamental-error review. *See State v. Brita*, 158 Ariz. 121, 124 (1988) ("It is highly undesirable to attempt to resolve issues for the first time on appeal, particularly when the record below was made with no thought in mind of the legal issue to be decided.").[4] As a result, we deem this issue waived on appeal.

III. Johnson's Constitutional Challenge to His Sentence.

¶22 Johnson also argues that his mandatory natural life sentence constitutes fundamental error because it is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article 2, Section 15, of the Arizona Constitution. More specifically,

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[4] While waived on appeal, these issues may be more appropriately raised in a request for post-conviction relief. *See* Ariz. R. Crim. P. 32. This is not to say that counsel was ineffective in stipulating to the admission of the redacted interview and not objecting to the apology letters. There may have been calculated reasons for that decision. *See, e.g., State v. Heurstel*, 206 Ariz. 93, 107, ¶ 61 (2003) (noting that a statement found to violate *Miranda* would be admissible to impeach the defendant's trial testimony). A full record is necessary to decide these issues. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002) (noting that ineffective assistance of counsel claims should be raised in Rule 32 proceedings). Relatedly, because we conclude Johnson waived the issue on appeal, we need not address the State's contention that admission of the interview excerpts and the letters was invited error.

Johnson argues that his IQ is 59, meaning that he is intellectually disabled, and that mandatory life sentences are unconstitutional for those with intellectual disabilities. Johnson further asks us to develop a framework for determining when the Arizona Constitution affords greater protections than the federal constitution for the intellectually disabled, specifically requesting that we adopt a six-part test developed by the state of Washington. *See State v. Gunwall*, 720 P.2d 808, 811 (Wash 1986). Johnson suggests that our adoption of this test would result in a finding that the Arizona Constitution's prohibition against cruel and unusual punishment is broader than its federal counterpart and, consequently, that the Arizona Constitution prohibits mandatory life sentences for those with intellectual disabilities. In making this argument, Johnson concedes that neither Arizona nor federal precedent directly supports his claim, but asserts that his conclusion is a natural extension of *Miller v. Alabama*, 567 U.S. 460 (2012) and *Atkins v. Virginia*, 536 U.S. 304 (2002).

¶23 In response, the State argues that Johnson never established that he was intellectually disabled in the superior court and therefore his claim is speculative. Additionally, the State contends that neither the Arizona Constitution nor the United States Constitution prohibits mandatory life sentences for the intellectually disabled. Finally, the State argues that even presuming Johnson's sentence is unconstitutional under an extension of existing caselaw, it cannot constitute fundamental error because there was no clearly established precedent prohibiting Johnson's sentence at the time it was imposed.

¶24 We agree with the State that Johnson has not demonstrated fundamental error. Fundamental error is that which is "clear, egregious, and curable only via a new trial." *State v. Gendron*, 168 Ariz. 153, 155 (1991). Given that Johnson's sentence was not prohibited by any Arizona or federal precedent at the time it was issued, we cannot say that any error in his sentence was "clear." Accordingly, we reject his claim. *See State v. Keith*, 211 Ariz. 436, 436-37, ¶ 3 (App. 2005) (finding no fundamental error where defendant claimed that existing case law had been impliedly overruled); *cf. also State v. Smith*, 228 Ariz. 126, 129, ¶ 10 (App. 2011) (noting that "[n]ovel assignments of error . . . seldom warrant relief" on fundamental error review).[5]

[5] Arizona courts have analogized fundamental-error review to plain-error review in federal courts. *State v. Henderson*, 209 Ariz. 300, 305, ¶ 16 n.4 (App. 2004) ("In the federal courts, the closest analogue to our doctrine

CONCLUSION

¶25 We hold that Johnson has failed to demonstrate reversible error arising from any prosecutorial misconduct. We also hold that Johnson waived his right to challenge the admissibility of the videotaped interview and the apology letters and further find no fundamental error in the imposition of his mandatory life sentence. Accordingly, we affirm Johnson's conviction and sentence.

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

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of fundamental error is the doctrine of 'plain error.'"), *vacated in part on other grounds*, 210 Ariz. 561 (2005). Though not controlling, we note that under the federal authorities, error may constitute "plain error" only if it is "clear or obvious under current law." *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003).