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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 07-22-2010
PHILIP G. URRY, CLERK
BY: GH

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 08-0733
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
REGINALD MARK JEFFREY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-180353-001 DT

The Honorable John R. Ditsworth, Judge

**AFFIRMED IN PART; VACATED IN PART AND REMANDED; SENTENCE
MODIFIED IN PART**

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I R V I N E, Judge

¶1 Reginald Mark Jeffrey ("Jeffrey") appeals his
convictions and sentences for felony murder and misconduct

involving weapons. Jeffrey argues that the trial court erred in denying his motion for acquittal on the felony murder charge. Jeffrey also argues that the court imposed a sentence greater than statutorily permitted for his conviction of misconduct involving weapons and erred in its application of presentence incarceration credit. For the following reasons, we affirm Jeffrey's conviction for felony murder, but reverse his sentence for misconduct involving weapons and remand.

FACTS AND PROCEDURAL HISTORY

¶2 Viewed in the light most favorable to sustaining the verdicts, the evidence presented at trial reflected the following. On December 25, 2006, Mary received a telephone call from Christina (her daughter). Christina indicated that she was having a problem with Victim (her fiancé). Mary did not have a car and therefore called her boyfriend (Wes). Wes arrived at Mary's apartment accompanied by Jeffrey. The three of them left to visit Christina and picked up Jeffrey's girlfriend on the way. They ultimately met with Christina and began looking for Victim. They located Victim at an apartment complex near central Phoenix.

¶3 Christina, Wes, and Mary went into the apartment to speak with Victim; however, Jeffrey stayed outside and talked with a group of people standing in front of the apartment. After being informed that the police were called, the group left and

met at a convenience store approximately one block away. At the store, Mary continued to talk to Victim and apparently resolved any conflict. Mary, Wes, Jeffrey, and Jeffrey's girlfriend then left for a location where they consumed a large amount of alcohol. Shortly thereafter, Wes received a telephone call from Christina. The group then drove to Victim's apartment to remove Christina from Victim's presence. Wes and Jeffrey, both carrying guns, exited the car and entered the apartment. Inside, Jeffrey and Victim argued, pulled out their guns, and began shooting.¹ Victim died of a gunshot wound to the chest.

¶4 The grand jury issued an indictment, charging Jeffrey with Count 1, felony murder, a class one dangerous felony; Count 2, first-degree burglary, a class three dangerous felony; Count 3, aggravated assault, a class three dangerous felony; Count 4, aggravated assault, a class three dangerous felony; and Count 5, misconduct involving weapons, a class four dangerous felony. A jury trial commenced on June 11, 2008. At the conclusion of the State's case, Jeffrey made a motion for a judgment of acquittal on Count 2. The court granted the motion and stated "[n]one of the testimony supported the allegation that the crime occurred within a fenced residential yard. Instead, it clearly demonstrated a course of conduct that happened entirely inside

¹ Wes testified that at least two other people inside the apartment also fired guns.

[the] apartment." Subsequently, the jury found Jeffrey guilty on the remaining counts. The court sentenced Jeffrey to twenty-five years' imprisonment in the Arizona Department of Corrections for Count 1, fifteen years' for Count 3, fifteen years' for Count 4, and ten years' for Count 5. The court further ordered the sentences to run concurrently and awarded 603 days of presentence incarceration for Count 1.

¶15 Jeffrey filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Constitution Article VI, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A) (2010).²

DISCUSSION

Felony Murder

¶16 Jeffrey argues that the trial court erred by not entering a judgment of acquittal on the felony murder charge after the court determined that there was no substantial evidence to support a finding of guilt on the underlying predicate felony.

¶17 Felony murder occurs when a person commits one of the crimes enumerated in A.R.S. § 13-1105 (2010) and in the course of and in furtherance of the offense, the person or another person causes the death of any person. *State v. Lacy*, 187 Ariz.

² We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

340, 349-50, 929 P.2d 1288, 1297-98 (1996). Here, the indictment alleged that Jeffrey "committed or attempted to commit Burglary First Degree and in the course of and in furtherance of such offense . . . caused the death of [Victim] in violation of A.R.S. §§ 13-1101, 13-1105, 13-702, 13-702.01, 13-703, 13-703.01 and 13-801."³ A separate count in the indictment charged Jeffrey with first-degree burglary by entering "the fenced residential yard of [Victim]."

¶18 Specifically, Count 1 of the indictment stated:

Jeffrey, on or about the 26th day of December, 2006, acting either alone or with one or more other persons, committed or attempted to commit Burglary First Degree and in the course of and in furtherance of such offense, or immediate flight from such offense, REGINALD MARK JEFFREY . . . caused the death of [Victim] in violation of A.R.S. §§ 13-1101, 13-1105, 13-702, 13-702.01, 13-703, 13-703.01 and 13-801.

Count 2 stated:

Jeffrey, on or about the 26th day of December, 2006, with intent to commit a theft or a felony therein, enter or remain unlawfully in the fenced residential yard of [Victim] . . . while he or his accomplice knowingly possessed an explosive, a deadly weapon, or a dangerous instrument, to-wit: HANDGUN, in violation of A.R.S. §§ 13-1001, 13-1501, 13-1508, 13-1506, 13-701, 13-702, 13-702.01, and 13-80 [sic].

³ A person commits the crime of burglary when "entrance to the structure is made with the requisite criminal intent." *State v. Bottoni*, 131 Ariz. 574, 575, 643 P.2d 19, 20 (App. 1982).

¶9 As Jeffrey acknowledges, it is well established that the State is not required to charge the underlying predicate felony to support a conviction for felony murder. *Lacy*, 187 Ariz. at 350, 929 P.2d at 1298. We therefore reject Jeffrey's argument that the State's theory of felony murder was limited to burglary as described in Count 2 of the indictment; specifically, that Jeffrey entered or remained unlawfully in Victim's fenced residential yard.

¶10 In a related argument, Jeffrey contends that the State deprived him of his right to proper notice of the underlying predicate felony. Our Supreme Court has recommended that the State provide such notice in the indictment when pursuing a felony murder conviction. See *State v. Blakley*, 204 Ariz. 429, 440, ¶ 56, 65 P.3d 77, 88 (2003) ("In order to avoid injustice and to ensure that proper notice has been given in a felony murder case, we believe the state should include the predicate felony in the original or amended indictment."). Nevertheless, this court has not read *Blakley* as requiring notice of the pertinent felony murder theory in the indictment "so long as the defendant receives sufficient notice to reasonably rebut the allegation." *State v. Rivera*, 207 Ariz. 69, 73, ¶ 12, 83 P.3d 69, 73 (App. 2004); see also *State v. Arnett*, 158 Ariz. 15, 19, 760 P.2d 1064, 1068 (1988) (when defendant had notice on first day of trial that state might present evidence of robbery to

support felony murder theory and defendant showed no prejudice, "not error to refuse to require the State to elect which theory of first degree murder was being relied on").

¶11 Here, the record demonstrates that Jeffrey had notice of the underlying predicate felony. As mentioned above, Count 1 of the indictment specifically identified first-degree burglary. The State's requested jury instructions, filed two months before trial, included: an instruction that "[e]ach count charges a separate and distinct offense;" a definition of a "residential structure;" and a request for a Burglary First Degree Form of Verdict. The State presented substantial evidence that Jeffrey committed a burglary and that Victim was killed in furtherance of this act. The State's opening statement and closing argument made no mention of Jeffrey entering a fenced area. Instead, the State argued that Jeffrey planned on taking drugs and/or money from Victim. Mary testified that Victim dealt drugs from his apartment. Jeffrey stated that Victim "would be an easy rip" and that "he was going to shoot up some mother F-ers tonight." After Jeffrey's first interaction with Victim on December 25, 2006, Jeffrey became agitated and stated "they don't know me, I will shoot them." As stated above, Jeffrey and Wes entered Victim's apartment and shot and killed Victim. Therefore, as the State argued at trial, Count 1 provided notice to Jeffrey that the underlying felony murder offense was burglary, and that the

burglary that comprised the felony murder charge was "separate from any other count."

Sentencing

¶12 Jeffrey argues that the trial court erred by imposing a sentence that exceeded the maximum term of imprisonment allowed under the law. He contends that the sentencing range for a class 4 dangerous non-repetitive offense is between four and eight years. At trial, the court sentenced Jeffrey to an aggravated sentence of ten years' imprisonment for his conviction of misconduct involving weapons. The State concedes that we should remand to the trial court for clarification on the intended sentencing scheme and possible recalculation of Jeffrey's sentence. We agree.

¶13 Jeffrey also argues that the court failed to apply 603 days of presentence incarceration credit to each of his concurrent sentences. The State agrees. Because pre-sentence incarceration credit calculation errors can be corrected without a remand to trial court, *see State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992); Ariz.R.Crim.P. 31.17(b), we modify the sentencing minute entry to reflect 603 days of pre-sentence incarceration credit for each of Jeffrey's convictions.

CONCLUSION

¶14 For the foregoing reasons, we affirm Jeffrey's conviction for felony murder, but modify the sentencing minute

entry to reflect 603 days of pre-sentence incarceration credit for each conviction. We vacate Jeffrey's sentence for misconduct involving weapons and remand to the trial court for proceedings consistent with this decision.

_____/s/_____
PATRICK IRVINE, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
PHILIP HALL, Judge