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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/25/10
PHILIP G. URRY, CLERK
BY: JT

STATE OF ARIZONA,) 1 CA-CR 08-0848
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
DAVID LEE RIVERS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-008273-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
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Attorneys for Appellant

W E I S B E R G, Judge

¶1 David Lee Rivers ("Defendant") appeals from his
convictions for first-degree felony murder and burglary in the

first degree and from the sentences imposed. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant was indicted on one count of first-degree premeditated and/or felony murder, a class 1 dangerous felony and burglary in the first degree, a class 2 dangerous felony. The State alleged one historical prior felony conviction and other aggravating circumstances. Viewed in the light most favorable to sustaining the verdicts, the evidence presented at trial reflected the following.

¶3 On January 15, 2007, Kristafer Bia, one of Defendant's friends, drove Defendant to an apartment complex in Phoenix to locate his cousin, M., who had run away from home. They knocked on the door of apartment 241 where the victim and his brother, J., M's boyfriend, lived. The victim answered the door.

¶4 M. came out of the bedroom and saw Defendant, Bia, J., and the victim in the living room. Defendant told M., "Get your stuff together, let's go." She and Defendant argued and M. told Defendant, "Get out. I don't want to go to my mom's house." As Defendant and Bia were leaving, Defendant said, "We'll be back." Because M. was afraid, she and J. left the apartment to stay with a friend in apartment 101, but the victim remained in apartment 241.

¶15 Bia and Defendant drove around, drank beer and later returned to apartment 241. Defendant picked up a wooden stick, which was about two feet long and two inches wide. He and Bia knocked on the door, and the victim answered. Defendant wanted to know the whereabouts of his cousin and the victim let them in. Bia saw Defendant waving the stick back and forth. Nervous about what "they were getting into," Bia went into the bathroom. He heard "grumbling noises," "like someone being hit." When he came out of the bathroom, he saw the victim on the couch bleeding and saw pieces of the wooden stick on the floor. Bia asked Defendant what he had done, and told him, "I think [you] took it too far." The victim ran out of the apartment, Defendant chased him, and Bia followed.

¶16 The victim ran downstairs to apartment 101 and began banging on the front door. This occurred within ten to fifteen seconds after he left apartment 241. Defendant came behind the victim, started hitting him and then kicked him. After Bia heard someone on the inside of the apartment shout at them to get away from the door, he pried Defendant off the victim. Bia then heard two gunshots.

¶17 After the shooting, Defendant and Bia fled the scene. Although at trial Bia stated that he did not see Defendant with a gun, after Bia was arrested, he told a detective that he saw

Defendant holding a gun, heard gunshots and surmised Defendant was the shooter.¹

¶18 One tenant in apartment 101 testified that sometime after M. and J. came to stay in his apartment, he heard banging on his bedroom windowsill. He also heard "scuffling" outside and the victim yelling "Stop. Stop." It sounded like someone was being pushed into his door. The tenant got a kitchen knife and yelled out, "Whoever is out there, I'm going to call the cops." Just as he was about to open the door, he heard two gunshots. When the tenant opened the door, he saw the victim slouched in the "corner part of [his] door." Another tenant in apartment 101 heard fists pounding on the front door as if someone was "trying desperately to get in." This was followed by the sound of two gunshots.

¶19 A neighbor near apartment 101 heard two men arguing and one saying, "No, no." He looked outside, heard two gunshots and saw sparks fly. Another neighbor heard shouting. He went onto his balcony, saw someone pointing what looked like a gun and another holding his hands out, saying, "No. no." He heard two gunshots, saw a flash and then saw a man flee into the

¹Bia pled guilty as an accomplice to burglary in the first degree and agreed to testify truthfully regarding Defendant's participation in the victim's murder. Bia received a four-year sentence.

parking lot. The neighbor called 911 and told the operator the shooter was wearing a light-colored jersey.

¶10 M. testified that she heard loud banging on the door to apartment 101 and two gunshots. J. also heard banging on the door and heard his brother say, "Open the door, Let me in." By the time paramedics arrived, the victim was dead.

¶11 The medical examiner who performed the autopsy observed injuries on both of the victim's hands. There were contusions and lacerations to his head and face, consistent with a blunt force injury caused by an instrument used during an assault. The medical examiner reported that the victim suffered two gunshot wounds, one to the heart, but opined that either wound could have caused the victim's death. He also retrieved bullet fragments from his chest area.

¶12 A homicide detective processed the crime scene and observed a trail of blood from apartment 241 to apartment 101. There were blood stains inside apartment 241 and blood on the window pane and door of apartment 101. He also found blood-stained pieces of broken wood.

¶13 Defendant was arrested later the same day at a house that was subsequently searched pursuant to a warrant. A detective found a gun hidden between two mattresses and a box of .357 ammunition on a dresser. He also found a bloody grey T-shirt in a garbage container outside a neighbor's house.

¶14 A ballistics expert compared two casings and two bullet fragments taken from the autopsy with tool markings obtained from test firing the gun seized during the search. He concluded that one bullet fragment found in the victim's chest was definitely fired from that gun. The evidence was inconclusive as to the other fragment and the casings.

¶15 When he was arrested later the same day, Defendant had blood on his cheek. A DNA analyst concluded that the blood sample taken from Defendant's cheek was a mixture, that the major contributor was consistent with the victim's DNA profile and that Defendant could not be excluded as the minor contributor. She also concluded that blood on a piece of broken wood found at the scene and on the grey T-shirt matched the DNA profile of the victim. As to who wore the T-shirt, she could neither exclude the victim nor Defendant. The DNA analyst determined that blood found on the gun was a mixture and that the major contributor was consistent with the victim's DNA profile. She could not draw any conclusions as to the minor contributor.

¶16 At the close of the State's case, Defendant made a motion for judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure, claiming there was insufficient evidence to support any of the charges. The court denied the motion. The jury found Defendant guilty of first-degree murder,

two jurors finding felony murder and ten jurors finding both premeditated murder and felony murder.² The jury also found Defendant guilty of burglary in the first degree. The court sentenced Defendant to life imprisonment with the possibility of release after twenty-five years for first-degree murder and to the presumptive term of ten and one-half years for burglary, the sentences to run concurrently. The court credited Defendant with 606 days of presentence incarceration. Defendant filed a timely notice of appeal.

¶17 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001).

DISCUSSION

¶18 Defendant raises one issue on appeal. He argues that the trial court erred in denying his Rule 20 motion for judgment of acquittal on the felony murder charge. He claims the State failed to produce sufficient evidence that the murder occurred in the course of and furtherance of or immediate flight from the predicate felony of burglary in the first degree.

²"A jury need not be unanimous as to the theory of first degree murder as long as all agree that the murder was committed." *State v. Gomez*, 211 Ariz. 494, 498, n. 3, ¶16, 123 P.3d 1131, 1135, n. 3 (2005) (citing *Schad v. Arizona*, 501 U.S. 624, 645 (1991)).

Standard of Review

¶19 We review a trial court's denial of a Rule 20 motion for judgment of acquittal for an abuse of discretion. See *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). In making this determination, "we view the evidence in the light most favorable to supporting the verdict and will reverse only if there is a complete absence of 'substantial evidence' to support the conviction." *Id.* (citation omitted). All reasonable inferences are resolved against the defendant and if there are conflicts in the evidence, we resolve such conflicts in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Determinations of the credibility of witnesses are for jury. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).

¶20 "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Further, in reviewing the sufficiency of the evidence, we make no distinction between direct and circumstantial evidence. See *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

Felony Murder

¶21 Under these facts, a person commits first-degree felony murder if, "[a]cting either alone or with one or more other persons, the person commits or attempts to commit . . . burglary [in the first degree] under . . . § 13-1508 . . . and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person." A.R.S. § 13-1105(A)(Supp. 2009). "A person commits burglary in the first degree if such person or an accomplice violates the provisions of . . . § 13-1507 [burglary in the second degree] and knowingly possesses . . . a deadly weapon or a dangerous instrument in the course of committing any theft or any felony." A.R.S. § 13-1508(A)(2001).³ "A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A)(2001). "[A] burglary predicated on an aggravated assault can serve as basis for a felony-murder conviction." *State v. Spoon*, 137 Ariz. 105, 110, 669 P.2d 83, 88 (1983); see also *State v. Dann*, 205 Ariz. 557, 566-67, ¶¶ 23-24, 74 P.3d

³The phrase, "'In the course of' means any acts that are performed by an intruder from the moment of entry to and including flight from the scene of a crime." A.R.S. § 13-1501(7)(Supp. 2009).

231, 240-41 (2003) (felony murder can be predicated on burglary based upon an intent to commit assault).⁴

¶122 Defendant claims that the burglary ended after Defendant assaulted the victim and the victim ran out of his apartment. He contends that because the predicate felony of burglary ended prior to the shooting and did not continue, the murder was not committed "in the course of and in furtherance of" the burglary or in "immediate flight" from the burglary.

¶123 Under the felony murder statute, the phrase "in the course of and in furtherance of" has been construed to mean that "the death result[ed] from an action taken to facilitate the accomplishment of one or more of the felonies enumerated in § 13-1105(A)(2)[.]" *State v. Lopez*, 173 Ariz. 552, 555, 845 P.2d 478, 481 (App. 1992) (quoting *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d. 1285, 1287 (1982)). Thus, "where the killing 'emanates' from the crime itself, and is a natural and proximate result thereof, it is committed in furtherance of the felony within the meaning of the statute." *Id.* Whether the death occurred in the course of and in furtherance of the predicate

⁴Aggravated assault is not one of the enumerated felonies in A.R.S. § 13-1105(A). The felony-murder doctrine does not apply where the felony is an offense included in the charge of homicide and the felony then merges into the resultant homicide. *State v. Hankins*, 141 Ariz. 217, 221, 686 P.2d 740, 744 (1984).

felony is a question to be determined by the trier of fact. *State v. Lacy*, 187 Ariz. 340, 350, 929 P.2d 1288, 1298 (1996).⁵

¶124 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). However, the burglary in this case was ongoing. Defendant entered apartment 241 with a dangerous instrument with the intent to commit the felony offense of aggravated assault. To carry out his intent, he assaulted the victim, chased him downstairs to apartment 101 within ten to fifteen seconds, continued the assault, shot the victim and fled. A jury could reasonably conclude that the victim's death occurred in the course of and in furtherance of the burglary because it "resulted from" Defendant's action to "facilitate the accomplishment" of the burglary, "emanated" from the burglary and was a "natural and proximate result" of the burglary.

¶125 Defendant argues, however, that because the "killing occurred outside and away from the burglarized apartment," it could not be in the course of or in furtherance of the burglary. Nothing in the language of the felony-murder or burglary

⁵In defining the phrase "in the course of and in furtherance of," the State relies on Arizona cases in which the jury was given an instruction on felony murder which states in part that, "It is enough if the felony and killing were part of the same series of events." This language has been disapproved because it does not accurately state the law. *State v. Martinez*, 218 Ariz. 421, 427-28, ¶ 23, 189 P.3d 348, 355 (2008).

statutes, however, indicates that the death must occur within the residential structure burglarized nor does the language preclude a finding of felony murder where, as here, there is a close spatial and temporal proximity between the burglary and the death. See *State v. Richmond*, 112 Ariz. 228, 232, 540 P.2d 700, 704 (1975)("[w]hen the felony is so entwined with the murder that it is part of that murder we will not hold a stopwatch on the events or artificially break down the actions of the defendant into separate components in order to avoid the clear intent of the legislature in enacting the felony murder rule.")

¶126 Defendant also suggests that because "the victim was murdered for no apparent reason," this somehow precludes a finding of felony murder. However, "[m]otive is not an element of the crime of murder[,]" [and] although the jury may consider motive or lack thereof in determining guilt or innocence, "the state need not prove motive." *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983). Thus, lack of motive does not negate a finding of felony murder. We conclude that there was sufficient evidence from which a rational trier of fact could find that the victim's death occurred in the course of and in

furtherance of the burglary and that Defendant was therefore guilty of felony murder.⁶

CONCLUSION

¶27 For the foregoing reasons, we affirm Defendant's convictions and sentences.

 /S/
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

 /S/
PHILIP HALL, Judge

 /S/
JOHN C. GEMMILL, Judge

⁶Given this conclusion, we need not decide whether the victim's death occurred during an immediate flight from the burglary.