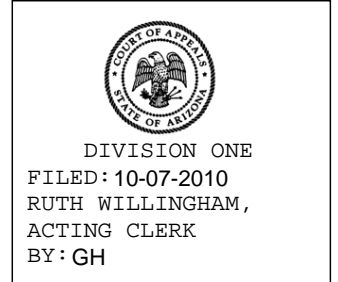


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS  
AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 09-0379  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
) (Not for Publication -  
ROBERT LAVERNE NYBERG, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-174753-001 DT

The Honorable Michael D. Jones, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Liza-Jane Capatos, Assistant Attorney General  
Attorneys for Appellee

The Law Office of Michael S. Reeves Phoenix  
by Michael S. Reeves  
Attorney for Appellant

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W E I S B E R G, Judge

¶1 Robert Laverne Nyberg ("Defendant") appeals from his conviction for second-degree murder following a jury trial and from the sentence imposed. For reasons that follow, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 We view the evidence in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). Defendant was indicted for second-degree murder, a class 1 dangerous felony. The State alleged four historical prior felony convictions. The following evidence was presented at trial.

¶3 Henry, the State's key witness, testified that in November 2007, he was living in Peoria with his family, including his half-sister, Christina. Christina was Defendant's girlfriend and was allegedly pregnant with Defendant's child. Henry, then age 17, was part of the Sun Town Gang. On the night of November 14, 2007, Henry and Christina were assaulted by members of the rival Dog Town gang, including Richard and the victim.

¶4 Christina testified that on November 18, 2007, she told Defendant about the assault and that she had possibly lost the baby as a result. She admitted telling Detective Laing of the Peoria Police Department that Defendant's response was that he "wanted to get them or scare them with a knife."

¶15 Henry testified that on the night of November 18, Christina asked him to show Defendant where "the guys from the fight" lived, "because he wants to know." When Henry got into Defendant's vehicle, Defendant said, "check out my new knife." Henry directed Defendant to Richard's house. Richard's father testified that Defendant came to his door and asked about his son's whereabouts. He told Defendant that Richard was not home. Defendant, who appeared angry, remarked that Richard's car was there, and left.

¶16 Henry testified that as he and Defendant were driving from Richard's house, Henry saw the victim in the middle of the street. He told Defendant that the victim was "one of the other guys in the fight." Defendant jumped out of the car and Henry, who was in the back seat, momentarily climbed into the driver's seat. He peered out the open car door and saw the victim laying on the street and Defendant pulling his knife out of him.

¶17 Henry further testified that Defendant got back into the vehicle, threw the knife down and sped away. He said Defendant told him that he had just killed the victim and he was going to come back and "finish the rest of those guys." Henry testified that after returning home, he overheard Defendant telling Christina that he had killed someone. Two days later, Henry told his family about what occurred and called the police.

¶8 Richard's father testified that after Defendant left his house, he observed Defendant's vehicle stop on his street, saw Defendant jump in the driver's side of the car and speed off. Two or three minutes later, he saw the victim, who was bleeding profusely, stagger toward his front door. The victim said "Call 911, I'm dying." Richard's father testified that when he asked the victim who had done this, he thought the victim said "Henry." He also testified that he told the police that the victim may have said "Henry or Harry." Richard's mother testified that when she saw the victim, "he had half his stomach out." The victim later died of two stab wounds to his chest and abdomen.

¶9 Defendant's sister, Helen, testified that the night of the murder, Defendant called her and said he had just stabbed someone in the heart. He told her he did it because that person had "killed his baby." The State introduced a copy of a text message Helen sent to Defendant's cell phone that night in which she wrote, "U kill a teenager . . . u wanna talk about dumb moves." She also testified that Defendant collected knives.

¶10 At trial, Christina recanted prior statements she had made to Detective Laing. She testified that when Defendant and Henry returned from Richard's house, Henry said he had just stabbed the victim. She also testified that Defendant told her Henry had committed the crime. She acknowledged, however,

telling Detective Laing that Defendant admitted to her that he had stabbed the victim and had thrown the knife in a dumpster. She claimed the detective pressured her to falsely accuse Defendant.

¶11 After Defendant was arrested, a crime technician took swabs from the interior of his vehicle, including the floor mat on the driver's side, a cut out area of carpet underneath the mat, and Defendant's shoes. A criminalist tested the DNA profile of blood found on two swabs taken from the carpet and floormat with that of the victim's DNA profile and found a match. She also tested the DNA profile of blood found on Defendant's right shoe with the DNA profiles of Defendant and the victim and found there was a mixture of DNA from both of them.

¶12 Defendant testified that when he learned of the assault, he told Henry they should obtain the license plate number of the car driven by Richard on the night it occurred and that he drove Henry to Richard's house for that purpose. He testified there was a knife in the back seat of his vehicle. Defendant further testified that as he was attempting to write down the license plate number of Richard's car, Henry said, "Here comes somebody" and jumped out of the vehicle. When Henry came back, he told Defendant to move over, got into the driver's seat and drove away. Henry told Defendant that he stabbed

someone. Defendant claimed he did not see what happened and denied stabbing the victim or telling Christina that he did so.

¶13 Detective Laing testified that Henry was a person of interest. He said, however, that after the police investigated the case, he was not a suspect and "there was no reason to go after him at that point."

¶14 The jury found Defendant guilty of the offense, a dangerous felony. The court found that the aggravating factors outweighed the mitigating factors and imposed an aggravated sentence of twenty-two years. Pursuant to the court's order, Defendant filed a delayed notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033 (A) (2010).

#### **DISCUSSION**

¶15 On appeal, Defendant claims that the trial court abused its discretion by permitting the State to impeach him with felony convictions that were more than ten years old and that the court erred in admitting an inflammatory photograph depicting the victim after he was stabbed.

#### **Prior Felony Convictions**

¶16 Defendant had a 1997 conviction for burglary committed in 1996, for which he spent over three years in prison. He also had 1995 convictions for theft, unlawful flight from a law

enforcement officer and criminal trespass. Although these crimes were committed on different dates, Defendant pled guilty to them, was convicted and sentenced on all three, and was released from prison on December 25, 1995. The State filed a request for a Rule 609 hearing to determine what prior felony convictions it could use to impeach Defendant if he chose to testify. The State sought to introduce evidence of all of Defendant's prior felony convictions.

¶17 Under Rule 609(b), Arizona Rules of Evidence, "[e]vidence of a conviction . . . is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." An exception exists to the ten-year time limit if "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect," and the proponent of the evidence gives sufficient written notice of intent to use the evidence to the adverse party. Ariz. R. Evid. 609(b). Following the Rule 609 hearing, the court found that the State gave sufficient notice of its intent to use the prior felony convictions and that the 1997 and the "three older 1995 convictions" were admissible to impeach Defendant.

¶18 The court made specific findings that the probative value of the 1997 conviction outweighed its prejudicial effect. It found that the credibility not only of Defendant, but of Henry, Christina, and Helen was a major issue and that the three older felony convictions were relevant and bore "importantly on the issue of credibility." As an example of the significance of credibility to the case, the court noted that it had permitted admission of considerable evidence, not normally allowed, of gang membership and affiliation because such evidence was "extremely important" to the witnesses' credibility, bias, and motive.

¶19 The court also found that the probative value of four felony convictions rather than one felony conviction was much greater, although it had the potential for greater prejudicial effect. The court further found that after Defendant served his sentences for the 1995 convictions and was released from custody on December 25, 1995, he committed the burglary offense soon thereafter on October 9, 1996, for which he was convicted in 1997. While testifying, Defendant admitted to having four felony convictions, informed the jury as to the nature of the convictions, and stated that none of them involved violence.

¶20 We review rulings on admission of prior felony convictions under Rule 609 for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995). Although



all prior felony convictions bear on a witness's truthfulness, admission of prior felony convictions over ten years old, should be admitted "very rarely and only in exceptional circumstances." *State v. Green*, 200 Ariz. 496, 499, ¶ 11, 29 P.3d 271, 274 (2001). The State has the burden of proving exceptional circumstances. *Id.* at ¶ 12.

¶21 In deciding whether a prior felony conviction can be admitted for impeachment purposes, the court should consider factors such as the length of time since the prior conviction, the similarity between the past and present offenses, the witness's criminal history since the prior conviction and the "centrality of the credibility issue." *State v. Williams*, 144 Ariz. 433, 438, 698 P.2d 678, 683 (1985) (citation omitted); *Green*, 200 Ariz. at 499, ¶ 13, 29 P.3d at 274. However, as to felony convictions more than ten years old, the mere fact that a defendant's credibility is an issue in the case does not alone justify admission of such convictions that would otherwise be inadmissible. *Id.* at ¶ 14.

¶22 In *Green*, our supreme court reversed the defendant's conviction for sexual abuse when the trial court admitted evidence of defendant's fifteen-year-old felony conviction solely because defendant's credibility was "extremely important." *Id.* at 497-98, ¶¶ 3-6, 29 P.3d at 272-73. The court found that admission of this evidence based on this sole

factor was erroneous and that the error was not harmless. *Id.* at 501, ¶¶ 21-22, 29 P.3d at 276. On appeal, Defendant argues that contrary to the holding in *Green*, the trial court abused its discretion by admitting evidence of the remote felony convictions based merely on Defendant's credibility and that the error was not harmless. Because *Green* is distinguishable, there was no abuse of discretion.

¶23 Regarding the probative value of the convictions, the court found that the credibility of not only Defendant, but of other witnesses was so central to the case that the court allowed otherwise potentially excludable evidence of gang membership and affiliation, much of which was helpful to Defendant to show that "someone . . . who equally plausibly might have committed this crime." This reflects the court's view that under these special circumstances, the jury should be given more information than in the usual case in order to fairly assess the witnesses' credibility and to reach a reliable judgment on the facts.

¶24 The court also found that evidence of multiple felony convictions had greater probative value than evidence of just one conviction, although it had the potential for greater prejudicial effect. The court further found that although the 1995 convictions were twelve years old, Defendant committed the fourth felony just a few months after being released from prison

on those convictions. Unlike *Green*, which involved admission of one remote felony conviction, allowing evidence of the three 1995 convictions showed that Defendant was a repetitive offender. Also, because Defendant committed another offense shortly after he was released from prison on the 1995 convictions, this showed he was unable to remain a law-abiding citizen for long. These factors made the probative value of the clearly admissible 1997 conviction even greater.

¶25 As to the prejudicial effect of their admission, the 1995 felony convictions for theft, unlawful flight and criminal trespass were non-violent class 4 and/or 5 offenses. They did not involve an element of falsification or false statement, such as fraud or perjury, which would bear directly on a defendant's propensity to testify untruthfully. *State v. Malloy*, 131 Ariz. 125, 127, 639 P.2d 315, 317 (1982). They were also dissimilar to the offenses for which Defendant was charged and therefore had less prejudicial impact. *Bolton*, 182 Ariz. at 303, 896 P.2d at 893. Further, the time between Defendant's first release from prison and the expiration of the ten-year time period was not very long so the 1995 convictions were not too remote in time. As the Rule recognizes, there is no bright-line demarcation that inviolably excludes such convictions if the circumstances warrant it, as they do in this case.

¶26 Finally, the court instructed the jury that evidence of a prior felony conviction could be considered only as to Defendant's credibility, but not as evidence of guilt and in closing, the prosecutor told the jury to follow this instruction. We presume that jurors follow the trial court's instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006).

¶27 Although the trial court did not make a specific finding that in the interests of justice, the probative value of the remote convictions substantially outweighed their prejudicial effect, it is clear from the record that the court considered their probative value, recognized their prejudicial effect and balanced these factors under the appropriate standard as required by Rule 609(b). *State v. Hunter*, 137 Ariz. 234, 237, 669 P.2d 1011, 1014 (App. 1983) (although trial court should make on-the-record finding based on specific facts and circumstances that probative value outweighs unfair prejudice, where clear from record court balanced factors, we review for abuse of discretion only). The trial court did not abuse its discretion in admitting evidence of the 1995 convictions.

#### **Admission of Inflammatory Photograph**

¶28 During the medical examiner's testimony, the State sought to introduce a photograph of the victim's stomach area taken at the hospital showing portions of his intestines

protruding outside his body. Defendant objected because the photograph was gruesome. The State argued the photograph was relevant to show the extent of the victim's physical injuries immediately preceding his death and the victim's state of mind when he was stabbed. The court found that the evidence was relevant for those purposes. It further found that although gruesome, the probative value of the photograph outweighed its prejudicial effect and allowed its admission. The medical examiner referred to the photograph during his examination.

¶29 The trial court's ruling on the admissibility of photographic evidence will not be overturned absent an abuse of discretion. *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995). "Inflammatory photographs are admissible if they are relevant and their probative value outweighs the danger of unfair prejudice." *State v. Rienhardt*, 190 Ariz. 579, 584, 951 P.2d 454, 459 (1997). See Ariz. R. Evid. 403 (relevant evidence may be excluded if danger of unfair prejudice outweighs probative value). Photographs of a murder victim are relevant if they illustrate what occurred or corroborate the testimony of witnesses. *Id.*; *State v. Thornton*, 187 Ariz. 325, 332, 929 P.2d 676, 683 (1996) (inflammatory photographs admissible to explain how victim killed). Here, the photograph was relevant to explain the manner in which the victim was killed, to corroborate the testimony of witnesses who saw the victim after

he was stabbed, and to provide a possible explanation for the victim's statements prior to his death.

¶30 As to whether the photograph was unfairly prejudicial, we agree with the trial court. The photograph was not so shocking that it would inflame the jurors' passions or result in significant prejudicial impact. *State v. McGill*, 213 Ariz. 147, 154-55, ¶¶ 30-32, 140 P.3d 930, 937-38 (2006). There was no error.

#### CONCLUSION

¶31 For the foregoing reasons, we affirm Defendant's conviction and sentence.

/s/\_\_\_\_\_  
SHELDON H. WEISBERG,  
Presiding Judge

CONCURRING:

/s/\_\_\_\_\_  
PETER B. SWANN, Judge

/s/\_\_\_\_\_  
JON W. THOMPSON, Judge