

**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**



DIVISION ONE
FILED: 08/26/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

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

STATE OF ARIZONA,)
) No. 1 CA-CR 09-0418
)
 Appellee,) DEPARTMENT E
)
 v.) **MEMORANDUM DECISION**
)
 FRANK ANTHONY CABALLEROS,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-005255-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

Frank Anthony Caballeros Phoenix
Appellant

H A L L, Judge

¶1 Frank Anthony Caballeros appeals from his convictions and the sentences imposed. Defendant's appellate counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that, after a diligent search of the record, he was unable to find any arguable grounds for reversal. This court granted defendant an opportunity to file a supplemental brief, which he has done. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶2 We review for fundamental error, error that goes to the foundation of a case or takes from the defendant a right essential to his defense. See *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988). We view the evidence presented in a light most favorable to sustaining the verdict. *State v. Cropper*, 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003). Finding no reversible error, we affirm.

¶3 Defendant was charged by indictment with one count of second-degree murder (Count One), a class 1 dangerous felony, in violation of Arizona Revised Statutes (A.R.S.) section 13-1104(A) (2010); one count of aggravated assault (Count Two), a class 3 felony, in violation of A.R.S. § 13-1204(A) (2010); and one count of misconduct involving weapons (Count Three), a class 4 felony, in violation of A.R.S. § 13-3102(A)(4) (2010).

¶14 The following evidence was presented at trial.¹ Defendant shot two guests at a party that started on the evening of November 22, 2007 and lasted into the early morning hours of the following day. B.B. hosted the party in his backyard, which was illuminated by a fire pit in the yard and a light in a nearby alley. Most of the guests at the party were sitting near the fire pit, talking, and laughing, and some were drinking alcoholic beverages.

¶15 The party was interrupted when defendant began arguing with Z.C., another guest at the party. Several witnesses observed that defendant was holding an assault rifle at his side. At the culmination of his argument with Z.C., defendant raised the rifle and shot Z.C. in the chest. Bullet fragments passed through Z.C.'s body and hit F.V., who was standing behind him, in the abdomen. Z.C. died as a result of the gunshot wound to his chest. F.V.'s injuries required him to have six major surgeries and around fifteen minor surgeries.

¶16 B.B. identified defendant, who he knew by name from living in the same neighborhood, in a photo lineup soon after the incident. The state presented testimony that swabs from a

¹ "[W]e view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant." *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009) (quoting *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984)).

beer bottle at the party matched defendant's DNA. Police arrested defendant, and a search warrant served on his home revealed a box of ammunition in his room that was of the same type as the spent shell casing found near Z.C.'s body.

¶17 Defendant claimed at trial, through counsel, that although he attended the party where the shooting took place, he was not the shooter. After a seven-day trial, the jury found defendant guilty as charged on all three counts. The trial court found that defendant had one historical prior felony conviction and sentenced him to an aggravated term of 20 years in prison on Count One, an aggravated term of 10 years in prison on Count Two, and a presumptive term of 4.5 years in prison on Count Three, with Counts One and Two to run consecutively and Count Three to run concurrently with Count One.

DISCUSSION

¶18 Defendant raises three issues in his supplemental brief, which we address in turn.

I. Presumption of Innocence

¶19 Defendant first claims that the court failed to properly instruct the jury in its final instructions that defendant was presumed innocent until proven guilty. Our review of the transcript, however, reveals that the court did instruct the jury on the presumption. The court stated in its final instructions that "the State ha[d] the burden of proving the

defendant guilty beyond a reasonable doubt" and that "defendant [wa]s not required to produce evidence of any kind" to obtain an acquittal. Taken together, these instructions properly stated the presumption of innocence and the burden on the state. Further, the court instructed the jury that defendant was "presumed by law to be innocent" in its preliminary instructions. Accordingly, we conclude that the court properly instructed the jury.

II. Rule 20 Motions

¶10 Defendant also claims that the trial court erred by denying his Rule 20 motions for judgment of acquittal after the state's case. As we understand his argument, he mainly claims that the fact that several witnesses had been consuming alcohol makes their testimony unreliable. We review the sufficiency of the evidence underlying a conviction only to determine "whether substantial evidence supports the verdict." *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007). Substantial evidence "is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (quotation omitted).

A. Second-degree Murder

¶11 A person commits second-degree murder when, without premeditation, he causes the death of another person intentionally or knowingly. A.R.S. § 13-1104(A)(1), (2). A person also commits second-degree murder if he causes the death of another by recklessly engaging in conduct creating a grave risk of death under "circumstances manifesting extreme indifference to human life." § 13-1104(A)(3).

¶12 These elements may be established by testimony of a witness who is intoxicated. "Every person is competent to be a witness except as otherwise provided in these rules or by statute." Ariz. R. Evid. 601. Even assuming witnesses were intoxicated at the time of the shooting, they would not necessarily be incompetent to testify because "the question of competency is within the sound discretion of the trial court." *State v. Jeffers*, 135 Ariz. 404, 420, 661 P.2d 1105, 1121 (1983). The court did not abuse its discretion by deeming the witnesses competent to testify and submitting the question of their credibility to the jury.

¶13 Further, the state presented substantial evidence to support defendant's conviction. R.V. testified that defendant raised an assault rifle and shot Z.C. at close range. Even

though R.V. had been drinking,² the jury could have reasonably determined that his recounted perception of the events was accurate despite his intoxication. See *Jeffers*, 135 Ariz. at 420, 661 P.2d at 1121. A.F., R.C., S.J., and B.B. also testified that they saw defendant at the party with an assault rifle at his side arguing with Z.C. shortly before hearing the shot. The state provided further corroboration by showing that investigators found a shell casing at the scene of the same variety as the military-grade ammunition found in a search of defendant's room. Accordingly, the state presented substantial evidence that could allow a reasonable jury to find defendant guilty of second-degree murder.

B. Aggravated Assault

¶14 A person commits aggravated assault when he "intentionally, knowingly or recklessly causes any physical injury to another person," A.R.S. § 13-1203, under certain special circumstances. § 13-1204(A). These circumstances include causing "serious physical injury to another," § 13-1204(A)(1), and using "a deadly weapon or dangerous instrument." § 13-1204(A)(2).

² R.V. admitted to drinking four or five Bud Light beers in the six hours leading up to the party and one during the party itself. Police never tested R.V.'s blood-alcohol content, as they did with other witnesses, because he rode with his brother, F.V., to the hospital.

¶15 The state presented substantial evidence of defendant's commission of an aggravated assault. Bullet fragments from the same bullet defendant shot at Z.C. passed through him and hit F.V. in the abdomen. The jury could reasonably have found either that defendant acted recklessly with regard to injuring F.V. by shooting Z.C. at close range with an assault rifle or that defendant's intent to shoot Z.C. transferred to F.V.'s injury that was caused by the same act. A.R.S. § 13-203(B)(1) (2010); *see also State v. Henley*, 141 Ariz. 465, 467, 687 P.2d 1220, 1222 (1984) (holding that intent was transferred when a defendant fired one bullet and injured two persons, supporting two assault convictions), *abrogated on other grounds by State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045 (2009).

¶16 The state also presented substantial evidence that F.V.'s injury was a "serious physical injury"; that is, that the injury "create[d] a reasonable risk of death, or . . . cause[d] serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(38) (2010). F.V. testified that he passed in and out of consciousness after the shooting and that the shooting led to six major surgeries and at least fifteen minor ones. Accordingly, the trial court did not

err in denying defendant's motion for judgment of acquittal on the aggravated assault charge.

C. Misconduct with Weapons

¶17 A person commits misconduct with weapons when he knowingly possesses a deadly weapon or prohibited weapon if he is a prohibited possessor. A.R.S. § 13-3102(A)(4). A person becomes a prohibited possessor if he has been convicted of a felony and his right to possess a firearm has not been restored. § 13-3101(A)(7)(b).

¶18 At trial, defendant stipulated that: (1) he was convicted of a felony on December 15, 2006; (2) he was placed on supervised probation for two years; and (3) his probation officer was J.C. Defendant also stipulated that, if called, J.C. would have testified that defendant was not allowed to possess any firearms as a condition of his probation, and that he had not had his right to possess firearms restored. See A.R.S. § 13-904(A)(5) (2010) (suspending a convicted felon's right to possess a firearm); § 13-905(B) (allowing restoration of rights upon discharge from probation). As mentioned in ¶ 13, *supra*, B.B., A.F., R.C., S.J., and R.V. all testified that they saw defendant at the party with an assault rifle on November 23, 2007, while he was still on probation. In combination with the stipulation, this testimony constitutes substantial evidence of

defendant's guilt. Thus, the trial court did not err in denying defendant's Rule 20 motion.

III. Alleged Use of Perjured Testimony

¶19 Finally, defendant alleges that the state knowingly solicited false testimony at trial. Specifically, defendant claims that several witnesses' testimony that they heard only one shot at the party differs from their statements immediately after the incident to police that they heard two shots, and argues that this amounts to perjury. Thus, defendant's claim actually amounts to an attack on these witnesses' credibility. Defense counsel pointed out these inconsistencies at trial to raise this credibility issue, and the issue was correctly left to the jury. See *State v. Fimbres*, 222 Ariz. 293, 297, ¶ 4, 213 P.3d 1020, 1024 (App. 2009) ("The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." (quoting *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995))). The mere presence of inconsistencies between prior statements and trial testimony does not itself prove that the testimony at trial was false. Accordingly, we reject defendant's claim.

CONCLUSION

¶20 We have read and considered counsel's brief and have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the

proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was given an opportunity to speak before sentencing, and the sentence imposed was within statutory limits.

¶21 After the filing of this decision, counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do no more than inform defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant has thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review. Accordingly, defendant's convictions and sentences are affirmed.

_ /s/ _____
PHILIP HALL, Judge

CONCURRING:

/s/ _____
DIANE M. JOHNSEN, Presiding Judge

/s/ _____
PATRICK IRVINE, Judge