IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 07/07/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0670
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
CANDICE LYNNE WRIGHT, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR-2007-1350

The Honorable Rick A. Williams, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Angela Corrine Kebric, Assistant Attorney General
Attorneys for Appellee

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G E M M I L L, Judge

¶1 Candice Lynne Wright appeals her conviction and sentence for second-degree murder. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The trial evidence, viewed in the light most favorable to sustaining the verdict and with all inferences resolved against Wright, revealed the following. *See State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005). On September 2, 2007, at 7:04 p.m., Wright called 911 to report finding her 73-year-old husband dead on the floor of their kitchen with "blood everywhere." Lake Havasu City Police officers responded. The first officers to arrive noticed shell casings in the kitchen and dining area and observed the victim had sustained gunshot wounds and had been dead "for a while."

¶3 According to officers, Wright appeared intoxicated and distraught until an officer swabbed her hands for gunshot residue, at which point her behavior changed and she became very talkative and inquisitive about the accuracy of residue tests. When informed that the presence of fertilizer could result in a "false positive," Wright stated she had been gardening that day. In response to an officer's request for her clothing to conduct further testing, Wright changed clothes and gave to the officer a shirt different from the one she had been wearing, but similar in color. Wright further informed officers that she "hated handguns." She agreed to accompany a detective to the police station for an interview.

¶4 Wright did not testify at trial, but portions of her videotaped interview at the police station were admitted. During the interview with Detectives Campbell and Slack, Wright explained her husband was preparing two steaks for their dinner when he suggested they needed more meat, so she volunteered go to the store. Wright stated she drove straight to the store, which is three-and-one-half miles away, remained there for 35 to 45 minutes "mess[ing] around looking at other stuff" and returned directly home after purchasing two steaks. Upon entering the house, Wright said she "saw this pool of blood and then I kind of blanked out" before talking "to the 911 lady." She described her two-year marriage as "idyllic" and said a recent argument over a choice of wallpaper was "as bad as it got." Wright also stated that the only time she had ever fired a pistol was in May 2004 when she obtained a concealed weapons permit. She consistently denied any involvement in the murder and claimed she did not know how her husband died.

¶5 The victim owned "twin" Kel-Tec .32 caliber handguns. One of the pistols was found in the victim's nightstand; the other was not recovered. An autopsy revealed the victim died from five gunshot wounds to the head, neck and chest. The five projectiles found in the victim's body were fired from the same .32 caliber handgun, but not the one found in the bedroom. Police discovered no evidence of a burglary or forced entry into

the home, nor was there evidence of a struggle. A neighbor heard four gunshots "right in a row" between 4:00 and 5:00 p.m.

¶6 In Wright's truck, police discovered an empty holster for a small caliber handgun. Video surveillance from the grocery store showed that Wright entered the store at 6:10 p.m., proceeded directly to the meat display and checked out at 6:13 p.m.

¶7 Trial testimony revealed that Wright frequently carried a .32 caliber handgun at her side, and that she had fired a handgun during an incident outside of her Prescott home a few weeks prior to the murder. Further, her relationship with the victim was marked by instances of strife and conflict, apparently stemming at least in part from Wright's chronic alcoholism. The victim's daughter testified she observed Wright throw a drink in her husband's face on Father's Day that year.

¶8 Over Wright's objection, the court instructed the jury on second-degree murder as a lesser included offense of the sole charge of first-degree murder. The jury found Wright not guilty of first-degree murder but guilty of second-degree murder. The jury subsequently found five of eight alleged aggravating factors.[1] The court sentenced Wright to an aggravated term of 18

[1] The jury found the following aggravating circumstances: infliction or threatened infliction of serious physical injury; use, threatened use, or possession of a deadly weapon or

years' imprisonment, and she timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(1) (2010).

ANALYSIS

I. Wright's Interview Statements

¶9 Wright moved before trial to suppress statements she made during the interview. She argued that from the inception of the interview she was subject to custodial interrogation, thereby requiring an advisement of her *Miranda*[2] rights. She also argued that the statements made after she was advised of her *Miranda* rights two-and-a-half hours into the interview were inadmissible under *Missouri v. Seibert*, 542 U.S. 600 (2004). The superior court found that Wright was not subject to custodial interrogation until a specific point during the interview when the questioning turned more accusatory. Accordingly, the court suppressed Wright's statements from that point in the interview to the point at which she was advised of

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dangerous instrument during the commission of the crime; physical, emotional, or financial harm caused to the victim's immediate family; the victim was 65 or older; and, Wright's violation of a position of trust with the victim.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

her *Miranda* rights.[3]

¶10 On appeal, Wright does not specify the statements that the court should have suppressed; instead, she appears to argue, as she did below, that the court should have suppressed all of her statements made during the interview.[4] The State responds that the court's suppression order was not erroneous, and in any event, any possible error was harmless.

¶11 We do not believe the initial questioning of Wright constituted custodial interrogation. *See Rhode Island v. Innis,* 446 U.S. 291, 300-01 (1980) (*"Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."). Factors to be considered in determining whether a person is in custody include: the method used to summon the person for questioning; the location of the questioning; the presence of objective indicia of arrest; and the form and length of the questioning. *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983).

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[3] The suppressed evidence constitutes seven of the transcript's seventy-seven pages.

[4] Wright challenges the admissibility of her statements only on the basis of *Miranda*. She does not argue that she made the statements involuntarily. *See State v. Montes,* 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983) ("Voluntariness and *Miranda* are two separate inquiries."). Accordingly, we do not address the voluntariness of her statements.

¶12 In *Cruz-Mata*, our supreme court found the trial court did not err in ruling defendant's pre-*Miranda* confession was admissible when the defendant voluntarily rode in the front seat of an unmarked police car to the police station for questioning; the interview lasted a total of one and a half hours; the defendant was not booked nor handcuffed; and no force was used to compel the defendant to respond to questioning. *Id*.

¶13 Here, Wright was voluntarily transported to the police station, and she sat in the front seat of the unmarked police vehicle. Wright was not handcuffed, searched, nor booked, as she was not considered a suspect at that time.[5] Wright was also placed in a "soft" interview room, a room used for victims and witnesses. Unlike the interview rooms used for suspects, the room in which she was questioned did not lock from the outside, was more spacious than a room used to interrogate a suspect, and contained a telephone, phone book, table, two soft seats, and a couch. Also, police never told Wright that "she was not free to leave." And while the interview lasted a total of seven-and-a-half hours, Wright was given numerous, sometimes lengthy, breaks and she was read her *Miranda* rights following approximately two-and-a-half hours of questioning. Based on this record, we do

[5] Officers testified at the suppression hearing that it was not until the officers began receiving information from detectives at the scene that conflicted with Wright's story that they began to view Wright as a suspect.

not believe the indicia of custody were present during Wright's initial questioning.

¶14 Even if we assume the court erred by concluding the first portion of Wright's interview was not subject to *Miranda*, any such error was harmless because her statements during that period of time were not inculpatory and there was overwhelming evidence against Wright. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) ("When reviewing the erroneous admission of an involuntary confession, the appellate court . . . simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt."); *United States v. Shabazz,* 564 F.3d 280, 286 (3rd Cir. 2009) (concluding that, even if a *Miranda* violation occurred, any error was harmless due to overwhelming evidence against defendant).

¶15 Additionally, we also find no error by the court in not suppressing statements Wright made after police gave her *Miranda* warnings. Unlike the defendant in *Missouri v. Seibert*, Wright did not confess to any crimes after being read her *Miranda* rights. Furthermore, Wright agreed unequivocally to speak with police officers after being read her *Miranda* rights. In fact, she had asked police officers if they were "going to read [her] [her] rights?" Following the reading of her *Miranda*

rights, officers asked Wright, "Are you willing to talk to us?" to which she responded, "Yes."

¶16 For these reasons, we find no reversible error regarding the admission of her interview statements to the police.

II. Other Act Evidence

¶17 Wright next argues the court erred in admitting testimony regarding a shooting incident in Prescott in 2006. Wright moved in limine to preclude the testimony based, in part, on its unduly prejudicial nature. *See* Ariz. R. Evid. 403 (evidence that is otherwise relevant is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice"). The court admitted the evidence because it was relevant to impeach Wright's statements to police regarding her unfamiliarity with and dislike of handguns. We generally review a trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. King*, 213 Ariz. 632, 636, ¶ 15, 146 P.3d 1274, 1278 (App. 2006).

¶18 On appeal, Wright argues that the trial court made no analysis of whether the evidence's probative value was outweighed by the danger of unfair prejudice. Although express Rule 403 findings may be preferable, they are not necessary when it appears from the record that the court weighed the probative value of the evidence against its prejudicial impact. *State v.*

Beasley, 205 Ariz. 334, 337, ¶ 15, 70 P.3d 463, 466 (App. 2003). On this record, the court in this case appears to have done so.

¶19 Wright also contends the court erred in allowing her husband's daughter to testify about a Father's Day drink-throwing incident. At trial, the defense objected to the testimony for lack of disclosure. The court allowed the testimony noting that although "normally something like that would be disclosed prior to trial[,] . . . the victim . . . can refuse the right to be interviewed prior to trial." The court also found that the expected "other act evidence instruction" would "cover . . . the Father's Day incident."

¶20 Assuming without deciding that the State should have disclosed the substance of the testimony prior to trial, we conclude the court did not abuse its discretion in admitting the testimony.[6] First, there was other evidence of Wright's "marital spats" with her husband shortly before his death. *See, e.g., State v. Shearer*, 164 Ariz. 329, 340, 793 P.2d 86, 97 (App. 1989) (admission of inadmissible evidence was harmless error

[6] Pursuant to Arizona Rule of Criminal Procedure 15.1, the State is required to make available to the defense a "list of all prior acts of the defendant." Ariz. R. Crim. P. 15.1(b)(7). The record indicates that the prosecutor knew about the Father's Day incident before the daughter testified. Thus, it appears the expected testimony should have been disclosed to Wright before the daughter took the stand. *See* Ariz. R. Crim. P. 15.1(f)(1) (prosecutor's disclosure obligations extend to information in the prosecutor's possession); *see also* Ariz. R. Crim. P. 15.6 (continuing duty to disclose).

when it was cumulative to and consistent with other trial testimony). Second, the purpose of the testimony was to impeach Wright's statement to police that her relationship with the victim was "idyllic" and devoid of conflict. Such impeachment evidence is especially relevant in this case because Wright's alibi defense placed her credibility as a central issue at trial. Accordingly, we find no abuse of discretion.

III. Instruction on Second-Degree Murder

¶21 Wright argues the superior court abused its discretion in instructing the jury on the lesser included offense of second-degree murder because the evidence did not support the instruction. *See State v. Dann*, 220 Ariz. 351, 363-64, ¶ 51, 207 P.3d 604, 616-17 (2009) (we review decision to give an instruction for abuse of discretion).

¶22 A party is entitled to an instruction on any theory of the case reasonably supported by the evidence. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). To convict Wright on the charged offense of first-degree murder, the State was required to prove that she intentionally or knowingly killed her husband with premeditation. *See* A.R.S. § 13-1105(A)(1) (2010).[7] The difference between first-degree murder and the lesser-

[7] We refer to a statute's current version if no material revisions occurred since the date of the offense.

included offense of second-degree murder is that the latter does not require premeditation. *See* A.R.S. § 13-1104(A)(1) (2010); *State v. Kamai*, 184 Ariz. 620, 623, 911 P.2d 626, 629 (App. 1995) (second-degree murder is homicide "without premeditation" and is a lesser included offense of first-degree murder).[8]

¶23 Wright argues that because she presented an "all or nothing" alibi defense, the State only presented evidence of the charged offense, which required premeditation. The faulty premise in her argument is that, to support an instruction on second-degree murder, the State must prove "without premeditation" as an element of the offense. *See id.* ("Proper jury instructions on second-degree murder do not list 'without premeditation' as an element of the offense that the state must prove.").

¶24 The State was entitled to a second-degree murder instruction because the circumstantial evidence supported the State's theory that Wright shot her husband when he confronted her about her drinking. The evidence at trial was that Wright's severe alcoholism caused her to be easily irritable, frustrated, and unable to control her impulsive behavior. Her drinking was a source of conflict with her husband, and she had at least a glass of wine and two martinis during the day of the shooting.

[8] The jury was not instructed on knowing or reckless second-degree murder pursuant to A.R.S. § 13-1104(A)(2), (3) (2010).

Based on this evidence, instructing the jury on second-degree murder was not error.

D. Infliction or Threatened Infliction of Serious Physical Injury as an Aggravating Factor

¶25 Finally, Wright argues the superior court improperly considered the infliction or threatened infliction of serious physical injury as an aggravating factor. *See* A.R.S. § 13-701(D)(1) (Supp. 2010). She asserts physical injury is an essential element of second-degree murder and therefore cannot also be considered as an aggravating factor for purposes of sentencing. Wright also contends that the trial court erred by focusing on Wright's alleged conduct, rather than the evidence presented at trial that some of the bullet wounds were non-fatal and it was uncertain whether the victim suffered the non-fatal wounds before he sustained the fatal ones.

¶26 The superior court has broad discretion in sentencing, and absent a finding of abuse of discretion, we will uphold a sentence that is within statutory limits. *State v. Sproule,* 188 Ariz. 439, 440, 937 P.2d 361, 362 (App. 1996). We review *de novo* an alleged legal error in sentencing. *State v. Virgo,* 190 Ariz. 349, 352, 947 P.2d 923, 926 (App. 1997). Whether a court properly employed a given factor to aggravate a sentence presents a question of law for our independent determination. *State v. Alvarez*, 205 Ariz. 110, 113, ¶ 6, 67 P.3d 706, 709

(App. 2003).

¶27 Pursuant to A.R.S. § 13-701(D):

> For the purpose of determining the sentence pursuant to subsection C of this section, the trier of fact shall determine and the court shall consider the following aggravating circumstances, except that the court shall determine an aggravating circumstance under paragraph 11 of this subsection:
>
> 1. Infliction or threatened infliction of serious physical injury, *except if this circumstance is an essential element of the offense of conviction* or has been utilized to enhance the range of punishment under § 13-704.

(Emphasis added.) At sentencing, the trial court directly addressed this issue and stated, "the infliction of serious physical injury is an aggravator in this particular case because we're not just dealing with a situation where a defendant shoots a victim one time and kills them. We have several shots that were fired at the victim." The court specifically noted that there were five shots that actually hit the victim, and the court believed that "each shot was a conscious decision." Although infliction or threatened infliction of serious physical injury may not be an aggravating factor in all second degree murder cases, we agree with the trial court that, under these circumstances, the infliction of serious physical injury is a permissible aggravating factor. Wright cites *State v. Harvey*, 193 Ariz. 472, 974 P.2d 451 (App. 1998) for the proposition that

infliction of serious physical harm is an essential element of negligent homicide. We agree, but we note that in *Harvey*, only one shot was fired. *Harvey*, 193 Ariz. at 474, ¶ 4, 974 P.2d at 453. For the reasons expressed by the trial court here, we find *Harvey* to be distinguishable.

¶28 Further, Wright's argument fails to recognize that the record contains evidence from which the jury could conclude that she inflicted serious physical injury on her husband prior to administering the fatal gunshot. *See* A.R.S. § 13-1104(A). The medical examiner testified that Wright's husband could have remained alive and conscious for up to 20 seconds while he bled to death within two minutes of sustaining the two most serious bullet wounds. Moreover, the evidence shows that at least two shots missed the victim, thereby supporting an inference that he was threatened with further serious physical injury before dying. Therefore, sufficient evidence supports the jury's conclusion that Wright inflicted, or threatened to inflict, serious physical injury before the victim died. For these reasons, the court did not err as a matter of law in considering this factor in deciding to impose an aggravated sentence.

¶29 For these reasons, we find no abuse of discretion in the trial court using the infliction or threatened infliction of serious physical injury as an aggravating factor along with the other four aggravating factors.

CONCLUSION

¶30 Wright's conviction and sentence are affirmed.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
MICHAEL J. BROWN, Judge