IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 08/18/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 10-0354
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOHN BERRY MARTIN,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-125880-001 DT

The Honorable F. Pendleton Gaines, III, Judge (Deceased)

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

The Hopkins Law Office PC — Tucson
By Cedric Martin Hopkins
Attorneys for Appellant

D O W N I E, Judge

¶1 Defendant John Berry Martin ("Defendant") appeals his conviction and sentence for manslaughter. He argues the trial court erred in precluding certain expert testimony and contends the prosecutor engaged in misconduct. Defendant also claims the jury's verdict is not supported by substantial evidence. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On April 15, 2009, Defendant shot his wife ("Victim") with a .38 caliber revolver in their bedroom. The Victim died from the gunshot wound. The State charged Defendant with second degree murder.

¶3 At trial, the State presented evidence of Defendant's statements to police, which indicated he shot the Victim when his "finger was on the trigger and it just went off." Defendant told officers he was "stressed out" and "wasn't going to take it anymore."

¶4 Defendant testified at trial that the shooting was an accident. He claimed the gun inadvertently "went off" after he grabbed it from a nightstand and pushed himself up from a kneeling position by the bed.

[1] "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

¶5 The jury found Defendant not guilty of second degree murder, but guilty of the lesser included offense of manslaughter, a class two felony and dangerous offense. The court imposed an aggravated sentence of 14.5 years' imprisonment.[2] Defendant 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), 13-4031, and -4033(A)(1).

DISCUSSION

I. Expert Witness

¶6 Before trial, Defendant disclosed several medical professionals as witnesses, at least one of whom treated Defendant before the shooting. Defendant also apparently disclosed medical records pertaining to treatment he received on February 19, 2009 after he passed out and injured his head. The State moved to preclude evidence regarding the blackout incident or any expert testimony that Defendant was subject to "blacking out." The State argued such evidence was irrelevant and that Arizona law does not recognize a defense of diminished capacity. The trial court granted the State's motion.

¶7 According to Defendant, preclusion of the expert evidence was an abuse of discretion. *See State v. Davolt*, 207

[2] The jury found that the offense resulted in emotional harm to the Victim's family. *See* A.R.S. § 13-701(D)(9).

Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004) (trial court's evidentiary rulings are reviewed for abuse of discretion). We disagree and, instead, agree with the State that this issue is not properly before us because Defendant failed to make an adequate offer of proof below.

¶8 "Error may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context . . . ." Ariz. R. Evid. 103(a)(2); *see also State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) ("When an objection to the introduction of evidence has been sustained, an offer of proof showing the evidence's relevance and admissibility is ordinarily required to assert error on appeal. . . . At a minimum, an offer of proof stating with reasonable specificity what the evidence would have shown is required."). "Offers of proof serve the dual function of enabling the trial court to appreciate the context and consequences of an evidentiary ruling and enabling the appellate court to determine whether any error was harmful." *Molloy v. Molloy*, 158 Ariz. 64, 68, 761 P.2d 138, 142 (App. 1988).

¶9 The trial court record is silent about the parameters and content of the proposed expert testimony and why it was relevant. Even if Defendant had made an adequate offer of proof, or if the nature of the excluded testimony was "apparent

from the context," *see* Rule 103(a)(2), nothing in this record reflects that Defendant suffered a blackout at or near the time of the shooting. Indeed, Defendant's statements to police officers and his own trial testimony indicate he was conscious and alert when he intentionally grabbed the pistol and placed his finger on the trigger. On this record, we cannot conclude the trial court committed reversible error by precluding the evidence at issue. *See State v. Villalobos*, 225 Ariz. 74, 82, ¶ 36, 235 P.3d 227, 235 (2010) (relying on Arizona Rule of Evidence 103(a)(2) in declining to find reversible error when trial court precluded expert evidence, the substance of which was unknown), *cert. denied*, 131 S. Ct. 901 (2011).

II. Prosecutorial Misconduct

¶10 Defendant next contends he was denied a fair trial due to prosecutorial misconduct.[3] Defendant does not claim to have brought any of the purported misconduct to the trial court's

[3] As examples of misconduct, Defendant points to the prosecutor's references in his opening statement to "the murder" and to Defendant as a "murderer." Defendant also mentions the prosecutor's "tense and contentious" cross-examination of him (1) when the trial court admonished both men to quit interrupting each other, and (2) when the trial court ordered the prosecutor to move to another line of questioning after he asked Defendant, "So were you lying to Detective Smith or are you lying now?" Finally, Defendant asserts it was misconduct for the prosecutor, during closing arguments, to refer to Defendant's trial testimony as untruthful, to use the phrase "I submit . . .[,]", and to accuse the defense team of "[m]anufacturing evidence."

attention, and our review of the record reveals that he did not do so. Appellate review of the issue is thus limited to fundamental error. *State v. Lamar*, 205 Ariz. 431, 441, ¶ 50, 72 P.3d 831, 841 (2003). Under fundamental error review, Defendant has the burden of demonstrating that error occurred, that it was fundamental, and that it prejudiced him. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 23, 115 P.3d 601, 607-08 (2005). However, Defendant has not argued that the trial court's actions amounted to fundamental error. Consequently, the issue has been waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶ 17, 185 P.3d 135, 140 (App. 2008) (declining to review for fundamental error because appellant did not argue the trial court committed fundamental error); *State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001) (finding issue waived because defendant failed to develop argument in his brief).

III. Sufficiency of Evidence

¶11 Consistent with Arizona law, the jury was instructed regarding the offense of manslaughter as follows:

> The crime of manslaughter requires proof that the defendant:
>
> 1. caused the death of another person; *and*
> 2. was aware of and showed a conscious disregard of a substantial and unjustifiable risk of death.

> The risk must be such that disregarding it was a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

¶12 Defendant implies the trial evidence was insufficient to support a manslaughter conviction because the State lacked eyewitness evidence "as to what actually transpired in the couple's bedroom prior to the shooting." Direct evidence, though, is not necessary to support a criminal conviction; circumstantial evidence alone is sufficient. *State v. Bible*, 175 Ariz. 549, 560 n.1, 858 P.2d 1152, 1163 n.1 (1993) (we do not distinguish "between the probative value of direct and circumstantial evidence."); *State v. Tison*, 129 Ariz. 546, 554, 633 P.2d 355, 363 (1981), *cert. denied,* 459 U.S. 882 (1982) (the lack of direct evidence of guilt does not preclude a conviction, which may rest solely on proof of a circumstantial nature).

¶13 The State presented substantial evidence of guilt. Defendant's testimony about the circumstances of the incident, coupled with his statements to law enforcement, and testimony he had been using firearms "all [his] life," was sufficient for a reasonable juror to conclude, beyond a reasonable doubt, that Defendant was aware of and showed a conscious disregard of a

substantial and unjustifiable risk of death. Substantial evidence supports the conviction.

CONCLUSION

¶14 Defendant's conviction and sentence are affirmed.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PATRICK IRVINE, Judge

/s/
LAWRENCE F. WINTHROP, Judge