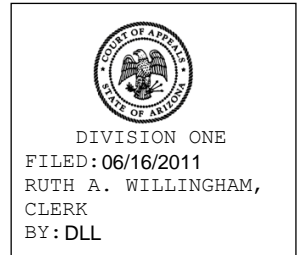


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 10-0394  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
)  
BRIAN EDWARD KING, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-118151-001DT

The Honorable Daniel Martin, Judge

**AFFIRMED**

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

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By Cedric Martin Hopkins  
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**K E S S L E R**, Presiding Judge

¶1 Brian Edward King ("Defendant") appeals his convictions and sentences for first degree murder, burglary in

the second degree, kidnapping, and misconduct involving weapons. Defendant argues the trial court abused its discretion in denying his motion for mistrial and in allowing into evidence photographs of the victim's burned body. For the reasons that follow, we affirm.

#### **BACKGROUND**

¶12 "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) (citation omitted). In the late evening of March 11, 2009, Defendant, Brian Christ and Breana Vance were at the victim's home. Defendant ordered the victim, a seventy-one year-old man, to lie down on the floor. The victim complied, and Defendant bound his hands with duct tape. Defendant asked the victim for the combination to his safe, and the victim told him. Defendant and Christ loaded items of the victim's personal property into Christ's vehicle before leaving and unloading the property at Christ's and Vance's apartment between 1:00 a.m. and 1:30 a.m. on March 12, 2009. Of the three individuals, Defendant was the last to leave the victim's house.

¶13 Just after 1:00 a.m. on March 12, 2009, police and fire personnel discovered the victim's residence fully engulfed in flames. The victim's burned body was discovered in the wreckage. His hands were still bound with tape behind his back.

The victim's coins, sword, guns, computer and monitor, pillowcase, and cane were later discovered at Defendant's residence.

¶4 The State charged Defendant with first degree murder in violation of Arizona Revised Statutes ("A.R.S.") section 13-1105 (2010), burglary in the second degree in violation of A.R.S. § 13-1507 (2010), kidnapping in violation of A.R.S. § 13-1304 (2010), and misconduct involving weapons in violation of A.R.S. § 13-3102 (Supp. 2010).<sup>1</sup> The State further charged all the offenses as dangerous. The jury found Defendant guilty as charged, and the court sentenced Defendant to natural life for the first degree murder conviction to be served concurrently with terms of imprisonment for the remaining offenses. Defendant appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4033(A)(1) (2010).

## DISCUSSION

### I. Motion for Mistrial

¶5 Before trial, Defendant moved *in limine* to preclude mention that at the time of the crime, Defendant had been recently released from prison. At the final trial management conference, Defendant informed the court that he was not

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<sup>1</sup> We cite current versions of statutes when they have not been materially amended since the events at issue.

concerned that any particular witness would testify about Defendant's prior incarceration, and the State declared it had no intention of eliciting that information other than as necessary to prove the misconduct involving weapons charge. Nonetheless, the court admonished the State to caution its witnesses not to mention any prior convictions during their testimony.

¶16 At trial, the State's witness J.O. stated on cross-examination that she lived with Defendant in February 2009 "[a]fter he got out of prison." On redirect, the State explored the nature of Defendant's relationship with Christ, and J.O. stated the two had met three times; one of which she said occurred while the two men apparently were in a vehicle and J.O. "was asked not to come to the vehicle." The prosecutor then asked, "When you say you were asked not to come to the vehicle, when did this take place, this one?" J.O. responded, "The day [Defendant] got out of prison."

¶17 During a break in proceedings after J.O.'s testimony concluded, Defendant moved for a mistrial based on J.O.'s references to Defendant's incarceration. In response, the prosecutor argued the testimony could not be attributed to the State because J.O. "was advised" not to mention Defendant's incarceration, she was noticeably nervous, and "it was in response to defense counsel's question . . . that she brought it

up." The prosecutor further asserted, "I do not believe that the jury took note of it." The court disagreed with the later assertion, stating the jury "clearly heard" the testimony, but the court declared: "I didn't see any significant physical reactions to the testimony that would indicate any member of the jury panel thought this was something so extraordinary that it really was worthy of note."<sup>2</sup> Accordingly, the court denied the motion for mistrial and informed Defendant it would give a curative instruction if Defendant requested one. Defendant did so, and when proceedings commenced the next trial day, the court instructed the jury: "During [J.O.]'s testimony on Thursday Ms. [J.O.] made references to [Defendant] having been released from prison. Such testimony is not relevant to your consideration of this case, and you must not allow Ms. [J.O.]'s testimony to influence your decision in any way."

¶18 Defendant argues the court erred in denying his mistrial motion because the evidence of his incarceration is inadmissible under Arizona Rule of Evidence 404(b) (Evidence of other crimes is generally "not admissible to prove the character of a person in order to show action in conformity therewith.").

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<sup>2</sup> The court further remarked: "I'll just make the record of my observation. I think that the testimony may have, in fact, been somewhat de-emphasized by the prior testimony as the nature of [J.O.]'s relationship with [Defendant] as having been best friends. And I'm not sure that the jury would think of one without the other."

¶9 As Defendant acknowledges, “[w]hen a witness unexpectedly volunteers an inadmissible statement, the remedy rests largely within the discretion of the trial court.” *State v. Marshall*, 197 Ariz. 496, 500, ¶ 10, 4 P.3d 1039, 1043 (App. 2000). “In deciding whether to grant a mistrial based on a witness’s testimony, the trial court considers (1) whether the testimony called to the jury’s attention matters that it would not have been justified in considering in reaching the verdict, and (2) the probability that the testimony influenced the jury.” *State v. Gulbrandson*, 184 Ariz. 46, 62, 906 P.2d 579, 595 (1995).

¶10 We conclude that the trial court acted within its discretion in denying Defendant’s motion for mistrial. The court specifically noted that the challenged testimony, which consisted of two short statements made outside the context of Defendant’s criminal history, did not seem to remarkably affect the jury.<sup>3</sup> We must defer to that finding. See *State v. Lamar*, 205 Ariz. 431, 439, ¶ 40, 72 P.3d 831, 839 (2003). Moreover, at Defendant’s request, the court instructed the jury before trial continued not to consider the testimony. We presume the jury followed that instruction. See *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). Consequently, no abuse of

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<sup>3</sup> For purposes of this analysis, we assume – and the State appears to concede – that J.O.’s comments were improper.

discretion occurred.<sup>4</sup> See, e.g., *State v. Jones*, 197 Ariz. 290, 305, ¶ 34, 4 P.3d 345, 360 (2000) (finding, in light of trial court's proper limiting instruction, no abuse of discretion in denying motion for mistrial based on witness's unsolicited "vague references to other unproven crimes and incarcerations").

## II. Victim Photographs

¶11 Defendant next contends the court erred in admitting photographs of the victim's burned body taken at the crime scene.<sup>5</sup> One of the photographs depicts the victim's intestines in the burned remains of his house. Two of the photos show the victim's charred torso, one of the photos is a close-up of the victim's bound hands, one is a close-up of the back of the victim's neck focusing on a necklace; and the last photograph depicts the remnants of the victim's belt and belt loops on the

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<sup>4</sup> Additionally, it is difficult to discern any prejudice resulting from J.O's comments because the jury had before it other evidence regarding Defendant's felony conviction in 2003 and his incarceration in 2008 and 2009. This evidence included certified court records and letters addressed to him in prison. See, e.g., *State v. Shearer*, 164 Ariz. 329, 340, 793 P.2d 86, 97 (App. 1989) (holding that the introduction of inadmissible evidence was harmless error when the evidence was cumulative to and consistent with other admissible trial testimony).

<sup>5</sup> Defendant also refers to "autopsy procedure" pictures, but in his substantive argument Defendant only addresses exhibits 16-21, which are copies of photographs taken at the scene. Accordingly, Defendant has waived any argument regarding admission of the autopsy photographs. See *State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001) (issue waived because defendant failed to develop argument in his brief).

floor where he was lying. Relying on *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983), and *State v. Jones*, 203 Ariz. 1, 49 P.3d 273 (2002), Defendant appears to argue, as he did below,<sup>6</sup> that the photographs are irrelevant or, alternatively, unduly prejudicial under Rule 403 (Relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value.).

¶12 We review the admission of photographs for abuse of discretion. *State v. Montano*, 204 Ariz. 413, 425, ¶ 55, 65 P.3d 61, 73 (2003). In our determination of whether a trial court erred in the admission of a photograph, we examine "the photograph's relevance, its tendency to inflame the jury, and its probative value compared to its potential to cause unfair prejudice." *State v. Morris*, 215 Ariz. 324, 339, ¶ 69, 160 P.3d 203, 218 (2007) (quoting *State v. Hampton*, 213 Ariz. 167, 173, ¶ 17, 140 P.3d 950, 956 (2006)). Relevant photographs may be admitted even if they may tend to prejudice the jury against the defendant. *State v. Bocharski*, 200 Ariz. 50, 55, ¶ 21, 22 P.3d

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<sup>6</sup> The trial court denied in most part Defendant's motion *in limine* seeking to preclude the photos. The court noted, however, that its ruling was preliminary and it would keep "a pretty close . . . eye on the testimony[]" to ensure that the photographs "are, in fact, necessary to give context to the medical examiner's testimony. If you feel that is not the case, [defense counsel], please raise the issue with me again at that time." Defendant did not later object to the admission of the photographs at trial. The State also withdrew before trial a photograph of the victim's burned head that it had initially intended to introduce.



43, 48 (2001). Photographs of a victim may be introduced to show, among other things, the nature and location of injuries, and to corroborate, illustrate, or explain testimony. *Morris*, 215 Ariz. at 339, ¶ 70, 160 P.3d at 218. Even gruesome or inflammatory photographs may be admitted so long as they are not admitted for the sole purpose of inflaming the jury. *Id.* Further, even where a defendant does not contest certain issues, photographs are admissible "because the 'burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'" *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996) (quoting *Estelle v. McGuire*, 502 U.S. 62, 69 (1991)). "The state 'cannot be compelled to try its case in a sterile setting.'" *Bocharski*, 200 Ariz. at 56, ¶ 25, 22 P.3d at 49 (quoting *Chapple*, 135 Ariz. at 289-90, 660 P.2d at 1216-17).

¶13 We find no abuse of discretion. Despite Defendant's argument to the contrary, the photographs were relevant to corroborate testimony implying that Defendant bound the victim's hands before fatally assaulting him and setting his home on fire. The photographs also provided context for testimony regarding how the victim was identified, and they corroborated the medical examiner's testimony that, although the cause of death was determined to be homicidal violence that occurred before the fire, the extensively charred body prevented a

conclusive determination of the method of homicide.<sup>7</sup> See *State v. LaGrand*, 153 Ariz. 21, 31, 734 P.2d 563, 573 (1987) (holding that photographs may be used to illustrate the testimony of the state's medical expert); *Chapple*, 135 Ariz. at 288, 660 P.2d at 1215 (stating that photographs may be used to corroborate state witnesses and to illustrate and explain testimony). Further, under the circumstances, the photographs are not so gruesome to make them unduly inflammatory nor unduly prejudicial.<sup>8</sup> See *State v. Castaneda*, 150 Ariz. 382, 391, 724 P.2d 1, 10 (1986) (holding that photographs of stab wounds in victim's chest and victim's nude body smeared with blood were properly admitted); *State v. Poland*, 144 Ariz. 388, 401, 698 P.2d 183, 196 (1985) (holding that photograph of victim's body and close-up photograph of victim's torso and decomposed head were properly admitted) aff'd . Indeed, exhibits 16-21 depict the expected results after a restrained person dies and burns in a fully-engaged house fire.

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<sup>7</sup> The photographs similarly were helpful in illustrating the medical examiner's testimony regarding her interpretation of radiographs taken of the victim's body.

<sup>8</sup> It is for this reason that *Chapple* and *Jones* are distinguishable. The latter involved photographs that were "graphic and disturbing, particularly given the nature of the crime [murder, kidnapping, and sexual assault] and the age of the victim [twelve years]." *Jones*, 203 Ariz. at 10, ¶ 30, 49 P.3d at 282. Similarly, in *Chapple* the Arizona Supreme Court determined the trial court abused its discretion in admitting close-up photographs of a bullet wound in the victim's charred skull because the pictures were "shocking" and had "almost no value or result except to inflame the minds of the jury." *Chapple*, 135 Ariz. at 289 n.7, 660 P.2d at 1216.

See *State v. Cruz*, 218 Ariz. 149, 169, ¶ 127, 181 P.3d 196, 216 (2008) ("There is nothing sanitary about murder.") (internal quotation marks omitted). There was no error in admitting the photographs.

**CONCLUSION**

¶14 Defendant's convictions and sentences are affirmed.

/s/

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DONN KESSLER, Presiding Judge

CONCURRING:

/s/

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DIANE M. JOHNSEN, Judge

/s/

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SHELDON H. WEISBERG, Judge