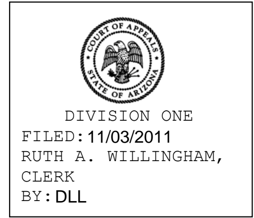
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 11/03/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,	No. 1 CA-CR 09-0601
Appellee,	DEPARTMENT B
v.	**MEMORANDUM DECISION**
THEODORE ROOSEVELT RUSHING,	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-103188-001 DT

The Honorable Michael W. Kemp, Judge

AFFIRMED

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

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K E S S L E R, Judge

¶1 Theodore Roosevelt Rushing appeals his convictions and sentences for manslaughter, a class 2 felony and dangerous offense; three counts of aggravated assault, each a class 3 felony and dangerous offense; and disorderly conduct, a class 6 felony. For reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On January 13, 2007, Rushing called K.S., his ex-girlfriend and mother of his three-year-old son, and asked her to come by his house so he could see his son. K.S. told Rushing that she had plans and could not come over. Rushing made repeated calls to K.S. throughout the day in an attempt to have her visit him, and when she continued to refuse, he told her that he would come by her apartment. K.S. told Rushing not to come, but when he insisted, K.S. informed Rushing that her current boyfriend, C.B., needed to talk to him.

¶3 When Rushing arrived at K.S.'s apartment, C.B. and Rushing walked downstairs because Rushing was not allowed inside her apartment. After K.S. joined them, C.B. started telling Rushing that he is now K.S.'s boyfriend, that he loves her and her children, that he has no intention of keeping Rushing from his son, but that he wants Rushing to stop threatening K.S. Rushing did not respond to C.B., but instead turned and started walking towards his truck.

¶4 As Rushing walked away, C.B. yelled, "Where the fuck you going? I'm still talking to you" and "Man, I love your son" and "you need to stop all of this BS." Rushing turned around and said, "Fuck my son? Fuck my son? I'll kill for my son," as he pulled out a handgun and pointed it at C.B. C.B., who was unarmed, pulled up his shirt to mid-chest and said: "Man, I've been shot before. You think a bullet's going to stop me?" and "If you're going to shoot, shoot." Rushing fired four times, shooting C.B. once in the chest and twice in the abdomen and wounding K.S. in her right thigh. C.B. collapsed to the ground and K.S. ran to her apartment to call 911.

¶5 Several people attempted to approach C.B. to offer first-aid, but Rushing threatened them with his gun and ordered them to stay away. When police officers responded, they found Rushing standing over C.B. still holding the gun. Rushing complied with the officers' commands to drop his gun and was taken into custody. C.B. was transported to the hospital where he was pronounced dead.

¶6 Rushing was indicted on one count of first-degree murder and five counts of aggravated assault. It took two trials to resolve the charges. At both trials, Rushing testified to shooting C.B., but claimed he did so in self-defense.

¶7 The jury at the first trial was unable to reach a verdict on the murder charge, but it found Rushing guilty of three counts of aggravated assault, guilty of the lesser-included offense of disorderly conduct on one assault count, and acquitted him of the remaining assault count. The jury also found the three aggravated assault offenses to be dangerous.

¶8 At the second trial on the murder charge, the jury acquitted Rushing of first-degree murder, but found him guilty on the lesser-included offense of manslaughter and found the offense to be dangerous. In the aggravation phase, the State sought to prove the existence of multiple victims as an aggravating factor, but the jury was unable to reach a verdict on this factor.

¶9 The trial court sentenced Rushing to a presumptive 10.5-year prison term on the conviction for manslaughter, mitigated five-year prison terms on the three aggravated assault convictions, and a mitigated half-year prison term on the conviction for disorderly conduct. The court ordered all five sentences be served consecutively. Rushing timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 13-4033(A) (2010).

DISCUSSION

A. Motion to Vacate Verdict

¶10 At a presentence status conference following the second trial, the trial court and counsel discussed information received from the jury commissioner that one of the jurors may not have been a resident of Maricopa County. The trial court ordered that if Rushing was going to file a motion regarding the matter, it was to be filed no later than June 26, 2009. The trial court further ordered the bailiff to provide Rushing with a copy of the juror's biographical sheet. Rushing did not file a motion with respect to the issue of the juror's residency. When Rushing attempted to raise the issue at sentencing on July 15, 2009, the trial court ruled the issue had been waived and that Rushing did not prove prejudice to justify relief from the verdict.

¶11 On appeal, Rushing contends the trial court erred by failing to hold an evidentiary hearing to determine whether the juror was qualified under A.R.S. § 21-201(2) (Supp. 2010).[1] That section requires, in pertinent part, that every juror "[b]e a resident of the jurisdiction in which the juror is summoned to

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[1] We apply the substantive law in effect when the offense was committed. A.R.S. § 1-246 (2002); *State v. Newton*, 200 Ariz. 1, 2, ¶ 3, 21 P.3d 387, 388 (2001). Absent material revisions after the date of an offense, we cite the statute's current version.

serve." *Id.* Rushing argues that if the juror was not a resident of Maricopa County, his constitutional and statutory rights to a valid jury of twelve were violated and his conviction at the second trial should be vacated. We disagree.

¶12 "A lapse regarding the statutory qualification of a juror is subject to a claim of waiver." *State v. Ebert*, 192 Ariz. 286, 288, ¶ 7, 964 P.2d 487, 489 (App. 1998). It has long been the rule that "where opportunity has been had to examine a juror as to his qualifications, and the juror has not concealed his disqualification by misleading or false answers, the subsequent discovery of the disqualification does not warrant . . . setting aside the verdict. Failure to interrogate and challenge the juror waives the disqualification." *Vincent v. Smith*, 13 Ariz. 346, 347, 114 P. 557, 557 (1911). Rushing does not argue that any members of the venire panel gave false or misleading answers regarding their qualifications during *voir dire*. Thus, by passing the venire panel for cause, Rushing has waived any error that the jurors did not meet the statutory qualifications for jury service. *See id.*

¶13 Furthermore, disqualification from juror service due to non-resident status is "not a question of 'the subversion of all the proceedings' but related 'to mere irregularities in constituting the panel.'" *Ebert*, 192 Ariz. at 289, ¶ 8, 964 P.2d at 490 (quoting *United States v. Gale*, 109 U.S. 65, 67

(1883)). Indeed, Rushing does not contend that the residence of a juror outside Maricopa County is "a circumstance of such bias as to jeopardize the impartiality of the proceedings." *Id.* at ¶ 9. Accordingly, the trial court did not err in ruling that Rushing failed to show any prejudice that would justify granting relief. *See Kohl v. Lehlback*, 160 U.S. 293, 302 (1895) (holding juror's statutory disqualification based on lack of citizenship did not affect "the substantial rights of the accused, and the verdict is not void for want of power to render it").

B. Impeachment with Prior Convictions

¶14 At Rushing's second trial, the State was permitted to impeach him with his felony convictions from the first trial. Rushing argues that admission of the evidence of prior convictions and the trial court's instruction informing the jury of its limited use for credibility purposes was error because the convictions were obtained in the same case and no judgment of conviction had been entered at the time of the second trial. Rushing contends the erroneous admission of this evidence and the jury instruction constitute a violation of double-jeopardy protection and fundamental fairness, which requires reversal and a new trial. We review a trial court's decision on the admissibility of convictions for impeachment purposes for an abuse of discretion. *State v. Green*, 200 Ariz. 496, 498, ¶ 7, 29 P.3d 271, 273 (2001).

¶15 Rule 609(a) of the Arizona Rules of Evidence provides for the admission of "evidence that [a] witness has been convicted of a crime" for "the purpose of attacking the credibility of a witness." This rule applies "even if the witness is also the defendant and the prior felony conviction was for a crime that occurred after the crime for which the witness is being tried as a defendant." *State v. Gretzler*, 126 Ariz. 60, 85, 612 P.2d 1023, 1048 (1980). It is also well established that a verdict of guilty is a "conviction" that may be used for impeachment purposes even if no judgment or sentence has been entered thereon. *State v. Reyes*, 99 Ariz. 257, 263-65, 408 P.2d 400, 404-05 (1965); *see also* Ariz. R. Crim. P. 26.2(b) (recognizing conviction as the "determination of guilt on any charge, or on any count of any charge"). Thus, the trial court acted well within its discretion in ruling that Rushing's convictions at his first trial were admissible at his second trial for impeachment purposes. Accordingly, neither the admission of this evidence nor the instruction on its proper use constitutes a violation of fundamental fairness or the guarantee against double jeopardy.

C. Preclusion of Evidence

¶16 Rushing further argues that the trial court erred in excluding evidence bearing on C.B.'s aggressive nature. The evidence at issue consisted of C.B.'s "187 Proof" tattoo and the

fact that he had prior convictions, including one for armed robbery. The trial court refused admission of this evidence because Rushing was not aware of the tattoo or prior convictions and because any relevance was outweighed by unfair prejudice. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004).

¶17 Rushing contends that the evidence of C.B.'s tattoo and prior convictions should have been admitted in regards to his claim of self-defense to prove that C.B. was the initial aggressor and to bolster his testimony that C.B. was coming towards him when he shot C.B. "When [a] [d]efendant raises a justification defense, he is entitled to offer at least some proof of the victim's reputation for violence." *State v. Connor*, 215 Ariz. 553, 558-59, ¶ 13, 161 P.3d 596, 601–02 (App. 2007) (citation and internal quotation marks omitted). However, the evidence that may be offered for this purpose is limited to "reputation or opinion evidence that the victim has a violent or aggressive character trait" or evidence of:

> specific instances of violence committed by the victim but only if the defendant knew of them . . . or if they are directed toward third persons relating to or growing out of the same transaction, or so proximate in time and place and circumstances as would legitimately reflect upon the conduct or motives of the parties at the time of the affray.

Id. (alteration in original) (citation and internal quotation marks omitted).

¶18 Here, the evidence Rushing sought to admit was neither reputation nor opinion testimony, but rather evidence of specific acts to prove character. Further, it is undisputed that Rushing was not aware of either the tattoo or the prior convictions at the time of the shooting and that neither had any proximate connection to the incident giving rise to the murder charge. Accordingly, the trial court did not err in ruling that this evidence was not admissible to prove C.B.'s character for violence or aggressiveness.

¶19 Our decision in *State v. Fish*, 222 Ariz. 109, 213 P.3d 258 (App. 2009), relied on by Rushing, is readily distinguishable. In *Fish*, the defendant presented evidence that when he encountered the victim in a remote wooded area, the victim's two barking and growling dogs ran toward him. 222 Ariz. at 112-13, ¶ 2, 213 P.3d at 261-62. The defendant fired a warning shot into the ground to disperse the dogs, and the victim responded by yelling threats while running at the defendant "with his eyes crossed and looking crazy and enraged." *Id.* at 113, ¶¶ 2-3, 213 P.3d at 262. The defendant shot and killed the victim. *Id.* at ¶ 3. At trial, the defendant argued that he acted in self-defense, but the jury found him guilty as

charged of second-degree murder. *Id.* at 113-14, ¶ 5, 213 P.3d at 262-63.

¶20 On appeal, we reversed in part on the grounds that the trial court failed to adequately instruct the jury on self-defense. *Id.* at 127, ¶ 57, 213 P.3d at 276. We further discussed the admissibility of evidence regarding the victim's specific prior acts of violence and aggression. *Id.* at 118-26, ¶¶ 25-54, 213 P.3d at 267-75. Although we did not reach a final decision on the admissibility of this evidence, we held that the evidence would be admissible "to rebut the State's argument that [d]efendant fabricated or exaggerated the [v]ictim's acts on the date of the shooting," subject to the trial court "balancing the probative value of the specific act evidence against any undue prejudice and confusion under Rule 403." *Id.* at 125, ¶ 50, 213 P.3d at 274. Because the prior specific-act evidence was virtually identical to the manner in which the defendant described the victim's conduct, we viewed the evidence as "highly probative of the veracity of [d]efendant's description of what he faced on the day of the shooting." *Id.* at 126, ¶ 53, 213 P.3d at 275.

¶21 The precluded evidence in the instant case is not comparable to that at issue in *Fish*. We made clear that we were addressing a unique set of facts in *Fish* and that our conclusion did "not mean that in any self-defense claim prior acts of a

victim unknown to the defendant at the time of the alleged crime are always admissible to corroborate the defendant's claim." *Id*. at 125, ¶ 49, 213 P.3d at 274. Moreover, to the extent the tattoo and prior convictions could be viewed as having some relevance in terms of corroborating Rushing's testimony of self-defense, the trial court could have reasonably concluded that any such relevance was substantially outweighed by the danger of unfair prejudice. *See* Ariz. R. Evid. 403. On this record, there was no abuse of discretion by the trial court in precluding evidence of C.B.'s tattoo and prior convictions.

D. Lesser-Included Offense Instructions

¶22 Over Rushing's objection, the trial court granted the State's request for instructions on the lesser-included offenses of second-degree murder and manslaughter by sudden quarrel or heat of passion in regards to the charge of first-degree murder. We review a trial court's decision on whether to give a jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006).

¶23 Both the defendant and the state are entitled to instructions on any lesser-included offenses for which there is evidentiary support. *Id.* at ¶ 14. Rushing does not dispute that second-degree murder and manslaughter by sudden quarrel or heat of passion are lesser-included offenses of first-degree murder. Rather, he maintains the evidence was insufficient to

support a jury finding that he committed either of the lesser offenses.

¶24 In *Wall*, the Arizona Supreme Court stated:

> We deem evidence sufficient to require a lesser-included offense instruction if two conditions are met. The jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense. It is not enough that, as a theoretical matter, "the jury might simply disbelieve the state's evidence on one element of the crime" because this "would require instructions on all offenses theoretically included" in every charged offense. Instead, the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense.

Id. at 4, ¶ 18, 126 P.3d at 151 (internal citations omitted) (quoting *State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984)). Relying on this language in *Wall*, Rushing argues that the instructions were not warranted because they were based on the mere possibility the jury would simply disbelieve the state's evidence that the murder was premeditated.

¶25 The State charged Rushing with first-degree murder in violation of A.R.S. § 13-1105(A) (2010), which states that a person commits this offense if "[i]ntending or knowing that the person's conduct will cause death, the person causes the death of another person . . . with premeditation." Premeditation means:

> the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

A.R.S. § 13-1101(1) (2010).

¶26 A person commits manslaughter by "[c]ommitting second degree murder as defined in § 13-1104, subsection A upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." A.R.S. § 13-1103(A)(2) (2010). A person commits second-degree murder if without premeditation that "person intentionally causes the death of another person." A.R.S. § 13-1104(A)(1) (2010).

¶27 Given that Rushing admitted to intentionally shooting C.B., if the jury rejected his claim of self-defense, the only issue left would be whether the killing was premeditated. Our review of the record reveals substantial evidence, including Rushing's own testimony, from which the jury could find that the shooting was the result of a sudden quarrel or heat of passion, which would reduce the intentional killing of C.B. from first-degree murder to either second-degree murder or manslaughter. *See* A.R.S. § 13-1101(1). This evidence includes the history of Rushing's relationship with K.S.; the presence of their child in common and Rushing's threats to gain custody; the existence of

K.S.’s new relationship with C.B.; and the manner in which C.B. “lectured” Rushing immediately prior to the shooting, particularly his comments relating to Rushing’s son.

¶28 Thus, this is not a case in which the only support for the lesser-included offenses was the jury's right to disbelieve the State's evidence on the element of premeditation. *Cf. State v. Schroeder*, 95 Ariz. 255, 259-60, 389 P.2d 255, 257-59 (1964) (holding evidence failed to support defendant's claim that he was entitled to instructions on second-degree murder and manslaughter as lesser-included offenses of first-degree murder). The trial court did not err in instructing the jury on the two lesser-included offenses.

E. Prosecutorial Misconduct

¶29 Rushing further contends the prosecutor engaged in misconduct during closing argument at the second trial by appealing to the jury’s emotions regarding the victim. At issue are the prosecutor’s final remarks to the jury:

> I ask when you go back, look at the physical evidence, things that aren’t contradicted, the scientific evidence. Speak for [C.B.]. Tell the defendant through your verdict that this crime will not be tolerated. You can’t go shoot [and] kill people because you’re mad, because you broke up with your girlfriend and she has a new man. The girl you refer to as a stupid bitch, that you’re going to teach a lesson to. The only lesson he taught was to that man. That man didn’t have anything to do with it.

> Now it’s your turn to go back and through your verdict teach the defendant a lesson that you can’t do this. Speak through your verdict. Give [C.B.] justice. Thank you.

¶30 “Attorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury.” *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). Here, the prosecutor’s remarks in question were made in direct response to defense counsel’s final words to the jury, imploring them to “[s]end [Rushing] home, he deserves it.”

¶31 The clear thrust of the argument was to urge the jury to find Rushing guilty based on the evidence and send a message to him that what he did was not justified and not acceptable. To the extent this argument could be viewed as having emotional overtones, “some amount of emotion in closing argument is not only permissible, it is to be expected.” *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27 (1983). There was nothing improper in the prosecutor’s argument. *See State v. Herrera*, 174 Ariz. 387, 397-98, 850 P.2d 100, 109-10 (1993) (holding prosecutor’s remarks about justice and protecting society were proper).

F. Sentencing

¶32 Finally, relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Rushing argues that the trial court erred when it considered the existence of multiple victims and the harm caused

to the victims as aggravating factors in sentencing because neither had been found by the jury. We review *de novo* the legality of a sentence. *See State v. Rasul*, 216 Ariz. 491, 496, ¶ 20, 167 P.3d 1286, 1291 (App. 2007).

¶33 In *Apprendi*, the United States Supreme Court held that, other than prior convictions, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." 530 U.S. at 490. However, nothing in *Apprendi* suggested "that it is impermissible for judges to . . . [take] into consideration various factors relating both to the offense and offender . . . in imposing a judgment *within the range* prescribed by statute." *Id.* at 481. In Arizona, the presumptive sentence is the statutory maximum for *Apprendi* purposes. *State v. Brown*, 209 Ariz. 200, 203, ¶ 12, 99 P.3d 15, 18 (2004).

¶34 The obvious flaw in Rushing's argument is that the trial court did not impose any aggravated sentences; Rushing received a presumptive prison term on the manslaughter conviction and mitigated prison terms on his other convictions. Because Rushing's punishment did not exceed the statutory maximum, there was no *Apprendi* violation in the trial court's consideration of the two aggravating factors. Thus, the court's consideration of the aggravating factors does not demonstrate a judicial bias against Rushing.

CONCLUSION

¶35 For the foregoing reasons, we affirm the convictions and sentences.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge