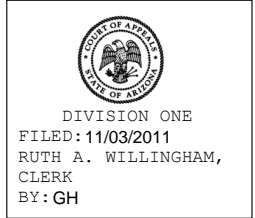


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 10-0649  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JORGE GUERRERO, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

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Appeal from the Superior Court in Mohave County

Cause No. CR2008-0927

The Honorable Rick A. Williams, Judge

**AFFIRMING CONVICTIONS; MODIFYING SENTENCES**

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And Jeffrey L. Sparks, Assistant Attorney General  
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**H A L L**, Judge

¶1 Jorge Guerrero appeals his convictions and sentences for first-degree murder and misconduct involving weapons on the grounds of insufficiency of evidence, evidentiary error, error

in jury instructions, and error in imposition of consecutive sentences. For the reasons that follow, we affirm his convictions but modify his sentences to be concurrent.

¶2 A grand jury indicted Guerrero and Santiago Sanchez in August 2008 on charges of first-degree murder and misconduct involving weapons. The judge denied the State's motion to consolidate the cases for trial. The evidence introduced at Guerrero's trial, viewed in the light most favorable to supporting his convictions,<sup>1</sup> was as follows. The victim was found dead more than four miles down a dirt road outside of Bullhead City on February 7, 2008, from multiple gunshot wounds. The victim was last seen alive the night before at about 11 p.m. talking to Guerrero and Sanchez, who were known by their street names, Wicked and Cartoon.<sup>2</sup> Guerrero and Sanchez had parked a rental car, a newer model white sedan, in the driveway in front of a local residence behind the car the victim had been driving. The owner of the car that the victim had been driving left the three men talking outside, and when she went to check on the victim a minute or so later she found the rental car and the three men gone.

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<sup>1</sup> *State v. Moody*, 208 Ariz. 424, 435 n.1, 94 P.3d 1119, 1130 n.1 (2004).

<sup>2</sup> The victim was known by his street name of Psycho.

¶13 An expert testified that the tire tracks left at the scene of the murder could have been made by the rental car. Another expert testified that a bullet fragment and shell casings found at the murder scene, and a bullet recovered from the victim's body, had been fired from the same handgun used in a drive-by shooting a week before. A witness to the drive-by shooting testified that Guerrero had fired a handgun from the driver's-side window of the vehicle.<sup>3</sup> Another witness testified that she saw Guerrero with a handgun the night before the murder.<sup>4</sup>

¶14 Witnesses testified that the victim owed Guerrero's mother drug money, and Guerrero had complained that the victim and a friend known as Turtle had raped the mother of his child, disrespecting him. At about 2 a.m. on February 7, 2008, a dancer at a local club received a voice mail and a text message from the victim begging her to give him money, saying it was a matter of life or death. Guerrero called an acquaintance at 3 a.m. and threatened harm to her children if she did not lie and tell anyone who asked that the victim had just left her house on foot. At the time, the acquaintance testified, Guerrero told her that the victim was "here with us, cruising around." Police

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<sup>3</sup> Guerrero had previously been acquitted of the charge of drive-by shooting in connection with this incident.

<sup>4</sup> The parties stipulated that Guerrero had two prior felony convictions, both committed in June 2005.

arrested Guerrero in February 2009 on the instant charges after authorities discovered that he was in Mexico using the name of Jorge Timoteo Miramontes Tapia.

¶15 The jury convicted Guerrero of the charged offenses of first-degree murder and misconduct involving weapons. The judge imposed a natural life sentence without possibility of parole on the first-degree murder conviction, plus two years for commission of the offense while on felony release. The judge imposed an aggravated twelve-year prison sentence for the conviction for misconduct involving weapons, plus two years for committing the offense while on felony release, to be served consecutively to the murder sentence. Guerrero timely appealed.

#### **Sufficiency of Evidence**

¶16 Guerrero argues first that insufficient evidence supported his convictions, because the evidence failed to demonstrate that he was even present at the scene of the murder, much less that he had a handgun, and used it in the shooting. He also argues that the State failed to prove premeditation.

¶17 We review de novo the sufficiency of the evidence to support the convictions. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482,

488, 675 P.2d 1301, 1307 (1983). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). A conviction "may rest solely on circumstantial proof." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985). Premeditation likewise may be proved entirely by circumstantial evidence; it can rarely be proved by direct evidence. See *State v. Thompson*, 204 Ariz. 471, 479, ¶ 31, 65 P.3d 420, 428 (2003).

¶18 A person commits first-degree murder if "intending or knowing that the person's conduct will cause death, the person causes the death of another person . . . with premeditation." A.R.S. § 13-1105(A) (2010).<sup>5</sup> The judge instructed on accomplice liability, which requires proof in pertinent part that a person, with intent to promote or facilitate commission of the offense, "aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result." Arizona Revised Statutes (A.R.S.) section § 13-303(A)(3), (B)(2) (2010); see also A.R.S. § 13-301(2) (2010). Misconduct involving weapons requires proof that the defendant knowingly possessed a deadly weapon and was a prohibited possessor, that

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<sup>5</sup> We cite to the current version of the statutes, because they had not been amended with respect to the subsections at issue since the offense was committed.

is, a convicted felon who had not had his civil right to carry a firearm restored. A.R.S. § 13-3102(A)(4)(Supp. 2010); A.R.S. § 13-3101(7)(B) (2010).

¶9 Viewing the evidence and all reasonable inferences in the light most favorable to supporting the verdict, we find that the State offered sufficient evidence to prove that Guerrero, a convicted felon, possessed a handgun and intentionally shot the victim after some reflection, either as a principal or an accomplice, as required to support his convictions for misconduct involving weapons and first-degree murder. Guerrero's argument that the evidence was insufficient because it did not include any forensic evidence or eyewitness testimony linking him to the murder has no merit. In this case, substantial circumstantial evidence supported the convictions: the victim was last seen alive in the company of Guerrero and Sanchez; the tire tracks on the vehicle they were driving could have made the tracks at the murder scene; Guerrero, who had two prior felony convictions, was seen with a handgun the day before the murder; and the bullets at the scene of the murder were fired from the same gun Guerrero used in a shooting he and Sanchez had engaged in two weeks earlier.

¶10 Witnesses identified two distinct motives Guerrero might have had for shooting the victim: the victim owed Guerrero's mother drug money, and Guerrero believed the victim

had raped his girlfriend, disrespecting him as a gang member. Guerrero, moreover, had coerced a person to lie about the victim's whereabouts around the time of the murder, and had fled the country shortly afterward and assumed a different name than he had used in this country. This circumstantial evidence was sufficient to support his conviction for murder, as well as his conviction for misconduct involving weapons. We are not persuaded otherwise by the evidence cited by Guerrero to suggest that other people had motives to shoot the victim. "[I]t is unnecessary for the prosecution to negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence." *Nash*, 143 Ariz. at 404, 694 P.2d at 234 (citation omitted). Nor are we persuaded by Guerrero's reliance on the inconsistencies in the witnesses' testimony. "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Cox*, 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007) (citation omitted). On this record, we find sufficient evidence was offered to convict Guerrero of the misconduct involving weapons, and, as a principal or an accomplice, of the murder.

¶11 The circumstantial evidence in this case was also more than sufficient to establish premeditation. Premeditation is "more than just a snap decision made in the heat of passion";

"[t]he key is that the evidence, whether direct or circumstantial, must convince a jury beyond a reasonable doubt that the defendant actually reflected" on the decision before killing. *Thompson*, 204 Ariz. at 478-79, ¶¶ 28, 31, 32, 65 P.3d at 427-28. The evidence demonstrated that Guerrero and Sanchez drove the victim several miles down a dirt road to a desert area outside of Bullhead City before shooting and killing him. The victim suffered three gunshot wounds: one from a bullet that entered his lower back/buttocks, traveled upward, and exited near his umbilicus; a second from a bullet that entered near the top of the shoulder and exited below his armpit; and the third from a bullet that fractured the thigh bone on his right leg.

¶12 The medical examiner could not determine the order of the shots. She testified, however, that he was probably not standing straight up when he was shot in the shoulder, and he was probably lying on the ground when he was shot in the leg. She testified that the victim might have been running, ducking, or lying on the ground when he was shot in the back. She testified that the shot to his lower back would have caused him to pass out within thirty seconds. A blood trail on the ground and other markings were consistent with the victim having crawled about twenty feet. Under these circumstances, the jury could reasonably conclude that Guerrero drove the victim to a deserted area outside of Bullhead City with the intention of



killing him, and then shot him repeatedly as he crawled away, finally firing the fatal shot through the lower back. The circumstantial evidence was more than sufficient to prove premeditation.

#### **Evidence of Gang Affiliation and Drive-By Shooting**

¶13 Guerrero argues that the trial court erred, requiring reversal, in admitting evidence of his membership in a criminal street gang and his involvement in a drive-by shooting the week before the murder, because it was not relevant for any proper purpose under Arizona Rule of Evidence (Rule) 404(b), and was unfairly prejudicial. He argues that the evidence of the drive-by shooting also violated the prohibition against double jeopardy and the doctrine of collateral estoppel, because he had been acquitted in a prior jury trial of his involvement in that offense.

#### **Gang Affiliation**

¶14 The trial court denied Guerrero's motion in limine to preclude evidence of his gang affiliation at trial, on the ground that it was so intertwined with evidence of the offense that it would be impossible to preclude. The judge noted first that he was not "convinced that membership in a gang constitutes a character trait" subject to Rule 404(b) analysis. He reasoned additionally that it would be difficult as a practical matter to preclude evidence of gang affiliation when nearly forty

witnesses would be identifying persons by "monikers such as Wicked, Cartoon, Psycho, Turtle, Goofy, Largo." Ultimately, the court found that the evidence's probative value outweighed any unfair prejudice because it was "so interwoven involving the witnesses of the case and the anticipated testimony, that it would simply be impossible or extremely difficult to separate." We review a trial court's ruling on the admission of evidence for abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 169, 800 P.2d 1260, 1277 (1990). We view the challenged evidence on appeal in the "light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998). We will affirm a trial court's ruling if legally correct for any reason. *State v. Chavez*, 225 Ariz. 442, 443, ¶ 5, 239 P.3d 761, 762 (App. 2010).

¶15 We find no such abuse of discretion. Although the State had not alleged that Guerrero had committed this offense for the benefit of a criminal street gang, the trial judge had granted the State's motion to add an allegation of gang motivation to the indictment. One of the witnesses at trial subsequently testified that Guerrero had told her the night before the murder that he had felt "disrespected" by the victim's rape of his girlfriend, and "people were going to start thinking that he was a punk." She also testified that Guerrero

told her that Turtle, the other person whom Guerrero suspected of raping his girlfriend, was not "a real Sureno" because of this. A gang expert testified that Guerrero was documented as a gang member, and as such, would be expected to retaliate against another person who "disrespected" his girlfriend, or called him a "punk." Retaliation could range "from just a simple beat-down, to an aggravated assault, to a murder," the expert testified. On this record, the evidence of gang affiliation was relevant to show a motive for the murder, and thus appropriately admitted. See *State v. Jackson*, 186 Ariz. 20, 26, 918 P.2d 1038, 1044 (1996) (holding that trial judge's ruling "allowing the state to offer evidence of gang membership to prove motive was correct"). Likewise, even assuming without deciding that gang affiliation is "character evidence," the use of this evidence to show Guerrero's motive was permissible under Rule 404(b).

¶16 Nor do we find any abuse of discretion in the judge's implicit finding that the probative value of this evidence outweighed any unfair prejudice. Guerrero offers no support for his argument that the jury would assume simply because he was a gang member that he was more likely to commit violent crimes. The gang expert did suggest that a gang member might retaliate violently to any perceived "disrespect," but he also testified that it was not a criminal offense to be a gang member, and that

the gangs in Bullhead City existed primarily for control of the drug trade. On this record, we decline to find that the judge abused his discretion in refusing to preclude this evidence as unfairly prejudicial.

#### **Drive-By Shooting**

¶17 Guerrero also argues that evidence that he fired a handgun in a drive-by shooting a week before the murder was not relevant for any proper purpose under Rule 404(b) and violated the prohibition against double jeopardy and the doctrine of collateral estoppel, because he had been acquitted in a prior jury trial of his involvement in that offense.

¶18 The trial court had denied Guerrero's motion to preclude evidence that he had fired the murder weapon five days before this shooting, reasoning that "the defendant's acquittal in the drive-by shooting case does not determine the ultimate issue in this case and therefore double jeopardy does not apply." The trial judge warned the State, however, not to suggest in any manner that he had committed the offense of drive-by shooting, and noted that the jury should be informed "that the defendant was acquitted in the case." The judge ultimately also instructed the jury on the limited use it might make of evidence presented of "other acts."

¶19 We review the admission of other act evidence for abuse of discretion. *State v. Dickens*, 187 Ariz. 1, 18, 926

P.2d 468, 485 (1996). Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to "prove the character of a person in order to show action in conformity therewith," but may be admissible for other limited purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before such evidence may be admitted, there must be clear and convincing proof "both as to the commission of the other bad act and that the defendant committed the act." *State v. Anthony*, 218 Ariz. 439, 444, ¶ 33, 189 P.3d 366, 371 (2008) (citing *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997)). The judge must also find that 1) the evidence is being offered for a proper purpose; 2) the evidence is relevant to that purpose; and 3) its probative value is not substantially outweighed by unfair prejudice. *Id.* If requested, the judge must provide an appropriate limiting instruction. *Id.*

¶20 We find no abuse of discretion in the trial court's admission of the evidence that Guerrero had fired the weapon used to murder the victim five days earlier in a drive-by shooting. The key issue at trial was the identity of the person or persons who killed the victim. The evidence that Guerrero had fired the gun used to kill the victim five days earlier was not offered to prove Guerrero's character in order to show action in conformity therewith, an impermissible purpose under

Rule 404(a). The evidence of Guerrero's use of the gun in the drive-by shooting was offered instead to identify Guerrero as the person who shot and killed this victim, a permissible purpose under Rule 404(b). See *State v. Dickens*, 187 Ariz. at 19, 926 P.2d at 486 (holding that evidence that defendant had stolen the guns used in the charged murders and robberies "was probative of several of the purposes outlined in Rule 404(b)").

¶21 This was not a case where the State sought to prove defendant's identity by showing a distinctive *modus operandi* between the prior crimes and the charged offense, as in the cases on which Guerrero relies. See, e.g., *State v. Roscoe*, 145 Ariz. 212, 217, 700 P.2d 1312, 1317 (1984) (noting that the "second requirement of the *modus operandi* exception is that the prior acts must be 'so unusual and distinctive as to be like a signature'"); *State v. Stuard*, 176 Ariz. 589, 597-99, 863 P.2d 881, 889-91 (1993) (applying same standard to ascertain if evidence of an attempted murder would have been admissible in a separate trial for three murders, and finding that "similarities among the crimes were sufficiently distinct for the evidence to fall within the identity exception of Ariz. R. Evid. 404(b)").

¶22 Rather, this was a case where the State sought to prove defendant's identity by showing that he had fired the *identical* handgun used to murder this victim in a drive-by shooting five days earlier. See, e.g., *State v. Nordstrom*, 200

Ariz. 229, 249-50, ¶¶ 62-65, 25 P.3d 717, 737-38 (2001) (holding that evidence that defendant and another were in possession of weapons of the type used in the murder a few hours earlier was admissible under Rule 404(b) to show identity and opportunity). An expert testified that the bullet fragments and shell casings found at the scene of the drive-by shooting and at the scene of the murder were fired from the same handgun. The witness's testimony that Guerrero fired the handgun during the drive-by shooting was sufficient to prove the prior act by clear and convincing evidence, and it was up to the jury to determine the weight it might give to this evidence in determining whether Guerrero still had possession of the handgun five days later. In short, we find no merit in Guerrero's argument that this evidence was inadmissible under Rule 404(b).

#### **Double Jeopardy/Collateral Estoppel**

¶123 Guerrero conceded before trial that the evidence would not violate his federal constitutional rights against double jeopardy under *Dowling v. United States*, 493 U.S. 342 (1990), but asked the court "to hold that Arizona's protection should be higher than the Federal protection." On appeal, he argues that the admission of the evidence violated his federal constitutional rights against double jeopardy under *Dowling*, and makes no argument that Arizona's protection is any higher than the federal protection.

¶124 We find no merit in Guerrero's argument that admission of the evidence violated his federal constitutional rights against double jeopardy under *Dowling*. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that a person may not "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Double jeopardy bars multiple prosecutions and punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). The prohibition against double jeopardy incorporates the doctrine of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 443-45 (1970). To apply the doctrine of collateral estoppel to bar relitigation of an issue, defendant must prove that the issue he claims is barred was actually decided in the prior proceeding. *Dowling*, 493 U.S. at 350. Collateral estoppel requires that "the issue sought to be relitigated must be precisely the same as the issue in the previous litigation." *State v. Bartolini*, 214 Ariz. 561, 564, ¶ 8, 155 P.3d 1085, 1088 (App. 2007) (quoting *State v. Jimenez*, 130 Ariz. 138, 140, 634 P.2d 950, 952 (1981)). We review claims of double jeopardy de novo. *State v. Welch*, 198 Ariz. 554, 555, ¶ 5, 12 P.3d 229, 230 (App. 2000).

¶125 The collateral estoppel component of double jeopardy does not preclude the State "from relitigating an issue when it



is presented in a subsequent action governed by a lower standard of proof." *Dowling*, 493 U.S. at 349. In *Dowling*, the Supreme Court considered whether the trial court violated defendant's double jeopardy rights by admitting at defendant's trial for bank robbery evidence under Rule 404(b) of a witness's identification of defendant as one of two intruders who had entered her home on another date, notwithstanding defendant's acquittal of charges arising from the home invasion. See *id.* at 344-47. The Supreme Court ruled that the witness's testimony at the bank robbery trial did not violate the doctrine of collateral estoppel because defendant's acquittal on the burglary and related charges "did not determine an ultimate issue in the present case." *Id.* at 348. The Court assumed for the sake of argument that defendant's acquittal of the charges arising from the home intrusion established that reasonable doubt existed as to whether defendant had been one of the intruders. *Id.* The Court reasoned, however, that because the government did not have to prove the witness's identification beyond a reasonable doubt to admit it pursuant to Rule 404(b) in the bank robbery trial, the prior acquittal did not raise a constitutional bar to its introduction at this trial. *Id.* at 348-50. The Court ruled alternatively that even if the lower burden of proof at the second proceeding did not serve to avoid the bar of collateral estoppel, the evidence was nevertheless

admissible because defendant had failed to demonstrate, as was his burden, that his acquittal in the first trial "represented a jury determination that he was not one of the men who entered [the witness's] home." *Id.* at 350-52.

¶126 The facts in this case are indistinguishable from those in *Dowling*. Here, the State sought to introduce a witness's identification of Guerrero as the person who used the murder weapon in an earlier drive-by shooting, pursuant to Rule 404(b). Because the State had only to prove the witness's identification by clear and convincing evidence for admission pursuant to Rule 404(b) in this murder trial, the prior acquittal did not raise a constitutional bar to its introduction at this trial. *See Dowling*, at 348-50. Moreover, just as in *Dowling*, even if the lower burden of proof did not serve to avoid the bar of collateral estoppel, the evidence was nevertheless admissible because Guerrero has failed to demonstrate that his acquittal of the charge of drive-by shooting represented a jury determination that he was not the person who shot the handgun in the drive-by shooting. *See id.* at 350-52. The offense of drive-by shooting requires proof that a person "intentionally discharge[d] a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure." A.R.S. § 13-1209(A) (2010). Guerrero has not cited from the record of his trial on the drive-by shooting

to show the grounds for his acquittal, or to a special verdict form that made a finding that he was not present at the scene or did not shoot the handgun. Guerrero instead simply argues without evidentiary support that by acquitting him of this charge, "the jury necessarily found in the drive-by trial that Appellant was not in possession of the gun which shot at the house (or he would have been convicted)," and that "he did not shoot the .45 caliber handgun" used in the drive-by shooting. This argument fails to satisfy Guerrero's burden under *Dowling's* alternative ruling to demonstrate that the prior jury necessarily determined that he was not the person who fired the handgun during the drive-by shooting. See *Dowling*, 493 U.S. at 350 (absent a special verdict form, such determination requires examination of the record of the prior proceeding, "taking into account the pleadings, evidence, charge, and other relevant matter"). For the foregoing reasons, we find that the admission of the witness's testimony in this trial identifying him as the drive-by shooter did not violate the doctrine of collateral estoppel or his federal constitutional rights against double jeopardy.

#### **Unlawful Flight Instruction**

¶127 Guerrero next argues that the trial court abused its discretion by instructing the jury on unlawful flight over his objection. The trial court denied Guerrero's motion in limine

to preclude evidence that he had fled to Mexico after this incident and ruled that he would give a flight instruction, reasoning that the evidence that Guerrero knew police wanted to question him on the drive-by shooting as well as the murder, and he nevertheless left the country, "does suggest consciousness of guilt." The judge subsequently instructed the jury it could consider "any evidence of the defendant's running away, hiding, or concealing evidence" in determining whether the State has proved the defendant guilty beyond a reasonable doubt, but "running away, hiding, or concealing evidence . . . after a crime has been committed does not by itself prove guilt."

¶28 We review the trial court's decision to give a jury instruction over objection for abuse of discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003). The State is entitled to a flight or concealment instruction if it is supported by the evidence. *State v. Grijalva*, 137 Ariz. 10, 15, 667 P.2d 1336, 1341 (App. 1983), *superseded by statute on other grounds as stated in State v. Cons*, 208 Ariz. 409, 413, ¶ 9, 94 P.3d 609, 613 (2004). A flight instruction is improper merely based on evidence that the suspect simply left the scene; it is proper "only when the defendant's conduct manifests a consciousness of guilt." *State v. Speers*, 209 Ariz. 125, 132-33, ¶¶ 27-30, 98 P.3d 560, 567-68 (App. 2004). In the absence of evidence of open flight such as that resulting from immediate

pursuit, to justify a flight instruction, the evidence must support an "inference that the accused utilized the element of concealment or attempted concealment." *Id.* at 132, ¶ 28, 98 P.3d at 567. The test "requires that the court be able to reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *Id.* at 132, ¶ 28, 98 P.3d at 567 (citation and internal quotation marks omitted).

¶129 We find no abuse of discretion in the judge's decision to give the instruction. A police detective testified that he had executed a search warrant on the home of Guerrero's girlfriend the day after the murder, and had told her that Guerrero was wanted for questioning, and that if she spoke to him, to tell him to call the detective or turn himself in. Guerrero did neither. Instead, Guerrero and his girlfriend checked into a hotel that night in Laughlin, Nevada. About a week after the murder, the victim's brother, a police officer in California, received a call from a person who identified himself as "Wicked," and said he was "on the run." Police finally located Guerrero about a year after the murder in Mexico, using the name of Jorge Timoteo Miramontes Tapia, a name different from the one he used in Bullhead City. This evidence demonstrates that not only did Guerrero flee this country after the murder, but he concealed his identity by using an alias. We

are not persuaded that the inference of consciousness of guilt from this conduct was dispelled by testimony that his girlfriend never told him he was wanted by police, he frequently visited relatives in Mexico, and the name he used in Mexico was in part a variation of his birth name. In short, the evidence demonstrated that Guerrero not only fled the country after this murder, but assumed a different identity. We find that Guerrero's conduct under the circumstances sufficiently manifested a "consciousness of guilt" to warrant the flight instruction, and we accordingly find no abuse of discretion in the judge's decision to give it. *See State v. Loyd*, 126 Ariz. 364, 367, 616 P.2d 39, 42 (1980) (holding that evidence that immediately after the murder defendant assumed a different name and left the state was sufficient to justify instruction on flight).

#### **Consecutive Sentences**

¶130 Guerrero finally argues that the trial court violated the prohibition against double punishment pursuant to A.R.S. § 13-116 by ordering that the prison term for misconduct involving weapons be served consecutive to his natural life sentence for first-degree murder. We agree.

¶131 We review de novo whether the trial court imposed consecutive sentences in violation of A.R.S. § 13-116. *State v. Urquidez*, 213 Ariz. 50, 52, ¶ 6, 138 P.3d 1177, 1179 (App.

2006). Under A.R.S. § 13-116, the trial court may not impose consecutive sentences for the same act. See *id.* We analyze whether a crime is one act permitting only concurrent sentences, or multiple acts permitting consecutive sentences, under the three-part test adopted in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989): 1) we consider the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge, and determining whether remaining evidence satisfies the elements of the other crime; 2) we then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime; and 3) finally, we consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer a different or an additional risk of harm than that inherent in the ultimate crime. See *id.* at 315, 778 P.2d at 1211.

¶32 In this case, all three prongs of the *Gordon* test support imposition of concurrent sentences. The ultimate crime for purposes of the first prong of the *Gordon* analysis was the most serious of the crimes, first-degree murder. Subtracting the evidence necessary to convict Guerrero of first-degree murder, we find the remaining evidence was *not* sufficient to convict Guerrero of misconduct involving weapons. The Indictment charged that Guerrero, a prohibited possessor,

possessed a deadly weapon on or about February 7, 2008, the date of the murder, at Silver Creek Road, the scene of the murder. Although a witness testified that she saw Guerrero with a handgun the night of February 6, 2008, the night before the victim was murdered, this was not the conduct for which Guerrero was charged. The conduct that formed the basis of his charge of misconduct involving weapons was possession of the handgun on the date of the murder, at the murder scene. The State in fact argued in its rebuttal closing that the conduct giving rise to this charge was possession of the handgun in shooting the victim. The act giving rise to the charge of misconduct involving weapons accordingly was the same act of possessing the handgun that constituted the act of murdering the victim, and the first prong accordingly supports imposition of concurrent sentences.

¶133 The second prong of the *Gordon* test also supports the imposition of concurrent sentences. This is because it was factually impossible for Guerrero to commit this murder, in which death was caused by multiple gunshot wounds, without also committing misconduct involving weapons. Finally, the victim did not suffer any additional or different harm beyond his murder from this Guerrero's possession of the handgun. See *State v. Carreon*, 210 Ariz. 54, 75, ¶ 108, 107 P.3d 900, 921



(2005). On this record, we find that the judge erred in imposing consecutive sentences. See *id.*

**Conclusion**

¶34 For the foregoing reasons, we affirm Guerrero's convictions, but modify the sentences to impose them concurrently.

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Judge