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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/22/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0827
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CORNELIUS RAY WESLEY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-157013-001DR

The Honorable Arthur T. Anderson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Angela Corinne Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Cornelius Ray Wesley ("Wesley") appeals his conviction for second-degree murder, arguing the trial court

erred in precluding the testimony of his rebuttal witness. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Wesley lived with his mother, C.W., and her boyfriend, J.W., in a Phoenix apartment. C.W. and J.W. had a tumultuous relationship that sometimes resulted in physical altercations that Wesley witnessed.

¶3 In July 2007, J.W. suffered a stroke that weakened his physical stamina and ability. One month later, while J.W. was in the shower, C.W. confronted J.W. about his potentially stealing Wesley's lighter, but she left while J.W. was still showering to avoid a confrontation. Wesley remained in the apartment.

¶4 After C.W. left, a 9-1-1 dispatcher received a call from the apartment and dispatched police. Inside the apartment the police found J.W. lying naked on the floor and bleeding from a chest wound. J.W. was pronounced dead, and it was later determined that he died from a stab wound in the heart.

¶5 Police charged Wesley with second-degree murder. Wesley contended he stabbed J.W. in self defense because J.W. was choking him. During trial, the medical examiner who conducted J.W.'s autopsy, Dr. Davenport, testified that J.W. had pulmonary hypertension and lethal coronary heart disease. Dr. Davenport testified: "I would find it hard to believe that

[J.W.] with these combined heart issues would be able to do exercise or even up to 30 seconds or even more than 10 seconds before becoming symptomatic." Symptoms J.W. could have experienced include chest pain, "atypical heart attack symptoms, which include nausea and vomiting or indigestion," a "burning sensation or pain down the left arm," palpitations, fainting, "sudden cardiac death," and being winded and short of breath.

¶6 Wesley attempted to impeach Dr. Davenport with her statements from a pre-trial interview. When Wesley asked Dr. Davenport to set an amount of time in which J.W. could have endured activity before showing symptoms of his medical condition, she declined to specify any length of time. After the State rested, Wesley requested permission to call a different medical examiner to rebut Dr. Davenport's testimony about J.W.'s medical condition and whether it would have prevented him from strenuous activity. The proposed medical examiner allegedly told Wesley's counsel that "giving a quantitative statement would be impossible because there's so much more that you need to know." However, Wesley had not disclosed the proposed witness because Wesley's counsel "just got a hold of her." The State argued Wesley interviewed Dr. Davenport approximately three months earlier and her testimony

did not change regarding quantifying the length of time J.W. could be active before showing symptoms of distress.

¶7 The trial court reviewed the interview and determined that Dr. Davenport did discuss in detail "her physical findings as well as its impact upon the victim's stamina and his ability even [sic] in a fight, how that might affect him." Therefore, Wesley "was on notice at that time that she held those opinions." The court also noted that after the interview with the medical examiner, Wesley filed a supplemental list of witnesses, and later filed a pretrial notice a week before trial, without mention of the other medical examiner. Thus, the court concluded the disclosure of the other medical examiner came "too late."

¶8 The jury convicted Wesley of second-degree murder and Wesley 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)(1) (2010).

DISCUSSION

¶9 Wesley contends that the trial court erred in failing to allow the second medical examiner to testify and rebut Dr. Davenport's testimony. The State argues that Wesley's "claim is precluded on appeal because he failed to make an adequate offer of proof" and in any event, the court did not abuse its discretion in precluding the witness from testifying. We find

that Wesley's offer of proof was adequate, but the trial court correctly precluded the testimony.

I. Offer of proof

¶10 A party may not claim error in the preclusion of evidence unless a substantial right is affected and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Ariz. R. Evid. 103(a)(2). "At a minimum, an offer of proof stating with reasonable specificity what the evidence would have shown is required." *State v. Towerly*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996).

¶11 Wesley's offer of proof was adequate. The proposed witness allegedly told Wesley's counsel that "giving a quantitative statement would be impossible because there's so much more that you need to know." Although Wesley did not name the proposed witness, he said that the witness was a medical examiner from Pima County. It is implied in the witness' title of "medical examiner" that the witness would be as qualified to testify about medical matters as Dr. Davenport. Also, Dr. Davenport admitted that she had not reviewed J.W.'s medical records and could not conduct tests such as a stress test. The proposed witness' purpose was to testify that without more information about J.W.'s medical condition, such as a review of his medical records and tests that would have had to be

performed while J.W. was alive, Dr. Davenport could not have given a timeline over which J.W. would have been able to exert himself. Wesley's statements about the proposed medical examiner's testimony were specific enough to show to what the proposed witness would testify.

II. Sanction for discovery violation

¶12 The State argues the trial court did not abuse its discretion in precluding the witness from testifying. We agree. A trial court may impose sanctions upon a party who fails to comply with the discovery rules set forth in Arizona Rule of Criminal Procedure 15. *State v. Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979). "One such sanction is the preclusion of an undisclosed witness' testimony," but the trial court "should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible." *Id.* "Prohibiting the calling of a witness should be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice." *Id.* Generally though, "the appropriate sanction for noncompliance with [R]ule 15 is left to the sound discretion of the trial court." *Id.*

¶13 Before precluding either party's witnesses, the trial court must determine whether "less stringent sanctions can be used," as well as whether (1) the precluded witness is vital to the proponent's case, (2) the "opposing party will be surprised

and prejudiced by the witness' testimony," (3) the proponent was motivated by bad faith or willfulness, and (4) any other relevant circumstances. *Id.*

¶14 Here, precluding the proposed medical examiner from testifying did not vitally affect the merits of Wesley's case. Wesley effectively highlighted weaknesses in Dr. Davenport's predictions about J.W.'s stamina through cross-examination. Wesley impeached Dr. Davenport with her testimony from pre-trial interviews to show that she had previously been hesitant to place a timeline on J.W.'s stamina and create doubt as to her opinion that J.W. could not be active for more than thirty seconds. Also during cross-examination, Wesley showed that Dr. Davenport had not reviewed J.W.'s medical records nor was she able to conduct any tests on J.W. to determine his stamina. Thus, through his cross-examination of Dr. Davenport, Wesley was able to illustrate the alleged flaws in Dr. Davenport's testimony, which was what the proposed medical examiner would have testified about.

¶15 As to the other factors, the trial court was within its discretion to preclude the testimony because Wesley was aware of Dr. Davenport's proposed testimony three months before trial.¹ Although there is no evidence of bad faith, Wesley's

¹ The transcript to which the trial court refers is not in the record on appeal. Thus, we deem the trial court's synopsis

lack of diligence in finding the proposed medical examiner before trial supports the trial court's decision.

CONCLUSION

¶16 For the foregoing reasons, we affirm Wesley's conviction.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge

accurate. See *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions.").