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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID SCOTT PAULSON, Appellant.	2 CA-CR 2011-0278 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200801125

Gilberto V. Figueroa, Judge
Janna L. Vanderpool, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant David Paulson was convicted of first-degree murder and sentenced to a term of life imprisonment with the possibility of release

in twenty-five years. On appeal, he argues (1) the trial court erred by failing to release a report, made pursuant to Rule 11, Ariz. R. Crim. P., related to his codefendant; (2) the court erred in several evidentiary rulings; (3) the cumulative effect of the evidentiary rulings precluded him from arguing self-defense, resulting in an unfair trial; (4) the prosecutor committed misconduct during closing argument; (5) the court erred in instructing the jury on flight and concealment; and (6) the sentence constitutes cruel and unusual punishment. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the verdict[]." *State v. Chappell*, 225 Ariz. 229, n.1, 236 P.3d 1176, 1180 n.1 (2010). In the early morning hours of June 20, 2008, seventeen-year-old Paulson and his sixteen-year-old girlfriend, Maeghan Rice, were riding together in her father's pickup truck. Paulson earlier in the night had told a friend he was mad at the victim, Rice's recent ex-boyfriend, and wanted to stab him. Rice agreed to help Paulson with his plan to kill the victim.

¶3 She drove to the victim's house and picked him up while Paulson hid beneath a blanket in the backseat. When she later drove past Paulson's house, she mentioned this fact, thereby signaling to Paulson to come out from his hiding spot. Paulson then stabbed the victim numerous times. The victim fled from the truck and was later found dead due to loss of blood from his wounds.

¶4 After the attack, Paulson abandoned the truck at an electrical substation, covering the vehicle's bloody interior with a blanket. Rice removed items from inside the truck, including the victim's brass knuckles and an "iPod" she did not recognize. She

then spoke to her brother and a friend about the incident and asked them to lie about it for her. That same day, Paulson took a prearranged flight to Utah, where he was arrested.

¶5 Paulson was charged by indictment with first-degree, premeditated murder. Rice pled guilty to second-degree murder and testified against Paulson at his trial. In his defense, Paulson testified that Rice's account was a lie and essentially an inversion of the facts. According to Paulson, he had been picked up by Rice; the victim had been hiding in the backseat of the truck; the victim had ambushed Paulson and struck him in the head with brass knuckles; and Paulson had used a knife in self-defense. The jury found Paulson guilty of first-degree murder, and this timely appeal followed the court's imposition of sentence.

Rule 11 Examination

¶6 Paulson first argues the trial court committed reversible error by not releasing the full "un-excised" records of the mental examination that had been performed on Rice pursuant to Rule 11.[1] In his motion below, Paulson maintained these records might contain relevant inconsistent statements by Rice, and he based his request for release on his "right to a fair trial" pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; federal case law, including *Brady v. Maryland*, 373 U.S. 83 (1963); and article II, §§ 4 and 24 of the Arizona Constitution. In response to his motion, a different superior court judge examined the Rule 11 records *in*

[1]Statements made by a criminal defendant during a Rule 11 evaluation concerning a charged offense are provided only to the defendant and may be redacted by defense counsel from any mental health experts' reports. Ariz. R. Crim. P. 11.4(a).

camera and determined they contained no exculpatory or material information. The court therefore denied Paulson's "motion for disclosure."[2]

¶7 Although it appears both Paulson and the state possessed redacted versions of Rice's Rule 11 report below, the trial court correctly observed that Rule 11 documents generally are confidential. *See* Ariz. R. Crim. P. 11.8. These records are privileged medical documents. *See* Ariz. R. Crim. P. 11.7(a) & cmt. Moreover, unless the presumption of sanity is at issue, "[n]o evidence of any kind obtained under [Rule 11] shall be admissible at any proceeding to determine guilt or innocence." Ariz. R. Crim. P. 11.7(a).

¶8 Ordinarily, when a criminal defendant asserts that his right to a fair trial requires access to privileged medical records, we have approved the process whereby a trial court inspects the records *in camera* to determine whether they contain material information. *E.g.*, *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 235, 238-39, 836 P.2d 445, 448, 451-52 (App. 1992). Although we review a court's ruling regarding the discovery of medical records for an abuse of discretion, to the extent the ruling implicates constitutional questions, we review those issues de novo. *State v. Connor*, 215 Ariz. 553, ¶ 6, 161 P.3d 596, 600 (App. 2007).

¶9 On appeal, Paulson overlooks or ignores these precedents and simply asserts the trial court should have provided him with the requested documents pursuant to Rule 15.1, Ariz. R. Crim. P., because the unredacted records were "in the possession of

[2]Judge Janna L. Vanderpool reviewed the Rule 11 documents at the request of Judge Boyd T. Johnson, and she issued the ruling before us. Due to a medical issue with Judge Johnson, Judge Gilberto V. Figueroa ultimately presided over the trial.

the Court," and the court's ruling "runs afoul of the spirit and intent of disclosure." Paulson's failure to develop this conclusory argument with relevant authority could result in his having waived it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004). But even if the argument were not waived, we would reject it nonetheless. The documents at issue have not been included in the record on appeal. We therefore have no basis to disturb the trial court's ruling preserving the confidentiality of those Rule 11 records that had not been disclosed to the state.

Evidentiary Issues

Hearsay

¶10 Paulson next argues the trial court erred by admitting "numerous" hearsay statements made by Rice that he claims were not excited utterances. Although he indicates in his opening brief where in the record the court made its preliminary rulings on some of Rice's out-of-court statements, he has failed to provide citations to the record indicating where the challenged statements ultimately were admitted into evidence. He likewise has failed to identify the specific statements he challenges on appeal, and he has not included the content of any of the challenged statements in his appellate briefs.

¶11 "'Judges are not like pigs, hunting for truffles buried in [the record].'" *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, n.2, 972 P.2d 658, 659 n.2 (App. 1998), *quoting United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (alteration in *Ramirez*). Rule 31.13(c)(1)(vi) requires that the legal argument in an appellant's opening brief contain record citations for each contention raised on appeal. When an appellant fails to comply with Rule 31.13 and presents an insufficiently developed argument that

does not permit appellate review, we will find the argument waived. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). We find Paulson's argument waived due to his failure to develop it.

¶12 But even assuming the trial court erred as alleged, we would find any such error to be harmless. An error is harmless if a reviewing court can determine, beyond a reasonable doubt, that it did not affect the verdict. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). The erroneous admission of hearsay can be harmless when a declarant testifies and is subject to thorough cross-examination. *E.g.*, *State v. Hoskins*, 199 Ariz. 127, ¶ 66, 14 P.3d 997, 1014 (2000). Here, Rice was questioned about her out-of-court statements and was thoroughly cross-examined. Under these circumstances, we would find harmless any error in admitting her statements as excited utterances.

¶13 Paulson also claims the trial court erred by sustaining the state's hearsay objection to the proffered testimony of a witness, Lauren Brown. In an attempt to establish the timeline on the night of the murder, Paulson sought to elicit from Brown that her father had told her, "You made your curfew," meaning she had arrived home before midnight. The court correctly ruled this statement was inadmissible hearsay, because it was an out-of-court statement offered to prove the truth of the matter asserted: that Brown had arrived home before a specific time. *See* Ariz. R. Evid. 801(c), 802. After the court's ruling, Paulson was able to establish the same point about Brown's arrival, over the state's objection, through questioning that did not elicit her father's statement. The trial court did not err or abuse its discretion in precluding the statement about

Brown's curfew. *See State v. Bronson*, 204 Ariz. 321, ¶ 14, 63 P.3d 1058, 1061 (App. 2003) (hearsay determinations reviewed for abuse of discretion).

Victim Evidence

¶14 Paulson also challenges the trial court's limitation of evidence relating to the victim. Specifically, he argues the court erred in precluding evidence concerning (1) the victim's propensity for violence; (2) the victim's "propensity regarding Nazi membership, white supremacy, and gang affiliation"; (3) the victim's use of brass knuckles; and (4) the victim's autopsy toxicology results. We generally review a trial court's evidentiary rulings for an abuse of discretion. *See State v. Garcia*, 224 Ariz. 1, ¶ 32, 226 P.3d 370, 380 (2010); *State v. Abdi*, 226 Ariz. 361, ¶ 21, 248 P.3d 209, 214 (App. 2011). We find none here.

¶15 "A defendant's constitutional right to present a defense 'is limited to the presentation of matters admissible under ordinary evidentiary rules.'" *State v. Hardy*, 230 Ariz. 281, ¶ 49, 283 P.3d 12, 22 (2012), *quoting State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996), *abrogated in part on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (2012). "To be admissible, evidence must be relevant, and its probative value must not be substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Hardy*, 230 Ariz. 281, ¶ 49, 283 P.3d at 22 (citation omitted); *accord* Ariz. R. Evid. 401, 403. Evidence of a victim's violent character is admissible to prove the victim was the first aggressor. *See* Ariz. R. Evid. 404(a)(2); *State v. Santanna*, 153 Ariz. 147, 149, 735 P.2d 757, 759 (1987). But such

evidence is permitted only in the form of reputation or opinion evidence. *See* Ariz. R. Evid. 405(a); *State v. Fish*, 222 Ariz. 117, ¶¶ 28-29, 213 P.3d 258, 267-68 (App. 2009).

¶16 As the state points out, Paulson in fact presented evidence about the victim's violent character. Paulson testified he knew the victim was aggressive and had a reputation in the community for violence. The state also asserts, without rebuttal, that Paulson "never attempted to introduce specific instances of conduct" by the victim. Thus, Paulson's argument regarding violent propensities is without merit.

¶17 His reliance on *State v. Machado*, 226 Ariz. 281, 246 P.3d 632 (2011), and similar case law is misplaced. As we emphasized in our own *Machado* opinion, that case involved a third-party culpability defense—that is, a defense claiming another person committed the crime with which the defendant had been charged. 224 Ariz. 343, n.10, 230 P.3d 1158, 1171 n.10 (App. 2010), *aff'd*, 226 Ariz. 281, 246 P.3d 632 (2011). It did not involve self-defense. *See id.* Here, in contrast, third-party culpability was not at issue. By Paulson's own account, his defense was self-defense, and "[h]e testified that [the victim] was the aggressor." To the extent Paulson now complains he could not "present corroborating evidence pertaining to the[victim's] propensities" that would have made his self-defense claim more credible, our evidentiary rules simply do not allow this practice. *See Fish*, 222 Ariz. 117, ¶¶ 34-35, 213 P.3d at 270.

¶18 Paulson's additional argument regarding the victim's "propensity" for hate groups or gangs is insufficiently developed and consequently waived. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838. He has failed, for example, to specify the ruling he challenges, indicate where in the record that ruling may be found, or explain what

specific evidence it precluded. And even if the argument were not waived, we would find no abuse of discretion in the preclusion of evidence on this topic. Given the issues in this case, such evidence was irrelevant and had great potential to distract jurors, arouse prejudice, and waste time. *See* Ariz. R. Evid. 401, 403.

¶19 Turning next to the evidence of the victim's use of brass knuckles, the state again correctly points out that this was not precluded. A close friend of the victim testified the victim owned brass knuckles and always carried them with him. Rice testified the brass knuckles she had found in the truck on the night of the murder belonged to the victim, and a photo of the brass knuckles was admitted into evidence. Paulson also testified the victim had attacked him with brass knuckles before the stabbing. Thus, Paulson's undeveloped argument on this point is either waived or, alternatively, meritless.

¶20 Paulson also claims the trial court erred by precluding evidence of the victim's autopsy toxicology results. In response to the state's pretrial motion, the court made a preliminary ruling precluding any evidence that drugs were found in the victim's blood or urine. Before the medical examiner testified, Paulson urged the court to revisit the issue and find admissible the test results showing methamphetamine in the victim's body. He specifically argued this evidence was relevant to show (1) the cause of death, because the victim could have died from a cardiac arrhythmia resulting from drug use; and (2) the victim was the initial aggressor, because a tendency toward violence is a side effect of methamphetamine use.

¶21 At an evidentiary hearing held outside the jury's presence, the medical examiner testified the methamphetamine found in the victim's body had no effect on his cause of death; rather, the victim had died from blood loss due to his multiple wounds. The medical examiner acknowledged that methamphetamine may cause some people to be violent, but he also testified there would be no way to know whether the level of the drug found in the victim's body had such an effect in this case. In light of this testimony, the trial court recognized the toxicology results might have some marginal relevance but nevertheless precluded them because their probative value was outweighed by the other concerns listed in Rule 403. The court observed, in particular, that "there is a significant prejudice that is assigned in our community to the use of meth[amphetamine]." This determination was within the court's sound discretion. *See State v. Neal*, 143 Ariz. 93, 101, 692 P.2d 272, 280 (1984).

¶22 Paulson further argues the prosecutor "opened the door" to the toxicology results by proceeding to ask the medical examiner the following questions during trial:

> Q. Doctor, as part of your examination procedure, do you collect various samples from individuals?
>
> A. Yes.
>
> Q. Okay. In addition . . . do you collect blood samples from people you examine?
>
> A. Yes.
>
> Q. Is that for the purposes of conducting future DNA testing or future testing?
>
> A. Yeah, just future testing in general, yes.

Q. Do you know if a sample of [the victim]'s blood was collected in this case?

A. Yes.

Q. And what was done with that blood sample, to your knowledge?

A. Well, there were several samples collected.

Q. Was one turned over to the Apache Junction Police Department?

A. Yes, it was.

¶23 Notably, Paulson's opening brief omits the last portion of this dialogue, which clarifies the context and purpose of the state's questions. The state established later at trial that the blood drawn from the victim during the autopsy was tested for DNA, and the questions here pertained to the chain of custody and laid the foundation for those DNA results. Similar foundational questions about the victim's fingerprints and clothing followed the passage quoted above. We therefore disagree with Paulson that the state invited the inference "that there was no alcohol or illicit drugs in [the victim]'s system at the time of his death." Viewed in context, the questions quoted above merely related to foundation and did not open the door to the toxicology results that had been precluded previously.

¶24 That no objection was made to this line of questioning underscores there was nothing improper about it. Beyond this, however, the absence of an objection leads this court to review the issue only for fundamental error. *See State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009); *see also State v. Butler*, No. 2 CA-CR 2011-0264,

¶ 21, 2012 WL 4354701 (Ariz. Ct. App. Aug. 29, 2012) (evidentiary objection must be contemporaneous and contain specific legal ground to preserve issue for appeal). Because Paulson has neither alleged nor established that the state's questions resulted in fundamental, prejudicial error, he is not entitled to appellate relief. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).[3]

Cumulative Error

¶25 Paulson contends "the cumulative effect of the trial court's evidentiary rulings precluded [him] from asserting self defense, resulting in an unfair, prejudicial trial." Arizona does not recognize a doctrine of cumulative evidentiary errors. *State v. Prince*, 160 Ariz. 268, 274, 772 P.2d 1121, 1127 (1989); *see State v. Ellison*, 213 Ariz. 116, ¶ 59, 140 P.3d 899, 916 (2006). "[S]everal non-errors and harmless errors cannot add up to one reversible error." *State v. Hughes*, 193 Ariz. 72, ¶ 25, 969 P.2d 1184, 1191 (1998). We therefore reject this argument.

Misconduct

¶26 Paulson claims the prosecutor committed misconduct by publishing to the jury a "photograph of Bonnie and Clyde" during summation. Yet Paulson has failed to include a transcript of the closing argument in the record on appeal. An appellant "has the duty to ensure that the record contains any material or documents necessary to his argument on appeal." *State v. Lavers*, 168 Ariz. 376, 399, 814 P.2d 333, 356 (1991).

[3]Paulson also globally argues that the trial court's admission of a photograph of the victim as a young adolescent opened the door to "the whole field of inquiry" about whether the victim was "a clean-cut, young, all American boy," thereby requiring the admission of "contrary evidence" proffered by Paulson. We may summarily reject this argument, as none of the authorities he has cited support such a conclusion.

"When the record is not complete, we must assume that any evidence not available on appeal supports the trial court's actions." *Id.* In the absence of the pertinent transcript here, we have no way to substantiate Paulson's claim and no basis on which to find error.

Jury Instruction

¶27 Paulson next challenges the trial court's provision of a standard "flight and concealment" instruction to the jury. As the state points out, Paulson "stipulat[ed]" to the instruction below. This precludes him from challenging its content in this court. "[W]hen a party requests an erroneous instruction, any resulting error is invited and the party waives his right to challenge the instruction on appeal." *State v. Logan*, 200 Ariz. 564, ¶ 8, 30 P.3d 631, 632 (2001). Moreover, Paulson concedes in his reply brief that he did not object to the instruction and that it was supported by the record, insofar as adequate evidence existed that he had concealed the truck where the attack had occurred. We therefore will not disturb the judgment based on this instruction.

Sentence

¶28 Last, Paulson claims that because he was seventeen at the time he committed this offense, his life sentence violates the Eighth Amendment's ban on cruel and unusual punishment. Although Paulson has not identified the "proper standard of review" he believes applies to his claim of error, Ariz. R. Crim. P. 31.13(c)(1)(vi), his argument depends upon the interpretation and application of recent United States Supreme Court case law. Accordingly, we regard his Eighth Amendment claim as being

subject to de novo review. *See State v. Kasic*, 228 Ariz. 228, ¶¶ 14-15, 265 P.3d 410, 413 (App. 2011).[4]

¶29 As defined by the former A.R.S. § 13-703(A),[5] a "life" term of imprisonment, such as Paulson received, allows the possibility of release after twenty-five years. This distinguishes it from a "natural life" term of imprisonment, which allows no possibility of release. 2005 Ariz. Sess. Laws, ch. 325, § 2. By law, a trial court must impose "life or natural life" upon a juvenile offender convicted of first-degree murder. *Id.*; *see also Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding death penalty unconstitutional for juvenile offenders).[6]

¶30 The Supreme Court recently held that mandatory life sentences without the possibility of parole, or automatic natural life sentences, are unconstitutional when applied to defendants who were under eighteen years old at the time of their crimes. *Miller v. Alabama*, ___ U.S. ___, ___, 132 S. Ct. 2455, 2460 (2012). Natural life sentences are the most severe sanctions that may be imposed on juvenile offenders. *Id.* at ___, 132 S. Ct. at 2466; *see Graham v. Florida*, ___ U.S. ___, ___, 130 S. Ct. 2011, 2034

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[4]Given our analysis that follows, we need not address whether Paulson preserved this issue below.

[5]We cite the version of the law in effect at the time Paulson committed his offense. *See* 2005 Ariz. Sess. Laws, ch. 325, § 2; 2005 Ariz. Sess. Laws, ch. 188, § 3; 2005 Ariz. Sess. Laws, ch. 166, § 2. Although Paulson challenges "Arizona's Statutory mandates which require a life sentence," he has not cited any statute in this argument section of his brief. Despite this deficiency, we exercise our discretion and entertain the argument on its merits.

[6]The current A.R.S. § 13-751(A)(2), as amended by 2012 Ariz. Sess. Laws, ch. 207, § 2, expressly allows only a sentence of life or natural life for a juvenile offender. This conforms Arizona law to *Roper*.

(2010); *Roper*, 543 U.S. at 568. The reason for this limitation is that "children are different." *Miller*, ___U.S. at ___, 132 S. Ct. at 2470. A sentencing scheme making such sanctions mandatory is thus cruel and unusual because it risks disproportionate punishment of juveniles, *id.* at ___, 132 S. Ct. at 2469, by ignoring the relevant mitigating information about them. *Id.* at ___, 132 S. Ct. at 2475. Accordingly, before a court may impose the most severe punishment, the constitution requires that juvenile offenders receive "individualized sentencing" consideration, *id.* at ___ n.6, 132 S. Ct. at 2466 n.6, that "take[s] into account the differences among defendants and crimes." *Id.* at ___ n.8, 132 S. Ct. at 2469 n.8.

¶31 Here, Paulson was not subjected to an automatic sentence of natural life imprisonment; rather, he received a lesser sentence through an individualized sentencing process. The trial court considered all the factors it deemed relevant to Paulson and his crime—including his young age, which the court found to be the primary mitigating factor in this case—and sentenced him to life imprisonment with the possibility of release after twenty-five years.

¶32 Rather than "forswear[ing] altogether the rehabilitative ideal," the trial court left Paulson with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, ___ U.S. at ___, 130 S. Ct. at 2030. And the court imposed this more mitigated sentence because it determined Paulson's age had limited his ability "to fully understand [his] behavior," "to fully comprehend the decisions and the choices [he] w[as] making," and "to take another course." In sum, the trial court demonstrated a keen awareness of those mitigating features of youth that have

animated our recent Supreme Court jurisprudence on the topic of juvenile sentencing. *See Miller*, ___ U.S. at ___, 132 S. Ct. at 2464-65 (recognizing "juveniles have diminished culpability and greater prospects for reform" due to "their distinctive (and transitory) mental traits and environmental vulnerabilities").

¶33 Although the Supreme Court has not yet settled all constitutional questions relating to sentencing juveniles for homicides,[7] we find nothing constitutionally suspect about the sentence Paulson received here. We likewise find nothing in the authorities Paulson has cited supporting his conclusion that the "lengthy" sentences prescribed for first-degree murder are unconstitutional because our statute "does not afford Courts any deviation." *Cf. State v. Pierce*, 223 Ariz. 570, ¶ 1, 225 P.3d 1146, 1146 (App. 2010) (upholding natural life sentence for juvenile). We therefore reject his challenge to his sentence under the Eighth Amendment.

Disposition

¶34 For the foregoing reasons, Paulson's conviction and sentence are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.

[7] *Miller*, for example, declined to determine whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." ___ U.S. at ___, 132 S. Ct. at 2469.