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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THE STATE OF ARIZONA, Appellee, v. CARLOS YANEZ PEYRON, Appellant,	)	2 CA-CR 2011-0286 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101809001

Honorable Edgar B. Acuña, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Carlos Peyron was convicted of first-degree felony murder, and two counts each of attempted armed robbery, attempted aggravated robbery, and kidnapping. On appeal, Peyron argues the trial court erred by denying his

motion to suppress his statements as involuntary, by denying his motion for directed verdict on the felony murder charge, and by using an improper reasonable doubt jury instruction. He further contends the state violated his right to equal protection by failing to offer him a plea bargain. Peyron also asserts that his motion for new trial based on each of the asserted trial errors should have been granted. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the conviction. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In May 2010, A.M. and C.M. were working at the M&M Customs shop when Carlos Peyron and three other men entered. One placed a gun at C.M.'s back and told him to hand over the stereo equipment and money. C.M. pushed A.M. into the shop's office and A.M. slammed the office door closed. A.M. retrieved his shotgun from the office, re-entered the store, and fired a round, which distracted the men and allowed C.M. to get his own weapon from his toolbox. One of the four men ran out the back door, then turned around and fired two shots at C.M., who fired back two times. C.M. returned to the store to find A.M. holding Peyron and the other two men at gunpoint.

¶3 Police arrived at the scene almost immediately in response to a 9-1-1 call. When the police arrived, they found one deceased person behind the store and three men being held at gunpoint inside. Peyron had a head injury, which he attributed to being pistol whipped. The police brought Peyron to the hospital for treatment, and after he was released, brought him to the police station for interrogation.

¶4 Peyron was charged with and convicted of first-degree felony murder, and two counts each of attempted armed robbery, attempted aggravated robbery, and kidnapping. The trial court denied Peyron's motion for new trial based on the denial of his motion to suppress, motion to dismiss the felony murder charge, and motion for directed verdict. He was sentenced to life in prison for the murder, with concurrent sentences for each of the other counts, the longest of which was 10.5 years. Peyron appeals from his convictions and sentences.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 13-4033(A)(1)–(3).

Motion to Suppress

¶5 Peyron first argues the trial court erred by denying his motion to suppress the statements he made during his interrogation. He contends the state did not meet its burden of proving his confession was voluntary despite his head injury. In reviewing a trial court's denial of a motion to suppress, we consider "only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009) (internal citations omitted).

[1]Peyron's notice of appeal only appeals from his sentence, and not his underlying conviction. However, the notice of appeal was sufficient to vest jurisdiction in this court to consider any error in the sentences, and in doing so, we may also consider the underlying convictions. *See State v. Smith*, 171 Ariz. 501, 504, 831 P.2d 877, 880 (App. 1992). A technical error in a notice of appeal does not render it invalid absent a demonstration of prejudice, which the state has not asserted. *See id.* We therefore consider the merits of Peyron's arguments against his conviction.

¶6 We will not overturn a trial court's determination of voluntariness absent clear error. *See State v. Graham*, 135 Ariz. 209, 211, 660 P.2d 460, 462 (1983). Statements are presumed to be involuntary and the state has the burden of demonstrating voluntariness by a preponderance of the evidence. *State v. Tapia*, 159 Ariz. 284, 287, 767 P.2d 5, 8 (1988).

¶7 In considering whether a confession is voluntary, a court must determine whether, under the totality of the circumstances, the will of the defendant was overborne. *State v. Hall*, 120 Ariz. 454, 456, 586 P.2d 1266, 1268 (1978). The mental or physical condition of a defendant is relevant to the inquiry but insufficient by itself to render a statement involuntary. *State v. Smith*, 193 Ariz. 452, ¶ 14, 974 P.2d 431, 436 (1999); *but see Mincey v. Arizona*, 437 U.S. 385, 398-402 (1978) (confession involuntary where defendant seriously wounded, evidently confused, still in hospital's intensive care unit and encumbered by medical apparatus, complained of "unbearable" pain, asked for the interrogation to stop, and repeatedly lost consciousness).

¶8 Peyron primarily bases his argument on the contention in his motion to suppress that he had sustained a "severe concussion." But no evidence was introduced at the hearing to support this contention and, therefore, the state was not required to rebut it.

¶9 Additionally, Peyron had been discharged from the hospital before his interrogation. He was not encumbered by medical apparatus, did not complain of pain, and did not request that the interrogation stop. Detective Diaz, the interrogating officer, testified that Peyron "yawned a couple of times" but did not seem to be having a difficult time and did not appear to be medicated. Peyron's answers were coherent, and he was

able to provide his name, address, date of birth, social security number, and home phone number without difficulty. The interrogation lasted for less than ninety minutes. Nothing in the transcript or testimony indicated Peyron's will had been overborne. The trial court considered the full video of the interrogation when determining voluntariness. Under these circumstances, we cannot say that the trial court erred in finding the confession voluntary.

Plea Bargain

¶10 Peyron next argues that the trial court should have granted his motion to dismiss the felony murder charge because the state violated his due process and equal protection rights by failing to offer him a plea bargain. He claims several other offenders whose crimes were equal to or worse than his were offered pleas. "[We] review constitutional issues and purely legal issues de novo." *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶11 There is no constitutional right to plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 560-61 (1977). Prosecutors have discretion in their law enforcement decisions, and "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *See Oyler v. Boles*, 368 U.S. 448, 456 (1962). And a court may not "order the State to offer a plea agreement entirely of the court's concoction" because "[s]uch a holding would surely violate separation of powers." *State v. Donald*, 198 Ariz. 406, ¶ 40, 10 P.3d 1193, 1204 (App. 2000).

¶12 Peyron cites *Espinoza v. Martin*, 182 Ariz. 145, 150, 894 P.2d 688, 693 (1995), as "strongly suggest[ing]" that the Equal Protection Clause applies to plea

bargaining. However, Peyron misreads *Espinoza*; the court there merely recited the defendant's equal protection argument and expressly declined to rule on a constitutional basis. 182 Ariz. at 150, 894 P.2d at 693. Peyron further notes that the United States Supreme Court has determined that the Sixth Amendment right to counsel applies to plea bargaining. *See Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1407-08 (2012); *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1388 (2012). Nevertheless, finding that the prosecutor was required to offer a plea bargain based on the Equal Protection Clause would go far beyond any precedent on which Peyron relies. And Peyron has not shown that his case fits within the bounds of other restrictions on the prosecutor's control of whether to offer a plea bargain, such as animus toward defense counsel. *See Donald*, 198 Ariz. 406, ¶ 40, 10 P.3d at 1204; *State v. Martin*, 139 Ariz. 466, 481, 679 P.2d 489, 504 (1984). Therefore, Peyron has not shown that the Equal Protection Clause applies here.

¶13 Moreover, even if the Equal Protection Clause applied to the state's decision not to plea bargain, not every situation in which the state treats different classes of individuals in different ways constitutes an equal protection violation. *Big D Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 565, 789 P.2d 1061, 1066 (1990). Unless a governmental action limits a fundamental right or affects a suspect class, it is subject only to rational basis review. *Id.* at 566, 1067. There is no right to a plea bargain at all, let alone a fundamental right. *See Weatherford*, 429 U.S. at 560-61. And Peyron has not alleged that he has been treated differently due to membership in a suspect class, only that there was "no valid reason" for the state's decision. *See Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 349, 842 P.2d 1355, 1362 (App. 1992) (suspect class is "one

which has historically suffered from discrimination, such as race, nationality or alienage"). Peyron's claim is therefore subject only to rational basis review. *See Big D Constr. Corp.*, 163 Ariz. at 566, 789 P.2d at 1067.

¶14 Under a rational basis review, the burden is on the challenger of an official action to demonstrate that no conceivable basis exists for the act. *Martin v. Reinstein*, 195 Ariz. 293, 309-10, 987 P.2d 779, 795-96 (App. 1999). As the state points out, the offenders who purportedly committed worse crimes than Peyron and yet were offered plea bargains may have had undisclosed extenuating circumstances, might have had circumstances that would make conviction difficult, or might have been offered those pleas in exchange for testimony against other offenders. Any of these would constitute a "conceivable basis" for offering a plea to the other offenders, but not to Peyron. *See Martin*, 195 Ariz. at 309-10, 987 P.2d at 795-96. And Peyron did not show the list of cases he provided in support of this argument is exhaustive or even representative of the state's plea bargaining practice.

¶15 Additionally, the state asserts that "all the facts that are known about Peyron's case" including the "circumstance[] of the murder[]" contributed to its refusal to offer him a plea. This constitutes a valid and conceivable basis for the state's decision here. Whether that was a wise or prudent exercise of executive discretion is not for this court to decide. *See Harrison v. Laveen*, 67 Ariz. 337, 344, 196 P.2d 456, 460 (1948) ("[D]etermining what is 'good public policy' is for the executive and legislative departments and . . . the courts must base their decisions on the law as it appears in the constitution and statutes."). Accordingly, Peyron has failed to assert a valid equal

protection claim, and the trial court did not err in denying Peyron's motion to dismiss based on a violation of Peyron's right to equal protection.

¶16 Peyron further argues that the state's failure to offer him a plea denied him due process and is "shocking to the universal sense of justice" under *Oshrin v. Coulter*, 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984). But that case does not address plea bargains, and Peyron cites no authority beyond this statement, nor explains why it applies to his case. *Id.* Peyron has therefore failed to assert a valid due process claim, and the trial court did not err in denying Peyron's motion to dismiss based on a violation of Peyron's right to due process.

Identity of Felony Murder Victim

¶17 Peyron argues the court erred by denying his motion under Rule 20, Ariz. R. Crim. P., because other than inadmissible hearsay and Peyron's own statements, the state presented no evidence that the victim named in the indictment, N.L., was actually deceased. The state responds that the identity of the victim is not an element of first-degree murder as defined by A.R.S. § 13-1105(A)(2) and asserts that they need only prove "that the man identified as the homicide victim was the same man shot to death." Rule 20 allows for a defense verdict "if there is no substantial evidence to warrant a conviction." We review the denial of a Rule 20 motion de novo, viewing the evidence in the light most favorable to sustaining the verdict. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). We will overturn a conviction only if no rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Id.* ¶ 16.

Elements of Felony Murder

¶18 Whether an offense includes a particular element is a question of law, which we review de novo. *State v. Olquin*, 216 Ariz. 250, ¶ 19, 165 P.3d 228, 232 (App. 2007). Even if not explicit in the statute, the identity of a victim is an essential element of the offense when the defining statute "provides that the prohibited conduct 'be committed *against* another person.'" *Id.* ¶ 21, *quoting State v. Tschilar*, 200 Ariz. 427, ¶ 34, 27 P.3d 331, 339 (App. 2001). Section 13-1105 defines felony murder as committing a predicate felony and also "caus[ing] the death of any person." The prohibited conduct must therefore be committed against another person, and the identity of the victim is an element of felony murder. Although this court held in *State v. Villegas-Rojas*, 644 Ariz. Adv. Rep. 7, ¶ 9 (Ct. App. Sept. 28, 2012), that the name of the victim, as opposed to a factual identification, is not required in every offense requiring a victim, in murder cases, "the state must prove that the victim named in the indictment is actually dead." *State v. Rhymes*, 129 Ariz. 56, 60, 628 P.2d 939, 943 (1981). The state named N.L. in its indictment. Accordingly, here the state was required to prove N.L. was in fact deceased.

Corpus Delicti

¶19 The corpus delicti rule requires that, before a defendant's statements may be used as evidence against him, the state must provide independent evidence "that a crime was committed and that someone was responsible for the offense." *State v. Sarullo*, 219 Ariz. 431, ¶ 7, 199 P.3d 686, 689 (App. 2008). Sufficient evidence apart from the defendant's confession must exist to create a "reasonable inference" that the

corpus delicti has been met. *State v. Gerlaugh*, 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982). The purpose of the rule is to prevent convictions based on untrue confessions. *Id*. We review de novo whether the corpus delicti has been satisfied. *See State v. Flores*, 202 Ariz. 221, ¶ 4, 42 P.3d 1186, 1187 (App. 2002).

¶20 It was undisputed that Peyron was one of four would-be robbers; that after A.M. and C.M. obtained guns, one of the robbers had tried to run away; and that C.M. shot that robber, resulting in the robber's death. The evidence established that the result had occurred and someone was criminally responsible for it. No possibility existed that Peyron would be convicted based on an untrue confession.

¶21 Peyron correctly claims that the identity of the victim in a homicide case is an element of the corpus delicti. *See State v. Thorp*, 70 Ariz. 80, 82-83, 216 P.2d 415, 417 (1950), *overruled on other grounds by State v. Hernandez*, 83 Ariz. 279, 282, 320 P.2d 467, 469 (1958). The state must therefore present evidence, other than Peyron's statements, that the deceased person was the person named in the indictment. *Id.*

¶22 At trial, C.M. looked at a photographic collage of the homicide victim and identified the deceased as N.L. C.M. then testified that he did not know N.L. prior to the encounter. Peyron did not object to this testimony on any ground, including hearsay. Even if this testimony was hearsay, when admitted without objection, hearsay becomes competent evidence, although not conclusive proof, of what it asserts. *See State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982). Nevertheless, we will reverse if the admission of the unobjected-to hearsay constitutes fundamental error. *Id.* Although Peyron mentions C.M.'s testimony in the factual recitation in his brief, he did not include

it in his analysis of the hearsay issue or argue that fundamental error had occurred. He has therefore waived this issue, and C.M.'s testimony may serve as a basis for satisfying the corpus delicti. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (not arguing fundamental error on appeal waives argument). Furthermore, we see no fundamental error. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).

¶23 C.M.'s testimony was sufficient to raise a "reasonable inference" that the victim was indeed N.L. and therefore satisfied the corpus delicti rule. *See Gerlaugh*, 134 Ariz. at 170, 654 P.2d at 806. Because the corpus delicti was established, Peyron's statements may be used to prove the identity of N.L. *See State v. Morris*, 215 Ariz. 324, ¶ 36, 160 P.3d 203, 212 (2007).

¶24 During Peyron's interrogation, a detective informed Peyron that "N." had died. The detective asked Peyron if the two were close. Peyron responded "[H]e was like my little brother, you know." The detective commented that the death would be hard on N.'s family, and Peyron replied "Man, his brother's in the pen, too. I'm going to have to see his brother." When the detective asked Peyron, "[D]id you plan for [N.] to get shot?" he responded "I think he ran out. . . . He was running. You guys find him dead, or what?" The detective replied "I think they found him in pretty bad shape. And they just couldn't do enough to help him." Peyron said "F___, man, Saturday his sister graduated, too." The detective suggested that N. was doing the robbery to help his family, and Peyron responded "That's the reason he was doing this for free."

¶25 Peyron did not express surprise or confusion as to why Diaz mentioned the victim's first name. Rather, Peyron's statements establish that a man named N. was at the scene of the crime that night, was running away, and was shot. Peyron's comments concerning their close relationship, N.'s brother, and N.'s sister make it clear that there was no confusion about which person named N. was being referred to, even though the detective did not use N.'s last name. Between C.M.'s testimony and Peyron's own statements, we cannot say that no rational trier of fact could have found beyond a reasonable doubt that the deceased person was N.L. *See West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Therefore the trial court did not err in denying Peyron's motion for acquittal pursuant to Rule 20, Ariz. R. Crim. P.

Use of *Portillo* Jury Instructions

¶26 Peyron next argues that the court erred when, over defense counsel's objection, it used the jury instruction concerning reasonable doubt mandated by our supreme court in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). We review de novo whether a jury instruction accurately states the law. *State v. Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d 786, 787 (App. 2008).

¶27 Our supreme court has rejected challenges to the instruction mandated by *Portillo* and repeatedly has expressed its preference for that instruction. *See, e.g.*, *State v. Dann*, 220 Ariz. 351, ¶ 65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *see also City of Phx. v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (court of appeals "bound by decisions of the Arizona Supreme Court

and ha[s] no authority to overrule, modify, or disregard them"). Accordingly, we reject Peyron's challenge to the use of the jury instruction.

Motion for a New Trial

¶28 Peyron's motion for a new trial was based on the trial court's denial of the motion to suppress his statements, denial of the motion to dismiss based on equal protection and due process, and denial of his Rule 20 motion. Because the court did not err in making these rulings, we affirm the trial court's denial of the motion for a new trial.

Conclusion

¶29 For the foregoing reasons, we affirm Peyron's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge