

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GLEN CUSFORD FRANCIS,
Appellant.

No. 2 CA-CR 2013-0074
Filed March 19, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20091310001

The Honorable Christopher C. Browning, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Judge Miller and Judge Brammer¹ concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, appellant Glen Francis was convicted of first-degree murder. On appeal, he argues the trial court erred in refusing to instruct the jury on second-degree murder and in denying his motion to dismiss the charge for preindictment delay. Because we conclude he was not entitled to a second-degree murder instruction and the court did not err in denying his motion to dismiss, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). The victim, R.K., was the leader of a Tucson mosque and subject to numerous death threats due to his controversial views on the Koran and his claim that he was a messenger from God. On January 31, 1990, the mosque's secretary arrived sometime before sunrise and discovered R.K.'s body on the floor of the mosque's kitchen. A chemical solvent had been spread over the kitchen floor and the stove's gas burners had been turned on. The burners were not lit, however, because the pilot light had not ignited. It was later determined that R.K. had died at around one in the morning and had sustained twenty-nine sharp force wounds and eighteen blunt force wounds.

¶3 Tucson police officers learned that Francis, using the alias Ben Phillips, began attending R.K.'s mosque three to four

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

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weeks before R.K. was murdered. When officers attempted to locate Francis in Tucson, they discovered he had left town but believed he may have gone to Dallas, Texas. The Tucson Police Department contacted the Federal Bureau of Investigation (“FBI”) and requested help in finding Francis. The FBI was unable to locate him at the time, but in 1994 an FBI agent learned that Francis, using the alias Joseph Wall, had returned to Dallas. At that point they interviewed him and collected fingerprints and hair samples.

¶4 In 2006, the Tucson police began a “cold-case” unit and reopened the investigation into R.K.’s homicide. Several of the DNA² samples collected at the original crime scene were sent to be re-analyzed. Forensic scientists determined one of the samples did not come from R.K., but instead matched Francis’s DNA. Police officers then re-examined the jacket R.K. had been wearing when he was killed and discovered an additional blood stain that had not been analyzed previously also matched Francis’s DNA.

¶5 In 2009, Francis was charged with first-degree murder of R.K. Over his objection, the trial court did not instruct the jury on second-degree murder and he ultimately was convicted of first-degree murder and sentenced to a life term in prison, with the possibility of parole after twenty-five years. We have jurisdiction over Francis’s appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Second-Degree Murder Instruction

¶6 Francis first argues the trial court erred in refusing to instruct the jury on the lesser-included offense of second-degree murder. We review a trial court’s decision to give a particular jury instruction for an abuse of discretion. *State v. Brown*, 233 Ariz. 153, ¶ 24, 310 P.3d 29, 37 (App. 2013). A court abuses its discretion when it commits an error of law. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006). We defer to the trial court’s assessment of the evidence. *Id.* ¶ 23.

²Deoxyribonucleic acid.

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¶7 “Second-degree murder is a lesser-included offense of premeditated first-degree murder, the difference between the two being premeditation.” *State v. Sprang*, 227 Ariz. 10, ¶ 6, 251 P.3d 389, 391 (App. 2011). “To support an instruction for second degree murder, the evidence reasonably construed should tend to show lack of premeditation.” *State v. Moreno*, 128 Ariz. 257, 261, 625 P.2d 320, 324 (1981). Pursuant to A.R.S. § 13-1101(1), “[p]remeditation” means that 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.” An act performed in immediate response to a “sudden quarrel or heat of passion” is not premeditated. *Id.*

¶8 A defendant is entitled to an instruction on a lesser-included offense if sufficient evidence supports giving the instruction. *Wall*, 212 Ariz. 1, ¶ 17, 126 P.3d at 151. Evidence is sufficient if “the jury could rationally fail to find the distinguishing element of the greater offense.” *State v. Bearup*, 221 Ariz. 163, ¶ 23, 211 P.3d 684, 689 (2009), quoting *State v. Detrich*, 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (1994). In other words, “[t]he 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.” *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151. “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.” *Id.*, quoting *State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984). Rather, “the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense.” *Id.*

¶9 If the defendant employs an all or nothing defense such as mistaken identity, he is not precluded from receiving a lesser-included instruction. *Id.* ¶ 25. But, in such a case, the defendant generally “produces evidence that he simply did not commit the offense and the state produces evidence that he committed the offense as charged,” leaving “little evidence on the record to support an instruction on the lesser included offenses.” *Caldera*, 141 Ariz. at 637, 688 P.2d at 645. The record, consequently, “is such that

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defendant is either guilty of the crime charged or not guilty." *State v. Salazar*, 173 Ariz. 399, 408, 844 P.2d 566, 575 (1992). In such cases, "the trial court should refuse a lesser included instruction" because it is not supported by any evidence. *Id.*

¶10 In *State v. Van Adams*, the defendant, like Francis, was convicted of first-degree murder and argued the trial court had erred in failing to instruct the jury on second-degree murder. 194 Ariz. 408, ¶¶ 10-11, 984 P.2d 16, 21 (1999). The supreme court determined that because the defendant had denied all involvement in the murder, presented no evidence the murder was not premeditated or he "innocently or mistakenly committed the acts," and the evidence supported the conclusion the defendant "had sufficient opportunity to reflect upon his actions and could have ceased his attack at any time during the struggle," thus satisfying the element of premeditation, a second-degree murder instruction was not warranted. *Id.* ¶¶ 12, 14.

¶11 At trial, Francis's defense was that the scientific evidence did not link him to the crime scene and that "everybody in the world wanted to kill" R.K. He did not present an alternative theory that he killed R.K. but lacked premeditation, or that he had "innocently or mistakenly committed the acts." *See id.* ¶ 14. The evidence presented at trial showed that Francis moved to Tucson using an alias shortly before the murder, began attending the mosque under the false pretense that he knew nothing about the religion and wanted to learn, would walk around the mosque examining the kitchen and R.K.'s office, both private areas, during social gatherings, and left Tucson immediately after the murder. The evidence further showed that on the night of the murder, Francis somehow had entered the locked mosque at a time when R.K. was known to be alone, came prepared with a chemical solvent apparently to attempt to destroy evidence, struggled with R.K., resulting in several defensive wounds to R.K., and ultimately caused R.K. to sustain nearly four dozen sharp and blunt force wounds to his head, neck, torso, and back, some with enough force to break his bones. Francis points to no evidence from which a jury could conclude he may have been present, but did not possess the requisite intent for first-degree murder when he killed the victim.

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¶12 We agree with the trial court's characterization of the record as lacking any "evidence whatsoever . . . to sustain a finding that this homicide was anything other than premeditated." *See Wall*, 212 Ariz. 1, ¶ 23, 126 P.3d at 152. Had the jury accepted Francis's mistaken identity theory of the case, it should have acquitted him, not convicted of second-degree murder. *See Salazar*, 173 Ariz. at 408, 844 P.2d at 575. Because a reasonable construction of the evidence does not tend to show a lack of premeditation, the court did not abuse its discretion in refusing to give the second-degree murder instruction. *See Moreno*, 128 Ariz. at 261, 625 P.2d at 324; *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151.

¶13 Francis argues, however, that "a jury could well find that a large number of stab wounds committed in a short period of time did not show premeditation." He relies on several cases in which the jury found the defendant guilty of second-degree murder despite the fact that the victim had sustained multiple stab wounds. *See State v. Johnson*, 229 Ariz. 475, ¶ 2, 276 P.3d 544, 546 (App. 2012) (facts of crime not recited because re-sentencing only issue; large number of stab wounds supported jury's finding murder "especially cruel"); *State v. Barraza*, 209 Ariz. 441, ¶¶ 1-3, 104 P.3d 172, 174 (App. 2005) (defendant claimed victim tried to sexually assault her); *State v. Alvarado*, 158 Ariz. 89, 90, 761 P.2d 163, 164 (App. 1988) (defendant convicted of *attempted* second-degree murder). But these cases are not directly on point and do not require us to conclude here that the trial court erred by finding, based on all of the evidence presented, no rational jury could fail to find premeditation. *See Wall*, 212 Ariz. 1, n.2, 126 P.3d at 151 n.2 ("The court, however, must consider all the evidence in the record, not just that presented by the defense, when determining whether to give a lesser-included offense instruction.").

¶14 Francis also appears to contend that if the stab wounds were inflicted over a short period of time, he had no time for "actual reflection" during the murder and, thus, did not premeditate the murder. Premeditation, however, is not required to occur during the actual killing, but can occur at any point preceding it. § 13-1101(1); *see also State v. Thompson*, 204 Ariz. 471, ¶ 32, 65 P.3d 420, 428-29 (2003) (approving jury instruction stating reflection occurs after forming intent to kill and before killing). Moreover, even if we

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only considered the period of time over which the wounds were inflicted as relevant, that period of time alone was enough to show premeditation because Francis “could have ceased his attack at any time during the struggle” with R.K. *See Van Adams*, 194 Ariz. 408, ¶ 12, 984 P.2d at 22. This argument consequently fails.

¶15 Francis also argues evidence contradicted the state’s theory that he came to Tucson with the intent to murder R.K. Francis contends the fact he obtained an Arizona driver’s license, subscribed to cable television service, attended the mosque and prayed with R.K., and left behind evidence that later would be used to identify him demonstrates he did not arrive in Tucson intending to murder R.K. But the fact Francis wanted to fit in with the mosque and did not know precisely when he would kill R.K. does not demonstrate that he did not premeditate the killing. And the evidence also showed Francis lied to mosque members about his knowledge of Islam, arranged to have his cable service terminated the same day of the murder, and obtained the driver’s license under a false name. Thus, when viewed together with all of the evidence presented to the jury, the evidence Francis points to does not establish he had lacked premeditation. *See Wall*, 212 Ariz. 1, n.2, 126 P.3d at 151 n.2. “[W]e recognize that a jury could disregard the fact the evidence only supported first-degree murder and decide to convict of second-degree murder,” but that possibility, without more, does not require us to find the trial court erred as a matter of law in refusing to give the jury the instruction on the lesser-included offense of second-degree murder. *See Sprang*, 227 Ariz. 10, ¶ 13, 251 P.3d at 393; *see also Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151.

¶16 Francis additionally contends the jury could have been “skeptical about the accuracy” of a former FBI agent’s testimony that Francis had told him “if [R.K.] proved parts of the Koran wrong, then as a Muslim, he deserved what he got.” The jury, of course, was free to judge the credibility of the witness and weigh the testimony accordingly. *State v. Bustamante*, 229 Ariz. 256, ¶ 5, 274 P.3d 526, 528 (App. 2012). And Francis has not shown how the jurors’ skepticism of the FBI agent’s testimony would have compelled them to believe R.K.’s killing had not been premeditated in light of all the other evidence presented at trial. *Wall*, 212 Ariz. 1,

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¶ 18, n.2, 126 P.3d at 151 & n.2. Speculation that the jury would disbelieve parts of the state's case is not a sufficient reason for this court to find the trial court abused its discretion. *Id.* ¶ 18. Accordingly, we reject his argument.

Preindictment Delay

¶17 Francis additionally argues the trial court erred by denying his motion to dismiss the charge due to preindictment delay based on the twelve years that had elapsed between the time the state obtained his fingerprint and hair samples in 1994, and when it began investigating the case again using those samples in 2006. We review a court's ruling on a motion to dismiss for an abuse of discretion. *State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. 1997).

¶18 "To establish that pre-indictment delay has denied a defendant due process, there must be a showing that the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, *and* that the defendant has actually been prejudiced by the delay." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988). The record contains no evidence that the state intentionally delayed indicting Francis to obtain a tactical advantage and Francis has not alleged the delay was intentional. Rather, Francis contends the state was negligent in waiting until 2006 to compare Francis's hair samples and fingerprints obtained in 1994 to evidence obtained from the scene of the crime. But even assuming the state had been negligent in this regard, it does not demonstrate the delay had been intentional and designed to "gain a tactical advantage" over Francis or harass him. Because Francis has not demonstrated this required element of the test for determining whether a defendant may be entitled to relief for preindictment delay, we necessarily reject his claim. *See id.*

¶19 Francis argues, however, that he is not required to demonstrate the state intentionally delayed the prosecution to gain a tactical advantage. He contends this requirement is the result of our supreme court's misinterpretation of *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovesco*, 431 U.S. 783 (1977). Francis asks us to apply instead a balancing test adopted by some federal

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circuit courts and other state courts that places the initial burden on the defendant to demonstrate actual prejudice, after which “the court must balance the defendant’s prejudice against the government’s justification for delay.” *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *see also, e.g.* *United States v. Bartlett*, 794 F.2d 1285, 1289 (8th Cir. 1986) (same); *State v. Higa*, 74 P.3d 6, 9-10 (Haw. 2003) (same); *State v. Brazell*, 480 S.E.2d 64, 68-69 (S.C. 1997) (same); *State ex rel. Knotts v. Facemire*, 678 S.E.2d 847, 856 (W. Va. 2009) (same). We, however, are “bound by decisions of the Arizona Supreme Court and ha[ve] no authority to overturn or refuse to follow its decisions.” *State v. Long*, 207 Ariz. 140, ¶ 23, 83 P.3d 618, 623 (App. 2004). Accordingly, any changes to the test for determining whether a defendant is entitled to dismissal of charges because of preindictment delay “would be in the exclusive purview of [the supreme court].” *State v. McPherson*, 228 Ariz. 557, ¶ 16, 269 P.3d 1181, 1187 (App. 2012).

¶20 Moreover, under either test, Francis was required to demonstrate he actually was prejudiced by the delay, which he has failed to do. “To make a showing of actual and substantial prejudice, ‘it is not enough to show the mere passage of time nor to offer some suggestion of speculative harm; rather the defendant must present concrete evidence showing material harm.’” *State v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (App. 1996), quoting *United States v. Anagnostou*, 974 F.2d 939, 942 (7th Cir. 1992), abrogated on other grounds as recognized by *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994).

¶21 Francis argues his ability to mount a defense was prejudiced by the passage of time because the crime scene could no longer be analyzed, potential witnesses may have moved, witnesses’ memories had faded, and he was not on notice to preserve evidence showing his whereabouts at the time of the murder. Francis, however, has not specified what evidence he could have gathered at the original crime scene that was not already in the law enforcement record, which, if any, witnesses were no longer available, what testimony he believed those witnesses would provide or what documents he would have preserved. He thus has not presented concrete evidence that he was actually and substantially prejudiced

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by the delay. *See Broughton*, 156 Ariz. at 397, 752 P.2d at 486. Based on the record before us, we cannot say the trial court erred by refusing Francis's request to dismiss the charge.

Criminal Restitution Order

¶22 Although neither party has raised this issue, we have discovered that in its sentencing minute entry, the trial court reduced the "fines, fees and assessments" it had imposed "to a Criminal Restitution Order [CRO]." But as this court repeatedly has determined, based on A.R.S. § 13-805(C),³ "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), quoting *State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Therefore, because this portion of the sentencing minute entry is not authorized by statute, the CRO must be vacated.

Disposition

¶23 For the foregoing reasons, we vacate the CRO but otherwise affirm Francis's conviction and sentence.

³Section 13-805(C) has since been renumbered to § 13-805(E). *See* 2012 Ariz. Sess. Laws, ch. 269, § 1.