IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAREN DOMINIC ENCINAS-PABLO,
Appellant.

No. 2 CA-CR 2019-0188
Filed August 11, 2022

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20174932001
The Honorable Michael J. Butler, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Jacob R. Lines, Assistant Attorney General, Tucson
Counsel for Appellee

Megan Page, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Vice Chief Judge Staring and Judge Espinosa concurred.

E P P I C H, Presiding Judge:

¶1 Daren Encinas-Pablo appeals his convictions and sentences for one count of first-degree murder and two counts each of armed robbery, aggravated robbery, and aggravated assault. He argues the trial court abused its discretion by ruling that he was "not constitutionally entitled to be competent" for the purpose of rejecting a plea agreement. He also argues that a mandatory life sentence with the possibility of parole after twenty-five years was unconstitutionally disproportionate as applied to him, a juvenile at the time of the offense. For the following reasons, we affirm Encinas-Pablo's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Encinas-Pablo. *See State v. Gill*, 248 Ariz. 274, ¶ 2 (App. 2020). In October 2017, Encinas-Pablo and an accomplice, Joseph S., approached N.E. and his fiancé, M.B., and asked to buy methamphetamine. When N.E. agreed to sell them $10 worth of drugs, Encinas-Pablo produced a gun, and he and Joseph S. robbed the couple. They handed over jewelry, a bag of drugs, and five dollars. M.B. then got on her bike to leave, turned around to see if N.E. was following her, but instead saw the flash of gunfire. N.E. was shot four times and died later that night from his injuries.

¶3 Shortly after the shooting, Encinas-Pablo was found nearby with a gunshot wound to his abdomen and taken to the hospital. Law enforcement found N.E.'s jewelry in Encinas-Pablo's clothes, which had been cut off and left behind by paramedics. Detectives interviewed Encinas-Pablo at the hospital, where he eventually admitted to participating in a robbery.

¶4 After a five-day jury trial in which the state argued Encinas-Pablo was guilty of first-degree murder on the theory of felony murder, he was convicted as described above. He was sentenced to life with the possibility of parole after twenty-five years for first-degree murder, to be

served concurrently to the sentences for the other six counts.[1] This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).[2]

Discussion

Competency to Reject a Plea Bargain

¶5 Encinas-Pablo first contends the trial court erred by stating he was not entitled to be found competent before rejecting a plea offer. He also argues the standard for competency should be applied differently for purposes of considering a plea offer, and alternatively, that Arizona should adopt a heightened competency standard for pleading defendants. These are questions of law that we review de novo. *See State v. Duffy*, 251 Ariz. 140, ¶ 10 (2021).

¶6 Before trial, the state offered Encinas-Pablo a plea to one count of second-degree murder, with a sentencing range of ten to twenty-five years. Encinas-Pablo rejected the offer during a *Donald* hearing, and the trial court inquired if it could "presume he's competent," and whether there was "an issue about his ability to reject the plea," observing "this is the most important decision he's ever going to make in this whole process."[3] Defense counsel stated that Encinas-Pablo was "neurologically incapable of thinking beyond the moment because of a neurocognitive disorder," but that "doesn't mean he's incompetent." Given counsel's comment, the court indicated there should be an evaluation of Encinas-

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[1]The sentences for those six counts total twenty-one years.

[2]Encinas-Pablo also appeals from the trial court's denial of his Rule 24, Ariz. R. Crim. P., motions to modify or vacate his sentences, but the court's denial raised no new issue not present in the original sentencing order, nor did it affect that order since the sentences remained unmodified. The court's post-judgment order was therefore not appealable. *See State v. Crain*, ___ Ariz. ___, ¶ 7, 512 P.3d 97, 99 (App. 2022).

[3]A *Donald* hearing is a pre-trial hearing in which any plea offer and the consequences of conviction are specifically discussed, and a record of a defendant's rejection of that offer is created, to guard against "'late, frivolous, or fabricated claims' of ineffective assistance of counsel 'after a trial leading to conviction with resulting harsh consequences.'" *State v. Mendoza*, 248 Ariz. 6, ¶ 18 (App. 2019) (quoting *Missouri v. Frye*, 566 U.S. 134, 146 (2012)); *see State v. Donald*, 198 Ariz. 406, ¶ 14 (App. 2000).

Pablo's competency before he accepted or rejected the plea, and declined to accept Encinas-Pablo's rejection of the offer at that time. The court ordered a Rule 11, Ariz. R. Crim. P., preliminary evaluation.

¶7 At the Rule 11 competency hearing, Encinas-Pablo presented expert testimony that he did "not have the capacity to competently accept or reject a plea due to deficits in abstract reasoning," without addressing his competency to stand trial. The trial court also considered two court-ordered expert reports finding Encinas-Pablo competent and testimony by a court-appointed expert that Encinas-Pablo displayed a "factual and a rational understanding of the legal proceedings in general," and "of the advantages and disadvantages of accepting a plea versus going to trial." The expert opined Encinas-Pablo believed the plea bargain was "not fair" given that it could result in a sentence of twenty-four years of imprisonment, not dissimilar from what he might receive if he was found guilty at trial.

¶8 The trial court observed, Encinas-Pablo "clearly understands the difference between what he's being offered and what he could face" and "understand[s] it in the context of his own plea." It also told Encinas-Pablo that he had raised an issue "for which there is no legal support." A few days later, the court held another *Donald* hearing, noting that it had reviewed the cases cited and they did not include a "case that says if you have a Constitutional right to be competent to reject a plea." It further explained that Encinas-Pablo would not be waiving any rights, but that he had been "adequately advised of the plea offer and knowingly, intelligently and voluntarily reject[ed] the plea offer."

¶9 At a subsequent hearing, the trial court asked Encinas-Pablo to clarify his position as to competency to stand trial. He stipulated that he was competent to stand trial, but re-stated his position that "he was not competent to reject a plea." The court then found that Encinas-Pablo "under[stood] the nature of the proceedings and [was] able to assist in his own defense," and was "competent for trial."

¶10 On appeal, Encinas-Pablo argues the trial court erred in ruling he "was not constitutionally entitled to be competent . . . to accept or reject a plea bargain," and his conviction should be reversed or the matter remanded to the court for additional fact-finding as to his competency. Despite stipulating to his competence to stand trial, he contends he was not competent to reject the plea bargain offered by the state because his "particular incompetencies affected decision making involved in entering a guilty plea but not . . . in assisting counsel at trial." He suggests that

although there is one competency standard, it may be applied differently to a defendant's competency to accept or reject a plea as compared to his competency to stand trial. Alternatively, he advocates Arizona should, pursuant to article II, § 4 of the Arizona Constitution, adopt a different competency standard for a defendant's decision to either accept or reject a plea, as "there is no principled reason for having an identical standard for competency to stand trial and competency to enter a plea." The state counters that the court did not err because it found Encinas-Pablo competent to stand trial and the same standard applies to competency to reject a plea agreement.

¶11 When a defendant's competency is at-issue, a trial court must conduct a two-stage inquiry before permitting him to enter a guilty plea, because pleading guilty involves the waiver of important federal constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *See Godinez v. Moran*, 509 U.S. 389, 400-01 (1993) (two-step inquiry); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (waiver of constitutional rights); *State v. Djerf*, 191 Ariz. 583, ¶¶ 34, 35 (1998) (applying *Boykin* to defendant accepting a plea agreement), *abrogated on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004). Similarly, a defendant who pleads not guilty and stands trial is likely to be confronted with "choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty." *Godinez*, 509 U.S. at 398-99.

¶12 In applying this test, a trial court first must determine whether the defendant is competent to stand trial by asking if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[4] *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see Godinez*, 509 U.S. at 398-99 (*Dusky* standard applies equally to those pleading guilty and not guilty). After

[4]Although our supreme court previously concluded that "competency to stand trial is a lower standard than competency to enter a plea," *State v. Bishop*, 162 Ariz. 103, 105, 107 (1989), it did so primarily in reliance on *Sieling v. Eyman*, 478 F.2d 211, 214-15 (9th Cir. 1973), which has since been explicitly rejected by the United States Supreme Court, *Godinez*, 509 U.S. at 397. Our supreme court subsequently repudiated *Sieling*'s higher standard of competency. *State v. Muhammad*, No. CR-21-0073-PR, ¶ 37, 2022 WL 2762125 (Ariz. July 15, 2022).

determining a defendant is competent, the second stage of the inquiry requires the court to ascertain whether the waiver of constitutional rights implicated by a plea of guilty is both knowing and voluntary. *Godinez*, 509 U.S. at 400-01; *see State v. Rose*, 231 Ariz. 500, ¶¶ 26, 31, 36 (2013) (where competency at-issue, entry of guilty plea requires competency finding and knowing, voluntary waiver of rights). "The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez*, 509 U.S. at 400-01 & n.12 ("In this sense there *is* a 'heightened' standard for pleading guilty . . . but it is not a heightened standard of *competence*."). A defendant must be competent to make a knowing and intelligent waiver of constitutional rights. *State v. Cornell*, 179 Ariz. 314, 322 (1994).

¶13 Here, although the trial court stated that under the case law it had been presented Encinas-Pablo was not entitled to be found competent to reject a plea offer, it nonetheless found him competent to stand trial. The record indicates the court declined to allow Encinas-Pablo to reject the plea offer during the initial *Donald* hearing, ordered two Rule 11 evaluations, and held a competency hearing. During that hearing it considered reports from three experts and heard and considered testimony from two of those experts. Although Encinas-Pablo's expert opined that he lacked the ability to engage in abstract reasoning, another expert testified Encinas-Pablo "display[ed] a factual and rational understanding of the advantages and disadvantages of accepting a plea versus going to trial." The court subsequently found his rejection of the plea offer to be knowing, intelligent, and voluntary. Implicit in the court's ruling is the additional finding that he was competent, because were Encinas-Pablo incompetent to consider his plea, he could not have knowingly and intelligently rejected it. *See State v. Williams*, 220 Ariz. 331, ¶ 9 (App. 2008) (we presume trial court knows the law and applies it correctly); *cf. Cornell*, 179 Ariz. at 322 (knowing and intelligent waiver of rights requires competence).

¶14 Significantly, just four days after the trial court made *Donald* findings as to his rejection of the plea, Encinas-Pablo stipulated to his competence to stand trial in reliance on the same reports considered by the trial court during the Rule 11 competency hearing regarding his competence to enter a plea. He was therefore competent to reject the plea offer, given that the standard for competency to consider a plea is the same standard for competence to stand trial. *See Godinez*, 509 U.S. at 398-99; *State v. Muhammad*, No. CR-21-0073-PR, ¶ 37, 2022 WL 2762125 (Ariz. July 15, 2022). Although Encinas-Pablo argues that applying the *Dusky* standard

might result in different outcomes for different stages of criminal proceedings given the mental capacities implicated, he overlooks *Godinez*'s reasoning that all criminal defendants are called upon to make profound and consequential decisions, whether pleading guilty or proceeding to trial. *See* 509 U.S. at 398-99. Assuming unchanged evidence of competency between proceedings, the competency standard should not result in different outcomes as applied to entering a guilty plea versus standing trial, because both require a defendant to make reasoned decisions in consultation with counsel. *See id.*

¶15 To the extent Encinas-Pablo argues Arizona should adopt a different competency standard for a defendant's decision to either accept or reject a plea under our state constitution, we decline to do so. He relies on *State v. Ibeabuchi*, in which we held a trial court may deny a criminal defendant the right to represent himself if he is mentally competent to stand trial but not mentally competent to conduct a trial or hearing himself. 248 Ariz. 412, ¶ 19 (App. 2020). However, the issue of denying "gray-area defendants" the right to self-representation does not focus on a defendant's competence to waive the right to trial but rather the impact of waiver on the court's ability to conduct a fair trial. *Indiana v. Edwards*, 554 U.S. 164, 173-74 & 176-77 (2008) (lack of capacity in self-representation is an "exceptional context" that "undercuts" providing a fair trial). Here, it is the decision, made in consultation with counsel, whether to waive rights by accepting an offered plea that is at-issue. In *State v. Muhammad*, our supreme court expressly repudiated a higher standard of competency for pleading, adopting *Godinez*'s conclusion. 2022 WL 2762125, ¶ 37. In determining Arizona law does not require a heightened competency standard for jury-trial waiver, the court noted that a heightened standard would impose "additional burdens on defendants with mental illnesses who would otherwise be competent to stand trial and who wish to exercise their constitutional right to proceed by bench trial." *Id.* ¶¶ 1, 35. Similarly, an otherwise competent defendant wishing to plead guilty subject to a heightened competency standard might be forced to proceed to trial, rather than accept a plea agreement. We find the reasoning of *Muhammad* compelling, even though the issue there was competency to waive a jury trial. Accordingly, Encinas-Pablo is not entitled to relief.

Cruel and Unusual Punishment

¶16 Encinas-Pablo next argues, as he did below, that his sentence of life with the possibility of parole after twenty-five years is cruel and unusual punishment in violation of his constitutional rights. *See* U.S. Const.

amends. VIII, XIV; Ariz. Const. art. II, § 15.[5] We review the constitutionality of a sentence de novo. *State v. Florez*, 241 Ariz. 121, ¶ 21 (App. 2016).

¶17 Encinas-Pablo claims his sentence is grossly disproportionate to N.E.'s murder, because "evidence was unsettled" as to whether he or Joseph S. had shot N.E., Joseph S. received a probation-only sentence, and Encinas-Pablo was only sixteen-years old at the time of the offense with "well-documented cognitive deficits, including his low IQ." He also contends that imposing mandatory sentences on juveniles who are automatically charged as adults violates the federal and state constitutions if it results in a disproportionate sentence. In response, the state argues that comparing Encinas-Pablo's offense of first-degree murder, the most serious crime in Arizona, with his sentence does not result in a threshold showing of gross disproportionality—which should conclude this court's inquiry. We agree.

¶18 An excessively long prison sentence can implicate the federal and Arizona constitutional prohibitions against cruel and unusual punishment. *See id.* ¶ 22; *State v. Davis*, 206 Ariz. 377, ¶ 13 (2003). In non-capital cases like this, we review Eighth Amendment challenges by first determining "if there is a threshold showing of gross disproportionality by comparing 'the gravity of the offense [and] the harshness of the penalty.'" *State v. Berger*, 212 Ariz. 473, ¶¶ 10-12 (2006) (alteration in *Berger*) (quoting *Ewing v. California*, 538 U.S. 11, 28 (2003)). This review "'does not require strict proportionality between crime and sentence,' but rather 'forbids only extreme sentences that are grossly disproportionate to the crime.'" *Graham v. Florida*, 560 U.S. 48, 59-60, 74-75 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part)) (life without parole for juvenile nonhomicide offenders violates the Eighth Amendment).

[5]Our supreme court has not interpreted article II, § 15 of the Arizona Constitution to be broader than the Eighth Amendment, *see State v. Soto-Fong*, 250 Ariz. 1, ¶¶ 43-44 (2020), and thus to the extent Encinas-Pablo argues that our constitution provides more protection than the Eighth Amendment, we cannot grant the relief sought, *see State v. McPherson*, 228 Ariz. 557, ¶ 16 (App. 2012) (interpreting our constitutional prohibition against cruel and unusual punishment more broadly "would be in the exclusive purview of [the Arizona Supreme Court]").

¶19 We are guided by the specific facts and circumstances of a defendant's crime.[6] *Berger*, 212 Ariz. 473, ¶¶ 13, 39, 47. These objective factors include the harm caused, the serious or violent nature of the offense, the defendant's culpability and degree of involvement, previous criminal history, and intellectual capabilities. *See id.* ¶ 13; *Davis*, 206 Ariz. 377, ¶¶ 31-32, 36-37. An offender's age is also relevant. *Graham*, 560 U.S. at 76. Our proportionality analysis takes into account if a defendant's offense is at the periphery of the offensive conduct sought to be prevented by a broadly sweeping governing statute. *See Davis*, 206 Ariz. 377, ¶¶ 36-37. But even "severe and unforgiving" penalties are not necessarily grossly disproportionate if a legislature has a reasonable basis for believing its sentencing scheme advances its penalogical goals. *Berger*, 212 Ariz. 473, ¶¶ 13-17 (quoting *Harmelin*, 501 U.S. at 1008 (Kennedy, J., concurring in part)). We accord "substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences."[7] *Id.* ¶ 13.

¶20 Encinas-Pablo committed first-degree murder. His offense was at the apex of the most serious, violent offenses and despite its prosecution as felony murder, his conduct was at the core, not the periphery, of the first-degree murder statute. *See Berger*, 212 Ariz. 473, ¶¶ 41, 44; A.R.S. § 13-1105. Although he argues the evidence is "unsettled" as to who pulled the trigger, the testimony presented at trial did not suggest he was less culpable than Joseph S. In a post-trial ruling considering whether the mandatory sentence was clearly excessive, the trial court noted "the only eyewitness at trial testified [Encinas-Pablo] was indeed the

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[6] To the extent Encinas-Pablo raises a categorical challenge to mandatory sentences for juvenile offenders tried and sentenced as adults, he does not sufficiently develop this argument or ask us to apply the categorical approach outlined in *Graham*. 560 U.S. at 61-76 (court considers "objective indicia" to determine if there is a "national consensus against the sentencing practice," then exercises its independent judgment to determine if practice violates Eighth Amendment). Thus, we do not address it. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) (insufficient argument of claim on appeal constitutes waiver).

[7] Only if this narrow-proportionality review leads to an inference of gross disproportionality, does this court "test[] that inference by considering the sentences the state imposes on other crimes and the sentences other states impose for the same crime." *Berger*, 212 Ariz. 473, ¶¶ 10, 12. Here, we need not proceed to that second step of the analysis because we conclude there is no inference of gross disproportionality.

shooter."[8] The record is not at all clear that "[Encinas-Pablo] was the follower and not the leader," as he asserts.

¶21 Encinas-Pablo points out that Joseph S. received a probation-only sentence, and argues the disparity between their sentences suggests gross disproportionality. Although an unexplained disparity between sentences among accomplices may be a mitigating factor in capital sentencing, *State v. Forde*, 233 Ariz. 543, ¶ 136 (2014), differences that result from plea bargaining are not necessarily mitigating, *State v. Carlson*, 202 Ariz. 570, ¶ 65 (2002).[9] Encinas-Pablo was on felony probation in adult court for aggravated assault and robbery at the time of this offense, whereas Joseph S. had no previous felony convictions and received his sentence as a result of a plea bargain. Given this and the evidence presented at trial suggesting that Encinas-Pablo was the shooter, the sentencing disparity here does not create an inference of gross disproportionality.

¶22 Encinas-Pablo also argues that because he was a child at the time of the offense, and moreover suffered from cognitive defects, his sentence was unconstitutionally severe. But this court owes significant deference to Arizona's constitutional mandate that he be prosecuted as an adult because of the serious, violent nature of his crime, and to the legislatively imposed mandatory minimum sentence for that crime, despite jurisprudence acknowledging that children are different in the context of the Eighth Amendment. *See* Ariz. Const. art. IV, pt. 2, § 22 (mandating "[j]uveniles 15 years of age or older accused of murder . . . shall be prosecuted as adults" and "[u]pon conviction all such juveniles shall be subject to the same laws as adults"). *But see Miller v. Alabama*, 567 U.S. 460, 481 (2012) (mandatory life without parole for juveniles violates the Eighth Amendment as "children cannot be viewed simply as miniature adults" (quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011))).

¶23 Encinas-Pablo next reasons that his cognitive challenges, including his low IQ and his inability to engage in abstract reasoning, support a finding of gross disproportionality because they impacted his

[8]Although not presented to the jury, Joseph S.'s presentence report indicates he told detectives that Encinas-Pablo had shot N.E., but N.E. was also armed and had shot Encinas-Pablo.

[9]Unexplained disparity in sentencing is generally only considered in capital cases, *see State v. Schurz*, 176 Ariz. 46, 57 (1993), but we assume, without deciding, that such a rule could apply here.

decision-making during the commission of the offense and his rejection of the plea offer. He argues he "could have received a sentence of as little as 10 years," in reference to the rejected plea offer, which offered a range of ten to twenty-five years. However, under the Eighth Amendment's gross-disproportionality analysis, we do not compare the sentence imposed upon a conviction with its potential disposition under a rejected plea offer. *Cf. Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part) (disproportionality analysis begins with comparing gravity of offense and severity of sentence).

¶24 Encinas-Pablo analogizes his circumstances to those of the defendant in *Davis*, 206 Ariz. 377, ¶¶ 36-37, wherein the court considered that the defendant's "intelligence and maturity level fell far below that of a normal young adult." Encinas-Pablo notes that at the time of his crimes, he was a sixteen-year-old child with documented cognitive deficits, as compared to Davis, an adult. However, the *Davis* court considered the defendant's intelligence and maturity in the context of evaluating the seriousness and harm of his sexual misconduct with children. *See* 206 Ariz. 377, ¶¶ 36-37 ("we cannot say that all incidents of sexual conduct are of equal seriousness and pose the same threat to their victims or to society"). Here, we cannot conclude that N.E.'s murder was made less harmful or less serious because of Encinas-Pablo's cognitive challenges and his low IQ which, according to one expert, was not so low as to impact his competency.

¶25 Comparing the gravity of Encinas-Pablo's offense to the harshness of his penalty, we conclude there is no threshold showing of an inference of gross disproportionality. Therefore, his sentence does not constitute cruel and unusual punishment in violation of the federal or state constitutions.

Disposition

¶26 For the foregoing reasons, we affirm Encinas-Pablo's convictions and sentences.