IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAMON CYRUS LEWIS,
Appellant.

No. 2 CA-CR 2022-0068
Filed April 27, 2023

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NOT FOR PUBLICATION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. CR20202515001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Kristin K. Mayes, Arizona Attorney General
Alice M. Jones, Deputy Solicitor General/Section Chief of Criminal Appeals
By Andrew Stuart Reilly, Assistant Attorney General, Phoenix
Counsel for Appellee

Megan Page, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
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MEMORANDUM DECISION

Judge Sklar authored the decision of the Court, in which Vice Chief Judge Staring and Judge O'Neil concurred.

S K L A R, Judge:

¶1 Damon Lewis appeals his convictions and sentences for first-degree murder, aggravated assault, and two counts of kidnapping. For the reasons that follow, we affirm Lewis'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 Lewis. *See State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015).

¶3 During summer 2020, E.R. and J.A. were living in a tent in a Tucson wash. On June 16, two men and a woman attacked them in their tent. The two male assailants, one of whom J.A. identified as Lewis, began kicking and beating E.R. J.A. attempted to shield E.R. with her body, but the female assailant grabbed her and held a sharp object against her throat. Lewis and the other male assailant dragged E.R. out of the tent as he struggled unsuccessfully to escape.

¶4 A neighbor, who had noticed a car parked in an alley near the wash, heard screaming, the sounds of someone being beaten, and cries for help. He told his wife to call the police. When a police helicopter flew overhead, the neighbor could hear male voices yell, "Let's get the fuck out of here," and "[T]he police [are] coming." The neighbor then heard footsteps running toward the car in the alley. As two police officers arrived at the neighbor's property, the car pulled out of the alley onto the street and sped away. Officers later found it abandoned but running.

¶5 Meanwhile, another officer heard a "blood curdling scream" coming from the direction of the wash. The screams led the officer to J.A., who was weeping over E.R.'s body. E.R. was lying in a pool of blood with his throat slashed. He had also suffered several facial contusions and abrasions, scalp and brain lacerations, and skull fractures, as well as injuries to his torso and extremities, all consistent with blunt-force trauma. Nearby, two large rocks were covered with blood, and an open pocketknife was

lying near a spot of bloodied sand. DNA on the knife closely matched E.R.'s DNA profile. J.A. had blood on her clothing and face, a laceration, and abrasions. One officer described J.A. as being "inconsolable" and so distraught that she could barely speak.

¶6 A nearby officer also saw a shirtless man covered in blood who matched the description of one of the suspects. The man, who was later identified as Lewis, approached a police car. He was behaving erratically, and his speech was slurred. However, he then moved away from the vehicle, stepped toward the officer, and failed to comply with instructions. Once another officer arrived, Lewis dropped to his knees and placed his hands behind his back.

¶7 After being handcuffed, Lewis again refused to comply with instructions—this time by refusing to identify himself, give his date of birth, or provide identification. He also grabbed an officer's fingers while the officer was trying to take fingerprints. And he tried to kick one of the officers who was taking a DNA sample. Ultimately, the officers were able to identify Lewis from his driver license photograph.

¶8 DNA samples taken from Lewis's leg, bicep, chest, and hands indicated the presence of blood containing E.R.'s DNA. E.R.'s blood was also found on the Mazda's center console and front passenger compartment. A soda bottle with Lewis's DNA was found on the passenger-side floorboard. Officers also found two bloody t-shirts and a cell phone, which contained numerous pictures of Lewis, that had been discarded at a nearby elementary school.

¶9 Lewis was charged with the first-degree murder and kidnapping of E.R and the kidnapping and aggravated assault of J.A. He was convicted on all counts after a seven-day jury trial. The trial court sentenced him to natural life in prison on the murder count, to run concurrently with a sentence of 10.5 years for the kidnapping of E.R. For the two counts involving J.A., the court sentenced Lewis to consecutive prison terms totaling eighteen years, to be served consecutively to the natural life term. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

EXCLUSION OF EVIDENCE CONCERNING DOMESTIC VIOLENCE BETWEEN E.R. AND J.A.

¶10 Lewis first argues that the trial court abused its discretion by precluding evidence in two police reports that detailed allegations of domestic violence involving J.A. and E.R. in 2016 and 2017. Lewis asserts

that the evidence was relevant to his third-party culpability defense. Specifically, he argues that the evidence supports the defense that J.A. was E.R.'s true murderer, especially given that her DNA was found on his body, and Lewis was merely a bystander.

¶11 Before trial, the state filed a motion to preclude the evidence from the police reports under Rules 403, 404, and 405 of the Arizona Rules of Evidence. According to the state, the 2016 incident involved allegations by J.A. and her mother and stepfather against E.R. Both parents apparently reported that when J.A.'s mother found E.R. beating J.A. and tried to intervene, E.R. hit her across the back with a wooden log. J.A. told officers that E.R. had started to fight with her parents after they told him to leave, throwing bricks and hitting her stepfather with a stick. But J.A. denied having been injured and refused to identify E.R. over fear that "if he found out he'd kill [her]." Officers said E.R. appeared drunk and denied the incident.

¶12 As described by the state, the 2017 incident involved allegations by J.A.'s adult daughter against J.A. and E.R. The daughter apparently reported that J.A. had attempted to break into their shared motel room while drunk. After the daughter kicked her out, J.A. bit her. When J.A. and E.R. returned to collect J.A.'s belongings, a further physical altercation ensued. E.R. pulled J.A. off her daughter. J.A. and E.R. were later contacted by police officers and denied any memory of the incident.

¶13 In response, Lewis argued that he intended to use the police reports as impeachment or rebuttal evidence. He also argued that E.R.'s history of violence against J.A., coupled with her fear of him, gave her a motive for murdering E.R. The trial court precluded the evidence contained in the reports under Rule 403. It reasoned that the probative value was substantially outweighed by the prejudicial effect, particularly given the time that had intervened between the incidents and E.R.'s murder.

¶14 We review the trial court's determination on the admissibility of third-party culpability evidence for an abuse of discretion. *See State v. Bigger*, 227 Ariz. 196, ¶ 42 (App. 2011). However, when evaluating such evidence under Rule 403, we view it in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect. *Id.* Lewis preserved these issues in the trial court, so we review for harmless error. *See State v. Coghill*, 216 Ariz. 578, ¶ 28 (App. 2007). Under harmless error review, the state bears "the burden of convincing us that error is harmless" and we must be satisfied beyond a reasonable doubt that any trial court error "had no influence on the jury's judgment." *State v.*

Smith, 242 Ariz. 98, ¶ 14 (App. 2017) (quoting *State v. Bible*, 175 Ariz. 549, 588 (1993)).

¶15 The admissibility of evidence offered to show third-party culpability is governed by Rules 401 through 403. *State v. Machado*, 226 Ariz. 281, ¶ 16 (2011). Such evidence is relevant under Rule 401 "only when it 'tend[s] to create a reasonable doubt as to the defendant's guilt.'" *Id.* n.2 (alteration in *Machado*) (quoting *State v. Gibson*, 202 Ariz. 321, ¶ 16 (2002)). Additionally, a defendant may not, in the guise of a third-party culpability defense, "raise unfounded suspicions or . . . simply 'throw strands of speculation on the wall and see if any of them will stick.'" *Bigger*, 227 Ariz. 196, ¶ 42 (quoting *State v. Machado*, 224 Ariz. 343, n.11 (App. 2010), *aff'd*, 226 Ariz. 281 (2011)).

¶16 Applying this standard, we conclude that the trial court did not abuse its discretion in precluding evidence from the police reports. As for the 2016 incident, even assuming the police report was accurate, we are not persuaded that the evidence demonstrated J.A. had a motive to murder E.R. The overall context of the evidence demonstrates otherwise. *See id.* ¶ 43 (explaining that, in context, proposed third-party culpability evidence had trivial probative value). J.A. was inconsolable over E.R.'s death, cooperated with police, and had suffered injuries. Although her DNA was found on E.R.'s body, this is unsurprising given that she and E.R. were living together, she had tried to use her body to shield E.R. during the attack, and she was weeping over him after he was murdered.

¶17 As for evidence of the 2017 incident, we similarly conclude that the trial court did not abuse its discretion in precluding it. Lewis argues that J.A.'s history of domestic violence and prior domestic violence by E.R. against J.A. supported the defense that violence between J.A. and E.R. was the cause of E.R.'s death. But even assuming the police report was accurate, J.A.'s violent conduct in the 2017 incident was not directed toward E.R. It therefore does not plausibly suggest a motive to attack him. Lewis's assertion is nothing more than a "strand[] of speculation" that because J.A. may have acted violently toward someone else in 2017, she murdered E.R. in 2020. *Id.* ¶ 42 (quoting *Machado*, 224 Ariz. 343, n.11). We therefore conclude that Rules 401 and 402, as clarified by *Machado*, precluded evidence of the domestic-violence incidents.

¶18 Lewis, however, points to cases concluding that remoteness between a prior act and the charged offense generally goes to the weight of the evidence, not its admissibility. *See State v. Van Adams*, 194 Ariz. 408, ¶ 24 (1999); *State v. Hinchey*, 165 Ariz. 432, 435-36 (1990); *State v. Fernane*, 185

Ariz. 222, 225 (App. 1995). But those cases concern Rule 404(b). Our supreme court has concluded that Rule 404(b) is not the proper standard for evaluating third-party culpability evidence. *See Machado*, 226 Ariz. 281, ¶ 16.

¶19 Nor would it make sense to apply this Rule 404(b) case law here. Rule 404(b) concerns the conduct of the defendant rather than a third party. *See Machado*, 226 Ariz. 281, ¶ 14. For a defendant, the Rule 404(b) evidence is generally not the only evidence of guilt. By contrast, there was not any compelling additional evidence against J.A. that could establish her guilt. The proffered evidence was very attenuated, consisting only of two police reports, which documented alleged incidents of domestic violence involving J.A. from several years prior with no direct connection to E.R.'s murder. It therefore did not meet the relevance standard of Rules 401 and 402. Admitting this evidence because of case law applying Rule 404(b) would improperly dilute that standard.

¶20 We note that the trial court precluded the evidence under Rule 403 rather than Rules 401 and 402. However, because we conclude that the evidence was irrelevant, we need not address whether its probative value was substantially outweighed by unfair prejudice. We will affirm the evidentiary rulings of a trial court if they are correct for any reason. *See State v. Carlson*, 237 Ariz. 381, ¶ 7 (2015).

¶21 Even if the trial court had erred in precluding the evidence, the error was harmless because Lewis's guilt was established by overwhelming evidence. *See State v. Romero*, 240 Ariz. 503, ¶ 9 (App. 2016) (error harmless if other evidence of guilt overwhelming). That evidence includes J.A.'s testimony that Lewis was one of E.R.'s attackers, the neighbor's testimony of hearing the murder transpire, Lewis being covered in E.R.'s blood near a parked vehicle—containing E.R.'s blood and Lewis's DNA—that had fled the crime scene, and the discarded bloody shirts near the phone containing photos of Lewis. Moreover, even if the evidence implicated J.A., it would not necessarily exculpate Lewis. The evidence demonstrated that multiple people were involved in E.R.'s murder, and the evidence of Lewis's guilt is overwhelming.

FLIGHT INSTRUCTION

¶22 Lewis also argues that the trial court erred in giving a flight instruction over his objection because the instruction was not supported by the evidence. "We review the trial court's decision to give a flight

instruction for abuse of discretion." *State v. Parker*, 231 Ariz. 391, ¶ 44 (2013).

¶23 A flight instruction may be given only if the state presents evidence of flight after a crime from which jurors could infer a defendant's consciousness of guilt. *State v. Solis*, 236 Ariz. 285, ¶ 7 (App. 2014). Such an inference is possible if the "flight or attempted flight was open, such as the result of an immediate pursuit," though active pursuit is not required. *State v. Smith*, 113 Ariz. 298, 300 (1976); *State v. Wilson*, 185 Ariz. 254, 257 (App. 1995). Rather, the manner in which the defendant left the crime scene "must reveal a consciousness of guilt." *State v. Celaya*, 135 Ariz. 248, 256 (1983). It is insufficient that the defendant was a passenger in a fleeing vehicle, and a driver's attempts to evade police cannot be imputed to a passenger of the vehicle without evidence that the passenger had encouraged the driver to do so. *See State v. Salazar*, 112 Ariz. 355, 357 (1975).

¶24 Here, we conclude that the trial court did not abuse its discretion in providing the flight instruction. Sufficient evidence allowed a jury to infer that Lewis had openly fled the scene to avoid arrest or contact with officers. The evidence placed Lewis at the scene when E.R. was murdered. The jury could have therefore inferred that Lewis had been one of the people the neighbor heard yelling the "police were coming" and they needed to get "out of here." It likewise could have inferred that Lewis was one of the people the neighbor heard going to the getaway car.

¶25 Lewis, nevertheless, points to evidence that he was not driving the car and that he surrendered to police. But evidence of flight to the car was sufficient to justify the instruction. The surrender did not occur until later. Lewis also argues that it is not unexpected that homeless people would flee police. However, alternative explanations for why a defendant fled the scene of a crime do not make a flight instruction improper. *See Parker*, 231 Ariz. 391, ¶ 50.

¶26 In the trial court, the argument concerning the flight instruction focused on Lewis's combative conduct after surrendering, including his unwillingness to provide a fingerprint. It is not clear from the record, though, that this conduct was the basis for the court's decision. Even if it was, the other evidence of flight was sufficient to support the instruction. And again, we may affirm the trial court's ruling if it is correct for any reason. *See Carlson*, 237 Ariz. 381, ¶ 7. We therefore conclude that the trial court did not abuse its discretion by giving the flight instruction.

DISPOSITION

¶27 We affirm Lewis's convictions and sentences.