FILED BY CLERK
MAY 11 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICHARD RAYMOND TURNER, Appellant.	2 CA-CR 2007-0102 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20023568

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Harriette P. Levitt
Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Richard Turner was convicted of one count of first-degree murder. The trial court sentenced him to natural life in prison. On appeal, Turner argues that the trial court erred in denying his motion to preclude a witness from testifying and in denying his motion to vacate judgment. He further alleges that the trial court violated his right to a speedy trial and to counsel. Because the trial court did not err, we affirm.

Facts

¶2 "We view the facts in the light most favorable to sustaining the conviction[]." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In November 2002, Turner entered D.'s home, stole D.'s television set, and beat D. to death with a heavy, blunt object. Turner's DNA was found on D.'s window frame. And when questioned, Turner told police that he recently sold a television set. Police also found items belonging to D. during a search of Turner's sleeping area at a local homeless camp. Additionally, they seized a bloody tissue approximately four feet from Turner's bed and DNA tests later revealed that the blood on the tissue belonged to D.

¶3 Turner was charged with first-degree murder but pled guilty to second-degree murder. This court granted Turner relief in a subsequent post-conviction proceeding, *see State v. Turner*, No. 2 CA-CR 2005-0049-PR, however, and the trial court then permitted Turner to withdraw from the plea agreement. Turner then asserted his right to a speedy trial and trial was set for July 2006.

¶4 Approximately three weeks before trial was scheduled to begin, the state informed Turner that it intended to call S.C. to testify at trial. Turner moved to preclude

S.C.'s testimony because she had not been timely disclosed and because she was being represented by the Pima County Public Defender's Office, as was Turner, and her presence as a witness would cause a conflict of interest. The trial court denied Turner's motion and Turner's attorney therefore withdrew from the case due to the conflict of interest. A new attorney was appointed to represent Turner, and trial was postponed for approximately seven months, until February 2007. Turner was convicted and subsequently filed a motion to vacate judgment, pursuant to Rule 24.2, Ariz. R. Crim. P. The trial court denied the motion, and this appeal followed.

Motion to Preclude Witness Testimony

¶5 Turner argues the trial court erred in failing to preclude S.C. from testifying at trial. We review a trial court's decision whether to preclude a witness from testifying for an abuse of discretion. *See State v. Delgado*, 174 Ariz. 252, 256, 848 P.2d 337, 341 (App. 1993); *State v. Hunt*, 118 Ariz. 431, 434, 577 P.2d 717, 720 (1978).

Rule 15, Ariz. R. Crim. P.

¶6 Turner first contends that S.C.'s testimony should have been precluded as a sanction pursuant to Rule 15, Ariz. R. Crim. P. Under Rule 15.1(b)(1), (c), the state is required to disclose the names of "all persons whom the prosecutor intends to call as witnesses in the case-in-chief" within thirty days of arraignment. The duty to disclose is continuous, however, and the state must "make additional disclosure . . . whenever new or different information subject to disclosure is discovered" and at least seven days before trial. Ariz. R. Crim. P. 15.6.(a), (c).

¶7 If the state fails to disclose the names of witnesses within the time frame enumerated by Rules 15.1 and 15.6, the trial court "shall impose any sanction it finds appropriate, unless the court finds that the failure to comply [with disclosure requirements] was harmless or that the information could not have been disclosed earlier even with due diligence and the information was disclosed immediately upon its discovery." Ariz. R. Crim. P. 15.7(a). "Whether to impose a sanction [at all] for late disclosure and which sanction to impose[, however,] are discretionary decisions left to the trial court." *State v. Moody*, 208 Ariz. 424, ¶ 114, 94 P.3d 1119, 1149 (2004). And if the court chooses to impose a sanction, "preclusion is 'a sanction of last resort.'" *Id.*, *quoting State v. Talmadge*, 196 Ariz. 436, 440, 999 P.2d 192, 196 (2000).

¶8 Turner does not dispute that the state timely disclosed S.C.'s initial interview. The state later disclosed its initial witness list, which did not include S.C., twenty-three days after Turner was arraigned. And Turner acknowledges that at the time the state prepared its initial list, S.C. "[d]id not . . . have any information that was helpful to the State's case." Accordingly, the state did not plan to call S.C. to testify and therefore was not required to include her on the original witness list.

¶9 Approximately three weeks before trial was scheduled to begin, however, S.C. revealed she had information about Turner's involvement in D.'s murder that she had not volunteered when initially questioned. In compliance with Rule 15.6, the state notified Turner of these statements immediately—approximately an hour after discovering their existence. Four days later, and more than seven days before trial was scheduled, the state

also filed a supplemental witness list that named S.C. Accordingly, the state complied with Rules 15.1 and 15.6 in disclosing its intent to call S.C. as a witness and the trial court, therefore, did not abuse its discretion by refusing to impose any sanctions. *See* Ariz. R. Crim. P. 15.7 (court shall impose any sanction it finds appropriate if "a party fails to make a disclosure required by Rule 15"); *see also State v. Dupuy*, 116 Ariz. 151, 156, 568 P.2d 1049, 1054 (1977) (trial court not required to sanction party when party's witness properly disclosed under Rule 15); *State v. Wallen*, 114 Ariz. 355, 361, 560 P.2d 1262, 1268 (App. 1977) (same).

¶10 Turner argues, however, that the court "should have considered its own conclusions regarding" S.C.'s credibility before it determined whether S.C.'s testimony should have been precluded. But we have already explained that the state complied with Rule 15 and the trial court did not err in refusing to preclude S.C.'s testimony. In any event, "'the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.'" *State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007), *quoting State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). Accordingly, S.C.'s lack of credibility does not alter our conclusion.

Rule 601, Ariz. R. Evid.

¶11 Citing Rule 601, Ariz. R. Evid., Turner also contends the trial court should have precluded S.C.'s testimony because of her questionable competency. But Turner failed to raise this issue below and has therefore forfeited all but fundamental error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). The defendant, and not

the state, has the "burden of persuasion in fundamental error review." *Id.* And Turner does not argue that the trial court's failure to preclude S.C.'s testimony under Rule 601 was fundamental. Therefore, he has not sustained his burden in a fundamental error analysis and we need not address this argument further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued).

Constitutional Claims[1]

¶12 Turner next contends the trial court's refusal to preclude S.C.'s testimony violated his rights to a speedy trial and to counsel.[2] We review a trial court's ruling on a speedy trial issue for an abuse of discretion. *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997). "We review a Sixth Amendment denial of right to counsel claim[, however,] de novo." *State v. Rasul*, 216 Ariz. 491, ¶ 4, 167 P.3d 1286, 1288 (App. 2007).

---

[1]Turner briefly mentions that the trial court's refusal to preclude the testimony of an additional witness, E.F., also violated his constitutional rights. Turner also asserts these claims in his appeal of the trial court's denial of his motion to vacate judgment. But Turner states no facts or law to support his contention. Accordingly, any argument regarding the trial court's refusal to preclude E.F. is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(iv), (vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claim waived on appeal by insufficient argument).

[2]Turner also argues that the trial court's decision not to preclude this witness's testimony violated his right to due process. His argument on appeal, however, is insufficient and the claim is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(iv), (vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

Right to Speedy Trial

¶13 Turner argues the trial court's decision not to preclude S.C. from testifying required the trial to be continued and therefore violated his right to a speedy trial. But Turner cites no authority establishing the constitutional standard for a speedy trial or otherwise supporting this claim. It is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include necessary supporting citations); *State v. Felkins*, 156 Ariz. 37, 38 n.1, 749 P.2d 946, 947 n.1 (App. 1988) (claim abandoned when not supported by sufficient authority).

Right to Counsel

¶14 Turner also claims that the trial court's failure to preclude S.C. from testifying violated his right to counsel because it forced his original court-appointed attorney to withdraw from the case. "Although [a] defendant is entitled to representation, he is not constitutionally entitled to any particular lawyer but simply to a *competent* lawyer." *State v. Schaaf*, 169 Ariz. 323, 330, 819 P.2d 909, 916 (1991). And "a defendant may be denied counsel of his . . . choice if that attorney . . . has an actual or serious potential conflict of interest." *Robinson v. Hotham*, 211 Ariz. 165, ¶ 14, 118 P.3d 1129, 1133 (App. 2005). Accordingly, if a defendant's counsel withdraws from representation, the defendant's "constitutional right to counsel is [nevertheless] fulfilled" if a "qualified member of the State Bar is assigned to represent [the] defendant and acts diligently on his behalf." *Schaaf*, 169 Ariz. at 330, 819 P.2d at 916.

¶15 When the state disclosed that it planned to call S.C. as a witness, Turner's original trial attorney moved to withdraw due to a conflict of interest. The trial court then appointed Turner new counsel. Turner admits that his second attorney was "well prepared for trial and adequately cross-examined witnesses and presented the defense [that Turner] wished to present." Accordingly, because Turner's original attorney withdrew because of a conflict of interest, and because Turner was subsequently assigned a second attorney who "act[ed] diligently on his behalf," the trial court's refusal to preclude S.C.'s testimony did not violate Turner's right to counsel. *Schaaf*, 169 Ariz. at 330, 819 P.2d at 916.

¶16 In his opening brief, Turner also briefly questions whether his original trial attorney "truly had a conflict" of interest requiring withdrawal. But Turner did not make this argument below and it is therefore forfeited absent fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. And because he does not request fundamental error review, we need not consider this issue. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140. In any event, Turner's own counsel moved to withdraw believing he had a conflict. And the single case Turner cites in support of this contention does not require that we find a conflict did not exist. *State v. Sustaita*, 183 Ariz. 240, 241, 902 P.2d 1344, 1345 (App. 1995), involved whether a defendant's attorney had a conflict of interest because another attorney in his office previously had represented the victim. But Turner's original attorney's conflict arose because another lawyer in his office *currently* represented S.C., a witness for the state, and had confidential information from S.C. concerning Turner's case. Therefore, *Sustaita*

is inapposite. *See Okeani v. Superior Court*, 178 Ariz. 180, 181-82, 871 P.2d 727, 728-29 (App. 1993).

¶17 Turner contends, however, that he "stated his desire to continue" with his original trial counsel "even after the conflict had been revealed," and that he therefore should have been permitted to waive any conflict of interest. But Turner never expressed any desire to waive the conflict of interest before trial; he simply stated that he wished to be represented by his original attorney and asked the trial court to release him on his own recognizance in the event that his original attorney withdrew. And the record does not show that S.C. would have been willing to waive any conflict. *See* ER 1.7(b), 1.10(c), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 (to waive a conflict of interest, both affected clients must give informed consent in writing). Accordingly, this argument is without merit and the trial court's failure to preclude S.C. did not violate Turner's right to counsel.

Motion to Vacate Judgment

¶18 Turner finally argues the trial court erred in denying his motion to vacate judgment.[3] We review a trial court's decision to deny a motion to vacate judgment for an abuse of discretion. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 90, 25 P.3d 717, 743 (2001).

¶19 About a week after being sentenced, Turner filed a motion to vacate judgment pursuant to Rule 24.2, Ariz. R. Crim. P. In his motion, Turner claimed, inter alia, that his

[3]In his opening brief, Turner initially states that the trial "court committed reversible error in denying [Turner's] motion for a new trial." The brief later appears to clarify, however, that Turner is actually appealing the court's denial of his motion to vacate judgment.

conviction was obtained in violation of his constitutional right to counsel and to a speedy trial. We have already determined that Turner's conviction was not obtained in violation of his right to counsel or to a speedy trial. And Turner does not cite any authority in this section of his argument sufficient to compel us to reconsider whether his right to speedy trial was violated. Accordingly, the trial court did not err in denying Turner's motion to vacate judgment.

Conclusion

¶20 In light of the foregoing, we conclude that the trial court did not err and therefore affirm Turner's conviction and sentence.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
PHILIP G. ESPINOSA, Judge