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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. ANTOINETTE JEANNE NEWCOMB, Appellant.	)	2 CA-CR 2007-0193 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200500185

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 After three jury trials, appellant Antoinette Newcomb was convicted of kidnapping, first-degree murder, and three counts of aggravated assault. The trial court then sentenced her to natural life imprisonment plus an additional 3.5 years. On appeal, Newcomb argues (1) her murder conviction must be reversed because there was no evidence the homicide "facilitated" the kidnapping, (2) the trial court erred in refusing to reopen the case to allow cross-examination of a witness, (3) the court erred in admitting evidence that Newcomb had used and dealt drugs, (4) her sentences are illegal and excessive, and (5) her first jury was improperly constituted. We affirm Newcomb's convictions and sentences for the reasons set forth below.

BACKGROUND

¶2 Viewed in the light most favorable to upholding the juries' verdicts, *see State v. Tschilar*, 200 Ariz. 427, n.1, 27 P.3d 331, 334 n.1 (App. 2001), the evidence presented at trial established the following facts. In early 2005, Newcomb was upset with the victim, Sammy J., because she believed he had stolen her credit card. She therefore made it known that she wanted to find and speak with him. After bringing Sammy to Newcomb's house on February 4, 2005, two of Newcomb's female friends heard her yelling at him as he apologized to her. Newcomb then arranged for Noel Alcarez-Guerrero, another person who was angry with Sammy, to come to her residence.

¶3 After Alcarez-Guerrero arrived, he yelled at Sammy for stealing stereo equipment from his truck and for taking Newcomb's credit card, and he punched and kicked

Sammy. Either Newcomb or Alcarez-Guerrero could then be heard talking about duct tape. Soon afterwards, the women who had brought Sammy to the house—Janae B. and Ana M.—saw him sitting with his hands bound behind his back.

¶4 Newcomb then invited Carl Schlobom to her residence, and he arrived in a red Kia sedan. Schlobom was jealous of Sammy's long-standing friendship with Schlobom's girlfriend. In addition, Schlobom believed Sammy was a "snitch" and had said of Sammy that he would "get him" one day. After Schlobom arrived at the house, Newcomb said she would pay "money or dope" to have Sammy killed. Schlobom said he "would take care of it for her." Janae and Ana then left the house, and Schlobom and Alcarez-Guerrero proceeded to beat Sammy with a baseball bat, jump on his chest, and strangle him to death with a ligature.

¶5 Janae had been driving Newcomb's car, a light-colored Buick LeSabre, on the day the murder took place. That night, Janae received a call from Alcarez-Guerrero, who told her that Newcomb had given him permission to use the car. Alcarez-Guerrero subsequently exchanged vehicles with Janae, taking the LeSabre and leaving her with his truck. Later that night, surveillance video showed Schlobom driving the LeSabre to a storage facility, where he deposited Sammy's body. On the body, the word "snitch" had been written in black and green ink. Schlobom then returned in the LeSabre to his own residence, where he discussed the murder with a female acquaintance. Newcomb came by the residence a

short time later in Schlobom's red Kia, exchanged keys with him, and drove away in the LeSabre.

¶6 A Cochise County Grand Jury indicted Newcomb on charges of aggravated assault, kidnapping, and first-degree murder.[1] After her first trial, the jury found her guilty of aggravated assault with a dangerous instrument or deadly weapon and aggravated assault causing the fracture of a body part. Because the jury could not reach a unanimous verdict on the other charges, however, the trial court declared a mistrial as to those counts. A second mistrial followed after Newcomb suffered a medical emergency during the proceedings. At the conclusion of her third trial, the jury found her guilty of the remaining charges: aggravated assault of a victim who was bound or restrained, kidnapping, and first-degree murder. On a special verdict form, the jury specified that it unanimously had found Newcomb guilty of felony murder, not premeditated murder.

¶7 The trial court sentenced Newcomb to a natural life term of imprisonment for the murder count, five years for kidnapping, and one year for aggravated assault of a restrained victim, all of which it ordered be served concurrently. For the two remaining counts of aggravated assault, the court imposed concurrent sentences, the longer for 3.5

[1]Schlobom and Alcarez-Guerrero were separately tried and convicted of murder and other charges related to the incident. *See State v. Schlobom*, No. 2 CA-CR 2006-0104 (memorandum decision filed Aug. 20, 2007); *State v. Alcarez-Guerrero*, No. 2 CA-CR 2006-0115 (memorandum decision filed Aug. 16, 2007).

years, and ordered those terms served consecutively to the other counts. We have jurisdiction of Newcomb's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

SUFFICIENCY OF THE EVIDENCE

¶8 Newcomb first argues the evidence was insufficient to support her felony murder conviction because "no evidence existed that the homicide 'facilitated' the kidnap." We review the sufficiency of evidence de novo, *see State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993), and will affirm if the conviction is supported by "substantial evidence." *State v. Ellison*, 213 Ariz. 116, ¶ 65, 140 P.3d 899, 916-17 (2006). "Substantial evidence" is evidence that reasonable people could accept as proving all the elements of a crime and the defendant's responsibility for its commission beyond a reasonable doubt. *State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009); *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). Because it is the jury's role to determine the credibility of witnesses, weigh the evidence, and resolve any conflicts therein, *Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d at 269; *State v. Gay*, 108 Ariz. 515, 517, 502 P.2d 1334, 1336 (1972), we will reverse for insufficient evidence "only where there is a complete absence of probative facts to support a conviction." *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995). The substantial evidence necessary to support a conviction may be either direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). "In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all reasonable inferences against the defendant."

State v. George, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003). By these standards, we find the evidence presented was sufficient to support Newcomb's conviction of felony murder.

¶9 "Felony murder occurs when a person commits one of the crimes enumerated in A.R.S. § 13-1105 and 'in the course of and in furtherance of [the] offense . . . [the] person or another person causes the death of any person." *State v. Lacy*, 187 Ariz. 340, 349-50, 929 P.2d 1288, 1297-98 (1996), *quoting* 1996 Ariz. Sess. Laws, ch. 343, § 2 (former A.R.S. § 13-1105(A)(2)).[2] Newcomb's indictment alleged that she and others had committed kidnapping—an offense listed in § 13-1105(A)(2)—and, "in the course of and in furtherance of the kidnapping," had caused the victim's death. A separate count in the indictment charged Newcomb with kidnapping the victim in violation of A.R.S. § 13-1304(A)(3), which prohibits "knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony."[3]

¶10 Newcomb does not challenge the sufficiency of the evidence supporting her kidnapping conviction. Rather, she claims the murder was not "in furtherance" of the kidnapping. In *Lacy*, our supreme court observed that "[a] death is 'in furtherance' when it

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[2]Although *Lacy* referred to a prior version of the statute, we refer in this decision to the version of § 13-1105 in effect on the date Newcomb committed her offense, which is found in 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 6. The language *Lacy* quoted from the prior version of § 13-1105(A)(2) is materially the same.

[3]We cite the current version of this statute, as it is substantively unchanged since Newcomb committed her offense.

results 'from any action taken to facilitate the accomplishment of the [predicate] felony.'" 187 Ariz. at 350, 929 P.2d at 1298, *quoting State v. Herrera*, 176 Ariz. 21, 29, 859 P.2d 131, 139 (1993) (second alteration in *Lacy*). Relying on this language, Newcomb contends the kidnapping of Sammy was already completed before he was killed; hence, the murder did not "facilitate" this crime but was instead "separate and independent from the kidnapping," making her murder conviction unwarranted. We reject Newcomb's argument, however, because *Lacy*'s definition of a homicide committed "in furtherance" of a predicate felony was, by its terms, illustrative rather than restrictive; it did not alter the plain language of § 13-1105(A)(2). *See also Herrera*, 176 Ariz. at 29, 859 P.2d at 139 ("A death is 'in furtherance' of an underlying offense if the death resulted from any action taken to facilitate the accomplishment of the felony.").

¶11 Indeed, our supreme court repeatedly has held a defendant may be convicted of felony murder based on kidnapping when the victim's death occurs after the kidnapping has been accomplished. *E.g.*, *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993); *Herrera*, 176 Ariz. at 30, 859 P.2d at 140; *State v. Salazar*, 173 Ariz. 399, 410, 844 P.2d 566, 577 (1992). Although a kidnapping is "complete" when one person unlawfully restrains another for a prohibited purpose, the crime continues as long as the victim remains restrained. *See State v. Jones*, 185 Ariz. 403, 405, 407, 916 P.2d 1119, 1121, 1123 (App. 1995). Accordingly, a death may be "in furtherance of" a kidnapping within the meaning of § 13-1105(A)(2) when it brings a kidnapping to a conclusion and results from an act taken

either to limit the victim's ability to resist or to decrease the likelihood of criminal prosecution. The issue of whether a death furthered a predicate felony is to be determined by the jury. *See State v. Scott*, 177 Ariz. 131, 138, 865 P.2d 792, 799 (1993); *Herrera*, 176 Ariz. at 29, 859 P.2d at 139.

¶12 The record here showed that the victim was kidnapped by Newcomb and Alcarez-Guerrero, that he was beaten and killed by Alcarez-Guerrero and Schlobom while still restrained, and that these three offenders then acted in concert promptly to dispose of his body. Under such circumstances, the jury reasonably could conclude Newcomb and her accomplices killed the victim "in the course of and in furtherance of" the kidnapping. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 6 (former § 13-1105(A)(2)). The trial court did not err in finding the state had presented sufficient evidence from which the jury could conclude the victim's death occurred in furtherance of the kidnapping.

REOPENING CASE

¶13 Newcomb next argues the trial court abused its discretion by partially denying her motion to reopen the case. After the charges had been submitted to the jury in the third trial, Newcomb moved to reopen the case on several grounds, one of which was to allow her to present evidence that a state's witness, David B., had offered inconsistent testimony. He testified at trial that Newcomb had told him she wanted to find Sammy and was willing to pay a reward to anyone who helped her do so. In a preliminary hearing in 2005, however,

David B. had testified he "wasn't told about any kind of reward."[4] He was not questioned about a reward in the first trial and did not mention the subject. Although the trial court acknowledged the earlier testimony would have provided a "potentially helpful line of inquiry," it found Newcomb's failure to pursue the inquiry did not result in a manifest injustice. For that reason, the court denied her motion to reopen the case to allow further examination of the witness.

¶14 A trial court may reopen a case if it determines that the moving party has offered additional evidence in good faith and that presentation of the evidence is necessary to the ends of justice. *State v. Mendoza*, 109 Ariz. 445, 447-48, 511 P.2d 627, 629-30 (1973); *see also State v. Patterson*, 203 Ariz. 513, ¶ 5, 56 P.3d 1097, 1098 (App. 2002) (purpose of reopening case "is 'to promote justice, not thwart it'"), *quoting State v. Dickens*, 187 Ariz. 1, 13, 926 P.2d 468, 480 (1996). A trial court has broad discretion in making these determinations. *Dickens*, 187 Ariz. at 12, 926 P.2d at 479. However, a trial court abuses that discretion if its decision whether to reopen a case deprives a party of a substantial right and results in prejudice. *See State v. Cota*, 99 Ariz. 237, 241, 408 P.2d 27, 29 (1965).

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[4]In her opening brief, Newcomb cited a transcript from February 16, 2005, as providing documentation of this statement. In her motion below, she cited a transcript from February 22, 2005. And, while arguing her motion to the trial court, she said the statement had been made at a hearing held February 26, 2005. Yet none of these transcripts appears in the record on appeal, and the limited excerpt Newcomb attached as an exhibit to her motion does not identify the date of the proceeding or the person who was testifying. In any event, the state does not challenge Newcomb's recitation of the facts, and we deem the record adequate to allow appellate review of this issue.

¶15 Newcomb was not denied any substantial right. Although the evidence she proffered to impeach David B. would have been useful to the jury in determining his credibility, Newcomb had the opportunity to examine him on cross-examination and in her own case-in-chief. *Cf. Cota*, 99 Ariz. at 241, 408 P.2d at 29 (allowing state to reopen not prejudicial error when defendant had "full and fair opportunity to rebut the additional evidence"). As Newcomb's counsel acknowledged to the court:

> I take . . . blame for this myself. When [the witness] testified I—[the prosecutor] gave me . . . a list of who he was going to call that first day. . . . And [David] B[.] was the first witness. And I really wasn't prepared to deal with him at that time. You know, with these witnesses having made so many statements before the trial and during the trial and at the preliminary hearing and the subsequent trials, it's very difficult to be prepared for all these inconsistent statements that they may have made. . . . And I'm not blaming anybody for that but myself.

Thus, the trial court did not violate Newcomb's constitutional rights to cross-examine witnesses or to present a defense by denying her motion.

¶16 Moreover, the witness's testimony was not necessarily inconsistent. Although David testified at trial that Newcomb had said "[s]he was offering a reward" for finding the victim, he also immediately qualified this remark by stating, "But not[,] like[,] to me." The earlier testimony Newcomb referred to in her motion could be interpreted as making the same point:

> Q: [Newcomb] wanted Sammy found?
>
> A: Yeah, because he was nowhere around at the time that I knew of[.]

Q: She was putting the word out?

A: Yes.

Q: Was she offering any type of reward?

A: I wasn't told about any kind of reward.

Q: Not to you anyways.

A: No.

In ruling on Newcomb's motion, the trial court properly could have considered the lack of clarity of these statements—or the arguable consistency between them—as a basis for refusing to reopen the case.

¶17 In sum, we conclude that presenting Newcomb's putative impeachment evidence was not essential to the ends of justice. Because she was not deprived a substantial right or prejudiced by the trial court's refusal to reopen the case, the court did not abuse its broad discretion by partially denying her motion to present additional evidence.

DRUG EVIDENCE

¶18 Newcomb further argues the trial court abused its discretion in allowing the state to introduce evidence that she "was a user and dealer in drugs."[5] Before trial, the state had sought to introduce evidence, pursuant to Rule 404(b), Ariz. R. Evid., that Newcomb had

[5]Newcomb has not meaningfully developed an argument in her opening brief regarding the admissibility of drug-use evidence. We therefore do not address this particular issue. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must contain citations to record and argument for each issue raised); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop argument properly in opening brief results in waiver on appeal).

sold methamphetamine. Newcomb opposed the state's motion and filed her own motion in limine to preclude any evidence she had sold or distributed illicit drugs. The court ruled evidence of her drug dealing near the date of the murder would be admissible to show motive and whether she had used methamphetamine as payment or consideration for the assistance of her accomplices. The court also determined the probative value of the evidence "substantially outweigh[ed] the danger of unfair prejudice, confusion of the issues and misleading of the jury." We review a trial court's admission of evidence under Rule 404(b) for an abuse of discretion. *State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999); *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007).

¶19 Generally, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). However, Rule 404(b) allows the use of other-act evidence for other relevant purposes such as showing a criminal defendant's "motive, opportunity, . . . [or] plan" to commit the charged offenses. *State v. Lacy*, 187 Ariz. 340, 348, 929 P.2d 1288, 1296 (1996).

> Before admitting [other-act] evidence, the trial court must conclude that (1) the state has proved by clear and convincing evidence that the defendant committed the alleged prior act; (2) the state is offering the evidence for a proper purpose; and (3) its probative value is not outweighed by the potential for unfair prejudice.

State v. Vigil, 195 Ariz. 189, ¶ 14, 986 P.2d 222, 224 (App. 1999); *see also* Ariz. R. Evid. 403 (relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

¶20 Newcomb first contends her drug dealing was not established by clear and convincing evidence. We reject this contention, as one witness testified she had seen Newcomb sell methamphetamine and another witness testified that her boyfriend, Noel Alcarez-Guerrero, had bought methamphetamine from Newcomb. Proof by clear and convincing evidence is a lesser standard than proof beyond a reasonable doubt, *State v. Turrentine*, 152 Ariz. 61, 68, 730 P.2d 238, 245 (App. 1986), and the testimony of a single witness is sufficient to meet even the latter standard. *See State v. Montano*, 121 Ariz. 147, 149, 589 P.2d 21, 23 (App. 1978). Thus, the trial court did not abuse its discretion in concluding clear and convincing evidence that Newcomb had sold drugs warranted admitting the evidence under Rule 404(b).

¶21 Newcomb also argues evidence that she had sold drugs "was not relevant . . . and not admitted for a proper purpose under Rule 404." Again, we disagree. Evidence is relevant under Rule 401, Ariz. R. Evid., if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, Ana M. testified that, on the day of the murder, after she had brought Sammy to Newcomb's house, Newcomb provided everyone there with methamphetamine, which they all smoked; Alcarez-Guerrero then smoked methamphetamine when he arrived at the house, before Sammy was restrained and beaten; and Newcomb said to Alcarez-Guerrero and Schlobom that she wanted to have Sammy killed

and would pay for it with "money or dope." Sammy's body was later discovered with the word "snitch" written on it.

¶22 In context, the evidence of Newcomb's selling drugs was not admitted to show she had acted in conformity with her bad character—a prohibited purpose under Rule 404(a) and (b). Rather, her drug dealing was relevant to the charged offenses insofar as it showed she could exert influence and control over her alleged accomplices and had a motive, plan, or opportunity, as Ana testified, to pay them for carrying out the murder. *Cf. State v. McCall*, 139 Ariz. 147, 152-53, 677 P.2d 920, 925-26 (1983) (evidence of drug-dealing plans with coconspirators admissible to show defendant's motive to commit murder). Consequently, the trial court did not err in concluding the evidence was offered for a proper purpose under Rule 404(b) and was admissible under Rules 401 and 402, Ariz. R. Evid.

¶23 Newcomb further claims the evidence of her drug dealing was "profoundly prejudicial," particularly because it suggested she dealt drugs to minors, and therefore should have been precluded pursuant to Rule 403. We recognize that in isolation such evidence could be highly prejudicial. Here, however, the prejudicial impact was minimized by the admissible evidence of drug use within her house on the day in question. Ana M., a witness for the prosecution, was a minor at the time of the offenses. During cross-examination, Newcomb attempted to impeach Ana's credibility by calling attention to the fact that she was a drug user with a felony record and had smoked methamphetamine both before going to Newcomb's house and repeatedly once she was there—presumably in Newcomb's presence.

Moreover, as noted, the state presented testimony, without objection, that Newcomb's accomplices had used methamphetamine at her residence. Any additional evidence linking Newcomb to methamphetamine sales was largely cumulative to other evidence already suggesting her involvement with the drug. Under such circumstances, we find the trial court did not abuse its discretion in concluding the probative value of the evidence of Newcomb's drug dealing outweighed its potential for unfair prejudice.

SENTENCES

Sentencing Procedures

¶24 Newcomb argues the trial court violated statutory and constitutional law when it, rather than a jury, found the aggravating factors justifying her natural life sentence and did so by a lesser standard of proof than beyond a reasonable doubt. In addition, she contends she was erroneously deprived of notice of statutory aggravating factors justifying her natural life sentence. We review challenges to the legality of a sentence de novo, *State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005), and we find the issues Newcomb raises are controlled by *State v. Fell*, 210 Ariz. 554, 115 P.3d 594 (2005).

¶25 In *Fell*, our supreme court held that a guilty verdict of first-degree murder alone authorizes a natural life sentence, without any additional factual findings. *Id.* ¶ 11. In so holding, the court emphasized that, under Arizona's sentencing code, a judge has "discretion to sentence an offender within a range—from life to natural life—for noncapital first degree murder," *id.* ¶ 15, and the legislature's enumeration and limitation of factors a

court may consider when imposing a sentence within that range does not render life imprisonment the "statutory maximum" for purposes of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). *Fell*, 210 Ariz. 554, ¶¶ 16-18, 115 P.3d at 598-99. Thus, no additional finding of aggravating circumstances, whether by the jury or the court, is necessary to the imposition of a natural life sentence. *Id.* ¶¶ 12, 19.

¶26 Although *Fell* was decided under statutes since modified, *see* 210 Ariz. 554, n.2, 115 P.3d at 596 n.2, its holding applies to this case nonetheless.[6] Having committed first-degree murder on February 4, 2005, in violation of former A.R.S. § 13-1105(A)(2) and (C),[7] Newcomb faced a punishment of "death or life imprisonment" as provided by former A.R.S. §§ 13-703[8] and 13-703.01.[9] The state did not seek the death penalty in this case, making § 13-703 inapplicable. *See* 2003 Ariz. Sess. Laws, ch. 255, § 1. Newcomb was therefore subject to the sentencing provisions found in former § 13-703.01(Q)(1), (2). That statute provided, in relevant part:

> Q. If the death penalty was not alleged or was alleged but not imposed, the court shall determine whether to impose a

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[6]Newcomb has failed to indicate, either by citation or argument, what version of the law she believes applies to her case, despite the multitude of changes our criminal code has undergone in recent years with respect to sentencing for first-degree murder.

[7]The version of this statute in effect when Newcomb committed the offense is found in 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 6.

[8]*See* 2003 Ariz. Sess. Laws, ch. 255, § 1.

[9]*See* 2003 Ariz. Sess. Laws, ch. 255, § 2.

> sentence of life or natural life. In determining whether to impose a sentence of life or natural life, the court:
>
> 1. May consider any evidence introduced before sentencing or at any other sentencing proceeding.
>
> 2. Shall consider the aggravating and mitigating circumstances listed in [A.R.S.] section 13-702 and any statement made by a victim.

2003 Ariz. Sess. Laws, ch. 255, § 2.

¶27 Here, as in *Fell*, the jury's verdict alone exposed Newcomb to a possible sentence of life imprisonment without the possibility of parole. Deciding whether to impose this punishment was within the trial court's discretion and did not depend on any additional factual findings, notwithstanding the requirement in former § 13-703.01(Q)(2) that the court "consider the aggravating and mitigating circumstances" listed in former § 13-702.[10] The court did not err, therefore, in sentencing Newcomb to imprisonment for her natural life without any findings having been made by the jury or beyond a reasonable doubt. Moreover, because former § 13-702 placed Newcomb on notice of the aggravating circumstances the court must and did consider, and because Newcomb has identified no other statutory provision or procedural rule requiring the state to provide any additional, specific notice of the aggravating factors it would assert, we reject her suggestion she was entitled to any more

[10]*See* 2004 Ariz. Sess. Laws, ch. 174, § 1.

notice than she received of the factors the court considered when imposing her life sentence.[11]

¶28 In her opening brief, Newcomb urges this court to ignore or reconsider the holding in *Fell* insofar as our supreme court "failed to address the ambiguities [that] arise when attempting to construe §§ 13-702, 13-703(D) and 13-703(Q) together with relevant constitutional precedent."[12] As an intermediate appellate court, we are not free to modify, disregard, or overrule the decisions of our supreme court. *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). We therefore may not disregard our high court's ruling on the ground that its reasoning was not, in an appellant's estimation, adequately comprehensive.

¶29 Nor may we regard *Fell* as having been abrogated by *Cunningham v. California*, 549 U.S. 270 (2007), as Newcomb suggests. In *Cunningham*, the Supreme Court

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[11]Newcomb's argument that former § 13-703.01 is internally inconsistent or required notice of aggravating circumstances is apparently based on a misreading of this statute. Former § 13-703.01(B) provided: "Before trial, the prosecution shall notice one or more of the aggravating circumstances under [§] 13-703, subsection F." 2003 Ariz. Sess. Laws, ch. 255, § 2. However, the latter provision only applied to cases in which the state sought the death penalty. *See* 2003 Ariz. Sess. Laws, ch. 255, § 1 (former § 13-703(F)) ("The trier of fact shall consider the following aggravating circumstances *in determining whether to impose a sentence of death* . . . .") (emphasis added). Thus, § 13-703.01(B) did not apply to Newcomb's case, and this subsection's requirement is wholly consistent with former § 13-703.01(Q), pertaining to noncapital sentences.

[12]Former § 13-703(D), which the supreme court considered in *Fell*, 210 Ariz. 554, ¶¶ 16-18, 115 P.3d at 598-99, and which required a trial court to explain in a special verdict its reasons for imposing a natural life sentence, was amended to remove this requirement in 2002, *see* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1, before Newcomb committed her offense.

held that California's "determinate sentencing law"—a law that allowed judges to find, by a preponderance of the evidence, the facts necessary for imposing an elevated "'upper term'" sentence—violated the Sixth and Fourteenth Amendments to the United States Constitution. *Id.* at 274. The mandatory features of California's sentencing scheme distinguish it from the statutes applicable here. Whereas California's law "obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation," *id.* at 275, Arizona's laws authorized the sentencing court to "impose a sentence of life or natural life" after "consider[ing]" certain aggravating and mitigating circumstances. 2003 Ariz. Sess. Laws, ch. 255, § 2. In Arizona, a sentencing court is directed by statute to make certain considerations, but no mandatory term is specified, and no findings are required, for a natural life sentence to be imposed; hence, our sentencing scheme does not "control[] the trial judge's choice" in the same unconstitutional manner as did the California statute invalidated in *Cunningham*. 549 U.S. at 277. Accordingly, the trial court did not err or violate Newcomb's constitutional rights in sentencing her to natural life imprisonment for her conviction of first-degree murder.

Excessive Sentence

¶30 Newcomb also contends her "combined sentence was excessive and should be reduced." Section 13-4037(B), A.R.S., authorizes this court to modify legally imposed sentences if they are excessive. *See State v. Long*, 207 Ariz. 140, n.6, 83 P.3d 618, 626 n.6 (App. 2004). Because the trial court is in the best position to evaluate a defendant convicted

of a crime, *id.*, we exercise this authority with great caution, *State v. Fillmore*, 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App. 1996), and we will uphold a sentence unless it clearly appears from the record that the trial court has abused its broad discretion in imposing the chosen term. *State v. McDonald*, 111 Ariz. 159, 166, 526 P.2d 698, 705 (1974). Newcomb specifically asks this court to make her life sentence parole-eligible, citing her minimal involvement in the murder and the strength of the evidence against her. We decline to do so, finding, as did the trial court, that Newcomb's actions precipitated the murder and therefore justify her natural life sentence. Her consecutive sentences for aggravated assault, totaling an additional 3.5 years, also are not excessive.

JURY

¶31 Last, Newcomb argues her two convictions for aggravated assault resulting from her first trial should be set aside because that jury was "improperly constituted." While presiding over jury selection in a different case, the trial court fortuitously discovered that the jury foreman in Newcomb's first trial had erroneously reported for jury duty there in lieu of his son, the intended recipient of the jury notice and preliminary questionnaire. As it happened, father and son had the same name and were living at the same address when the jury materials were mailed.

¶32 On September 12, 2006, the court filed a notice apprising Newcomb that the matter had been investigated and it appeared "[t]hat [the jury questionnaire was filled out by . . . the father, rather than by the son, because the son has certain disabilities." The notice

also advised Newcomb "the Court will not on its own initiative take any action. If either party believes action should be taken, such party should file an appropriate motion."

¶33 Newcomb took no action in response to the trial court's notice until June 19, 2007—after she had been sentenced and had filed her notice of appeal—when she moved to vacate her convictions from the first trial pursuant to Rule 24.2(a)(2) and (3), Ariz. R. Crim. P. After a hearing on the motion, the court found "[n]othing on the Notice and Jury Questionnaire that [the foreman] filled out . . . allowed a layperson to distinguish between the father and the son." The court further found "the actions of [the foreman] in filling out the juror questionnaire intended for his son, and his appearing for the trial in May 2006, were done innocently and without any intent to deceive or mislead the Court or anyone else." The court observed the father had provided his own age on the preliminary questionnaire and his answers in a subsequent questionnaire and during *voir dire* showed he was legally qualified to serve as a juror.

¶34 At the hearing, the court heard testimony from the son and determined he was mentally fit to serve on a jury. The court noted, however, that the father was not a witness at the hearing and consequently had been unable to give the factual basis for his opinion and earlier comments regarding his son's mental capacity. The court then concluded, "No evidence exists to show that the father acted improperly in filling out a questionnaire and responding to a jury summons which he believed to be intended for him," and it denied Newcomb's motion to vacate.

¶35 On appeal, Newcomb claims the foreman had "impersonated his son for the purpose of becoming a prospective juror in [her] first trial" and had done so "by perpetrating a fraud on the court." She points out that the foreman had informed the court the jury was deadlocked in an eleven-to-one vote in the first trial, contrary to the court's instructions not to disclose the jury's numerical votes, and had suggested excusing one of the jurors for refusing to follow the law. From these actions, Newcomb speculates the foreman was motivated by "an inordinate desire to serve on the jury, perhaps in order to contribute to a guilty verdict in a high profile case."

¶36 To the extent Newcomb has asserted a jury misconduct claim, we find no basis for disturbing the trial court's ruling. "'[J]uror misconduct warrants a new trial [only] if the defense shows actual prejudice or if prejudice may be fairly presumed from the facts.'" *State v. Dann*, 220 Ariz. 351, ¶ 115, 207 P.3d 604, 624 (2009), *quoting State v. Miller*, 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994) (second alteration in *Dann*). "We review the trial court's ruling regarding alleged jury misconduct for an abuse of discretion." *Id.* ¶ 106.

¶37 Here, the record amply supports the trial court's findings that the foreman's service on Newcomb's first jury was the result of "innocent name confusion" and that he was, in fact, qualified to serve on the jury. As the court aptly observed: "In the case of one qualified juror who innocently took the place of another qualified juror with the same name, the Court does not see how it could, [n]or why it should, presume prejudice." We agree with the court's analysis and find nothing in the foreman's comments suggesting he was biased

or dishonest or otherwise deprived Newcomb of her right to trial by an impartial jury. We also reject Newcomb's argument, offered without elaboration or authority, that "the seating of [the foreman] constituted structural error" and "create[d] a presumption of prejudice," when this juror was subjected to *voir dire*, was qualified to serve, and had no identifiable bias or interest in the case. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must contain citations to relevant authority and argument for each contention raised on appeal); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop argument in opening brief results in waiver).

DISPOSITION

¶38 For the foregoing reasons, we affirm Newcomb's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge