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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. LAWRENCE TASHQUINTH, SR., Appellant.	)	2 CA-CR 2008-0172 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20064189

Honorable Michael J. Cruikshank, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, Lawrence Tashquinth was convicted of second-degree murder. On appeal, he claims the trial court erred when it failed to hold an evidentiary hearing regarding the voluntariness of his statement to police and improperly admitted gruesome photographs. We affirm for the reasons stated below.

Facts and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Responding to a 911 call, police officers found the victim in an apartment lying on a couch with Tashquinth kneeling over her. The victim had four stabs wounds, and paramedics subsequently pronounced her dead at the scene. Tashquinth had a knife stuck in his right side and was transported to the hospital. Eleven days later, while still in the hospital, Tashquinth was interviewed by a police detective. He was later charged with first-degree murder.

¶3 Tashquinth's first trial ended in a mistrial because the jury could not reach a verdict. After a second trial, the jury found him guilty of second-degree murder. The trial court sentenced Tashquinth to sixteen years' imprisonment, and this appeal followed.

Voluntariness of First Statement to Police

¶4 Tashquinth first argues that the statement he made to police while at the hospital was not voluntary and his due process rights were violated by the trial court's admission of the statement without first conducting an evidentiary hearing to determine whether the statement was voluntarily made. Tashquinth had objected to the admission

of the statement during the first trial on this ground. The trial court overruled the objection and determined the confession had been voluntary. At the second trial, Tashquinth objected to the introduction of this statement based solely on the fact that he had not been given *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436 (1966).[1]

¶5 When an objection made in a first trial is not renewed at the second trial, the objection is forfeited on appeal. *See State v. Anderson*, 210 Ariz. 327, ¶ 18, 111 P.3d 369, 378 (2005); *State v. De La Ossa*, 128 Ariz. 37, 39, 623 P.2d 826, 828 (App. 1980); *see also United States v. Gomez*, 67 F.3d 1515, 1526 n.13 (10th Cir. 1995) ("[I]t is fundamental that, in cases where a new trial has been ordered, objections made during the first proceeding do not preserve issues for appeal in the second."). When an issue raised on appeal was not preserved at trial, the defendant has forfeited the right to seek relief for all but fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). However, because Tashquinth does not argue fundamental error on appeal, and because we, in any event, find none, the issue is waived. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal when not argued); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it).

[1]During the discussion about *Miranda* warnings at the second trial, the trial court stated that there was "not a voluntariness issue at this point," and Tashquinth did not take that opportunity to renew his objection.

Admission of Photographs

¶6 Tashquinth next argues that the trial court erred by admitting gruesome photographs.[2] We review a trial court's decision to admit photographs for abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 44, 207 P.3d 604, 615 (2009).

¶7 To determine the admissibility of an allegedly gruesome photograph, the court considers the relevance of the photograph, its inflammatory nature, and whether its probative value is outweighed by the potential for prejudice. *State v. Cruz*, 218 Ariz. 149, ¶ 125, 181 P.3d 196, 215-16 (2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 900 (2009). Relevant photographs that are gruesome or inflammatory may still be admissible unless they are "'admitted for the sole purpose of inflaming the jury.'" *State v. Morris*, 215 Ariz. 324, ¶ 70, 160 P.3d 203, 218 (2007), *quoting State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982).

Exhibits 45 and 52

¶8 At trial, Tashquinth objected when the state sought to introduce two photographs, one of the victim's clothing and one of the victim's body taken at the autopsy. The court admitted the photographs and Tashquinth argues on appeal, the photographs listed as exhibits 45 and 52 were gruesome and cumulative and "without probative value." We consider each in turn.

[2]Although Tashquinth makes a passing reference to exhibit 52 as having "no relevance at all," he does not adequately develop this argument. It is, therefore, waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶9 Tashquinth contends that exhibit 45, which shows a profile view of the victim's body at the autopsy, is "bloody, gory, gruesome, cumulative" and of "little if any probative value." But "[p]hotographs of a victim's body are always relevant" in a murder prosecution. *Morris*, 215 Ariz. 324, ¶ 70, 160 P.3d at 218. The photograph depicts the victim's body lying on the autopsy table, and it is not unusually bloody. The trial court reasonably could have determined that this photograph is not inflammatory and that its probative value is not outweighed by any prejudicial effect. Thus, we cannot conclude that the trial court abused its discretion in admitting exhibit 45.

¶10 Exhibit 52, which was also taken at the time of the autopsy, depicts a pile of soiled clothing that had been removed from the victim. Tashquinth contends the court erred in admitting the photograph, characterizing it as "extremely prejudicial." The photograph arguably had minimal probative value because the soiled shirt itself was admitted into evidence; however, the items photographed appear to include other items of clothing as well. And the trial court reasonably could have determined that this photograph was not gruesome.

¶11 Tashquinth cites *State v. Davolt*, 207 Ariz. 191, ¶¶ 62-63, 84 P.3d 456, 473-74 (2004), to support his assertion that the trial court abused its discretion by admitting the two exhibits. In *Davolt*, our supreme court determined that admission of the autopsy photographs was not an abuse of discretion but that admission of photographs of the crime scene showing "the victims' charred bodies" was erroneous. *Id.* Exhibits 45 and 52 are not remotely similar to photographs of charred bodies.

Exhibits 59 and 87

¶12 Tashquinth also argues that *either* exhibit 59 or 87, both photographs of the victim's body, was admissible but that the court abused its discretion by admitting both of them. Tashquinth did not object to the admission of exhibit 59. Exhibit 87 is included on the exhibit list from the second trial, and Tashquinth cites to this list as the basis for his objection to the admission of both photographs. However, exhibit 87 itself does not show that it was admitted, nor does the record otherwise establish that exhibit 87 was admitted or given to the jury.

¶13 Additionally, Tashquinth's argument is based on a decision the court had made during the first trial, when it had advised the state it would only admit one of the three photographs the state was then seeking to admit.[3] Because this decision was made during a trial that resulted in a mistrial, it was not binding on the state in the second trial. *See King v. Superior Court*, 108 Ariz. 492, 493, 502 P.2d 529, 530 (1972) (court concurred with assertion that "a mistrial places the parties in the same position as if the case had never been tried"); *cf. Anderson*, 210 Ariz. 327, ¶ 18, 111 P.3d at 378 (objection made at the first trial not renewed at the second trial is waived on appeal). Accordingly, even if exhibit 87 was given to the jury, Tashquinth waived any objection to the admission of both photographs and forfeited the right to relief for all but fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

[3]In the first trial, the state sought to admit exhibits 59, 74, and 87, and Tashquinth objected. The court stated the state could "get by with . . . 87, 74 or 59."

¶14 Fundamental error is "'error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009), *quoting Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. The defendant has the burden of proving both that "fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶15 In *State v. Stevens*, 158 Ariz. 595, 764 P.2d 724 (1988), our supreme court considered a similar issue. Two photographs of a crime scene, which were never admitted into evidence, were inadvertently presented to the jury. 158 Ariz. at 597, 764 P.2d at 726. The court found that the two photographs were similar to a third photograph that had been admitted and that these photographs could not, therefore, have "contributed to the verdict beyond a reasonable doubt." *Id.* Thus, any error was found to be harmless. *Id.*

¶16 Exhibits 59 and 87 are very similar. They are both similar views of the victim's body, although exhibit 87 was taken at a greater distance than exhibit 59 and shows the victim's face. Even assuming the trial court's original order had still been in effect, one of the two photographs would have been admitted under that order. Presentation to the jury of the second, similar photograph would not be an error that rises to the level of fundamental error by infringing upon appellant's right to a fair trial, but it would rather be harmless error of the kind found in *Stevens*. *See id.* And, even if it were fundamental error, Tashquinth has not shown it was prejudicial. He asserts there was prejudice because this trial resulted in a conviction rather than in a hung jury, but Tashquinth has not established that the admission of the two photographs rather than one

is what resulted in the different outcomes. Thus, Tashquinth has not established any error here was both fundamental and prejudicial.

Conclusion

¶17 We affirm Tashquinth's conviction and the sentence imposed.

JOSEPH W. HOWARD, Chief Judge

PHILIP G. ESPINOSA, Presiding Judge

GARYE L. VÁSQUEZ, Judge