FILED BY CLERK
JUNE 26 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS DAVID LOPEZ, Appellant.	2 CA-CR 2008-0046 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20053890

Honorable Christopher C. Browning, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Jesus Lopez was convicted of first-degree murder and abuse of a child under the age of fifteen under circumstances likely to cause death or

physical injury. The trial court sentenced Lopez to a life term of imprisonment with no parole eligibility for twenty-five years and to a consecutive, 3.5-year prison term for child abuse. On appeal, he contends the court erred when it refused to give his requested jury instruction defining the term "reflection" for purposes of the first-degree murder charge. He also contends the court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on the child abuse charge. We affirm for the reasons stated below.

¶2 "We view the facts in the light most favorable to sustaining the verdict[s]." *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). Lopez and his wife had been having marital difficulties that appeared to have escalated in the two weeks preceding the day he shot and killed her. The neighbor who heard the gunshots and called the police had heard the couple fighting earlier that morning and had heard their daughter crying. After hearing a number of shots fired, the neighbor heard something fall and saw Lopez's car leaving the house. Police officers arrived and found Lopez's wife, A., dead on the floor. She had sustained fourteen gunshot wounds. Based on the location of the bullet casings, it appeared Lopez had shot at A. while walking down the hall toward her from the master bedroom. Lopez called his mother at work on the morning of the shooting and told her he had done "something really, really bad," explaining that he had shot and killed A. and that he had their daughter with him. Lopez then took his daughter to his mother's house and left her with his brother-in-law.

¶3 Consistent with A.R.S. § 13-1105, the trial court instructed the jury the offense of first-degree murder includes the following elements: a person caused the death of another, the person intended or knew his conduct would cause the death of another, and the person committed the murder with premeditation. With respect to premeditation, the court instructed the jury as follows:

> Premeditation means that the defendant intended to kill another human being or knew that he would kill another human being and . . . after forming that intent or knowledge reflected on the decision before killing. It is this reflection regardless of the length of time in which it occurs that distinguishes first degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

The court then instructed the jury on the offenses of second-degree murder, manslaughter, and negligent homicide.

¶4 During the settling of instructions, the court and counsel discussed the elements of first-degree murder and the fact that our supreme court had made clear in *State v. Thompson*, 204 Ariz. 471, ¶ 32, 65 P.3d 420, 428 (2003), that the state is required to prove actual reflection. But the court rejected Lopez's proposed instruction defining the term "reflection" as follows:

> "Reflection" is defined as "a fixing of the thoughts on something; careful consideration." In other words, it includes such things as meditation, rumination, deliberation, cogitation, study, and thinking. It is a time period of some substance, that i[s], it must be a time period sufficient to encompass a complex thought process, the kind of process involved, for example, in "careful consideration."

In opposition, the prosecutor contended the instruction was a comment on the evidence and not required by *Thompson*. She noted, too, that the legislature had not defined the term, which, she argued, meant it had not intended a definition be required. Observing that the language in the proposed instruction did not exist in *Thompson*, the court refused to give it. The court assured defense counsel, however, that it would not prevent her from explaining the concept of reflection to the jury, including, as defense counsel had phrased it, "the mental process that is involved in reflection."

¶5 On appeal, Lopez contends that, because the defense in this case was that the murder had not been premeditated but rather had been "the effect of a sudden quarrel or heat of passion," the proposed instruction "would have helped the jury understand the issue to be decided" and was both "proper and necessary." Lopez concedes the instruction given was consistent with *Thompson* but nevertheless asserts the proposed instruction was particularly necessary here because of the state's argument in closing that reflection can be "this quick," only a "split second." Lopez also contends the trial court erred in concluding the instruction was a comment on the evidence.

¶6 "We evaluate the trial court's denial of a proposed jury instruction for abuse of discretion, but review de novo whether a jury instruction correctly states the law." *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). And, in determining whether instructions "correctly reflect the law," we view them "in their entirety." *Id*. We examine whether the instructions that were given would have misled the jury, affirming when "the instructions as a whole are 'substantially free from error.'" *Id.*, *quoting State v. Norgard*, 103

Ariz. 381, 383, 442 P.2d 544, 546 (1968). A court does not err by refusing an incorrect instruction. *Cox*, 217 Ariz. 353, ¶ 17, 174 P.3d at 268.

¶7 The instructions the trial court gave for first-degree murder were correct and consistent with our supreme court's decision in *Thompson*. The jury was adequately instructed that the state had to prove Lopez had actually reflected before shooting A. *See Thompson*, 204 Ariz. 471, ¶ 20, 65 P.3d at 425 (state must prove actual reflection "to minimize the emphasis placed on the mere passage of time as a proxy for proving reflection"; "premeditation can occur as instantaneously as 'successive thoughts of the mind'"). The state's argument that the amount of time that elapsed was not determinative of whether Lopez had reflected was also correct and consistent with the instruction the court gave on premeditation. We see nothing unique about this case that so distinguishes it from any other first-degree murder case in which the defendant denies having reflected that would require further instruction.

¶8 Additionally, the proposed instruction is inconsistent with *Thompson*. And we also reject Lopez's suggestion that the proposed instruction was necessary here because "the evidence of premeditation was *not* overwhelming." That the evidence of premeditation was not overwhelming would be relevant in determining whether an erroneous first-degree murder instruction to which the defendant had objected was harmless. *See State v. Dann*, 205 Ariz. 557, ¶¶ 18-21, 74 P.3d 231, 239-40 (2003). But even assuming Lopez is correct that evidence of premeditation was not overwhelming, it does not mean the instructions given were erroneous or the court erred in rejecting the proposed instruction.

¶9 Moreover, in closing argument, both the prosecutor and defense counsel explained the first-degree murder instructions in such a way that the meaning of reflection was clear. *See State v. Morales*, 198 Ariz. 372, ¶ 5, 10 P.3d 630, 632 (App. 2000) (considering prosecutor's closing argument in evaluating instruction, noting prosecutor clarified "any alleged ambiguity"); *State v. Russell*, 175 Ariz. 529, 533, 858 P.2d 674, 678 (App. 1993) (rejecting challenge to jury instruction based in part on opening statements and closing arguments of prosecutor and defense counsel clarifying any misunderstanding). Both assured that the jury understood reflection could occur quickly, that there had to be some amount of time to reflect, and that the state had to prove Lopez had actually reflected before shooting A. *See Dann*, 205 Ariz. 557, ¶ 16, 74 P.3d at 239 ("[I]f a court's instruction or a prosecutor's comment to the jury signals that the mere passage of time will suffice to establish the element of premeditation, those instructions or comments constitute error."). The state suggested to the jury the kind of evidence it could consider as proving that Lopez had reflected before shooting: the couples' marital problems in the preceding weeks, the fact that Lopez and A. were overheard arguing earlier on the morning of the shooting, the number of shots fired, and the fact that Lopez appeared to have been walking toward A. as he shot at her at least fourteen times.

¶10 Similarly, defense counsel explained the concept of reflection to the jury along the lines she had discussed during the settling of the jury instructions. She pointed out that, under Arizona law, no specific length of time is required to permit reflection. She also stressed that Lopez was impulsive generally and had acted impulsively when he shot A.

¶11 In sum, the jury was correctly and adequately instructed on the law pertaining to the offense of first-degree murder. The trial court did not abuse its discretion in refusing to give Lopez's proposed instruction on the meaning of reflection.

¶12 Lopez also contends the trial court erred in denying his Rule 20 motion on the child abuse charge, arguing the state failed to present sufficient evidence that the child's death or serious physical injury was probable. He argues the court applied the wrong standard in ruling on the motion by considering whether it was likely or possible the child could have been killed or injured during Lopez's shooting of A., rather than whether it was probable. We will not disturb the trial court's ruling on Lopez's motion absent an abuse of discretion. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). A motion for judgment of acquittal should only be granted when there is no substantial evidence proving the elements of the offense. Ariz. R. Crim. P. 20(a). Only if there is "a complete absence of probative facts to support a conviction," will we reverse a trial court's denial of a motion for judgment of acquittal. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). In determining whether there was sufficient evidence to withstand a Rule 20 motion, "we view the evidence in the light most favorable to sustaining the verdict." *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984). "[I]f reasonable minds can differ on inferences to be drawn [from the evidence], the case must be submitted to the jury . . . [and the] trial judge has no discretion to enter a judgment of acquittal." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted).

¶13 Lopez was charged with "intentionally or knowingly causing or permitting [his three-year-old daughter] . . . to be placed in a situation where her health was endangered, under circumstances likely to produce death or serious physical injury," in violation of A.R.S. § 13-3623(A)(1). Lopez is correct that the term "likely" in this statute has been interpreted to mean probable, rather than possible. *State v. Johnson*, 181 Ariz. 346, 350, 890 P.2d 641, 645 (App. 1995). And, as he points out, in *State v. Greene*, 168 Ariz. 104, 107-08, 811 P.2d 356, 359-60 (App. 1991), this court concluded the trial court should have granted the defendant's Rule 20 motion on a child abuse charge when the evidence only established "a *potential* for harm," rather than circumstances likely to produce death or serious injury. But the filthy, even dangerous, home in *Greene* is not the same as the circumstances here, particularly for Rule 20 purposes. *See id*., 168 Ariz. at 105, 811 P.2d at 357.

¶14 Moreover, in *Johnson*, Division One of this court distinguished *Greene* and found there was sufficient evidence to establish a factual basis for the defendant's guilty plea to child abuse under circumstances likely to produce serious injury or death. 181 Ariz. at 350, 890 P.2d at 645. In *Johnson*, eleven adults were in the defendant's apartment when police officers executed a search warrant, and several were injecting liquid cocaine; the defendant's three children were playing in the apartment, unsupervised; cocaine, razor blades, drug-filled syringes, and other drug paraphernalia were "lying about the apartment readily accessible to" the children; and the apartment was filthy and "unhealthy." *Id*.

¶15 The case before us is certainly more analogous to *Johnson* than *Greene*. The state presented an abundance of evidence that Lopez had walked down the narrow hallway

of his home, repeatedly shooting at A. Psychologist Richard Hinton testified Lopez had told him his daughter had been in a bedroom during the shooting; she had come out of the bedroom after the gunfire had awoken her. Assuming as true Lopez's contention both below and on appeal that his daughter had been in her bedroom, that fact does not render the evidence insufficient to support the conviction, as Lopez suggests. Rather, together with other evidence, it supports the jury's verdict. There were three bedrooms on one side of the hallway between the master bedroom, which was at the end of the hallway where Lopez had been when he began shooting, and the threshold to the kitchen, which is where A. had been when Lopez had shot her as he walked down the hallway. Thus, Lopez had to have passed the other bedrooms as he repeatedly shot at A. The hallway was narrow, only three feet, seven inches wide.

¶16 Additionally, there was evidence that bullets ricochet and change directions, that a bullet had been found embedded in the hallway wall, apparently on the same side as the bedrooms other than the master bedroom, and that markings on the ceiling suggested bullets had struck there as well. There was also evidence that bullets can penetrate through walls. Additionally, as the state points out, Lopez told Hinton that he had fired with one hand and with his eyes closed, from which jurors could infer Lopez had not been fully in control of the gun and thereby had increased the risk of harm to his child. The trial court was not required to find the evidence actually established these elements of the offense in order to deny the motion; it was only required to find that reasonable persons could view the

evidence as sufficient to establish those elements beyond a reasonable doubt.[1] *See State v. Molina*, 211 Ariz. 130, ¶ 8, 118 P.3d 1094, 1097 (App. 2005). The court did not abuse its discretion in denying Lopez's motion for a judgment of acquittal.

¶17 The convictions and sentences are affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge

[1]We are not convinced the trial court applied the wrong standard. The court reviewed the evidence that bullets ricochet, that the hallway was small and constructed of drywall, and that, in fact, of the more than fourteen shots fired, some bullets did ricochet and go into the drywall. And as the court pointed out and defense counsel conceded during the discussion about the Rule 20 motion, there was testimony from the ballistics experts that bullets can go through walls. The court then stated, in the disjunctive, "[T]hat is enough to create the possibility or likelihood that serious physical injury or death could occur." In any event, as we have found, the quantum of evidence presented was sufficient to withstand the motion.