FILED BY CLERK
SEP 25 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. OSCAR ROLANDO TERRAZAS, Appellant.	2 CA-CR 2008-0207 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073517

Honorable John S. Leonardo, Judge

REVERSED AND REMANDED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Frank P. Leto
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Appellant Oscar Terrazas appeals his convictions for first-degree murder and aggravated assault. He argues the trial court erred by denying his motion to sever the two charges and that several of the jury instructions given by the court were error. We reverse.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Terrazas's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Around midnight on September 9, 2007, Terrazas went to M.'s residence to discuss purchasing a television from him. Terrazas and M. argued over whether M. would allow Terrazas to use M.'s bicycle to transport the television. When Terrazas began to take the bicycle out of M.'s residence without permission, M. tried to stop him by grabbing the bicycle. Terrazas then stabbed M. seven times, killing him.

¶3 Several minutes after Terrazas left the scene, he encountered D. about a block away. Terrazas told D. "he was from Hollywood[, a Tucson barrio]," and, in response, D. "let him know it was me" because he had "seen [Terrazas] around." Terrazas then, according to D. for "no reason," stabbed D. twice, once in the arm and once in the thigh. Police arrested Terrazas shortly thereafter. Both D.'s and M.'s blood was found on a knife Terrazas had been holding when arrested; M.'s blood was also found on Terrazas's shoes, hands, and back.

¶4 A grand jury charged Terrazas with first-degree murder of M. and two counts of aggravated assault of D.—one with a deadly weapon and one causing serious physical injury. The trial court granted the state's motion to dismiss with prejudice the latter assault

count before trial. After a four-day trial, the jury found Terrazas guilty of both remaining counts. The court sentenced him to a life term of imprisonment with the possibility of parole after twenty-five years for M.'s murder and a presumptive, consecutive prison term of 11.25 years for the aggravated assault on D. This appeal followed.

Discussion

¶5 Terrazas contends the trial court erred in giving, over his objection, three jury instructions at the close of the evidence. He argues the court's instructions: (1) improperly "undermined the role of defense counsel in discussing the evidence and arguing all reasonable inferences from [it] that favor acquittal"; (2) misstated the law and misled the jury by "inform[ing] the jury that only the culpable mental state of intent may be found by circumstantial evidence," without mentioning knowledge and recklessness; and (3) improperly commented on the evidence, in violation of the Arizona Constitution, by "limit[ing] the jury's determination of witness credibility." We review de novo constitutional issues and whether a jury instruction properly states the law. *See State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119,1140 (2004) (constitutional issues); *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997) (jury instructions).

¶6 We first address Terrazas's argument that the trial court improperly instructed the jury regarding witness credibility and weighing the evidence. At the close of the evidence, the court instructed the jury it was required to assess the credibility of the witnesses and weigh the evidence by "carefully evaluat[ing] the testimony given, the circumstances under which the witness has testified and every matter in evidence that tends to indicate

whether the witness is worthy of belief." The court further stated that "innocent misrecollection, like failure of memory, is not an uncommon experience." It also instructed the jury that, "in weighing inconsistencies or discrepancies [in witness testimony], [it] should consider whether they concern a matter of importance, or an unimportant detail, and whether the discrepancy or inconsistency results from innocent error or willful falsehood."

¶7 Terrazas takes issue with the portions of the court's instruction in which it stated that "innocent misrecollection" and a "failure of memory" are "not uncommon" and that, when weighing inconsistencies in a witness's testimony and assessing credibility, the jury "should consider" whether the inconsistency involved a minor detail or was unintentional. Terrazas's defense at trial was that the state's witnesses were not credible and, because "[t]he State's case relies on the accuracy, the one hundred percent accuracy [of its witnesses' testimony]," it had failed to prove his guilt. In both opening and closing arguments, Terrazas attempted to undermine the credibility of the state's witnesses by highlighting numerous gaps and inconsistencies, many involving minor details, in their testimony. Terrazas asserts the instructions the court gave "improperly limited the way in which the jury could analyze witness credibility," and, therefore, constituted an improper comment on the evidence.

¶8 Although American judges historically were permitted to comment on the evidence and its weight to aid the jury in reaching a verdict, the Arizona Constitution forbids Arizona's judges from doing so. *See* Ariz. Const. art. VI, § 27; *State v. Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d 368, 388 (2006). Our constitution directs that "[j]udges shall not charge

juries with respect to matters of fact, nor comment thereon, but shall declare the law." Ariz. Const. art. VI, § 27. A trial court violates this provision when it expresses an opinion regarding what the evidence proves or "'interfere[s] with the jury's independent evaluation of th[e] evidence.'" *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388, *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998).

¶9 The state contends the trial court did not comment improperly on the evidence because the instruction was not worded in such a manner that the court gave its "opinion about any piece of evidence." But the state ignores that "'express[ing] an opinion as to what the evidence proves'" is only one manner in which a trial court may comment improperly on the evidence. *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388, *quoting Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d at 1011. As we have noted, a court also can violate our constitution's prohibition on commenting on the evidence by giving an instruction that otherwise "'interfere[s] with the jury's independent evaluation of th[e] evidence.'" *Id.*, *quoting Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d at 1011. As we explain below, the trial court did so here.

¶10 We find our supreme court's decision in *Garrett v. State*, 25 Ariz. 508, 219 P. 593 (1923), instructive. There, the trial court instructed the jury that an alibi, if found to be true, is a "conclusive" defense. *Id.* at 511, 219 P. at 594. It also stated that it was the jury's responsibility to assess the witnesses' credibility and weigh any conflicting testimony, "tak[ing] into consideration . . . those rules of ordinary experience and general observation by which intelligent men decide." *Id.* It continued,

> The fact, however, which experience has shown, is that an alibi as a defense is capable of being and has been occasionally successfully fabricated, that, even when wholly false, its detection may be a matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance.

Id.

¶11 The defendant asserted the final sentence of the trial court's instruction was an improper comment on the evidence, violating the Arizona Constitution. *Id.* at 512, 219 P. at 594. Looking to other jurisdictions for guidance, our supreme court noted that, although the trial court's statements may have been true based on its experience, "'it is [not] within the province of the judge . . . to discredit a particular defense or the evidence in support of a particular proposition'" by giving instructions based on "'no known rule of law or logic.'" *Id.* at 514, 219 P. at 595, *quoting Henry v. State*, 70 N.W. 924, 926 (Neb. 1897). The court concluded that the trial court's instruction implicitly "disparag[ed]" the defendant's alibi defense and provided the jury "rule[s] . . . to be used in weighing the testimony concerning the alibi," thereby constituting an improper comment on the evidence. *Id.* at 515-16, 219 P. at 595.

¶12 Here, after correctly instructing the jury it was its duty to weigh the evidence and assess the witnesses' credibility, the trial court observed that "innocent misrecollection, like failure of memory, is not an uncommon experience." It further instructed the jury that, "in weighing inconsistencies or discrepancies, [it] should consider whether they concern a matter of importance, or an unimportant detail, and whether the discrepancy or inconsistency results from innocent error or willful falsehood." As in *Garrett*, the first of these statements

is not a statement of the law but, rather, a generalization perhaps based on the judge's own extensive experience that discredits a proposition necessary to Terrazas's defense—that misrecollection or memory failure is not normal and, therefore, some of the state's witnesses are not credible. *See* 25 Ariz. at 514-16, 219 P. at 595. And, also similar to *Garrett*, the second statement interfered with the jury's independent evaluation of the testimony by providing it rules, not founded in the law, to be used in weighing the evidence—that is, informing the jury what it "should" consider and what is and is not important in assessing the credibility and weight of a witness's testimony. *See Id.* at 515-16, 219 P. at 595; *see also State v. Dixon*, 127 Ariz. 554, 560, 622 P.2d 501, 507 (App. 1980) (trial court may inform jury of permissible inference "as long as the jury is informed that the inference is not conclusive"); *State v. Wallen*, 114 Ariz. 355, 359, 560 P.2d 1262, 1266 (App. 1977) ("The court in instructions may not discuss certain inferences which may or may not be drawn from the evidence and instruct the jury as to which inferences they should adopt.").

¶13 Nonetheless, the state contends these statements were not improper because they were matters of "common sense," and "jurors do not check their common sense at the courtroom door." We agree that jurors may consider matters of common sense in reaching their verdicts. *See State v. McLoughlin*, 133 Ariz. 458, 461 n.2, 652 P.2d 531, 534 n.2 (1982) (jurors may rely on their common sense and life experience during deliberations); *State v. Lindeken*, 165 Ariz. 403, 406, 799 P.2d 23, 26 (App. 1990) (same). But we disagree the trial court's instructions here state undisputable matters of common sense. A reasonable juror easily could disagree that misrecollection and memory failure are common experiences of

witnesses to a violent crime. Rather, reasonable jurors could conclude, based on their own experiences, that a witness to a violent crime likely would remember vividly the details about the crime and that such a witness's inability to do so suggests the witness may not be credible. *See McLoughlin*, 133 Ariz. at 461 n.2, 652 P.2d at 534 n.2. In fact, whether it is common for a crime victim to experience lapses in memory or to misremember details is in certain circumstances properly the subject of expert testimony. *See State v. Chapple*, 135 Ariz. 281, 292-94, 660 P.2d 1208, 1219-21 (1983). A reasonable juror could also believe, contrary to the court's instruction, that minor discrepancies or inconsistencies in the details of a witness's testimony are equally important as discrepancies in major elements of the testimony when assessing the witness's credibility. As we have explained, a trial court may not give the jury instructions that, although consistent with the court's experience, restrict the jury's ability to independently weigh the evidence based on "'no known rule of law or logic.'" *Garrett*, 25 Ariz. at 514, 219 P. at 595, *quoting Henry*, 70 N.W. at 926.

¶14 When, as here, the defendant has preserved the issue in the trial court, the state has the burden of proving "'beyond a reasonable doubt[] that the error did not contribute to or effect the verdict.'" *State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 373 (2008), *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). The state does not contend the error was harmless but, instead, merely asserts Terrazas's claim of error is "meritless" and "[n]o error occurred." In any event, like the supreme court in *Garrett*, we cannot say the error here was harmless. As previously noted, Terrazas's defense was premised on his ability to convince the jury the state's witnesses were not credible due to

gaps and inconsistencies, some minor, in their testimony. The court's instructions "'defaced with the stigma of judicial suspicion'" Terrazas's proposition that the inconsistencies here were important to the jury's assessment of the witnesses' credibility. *Garrett*, 25 Ariz. at 513, 219 P. at 595, *quoting State v. Cartwright*, 174 N.W. 586, 587 (Iowa 1919). And, because the jury is presumed to follow the instructions the court gives it, *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006), we cannot say the court's instruction did not affect the verdict.

Disposition

¶15 For the foregoing reasons, we reverse Terrazas's convictions and sentences and remand the case to the trial court for a new trial.[1]

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

[1]Because we reverse Terrazas's convictions based on the trial court's credibility instruction, we need not reach his remaining arguments regarding two other instructions the court gave the jury. We also need not reach his argument the court erred in denying his motion to sever the charges against him. Nothing in this decision, however, should be interpreted to preclude him from making an appropriate motion to sever charges in a subsequent trial.