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JULY 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>JULIAN ADRIAN WYATT,<br><br>Appellant. | 2 CA-CR 2008-0274<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063253

Honorable Howard Hantman, Judge

AFFIRMED

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David Alan Darby — Tucson
Attorney for Appellant

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E S P I N O S A, Presiding Judge.

**¶1** Following a five-day jury trial, appellant Julian Wyatt was convicted of first-degree murder arising from an attempted home invasion. The trial court sentenced Wyatt to a term of life imprisonment with the possibility of release after twenty-five years. Counsel

has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting he has thoroughly reviewed the record but found no arguable issue for appeal. He asks that we search the record for fundamental error. Wyatt has filed a supplemental brief raising various issues, none of which requires reversal. We affirm.

**¶2** Viewing the evidence in the light most favorable to sustaining the verdict, we find there was sufficient evidence to support the jury's finding of guilt. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). Early in the morning on January 3, 2006, M.'s husband, R., told M. he believed someone was trying to break into their home and went to investigate. M. heard a gunshot, and R. instructed her to "call 911 and put the children onto the floor," after which approximately twenty-one shots were fired at the home. Officers discovered bullet holes in the front windows and door of the home and found R., who ultimately died of a gunshot wound, lying on the living room floor. The weapon (an AK-47) matching the shell casings found at the murder scene was found "wrapped in a leather jacket" inside a broken-down vehicle in the backyard of the home of Wyatt's childhood friend, Adrian, and Adrian's brother, Jacob, where Wyatt frequently stayed.[1]

**¶3** Jacob testified that he, Adrian, and Wyatt had discussed plans for Jacob and Wyatt to rob a particular home to obtain drugs and money. Wyatt and Jacob drove to R.'s home. Wearing a mask and gloves and armed with Adrian's AK-47, Wyatt tried to knock

[1]Jacob pled guilty to manslaughter.

down the front door of R.'s home without success. After hearing a "clicking noise" from inside the house, Wyatt shot at the front door and continued shooting as he and Jacob drove away. Wyatt was overheard the day after the incident saying that he had "heard a body drop" and that he had "unloaded a whole clip" from the AK-47. Jacob was arrested soon after the incident; Wyatt turned himself in to the police eight months later. Wyatt's former girlfriend, Rochelle, told the police that Wyatt had told her "we did something . . . really bad that night. [W]e did a jack[2] and it went bad and the guy shot at us through the door . . . [we] shot and then [we] ran. [We] think the guy died . . . ."

**¶4** Relying on Rule 15.1(b)(8), Ariz. R. Crim. P., Wyatt contends the prosecutor improperly told the jury about evidence of deoxyribonucleic acid (DNA) found in a hood that was discovered at the murder scene. In his opening statement, made before the final DNA test results had been received, the prosecutor stated: "There were some mixtures [of DNA] found on a hood that was left behind at the scene worn by one or more—one, probably, of the people who fired the weapon, or the driver as Jacob . . . says." Wyatt argues the state improperly led the jury to believe that the DNA evidence, which was ultimately shown to be "inconclusive," linked him to the crime. In anticipation of the final results of the DNA test, which were expected to arrive on the second day of trial, the parties reached the following agreement:

[2]Rochelle explained that a "jack" means to steal something.

THE COURT: Well, the report is coming tomorrow, right? For all of us to see by noon.

. . . .

THE COURT: Otherwise, we'll just preclude it outright and address the issue of impropriety of the injection of DNA in opening statements when there is no basis to say it's there or not there. It's just not fair to [Wyatt].

[THE STATE]: I can make it clear and say that there's no evidence that it's [Wyatt], which I think is the negative that I made clear, that there's no physical evidence that links [Wyatt] to [the murder]. All I want is to make sure the jurors know we tried to find it, the DNA evidence was tested and they couldn't make an identification from the DNA evidence. I don't see how that's prejudicial.

THE COURT: It's plural. It's not just one person. It could be [Wyatt]. That's the problem for the defense hearing that for the first time. I'm not sure why —

[THE STATE]: I can stipulate it's not [Wyatt] if that's what ultimately comes, if that['s] what the curative thing is that makes it clear that . . . if it wasn't clear before, the DNA says it wasn't [Wyatt] if that's what it will take, I'll do that.

THE COURT: What about that?

[DEFENSE COUNSEL]: That sounds fine.

**¶5** After the test results were received, the trial court read the following stipulation to the jury: "The parties stipulate that State's Exhibit 205, a black and red hood was submitted for DNA analysis. Peggy Toporek . . . a criminalist with the Arizona Department of Public Safety crime lab indicated the results of the analysis were inconclusive." Therefore, even if the prosecutor had been guilty of misconduct when he referred to the DNA

evidence in his opening statement, in light of the stipulation, Wyatt's argument that he was somehow prejudiced by the prosecutor's statements about the DNA evidence is without merit. Moreover, in his opening statement, the prosecutor also told the jury there was "no DNA evidence to prove" who had shot the victim.

**¶6** Wyatt also contends the trial court abused its discretion when it permitted the state to call his sister, Roberta, to testify, claiming the state had not timely disclosed her as a witness. He also asserts the prosecutor was guilty of misconduct for his untimely disclosure of Roberta and for misrepresenting Roberta's anticipated testimony. Although police had obtained a recorded statement from Roberta just after the shooting, the state did not include her on its final witness list because it had been unable to locate her before the trial. In an effort to convince the court to permit Roberta to testify over defense counsel's objection once Roberta had been located, the prosecutor told the court on the second day of trial that Roberta had told police she had seen Wyatt "take a leather jacket, wrap the gun in the leather jacket and [take] it and put it in the car." The court granted the state's request and permitted Roberta to testify. Roberta then testified that, because she "was really messed up on drugs" when she had spoken to the police, she did not remember what she had said at that time. Portions of the transcript of Roberta's statement to the police that were read to the jury established Roberta had told police she had seen Wyatt carrying a black jacket with "something" wrapped inside of it the day before the shooting.

**¶7** Wyatt contends the trial court would not have permitted Roberta's last-minute testimony if the prosecutor had not mischaracterized her anticipated testimony. Relying on Rule 15.7(a)(3), Ariz. R. Crim. P., Wyatt argues the court should have sanctioned the state by granting a continuance or declaring a mistrial once the discrepancy between Roberta's anticipated testimony and her statement to the police was revealed. Because Wyatt did not request this relief below, we review only for fundamental error, and we find none. Any error resulting from the late admission of Roberta's testimony that Wyatt was carrying "something" under his jacket was simply not significant when viewed in the context of the other evidence presented. In addition, Wyatt's argument that defense counsel was not given adequate time to interview Roberta before she testified at trial was waived. When arrangements were made for counsel to interview Roberta before she testified, counsel indicated that the proposed plan "should be sufficient."

**¶8** In light of Roberta's inability to recall any portion of her prior statement to the police, the state read or had her read portions of that statement. Wyatt contends the trial court erred by permitting the jury to hear the following portion of Roberta's statement to the police: "And when my brother got out [of] the car, he was . . . like poached [under the influence of drugs]." During a bench conference on the admissibility of this statement, the court asked defense counsel whether she wanted to move for a mistrial; she responded affirmatively, and the court then denied her request. Wyatt contends a mistrial should have been granted because Roberta's statement permitted the jury to infer that his drug habit had

motivated his conduct in this matter. *See* Ariz. R. Evid. 404(b). The state agreed with defense counsel that it was not permitted to present evidence that Wyatt had been under the influence of drugs on the night in question and explained it was instead trying to show that Wyatt had been tired, to which defense counsel responded, "the bell has been rung." Based on the court's suggestion that defense counsel move for a mistrial, we can infer the court did not believe the state had established a proper ground to admit this evidence under Rule 404(b). However, it is also clear the court saw no basis for granting a mistrial.

**¶9** "[T]he declaration of a mistrial is the most dramatic remedy for a trial error and should be granted only if the interests of justice will be thwarted otherwise." *State v. Roque*, 213 Ariz. 193, ¶ 131, 141 P.3d 368, 399 (2006). We review a trial court's denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). Because the trial court is in the best position to assess the effect of a witness's statements on the jury, we defer to the court's determination whether a mistrial is required. *Id*. We find no reversible error in the trial court's denial of a mistrial here. Based on the record, we cannot say the court abused its discretion in declining to find that Roberta's brief, isolated reference to Wyatt's drug use, taken in the context of the evidence as a whole, was unduly prejudicial. *See Roque*, 213 Ariz. 193, ¶ 133, 141 P.3d at 400.

**¶10** As a result of information Wyatt learned during his interview with Jacob, after the state disclosed Jacob as a witness just before trial, Wyatt filed a notice of a third-party culpability defense. In his last argument, Wyatt contends the trial court abused its discretion

by refusing to permit Adrian to testify, thereby denying Wyatt the opportunity to support his third-party culpability defense. Although Adrian's name appeared on the witness list contained in the joint pretrial statement, he did not testify at trial, nor does it appear from the record Wyatt attempted to call him as a witness. Although we review a trial court's ruling on the admissibility of third-party culpability evidence for an abuse of discretion, *see State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002), in the apparent absence of any request by Wyatt to call Adrian as a witness, we find no abuse. In any event, the jury heard Jacob's testimony that Adrian had helped plan the incident and had provided the weapon used in the shooting.

**¶11** Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and, having found none and having rejected the claims raised in Wyatt's supplemental brief, we affirm Wyatt's conviction and sentence.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

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JOHN PELANDER, Judge

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JOSEPH W. HOWARD, Chief Judge