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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THE STATE OF ARIZONA, Appellee, v. FABIAN HERNANDEZ, Appellant.	2 CA-CR 2009-0232 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083310

Honorable John S. Leonardo, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Fabian Hernandez was convicted of second-degree murder, kidnapping, and armed robbery. He was sentenced to a combination of concurrent and consecutive, presumptive sentences amounting to 26.5 years' imprisonment. He raises a number of issues on appeal, none of which warrant reversal.

Factual and Procedural History

¶2 We view the facts in the light most favorable to upholding Hernandez's convictions, drawing all reasonable inferences in favor of the jury's verdict. *See State v. Pierce*, 223 Ariz. 570, n.2, 225 P.3d 1146, 1146 n.2 (App. 2010). Late one evening in August 2008, H., accompanied by his ten-year-old son, H. Jr., drove to a trailer park to pick up his stepson, M., who had been visiting a friend. As they were leaving, Hernandez, a resident of the trailer park, approached the car when H. slowed to traverse a speed bump. Hernandez grasped the open car window and started asking H. "who [he was] looking for." H. ignored him and continued driving away. Hernandez then produced a gun and shot H. in the face, killing him. M. took control of the steering wheel from the passenger seat, and, once the car was stopped, M. and H. Jr. ran to seek help.

¶3 Hernandez then approached a sport utility vehicle (SUV) in which J.B., J.F., and S. were waiting for their friend, L., to return from a trailer. Hernandez put his gun to J.B.'s head while speaking to him. At that point, L. returned from the trailer and, not noticing that Hernandez had a gun, attempted to get in the SUV. As she did so, Hernandez ordered her to come with him and give him her purse. Hernandez held the gun to L.'s side and walked her away from the SUV to a darkened area behind a shed, where he demanded "sexual favors" from her.

¶4 Meanwhile, M. and H. Jr. had summoned law enforcement officers, and a number of Pima County sheriff's deputies began investigating the trailer park. S., J.B., and J.F. also sought help and directed one deputy to the area where Hernandez had taken L. When the deputy approached Hernandez, he ran and jumped a fence to escape. He was later found in a nearby trailer home and arrested, and was eventually convicted and sentenced as set forth above. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Manslaughter Instruction

¶5 Hernandez first contends the trial court committed fundamental, prejudicial error when it failed to instruct the jury sua sponte on sudden-quarrel manslaughter as a lesser offense of murder. Because he did not seek this instruction at trial and raises this issue for the first time on appeal, we review only for fundamental error. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 81, 25 P.3d 717, 741 (2001). To warrant reversal based on a trial court's failure to instruct the jury on a lesser offense in a non-capital case, a defendant must show he was entitled to such an instruction and the court's failure to give one "interfere[d] with [his] ability to conduct his defense." *State v. Whittle*, 156 Ariz. 405, 407, 752 P.2d 494, 496 (1988).

¶6 Hernandez's argument hinges on his assumption that he was entitled to an instruction on heat-of-passion or sudden-quarrel manslaughter. A person commits that offense by committing second-degree murder "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." A.R.S. § 13-1103(A)(2). "Adequate

provocation" is defined as "conduct or circumstances sufficient to deprive a reasonable person of self-control." A.R.S. § 13-1101(4).

¶7 Hernandez has not pointed to any evidence, nor do we see any in the record, showing that H.'s actions provoked Hernandez, causing him to lose his self-control and shoot H. Rather, Hernandez testified that, after he had approached H.'s vehicle, H. had, for no reason, grabbed his arm and begun to speed up, attempting to drag Hernandez alongside the car or cause him to be pulled under the tires. Hernandez maintained he had not intended to shoot H. and had only fired because he was "scared," had struggled to free his hand, and "was just firing at him to release [his] hand so [he] could get away." Thus, Hernandez's version of the facts shows only that he acted rationally and with purpose, shooting his gun in self-defense.[1] Hernandez did not allege he had quarreled with H. or that he had exhibited any emotion other than fear and a desire to protect himself in a dangerous situation. Accordingly, he was not entitled to an instruction on sudden quarrel or heat of passion, and the trial court's not giving one did not constitute fundamental error.

[1]Although the trial court gave a justification instruction at Hernandez's request, this is irrelevant to his claim that he was entitled to a sudden-quarrel manslaughter instruction. *Cf. State v. King*, No. CR-09-0333-PR, ¶¶ 2, 16-18, 2010 WL 2670928 (Ariz. July 7, 2010) (defendant entitled to justification instruction after fatally beating victim who had allegedly thrown two-liter bottle of water). Contrary to Hernandez's assertion, a sudden-quarrel or heat-of-passion killing does not occur when the force exerted simply is disproportionate to the precipitating event but, rather, when the defendant loses control as the result of extreme emotions provoked by the victim. *Cf. State v. Hutton*, 143 Ariz. 386, 389-90, 694 P.2d 216, 219-20 (1985) (sudden-quarrel-manslaughter instruction warranted in potential capital case where jury could infer victim's attack with fist so angered defendant he responded with knife).

Admission of Prior Testimony

¶8 At a pre-trial hearing conducted pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), L. testified and was cross-examined. She subsequently died before trial. Over Hernandez's objection, the trial court allowed the state to read at trial L.'s testimony from that hearing. Hernandez argues the admission of L.'s preserved testimony violated the Confrontation Clause of the Sixth Amendment because he had not been present at the hearing and did not have the opportunity to meaningfully cross-examine L. We do not address Hernandez's specific arguments, however, because, even assuming the court erred in admitting L.'s testimony, the record clearly demonstrates that any error would have been harmless. *See State v. Bocharski*, 218 Ariz. 476, ¶¶ 38-41, 189 P.3d 403, 413 (2008) (presuming error in resolving alleged Confrontation Clause violation under harmless error standard). "'[E]rroneously admitted evidence is harmless in a criminal case only when the reviewing court is satisfied beyond a reasonable doubt that the error did not impact the verdict.'" *Id.* ¶ 38, *quoting State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805 (2000).

¶9 At the pretrial hearing, L. testified Hernandez had forced her to go with him at gunpoint, had taken her purse, and had held a gun to her side as they walked away from the SUV. At trial, both J.B. and J.F. testified to the same effect—that Hernandez had been holding a gun, had told L. to leave with him, and had controlled L.'s movement by grabbing her. J.F. also testified that Hernandez had kept his gun pointed at L. as they walked away and had taken her purse. Thus, we are satisfied that any error in admitting L.'s preserved testimony would be harmless beyond a reasonable doubt. The portions of

L.'s testimony relating to the kidnapping and armed robbery of which Hernandez was convicted were cumulative to testimony of other witnesses at trial.

¶10 Hernandez disputes such a conclusion, pointing to testimony solely from L. that Hernandez had made sexual demands of her. He contends this testimony was not harmless because the jury was instructed it could find him guilty of kidnapping if he "knowingly restrained another person with the intent to" commit a sexual offense. There was overwhelming evidence, however, that Hernandez had committed kidnapping by restraining L. with the intent to place her "in reasonable fear of immediate physical injury," a method of committing kidnapping on which the jury was also instructed. Thus, even had Hernandez discredited L.'s testimony about his having made sexual demands, we can conclude beyond a reasonable doubt that the jury would have found him guilty of kidnapping in any event, based on his having placed L. in reasonable fear of physical harm by holding her at gunpoint and forcing her to go with him.[2]

¶11 To the extent Hernandez contends he was denied the opportunity to challenge L.'s credibility with evidence of her alleged drug use, we do not consider this claim. Not only did he fail to present such an argument to the trial court, there is no

[2]Hernandez also suggests that L.'s credibility would have been significant because of L.'s, J.B.'s, and J.F.'s differing accounts of the crime. The inconsistencies to which he points, however, are minor and irrelevant to the charges. Additionally, most of the inconsistencies were between J.B.'s and J.F.'s versions of events. Both witnesses testified and were cross-examined at trial, yet Hernandez did not address the differences in their accounts either on cross-examination or in closing argument.

evidence he was aware at the time of trial that she allegedly had used drugs.[3] Because we can say beyond a reasonable doubt that the jury would have found Hernandez guilty of armed robbery and kidnapping without L.'s testimony, any error in its admission was harmless.[4]

Mistrial

¶12 Hernandez next asserts the trial court erred in denying his request for a mistrial after a witness testified Hernandez had held L. "hostage." He argues this statement constituted improper opinion testimony on an ultimate issue and also was unduly prejudicial. We review the court's denial of a mistrial for a clear abuse of discretion. *See State v. McCrimmon*, 187 Ariz. 169, 172, 927 P.2d 1298, 1301 (1996).

¶13 At trial, the prosecutor asked one of the responding deputies why he had fired his weapon at Hernandez. The deputy testified, "At that point I believed he was the suspect involved in the homicide that we were investigating. And he had just, he was just holding a lady hostage." The trial court sustained Hernandez's objection to this statement; the following day, Hernandez moved for a mistrial.

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[3]The *Dessureault* hearing took place less than three weeks before trial. Despite any effect L.'s drug use could have had on her identification of Hernandez, he made no mention of it.

[4]Although we resolve this issue through harmless-error analysis, we are unconvinced any error occurred. Given that his counsel expressly waived Hernandez's presence, we would not find any violation of his right to face-to-face confrontation absent extraordinary circumstances. *See State v. Collins*, 133 Ariz. 20, 23, 648 P.2d 135, 138 (App. 1982) (defendant bound by attorney's waiver absent extraordinary circumstances). And, in light of his attorney's opportunity to cross-examine L. at the *Dessureault* hearing on what the state characterized as "essentially a dress rehearsal of her trial testimony," it cannot be said he lacked a meaningful opportunity to cross-examine her.

¶14 From the record, we cannot determine conclusively the basis on which Hernandez objected below or the trial court's reason for sustaining the objection. Hernandez's counsel made no mention of the deputy's statement being improper testimony on an ultimate issue, nor can we see how his testimony was such. The deputy merely described what he had perceived to be happening at the time: a group of people in an SUV had pointed him in the direction of a homicide suspect, he saw Hernandez holding a woman and then fired his weapon. Additionally, Hernandez's counsel elicited testimony that one of the people in the SUV had said, "There's a guy over there, he's got a gun, he's got a girl." Based on this evidence, no reasonable jury would have interpreted the deputy's statement as a conclusive opinion about the kidnapping charge rather than merely the deputy's recollection and description of events as they appeared to him. The trial court did not abuse its discretion in denying Hernandez's mistrial motion.[5]

Credibility Instructions

¶15 Hernandez contends the trial court erred by instructing the jury that "innocent misrecollection, like failure of memory, is not an uncommon experience" and "in weighing inconsistencies or discrepancies," the jury "should consider whether they concern a matter of importance, or an unimportant detail, and whether the discrepancy or

[5]We likewise reject Hernandez's argument that the deputy's testimony was unduly prejudicial. He did not meaningfully argue this below and, on appeal, rests on his bare assertion that the word "hostage" "is an inflammatory and prejudicial term associated with terrorism and other notorious crimes." We therefore find this argument waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening briefs must present argument containing contentions of appellant with citations to authorities and record); *see also State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (argument waived when neither developed properly nor supported by authority).

inconsistency results from innocent error or willful falsehood." Conceding he did not object to these instructions at trial, Hernandez argues they amounted to fundamental error. He asserts that, in light of the "contradict[ory]" statements of the state's witnesses and his own trial tactic of "highlighting inconsistencies, many involving minor details, in their testimony," the instructions amounted to a comment on the evidence.

¶16 To warrant reversal, Hernandez first must show the trial court's instructions constituted error that went to the foundation of his case, taking from him an essential right and denying him a fair trial. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Roque*, 213 Ariz. 193, ¶¶ 65-68, 141 P.3d 368, 388 (2006) (claim judge commented on evidence reviewed for fundamental error). Jury instructions constitute a comment on the evidence in violation of article VI, § 27 of the Arizona Constitution when they express "'an opinion as to what the evidence proves,' in a way that interferes 'with the jury's independent evaluation of that evidence.'" *State v. Dann*, 205 Ariz. 557, ¶ 50, 74 P.3d 231, 245 (2003), *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998).

¶17 Citing *Garrett v. State*, 25 Ariz. 508, 219 P. 593 (1923), Hernandez contends the challenged instructions were "a generalization . . . based on the judge's own extensive experience, that discredit[ed] a proposition necessary to [his] defense[—]that misrecollection or memory failure is not normal." He also argues that, in instructing the jury to consider whether misrecollections involved an important fact, the trial court "provid[ed] rules, not founded in the law, to be used in weighing the evidence . . . , informing the jury . . . what is and is not important." He thus concludes the court

"deprived him of a fair trial, and could have impacted the verdicts" because his defense depended on his ability to discredit the state's witnesses and, without the instruction, the jury may have assessed credibility differently.

¶18 We look to the trial court's instructions as a whole to determine whether they interfered with the jury's independent consideration of the evidence. *See State v. Wallen*, 114 Ariz. 355, 359, 560 P.2d 1262, 1266 (App. 1977). As the state points out, the challenged instructions here were not delivered in isolation but in the context of a larger group of instructions regarding witness credibility. The court informed the jurors that they were "the sole judges of the credibility of a witness and the weight of the evidence" and charged them to "carefully evaluate" "every matter in evidence that tends to indicate whether the witness is worthy of belief." Immediately prior to the language to which Hernandez now objects, the court instructed that inconsistencies and discrepancies "may or may not cause [the jurors] to discredit" a witness's testimony. And following this language, the court listed considerations in determining credibility, including corroboration, appearance of trustworthiness in light of all the circumstances, "the witness's memory or lack of memory," evidence of interest and bias, and the jurors' own "reason, common sense[,] and experience." Given the context of the challenged instructions and the court's express charge that the jury alone was to decide whether inconsistencies were material and make all credibility determinations, we cannot say the instructions constituted a comment on the evidence that interfered with the jury's evaluation of the evidence. Accordingly, Hernandez has failed to meet his burden of demonstrating error, let alone fundamental, prejudicial error.

Excessive Sentences

¶19 Hernandez maintains his sentences, totaling 26.5 years' imprisonment for his second-degree murder, armed robbery, and kidnapping convictions, were excessive. We have no authority to disturb a sentence unless the trial court has abused its discretion, which may occur by failing to investigate adequately the facts relevant to sentencing. *See State v. Sasak*, 178 Ariz. 182, 189, 871 P.2d 729, 736 (App. 1993).

¶20 Hernandez concedes his sentences were within the statutory range but contends they were "arbitrary and capricious" because of the "substantial" mitigation he presented, including his mental illness and the trauma he suffered from having witnessed his own father's suicide when he was a child. As the state points out, however, he presented this mitigating evidence to the trial court, which was required only to consider it, not to find it mitigating. *See State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). Moreover, the court sentenced him to three presumptive terms, two of which it ordered to be served concurrently, for three dangerous felonies, including a homicide. We fail to see how the sentences are excessive.

Improper Aggravating Factor

¶21 Hernandez next contends the trial court committed fundamental error by considering his history of substance abuse as an aggravating factor. We do not disturb a sentence that is within the statutory range absent a clear abuse of the trial court's discretion. *See State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). Although a defendant may demonstrate prejudice from the use of an improper aggravating factor to impose an aggravated sentence, *see State v. Munninger*, 213 Ariz.

393, ¶¶ 9-14, 142 P.3d 701, 704-05 (App. 2006), Hernandez has cited no authority, nor are we aware of any, supporting the same conclusion when the trial court has imposed a presumptive term. Because a judge need not recite any aggravating or mitigating factors in imposing a presumptive sentence, *see State v. Johnson*, 210 Ariz. 438, n.1, 111 P.3d 1038, 1041 n.1 (App. 2005), we need not consider whether the court committed fundamental error in considering Hernandez's history of substance abuse as an aggravating factor.[6]

***Portillo* Instruction**

¶22 Finally, Hernandez contends the trial court's instructing the jury on reasonable doubt as directed by our supreme court in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), constituted structural error. That court repeatedly has rejected similar challenges. *See, e.g.*, *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Roseberry*, 210 Ariz. 360, ¶ 55, 111 P.3d 402, 411-12 (2005); *Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d at 249-50; *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003). We are bound to follow our supreme court's decisions, *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003), and therefore reject this claim.

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[6]We note the sentencing transcript reflects the trial court focused primarily on the other aggravating factor: the emotional toll on the victims, which even Hernandez's counsel conceded was "catastrophic." Whereas the court briefly mentioned Hernandez's substance abuse at sentencing, it received oral testimony regarding the harm to the victims and discussed this factor at length. *See Munninger*, 213 Ariz. 393, ¶¶ 12-13, 142 P.3d at 705 (when one proper aggravating factor exists that would support aggravated sentence, additional improper aggravators do not constitute fundamental error).

Disposition

¶23 Hernandez's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge