

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRYAN LAMAR LEE,
Appellant.

No. 2 CA-CR 2014-0312
Filed November 4, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20120588002
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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Counsel for Appellee

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 After a jury trial, Bryan Lee was found guilty of first-degree murder and kidnapping. He was sentenced to life in prison without the possibility of release for twenty-five years on the murder conviction and a 10.5-year prison term for the kidnapping conviction. On appeal, he argues the trial court erred in denying his motion to preclude certain statements as inadmissible hearsay and in failing to instruct the jury on third-party culpability. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Forde*, 233 Ariz. 543, n.2, 315 P.3d 1200, 1209 n.2 (2014). In November 2011, J.P. was reported missing after police discovered his truck abandoned in a Marana neighborhood. Investigators went to J.P.'s address and spoke with his roommate, who said he had not seen him in a few days. They also interviewed several people associated with J.P., including Lee, who admitted he had routinely purchased marijuana from him in the past, but claimed he had no information about J.P.'s disappearance. Lee also related he had met J.P. through his friend, Reed Marrone, and he had not seen J.P. since before Thanksgiving.

¶3 In January 2012, Lee's girlfriend, K.B., saw a billboard offering a reward for information about J.P.'s death. She eventually contacted police and reported that Lee had told her he and Marrone killed J.P. According to K.B., Marrone had owed J.P. money, so he and Lee formulated a plan to kill him. She further related that the day J.P. was murdered, Marrone called J.P. and said "he had his

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money for him” and asked that he “bring some more marijuana” to his house. When J.P. arrived, Lee put him in a chokehold from behind, and he and Marrone took turns strangling him to death. Marrone and Lee then wrapped J.P. in plastic and bedding, and placed him in his own truck with a couch on top of his body. They drove the truck to Marana and with the help of their friend, Tyler Brown, buried J.P. in the desert.

¶4 Detectives subsequently interviewed Marrone and he admitted he knew where J.P. was buried, and eventually led them to the body, which was identified through dental records. Lee’s palm print and Brown’s fingerprints were found on plastic wrapping recovered near J.P.’s burial site. Cellular telephone records for Lee and Marrone showed that both their phones “hit” off towers in Marana the evening J.P. was murdered.

¶5 Lee and Marrone were charged with murder, robbery, and kidnapping, and Brown was charged with “abandonment or disposal of a body,” a class five felony. Brown later agreed to a “free talk” and was offered a plea agreement to a class six undesignated offense in exchange for testifying against Lee and Marrone. During the free talk, Brown admitted he had helped dispose of J.P.’s body, but claimed he did not know any details about how J.P. had died.

¶6 Lee’s first trial ended in a mistrial the morning before Brown was scheduled to testify when Brown revealed to his attorney he had not been entirely truthful in early interviews. Following a second jury trial, Lee was convicted of first-degree murder and kidnapping, but acquitted of aggravated robbery. The trial court imposed sentences as described above, and Lee timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21, 13-4031, and 13-4033.

Motions to Preclude Testimony

¶7 Lee first contends the trial court erred in denying his motions to preclude testimony about statements made during a conversation among Marrone, Brown, and Lee on the day J.P. was murdered. Specifically, he argues the inculpatory statements that

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Brown could not attribute with certainty to either Lee or Marrone lacked foundation and Marrone's admissions constituted inadmissible hearsay because the state failed to demonstrate Lee had adopted those admissions. "We review a trial court's evidentiary rulings for a clear abuse of discretion." *State v. Abdi*, 226 Ariz. 361, ¶ 21, 248 P.3d 209, 214 (App. 2011).

¶8 As noted above, Brown caused a mistrial in Lee's first trial after disclosing that he had not told the whole truth about J.P.'s death. During a later interview, Brown related for the first time that Marrone and Lee had described killing J.P. in detail on the night of the murder. When asked to attribute specific statements to Marrone or Lee, Brown said he was not sure if he would be able to differentiate among some of the statements.

¶9 Lee filed two motions to preclude, arguing that any statements made by Marrone to Brown should be barred as inadmissible hearsay and contending the statements Brown could not specifically attribute to either defendant lacked foundation. The state responded that any statements made by Marrone in Lee's presence were admissible as adopted admissions because Lee had actively participated in the conversation. The trial court agreed, noting Lee's participation "show[ed] that he adopted the statements made by . . . Marrone," and concluded the statements were not hearsay.

¶10 At trial, apparently consistent with his statements in an interview after the mistrial,¹ Brown testified that on the day J.P. was

¹Lee takes issue with the state's reference to Brown's trial testimony and notes that this court "considers only the evidence . . . presented at the suppression hearing" when reviewing a pretrial ruling on a motion to suppress. *See State v. Becerra*, 231 Ariz. 200, ¶ 4, 291 P.3d 994, 996 (App. 2013), *review granted* (Ariz. May 29, 2013). But it appears Lee did not offer any evidence at the hearing on his motions, presenting only argument. And to the extent the trial court may have relied on portions of a transcript of Brown's pretrial interview, that transcript is not before us; we therefore presume it supports the trial court's ruling. *See State v. Villalobos*,

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murdered, he “showed up at [Marrone]’s house just like [he] would any other day,” and noticed a truck outside that he did not recognize with Marrone’s couch in it. Marrone and Lee were both in the house when Brown arrived. After “hanging out for a couple of minutes,” Brown “felt a weird energy about the room” and asked “what was going on.” After a private conversation, Lee and Marrone eventually revealed to Brown that “they had killed [J.P.]” and “he was in the back of the truck under the couch.”

¶11 Brown testified “they [had] approached [him] with the idea to follow them out to Marana to get rid of the body.” He recalled that Marrone “verbally” suggested the idea, but Lee was “present for the whole formation of the plan.” Brown also stated “they had described . . . to [him] exactly what had happened,” and provided details regarding how long it had taken for J.P. to die and how they had cleaned up afterwards. Brown “particularly remember[ed Marrone]” describing the events, but said they “were all three discussing it,” and he specifically recalled Lee had said J.P. “immediately became weak in the knees,” when he grabbed him, and that choking J.P. “was very hard and he had to call [Marrone]

114 Ariz. 392, 394, 561 P.2d 313, 315 (1977) (appellate court presumes testimony or evidence not included in record on appeal supported trial court’s rulings). In any event, Brown’s statements as described at the hearing and in the motions to preclude were consistent with his trial testimony.

Furthermore, pretrial evidentiary rulings are generally subject to change when evidence is introduced at trial. *See* Bennett Cooper et al., *Arizona Practice Series: Trial Handbook* § 4:2 (2014) (rulings on motions in limine “interlocutory” and reconsideration not barred absent prejudice to party), *citing* *Henry ex rel. Estate of Wilson v. HealthPartners of S. Ariz.*, 203 Ariz. 393, ¶¶ 19-20, 55 P.3d 87, 93 (App. 2002). Indeed, the record here strongly suggests the trial court did not deem its ruling to necessarily be final because it prefaced it with “[a]t this time it is the ruling of the Court as follows.”

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over to take turns.”² According to Brown, there were no signs of a struggle in the house because Lee and Marrone had cleaned up, wrapped J.P.’s body, and put him in the truck before Brown arrived.

¶12 Brown followed Lee and Marrone to Marana, where he had left his car at a convenience store before joining them in J.P.’s truck. The three men then drove to a desert area where they dug a shallow grave, removed J.P.’s body from the truck, unrolled him from plastic sheeting he had been wrapped in, and buried him. After retrieving Brown’s car, Lee and Marrone dumped the couch on the side of the road and left J.P.’s truck in a Marana neighborhood along with his keys and cell phone. The three then drove back to Marrone’s house in Brown’s car. On the way, Marrone reportedly stated “the situation was just so crazy and unreal,” and Lee said he “didn’t expect his hands to get so tired or [the murder] to take so long.” At the house, Marrone gave Brown “a little bit of marijuana” and “[a] couple hundred dollars.”

Adopted Admissions

¶13 Lee contends Marrone’s statements were inadmissible hearsay because “the [s]tate did not make a sufficient showing that [he had] adopted [Marrone’s] statements.” Hearsay is inadmissible unless a rule, statute, or constitutional provision provides otherwise. Ariz. R. Evid. 802. An admission by a defendant is not hearsay. Ariz. R. Evid. 801(d)(2)(A). Nor is a statement by a third party offered against a defendant who manifested an adoption or belief in the statement’s truth. Ariz. R. Evid. 801(d)(2)(B). Such a statement is adopted when a defendant affirmatively agrees with statements made in his presence or expounds upon the statements by adding his own comments or explanations. *State v. Anderson*, 210 Ariz. 327, ¶ 36, 111 P.3d 369, 381 (2005); *cf. Taylor-Bertling v. Foley*, 233 Ariz. 394, ¶¶ 14-16, 313 P.3d 537, 542 (App. 2013) (statements by homeowner’s father not adopted by homeowner when she made no

²Lee does not dispute that any statement attributed directly to him with certainty was admissible as a party admission. *See* Ariz. R. Evid. 801(d)(2).

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statement of agreement and added no further explanation or comment).

¶14 Lee argues the state failed to make a sufficient showing that he was “actively participating” in the conversation with Brown and Marrone and, consequently, his participation did not rise to the level described in *State v. Daugherty*, in which the defendant “expressly agreed with . . . the statements made by her companion.” 173 Ariz. 548, 550, 845 P.2d 474, 476 (App. 1992). Instead, Lee contends he was “merely present” when Marrone was speaking to Brown. The available record, however, refutes that contention.

¶15 According to Brown’s version of the events, all of Marrone’s statements discussed at the pretrial hearing and testified to at trial were made in Lee’s presence, and Lee expounded on them by adding his own comments and observations throughout the conversation. See *Anderson*, 210 Ariz. 327, ¶ 36, 111 P.3d at 381. For example, at the house, Lee related that choking J.P. had been “very hard,” and while driving back from Marana, Lee said he “didn’t expect his hands to get so tired or [the murder] to take so long.” Even if Lee’s comments were not in direct response to Marrone’s, they amply demonstrated his active participation in the conversation. Accordingly, we find no abuse of discretion in the trial court’s admission of Marrone’s statements as Lee’s adopted admissions.

Lack of Foundation

¶16 In a related argument, Lee contends that statements Brown could not attribute to either Lee or Marrone with certainty lacked foundation, citing *State v. Wehrhan*, 25 Ariz. App. 277, 542 P.2d 1157 (1975) and *State v. Gaddy*, 118 Ariz. 594, 578 P.2d 1023 (App. 1978). In *Wehrhan*, a witness testified she had heard either the defendant “or someone else” say a restaurant had been robbed. 25 Ariz. App. at 279, 542 P.2d at 1159. According to the witness, even if the defendant did not say it, the statement was uttered in his presence, but she was unsure if the defendant had heard it. *Id.* This court determined the trial court had erred in admitting the statement

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because the witness could not state with certainty that it was made by the defendant or that he heard the statement. *Id.*

¶17 In *Gaddy*, the state sought to admit a portion of a medical report that stated the defendant had been injured by a nightstick after he had “cut somebody’s throat.” 118 Ariz. at 595, 578 P.2d at 1024. The defendant objected on hearsay grounds. *Id.* A key issue was whether the defendant had been injured before or after the stabbing incident. *Id.* When the doctor was asked about the information contained in the report, he had difficulty remembering the facts and gave conflicting and confusing answers. *Id.* at 596, 578 P.2d at 1025. Nevertheless, the trial court admitted the exhibit into evidence. *Id.* In reversing its ruling, we concluded the statement lacked foundation to qualify as an exception to the hearsay rule because the source of the information was not established. *Id.*

¶18 At trial, Lee argued that the statements Brown could not specifically attribute to either him or Marrone lacked foundation because, without identifying the declarant, “we can’t say which hearsay exception applies, and if we can’t say which hearsay exception applies, then that statement remains hearsay if the [s]tate is offering it for the truth of the matter asserted.” We disagree.

¶19 Unlike in *Wehrhan* and *Gaddy*, there is no foundational issue here because Brown was certain that the statements were made either by Lee or Marrone, in both their presence, with no one else present during the conversations. Thus, each statement was either made by Lee and constituted an admission by party opponent, or was made by Marrone in Lee’s presence and impliedly adopted by him, as noted above. *See* Ariz. R. Evid. 801(d)(2); *cf.* *State v. John*, 557 A.2d 93, 109 (Conn. 1989) (that witness could not recall which defendant made statement not essential to admissibility because both defendants adopted it through responses to witness’s subsequent questions). In either scenario, the statements would have been admissible non-hearsay. *See id.*; *see also Commonwealth v. Brown*, 476 N.E.2d 580, 583 (Mass. 1985) (statements not specifically attributable to particular defendant admissible where statement was

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either admission by defendant or implied adoption of co-defendant's admission).

Confrontation clause

¶20 Lee also argues he was denied his constitutional right to confront witnesses against him when Marrone's out-of-court statements were admitted because he was "unable to cross-examine [Marrone] on th[o]se incriminating statements." See U.S. Const. amend. VI. "The Sixth Amendment prohibits a court from admitting testimonial hearsay statements made by a non-testifying witness unless that person is unavailable and the defendant had a prior opportunity for cross-examination." *State v. Forde*, 233 Ariz. 543, ¶ 65, 315 P.3d 1200, 1218 (2014), citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004). A statement is testimonial if the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Ohio v. Clark*, ___ U.S. ___, ___, 135 S. Ct. 2173, 2180 (2015), quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011).

¶21 Ordinarily, we review an evidentiary issue that implicates the Confrontation Clause de novo. See *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006). Lee, however, failed to object on this basis below, see *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993); we thus review the issue only for fundamental error, see *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error review applies when defendant fails to object to alleged trial error).

¶22 We find no error here, much less fundamental error. Once Lee adopted Marrone's statements, they effectively became his own statements and were no longer hearsay. See Ariz. R. Evid. 801(d)(2)(B) (statement adopted by party not hearsay). Moreover, Marrone's statements were not testimonial. See *Clark*, ___ U.S. at ___, 135 S. Ct. at 2180 (statements not testimonial when made to persons outside of a law enforcement context and primary purpose not to create state's evidence). Thus, the Confrontation Clause is inapplicable. See *Crawford*, 541 U.S. at 54; see also *People v. Jennings*, 237 P.3d 474, 508 (Cal. 2010) (when inculpatory statement made in

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defendant's presence is admissible as adoptive admission, court no longer concerned with credibility of original declarant; accordingly, no confrontation right impinged by its admission).

Third-Party Culpability Instruction

¶23 Lee next argues the trial court erred in refusing to give his requested jury instruction on third-party culpability. We review a trial court's decision to reject a proffered jury instruction for an abuse of discretion, *see State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995), and will not reverse "absent a clear abuse of that discretion and resulting prejudice," *State v. Larin*, 233 Ariz. 202, ¶ 6, 310 P.3d 990, 994 (App. 2013).

¶24 "A trial judge must instruct the jury 'on any theory reasonably supported by the evidence,'" but need not give a proposed instruction when other instructions adequately cover its substance. *State v. Parker*, 231 Ariz. 391, ¶ 54, 296 P.3d 54, 68 (2013), quoting *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004). "No Arizona case has required a third-party culpability instruction" because "the substance of the instruction [i]s adequately covered" by the instructions "on the presumption of innocence and the [s]tate's burden of proving beyond a reasonable doubt all elements of the crimes charged." *Id.* ¶¶ 55-56. Thus, even when a third-party culpability theory is supported by the evidence, a trial court is not required to separately instruct the jury on third-party culpability so long as the court properly "instructed the jury on the presumption of innocence and the state's burden of proof." *State v. Welch*, 236 Ariz. 308, ¶¶ 29-30, 340 P.3d 387, 395 (App. 2014).

¶25 At trial, Lee requested a third-party culpability instruction in support of his theory that Marrone had killed J.P., "either by himself or with the help of . . . Brown." The trial court declined the proposed instruction, finding it adequately covered by other instructions "as a whole." The court did instruct the jury on Lee's presumption of innocence and the state's burden to prove "each element of each charge beyond a reasonable doubt." *See Parker*, 231 Ariz. 391, ¶ 56, 296 P.3d at 68.

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¶26 Lee nevertheless contends a third-party culpability instruction was required because “the prosecutor’s closing argument improperly raised the burden of proof for the defense to prevail on a third party theory by indicating that . . . [Marrone] could not have committed the murder by himself and his accomplice could not have been anyone other than . . . Lee.” He did not, however, object during the state’s closing or rebuttal argument, or request any additional instructions at that time. Thus, we review the court’s failure to sua sponte give the instruction after the state’s rebuttal for fundamental, prejudicial error only. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶27 Lee has not demonstrated any error, let alone fundamental error. Contrary to his assertion, the state’s rebuttal did not improperly “raise[] the burden of proof” for him to prevail on his third-party theory. Moreover, it is not entirely clear which portion of the state’s rebuttal Lee contends “indicat[es] . . . [Marrone] could not have committed the murder by himself and his accomplice could not have been anyone other than . . . Lee.” Finally, Lee’s contention that the prosecutor’s closing arguments implied improper statements of law is unpersuasive in view of the court’s instructions, including the admonition that counsel’s argument should only be used to help the jury understand the evidence and the law as instructed by the court. *Cf. State v. Reyes*, 232 Ariz. 468, ¶ 7, 307 P.3d 35, 38 (App. 2013) (jury presumed to follow trial court’s instructions).

Disposition

¶28 For the foregoing reasons, Lee’s convictions and sentences are affirmed.