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AUG 16 2007  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA, )  
)  
Appellee, ) 2 CA-CR 2006-0115  
) DEPARTMENT B  
)  
v. ) MEMORANDUM DECISION  
) Not for Publication  
) Rule 111, Rules of  
NOEL ALEJANDRO ALCAREZ- ) the Supreme Court  
GUERRERO, )  
)  
Appellant. )  
\_\_\_\_\_ )

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200500144

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Michael T. O'Toole

Phoenix  
Attorneys for Appellee

Joy Bertrand

Phoenix  
Attorney for Appellant

ESPINOSA, Judge.

¶1 Noel Alcarez-Guerrero was convicted after a jury trial of first-degree murder, a class one felony; kidnapping, a class two felony; aggravated assault resulting in a bone

fracture, a class four felony; aggravated assault with a deadly weapon or dangerous instrument, a class three felony; and aggravated assault while the victim was restrained, a class six felony. The trial court sentenced him to natural life for the murder conviction, to be served concurrently with a six-year term for aggravated assault resulting in a fracture and a 7.5 year sentence for aggravated assault with a deadly weapon. Consecutive to those sentences, the court also imposed a five-year term for kidnapping and one year for aggravated assault while the victim was restrained, to be served concurrently. On appeal, Alcarez-Guerrero argues the trial court erred by admitting evidence about his flight from police in an attempt to avoid arrest, by denying his motion for a judgment of acquittal based on Rule 20, Ariz. R. Crim. P., 17 A.R.S., by giving a jury instruction on felony murder, and by sentencing him to natural life for the murder without a jury finding. He also contends insufficient evidence supports his conviction for felony murder. Finding no error, we affirm.

### **Factual and Procedural Background**

¶2 We view the facts and any reasonable inferences from those facts in the light most favorable to sustaining the jury's verdict. *See State v. Hollenback*, 212 Ariz. 12, ¶ 2, 126 P.3d 159, 161 (App. 2005). In February 2005, the body of Sammy J. was found in a self-storage facility. Video surveillance footage provided Sierra Vista police with information that led them to Alcarez-Guerrero and others involved in the murder.

¶3 When Tucson police officers attempted to arrest Alcarez-Guerrero at the request of the Sierra Vista police department, he fled in a vehicle. Tucson police followed

Alcaez-Guerrero through residential neighborhoods, city streets, and undeveloped desert areas until a police helicopter was able to track him from the air. Once the helicopter established visual contact with Alcaez-Guerrero's truck, the ground pursuit dropped back. The chase ended when Alcaez-Guerrero ran a red light and struck a vehicle and then a wall. He fled on foot into a residential yard and was arrested at that location.

¶4 After his arrest, Alcaez-Guerrero admitted to police detectives his brother had warned him he was wanted for Sammy's murder. Alcaez-Guerrero also told them he was angry with Sammy, had taken Sammy to the residence where the other defendants were, and had slapped Sammy repeatedly but denied killing him. During the interview Alcaez-Guerrero spontaneously denied choking or kicking Sammy, before the manner of his death had been made public. Alcaez-Guerrero also told officers the events surrounding Sammy's death had been "already planned" when he took Sammy to the residence.

¶5 The state charged Alcaez-Guerrero with first-degree premeditated murder, first-degree felony murder, kidnapping, aggravated assault causing a fracture of a body part, aggravated assault with a deadly weapon, and aggravated assault while the victim was restrained. It also charged two other defendants with crimes related to Sammy's death, but their trials were severed. Alcaez-Guerrero was convicted and sentenced as noted above and this appeal followed.

## Flight Evidence

¶6 Alcaez-Guerrero first argues the trial court committed fundamental error by permitting the introduction at trial of evidence about his flight from police. The state contends the evidence was properly admitted and no fundamental error occurred. Because Alcaez-Guerrero concedes he failed to object to the evidence, we review the issue only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶7 We will characterize error as fundamental when it prevents a fair trial by depriving the defendant of a right essential to his or her defense, or goes to the foundation of the defendant's theory of the case. *State v. Siddle*, 202 Ariz. 512, ¶ 4, 47 P.3d 1150, 1153 (App. 2002). Alcaez-Guerrero bears the burden of persuasion, and "must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. "Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

¶8 Alcaez-Guerrero claims the admission of the evidence about his flight to avoid arrest violated Rules 404(b) and 403, Ariz. R. Evid., 17A A.R.S. Rule 404(b) prohibits the admission of "evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." The rule also provides such

character evidence may be admitted for other purposes, which include “absence of mistake or accident” and “knowledge.” Ariz. R. Evid. 404(b).

¶9 Evidence of a suspect’s flight from apprehension is generally relevant and admissible. *See State v. Spears*, 209 Ariz. 125, ¶¶ 28-30, 98 P.3d 560, 567-68 (App. 2004) (evidence of flight “in a manner which obviously invites suspicion or announces guilt” is admissible), *quoting State v. Weible*, 142 Ariz. 113, 116, 688 P.2d 1005, 1008 (1984). Our supreme court has also stated: “In Arizona, flight or concealment of an accused is a fact which may be considered by the jury as raising an inference that the accused is guilty.” *State v. Edwards*, 136 Ariz. 177, 184, 665 P.2d 59, 66 (1983); *see also State v. Bible*, 175 Ariz. 549, 592, 858 P.2d 1152, 1195 (1993) (“Evidence of flight from, or concealment of, a crime usually constitutes an admission by conduct.”). Alcarez-Guerrero’s flight from police demonstrates, and his subsequent admission confirms, he knew he was a suspect in Sammy’s murder and was attempting to avoid arrest. In addition, Alcarez-Guerrero himself raised the issue of his flight in an attempt to counter the inculpatory nature of his statements following his arrest, describing the chase as “a rather harrowing or hectic experience” and noting “[he had] been through a lot” prior to that interview.

¶10 Alcarez-Guerrero also argues that his failure to contest the fact he fled from police rendered any evidence of that flight, including photographs of his crashed truck,

irrelevant and unfairly prejudicial under Rule 403, Ariz. R. Evid.<sup>1</sup> He relies on two cases finding an abuse of discretion in admitting gruesome photographs of murder victims when the defendants were not contesting “the fact of the victim’s death, the extent of [the victim’s] injuries, or the manner of [the victim’s] demise.” *State v. Bocharski*, 200 Ariz. 50, ¶ 23, 22 P.3d 43, 49 (2001); *see also State v. Davolt*, 207 Ariz. 191, ¶ 63, 84 P.3d 456, 474 (2004). But those cases are inapposite because the shockingly graphic evidence there bears no resemblance to the flight evidence Alcaarez-Guerrero complains of, notwithstanding his characterization of the car chase as “extreme, violent, and frightening.” Moreover, “[i]f evidence is admissible for any reason, the fact that it also incidentally raises an irrelevant issue does not make the admission of the evidence error.” *State v. Mosely*, 119 Ariz. 393, 401, 581 P.2d 238, 246 (1978).

¶11 The evidence of Alcaarez-Guerrero’s flight was admissible to show his consciousness of guilt, an issue he vigorously contested at trial, and we reject the claim that it was “inflammatory” and unfairly prejudicial. *See Bible*, 175 Ariz. at 592, 858 P.2d at 1195; *Edwards*, 136 Ariz. at 184, 665 P.2d at 66; *Spears*, 209 Ariz. 125, ¶ 30, 98 P.3d at 568. Thus, the trial court did not err in admitting this evidence. Because Alcaarez-Guerrero has failed to show any error, fundamental error could not have occurred. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08; *Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

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<sup>1</sup>Any photographs admitted in this case were not included in the record on appeal, but that omission from the record is of no moment.

## Statements at Sentencing

¶12 Next, to the extent we understand his arguments, Alcaez-Guerrero contends the trial court's explanation at sentencing of its decision to impose consecutive sentences for his kidnapping and murder convictions somehow rendered erroneous the denial of his motion for judgment of acquittal pursuant to Rule 20 and its instruction to the jury on first-degree, felony murder. Alcaez-Guerrero similarly claims the trial court's "finding at sentencing vitiates any felony murder verdict," maintaining without authority or explanation that the court's general statements somehow illustrate the insufficiency of the evidence supporting his conviction.

¶13 First, Alcaez-Guerrero takes liberties with the record. The trial court made no finding or suggestion at sentencing that he had not committed first-degree murder based on felony murder, but explained its reasons for imposing consecutive sentences for particular offenses rather than concurrent ones.<sup>2</sup> Second, both the denial of a Rule 20 motion and the giving of a particular jury instruction are decisions that we review in light of the evidence before the court at the time the decision was made. *See* Ariz. R. Crim. P. 20(a); *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (judgment of acquittal appropriate only when there is no substantial evidence that could support conviction); *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984) ("If reasonable [persons] could differ as to

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<sup>2</sup>Alcaez-Guerrero does not argue that the imposition of the consecutive sentences was error.

whether the evidence establishes a fact in issue, that evidence is substantial.”); *State v. Cruz*, 189 Ariz. 29, 31, 938 P.2d 78, 80 (App. 1996) (trial court may properly give instruction on any theory reasonably supported by evidence). Alcaez-Guerrero does not explain how statements made by the trial court at sentencing, months after the verdict was returned, require the reversal of those decisions made during trial. Nor has he cited any authority to support that argument, and we have found none.

¶14 Although Alcaez-Guerrero also contends insufficient evidence exists to support his felony murder conviction, he only challenges the lack of special interrogatories on the verdict form. Again without any supporting authority, he claims “special interrogatories about which theory of first degree murder [the jury] applied in reaching its verdict” are required but were not requested of the jury and thus, the felony murder verdict cannot stand. We disagree because, “in Arizona, first-degree murder is only one crime whether it is premeditated murder or a felony murder.” *State v. Gerlaugh*, 134 Ariz. 164, 168-69, 654 P.2d 800, 804-05 (1982). Although the defendant may demand a unanimous verdict on whether an offense has occurred, he or she is not entitled to a unanimous decision on exactly how that offense was committed. *Id.* Therefore, interrogatories were not required and Alcaez-Guerrero has provided no reason to overturn the jury’s decision. We also note that it is the jury’s responsibility to determine whether a death occurred “in the course of and in furtherance of” a felony, not the trial court’s, and it is therefore difficult to see how a trial

court's statements at sentencing could be grounds for overturning the jury's verdict. A.R.S. § 13-1105(A)(2).

¶15 Because Alcarez-Guerrero has cited no authority that supports his novel contentions, as required by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., 17 A.R.S., we do not further address the issues he raises based on the trial court's statements at sentencing. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief must include "an argument which shall contain the contentions of the appellant with respect to the issues presented, and . . . with citations to the authorities, statutes and parts of the record relied on"); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised.").

### **Sentencing Issues**

¶16 Alcarez-Guerrero asks us to vacate his murder sentence because a judge rather than a jury sentenced him to natural life without parole (natural life) instead of life with the possibility of parole after twenty-five years (life). Because the United States Supreme Court has held that an aggravating factor that would subject a defendant to a sentence in excess of the statutory maximum must be established by a jury beyond a reasonable doubt, *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), Alcarez-Guerrero contends his sentence is unconstitutional. Were natural life an aggravated sentence, he might have a colorable *Apprendi* claim. However, the Arizona Supreme Court has explicitly

rejected such a characterization of Arizona’s sentencing scheme in *State v. Fell*, 210 Ariz. 554, ¶ 19, 115 P.3d 594, 600 (2005).

¶17 Alcaez-Guerrero argues that *Fell* is contrary to the Sixth and Fourteenth Amendment rights to jury trial and procedural standard of proof beyond a reasonable doubt, as recently interpreted by the United States Supreme Court in *Cunningham v. California*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 856 (2007). But we have no authority to overrule our state supreme court, and it is that court to which Alcaez-Guerrero should address his arguments. *See State v. Long*, 207 Ariz. 140, ¶ 23, 83 P.3d 618, 623 (App. 2004). Moreover, *Cunningham* does not explicitly or implicitly overturn the decision in *Fell*. The crux of *Fell* was that a sentence of either life or natural life is warranted by a jury finding of guilt in a first-degree murder trial and natural life is not an aggravated sentence warranting jury findings under the Sixth Amendment. *See Fell*, 210 Ariz. 554, ¶¶ 14, 19, 115 P.3d at 598-560. Unlike the California sentencing scheme in *Cunningham*, Arizona’s first-degree murder statutes do not create tiers of punishment, but “provide[] the superior court with the discretion to sentence an offender within a range—from life to natural life—for non-capital first degree murder.” *Fell*, 210 Ariz. 554, ¶ 15, 115 P.3d at 598.

¶18 Here, based on the jury’s verdict, the trial court had the discretion to sentence Alcaez-Guerrero to either life or natural life, *see Id.* ¶ 17, without performing any additional fact-finding, *see Id.* ¶¶ 13-15. We fail to see the conflict between *Cunningham* and *Fell* that Alcaez-Guerrero alleges. As the state points out in its brief, “*Cunningham* confirms that

*Fell* is correctly decided because it reaffirms that the Sixth Amendment is not [violated] if ‘the jury’s verdict alone’ authorizes the sentence.” *Cunningham*, \_\_\_ U.S. \_\_\_, 127 S. Ct. at 869. Here, it was solely the jury’s guilty verdict that put Alcarez-Guerrero at risk of life or natural life and when the trial court sentenced him, it did not violate the Sixth Amendment.

¶19 Alcarez-Guerrero makes a number of additional arguments premised on the assumption rejected in *Fell* that natural life is an aggravated sentence under Arizona’s statutory scheme. Because we reject Alcarez-Guerrero’s contention that *Fell* has been superceded by *Cunningham*, we necessarily reject those arguments as well.

#### **Disposition**

¶20 For the foregoing reasons, Alcarez-Guerrero’s convictions and sentences are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge