

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 05-0214
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	<b>MEMORANDUM DECISION</b>
	)	(Not for Publication
JOHN MCNEICE,	)	- Rule 111, Rules of
	)	the Arizona Supreme
Appellant.	)	Court)
	)	<b>Filed 11-1-07</b>

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Appeal from the Superior Court in Yuma County

Cause No. S1400CR200200196

The Honorable Andrew W. Gould, Judge

**CONVICTIONS AFFIRMED IN PART, VACATED IN PART; SENTENCES  
AFFIRMED IN PART, VACATED IN PART**

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**B R O W N**, Judge

¶1 John Wilbur McNeice appeals his convictions for two counts of first-degree felony murder and one count of robbery. He argues the trial court erred in denying his motion to

suppress. He also contends the trial court abused its discretion in denying his requested *Willits* instruction. Finally, McNeice challenges the sufficiency of evidence supporting his convictions. For the reasons that follow, we affirm the robbery conviction and one conviction for first-degree murder. We vacate the other first-degree murder conviction.

#### **BACKGROUND<sup>1</sup>**

¶2 At approximately 2:00 a.m. on February 14, 2002, officers from the Yuma Police Department were dispatched to check on the welfare of a bartender at Pop's Place Bar ("Pop's Place"). Police located the victim, K.G., on the floor behind the bar with multiple serious injuries to her face, head, and hands. She was pronounced dead at the scene. K.G. was naked from the waist down except for her socks, and the cash register drawer was open and empty. The victim's pants were inside-out on the floor next to her with her shoes inside the pants. The pants were torn in the crotch area. The right side of K.G.'s bra was moved over the top of her breast, and ripped panties were discovered in the sink behind the bar. Broken liquor bottles and blood covered the floor behind the bar. Police

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<sup>1</sup> We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against McNeice. *State v. Long*, 207 Ariz. 140, 142, ¶ 2, 83 P.3d 618, 620 (App. 2004).

discovered one set of bloody shoeprints throughout the establishment.

¶13 An autopsy revealed that K.G. died from multiple blunt force trauma to the head, with strangulation as a secondary contributing factor. Glass from multiple liquor bottles was found deeply imbedded in numerous scalp wounds. The victim's brain was bruised. The medical examiner testified that the victim had defensive wounds to her hands and arms, fingernails were missing, and injuries to the victim's back were consistent with her having been dragged along the floor. The lateral wall of the victim's vagina was freshly bruised.

¶14 As the police continued their investigation during the morning of February 14, 2002, McNeice, apparently a homeless man, soon became an investigative lead. The police learned that D.T. employed McNeice part-time as an assistant in D.T.'s plumbing business. Police officers arrived at D.T.'s house shortly after 8:00 a.m. and discovered shoeprints in the front yard matching the prints at Pop's Place. Overhearing the police inform D.T. that McNeice was wanted for questioning, C.T., D.T.'s son, went to an inoperative car parked in the backyard where McNeice occasionally slept to inform McNeice that the police were looking for him. D.T. did not know McNeice was

presently in the car and informed the officers accordingly. The police left for a short time.

¶15 Returning to D.T.'s house sometime between 9:15 and 9:30 a.m., Officer Duran was informed by D.T. and C.T. that McNeice had been sleeping in the car that morning. The three quickly went to the backyard to determine if McNeice was still in the car. He was not. Officer Duran seized a personal check from the car's back seat. The check was written to Pop's Place by someone other than McNeice and was dated February 13, 2002. After procuring a search warrant, police uncovered two rolls of quarters under sheets covering the car.

¶16 Meanwhile, around 8:00 a.m., McNeice went to a local bar, Sage and Sand, where he played pool and bought two rounds of drinks for the other patrons. He also gave a friend \$20.00 to buy steaks for a proposed barbeque party. When the discussion turned to the crime at Pop's Place the previous evening, McNeice said that he was there around closing time. Later, around 1:00 p.m., he left Sage and Sand to go to Thunder Road, another local bar, where he continued to drink beer and whiskey and buy drinks for others.

¶17 Shortly before 3:00 p.m., a disturbance was reported at Thunder Road. Responding to the call, Officer Fell saw the suspect outside the bar acting in an agitated manner. The

suspect became increasingly aggressive as Officer Fell approached. The suspect identified himself as McNeice. Officer Fell then called for back-up, alerting the officers listening on the police radio that he was speaking with McNeice. When the other officers arrived to assist, the suspect began swearing and yelling. Noticing a bulge in McNeice's rear pocket and being concerned for their safety, the officers searched him and discovered a roll of quarters and a wad of cash in his pockets. The officers eventually restrained him and discovered what appeared to be blood on his socks. The soles of his shoes matched the prints found at Pop's Place and around D.T.'s house. McNeice was transported to the police station and Officer Martin conducted a videotaped interview for approximately three hours.

¶18 The State indicted McNeice on one count of premeditated first-degree murder, two counts of first-degree felony murder, one count of sexual assault, and one count of robbery. Prior to trial, the State withdrew its notice to seek the death penalty. The jury acquitted McNeice of sexual assault and first-degree premeditated murder, but found him guilty of the lesser-included offense of second-degree murder. The jury also found him guilty of robbery and two counts of felony murder based on robbery and apparently attempted sexual assault as the underlying offenses. The trial court vacated the second-degree

murder conviction because of improper verdict forms<sup>2</sup> and sentenced him to concurrent statutory life sentences for the felony murder convictions. For the robbery conviction, he was sentenced to three years' imprisonment and four months' community supervision to be served consecutively to the life sentences. McNeice timely appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (2001).

## DISCUSSION

### I. Denial of Motion to Suppress

¶9 Prior to trial, McNeice filed a motion to suppress evidence police obtained from searching the car in which he had been sleeping. He also sought to suppress statements he made while being transported to the police station and during his interview. The trial court held a suppression hearing and denied the motion by two written orders.

¶10 In reviewing the denial of a motion to suppress, we review only the evidence submitted at the suppression hearing, and we view those facts in the manner most favorable to

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<sup>2</sup> Although the verdict forms for premeditated first degree murder allowed the jury to find McNeice guilty or not guilty, the forms for the lesser-included offenses of second-degree murder, reckless manslaughter, and manslaughter by sudden quarrel or heat of passion only provided for findings of guilt.

upholding the trial court's ruling. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996); *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003). The trial court determines the credibility of witnesses. *State v. Ossana*, 199 Ariz. 459, 461, ¶ 7, 18 P.3d 1258, 1260 (App. 2001). Although we defer to the trial court's factual determinations, we review de novo its ultimate legal conclusion. *Box*, 205 Ariz. at 495, ¶ 7, 73 P.3d at 626. A trial court's ruling on a motion to suppress will not be reversed on appeal absent clear and manifest error. *State v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995).

#### **A. Evidence**

¶11 McNeice argues his constitutional rights to privacy were violated when the trial court allowed into evidence items obtained as a result of a police search of the car in which he slept.<sup>3</sup> He contends he had a legitimate expectation of privacy in the car, as evidenced by sheets covering the car's windows. He further contends that Officer Duran could not have reasonably

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<sup>3</sup> On appeal, and for the first time, McNeice alleges violations of his privacy rights under the Arizona constitution. However, he does not elaborate on this contention, and with one limited exception, all the cases he cites concern federal constitutional issues. Therefore, we confine our analysis to the purported violations of McNeice's federal rights. See *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to argue a claim on appeal constitutes waiver).

believed D.T., the homeowner in whose yard the car was located, consented to a search of the vehicle.

¶12 The following facts related to the search of the car are undisputed. McNeice had been periodically sleeping in the car for about four weeks prior to the search on February 14, 2002. On the morning of the search, C.T. observed McNeice sleeping in the car with the rear door open and his feet sticking out of the car. A tarp or sheets covered the car.

¶13 D.T.'s sister, M.U., owned the car. The car was driven to D.T.'s home to be stored until it could be repaired. M.U. did not want D.T. to fix the car, she did not give D.T. permission to use the car, and she did not permit D.T. to allow others to use the car. M.U. never gave McNeice permission to sleep in the car, and indeed had no idea he was sleeping there until the police or D.T. told her so. D.T. never told McNeice he could sleep in the car, and the two never talked about McNeice doing so.

¶14 The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures." U.S. Const. amend. IV. Fourth Amendment rights are personal rights and cannot be vicariously asserted; that is, evidence cannot be suppressed because a third party's Fourth Amendment rights have

been violated. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); *State v. Steiger*, 134 Ariz. 268, 272, 655 P.2d 808, 812 (App. 1982). To establish a violation of the Fourth Amendment, a defendant must show that he or she has a legitimate expectation of privacy in the premises to be searched. *Rakas*, 439 U.S. at 143 n.12. Whether a person's expectation of privacy is legitimate as a matter of constitutional law requires satisfaction of a two-prong test: First, the person must have a subjective expectation of privacy in the place to be searched, and second, this expectation must be one that society is prepared to accept as reasonable. *Id.*; *Steiger*, 134 Ariz. at 272, 655 P.2d at 812. Courts examine the totality of the circumstances in determining whether a defendant has a legitimate expectation of privacy. *Steiger*, 134 Ariz. at 272, 655 P.2d at 812.

¶15 Here, the record shows that McNeice did not have permission, and therefore had no lawful right, to sleep in M.U.'s car. Had M.U. known McNeice was sleeping in her car, she could have properly excluded him from the vehicle. As a trespasser, McNeice did not have a legitimate expectation of privacy in the car. See *State v. Adams*, 197 Ariz. 569, 573, ¶ 21, 5 P.3d 903, 907 (App. 2000) (noting that those who are not entitled to occupy the premises at all, as trespassers, have no

legitimate expectation of privacy in another's property). Accordingly, the search of the vehicle did not amount to a violation of McNeice's privacy rights under the Fourth Amendment, and he lacked standing under the Fourth Amendment to suppress evidence seized from the vehicle. See *Steiger*, 134 Ariz. at 272, 655 P.2d at 812.

¶16 Furthermore, even if we assume McNeice subjectively expected privacy in the car,<sup>4</sup> such a subjective belief is insufficient to establish a legitimate expectation of privacy. See, e.g., *U.S. v. Dodds*, 946 F.2d 726, 728-29 (10th Cir. 1991) (trespasser has no legitimate expectation of privacy in vacant apartment that he had slept in on previous occasions); *Steiger*, 134 Ariz. at 270-73, 655 P.2d at 810-13 (although defendants were allowed access to parts of ranch and had authority to eject trespassers, defendants' unauthorized use of a barn on the ranch precluded any legitimate expectation of privacy in the barn despite defendants' clear subjective belief to the contrary).

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<sup>4</sup> We note that at the suppression hearing, McNeice did not testify he believed he had a right to privacy while he was in the car, and there was no evidence that he covered the windows or that they were otherwise covered to provide him or anyone else privacy while in the car. Furthermore, C.T. testified that McNeice's feet were sticking out of an open door when C.T. discovered him sleeping in the vehicle the morning of the murder, thus supporting a reasonable inference that McNeice did not subjectively believe he had a right to privacy while in the car.

Therefore, we conclude that the trial court did not err in denying McNeice's motion to suppress evidence.<sup>5</sup>

### B. Statements

¶17 McNeice also argues that statements he made to the police while being transported to the police station and during his interview should have been suppressed as "the fruit of the poisonous tree" because he was unlawfully arrested outside the Thunder Road bar. Specifically, he asserts his arrest "resembled a free-for-all where nobody took responsibility for arresting [McNeice] individually, yet everyone participated in the arrest. Nobody knew the probable cause for arresting [McNeice], but everyone assumed others had probable cause to arrest him. It was a guessing game; just arrest him for something. . . . There was no probable cause to arrest [McNeice for the murder]."<sup>6</sup> We disagree.

¶18 At the suppression hearing, Officer Fell testified that he arrested McNeice for disorderly conduct, not the murder

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<sup>5</sup> Based on our conclusion that McNeice did not have a legitimate expectation of privacy in the car, we need not consider whether Officer Duran reasonably believed D.T. had authority to consent to a search of the vehicle.

<sup>6</sup> McNeice does not argue that the pat-down resulting in police seizing the roll of quarters and wad of cash constituted an improper protective search. See *State v. Vasquez*, 167 Ariz. 352, 355, 807 P.2d 520, 523 (1991) (even if police lack probable cause to arrest, they may take steps to protect themselves by conducting a protective search).

of K.G. The trial court specifically found the officer's testimony credible. The trial court further found that Officer Fell had probable cause to arrest McNeice for disorderly conduct. Therefore, the record supports the trial court's probable cause determination.

¶19 To make a warrantless arrest, a police officer must have probable cause to believe both that a crime has been committed and that the person to be arrested committed the crime. *State v. Keener*, 206 Ariz. 29, 32, ¶ 15, 75 P.3d 119, 122 (App. 2003). Probable cause exists when "reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Hoskins*, 199 Ariz. 127, 137-38, ¶ 30, 14 P.3d 997, 1007-08 (2000), *supplemented by* 204 Ariz. 572, 65 P.3d 953 (2003). Further, whether probable cause exists depends on all of the facts and circumstances known at the time of the arrest. *Keener*, 206 Ariz. at 32, ¶ 15, 75 P.3d at 122.

¶20 A person commits disorderly conduct when he knowingly disturbs the peace or quiet of a neighborhood by engaging in seriously disruptive behavior or making unreasonable noise. A.R.S. § 13-2904(A) (2001). Here, the police officers had probable cause to arrest McNeice for disorderly conduct. McNeice was disruptive and combative and shouting profanities at

the officers. The confrontation occurred near a public school where Officer Fell was stationed and from which the students would soon be exiting. McNeice was lawfully arrested for disorderly conduct. Accordingly, the arrest did not form a basis for suppressing McNeice's statements, and the trial court did not err in denying McNeice's motion on this basis.

## II. *Willits* Instruction<sup>7</sup>

¶21 While settling final jury instructions, the trial court denied McNeice's request for a *Willits* instruction based on mold that apparently covered the shoes McNeice was wearing the day he was arrested and that purportedly was caused by the State's improper storage. As he did below, McNeice argues that the mold prevented him from testing the shoes for blood splatter, the absence of which would tend to exonerate him.<sup>8</sup> We review a trial court's decision to deny a *Willits* instruction

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<sup>7</sup> See *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

<sup>8</sup> McNeice also argues that he was entitled to a *Willits* instruction based on the State's failure to retrieve the clothes he was wearing the night of the murder and to "bag" the victim's hands. We disagree. A *Willits* instruction is not required merely because a more thorough or exhaustive investigation could have been undertaken by the State. *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). Furthermore, the State is not duty-bound to seek potentially exculpatory evidence for the defense. *State v. Tyler*, 149 Ariz. 312, 317, 718 P.2d 214, 219 (App. 1986). McNeice's suggestion that these items might have been potentially exculpatory is insufficient to demonstrate that the trial court should have given a *Willits* instruction.

for an abuse of discretion. *State v. Davis*, 205 Ariz. 174, 180, ¶ 36, 68 P.3d 127, 133 (App. 2002).

¶122 "When the state destroys material evidence, the contents or quality of which are at issue in trial, the jury may infer that the facts are against the state's interest." *Murray*, 184 Ariz. at 33, 906 P.2d at 566. However, a defendant is not automatically entitled to a *Willits* instruction when evidence is destroyed. *Id.* The defendant must prove that prejudice resulted from the failure to preserve the evidence. *Id.*

¶123 Here, in denying McNeice's request, the trial court stated:

But the most important prong the court relies on as to DNA evidence is the defendant hasn't suffered any prejudice and the court has noted on the record already the undisputed evidence is there isn't blood on the shoes. Defense counsel can argue that. The State can't dispute that fact. And so there is no necessity for the instruction. Defense counsel and the defendant have the ability to argue that there is no blood on the shoes . . . .

A *Willits* instruction "permits a jury to draw an inference against the state if the state allows evidence within its control to be destroyed." *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988). Because defense counsel was able to argue to the jury that there was no blood on the shoes, and there was no conflicting argument or evidence presented by the

State, no inference was necessary. Thus, McNeice was not prejudiced by the absence of a *Willits* instruction regarding the presence of mold on his shoes. Furthermore, there was no showing that the shoes were so contaminated that they could not be tested for blood or DNA; indeed, McNeice never requested to have the shoes tested. Accordingly, the trial court did not abuse its discretion in denying McNeice's request for a *Willits* instruction.

### III. Sufficiency of Evidence

¶24 McNeice argues that insufficient evidence supports his convictions. He asserts that the evidence fails to establish a "nexus" in time between the victim's death and the commission of the underlying felonies.

¶25 When addressing a sufficiency of evidence argument, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). We will reverse only if we find a complete absence of probative facts to support the conviction. *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976); see also *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) ("[I]t must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the

conclusion reached by the jury." ). Finally, we will not weigh the evidence, as that is the function of the jury. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶26 To secure a conviction for sexual assault, the State was required to prove that McNeice intentionally or knowingly penetrated the victim's vulva with a part of his body or with any object without the victim's consent. A.R.S. §§ 13-1401(3), -1406(A) (2001). A conviction for the crime of robbery required proof of the following four elements: McNeice took another person's property; from the other person or his/her immediate presence; the taking was against the other person's will; and, McNeice threatened or used force against any person with the intent to coerce surrender of the property or to prevent resistance to taking or keeping the property. A.R.S. § 13-1902(A) (2001). The crime of first-degree felony murder required proof that McNeice committed or attempted to commit sexual assault or robbery, and in the course of and in furtherance of those crimes or immediate flight therefrom, caused the victim's death. A.R.S. § 13-1105(A)(2) (Supp. 2006). The crime of attempt to commit sexual assault, as it relates to felony murder, required proof that McNeice intentionally committed any act that was a step in a course of conduct, which McNeice planned would end or believed would end in the

commission of the crime of sexual assault. See A.R.S. § 13-1001(A)(2) (2001). Our review of the record reveals that sufficient evidence supports the jury's verdicts.

¶127 In ruling on McNeice's motion for new trial, the trial court made the following findings.<sup>9</sup> Indisputably, the victim was murdered. McNeice conceded he was present at Pop's Place shortly before the victim's death, and he admitted he was the last person there before the victim closed the bar. The medical examiner testified that the injuries on the victim's hands and arms were consistent with defensive wounds. DNA test results proved that the victim's blood was on McNeice's underwear,<sup>10</sup> and McNeice's DNA was on one of the victim's acrylic fingernails found near her body. The victim was half-naked, her bra was moved, and the medical examiner discovered a fresh penetration injury to her vagina.

¶128 With respect to the robbery, the trial court found that E.W. paid Pop's Place on February 13, 2002, with a check made out for \$20.00, and the check was found the next day in a car where McNeice had slept. Money was missing from the cash

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<sup>9</sup> The videotape of McNeice's interview was played to the jury and entered into evidence; however, it is not in the record on appeal. We presume the tape supports the trial court's findings that are based on the interview. See *State v. Brown*, 188 Ariz. 358, 359, 936 P.2d 181, 182 (App. 1997).

<sup>10</sup> Defendant was wearing two pair of underwear; the victim's blood was on both pairs.

register, which was open and next to the victim's body. McNeice was found with denominations and quarter roll wrappings consistent with those that would have been found at Pop's Place. McNeice spent large amounts of cash at local bars after the murder; indeed, he used a \$50.00 bill that had the victim's blood on it.

¶129 Moreover, McNeice did not report the victim's serious injuries or the robbery and murder to which he apparently claimed to be an innocent witness. Further, sometime after learning the police were looking for him, McNeice fled from the car in which he had been sleeping.

¶130 The trial court's findings are supported by the record. Based on these facts, the jury could have reasonably found that McNeice contemporaneously robbed, murdered, and attempted to sexually assault the victim. We thus conclude that sufficient evidence supports McNeice's convictions.<sup>11</sup>

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<sup>11</sup> McNeice cites no authority for his argument that *Blakely v. Washington*, 542 U.S. 296 (2004) prevents juries from finding a defendant guilty of felony murder when a non-guilty verdict has been rendered with respect to the underlying offense. A completed crime is not necessary for a felony murder conviction and therefore one of his felony murder convictions was properly based on his *attempt* to sexually assault K.G. See A.R.S. § 13-1105(A)(2).

#### IV. Felony Murder Convictions

¶31 The parties agree that because McNeice was found guilty as to murdering only one victim, his sentence should reflect one conviction for felony murder. When there is one victim, first-degree murder is only one crime, regardless of the theory underlying the finding of guilt. See *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982). Here, McNeice was found guilty of two counts of felony murder with respect to one victim and was sentenced to two concurrent terms of statutory life imprisonment. Accordingly, we vacate one of the felony murder convictions and the statutory life sentence imposed.

**CONCLUSION**

¶132 For the foregoing reasons, McNeice's convictions and sentences for robbery and one count of felony murder are affirmed. We reverse McNeice's conviction on the other count of felony murder and vacate the corresponding sentence.

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

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JOHN C. REA, Judge *Pro Tempore*\*

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LAWRENCE F. WINTHROP, Judge

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\* The Honorable John C. Rea, a judge of the Superior Court of Maricopa County, was authorized to participate as a Judge *Pro Tempore* of the Court of Appeals by order of the Chief Justice of the Arizona Supreme Court. Ariz. Const. art. 6, § 31.