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SUPREME COURT OF ARKANSAS

No. CR-20-581

ZACHERY KEESEE APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered:** March 31, 2022 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. 23CR-18-644] HONORABLE CHARLES E. CLAWSON, JR., JUDGE AFFIRMED.

RHONDA K. WOOD, Associate Justice

Zachery Keesee was convicted of capital murder and sentenced to life imprisonment without parole. On appeal, he argues that the State submitted insufficient evidence to support his conviction and that the circuit court made many evidentiary rulings that require reversal. We find no reversible errors and affirm.

I. *Background*

On an early May morning in 2018, Christopher Bynum and Andrew Morstain shot and killed Leo Panduro in a Days Inn motel room in Conway. Video-surveillance footage at the hotel showed that Morstain and Bynum entered Panduro's hotel room. Immediately after, gunfire ensued. The police found Panduro's body on the bed. He had been shot in the head, chest, arm, and wrist.

Surveillance footage showed that a gray BMW sedan and a U-Haul truck arrived at the hotel just before the murder and departed following it. The police recovered the BMW

from a garage in Sherwood that Keesee's brother-in-law rented. Inside the BMW, police found Morstain's driver's license, clothes stained with Morstain's and Panduro's blood, body armor, a rifle, and a small box containing cocaine. The BMW was registered to Izikea, LLC, a company Keesee founded. Police also recovered the U-Haul truck from a parking lot near the garage in Sherwood. A man in California had rented the U-Haul truck and listed Keesee as a contact person on the rental agreement. Surveillance footage showed Keesee and Bynum walking together near the Sherwood garage a few hours after the murder.

Two days after the murder, police responded to America's Best Value Inn, another Conway hotel located near the Days Inn, because luggage had been left in a room. Panduro had rented that room as well. In the luggage police found a package containing one kilogram of methamphetamine; bank-transaction receipts; a Wells Fargo business debit card; shopping receipts; thousands of dollars in cash; MoneyGram receipts; and a journal containing notes written in Spanish.

After the murder, Keesee, Bynum, and Morstain fled to Mexico. A month later, Keesee tried to cross back into the United States, and border agents detained him. The State charged Keesee as an accomplice to premeditated-and-deliberated capital murder. The State later amended the information to include a charge for an alternative theory of accomplice to capital-felony murder based on an underlying felony violation of the Uniform Controlled Substances Act. The jury was given special interrogatories allowing them to decide independently whether Keesee was guilty of either or both of the alternative theories. The jury found Keesee guilty under both theories. Because the State waived the death penalty, Keesee was sentenced to life imprisonment.

II. *Analysis*

A. Sufficiency of the Evidence

Keesee was convicted of premeditated-and-deliberated capital murder, and the State based his criminal liability on his status as an accomplice. A person commits capital murder if "[w]ith the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person." Ark. Code Ann. § 5-10-101(a)(4) (Repl. 2013). Because it is difficult to prove intent by direct evidence, a jury may infer premeditation and deliberation from circumstantial evidence. *Boyd v. State*, 369 Ark. 259, 263, 253 S.W.3d 456, 459 (2007). When, as here, criminal liability is based on accomplice liability, we affirm a sufficiency challenge if the defendant acted as an accomplice in the commission of the offense. *Cook v. State*, 350 Ark. 398, 408, 86 S.W.3d 916, 922 (2002). A defendant is an accomplice if he renders the requisite aid or encouragement to the principal who committed the offense. *Id.* The appellant does not have to be at the murder scene to be guilty as a murder accomplice. *Id.*

In reviewing Keesee's sufficiency challenge, we view the evidence in the light most favorable to the State and will affirm if substantial evidence, direct or circumstantial, supported the verdict. *Kellensworth v. State*, 2021 Ark. 5, at 4, 614 S.W.3d 804, 807. To be substantial, the circumstantial evidence must exclude every reasonable hypothesis other than the accused's guilt. *Id.* It is the jury's decision whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence. *Id.*

Considering the evidence in the light most favorable to the State, the State presented sufficient evidence for the jury to convict Keesee as an accomplice to the premeditated-and-deliberated capital murder of Panduro.

1. *Evidence prior to the murder*

The trial evidence showed that Keesee and Panduro were involved in a drug-trafficking operation. Before the murder, Keesee told his sister, Rachel Walls, that Panduro had stolen weed and had tried to frame him. On occasion, Rachel accepted packages for Keesee. The day before the murder, Rachel received a package addressed to Keesee. Keesee called and told her not to let Panduro pick it up. Yet when Panduro arrived that evening, Rachel gave him the package. As Panduro was leaving, he said to her, "I'm sorry about your brother [Keesee]."

Keesee also told others that Panduro had been threatening him. The weekend before the murder, Keesee told his girlfriend that Panduro "was threatening to cut his fingers off if he didn't give him the money that he owed," and that he "had to get his boys to take care of a situation for him." That same weekend, Keesee sent a text message to another friend stating that he had "just dodged getting kidnapped." And Morstain told his girlfriend that he was going to Arkansas because drugs had been stolen, and he was going to kill him (Panduro).

On the morning of the murder, a gray BMW sedan and a U-Haul truck arrived at the Days Inn and departed right after the murder. Keesee was connected to both vehicles. The BMW was registered to Keesee's business, and Keesee was listed as a contact on the U-Haul truck-rental agreement. Video surveillance showed that at least three individuals were

in the two vehicles. Two men, Morstain and Bynum, entered the motel room before shots were fired and exited following the shots.

2. *Evidence after the murder*

The murder occurred at approximately 5:45 a.m. Around that same time, Keesee's brother-in-law, Cade Marbury, received a phone call, and after he hung up, he told his wife that he was going to the Days Inn. At around 6:00 a.m., Keesee tried to call his sister, but she did not answer. Sometime before 7:00 a.m., Keesee's mother called into work and asked to take the day off due to a family emergency. At 7:15 a.m., Keesee tried to contact a friend, Haley Barnes, but when she did not answer, he sent her a text message saying, "Baby, call me back right now. SOS."

The two vehicles seen at the Days Inn were later recovered near each other in Sherwood. The BMW was found in the garage that Keesee's brother-in-law rented. And the U-Haul truck was found in a nearby parking lot. Shortly after the murder, surveillance videos captured Keesee and Bynum walking in Sherwood near where police found the BMW sedan and the U-Haul truck. Later that morning, Keesee showed up at Rachel's house. Rachel did not want to let him in but eventually did because their mother called and told her to. When Keesee was there, she noticed blood on his pants. Keesee was supposed to meet Haley that afternoon but did not show up.

After the murder, Keesee fled with Bynum and Morstain to Mexico. Morstain's girlfriend, Julie Holister, testified that she traveled with them to Mexico and stayed with them there. Julie testified that the three had said they were running from the law. Keesee

also joked about Panduro's murder, stating that Panduro's son would come back for revenge.

3. *Discussion*

Considering this evidence, we hold that the State presented sufficient evidence to support Keesee's conviction for premeditated-and-deliberated capital murder. Keesee's statements and actions established his motive and intent for Morstain and Bynum to kill Panduro. The State presented evidence that he had solicited Morstain and Bynum to come from Texas to Conway to commit the murder. The State presented circumstantial evidence that he provided the vehicles seen at the crime scene, was present at the murder, helped dispose of the vehicles after the murder, and fled to Mexico with the principals who carried out the murder. Thus, the circuit court did not err in denying Keesee's motions for directed verdict.

Because the State presented sufficient evidence on the premeditated-and-deliberated capital-murder conviction, we need not decide whether the felony-murder conviction was factually deficient. *See Griffin v. United States*, 502 U.S. 46, 59 (1991). We have previously affirmed a general guilty verdict so long as there was sufficient evidence to support the conviction on one ground. *Norris v. State*, 2010 Ark. 174, at 6, 368 S.W.3d 52, 56; *Terry v. State*, 371 Ark. 50, 56, 263 S.W.3d 528, 533 (2007). A guilty verdict decided by special interrogatories does not require any different result. And because we affirm Keesee's sufficiency challenge for premeditated-and-deliberated capital murder, we do not address his arguments that involve his felony-murder conviction, including whether the circuit court erred in denying Keesee's motion to strike the amended information that added felony

murder; whether the State's felony-murder charge contradicted its prosecution of, and statement made by, Bynum; and whether the circuit court improperly defined "delivery" in its felony-murder jury instruction.[1]

B. Authentication and Hearsay Objections

Keesee next argues that the circuit court erroneously admitted several pieces of evidence over his authentication and hearsay objections. We review a circuit court's decision to admit or exclude evidence for an abuse of discretion and will reverse only upon a showing of prejudice. *Adams v. State*, 2021 Ark. 34, at 4, 617 S.W.3d 249, 252.

1. *BMW sales order*

Keesee argues the circuit court abused its discretion in admitting a document from a Mercedes-Benz dealership detailing the sale of the BMW because the document was not authenticated. Authentication of a document is a condition precedent to admissibility. Ark. R. Evid. 901(a) (2021). Rule 901(a) provides that authentication is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

[1]Additionally, several of Keesee's arguments on appeal are not preserved for our review because he failed to raise them to the circuit court. *Fink v. State*, 2015 Ark. 331, 469 S.W.3d 785. These arguments include:

1. the State presented insufficient evidence of causation because it didn't prove that "but for" Keesee's involvement, the murder of Panduro would not have occurred;
2. exhibits pertaining Keesee's mother requesting time off work were hearsay evidence;
3. the 404(b) evidence of a prior drug transaction was more prejudicial than probative under Arkansas Rule of Evidence 403;
4. the State's questions to his sisters about requesting and receiving immunity were irrelevant; and
5. the admission of certain autopsy photographs was unduly prejudicial and inflammatory.

Thus, evidence is authenticated when the trial judge in his discretion is satisfied that it is genuine and in reasonable probability has not been tampered with. *Davis v. State*, 350 Ark. 22, 39, 86 S.W.3d 872, 883 (2002). Evidence may be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Ark. R. Evid. 901(b)(4).

The trial court did not abuse its discretion by admitting the BMW sales document. Under Rule 901(b)(4), an item can be authenticated by its contents or other distinctive characteristics. On this document the purchaser was listed as Izikea, LLC, and the vehicle's serial number matched the serial number of the BMW in which the police found it. This evidence supported the fact that the document was what the State claimed it to be—the sales order for the BMW found in the Sherwood garage.

2. *Journal entries*

Keesee also asserts that the circuit court erred in admitting pages from a journal found in Panduro's luggage. He argues the pages were not properly authenticated and contained hearsay statements. The journal entries, which were in Spanish, outlined drug transactions, including debts owed by Keesee and Morstain. For example, one page stated: "Zak gave me 1900.00 for a package that he delivered and something else that was delivered by his brother in law." Another read: "Andro owes = Tex we gave him: 15 packages at 1300 . . . He owes us 13000.00." And another: "I loaned 1500.00 to Zack to pay for the ticket that Franky [got] and for the insurance on his truck for 6 months."

We first address Keesee's argument that the circuit court erroneously admitted this evidence over his authentication objection. *See Davis*, 350 Ark. at 39–40, 86 S.W.3d at 883

("[B]efore a discussion of hearsay may be undertaken it must first be determined that the document is what it is purported to be."). The State presented testimony that the hotel's employee found the luggage in Panduro's room. Keesee did not object to the authentication of the luggage, and the journal was found within the luggage. Thus, we reject Keesee's authentication argument to the extent he claims that the journal was not properly authenticated as an item in Panduro's possession.

However, Keesee also made an authentication and hearsay objection to the journal's contents being read to the jury. The circuit court admitted the journal's contents as nonhearsay because they were made by a co-conspirator in furtherance of the conspiracy under Arkansas Rule of Evidence 801(d)(2)(v). We conclude that this was an abuse of discretion but that the error was harmless.[2]

Arkansas Rule of Evidence 801(d)(2)(v) provides that statements of co-conspirators are nonhearsay if the prosecution establishes by a preponderance of the evidence that (1) a conspiracy existed; (2) both the declarant and the defendant were parties to the conspiracy; and (3) the statement was made in the course of and in furtherance of the conspiracy. *Id.*

Here, the State could not have met the requirements of Rule 801(d)(2)(v) because it did not present evidence that Panduro wrote the journal entries. And without proper authentication as to the author of the statements written in the journal, the circuit court

[2]Keesee also argues that certain statements attributed to his mother were erroneously admitted as nonhearsay statements by a co-conspirator under Rule 801(d)(2). However, those statements, some of which the trial court limited, were not admitted for that reason. Because Keesee does not challenge on appeal the circuit court's particular reasons for admitting those statements, we do not review them. *See Fuson v. State*, 2011 Ark. 374, 383 S.W.3d 848.

abused its discretion by concluding the unidentified author was a co-conspirator and that the statements were nonhearsay under Rule 801(d)(2)(v). *See Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972).

That said, we find that this error was harmless. The journal entries documented drug transactions, including debts owed by Keesee to the drug business. At trial, the State asserted that the debts documented in the journal established a motive for killing Panduro. But the State offered independent evidence of this motive. For example, Keesee's girlfriend also testified that Keesee owed money and that Panduro had threatened to cut off his fingers unless he paid.

And the State offered an alternative motive for the murder, which did not rely on the journal entries: that Panduro had stolen drugs from Keesee. That theory was supported with Rachel's testimony that Panduro had intercepted a package that Keesee wanted and with Julie's testimony that Morstain said he was going to Arkansas because some drugs had been stolen. Because the journal was cumulative of other statements about Keesee's debt, and evidence of an alternative, equally plausible motive for the murder was admitted, we conclude that Keesee failed to demonstrate that this error was prejudicial to his conviction for premeditated-and-deliberated capital murder.[3]

3. *Evidence from luggage*

Next, Keesee argues that several other pieces of evidence from Panduro's luggage, including Wells Fargo bank receipts and a Wells Fargo business debit card were improperly

[3]Again, because we find that there was sufficient evidence to convict Keesee of premeditated-and-deliberated capital murder, we do not address whether this evidence was prejudicial to Keesee's felony-murder conviction.

admitted hearsay. We conclude that the circuit court did not abuse its discretion because the evidence was not hearsay.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c). But an out-of-court statement is not hearsay if it has relevancy apart from the truth of the matter that it asserts or implies. *Id.* Thus, if making the statement is, in itself, relevant, evidence that the statement was made is not barred by the hearsay rule. *See Swain v. State*, 2015 Ark. 132, 459 S.W.3d 283.

This evidence was not inadmissible hearsay because it was not offered for the truth of the matter asserted. The bank receipts were not offered to prove that cash deposits were made into bank accounts. And the debit card was not offered to prove that Frankie or Izikea had an account with Wells Fargo. Instead, the State introduced these items as evidence of Panduro, Keesee, and Frankie's association with one another and with drug activities. The bank receipts were offered to show that similar transactions, e.g., cash deposits, were made by Panduro and Keesee, and the debit card showed Frankie's connection to Keesee's business, Izikea. It is the fact of these transactions, and not the truth of the statements, that was relevant. *See United States v. Hyles*, 479 F.3d 958, 968–69 (8th Cir. 2007). So they are not hearsay, and the circuit court did not err in admitting them.

4. *Statements made by Julie Holister and Sarah Marbury*

Keesee also challenges statements made by Julie Holister, Morstain's former girlfriend, and his sister, Sarah Marbury, as inadmissible hearsay. At trial, Marbury testified that on the morning of the murder, her husband received a phone call and told her that he

was going to the Days Inn. Similarly, Julie testified that before Panduro's murder, Morstain told her about his plan to travel to Arkansas to commit a murder. She stated, "I remember Andrew telling me that a lot of drugs had gotten stolen, and they needed to go to Arkansas, and he was going to kill him." We conclude that both statements fall under the Rule 803(3) exception as a statement of the declarant's then-existing state of mind, such as intent, plan, and motive. Ark. R. Evid. 803(3).

Rule 803(3) allows for hearsay statements, even if the declarant is available, as evidence of a "declarant's then existing state of mind . . . such as intent, plan, motive, design . . . but not including a statement of memory or belief to prove the fact remembered or believed." We have stated that testimony about a person's intent to do something in the future is a hearsay exception. *King v. State*, 2019 Ark. 114, at 8, 571 S.W.3d 476, 480. For example, a witness's testimony that the victim had stated that she planned to spend the weekend she was murdered with the defendant was admissible. *Id.* Similarly, a witness's statement that the victim was planning to divorce the defendant was admissible. *Nicholson v. State*, 319 Ark. 566, 571–72, 892 S.W.2d 507, 510 (1995); *see also State v. Abernathy*, 265 Ark. 218, 222, 577 S.W.2d 591, 593 (1979) (victim's statement that she planned to meet defendant the night of the murder fell within Rule 803(3)).

Cade Marbury's statement to his wife fell within the Rule 803(3) exception because it concerned his then-existing state of mind and plan to go to the Days Inn. Likewise, Julie's testimony showed Morstain's state of mind, including his intent and plan to travel to Arkansas to murder Panduro. Thus, the circuit court did not err in allowing either statement.

The dissent and concurrence do not dispute that Julie's testimony falls under the Rule 803(3) exception. Instead, both oppose affirming on this basis because the State did not raise this specific hearsay exception to the circuit court. But this elevates form over substance. At trial, Keesee objected to Julie testifying about any statements Morstain made to her as hearsay. The State then argued the statement was nonhearsay. The court admitted it. Thus, the circuit court undoubtedly considered whether the statement was inadmissible hearsay and found it was not.

Our standard in reviewing evidence is simply whether the circuit court abused its discretion in admitting the evidence. This standard does not require the circuit court to rule on each hearsay exception. *See Hawkins v. State*, 348 Ark. 384, 387, 72 S.W.3d 493, 494 (2002) (affirming admittance of hearsay testimony which the trial court admitted the statement "without explanation"). Instead, we reverse only if the court acted thoughtlessly and without due consideration. *Ventry v. State*, 2021 Ark. 96, 622 S.W.3d 630. Here, the circuit court did not abuse its discretion; it thoughtfully considered whether Julie's statement should have been excluded as hearsay and concluded it should not. But its decision was ultimately correct because another hearsay exception, Rule 803(3), applied.

And contrary to the dissenting and concurring opinions, we have affirmed evidentiary rulings when the circuit court reached the right result, even if its reason was incorrect. *See Harris v. State*, 339 Ark. 35, 40, 2 S.W.3d 768, 770 (1999) (affirming admittance of prior statement under Rule 801(d)(1)(ii) after circuit court incorrectly admitted it under Rule 612); *Dandridge v. State*, 292 Ark. 40, 42, 727 S.W.2d 851, 852–53 (1987) (affirming introduction of hearsay objection as nonhearsay after circuit court ruled it

was hearsay but not prejudicial); *Chisum v. State*, 273 Ark. 1, 6–7, 616 S.W.2d 728, 730–31 (1981) (affirming introduction of statements as impeachment evidence under Rule 613 after circuit court incorrectly ruled they were admissible under the recorded recollections exception in Rule 803(5)). Our decision here is more consistent with judicial reasoning than remarkable. For these reasons, we affirm on this issue.

C. Rule 404(b) Evidence of a Prior Drug Transaction

Keesee also argues that the circuit court erroneously allowed the State to admit evidence of his involvement in a prior drug transaction. Haley Barnes testified, over Keesee's Rule 404(b) objection, that she saw him engage in an activity that looked like a drug transaction.

Rule 404(b) provides that any evidence of a person's other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he acted in conformity with it. Ark. R. Evid. 404(b). But the evidence may be admissible for other purposes, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Under this exception, the State may introduce evidence showing all the circumstances connected with, and contemporaneous to, a particular crime to put the jury in possession of the entire transaction. *Dixon v. State*, 2011 Ark. 450, at 13, 385 S.W.3d 164, 173–74. Evidence offered under Rule 404(b) also must be independently relevant to make the existence of any fact of consequence more or less probable than it would be without the evidence. *Id.* at 12, 385 S.W.3d at 173.

As discussed above, the State purported to show that Keesee's motive for premeditated murder was linked to his drug activities with Panduro: either that Keesee

owed money for drugs or that Panduro intercepted a package of drugs that Keesee wanted. Thus, Haley's statement about a prior drug transaction was admissible as independent evidence of Keesee's involvement in the sale of drugs, which was motive for the murder. This testimony, while not directly linked to the murder, was an "integral and interwoven part" of the circumstances surrounding it. *Dixon*, 2011 Ark. 450, at 13, 385 S.W.3d at 174. For that reason, we find no abuse of discretion in admitting this testimony because it was independently relevant to Keesee's motive.

D. Jury Instructions

Keesee next argues that the circuit court erroneously gave non-model jury instructions. A party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction. *Grubbs v. State*, 2020 Ark. 42, at 4, 592 S.W.3d 688, 691. We will not reverse the circuit court's decision to give or reject an instruction unless the court abused its discretion. *Id.* When the circuit court determines that the jury should be instructed on an issue, the model criminal instruction must be used unless the court concludes it does not accurately state the law. *Id.*

Here, the State requested, and the circuit court permitted, a jury instruction pertaining to Keesee fleeing to Mexico after the murder. The jury instruction read, "Evidence that a defendant fled to avoid arrest or detention by the police may be considered by you in your deliberation as circumstantial evidence of the guilt of the defendant." The circuit court did not err in instructing the jury on intentional flight because the jury instruction accurately reflected the law. *See Eliott v. State*, 342 Ark. 237, 241, 27 S.W.3d

432, 435 (2000) ("[T]he flight of a person charged with the commission of a crime has some evidentiary value on the question of his probable guilt.").

Keesee also argues that the jury should have been instructed on second-degree murder as a lesser-included offense. However, under the skip rule, when an appellant is convicted of capital murder and the jury was instructed on first-degree murder, but not second-degree murder, the failure to give the second-degree murder instruction is harmless. *Davis v. State*, 2009 Ark. 478, at 14–15, 348 S.W.3d 553, 561–62. We therefore also affirm on this point.

E. Immunity

The State, during its redirect examination, asked Rachel about requesting and being granted immunity. Keesee objected to these questions as outside the scope of its cross-examination.[4] Because the trial judge, within his sound and liberal discretion, may permit a party to bring out a matter that he failed to elicit on direct, we also affirm this point. *Moore v. State*, 362 Ark. 70, 47, 207 S.W.3d 493, 496 (2005); *see also* Ark. R. Evid. 611(a) (imposing a duty on trial courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time").

F. Prosecutor's Comments

Keesee also argues that the trial court abused its discretion by overruling his objection to a comment made by the prosecutor that he alleges editorialized and vouched for a

[4]We also reject Keesee's argument on appeal that asking Sarah Marbury about her immunity was outside the scope of her cross-examination because the State questioned Sarah about her immunity during its direct examination, not redirect.

witness's testimony. During Rachel's testimony, the prosecutor asked, "[Y]ou're not comfortable having to do this are you?" Rachel responded no. Keesee's counsel objected. The circuit court overruled the objection but admonished the prosecutor, telling him that he had gone on for too long about the witness's physical condition and should move on. Keesee's counsel did not ask the circuit court for either a mistrial or an admonition to the jury. Therefore, even though the circuit court stated it overruled this objection, it concurrently told the prosecutor to "move on to something else," giving Keesee the relief he requested. Thus, the circuit court's handling of the objection was not an abuse of discretion.

G. Autopsy Photos

Finally, Keesee claims that the circuit court abused its discretion by admitting two photographs of Panduro's autopsy, which he alleges were cumulative. The admission of photographs is a matter left to the circuit court's sound discretion, which we will not reverse absent an abuse of discretion. *Collins v. State*, 2020 Ark. 371, at 6, 610 S.W.3d 653, 657. Photographs are generally admissible if they help explain testimony. *Id.* Cumulative photographs are not, standing alone, sufficient reason to exclude them. *Id.*

Here, the first photographs to which Keesee objected showed Panduro's body once it was received by the medical examiner and before the autopsy was performed. The second photograph showed a different angle of wounds to his face. These photographs helped the medical examiner explain the process she undertook when performing the autopsy as well as the wounds suffered by Panduro. We therefore conclude that the circuit court did not abuse its discretion in admitting the photographs, and we affirm its decision.

III. *Rule 4-3(a)*

In compliance with Arkansas Supreme Court Rule 4-3(a), we have examined the record for all objections, motions, and requests made by either party that the circuit court decided adversely to the appellant. We find no prejudicial error.

Affirmed.

WOMACK, J., concurs.

BAKER, HUDSON, and WYNNE, JJ., dissent.

SHAWN A. WOMACK, Justice, concurring. I join the majority opinion with one exception. The majority opinion's decision to raise a nonjurisdictional argument on behalf of the State is remarkable. It is not only inappropriate but also unnecessary. The dissenting opinion thoroughly addresses this problem, but I write separately to emphasize a few points.

This court regularly refuses to raise arguments on a party's behalf. *See, e.g.*, *Gray v. Thomas-Barnes*, 2015 Ark. 426, at 5, 474 S.W.3d 876, 879 (holding that this court "will not research or develop an argument for an appellant."). Not only did the State fail to argue on appeal that Morstain's statement was admissible as evidence of a "declarant's then existing state of mind," Ark. R. Evid. 803(3), but also, the State never presented this theory to the circuit court. This court likewise does not entertain nonjurisdictional arguments that a party did not raise before the circuit court. *E.g.*, *Hendrix v. State*, 2019 Ark. 351, at 6, 588 S.W.3d 17, 21. Yet it appears the majority opinion is making an exception when the State is a party. The State already enjoys certain procedural advantages—for example, being able to sue but not be sued. *See, e.g.*, Ark. Const. art 5, § 20. This court should not go out of its way to craft others.

Importantly, only a minority of this court endorses the majority opinion's approach. Four of the seven justices recognize that the majority opinion's analysis is a departure from this court's typical practice—and that of nearly all appellate courts.[1] An appellate court may only find that a circuit court came to the right result, albeit for the wrong reason, *if* a party has argued the alternative reason. *Yanmar Co. v. Slater*, 2012 Ark. 36, at 14, 386 S.W.3d 439, 448 (holding that "[a]lthough this court may affirm a circuit court's decision for an alternative reason on the basis that the circuit court may have reached the right result but the reason stated for the decision is wrong, we will not do so when an issue was never raised below."). As a result, it remains the law in Arkansas that parties must raise nonjurisdictional arguments if they want this court or the court of appeals to entertain them. Parties should not rely on this court to do their lawyering for them.

Nevertheless, the majority's efforts are unnecessary to affirm Keesee's conviction and sentence. While Morstain's statement was not admissible as a statement made "during the course and in furtherance of the conspiracy," Ark. R. Evid. 801(d)(2)(v), its admission was harmless error. *See Wright v. State*, 368 Ark. 629, 638, 249 S.W.3d 133, 140 (2007). Even without the introduction of Morstain's statement, the State presented substantial evidence

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[1] *E.g.*, *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010 (2022) ("[I]f a non-jurisdictional argument was not raised below, we generally will not consider it as an alternative ground for affirmance."); *United States v. Broeker*, 27 F.4th 1331 (8th Cir. 2022) ("Because the district court was not given an opportunity to address this argument below, we will not pass upon it for the first time on appeal."); *Northern Bottling Co. v. Pepsico, Inc.*, 5 F.4th 917, 922 (8th Cir. 2021) ("It is well settled that a party's failure to raise an argument before a trial court typically waives that argument on appeal."); *Merica v. S&S Home Improvements, Inc.*, 2021 Ark. App. 197, at 8, 625 S.W.3d 356, 361 ("[I]t is well settled that this court does not consider arguments raised for the first time on appeal, and a party cannot change the grounds for an objection or motion on appeal, but is bound by the scope and nature of the arguments made at trial.").

to support a conviction for premeditated and deliberated murder. *See Collins v. State*, 2021 Ark. 35, at 4, 617 S.W.3d 701, 704.

As discussed in greater detail in the majority opinion, Keesee was involved in a drug-trafficking conspiracy with Panduro, and Panduro had threatened to torture and possibly kill Keesee. This led Keesee to "get his boys to take care of a situation for him." The two cars that Morstain and Bynum took to the hotel where they killed Panduro were associated with Keesee; shortly after the murder, police found one of those cars at a garage in Sherwood that Keesee's brother-in-law rented. Police later found the other car abandoned just a few blocks away. After the murder, Keesee made several panicked phone calls and sent text messages to friends and family asking for help. Keesee then fled to Mexico with Morstain and Bynum. These are but a few of the many pieces of evidence that support the jury's verdict.

Although the admission of Morstain's statement was prejudicial—as is nearly all evidence the State introduces against a criminal defendant—the error was slight, and the evidence of guilt was overwhelming. *See Martinez v. State*, 2019 Ark. 85, at 6, 569 S.W.3d 333, 337. Therefore, I respectfully concur and join the majority's decision to affirm Keesee's conviction and sentence.

KAREN R. BAKER, Justice, dissenting. Because the circuit court abused its discretion in admitting prejudicial, inadmissible evidence, I dissent from the majority opinion and would reverse and remand the matter for a new trial.

First, I find merit in Keesee's argument regarding authentication of the journal contents, and I disagree with the majority that the admission of this evidence was harmless

error. The record demonstrates that the prosecution presented no proof that the journal matched Panduro's handwriting, that his name was written anywhere on its pages, or that the journal pages had any distinctive characteristics that would lead to the conclusion that it was Panduro's journal. The journal was written in Spanish, but no evidence was presented to show that Panduro spoke Spanish. Rather, the prosecution relied solely on the facts that it was found in what was purportedly Panduro's luggage and in a room that he had rented. The journal pages did contain the names of several co-conspirators; however, while these names may have tied the journal to the drug-trafficking conspiracy, there was nothing to show that it was actually Panduro's journal or that he wrote those entries. In *Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972), because there was no evidence to show in whose handwriting the notebook entries were made, and the only connection between the notebook and any of the parties was the first two initials of Caton's name, we determined that there was insufficient authentication of a notebook that contained initials identical to Caton's in several places and was found in a vehicle owned by the co-defendant and driven by Caton to the shopping center where they were arrested. More recently, in *Armstrong v. State*, 2020 Ark. 309, 607 S.W.3d 491, we affirmed the exclusion of text messages based on a lack of authentication where the only evidence that the texts were authored by the murder victim was the police officer's testimony that the victim's name was programmed on the phone as the sender.

Here, the record does not contain any testimony identifying the journal as Panduro's, and neither the journal's contents nor the circumstances in which it was found were sufficient to authenticate it. Thus, the circuit court erred by admitting the journal contents

over Keesee's objection. The majority agrees that the circuit court abused its discretion when it admitted the journal's contents. However, the majority further compounds this error by also holding that this error was harmless. Our standard does not support this holding.

We have repeatedly explained that "even when a circuit court errs in admitting evidence, we may declare the error harmless and affirm if the evidence of guilt is overwhelming and the error is slight. *Kelley v. State*, 2009 Ark. 389, 327 S.W.3d 373. In determining whether the error is slight, we look to see if the defendant is prejudiced. *Id.*" *Johnston v. State*, 2014 Ark. 110, at 7, 431 S.W.3d 895, 899. Here, the error was extremely prejudicial to Keesee because it connected him to Panduro, Morstain, Bynum, and Frankie. In addition, the State used this evidence to support Keesee's motive to murder Panduro because the journal indicated that Keesee owed money. Thus, the error in admitting this prejudicial evidence was not slight. Furthermore, the circumstantial evidence supporting Keesee's conviction was far from overwhelming. Yet the majority twists the use of the harmless-error doctrine to affirm Keesee's conviction. The "harmless error doctrine has been called a '[c]onstitutional [s]neak [t]hief' for the way it enables courts to take away with one hand what they have given with the other. . . . Recognizing that harmless error is inexorably tied up with the way constitutional rights are defined makes visible how judges can deploy harmless error doctrine to expand, contract, or even eliminate constitutional rights. And thus it avoids sweeping difficult normative questions under the rug." Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2125 (2018).

Second, the majority errs by allowing the admission of Holister's testimony. On appeal, Keesee challenges Holister's testimony that "I remember Andrew telling me that a lot of drugs had gotten stolen and they needed to go to Arkansas and he was going to kill him." Keesee contends that this statement by Morstain was a casual admission of culpability that in no way furthered the conspiracy to kill Panduro and that it therefore did not fall within the exception in Arkansas Rule of Evidence 801(d)(2)(v) as ruled by the circuit court. Keesee further claims that the statement was prejudicial because it helped establish a motive for killing Panduro. Rather than address Keesee's argument, the majority sua sponte develops an entirely different argument that the State did not present or develop at trial or on appeal and affirms Keesee's conviction and sentence.

The majority abruptly states:

> [Holister's] testimony [fell within the Rule 803(3) hearsay exception because it showed] Morstain's state of mind, including his intent and plan to travel to Arkansas to murder Panduro. Thus, the circuit court did not err in allowing [the] statement.
>
> The dissent and concurrence do not dispute that [Holister's] testimony falls under the Rule 803(3) exception. Instead, both oppose affirming on this basis because the State did not raise this specific hearsay exception to the circuit court. But this elevates form over substance. At trial, Keesee objected to [Holister] testifying about any statements Morstain made to her as hearsay. The State then argued the statement was nonhearsay. The court admitted it. Thus, the circuit court undoubtedly considered whether the statement was inadmissible hearsay and found it was not.
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> . . . .
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> Here, the circuit court did not abuse its discretion; it thoughtfully considered whether [Holister's] statement should have been excluded as hearsay and concluded it should not. But its decision was ultimately correct because another hearsay exception, Rule 803(3), applied.

The majority's position is wholly misplaced. A thorough and careful review of the record demonstrates that the circuit court did not "thoughtfully consider" whether Holister's statement should have been excluded as hearsay, and its decision was ultimately correct because another hearsay exception, Rule 803(3), applied. Rather, the record demonstrates that the State contended that the statement was admissible as a statement made in furtherance of the conspiracy pursuant to Rule 801(d)(2)(v). The circuit court considered the Rule 801(d)(2)(v) argument and found that because the statement was associated with the furtherance of the conspiracies by a co-conspirator, it was admissible on this basis. No other argument or theory regarding admissibility was presented or ruled upon. As the State acknowledged in oral argument, the State failed to raise the Rule 803(3) argument either to the circuit court or on appeal, and therefore, Keesee was not afforded the opportunity to defend himself. Although the record demonstrates that the State raised Rule 803(3) with regard to other pieces of evidence being addressed, the State failed to do so in this instance. Yet, out of whole cloth, the majority raises the Rule 803(3) exception-to-hearsay argument to support its leap to affirm the circuit court. However, this not only deprives Keesee of an opportunity to defend the argument but also departs from fundamental principles of appellate law. We have been resolute in stating that we will not make a party's argument for that party or raise an issue sua sponte unless it involves the circuit court's subject-matter jurisdiction, which we will raise on our own. *Sullivan v. State*, 2012 Ark. 178, at 5; *see also City of Little Rock v. Cir. Ct. of Pulaski Cty.*, 2017 Ark. 219, at 5, 521 S.W.3d 113, 116. Further, "absent an issue of subject-matter jurisdiction, an appellate court will not address an issue if it was not presented to the trial court, ruled upon by the trial judge, and argued

by the parties on appeal. *See, e.g.*, *Reeve v. Carroll County*, 373 Ark. 584, 587, 285 S.W.3d 242, 246 (2008)." *Edwards v. Edwards*, 2009 Ark. 580, 8, 357 S.W.3d 445, 450. Finally, we have explained that "this court may affirm a circuit court when it has reached the right decision, albeit for the wrong reason, so long as the issue was raised and a record was developed below. *Ark. State Bd. of Election Comm'rs v. Pulaski Cty. Election Comm'n*, 2014 Ark. 236, 437 S.W.3d 80." *McArthur v. State*, 2019 Ark. 220, at 3, 577 S.W.3d 385, 387 (emphasis added).

In *Hanlin v. State*, 356 Ark. 516, 529, 157 S.W.3d 181, 189 (2004), we addressed a situation analogous to the one before us and held that the circuit court abused its discretion in admitting hearsay testimony. While we recognized that the evidence at issue could have been admitted pursuant to the pedophile exception, we explained,

> The problem with this court's application of the pedophile exception, *sua sponte*, is that it was not raised by the State before the circuit judge or in this appeal. Thus, Hanlin has not had an opportunity to address it or raise any defense to it. Though this court will go, on occasion, to the record to affirm for a different reason, typically this is done when that alternative reason was raised by a party and has been developed at the circuit court level. *See, e.g.*, *Johnson v. State*, 343 Ark. 343, 37 S.W.3d 191 (2001); *Heagerty v. State*, 335 Ark. 520, 983 S.W.2d 908 (1998). We have also affirmed for a different reason when the documentary evidence in the record clearly gave us a basis for doing so (*State of Washington v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999)), or when a statute, not argued by either party, is used by this court to affirm the trial court's determination (*Robinson v. State*, 274 Ark. 312, 624 S.W.2d 435 (1981)). This court has been resolute in stating that we will not make a party's argument for that party or raise an issue, sua sponte, unless it involves the trial court's jurisdiction. *See, e.g.*, *Ilo v. State*, 350 Ark. 138, 85 S.W.3d 542 (2002). Moreover, we will not consider an argument unless it has been properly developed. *See Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000). Though the *Ilo* and *Haire* opinions address the development of an issue by the defendant, we believe the same rationale should apply to the State. In short, under these circumstances, for this court to raise a new theory or ground for affirmance on our own motion such as the pedophile exception would deprive Hanlin of his right to be heard on the issue. This we will not do.

Hanlin, 356 Ark. at 529, 157 S.W.3d at 189; *see also Phillips v. Earngey*, 321 Ark. 476, 481, 902 S.W.2d 782, 785 (1995)("It is axiomatic that we refrain from addressing issues not raised on appeal").

Like Hanlin, Keesee was not afforded the opportunity to address or defend a Rule 803(3) argument with regard to this evidence. Here, Holister's testimony was hearsay evidence that the State was required to demonstrate fell within an exception to hearsay and was admissible. The State failed to do so, yet the majority sua sponte develops an argument for the State supporting the admission of this hearsay evidence. Furthermore, the admission of Morstain's statement was clearly prejudicial. Not only did it establish a motive for Panduro's killing, but the prosecution also used this evidence, along with Huff's testimony that Keesee had asked his "boys" from Texas to take care of the situation, to show that Keesee solicited Morstain and Bynum to commit the murder. Because Keesee's conviction for premeditated and deliberated capital murder was based solely on circumstantial evidence that he was an accomplice to the killing, and the circuit court's error in admitting the testimony was highly prejudicial, the error was certainly not harmless. Thus, I would reverse and remand for a new trial.

HUDSON and WYNNE, JJ., join.

Lassiter & Cassinelli, by: *Michael Kiel Kaiser*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Joseph Karl Luebke*, Ass't Att'y Gen.; and *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.