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See Ariz. R. Supreme Court #111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 10/23/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

STATE OF ARIZONA, ) 1 CA-CR 11-0424  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 111, Rules of the  
TINA MARIE THOMPSON, ) Arizona Supreme Court)  
)  
Appellant. )  
)  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-123146-001 DT

The Honorable Sherry K. Stephens, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Liza-Jane Capatos, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
by Christopher V. Johns, Deputy Public Defender  
Attorneys for Appellant

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**P O R T L E Y**, Judge

¶1 Defendant Tina Thompson ("Thompson") appeals her conviction and sentence for second-degree burglary. She

contends the trial court erred by finding that juror misconduct did not taint the verdict and by denying her motion for new trial. For the reasons that follow, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶12 Thompson was convicted of second-degree burglary and acquitted of misconduct involving weapons.<sup>1</sup> Two days later, the court and defense counsel received an anonymous telephone message that Juror #11 had conducted internet research and divulged that she learned the criminal histories of Timothy Barnum, Thompson's boyfriend who testified on her behalf, and Brian Kirkpatrick, her burglary co-defendant. Thompson then filed a motion for new trial.

¶13 The court conducted an evidentiary hearing on April 7, 2011. Juror #11 testified and acknowledged that she looked up information about Barnum and Kirkpatrick on the superior court website after the first day of deliberations. She testified that she discovered Barnum had a drug paraphernalia conviction and Kirkpatrick had a "weapons" charge and other cases. She stated, however, that the jury had already reached a consensus that Thompson was guilty of burglary before she conducted her research; the information had "no impact whatsoever" on her verdict; and she did not share her research until the verdict

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<sup>1</sup> During her trial, Thompson admitted to having two prior felony convictions from 2004.

forms had been completed and signed and the bailiff had been informed that the deliberations were completed.

¶14 The court also heard from a police detective who had been directed to interview the other members of the jury after the disclosure. He testified that several jurors stated that they were aware of the internet research; several stated that the research concerned the criminal histories of Barnum and Kirkpatrick; but all stated that their verdicts were unaffected by the information. The court subsequently denied the motion after finding that the State proved beyond a reasonable doubt that the extrinsic evidence did not affect the verdicts.

#### **DISCUSSION**

¶15 Thompson contends that the trial court erred in denying her motion for new trial. Specifically, she argues that the State failed to prove beyond a reasonable doubt that Juror #11's criminal history research did not taint her burglary conviction.

¶16 We review the trial court's decision to grant or deny a new trial based on jury misconduct for an abuse of discretion. *State v. Hall*, 204 Ariz. 442, 447, ¶ 16, 65 P.3d 90, 95 (2003). If the jury receives extrinsic evidence, prejudice is presumed and a new trial is warranted unless the State can demonstrate "beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict." *Id.* (internal quotation marks

omitted). To determine "whether extrinsic evidence has contributed to a verdict," the following factors have to be considered:

1. whether the prejudicial statement was ambiguously phrased;
2. whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial;
3. whether a curative instruction was given or some other step taken to ameliorate the prejudice;
4. the trial context;<sup>2</sup> and
5. whether the statement was insufficiently prejudicial given the issues and evidence in the case.

*Id.* at 448, ¶ 19, 65 P.3d at 96. We "accord[ ] deference to the trial judge who held the evidentiary hearing and was in the best position to assess the effect of the extrinsic evidence." *Id.* at 449, ¶ 23, 65 P.3d at 97.

¶7 During the trial, Barnum testified for Thompson and admitted that he had two prior felony convictions from 2003. Barnum also testified that he knew Kirkpatrick and knew that

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<sup>2</sup> Factor four includes

whether the material was actually received, and if so, how; the length of time it was available to the jury; the extent to which the jurors discussed and considered it; whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and any other matters which may bear on the issue of reasonable possibility of whether the extrinsic material affected the verdict.

*Id.*

Kirkpatrick was in prison. The jury did not receive testimony about the nature of Barnum's felony convictions or why Kirkpatrick was in prison. The trial court instructed the jury, and they began their deliberations. After the first day of deliberations, Juror #11 decided to search the superior court website despite the admonition not to do any independent research. She discovered the information she was looking for and reported the information to other jurors. Consequently, the trial court correctly determined that the jury received extrinsic evidence and had to determine whether the verdict was compromised by the information.

¶18 Following the direction of our supreme court in *Hall*, the court analyzed the evidence against the factors and determined that there was proof beyond a reasonable doubt that the evidence did not taint the verdict. We agree.

¶19 The first three factors are straightforward. First, the information was not ambiguous. Juror #11 wanted to know why Barnum and Kirkpatrick had been convicted. Second, the extrinsic information was cumulative to the trial testimony. The jury heard that Barnum had two felony convictions, and that Kirkpatrick was in prison. The jury had not been told about the nature of any of the felony convictions because the court had determined that the nature of the convictions was not relevant. Additionally, Barnum testified that Kirkpatrick was in prison in

support of Thompson's testimony that Kirkpatrick was responsible for the burglary and she was merely present. Third, the jury was properly instructed before they began their deliberations. They were instructed that the State had the burden of proof, that they could only consider evidence presented during the trial, that they could only consider a witness's prior convictions as it might affect the witness's credibility, and that they need not consider the absence of another participant in the crime in determining whether Thompson was guilty or not guilty of the charges.

¶10 The court then considered the context of when and how the jury received the extrinsic information. No juror was aware of the extrinsic information at the end of the first day of deliberations when the jurors reached a consensus about the burglary charge. Although other jurors may have been curious about the nature of the felony convictions that Barnum had incurred or why Kirkpatrick was in prison, only Juror #11 violated her admonition and conducted the research. She testified, however, that the information had "no impact whatsoever" on her vote to convict Thompson of burglary. Other jurors may have learned about the information before the verdict forms were signed, though some only heard the information after the forms were signed and deliberations over. Regardless of

when the other jurors may have heard the information, all stated that the information did not influence their votes or verdict.

¶11 Finally, the extrinsic information was insufficiently prejudicial to warrant a new trial. As noted, the jury knew about Barnum's felony convictions and that Kirkpatrick was in prison. Despite Thompson's claim that she was merely present, the jury had to determine credibility and whether there was sufficient evidence that she was involved in the burglary beyond a reasonable doubt. The jury decided that she was involved in the burglary, and the fact that the jury acquitted her of the weapons charge demonstrates that they were attentive to the evidence and did not allow the extrinsic information to taint their independent evaluation of the evidence. Consequently, the trial court did not abuse its discretion by finding that the extrinsic information obtained by Juror #11 did not contribute to the verdict.

#### CONCLUSION

¶12 Based on the foregoing, we affirm Thompson's conviction and sentence.

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/\_\_\_\_\_  
PATRICIA A. OROZCO, Judge

/s/\_\_\_\_\_  
RANDALL M. HOWE, Judge