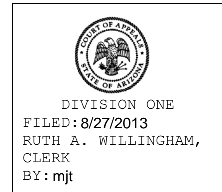
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
***See* Ariz.R.Sup.Ct. 111(c); ARCAP 28(c); Ariz.R.Crim.P. 31.24**



DIVISION ONE
FILED: 8/27/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 12-0361
v.	DEPARTMENT B
CESAR CHACON, Appellant.	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-048718-001

The Honorable Warren J. Granville, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee

Bruce Peterson, Legal Advocate — Phoenix
By Frances J. Gray, Deputy Legal Advocate
Attorneys for Appellant

K E S S L E R, Judge

¶1 Defendant, Cesar Chacon, appeals his convictions and sentences for first degree murder and misconduct involving weapons. Chacon argues the trial court abused its discretion in

denying his motion for mistrial after an outburst by the victim's father ("Mr. S.") in the jury's presence. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On November 16, 2010, M.S. was at a friend's house when she decided to purchase a $50.00 gift card with her prepaid Visa and resell it for $25.00. She sold the card to Chacon, but when Chacon tried to use it, the card was declined.

¶3 Chacon was angry and called M.S. who told him she would give him another gift card. Chacon thought M.S. was lying. M.S. told Chacon she was not going to give him anything until she saw the gift card. M.S. agreed to go with Chacon back to his house to get the card. After obtaining the card, Chacon asked the driver to pull over and asked M.S. if he could talk to her. M.S. and Chacon walked off into the dark, and after a couple of minutes the driver heard gun shots.

¶4 Chacon got back into the car and the driver dropped him off at home. The driver testified that Chacon told him to get rid of the gun and warned him that "[t]he same thing could happen to [him]." When he returned home, Chacon told his girlfriend he shot M.S. Chacon then called M.S.'s friends and told them he had just shot their "home girl."

¶5 Chacon was arrested and charged with one count of first degree murder, a class 1 dangerous felony, and one count

of misconduct involving weapons, a class 4 felony. During the trial, Dr. Keen, a forensic pathologist, was testifying about M.S.'s injuries when Mr. S. verbally attacked and attempted to physically attack Chacon as reflected in the transcript:

> Q. So would she be able to feel the pain from this injury?
>
> A. And still be able to move.
>
> Q. And still be able to scream?
>
> A. Still be able to scream.
>
> Q. That bullet, was it recovered --
>
> MR. [S.]: You killed my fucking daughter. You son of a bitch.
>
> THE COURT: Ladies and gentlemen, let's go back to the jury room.
>
> MR. [S.]: She didn't deserve this.
>
> THE DEPUTY: Can I get a deputy to 5B?
>
> MR. [S.]: She didn't deserve this.
>
> (Thereupon, the jury exited the courtroom and an off-the-record discussion was held.)
>
> MR. [S.]: I'm sorry. I can't take it anymore.
>
> THE DEPUTY: I know.

Outside of the presence of the jury, the trial court made a record of what happened:

> THE COURT: Let the record . . . reflect the jurors have been excused. Mr. Chacon is present. Counsel are present. Right before

excusing the jurors there was a disruption in the courtroom.

A gentlemen later identified to me as Mr. [S.], the victim's father, had been sitting in the gallery portion of the court and during the course of Miss Stevens' questioning of Dr. Keen, got up and charged in the direction of the defense counsel and defendant, defense counsel table.

The seating of the table was Miss Centeno-Fequiere sat center. Ms. Orozco sat in the second seat. Mr. Chacon on the far seat. It was clear Mr. [S.] was intending to get to Mr. Chacon. On his way he was quoted as saying, you killed my daughter.

Before he was able to get to Mr. Chacon, the court deputy was able to intercept that effort also with the assistance of the case agent, Mr. [S.] was restrained. Mr. Chacon stood and waited for instructions. At that point the jurors were excused.

Miss Stevens was in the worst position because she was facing Dr. Keen and the disruption was all behind her so I won't ask you whether there is anything that you want to correct or add.

Miss Centeno-Fequiere, is there anything that you want to add or . . . correct in my observations?

MS. CENTENO-FEQUIERE: No, Your Honor. Well, I guess there's one thing, and I -- when I moved out of the way, Miss Orozco was still in this general area behind the desk when Mr. [S.] was held on the ground and unable to get away for a couple seconds because she was basically pinned against the desk and with the chair behind her because they were holding him down. Other than that, it's an accurate reflection, Your Honor.

> THE COURT: I could not see from my [perspective] whether either of -- any of you were actually struck.
>
> MS. CENTENO-FEQUIERE: I was not struck, Your Honor. I was able to get out of the way in time.
>
> THE COURT: Miss Orozco?
>
> MS. OROZCO: Your Honor, I clearly hit the desk somewhere with my leg but it was the desk.
>
> THE COURT: Mr. Chacon, were you struck at all?
>
> MR. CHACON: No. No, Your Honor.

¶6 Chacon moved for a mistrial, stating that a curative instruction would not "cure what this jury saw," questioning the jury would "exacerbate and further focus them on the issue," and moving forward "would be a comment on the evidence itself." The State countered saying emotional outbursts have happened in the past, there was no comment on the evidence, and the court must determine whether each individual juror can hold to the admonition given to them.

¶7 The trial court stated it would reserve judgment on the motion for mistrial and individually voir dire the jurors to determine whether the disruption would affect their ability to continue serving as fair and impartial jurors. When the jury returned, the court made the following statement:

> Ladies and gentlemen, the disruption that we had is not admissible evidence. That said, the question is, whether you can continue to require the State to prove its case beyond a reasonable doubt based solely on the admissible evidence so because it’s not admitted evidence, it’s not something that you can discuss or consider.
>
> That may be easier said than done so what I am going to do is, I’m going to ask each of you individually to consider whether you may continue as a juror that may make your decision solely on the basis of admissible evidence disregarding the disruption that you heard.
>
> Only you can answer that question so what I will do is, I will ask juror number 1 to remain and if the other jurors would step, go back to the jury room and bring you back one at a time.
>
> There is no right answer. There is no wrong answer. It’s terribly important that I have an honest answer to that question so if the jurors would go back. Please don’t discuss again the disruption. It’s not admissible evidence and then we’ll figure out where we’re at.

The trial court then questioned each juror individually. Various jurors reported feeling “excited and jumpy at first,” “[a] little adrenaline rush,” and “shocked.” One juror also reported overhearing two or three female jurors asking if they saw the disruption, but the conversation stopped before anyone answered the question because another juror interjected that they were not allowed to discuss it. Each juror maintained that

the disruption would not affect his or her ability to continue to serve as a fair and impartial juror.

¶8 Chacon argued that at least two of the jurors would be incapable of following instructions or the law as they lied when questioned about whether they heard jurors discuss the outburst. Chacon argued that the jury saw his counsel react in a fearful manner, and it would be impossible for the jury not to consider that when assessing counsel's cross-examination of witnesses. The State argued that based on the way the questions were asked, the jurors did not lie about discussing the outburst because there was only a general question posed and no actual conversation held.

¶9 The trial court denied the motion for mistrial, providing the following explanation:

> THE COURT: I am going to split the issues because I do appreciate the fact that . . . [Mr. S] was charging in the direction of both counsel and that's why I afforded you the break that we did, and I am going to deny the motion to have mistrial but if you need the break for the rest of the night, I'm going to give you the break because it was -- the [perspective] that you had was different than every other [perspective] in the courtroom.
>
> That is, [Mr. S] . . . was charging in your direction and -- but in terms of recognizing that the jurors individually were interviewed and one said, was shocked, another one said there was an adrenaline rush, another one talked about blood pressure raiser.

> Each of them said that they could recognize that it was inadmissible evidence and not affect their ability to continue to require the State to prove its case.
>
> To Miss Orozco's point, I don't in any way diminish her [perspective] but from my [perspective] I thought both lawyers, the deputies, the case agent all dealt with it very professionally and as calmly as possible under the circumstances.
>
> And so I don't know if the jurors' perception of the reaction of counsel was as she perceived it to be. So considering that we are in day seven of a trial that's going to last at least another weekend before the jurors deliberate, the answers and the demeanor of the answers of the jurors that they could continue to serve as fair and impartial jurors, the motion for mistrial is denied.
>
> I will defer to counsel during the closing instructions whether we have any special instruction to cover this or we let sleeping dogs lie . . . .

¶10 Defense counsel filed two motions for reconsideration, one arguing that the disruption was more than a verbal outburst as it involved physical violence, and the other arguing that the jury would consider Chacon's failure to respond to Mr. S.'s accusation as an admission of guilt. The trial court denied both motions.

¶11 Chacon submitted a proposed curative jury instruction, which the court modified as follows: "There was an improper outburst during the trial. Nothing done or said during the

incident was admissible evidence. You must not make any inferences regarding any observations you may have made. You must base your decisions solely on the evidence admitted in this case."

¶12 The jury convicted Chacon on both counts. Chacon then filed a renewed motion for judgment of acquittal, or in the alternative, a new trial, arguing in part that the outburst denied him a fair trial. The trial court denied the motion, stating it found "no evidence to support the allegation that the jury's verdict was based upon the inadmissible outburst by the victim's father." The trial court sentenced Chacon to life without parole for his conviction of first degree murder, and a concurrent 2.5 year term for his conviction of misconduct involving weapons.

¶13 Chacon timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, as well as Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

¶14 Chacon argues the trial court abused its discretion in denying his motion for mistrial after Mr. S.'s outburst and attempted assault on Chacon in the presence of the jury. Chacon claims that the verbal and attempted physical assault on him in the courtroom violated his rights to silence and confrontation,

and the court's refusal to grant a mistrial violated his right to a fair and impartial jury.

¶15 We review the trial court's denial of a mistrial for an abuse of discretion. *State v. Kuhs*, 223 Ariz. 376, 380, ¶ 18, 224 P.3d 192, 196 (2010); *see also State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983) ("The decision to grant or deny a motion for mistrial rests within the sound discretion of the trial court and the failure to grant a motion for mistrial is error only if such failure was a clear abuse of discretion."). When a motion for mistrial is based upon a spectator's improper outburst, "[t]his deferential standard of review applies because the trial judge is in the best position to evaluate 'the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.'" *State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993) (quoting *Koch*, 138 Ariz. at 101, 673 P.2d at 299); *see also State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991) ("Declaring a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that that is the only remedy to ensure justice is done."); *People v. Haskett*, 640 P.2d 776, 854 (Cal. 1982) ("Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.").

"An abuse of discretion exists when the record, viewed in the light more favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision." *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 14, 66 P.3d 70, 73 (App. 2003).

¶16 Due process requires a criminal defendant be given a fair trial before an unbiased and impartial jury. U.S. Const. amend. XIV; Ariz. Const. art. 2, §§ 4, 24; *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."). However, "the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" *Rushen v. Spain*, 464 U.S. 114, 118 (1983) (citing *Smith*, 464 U.S. at 217).

> When . . . an incident involving an unexpected emotional outburst occurs, the judge must act promptly and decisively to restore order and to erase any bias or prejudice which may have been aroused. Whether it is possible to accomplish this in a particular case is a question necessarily first addressed to the sound discretion of the trial judge. Not every disruptive event

> occurring during the course of trial requires the court automatically to declare a mistrial, and if in the sound discretion of the trial judge it is possible despite the untoward event, to preserve defendant's basic right to receive a fair trial before an unbiased jury, then the motion for mistrial should be denied. On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

State v. Blackstock, 333 S.E.2d 245, 253 (N.C. 1985) (citations and internal quotation marks omitted); *see also Bible*, 175 Ariz. at 598, 858 P.2d at 1201 (stating that when a motion for mistrial is based upon evidentiary concerns due to a spectator's improper outburst, "[t]his deferential standard of review applies because the trial judge is in the best position to evaluate the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial." (citation and internal quotation marks omitted)).

¶17 We cannot say that the isolated incident at issue in this case, after the countermeasures administered by the trial court who was present, saw the incident and then heard counsel's

view of what should occur, so jeopardized Chacon's right to a fair trial that the trial court abused its discretion in denying his motion for a mistrial. In *Bible*, during testimony regarding the defendant's prior convictions, the victim's father ran out of the courtroom and yelled "[t]hat fucking asshole." *Bible*, 175 Ariz. at 597, 858 P.2d at 1200. In affirming the denial for mistrial, the court stated "[t]he substance of his comment and its context make clear that strong emotion prompted the outburst. No information was conveyed other than the father's animosity toward [the] [d]efendant, a feeling that could hardly have surprised the jurors." *Id.* at 598, 858 P.2d at 1201. The court affirmed the denial of the motion for mistrial based on the nature of the outburst, the prompt instruction given, and the exclusion of the victim's father from the remainder of the trial. *Id.* Mr. S.'s statement, although accusatory, was of a similar nature. The outburst was the result of a grieving father unable to control his emotions during an especially lurid and graphic portion of testimony.

¶18 Similarly, in *Messer v. Kemp* (cited in *Bible*, 175 Ariz. at 598, 858 P.2d at 1201), during testimony regarding the defendant's description of the murder, the victim's father lunged at the defendant, yelling, "[h]e'll pay," "[y]ou're liable," and "[y]ou're going to get it." *Messer*, 760 F.2d 1080, 1086 (11th Cir. 1985). The court affirmed the denial of the

motion for mistrial, noting the trial court twice instructed the jury to disregard the outburst, the court asked the jury whether the outburst would affect their judgment and the jury gave no indication it would, each individual juror was called as a witness and testified that the outburst did not affect his or her judgment, and a majority of the jurors stated they did not remember any of the other jurors mentioning the incident during deliberations. *Id.* at 1087.

¶19 Chacon argues that *Bible* and *Messer* are distinguishable because there was no pronouncement of guilt, there was no overt physical violence, and in *Messer*, the defendant admitted to the murder. As discussed above, although Mr. S.'s outburst was an accusatory statement, it was prompted by extreme emotion and was similar to the statements in *Bible* and *Messer*. As in *Bible*, the outburst was the result of a grieving father unable to control his emotions during an especially lurid and graphic portion of testimony. In addition, although there was no actual physical contact in *Messer*, the victim's father lunged forward toward the defendant and had to be restrained by officers, as occurred here. 760 F.2d at 1086.

¶20 It is clear that the trial court considered Mr. S.'s actions to be potentially prejudicial to Chacon, and as a result, as in *Messer*, it maintained control of the situation and took prompt steps to neutralize that risk of prejudice.

Immediately following the outburst, the jury was excused from the courtroom, a record was made to describe the incident, and a recess was taken. Once order was restored, the judge instructed the jury that the disruption was not admissible evidence. To determine whether they could "continue to require the State to prove its case beyond a reasonable doubt based solely on the admissible evidence," the trial court polled each juror individually. All of the jurors maintained the disruption would not affect their ability to continue to serve as fair and impartial jurors.[1] Prior to deliberations, the trial court gave a second curative jury instruction. "We presume that the jurors followed the court's instructions." *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006).

¶21 Because Mr. S.'s outburst was an emotional reaction to graphic testimony, the trial court admonished the jury that the outburst was not evidence, and each juror maintained his or her

[1] Although one juror reported overhearing two or three female jurors asking if they saw the disruption or not, there is no evidence of any actual discussion.

ability to remain fair and impartial, the trial court did not abuse its discretion in denying Chacon's motion for mistrial.[2]

[2] Additional case law from other states is consistent with the conclusion that the superior court did not abuse its discretion. *See, e.g.*, *Berryhill v. State*, 726 So. 2d 297, 302-03 (Ala. Crim. App. 1998) (stating mistrial not required where when victim's daughter left the witness stand, she "made a motion with her finger 'like a gun,' pointed her finger at [defendant's] head, and mouthed the word 'pow'"); *State v. Sanford*, 660 So. 2d 555, 560-61 (La. Ct. App. 1995) (stating mistrial not required where some jurors witnessed victim's father verbally confront and try to physically attack defendant during a court recess); *Bell v. State*, 631 So. 2d 817, 819-20 (Miss. 1994) (stating mistrial not required where victim's mother shouted "He killed my son in cold blood" several times and had to be forcibly removed from the courtroom); *Byrd v. State*, 420 S.E.2d 748, 749 (Ga. 1992) (stating mistrial not required where victim's uncle approached defendant, made a threatening gesture with his crutch, and yelled obscenity-laced threats); *State v. Weinberg*, 575 A.2d 1003, 1011-13 (Conn. 1990) (stating mistrial not required where during closing argument, members of the courtroom audience made facial expressions and gestures indicating disapproval of defendant and his counsel, and the victim's mother directed mock applause toward defense counsel); *State v. Morales*, 513 N.E.2d 267, 271 (Ohio 1987) (stating that an emotional outburst by the victim's brother during cross-examination of the defendant's father did not prejudice the defendant and did not deny him fair trial).

¶22 We also reject Chacon's argument that the outburst violated his right to remain silent and his right to confront his accusers. Chacon cites no authority that such an outburst could violate his Fifth Amendment right to remain silent or his Sixth Amendment right to confront witnesses against him. Ariz. R. Civ. P. 13(a)(6) (providing that appellant's brief shall contain an argument with citations to authorities, statutes, and the record); *Sholes v. Fernando*, 228 Ariz. 455, 460 n.3, ¶ 14, 68 P.3d 1112, 1117 n.3 (App. 2011) (finding appellant's "sweat equity" argument that failed to cite to the record or relevant authority to be waived); *Carillo v. State*, 169 Ariz. 126, 132,

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Similarly, we find support for our conclusion in *United States v. Williams*, 822 F.2d 1174, 1188-89 (D.C. Cir. 1987), *superseded by rule on other grounds as stated in United States v. Caballero*, 936 F.2d 1292, 1298-99 (D.C. Cir. 1991). In *Williams*, the District of Columbia Circuit Court of Appeals considered the following factors in assessing juror bias: "the nature of the communication, the length of the contact, the possibility of removing juror taint by a limiting instruction, and the impact of the communication on . . . the juror[s] involved." *Id.* "The trial court obviously is the tribunal best qualified to weigh the relevant factors and draw the conclusion appropriate." *Id.* at 1889. Here, the trial court's remarks indicate that it considered each of those factors. The court clearly considered the potential prejudicial nature of the communication, and as a result, took prompt steps to cure any possible prejudice. It also considered the length of the contact, stating "it was quickly and quietly controlled and its impact on the jurors, from my perspective and from their own observation, was short lived and can be put aside." The record also shows that the court considered the impact of the communication and the possibility of curing any prejudice through a limiting instruction as the court conducted a voir dire, concluded the jurors were able to continue to be fair and impartial, and both after the event and prior to deliberations, instructed them to only consider admissible evidence.

817 P.2d 493, 499 (App. 1991) ("Issues not clearly raised and argued on appeal are waived."). Moreover, not only was Mr. S. not a witness for confrontation clause purposes, but the trial court's remedial measures, including its voir dire of each juror and its cautionary instructions, precluded any need for a mistrial.

¶23 Our conclusion that the outburst did not prejudice Chacon is supported by the overwhelming evidence of his guilt. *See, e.g.*, *Newell*, 212 Ariz. at 403-04, ¶ 70, 132 P.3d at 847-48 (finding trial court did not abuse its discretion in denying mistrial where, based on the context of the entire trial, overwhelming evidence of guilt influenced the jury to convict appellant rather than the prosecutor's improper statements); *State v. Jackson*, 157 Ariz. 589, 593, 760 P.2d 589, 593 (App. 1988) (finding trial court did not abuse its discretion in denying motion for mistrial based on an improper remark regarding prior bad act evidence when the prosecutor did not intend for it to be mentioned, the appellant admitted he had prior felonies, and the evidence of his guilt was overwhelming); *see also Hoffman v. State*, 611 P.2d 267, 271 (Okla. Crim. App. 1980) (stating that admonishing the jury and removing the spectator from the courtroom cured any error from an outburst by the decedent's brother accusing the attorney of lying during closing arguments, and that where "a conviction is based on

overwhelming evidence it cannot be held to have been prejudicial to the rights of the appellant”).[3]

CONCLUSION

¶24 For the foregoing reasons, we conclude the trial court did not err in denying Chacon’s motion for mistrial and accordingly affirm his convictions and sentences.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
ANDREW W. GOULD, Judge

/s/
SAMUEL A. THUMMA, Judge

[3] Chacon has moved for new counsel on appeal, contending his appellate counsel misstated one underlying fact in the opening brief. Any such alleged error does not relate to the issue on appeal. Accordingly, we deny that motion.