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

DIVISION ONE
FILED: 02/04/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0210
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ADOLFO COLLINS DONGON,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. CR 2007 0247

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

Emily Danies — Tucson
Attorney for Appellant

W I N T H R O P, Judge

¶1 Adolfo Collins Dongon ("Appellant"), appeals from his convictions on two counts of aggravated assault, each a Class 3

dangerous offense involving domestic violence; and one count of aggravated assault, a Class 6 offense, also involving domestic violence. He contends that the trial court erred because it (1) denied his attorney's requests to withdraw, (2) failed to grant a mistrial after the state showed the jury a photograph that was not previously admitted at trial, and (3) amended the jury instructions because of a jury question. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On January 26, 2007, Appellant and his brother assaulted their mother's boyfriend and shot him in the leg. Citing the accomplice liability statutes, the state charged Appellant and his brother as codefendants with four counts of aggravated assault involving domestic violence.

¶3 Appellant's brother absconded before trial, and Appellant agreed to sever his case; accordingly, Appellant was tried alone. At the conclusion of trial, the jury found Appellant guilty of three of the counts of aggravated assault - two of the offenses as Class 3 dangerous felonies and the third as a Class 6 non-dangerous offense for assaulting the victim while his ability to resist was substantially impaired.

¶4 On March 12, 2008, the trial court sentenced Appellant to concurrent, presumptive prison terms of 7-1/2 years on the two Class 3 aggravated assaults and to a consecutive,

presumptive one-year prison term on the Class 6 assault. The trial court also ordered Appellant to pay the victim $122,572.08 in restitution jointly and severally with any other person ordered to pay restitution.[1]

¶5 Appellant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001) and 13-4033 (2001).

ANALYSIS

1. Denial of Request to Appoint New Attorney

¶6 Appellant argues that the trial court committed reversible error when it denied several of his requests to appoint new trial counsel. The relevant facts are as follows.

¶7 On October 19, 2007, Appellant's attorney filed a motion to withdraw as attorney of record because Appellant was out of financial compliance with his retainer agreement, presenting an "undue hardship" for counsel. She noted, however, that Appellant was "eligible for the appointment of a public defender." At that time, trial was scheduled to start during the last week of January 2008. The trial court denied the motion to withdraw.

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[1] The state also charged the victim's girlfriend, Appellant's mother, with hindering prosecution in the first degree pursuant to Arizona Revised Statutes ("A.R.S.") section 13-2512 (Supp. 2009), a Class 5 felony.

¶8 At a pretrial conference on December 3, 2007, defense counsel informed the trial court that she had been out of contact with Appellant "for several months." It appears from the record that Appellant was not present at the beginning of the pretrial conference, but arrived sometime "[t]hereafter." The trial court admonished Appellant to be "on time and present" for the next scheduled hearing.

¶9 At the January 14 re-scheduled pretrial conference, defense counsel advised the trial court that they were "legally" ready to proceed to trial. She also stated her belief, however, that Appellant "want[ed] a different attorney" and that he "would like to make that request." Appellant then addressed the court, asking for a "court-appointed attorney" to replace his current defense attorney, who was retained. When asked the reason for his request, Appellant stated only, "I can't afford her."

¶10 The trial court denied Appellant's request, noting that the trial was two weeks away. Defense counsel assured the court that "[a]nother attorney could pick this case up relatively quickly[.]" The trial court stated "to the extent that that's a request for appointment or motion to withdraw, I'm going to deny that without prejudice at this point." Because of other matters possibly affecting the firm trial date, the court set another hearing for January 22, at which time it would give

Appellant an "opportunity for appointed counsel rather than retained counsel." In the interim, the trial court requested that Appellant submit a financial statement to assist the court in determining whether it should appoint an attorney to represent him. The court informed Appellant that he could either send the financial statement to the court in advance or "bring it with you next week" to the January 22 hearing. Appellant replied, "Okay." Defense counsel also offered to help him obtain the appropriate form.

¶11 At the January 22 hearing, the trial court confirmed the January 30 trial date and Appellant's attorney renewed her motion to withdraw. She acknowledged that Appellant was "back in contact" with her "as of the last few weeks[,]" and the court's orders requiring her to "give up another week's worth of income this month is an undue hardship[.]" The trial court denied her motion and the matter proceeded to trial.

¶12 At the sentencing hearing on March 3, 2008, Appellant personally requested a pre-sentencing mitigation hearing. Defense counsel again moved to withdraw, stating that Appellant no longer wanted to have her as his attorney and that he had the right to proceed on his own, which was what he desired. The trial judge asked Appellant if he wished to proceed on his own. Appellant replied, "I wanted to know if the State could appoint me a counsel for this particular sentencing." The judge

responded, “No, negative. You have an attorney representing you on the case.” Defense counsel acknowledged that she had not anticipated doing a presentence mitigation hearing because she knew the court would be imposing presumptive terms and asked Appellant directly, “Do you want to go by yourself or . . . ?” Appellant interrupted, stating, “I want an attorney with me.” Defense counsel replied, “[T]hen you’re stuck with me,” to which Appellant responded, “Uh-huh.” Sentencing was re-set for March 12, 2008, at which time Appellant presented several letters as mitigation evidence.

¶13 Appellant now argues that the trial court erred by denying his retained defense attorney’s motion to withdraw based on the financial hardship she endured as a result of his non-compliance with their fee agreement. He cites *Riley, Hoggatt & Suagee, P.C., v. Riley*, 165 Ariz. 138, 796 P.2d 940 (App. 1990) and Rule 6.3 of the Arizona Rules of Criminal Procedure in support of his argument that the court’s denial of the motion violated his Sixth Amendment right to effective representation. Neither of these authorities supports Appellant’s argument.

¶14 *Riley* stands for the proposition that Appellant’s *counsel* had the right to contest the trial court’s denial of her motion to withdraw based on Appellant’s non-payment of fees and could have proceeded via special action had she desired to do so. 165 Ariz. at 140, 796 P.2d at 942. It does not hold that

any financial hardships visited upon defense counsel may automatically be viewed as affecting the effective representation of the client. In fact, as Appellant acknowledges, Rule 6.3(b) specifically provides that, unless and until the trial court permits withdrawal, an attorney representing a defendant *"at any stage"* (emphasis added) has a duty to continue the representation. The record shows that retained defense counsel diligently continued to represent Appellant at all stages of the case despite his non-compliance with the retainer agreement and the court's denial of the motion to withdraw.

¶15 Furthermore, despite Appellant's repeated requests for appointed counsel, the record does not indicate that Appellant was financially entitled to appointed counsel. Rather, the trial court appears to have been willing to entertain appointing counsel, specifically requesting that Appellant file a financial statement in support of that request. There is no evidence that Appellant complied with the court's request and therefore no proof that he was eligible for court-appointed counsel.

¶16 "We review a trial court's denial of a defendant's request for substitute counsel for a clear abuse of discretion." *State v. Paris-Sheldon*, 214 Ariz. 500, 504, ¶ 8, 154 P.3d 1046, 1050 (App. 2007) (citation omitted). The trial court abuses its discretion "if it fails to inquire into the basis for the

defendant's dissatisfaction with counsel or fails to conduct a hearing on the defendant's complaint after being presented with specific factual allegations in support of the request for new counsel." *Id.* (citing *State v. Torres*, 208 Ariz. 340, 343, ¶¶ 7-8, 93 P.3d 1056, 1059 (2004)). Based on these circumstances, we find that the trial court did not abuse its discretion when it denied Appellant's requests to replace his retained defense counsel with appointed counsel.

¶17 Appellant also faults the trial court for failing to inquire more fully into his request to substitute counsel. The record, however, shows that the trial court adequately explored the basis for Appellant's request. Appellant provided only one reason in support of his desire for new counsel – his inability to afford his retained counsel. The trial court offered Appellant the opportunity to prove need, but apparently Appellant declined to supply the requisite financial statement. The nature of the court's inquiry into a defendant's complaint depends upon the nature of his request. *Torres*, 208 Ariz. at 343, ¶ 8, 93 P.3d at 1059. Here, the trial court's inquiry was sufficient based on the nature of Appellant's specific complaint.

¶18 For the first time, Appellant also appears to argue on appeal that his relationship with his counsel was "fractured." Thus, he contends that the court's refusal to permit her

withdrawal despite Appellant's nonpayment of fees created a "contentious relationship" between them and that it was "demoralizing at best" to know that his counsel did not want to represent him and that he could not pay. Appellant never raised these complaints with the trial court, however, and has therefore forfeited relief on this basis save for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶19 Despite counsel's occasional statement that Appellant had failed to keep in contact with her, the record shows that Appellant resumed contact several weeks before trial. Defense counsel never purported to be unprepared for trial, and the record bears no evidence that she did anything but fully represent Appellant. Furthermore, the record establishes that Appellant never indicated having a problematic relationship with his counsel or had any questions about the quality of representation she was providing. We therefore find no error, let alone fundamental error, in the trial court's failure to replace Appellant's counsel based on the nature of their working relationship.

2. Admission of Photograph

¶20 During her closing argument, the prosecutor displayed a photograph that had not been admitted into evidence at trial. Defense counsel brought the matter to the trial court's

attention in a side bar. After closing arguments concluded, the trial court ascertained that "an unadmitted exhibit was flashed in front of the jury in closing." Defense counsel moved for a mistrial, arguing that the parties had "precluded these gory photos for a reason." The prosecutor acknowledged inadvertently including the photo in her presentation and defense counsel argued that, regardless of the fact that it was mistakenly shown, it was nonetheless "a significant mistake and an irreparable mistake at this point" that entitled Appellant to a new trial.

¶21 The trial court denied the motion for mistrial, finding the offending photograph "cumulative" and not "significantly more gruesome or prejudicial" than the admitted photographs of the victim's injuries. According to the court, the reason the un-admitted photograph was initially excluded was due to its cumulative nature and not because "there was more blood shown" than in the other photograph. In addition, given the fact that the photograph had been displayed not "nearly as long as 30 seconds," the trial court found no prejudice from its inadvertent display to the jury.

¶22 Appellant argues that the trial court erred in denying the motion for mistrial and that prejudicial error occurred. He maintains that the prosecutor's misconduct violated his rights

to a fair trial because the jury was "swayed [by] additional sympathy for the victim" in viewing the "gory photograph."

¶23 A trial court's denial of a motion for mistrial is reviewed for a clear abuse of discretion. *State v. Nordstrom*, 200 Ariz. 229, 250, ¶ 67, 25 P.3d 717, 738 (2001) (citation omitted). The trial judge's discretion in deciding such motions is broad because he is in the best position to determine whether the evidence at issue will actually affect the outcome of the trial. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). "A declaration of mistrial is the most dramatic remedy for trial error and is appropriate only when justice will be thwarted if the current jury is allowed to consider the case." *Nordstrom*, 200 Ariz. at 250, ¶ 68, 25 P.3d at 738.

¶24 As Appellant conceded at trial, there was no indication that the showing of the photograph was anything other than inadvertent on the part of the prosecutor. The trial judge himself ascribed the error to the pitfalls of Power Point presentations. We have reviewed the photographs and agree with the trial court's characterization of the photograph as "cumulative" and no more "gory" than admitted photographs. We also note that the testimony is replete with mention of the copious amount of blood the victim lost from his injuries. In light of that testimony and the other photographs, we doubt that the brief display of this one additional photograph would have

unduly "swayed" the jurors. The trial court's determination is supported by the record and well within its discretionary powers.

3. Jury Instruction on Accomplice Liability

¶25 Citing no legal authority, Appellant argues that the trial court erred when, in response to a jury question, it informed the jurors that accomplice liability applied to all of the charged offenses. According to Appellant, this is error because he was not tried with his codefendant. We reject this argument.

¶26 We review a trial court's decision to give or refuse a requested jury instruction for an abuse of discretion. *State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471, ¶ 8, 123 P.3d 662, 665 (2005). We review *de novo* whether a jury instruction accurately reflects the law. *State v. Cox*, 217 Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007). We also read the jury instructions as a whole to ensure that the jury received the information needed to arrive at a legally correct decision. *Granville*, 211 Ariz. at 471, ¶ 8, 123 P.3d at 665. We will not reverse a conviction based on a trial court's ruling regarding a jury instruction unless we can reasonably find that, taken as a whole, the instructions misled the jury. *State v. Rutledge*, 197 Ariz. 389, 393, ¶ 15, 4 P.3d 444, 448 (App. 2000) (citation omitted).

¶27 Although the state charged accomplice liability in all of the offenses in the indictment, when settling final instructions, it only requested an accomplice liability instruction on the aggravated assault charge in Count III.[2] After the jury commenced its deliberations, it sent the court a question noting that only the instructions for Count III contained the words "the defendant or his accomplice" whereas the instructions for Count II, which charged Appellant with causing physical injury to the victim while using a deadly weapon or dangerous instrument, solely mentioned Appellant. The jury's question was: "If we believe that an accomplice of the defendant actually used the handgun, then should we not hold the defendant guilty?" Defense counsel wanted the trial court to respond simply, "correct," because the accomplice was not tried with Appellant. The prosecutor argued that all of the counts in the indictment alleged accomplice liability and agreed with the trial court that the appropriate response was that "accomplice liability may apply . . . to any of the counts charged by the indictment." The trial court so instructed the jury. Appellant

[2] This charge, on which Appellant was acquitted, alleged that he committed aggravated assault by intentionally, knowingly or recklessly causing physical injury to the victim using a deadly weapon or dangerous instrument, "to wit: a pipe and/or hammer." The state specifically requested accomplice liability on this offense because at trial there was testimony that Appellant was the shooter, but no testimony that he was holding a pipe or hammer.

argues that this deprived him of a fair trial because he was denied the right to be tried with his codefendant.

¶28 First, we note that Appellant agreed to sever his trial from that of his codefendant. Regardless, a defendant does not have an absolute right to be tried with a codefendant. *State v. Covington*, 136 Ariz. 393, 395, 666 P.2d 493, 495 (App. 1983).

¶29 Furthermore, the state was entitled to an accomplice liability instruction on all of the offenses charged. As noted above, the indictment clearly alleged accomplice liability for all of the charges. Moreover, all of the testimony presented at trial indicated that both Appellant and his brother acted in concert when attacking, beating, and ultimately shooting the victim. The instruction was also proper because it was supported by the evidence at trial. Taken as a whole, the instructions did not mislead the jury. The trial court properly instructed it that Appellant's guilt or innocence was not to be affected by the fact that another person might have participated or cooperated in the crime; rather, "[t]he only matter for you to determine is whether the State has proved [Appellant] guilty beyond a reasonable doubt." *See Granville*, 211 Ariz. at 471, ¶ 8, 123 P.3d at 665. *See also State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) (jurors presumed to follow trial court's instructions).

¶30 Finally, the instruction did not impede Appellant's defense, which did not depend on his status as a principal or accomplice. At trial, Appellant relied on an alibi defense and denied any involvement in the incident. We find no abuse of discretion in the trial court's instruction of the jury.

CONCLUSION

¶31 For the foregoing reasons, we affirm Appellant's convictions and sentences.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge