DIVISION ONE
FILED: 04-22-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0071
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
REYNALDO MIGUEL LAGUNA,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-158672-002 DT

The Honorable Joseph C. Welty, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorney for Appellant

J O H N S E N, Judge

¶1 Reynaldo Miguel Laguna appeals his conviction on one count of armed robbery. He argues the superior court committed fundamental error by delaying inquiry into a juror's response to post-verdict polling. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The superior court sentenced Laguna to 14 years in prison.[1] Laguna timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033 (2010).

DISCUSSION

¶3 On the first day of jury deliberations, the jury informed the court that it was unable to reach a unanimous verdict and that there were "strong convictions on both sides that individuals will not be able to change their votes." It asked the court how it should proceed. The parties agreed the court should read the jury the "impasse instruction," and the court called the jury into open court and did so. The jury then retired and continued to deliberate until after 5:00 p.m. It

[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Laguna. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

met again three days later and, after further deliberation, rendered its guilty verdict.

¶4 When the jurors were polled concerning whether their guilty verdict was their "true verdict," Juror Six replied, "Um, yes. I guess." After completing the polling, the court proceeded directly to instruct the jury concerning the aggravation phase. The prosecutor interrupted these instructions and requested a sidebar conference. During the sidebar conference, Laguna's attorney stated, "While we are up here, Juror Number 6, I believe in the back row she said, yes, I guess. I don't know how . . . ." The court interjected that it had heard "yes as the last word" but that it also had noted "hesitation." The prosecutor stated that he had heard the response as "um, yes." The court then stated, "The record will be what the record is, but the last thing she said is um, yes. All right?" The court then resumed instructing the jury on the aggravation phase.

¶5 Once the jurors had retired to deliberate again, defense counsel asked the court to "check the record" with the court reporter to see if Juror Six had said, "yes, I guess?" After the court heard the actual answer, it apologized to defense counsel and acknowledged that it had not heard the "I guess" portion of the answer. While the court agreed that additional action was necessary, it was reluctant to interrupt

the jurors' deliberations on the aggravating factors. It reasoned that because no new evidence had been presented to the jury as part of the aggravation phase, there was not "any additional prejudice at this point [in] time." The court, therefore, suggested it poll the jurors anew concerning their guilty verdict before they rendered their decision on the aggravating factors. Defense counsel stated, "I agree, too. I'm happy with that." The court then proposed that, prior to asking for the verdict on aggravation, it would inform the jurors there was "a concern amongst the parties as to the result of the poll on the initial verdict" and the clerk would "re-poll" on that issue. If the jurors affirmed their guilty verdicts, the court then would take the results of their deliberations on aggravation; if, instead, Juror Six expressed "the same hesitation that apparently was registered in the record last time," the court would "take up that issue again."

¶6 Defense counsel informed the court he preferred that the court question Juror Six "separately" and that he was concerned that the presence of the other jurors might exert "undue influence." The court, however, was concerned about singling out Juror Six for questioning lest the court appear to be "inquiring into the mind set of an individual juror." Defense counsel ultimately did not object to the court's proposed course of action.

¶7 Accordingly, when the jury returned and before it rendered its aggravation verdict, the court addressed it as follows:

> Before I ask you whether you have reached a verdict with respect to the aggravation stage in this case, there has been some discussion with the Court amongst counsel with respect to the prior polling of the jury on the question of the substantive offense. In other words, your initial verdict in the matter.
>
> As a result of that discussion, I'm going to ask the Clerk to poll the jury again. This question is with respect to your verdict, not the aggravation stage, but on your verdict as to guilt or innocence, or guilt or not guilt, on the question of your initial verdict.

The clerk next asked each juror, "Is this your true verdict?" Each of the jurors, including Juror Six, replied "Yes."

¶8 On appeal, Laguna argues that the superior court committed fundamental error and thereby deprived him of his right to a fair trial.[2] Laguna concedes he did not object to the court's proposed handling of the situation, so we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Lopez*, 217 Ariz. 433, 435, ¶ 4, 175 P.3d 682, 684 (App. 2008).

---

[2] The state argues Laguna invited the asserted error. We do not accept the State's argument under the facts of this case. *See State v. Lucero*, 223 Ariz. 129, 138, ¶ 31, 220 P.3d 249, 258 (App. 2009) (when party "merely acquiesced in the error proposed by another, the appropriate sanction should be to limit appellate review to fundamental error").

¶9 In order to prevail on appeal, Laguna must establish not only that fundamental error occurred, but also that the error caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. We conclude the superior court committed no error.

¶10 At trial, defense counsel suggested that the court question Juror Six separately about her response. But that course of action would have run the risk of singling her out as the source of some problem. The record shows the superior court was aware of our recent case law on the issue, *see State v. Rodriguez-Rosario*, 219 Ariz. 113, 193 P.3d 807 (App. 2008), and desired to refrain from doing anything that might inadvertently communicate that the juror was the cause of any additional inquiry. In *Rodriguez-Rosario,* we noted that focusing on an individual juror might give rise to a finding of coercion and therefore is "pregnant with possibilities for error." 219 Ariz. at 116, ¶ 14, 193 P.3d at 810 (internal quotation and citations omitted).

¶11 In *Rodriquez-Rosario* relied heavily on the reasoning of our supreme court in *State v. McCrimmon*, 187 Ariz. 169, 927 P.2d 1298 (1996). That case established that the superior court has discretion to "make discreet inquiries of the jury as a whole to decide whether the jury is deadlocked or whether further deliberations might be useful" to avoid the appearance

of coercion. *Id*. at 174, 927 P.2d at 1303. That is precisely what the court did in this case. By simply informing the jury that a "discussion with the Court amongst counsel" prompted the re-polling, the superior court properly avoided singling her out, thereby minimizing the possibility of influencing her response or that of any other juror. It also avoided the pitfall of improperly creating a potentially coercive "numerical division" among the jurors based merely on Juror Six's ambiguous aside. *Id.* at 172, 927 P.2d at 1301.

¶12 Laguna nonetheless argues that, based on Juror Six's "I guess," without more, the superior court should have found the verdict was not unanimous. Relying on *Rodriguez-Rosario*, Laguna argues the court was obligated either to *sua sponte* declare a mistrial or send the jurors back to deliberate further. *See Rodriguez-Rosario*, 219 Ariz. at 116-17, ¶¶ 14, 19, 193 P.3d at 810-11 (court should have granted motion for mistrial). He contends that forcing Juror Six to restate her vote in front of the other jurors "with whom she had not really agreed" effectively coerced her second guilty verdict.

¶13 This case, however, is distinguishable from *Rodriguez-Rosario.*[3] When initially polled in that case, the juror

[3] *U.S. v McCoy,* 429 F.2d 739 (D.C. Cir. 1970), and *State v. Austin*, 6 Wis. 205 (1858), on which Laguna relies, also are distinguishable. In *McCoy,* when initially polled, a juror replied "Yes, with a question mark." 429 F.2d at 741. The

responded, "No" and that he "just went along" with the guilty verdict. *Id.* at 114, ¶ 3, 193 P.3d at 808. Here, Juror Six merely followed her initial "yes" reply with an ambivalent "I guess," which is not a "clear statement" of disagreement with the verdict. *Id.* at 115, ¶ 10, 193 P.3d at 809.

¶14 Moreover, "[w]hat conduct amounts to coercion is particularly dependent upon the facts of each case." *State v. Fernandez*, 216 Ariz. 545, 548, ¶ 8, 169 P.3d 641, 644 (App. 2007) (quoting *State v. Roberts*, 131 Ariz. 513, 515, 642 P.2d 858, 860 (1982)). Here the court re-polled all of the jurors without singling out any one of them or giving any indication of any division among them. The record indicates that neither the court nor the prosecutor initially heard the "I guess" portion of Juror Six's response. There is no indication in the record that other jurors heard it, let alone that the jurors

---

court then "instructed the juror to answer yes or no." *Id*. When the juror answered "yes," the court accepted the verdict over defense counsel's objection without further inquiry. *Id*. The court of appeals reversed, holding the juror's response to the court's directive was insufficient to remove the uncertainty of her verdict. *Id*. at 742. Here, the superior court issued no directive but simply gave all of the jurors, including Juror Six, the opportunity to respond to the polling as they desired.

In *Austin*, a juror stated that he "subscribed the verdict," but upon further questioning responded that he had "doubts about the defendant's guilt." 6 Wis. at 205. When the court told him he need not argue the question but simply answer yes or no, the juror replied "[t]hen I will answer yes." *Id*. The court reprimanded the juror for answering argumentatively, and on repeat questioning, the juror finally answered, "Yes." *Id*. Here, the superior court did not pressure Juror Six in any way.

interpreted it to suggest that Juror Six was not in agreement. Furthermore, Laguna does not argue Juror Six expressed any hesitation during re-polling. The record establishes that, upon re-polling, Juror Six unequivocally responded that the guilty verdict was her true verdict.

¶15 Given the particular circumstances of this case, the superior court committed no error by simply re-polling the entire jury to determine if their guilty verdict was indeed unanimous. The record contains no indication that Juror Six's verdict was the product of coercion that rendered the overall guilty verdict not unanimous.

¶16 For the foregoing reasons, we affirm Laguna's conviction and sentence.

/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/_____
PATRICIA A. OROZCO, Presiding Judge

/s/_____
JON W. THOMPSON, Judge