DIVISION ONE
FILED: 03-18-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0115
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
SCOTT RAYMOND RAPP,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. CR 2008-0389

The Honorable Charles D. Adams, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Jr.,
Coconino County Public Defender — Flagstaff
By H. Allen Gerhardt, Jr.
Attorneys for Appellant

S W A N N, Judge

¶1 Scott Raymond Rapp ("Defendant") appeals from his convictions and sentences for five counts of aggravated assault, violations of A.R.S. § 13-1204(A)(2) and class two felonies, and one count of misconduct involving weapons, a violation of A.R.S. § 13-3102(A)(4) and a class four felony. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On the evening of May 2, 2008, D.G. reported to police that her vehicle, a 2007 Chevrolet Tahoe, had been stolen from the parking lot in front of her Phoenix, Arizona business. Upon her return to her residence early the next morning, D.G. also reported that a handgun had been stolen from her bedroom.

¶3 Soon after receiving the report of the missing Tahoe, police located the vehicle near Camp Verde, Arizona, traveling north on Interstate 17. Defendant was the driver. Four police vehicles, containing five officers and one civilian observer, participated in a traffic stop of the Tahoe. Another officer used his vehicle to set up a traffic break behind the stop area.

¶4 Defendant pulled the Tahoe off the road and the five officers exited their vehicles with their guns drawn. The

[1] We view the facts in the light most favorable to sustaining the verdicts, *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997), and the court's restitution order. *State v. Lewis*, 222 Ariz. 321, 323, ¶ 2, 214 P.3d 409, 411 (App. 2009).

civilian observer remained seated in one of the police vehicles. One of the officers ordered Defendant to put his hands up. Defendant responded by flinging open the door of the Tahoe and quickly exiting. With a gun in his hand, Defendant walked toward the officers while firing at least two shots in their direction. Some of the officers returned fire, shooting Defendant multiple times and also shooting the Tahoe's windows, doors, and tire. The wounded Defendant was soon taken into custody and given medical aid. None of the officers were wounded but one of the police vehicles sustained significant damage.

¶5 Defendant was indicted and tried for six counts of aggravated assault on peace officers engaged in the execution of their official duties, one count of aggravated assault, two counts of theft, and one count of misconduct involving weapons. Defendant's defenses at trial were that D.G. had loaned him the Tahoe and gun, and that he did not fire the gun at the officers.

¶6 During the jury's deliberations, a juror misconduct issue arose. The presiding juror approached the court's bailiff with a two-page MapQuest printout and asked whether the jury could refer to it. Apparently, the jury had been discussing the proximity of Defendant's house to D.G.'s house because Defendant had testified that, on the night in which D.G. purportedly gave him the keys to the Tahoe and permission to use the vehicle on

his May 2 trip, he had walked "a couple miles" from D.G.'s house to his own house. Because an inaccurate address had been used in the MapQuest search, the printout reflected that the distance between the two residences was approximately twelve miles. Outside of the presence of the jury, defense counsel asserted that the actual distance was approximately six miles.

¶7 The court suspended jury deliberations and, outside of the presence of the other jurors, questioned the presiding juror about the printout. The presiding juror explained that another juror, Juror #9, had obtained the printout during a lunch break and had told the other jurors that he had information if they wanted to discuss it. The jurors understood that the information concerned the distance between Defendant's and D.G.'s residences. Realizing that they were not supposed to have the information, the jurors did not discuss the printout and immediately gave it to the bailiff. The printout was folded when Juror #9 brought it into the jury room, and no juror other than Juror #9 saw its contents. The presiding juror told the court that "[i]t really wasn't that pressing of an issue in our deliberations, regardless" and added, "I promise, we didn't talk about that issue. It's really not relevant."

¶8 The court then questioned Juror #9. Juror #9 volunteered that he knew he had not used accurate addresses in

the MapQuest search and confirmed that he had not discussed the results of the search with other jurors.

¶9 Defense counsel requested that Juror #9 be replaced, or at least have the fact that he had used inaccurate addresses be reiterated to him. The prosecutor did not object to replacement. But after confirming that Juror #9 had not done any other external research, the court opted instead to give an instruction to the juror. The court instructed Juror #9 that the addresses he had used were incorrect. The court also confirmed with Juror #9 that he would not use the information from the search in deciding the case and that he would not discuss the information with other jurors. The court reiterated that no juror could do outside investigation, and Juror #9 responded that he now understood that rule. The jury resumed deliberations.

¶10 After considering all of the evidence, the jury was able to reach a verdict only on five aggravated assault counts and the misconduct involving weapons count. On those counts, the jury found that Defendant was guilty. The jury was unable to reach a verdict on the remaining aggravated assault counts and the theft counts. On those counts, the court declared mistrial and dismissed the charges without prejudice.

¶11 The court entered judgment on the guilty verdicts and sentenced Defendant to consecutive presumptive terms of ten and

a half years of imprisonment for each aggravated assault conviction and a concurrent presumptive term of ten years for the misconduct involving weapons conviction. Defendant was ordered to pay restitution to the Arizona Department of Public Safety for the damage caused to the police vehicle and to D.G. and her vehicle insurer for the damage caused to the Tahoe.

¶12 Defendant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A) (Supp. 2009).

DISCUSSION

¶13 Defendant raises two arguments on appeal. We address each argument in turn.

I. Juror Misconduct

¶14 First, Defendant contends that the superior court erred in failing to excuse Juror #9, and therefore a new trial should be ordered.

¶15 It is undisputed that Juror #9 engaged in misconduct. Ariz. R. Crim. P. 24.1(c)(3)(i) provides that a juror is guilty of misconduct, and a new trial may therefore be granted, when the juror "[r]eceiv[es] evidence not properly admitted during the trial." We review a trial court's decision to grant or deny a new trial based on juror misconduct for an abuse of discretion. *State v. Jones*, 185 Ariz. 471, 484, 917 P.2d 200,

213 (1996). Here, Defendant did not request a new trial in the court below, and the record contains no indication that the court considered whether granting a new trial would be an appropriate remedy for the misconduct. Defendant did, however, object to the retention of the offending juror, and the remedy of a new trial was available to the court. Therefore, review for an abuse of discretion rather than fundamental error is appropriate.

¶16 Juror misconduct justifies a new trial when a criminal defendant shows actual prejudice, or when prejudice may be presumed from the facts. *State v. Hall*, 204 Ariz. 442, 447, ¶ 16, 65 P.3d 90, 95 (2003). "Once the defendant shows that the jury has received *and considered* extrinsic evidence, prejudice must be presumed and a new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict." *Id.* (emphasis added) (citation omitted).

¶17 We discern no abuse of discretion in the superior court's refusal to presume prejudice. Juror #9 obtained extrinsic evidence.[2] But he volunteered that he knew that the evidence was based on inaccurate data, and he confirmed that he would not use the evidence in deciding the case. His comments

[2] Defendant does not contend, and we do not find, that any juror other than Juror #9 received or considered the extrinsic evidence.

provided a sufficient basis from which the court could reasonably find that he had not "considered" the extrinsic evidence. Moreover, the remaining jurors properly alerted the court and prevented consideration of the evidence.

¶18 We also discern no abuse of discretion in the superior court's refusal to find actual prejudice. We assess whether extrinsic evidence affected a jury's verdict by analyzing the following factors:

> 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; and
> 5. whether the statement was insufficiently prejudicial given the issues and evidence in the case.

Hall, 204 Ariz. at 448, ¶ 19, 65 P.3d at 96 (quoting *United States v. Keating*, 147 F.3d 895, 902-03 (9th Cir. 1998)). The fourth factor, the trial context, 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 the reasonable possibility of whether the extrinsic material affected the verdict.

Id. (quoting *Keating*, 147 F.3d at 902-03).

¶19 The first factor does not apply here. Regarding the second factor, an inaccurate map-based calculation of distance would not be otherwise admissible, and the inaccurate calculation was not cumulative of other evidence presented at trial.[3] Analysis of the remaining factors, however, supports the court's implicit finding that the extrinsic evidence did not threaten to affect the verdicts. Regarding the third factor, the court gave thorough curative instructions, not only instructing Juror #9 that he could not use or discuss the extrinsic evidence but also confirming that he now understood the relevant portion of the standard jury admonition. Regarding the fourth factor, as we discussed above, Juror #9's statements indicated that he did not consider the evidence. Even before he agreed to not consider it, he volunteered that he knew that the underlying data was inaccurate. And the presiding juror confirmed that the evidence was not shared with other members of the jury. Regarding the fifth factor, the distance between Defendant's and D.G.'s residences was not a crucial issue in the case, and the alleged misinformation therefore was not significantly prejudicial.

¶20 With the benefit of hindsight, we can be assured that the evidence did not prove to be significantly prejudicial. The

[3] The State presented no evidence, accurate or inaccurate, regarding the distance between Defendant's and D.G.'s residences.

evidence pertained to the question whether Defendant had committed theft of the Tahoe, and for this offense Defendant was not convicted. The evidence also pertained to the question of Defendant's general credibility, a question relevant to his defenses to all counts - including those counts for which he was found guilty. But given the totality of the evidence bearing upon Defendant's general credibility, any damage caused by the discrepancy between Defendant's vague estimate of a walkable "couple miles" and the MapQuest printout's estimate of approximately twelve miles was *de minimis*.

¶21 We conclude, therefore, that while excusal of Juror #9 would have been a more conservative and cautious solution, the superior court did not abuse its discretion in declining to do so and in declining to grant a new trial.

II. Restitution

¶22 Defendant next contends that the court erred in awarding restitution to D.G. and her insurer because Defendant was convicted only of offenses for which the officers, not D.G., were named victims. We review a restitution order for an abuse of discretion. *State v. Slover*, 220 Ariz. 239, 242, ¶ 4, 204 P.3d 1088, 1091 (App. 2009).

¶23 In awarding restitution to D.G. (and her insurer) as a "victim," the superior court stated that it relied on *State v. Guilliams*, 208 Ariz. 48, 90 P.3d 785 (App. 2004). In *Guilliams*,

the court held that "even a so-called 'victimless' crime can result in a victim entitled to a restitution award[,] . . . so long as the criminal act directly results in economic damages to the person or entity receiving the award." 208 Ariz. at 52, ¶ 14, 90 P.3d at 789. The court held that in Arizona, the standard for determining whether a defendant's act is the direct cause of economic damages may be articulated as a "modified but for standard," under which "the government must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal nexus between the conduct is not too attenuated (either factually or temporally)." *Id.* at 53, ¶ 18, 90 P.3d at 790 (quoting *United States v. Vankin*, 112 F.3d 579, 589-90 (1st Cir. 1997)).

¶24 In *State v. Lewis*, 222 Ariz. 321, 214 P.3d 409 (App. 2009), an opinion published after the superior court entered the restitution order that is contested in this appeal, the court applied the *Guilliams* rule in an analogous case. In *Lewis*, an individual attending a house party was shot in the shoulder. 222 Ariz. at 323, ¶ 2, 214 P.3d at 411. The defendant was convicted of drive-by shooting, but was acquitted of aggravated assault resulting in serious physical injury. *Id.* at ¶ 3. Nevertheless, the superior court ordered the defendant to pay restitution to the wounded individual and her insurer for her

medical expenses. *Id.* at ¶ 4. The court of appeals affirmed the restitution award. *Id.* at 327, ¶ 20, 214 P.3d at 415. Noting that it is the facts underlying a conviction and not the elements of the offense that determine whether an individual is a victim, *id.* at 325, ¶ 9, 214 P.3d at 413, the court concluded that the superior court could reasonably find that the defendant's criminal conduct (the drive-by shooting) directly caused the victim's economic loss. *Id.* at 326, ¶ 16, 214 P.3d at 414.

¶25 Here, Defendant's convictions for aggravated assault and misconduct involving weapons were based on his highway encounter with the police officers. Much like the *Lewis* defendant's acquittal for aggravated assault, the fact that Defendant was not convicted for the crime of stealing the Tahoe from D.G. was of no consequence to the determination of Defendant's liability to D.G. for damage caused to the Tahoe during the highway encounter. There was sufficient evidence from which the superior court could find that Defendant's criminal actions during that encounter directly caused the damage to the Tahoe: Defendant instigated a shootout with the officers when he exited the Tahoe and fired the gun, and the shootout was the direct and immediate cause of the Tahoe's damage. We find no abuse of discretion in the superior court's

order that Defendant pay restitution to D.G. and her insurer for that damage.

CONCLUSION

¶26 For the reasons set forth above, we affirm Defendant's convictions and sentences.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge