

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/28/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) No. 1 CA-CR 11-0390
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RICARDO LUGO HUESCA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR201001205

The Honorable John Neff Nelson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
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Attorneys for Appellee

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By Jose De La Luz Martinez
Attorneys for Appellant

D O W N I E, Judge

¶1 Ricardo Lugo Huesca appeals his convictions and sentences for attempted transportation of marijuana for sale and possession of marijuana for sale. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Huesca was indicted for transportation of marijuana for sale, ("count 1") and possession of marijuana for sale ("count 2") both class 2 felonies. A jury trial ensued.

¶3 After final jury instructions and closing arguments, the trial court excused jurors for lunch. During the lunch recess, a woman approached Juror #8 at a nearby restaurant and began speaking to him in Spanish. Juror #8 did not understand Spanish very well, but understood the word "mother" and also understood the woman was asking him if he spoke Spanish. Realizing he had seen the woman at the trial, the juror repeatedly said he could not talk to her. Eventually, the woman said "okay" and walked away.

¶4 Before deliberations began, Juror #8 told the bailiff what had happened. The court then questioned Juror #8 individually. Juror #8 explained what had transpired and advised the court he had told two other jurors that he believed one of Huesca's family members approached him. The court questioned the other jurors as a group. None expressed concern about continuing to serve in a fair and impartial manner, and the court allowed them to deliberate.

¶15 The jury found Huesca guilty of the lesser included offense of attempted transportation of marijuana for sale as to count 1. It found him guilty of count 2. The court sentenced Huesca to concurrent terms of 3.5 years' imprisonment, with 256 days of presentence incarceration credit. Huesca timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A).

DISCUSSION

¶16 Huesca contends the court erred by not: (1) questioning jurors more extensively, (2) declaring a mistrial sua sponte, and (3) conducting an evidentiary hearing. We address each contention in turn.

I. Questioning of Jurors

¶17 We review a trial court's investigation into alleged juror misconduct for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 207, ¶ 56, 84 P.3d 456, 472 (2004); see also *State v. Adams*, 27 Ariz. App. 389, 392, 555 P.2d 358, 361 (1976) (whether a new trial should be ordered due to communications between a juror and party is within trial court's sound discretion). A court abuses its discretion only when its action is clearly untenable, legally incorrect, or amounts to a denial of justice. *State v. Gomez*, 211 Ariz. 111, 114, ¶ 12, 118 P.3d 626, 629 (App. 2005) (citation omitted).

¶18 "A trial court's duty to investigate alleged incidents of juror misconduct arises only if there is an allegation that . . . relate[s] to a material fact or law at issue in the case." *Davolt*, 207 Ariz. at 208, ¶ 56, 84 P.3d at 473. "Bare allegations of juror misconduct are insufficient to trigger the trial court's duty to investigate the matter further." *Id.* Juror #8 advised the court that if the woman who approached him was discussing the case, he "didn't get it," as his Spanish is "very broken." The following colloquy also occurred:

THE COURT: . . . Have you told other members of the jury?

THE JUROR: . . . I did talk to two people, let them know that someone approached me and, you know.

THE COURT: Did you say who it was?

THE JUROR: What I believed to be a family member, but I didn't know who.

THE COURT: And did you say anything else?

THE JUROR: No, that was it.

¶19 The court assembled the other jurors and explained what had happened during the lunch recess. It inquired whether they could be "fair and impartial in deciding [the] case" and whether what happened "would in any way influence [them] in deciding this case." Huesca claims a more extensive examination of each juror was warranted because the transcript reflects that

only "some" jurors responded in the affirmative when the court asked if they could be fair and impartial.

¶10 The court's response to a claim of juror misconduct "should be 'commensurate with the severity of the threat posed.'" *State v. Miller*, 178 Ariz. 555, 557, 875 P.2d 788, 790 (1994) (quoting *United States v. Thomas*, 463 F.2d 1061, 1063 (7th Cir. 1972)). In the case at bar, no juror gave any indication the incident would prevent him or her from being fair and impartial, despite having the opportunity to express such an inability. The court advised jurors nothing suggested Huesca was responsible for the family member's contact, inquired whether they could be fair and impartial, and instructed them to "resolve this case . . . solely on the evidence . . . heard and seen in the courtroom."¹ We presume that jurors follow their instructions. *State v. Velazquez*, 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007).

¶11 Huesca never argued or established that the woman's comments related in any manner to the trial. As such, he has not established that the alleged misconduct related to a material fact or law at issue in the case. *See Davolt*, 207

¹ The court also told Juror #8 individually that the woman's conduct was "no reflection" on Huesca and that nothing "whatsoever" suggested Huesca had anything to do with the contact.

Ariz. at 208, ¶ 56, 84 P.3d at 473. Under these circumstances, the court's response was adequate.

II. Mistrial

¶12 Huesca next argues the court should have sua sponte declared a mistrial because jurors discussed the case before deliberating. "Trial courts have considerable discretion to determine whether juror misconduct requires a mistrial or other corrective action, and the trial court's decision will not be overturned absent a clear abuse of that discretion." *State v. Slover*, 220 Ariz. 239, 246, ¶ 22, 204 P.3d 1088, 1095 (App. 2009) (citation omitted).

¶13 Huesca did not request a mistrial. "Absent fundamental error, a defendant cannot complain if the court fails to . . . sua sponte order a mistrial." *State v. Ellison*, 213 Ariz. 116, 133, ¶ 61, 140 P.3d 899, 916 (2006) (citations omitted). Moreover, the court granted Huesca the relief he requested: a jury instruction that outside evidence could not be considered. Huesca cannot now complain that his requested remedy was inadequate.

¶14 Furthermore, Huesca has not demonstrated that jurors in fact discussed the case before deliberating. Assuming the woman who approached Juror #8 discussed the case, the juror was unable to understand it, and he merely told two other jurors that someone he "believed to be a family member" of Huesca's had

approached him. That statement has nothing to do with the substantive merits of Huesca's case. We find no error, let alone fundamental error, in the failure to sua sponte declare a mistrial.

III. Evidentiary Hearing

¶15 Finally, Huesca argues the trial court should have convened an evidentiary hearing to determine whether prejudicial juror misconduct had occurred. Huesca, though, never requested an evidentiary hearing and has thus waived this claim absent fundamental error. Huesca has not characterized the alleged error as fundamental and has thus waived the argument on appeal. See *State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal if not raised).

¶16 Nor has our review of the record revealed any fundamental error. See *State v. Fernandez*, 216 Ariz. 545, 554, ¶ 32, 169 P.3d 641, 650 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it.") (citation omitted). As discussed *supra*, the court adequately questioned the jurors and explored whether communications of a substantive nature had occurred and whether

any juror had misgivings about his or her ability to continuing serving fairly and impartially.²

CONCLUSION

¶17 We affirm Huesca's convictions and sentences.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
ANN A. SCOTT TIMMER, Judge

² Huesca's reliance on *Miller*, 178 Ariz. 555, 875 P.2d 788, is unpersuasive. In *Miller*, the defendant "promptly filed a motion for new trial and request for evidentiary hearing" after learning of alleged juror misconduct. 178 Ariz. at 557, 875 P.2d at 790. The trial court refused to hold an evidentiary hearing. *Id.* The Arizona Supreme Court reversed, concluding the alleged misconduct related to the ultimate issue in the case and "should have persuaded the [court] that further inquiry was necessary." *Id.* In the case at bar, nothing suggests the family member's comments or Juror #8's statements to other jurors related to any issue in the case.