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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. KAMONDAI RICHARD YOUNG, Appellant.	)	2 CA-CR 2011-0179 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. S0200CR20100586

Honorable James L. Conlogue, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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K E L L Y, Judge.

¶1 Kamondai Young was convicted after a jury trial of theft of property valued less than $1,000—specifically, a handgun and two boxes of ammunition—and was

sentenced to a presumptive, 1.75-year prison term.[1] He argues on appeal that his constitutional right to confront witnesses against him was violated when a deputy testified concerning statements made to him by a non-testifying party. He also asserts the trial court improperly coerced the jury to continue deliberations after the foreperson informed the court the jury could not reach a verdict. We affirm.

¶2 On May 19, 2010, law enforcement officers executing a search warrant at a residence found a revolver and two boxes of ammunition concealed in a furnace. Elsewhere in the residence, they also found a box and a notebook, both bearing Young's name. Several days later, S. reported that his revolver was missing and that he had last seen it in early May. After speaking with S., officers determined the revolver found at the residence was his. Young's DNA[2] was found on the revolver's grip.

¶3 During trial, a deputy testified that S. had told him that S.'s girlfriend's daughter, E., "had some information about [S.'s] weapon." The deputy confirmed he had spoken with E. and that, after doing so, he "conclude[d] that Kamondai Young was a suspect in the theft of [S.]'s gun." The trial court sustained Young's objection on relevance grounds but, following a bench conference, overruled Young's hearsay objection after the state argued the testimony was admissible to show its "effect on the listener." The deputy again confirmed that he had spoken with E. and added that "the

[1]Young also was charged with misconduct involving weapons. That charge was severed and Young was convicted after a separate jury trial and sentenced to a 4.5-year prison term, to run concurrently to the prison term imposed for his theft conviction.

[2]Deoxyribonucleic acid.

information" S. had given him that prompted him to do so "contain[ed a reference to] Kamondai Young."

¶4 Young asserts on appeal that, because the state, "introduce[d] [E.'s] statements regarding her familiarity with Mr. Young," he "had the right to confront and cross-examine her" pursuant to the Sixth Amendment's Confrontation Clause. But Young did not object on this basis below, either directly or implicitly, and therefore has not preserved this claim for review. *See State v. Alvarez*, 213 Ariz. 467, ¶¶ 6-7, 143 P.3d 668, 670 (App. 2006) (objection to testimony solely on evidentiary ground of hearsay insufficient to preserve confrontation argument); *cf. State v. King*, 212 Ariz. 372, ¶ 14, 132 P.3d 311, 314 (App. 2006) (though Confrontation Clause not mentioned, confrontation argument preserved where counsel explicitly objected based on inability to cross-examine absent witness). We therefore review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶5 First, we observe that Young does not discuss the trial court's apparent determination that the deputy's circuitous reference to E.'s statement was not offered to prove the truth of the matter asserted but instead to show its effect on the listener. The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). Thus, Young has not established his confrontation rights were even implicated by the deputy's testimony. In any event, because Young has failed to argue that the alleged error here was fundamental, and because we find nothing that can be so

characterized, the argument is waived and we do not address it further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶6 Young next asserts the trial court "committed reversible error by coercing the jury back to deliberate the case after [it] was informed that the jury could not reach a verdict." After approximately one day of deliberations, the bailiff informed the court that the jurors were "having trouble reaching a unanimous decision." The court, in counsel's presence, discussed the matter with the jury foreperson. The court emphasized that it did not wish to pressure the jury to reach a decision and asked the foreperson whether "further deliberations would be fruitful," stating it would "accept [her] opinion on that." The foreperson replied that she "d[id]n't think so," after which the court discussed the matter with counsel. The court stated it could "ask if there is any additional information" the jury required and "send them back in, and then they can send a note in to us or something like that." Young stated he "ha[d] no objection to asking generally if there is . . . disagreement about what the facts are, or if they just feel that they need more information." The court then instructed the jury as follows:

> Now, ladies and gentlemen, you will only—you will have to make your decision based solely on the evidence that was presented. There won't be any additional evidence that will be presented to you.
>
> It might be helpful for you, if there are specific questions that you might have, that I could attempt to answer,

> or if we could even ask the attorneys to present argument on specific points, if that would be helpful to you.
>
> But I am going to suggest that we give you a short time to reconvene, and then talk amongst yourselves on the issue of whether or not there is something additional that could be provided that might be helpful, knowing that there is not going to be any additional evidence presented.
>
> So, why don't we give you a short time to do that, and then I will allow you to decide, at that point, whether any further deliberations would be at all fruitful. And if you find that they would not, then that's fine. You just need to let me know.
>
> So, go ahead and reconvene in the jury room, discuss the point for just a few minutes, and then we'll check back in with you.

Approximately one hour later, the jury returned a guilty verdict and, during a jury poll, each juror confirmed his or her verdict.

¶7 A trial court is permitted to assist a deadlocked jury, and we review the court's response to the jury for an abuse of discretion.[3] *See State v. Kuhs*, 223 Ariz. 376, ¶¶ 41-42, 224 P.3d 192, 200 (2010). In examining whether the court abused its discretion and consequently coerced the jury's verdict, "we examine 'the actions of the judge and the comments made to the jury based on the totality of the circumstances and attempt[] to determine if the independent judgment of the jury was displaced.'" *Id.* ¶ 42, *quoting State v. Huerstel*, 206 Ariz. 93, ¶ 5, 75 P.3d 698, 702 (2003) (alteration in *Kuhs*).

[3]Although Young did not object to the impasse instruction, we agree with the state that juror coercion would constitute fundamental error had it occurred. *See State v. Lautzenheiser*, 180 Ariz. 7, 10, 881 P.2d 339, 342 (1994).

¶8 As we understand his argument, Young asserts the trial court improperly coerced the jury to reach a verdict because it did not advise the jury that its instruction was not intended to force it to reach a verdict and because it did not "honor[]" the foreperson's opinion that further deliberations would not be helpful. Rule 22.4, Ariz. R. Crim. P., provides that, "[i]f the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process." And, "[a]fter receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate." *Id.* The comment to Rule 22.4 contains a recommended instruction that begins by stating: "This instruction is offered to help your deliberations, not to force you to reach a verdict." Although the court's instruction here did not contain that precise language, Young has cited no authority, and we find none, suggesting that an instruction without such language necessarily is coercive. Instead, courts have found a trial court's impasse instruction to be improperly coercive only when the court had been aware of a lopsided numerical split among the jurors, or when the jury did not indicate it had reached an impasse. *See Kuhs*, 223 Ariz. 376, ¶ 43, 224 P.3d at 200-01. Nothing of that nature occurred here, and nothing in the court's instruction was inconsistent with the suggested instruction provided in the comment to Rule 22.4. Instead, consistent with that recommended instruction, the court invited the jury to identify remaining issues and advised the jury what information it might be given to assist it in reaching a verdict. *See* Ariz. R. Crim. P. 22.4 cmt.

¶9 Indeed, the trial court had already expressly told the jury before giving the instruction that it did not wish to pressure the jurors into reaching a verdict. Moreover, the court did not, as Young suggests, require that the jury deliberate further—as we noted above, it merely advised the jury what further information it could be given and instructed it to consider whether such information would be helpful to its deliberations. Finally, a trial court is not required to accept a jury's claim that it is deadlocked. *Kuhs*, 223 Ariz. 376, ¶ 41, 224 P.3d at 200. We find no error.

¶10 Young's conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa