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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THE STATE OF ARIZONA, Appellee, v. BARBARA M. SANCHEZ, Appellant,	)	2 CA-CR 2011-0207 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101918001

Honorable Jane L. Eikleberry, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Barbara Sanchez appeals from her convictions and sentences for two counts of aggravated assault, six counts of endangerment, driving while under the influence of an intoxicant, driving with an alcohol concentration of .08 or more, and driving while under the extreme influence of liquor. She argues the trial court abused its discretion by failing to grant a continuance or declare a mistrial, and by denying her motion for a new trial.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Sanchez's convictions. *See State v. Francis*, 224 Ariz. 369, ¶ 2, 231 P.3d 373, 374 (App. 2010). Four women who had been drinking in a house left together in a vehicle owned by Sanchez.[1] They intended to purchase cigarettes and more alcohol. Sergeant Armando Abrams was driving two cars behind Sanchez's car when it rear-ended a truck. He pulled next to the drivers' sides of the two vehicles "immediately" after hearing the collision to check for injuries and ask for identification. The driver of Sanchez's vehicle identified herself as Sanchez. When Abrams parked his car behind the vehicles approximately thirty seconds later, Sanchez still was seated in the driver's seat. Abrams told another officer that Sanchez was the driver, and asked him to investigate her further. After Sanchez failed multiple field sobriety tests, she was transported to the police substation, where she submitted to breath tests that showed she had a blood alcohol concentration of .227 and .229.

[1]Although the car title was in a co-worker's name, Sanchez had assumed responsibility for making the car payments and used the car as her own.

¶3 Sanchez was charged with aggravated assault causing temporary but substantial disfigurement of one of her passengers who had suffered a broken leg, aggravated assault with a deadly weapon as to the same passenger, six counts of endangerment with respect to the other occupants of the car and truck, and three counts of driving under the influence of an intoxicant.

¶4 At trial, Sanchez testified one of the car's other occupants, Maria H., had been driving when the collision occurred. She also used photographs of bruising and a medical report to support her theory that Maria H. had been seated on the driver's side of the car and that Sanchez had been sitting on the passenger's side. However, in addition to Abrams's testimony that Sanchez had been in the driver's seat immediately after the collision, the driver of the truck testified she had walked to the car to check on its occupants and briefly talked to the still-seated driver, whom she identified as Sanchez. She also noted Sanchez was significantly younger than the car's three other occupants. And the passenger whose leg had been broken testified she was seated right behind Sanchez, who was driving the car.

¶5 When Maria H. failed to appear at trial, Sanchez moved for a mistrial or for a one-day continuance. The trial court denied the motions and trial concluded without testimony from Maria H. During its deliberations, the jury submitted a question asking why Maria H. had not testified, and the court instructed them not to consider that issue.

¶6 The jury found Sanchez guilty of all charges. She was sentenced to concurrent prison terms, the longest of which is six years. After trial, Maria H. appeared

before the trial court on the bench warrant and, although not under oath, stated she had been the one driving. Sanchez filed a motion for a new trial, which the court denied. This appeal followed.

Discussion

Motions for Mistrial or Continuance

¶7 Sanchez first argues the trial court erred by failing to declare a mistrial or grant a continuance when Maria H. failed to appear as a witness.[2] We review the court's denial of a motion for a mistrial for an abuse of discretion. *State v. Alvarez*, 228 Ariz. 579, ¶ 12, 269 P.3d 1203, 1206 (App. 2012). A mistrial is "'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *Id.*, *quoting State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003). We also review the denial of a motion for continuance for a clear abuse of discretion. *State v. Dixon*, 226 Ariz. 545, ¶ 53, 250 P.3d 1174, 1184 (2011). A trial court shall grant a continuance only "upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." *Id.* ¶ 52; *see also* Ariz. R. Crim. P. 8.5(b).

[2]Sanchez also argues the trial court erred by failing to timely order that a warrant be issued for Maria H.'s arrest. However, she fails to develop or offer any authority in support of this argument as an independent issue. Therefore, it is waived on appeal. *See State v. King*, 226 Ariz. 253, ¶ 11, 245 P.3d 938, 942 (App. 2011) (opening brief must present significant argument supported by authority); Ariz. R. Crim. P. 31.13(c)(1)(vi) (same).

¶8 Both the state and Sanchez had subpoenaed Maria H. When she had not appeared by the second day of trial, the court ordered that a warrant be issued for her arrest based on her failure to comply with a subpoena. But, the warrant did not issue for another two days, which was after the case had been submitted to the jury. When Maria H. still had not appeared on the third day of trial, Sanchez moved for a mistrial or continuance, arguing Maria H. was a material witness. The court inquired whether Maria H. had given a statement previously, and the state provided a transcript of an interview one of its detectives had conducted.

¶9 In that interview, Maria H. explained that a few days after the accident Sanchez had asked her to say she had been the driver. Hoping to keep Sanchez from getting "in trouble," Maria H. had agreed and, when Sanchez brought the legal owner of the car to Maria H.'s home shortly afterwards to talk to her and take pictures, she told him she had been driving. Maria H. also stated in the interview with the detective that if she were called to testify, she would say she was not the driver. The trial court concluded that Maria H.'s statement suggested her testimony was not critical and denied the motion.[3]

¶10 Sanchez argues a continuance was indispensable to the interests of justice because her defense theory was that "there was a reasonable possibility that Maria H[.] was the driver, and therefore a reasonable doubt that [Sanchez] was guilty." She argues

[3]The trial court also noted Sanchez had "all week to go look for [Maria H.]." However, the court stated this was not the primary basis for its decision, and we need not address it because we conclude the court's ruling was proper based on its assessment of the likely testimony.

this case is similar to *State v. Ahumada*, 25 Ariz. App. 247, 248, 542 P.2d 828, 829 (1975), in which this court concluded the trial court had abused its discretion by refusing to continue the trial for one day to allow the defense to present alibi testimony. However, in that case it was "clear that supportive testimony was to be elicited" and would not have been cumulative. *Id.* The trial court is "'the only party in a position to determine'" whether testimony is necessary to serve the ends of justice, *Dixon*, 226 Ariz. 545, ¶ 53, 250 P.3d at 1184, *quoting State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983), and we cannot say the likely testimony in this case was so similar to the testimony in *Ahumada* that the trial court was required to continue the trial. It was far from "clear" that Maria H.'s testimony would support the defense, and her previous statement supported the court's conclusion that it could have been harmful.[4]

¶11 Sanchez contends the trial court's conclusion was based on "guesswork" because there was no assurance Maria H. would testify consistently with her previous statement, which had not been made under oath. However, a court does not abuse its discretion merely because it must make a determination based on incomplete information. We will find an abuse of discretion only where "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v.*

[4]The two other Arizona cases Sanchez urges us to consider are likewise inapposite. *State v. Carlos*, 199 Ariz. 273, ¶ 9, 17 P.3d 118, 121 (App. 2001) addressed whether a trial court erred by precluding the defendant from calling a witness, which did not occur here. And in *Territory v. Davis*, 2 Ariz. 59, 63-64, 10 P. 359, 361 (1886), the trial court abused its discretion by denying a continuance when the court had informed the defendant he would not be tried again and his counsel had been ill at the time of the second trial.

Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). Sanchez also maintains the court's determination was incorrect because when Maria H. appeared at her contempt hearing the week after Sanchez's trial ended, she told the court she had been the driver. But we cannot expect the court to have considered information it did not have at the time of its ruling. And Sanchez does not dispute the court's statement at the time of its ruling that the state's interview was "the only statement [it] ha[d] indicating what that witness would testify to."

¶12 Sanchez further argues that if the trial court was required to apply the factors set forth in *State v. Reynolds*, 123 Ariz. 117, 118, 597 P.2d 1020, 1021 (App. 1979) to determine whether to grant a continuance in order to secure a witness, it failed to do so because its rationale did not fit any of the *Reynolds* factors. But our case law suggests we may uphold a trial court's decision to deny a motion to continue without relying on the *Reynolds* factors. *E.g.*, *State v. Cook*, 172 Ariz. 122, 834 P.2d 1267 (App. 1992); *State v. Nadler*, 129 Ariz. 19, 628 P.2d 56 (App. 1981). And in any event, the court's decision in this case rested on the significance of the testimony and whether it likely would have helped the defense—considerations reflected in two of the *Reynolds* factors.[5] *See Reynolds*, 123 Ariz. at 118, 597 P.2d at 1021 (factors include whether testimony material and likelihood it would have affected verdict).

[5]Alternately, Sanchez invites us to apply the *Reynolds* factors, arguing the "test is easily met here." First, whether a continuance could have been granted properly is not the issue before us. Second, it is not our role to reweigh the factual findings of the trial court. *See State v. Garcia*, 224 Ariz. 1, ¶ 6, 226 P.3d 370, 376 (2010) (we defer to factual

¶13 Sanchez also suggests the trial court's assessment of Maria H.'s likely testimony "rendered impotent" the subpoena that ordered her to appear, and impeded the function of the jury. However, the subpoena retained its legal significance, as evidenced by the fact that Maria H. was found in criminal contempt of court for disobeying it. And Sanchez has not provided any authority to support her suggestion that allowing a court to consider the substance of likely testimony when deciding whether to continue a trial infringes on the role of the jury. Instead, these arguments echo her more general concern that the court allowed the proceedings to conclude without Maria H.'s testimony—an argument we have already addressed.

¶14 Sanchez has not shown that the trial court erred in determining a continuance was not essential to "the interests of justice," or that justice was "thwarted" by the court's refusal to grant a mistrial. *Alvarez*, 228 Ariz. 579, ¶ 12, 269 P.3d at 1206; *Dixon*, 226 Ariz. 545, ¶ 53, 250 P.3d at 1184. Therefore, the court did not abuse its discretion in denying Sanchez's motions for a continuance or mistrial.[6]

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findings unless clearly erroneous); *see also Dixon*, 226 Ariz. 545, ¶ 53, 250 P.3d at 1184 (trial court in best position to determine whether facts justify delay).

[6]We need not address Sanchez's argument that any error "was of constitutional magnitude" because we find no error. She has not argued the legal standards we already have applied are insufficient to protect her constitutional right to compulsory process, nor has she identified any action of the trial court, beyond its denial of her motions, to support an additional allegation of error.

Motion for a New Trial

¶15 We review a trial court's ruling on a motion for new trial for an abuse of discretion. *See State v. Ruggiero*, 211 Ariz. 262, ¶ 6, 120 P.3d 690, 692 (App. 2005). Sanchez's motion alleged the court "ha[d] erred in the decision of a matter of law" by denying her motion to continue, pursuant to Rule 24.1(c)(4), Ariz. R. Crim. P. Although she contends on appeal a court also may grant a new trial if "[f]or any other reason . . . the defendant has not received a fair and impartial trial," Ariz. R. Crim. P. 24.1(c)(5), she neither alleged this ground below nor argued the court's failure to grant the motion on this ground sua sponte constituted fundamental error. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008) (failure to argue fundamental error for issue not raised below waives issue on appeal).

¶16 Sanchez argues that, when deciding whether to grant a new trial, the court was required to consider Maria H.'s post-trial unsworn statement and it erred by "rul[ing] as if that had never happened." However, Sanchez failed to allege any ground for a new trial other than the propriety of the court's rulings during trial, and at the time of its ruling the court had before it only Maria H.'s previous statement indicating she would deny being the driver if she were to testify. *See State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005) (we defer to factual findings supported by record and not clearly erroneous). Accordingly, for the same reasons we already have concluded the court did not err in denying Sanchez's motion to continue, we conclude the court committed no error in denying Sanchez's motion for a new trial.

Disposition

¶17 For the foregoing reasons, the convictions and sentences are affirmed.

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

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge