IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID BRYAN RIVERA,
Appellant.

No. 2 CA-CR 2015-0201
Filed August 8, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20142849001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED IN PART AS MODIFIED; REVERSED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 After a jury trial, David Bryan Rivera was convicted of second-degree burglary, robbery, and aggravated robbery. On appeal, he claims the trial court erred by denying his motion for a mistrial made after a medical device attached to the victim's arm suddenly began leaking bodily fluids in the courtroom, in the presence of the jury. Rivera also claims one of his convictions was "multiplicitous" to another count, and disputes the trial court's calculation of presentence incarceration credit. For the reasons explained below, we affirm in part, with modification, and vacate in part.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Rivera's convictions and sentences. *See State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In June 2014, Rivera and an accomplice broke a window and entered the apartment of J.M. The accomplice pushed J.M. out of his wheelchair, and both men searched J.M.'s clothing and apartment. J.M. claimed both men pointed guns at him, and that Rivera put a gun to his head and threatened to shoot if he did not reveal where he kept his cash.

¶3 Rivera and his accomplice took electronics, cash and medical marijuana, leaving J.M. on the floor. J.M. was able to identify Rivera because they occasionally drank and used marijuana together. Rivera was arrested the following day and charged with first-degree burglary, kidnapping, armed robbery, and aggravated robbery.

¶4 At the time of the trial, J.M. had been seriously ill and he was temporarily released from the hospital so he could testify. At

the conclusion of his testimony, a medical device attached to his upper arm began to leak, spilling blood and bodily fluid onto his arm and the courtroom floor. The proceedings were halted, and the court ordered a recess so the floor could be cleaned.

¶5 Rivera moved for a mistrial, which the trial court denied. The court then apologized to the jury and asked whether anyone felt too uncomfortable to continue, too emotionally or otherwise impacted to be "fair and impartial," or unable to be fair and impartial because of "sympathy for the victim." None of the jurors responded affirmatively, and the trial continued.

¶6 The jury acquitted Rivera of armed robbery and first-degree burglary, but found him guilty of the lesser-included offenses of robbery and burglary in the second degree. *See* A.R.S. §§ 13-1507, 13-1508, 13-1902, 13-1904. The jury also found Rivera guilty of aggravated robbery, *see* A.R.S. § 13-1903, but failed to reach a verdict on the kidnapping charge, which the state later dismissed. The court sentenced Rivera to concurrent sentences of 11.25 years for burglary and aggravated robbery and ten years for robbery. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21, 13-4031, and 13-4033.

Motion for Mistrial

¶7 Rivera argues the trial court erred when it denied his motion for mistrial, and that he was deprived of a "fair trial by an impartial jury" in violation of his right to due process. A court's refusal to grant a mistrial is reviewed for abuse of discretion. *State v. Naranjo*, 234 Ariz. 233, ¶ 73, 321 P.3d 398, 413 (2014). Constitutional claims are reviewed de novo. *Id.*

¶8 Rivera does not cite, nor do we find, any cases addressing similar facts. However, we may take guidance from cases addressing whether a mistrial should be granted "based on a witness's testimony." In such instances, a court must consider two factors: "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*,

205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003); *see also State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993) ("[T]he trial judge is in the best position to evaluate 'the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.'"), *quoting State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983).

¶9 Rivera argues the jurors must have felt sympathy when they witnessed J.M.'s medical device leaking and his attendant "distress" from "just feet away." He also claims, in light of J.M.'s testimony that his injury could have happened when he was pushed out of his wheelchair, the jury must have felt "prejudice against [Rivera], in addition to just plain horror."

¶10 Although members of the jury may have felt some sympathy for J.M., we cannot say prejudice necessarily followed. *Cf. Bible*, 175 Ariz. at 597-98, 858 P.2d at 1200-01 (following outburst by murder victim's father, court did not abuse discretion by instructing jury, "[y]ou notice we don't tell you not to have emotion or not to have sympathy, just that you don't base your decision on that"). Nor can we conclude, as Rivera suggests, the trial court's questioning failed to provide "a reasonable basis to conclude [the jurors] were not influenced by" J.M.'s medical event. The court appropriately polled the jurors, employing multiple questions, and, based on the unanimous indication they could be fair and impartial, continued with the trial. *See State v. Woods*, 237 Ariz. 214, ¶ 27, 348 P.3d 910, 917 (App. 2015) (trial court abused discretion by declaring mistrial without questioning jury about effect of exposure to potentially prejudicial material). Absent some indication of potential prejudice, no further questioning or measures were required. *See id.* ¶¶ 15, 18-19.[1]

[1] *Woods* involved a mistrial granted over the defendant's objection. *Id.* ¶ 11. The distinction is not significant here. Also, Rivera's reliance upon *Artisst v. United States*, 554 A.2d 327 (D.C. 1989), is misplaced. In that case, the court erred by not conducting a hearing to determine whether any prejudice warranted a new trial. *Id.* at 332. But the situation involved a juror who twice failed to acknowledge that she knew the defendant personally. *Id.* at 330. In

¶11 Further, the court instructed the jury "not [to] be influenced by sympathy or prejudice," an instruction the jury is presumed to have followed. *See State v. Nelson*, 229 Ariz. 180, ¶ 45, 273 P.3d 632, 642 (2012). And, as the state notes, the decision to convict Rivera of lesser-included offenses indicates the jury was not influenced by sympathy for J.M. *See State v. Anderson*, 199 Ariz. 187, ¶ 33, 16 P.3d 214, 220 (App. 2000) (argument that jury was inflamed undermined by acquittal of several offenses). We conclude the trial court did not abuse its discretion in denying Rivera's motion for mistrial.

"Multiplicitous" Conviction

¶12 Rivera argues on appeal, as he did below, that his conviction of both aggravated robbery and the lesser-included offense of robbery violates double jeopardy and requires this court to vacate the robbery conviction. "We review de novo whether double jeopardy applies." *State v. Brown*, 217 Ariz. 617, ¶ 12, 177 P.3d 878, 882 (App. 2008).

¶13 The double jeopardy clauses of the United States and Arizona Constitutions prohibit multiple prosecutions and punishments for the same offense, including "greater and lesser-included offenses," which are considered the "same offense" for double jeopardy purposes. *State v. Garcia*, 235 Ariz. 627, ¶ 5, 334 P.3d 1286, 1288 (App. 2014). A defendant can be charged with multiple offenses for the same conduct only when "each offense 'requires proof of a fact which the other does not.'" *State v. Jones*, 235 Ariz. 501, ¶ 13, 334 P.3d 191, 194 (2014), *quoting Blockburger v. United States*, 284 U.S. 299, 304 (1932).

¶14 Rivera's indictments for armed robbery and aggravated robbery required proving non-common elements: the use of a weapon for armed robbery and the assistance of an accomplice for

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light of its awareness of potential prejudice with respect to a specific juror, "the court was under an obligation to investigate the possibility of juror prejudice by more than a perfunctory poll of the jury" as a whole. *Id*. at 331.

aggravated robbery. *See* §§ 13-1903, 13-1904. Robbery, however, is a lesser-included offense of both armed robbery and aggravated robbery. *See* §§ 13-1902 through 13-1904; *see also Garcia*, 235 Ariz. 627, ¶ 6, 334 P.3d at 1288-89 (To constitute a lesser-included offense, "the greater offense must require each element of the lesser offense plus one or more additional elements not required by the lesser offense.").[2] When the jury acquitted Rivera of armed robbery and instead convicted him of the lesser-included offense of robbery, the robbery count became the "same offense" as the aggravated robbery count for double jeopardy purposes. *See id.* ¶ 5.

¶15 The state has conceded this issue and agrees Rivera's conviction and sentence on the lesser-included offense should be vacated. We concur and therefore vacate Rivera's conviction and sentence for robbery.

Presentence Incarceration Credit

¶16 Rivera also argues he is entitled to an additional thirteen days of presentence incarceration credit. The trial court's calculation of such is a question of law that we review de novo. *See State v. Bomar*, 199 Ariz. 472, ¶ 5, 19 P.3d 613, 616 (App. 2001). Although Rivera did not object below, a trial court's grant of insufficient presentence incarceration credit is fundamental error. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989).

¶17 Rivera argues he was entitled to fifty-three days of presentence incarceration credit, rather than the forty days the trial court awarded. The state concedes this issue, as well, and we agree. Section 13-712(B), A.R.S., entitles a defendant to full credit for "time actually spent in custody" for an offense prior to sentencing for the same offense. Rivera is entitled to ten days of credit for time spent in custody after his arrest but before he was released on bond and forty-three days for time spent in custody between his trial and sentencing. *See State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993) ("day of booking" counts towards presentence

[2]In *Garcia*, the court specifically identified "robbery [as] a lesser included offense of armed robbery." *Id.* ¶ 7.

incarceration credit); *State v. Hamilton*, 153 Ariz. 244, 245-46, 735 P.2d 854, 855-56 (App. 1987) (day of sentencing counted against prison sentence, not presentence credit). Accordingly, we modify Rivera's sentence pursuant to A.R.S. § 13-4037 to include credit for fifty-three days of presentence incarceration. *See id.* at 246, 735 P.2d at 856.

Disposition

¶18 We vacate Rivera's conviction and sentence for robbery, affirm Rivera's convictions for aggravated robbery and second-degree burglary, and modify his sentences to include credit for a total of fifty-three days of presentence incarceration.