FILED BY CLERK
MAR 23 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. PAIGE NICOLE HAMRICK-BRADWAY, Appellant.	2 CA-CR 2010-0110 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093091001

Honorable Clark W. Munger, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean
Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Paige Hamrick-Bradway was convicted of one count of second-degree burglary and one count of theft by control. The trial court suspended the imposition of sentence and placed her on probation for five years on the burglary charge and for four years on the theft charge, with the terms to be served consecutively. The court further ordered her to serve ninety days in jail as a condition of probation. On appeal, Hamrick-Bradway contends the court 1) abused its discretion in denying her motion for a mistrial, 2) coerced the jury verdict, and 3) erred in imposing consecutive terms of probation. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 In the early morning hours of July 24, 2009, E. was awakened by a noise apparently coming from outside. She went into her backyard to investigate and saw a flashlight shining out of the window of her neighbors' house. Her neighbors were on vacation in California. E. went back inside and called 9-1-1. She continued to watch the house through the window and saw an unfamiliar vehicle back into the neighbors' driveway. A male and a female then carried items out of the house and loaded them into the trunk of the car. They drove away, with the female, later identified as Hamrick-Bradway, driving the car.

¶3 When a police officer responded to the residence, he found a security screen door at the back of the house was open and the wood door had footprints on it. Both doors had "gouge marks." He entered the residence through another back door that was unlocked. While inside, he noticed a skylight also had been damaged. Meanwhile, another officer conducted a traffic stop of a vehicle matching the description given by E.

During a search of the car pursuant to a warrant, officers found two flat screen televisions, duffel bags containing various items, and a piece of mail with the victims' address on it.

¶4 One of the officers advised Hamrick-Bradway of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and she agreed to answer his questions. Hamrick-Bradway told the officer that she and her friend had "robbed [the victims], breaking and entering, [and] took their stuff." She said they "planned it together" after she had seen an update on a social-networking internet site by the victims stating they were out of town. She said her friend broke into the residence through the skylight and let her in the back door.

¶5 Hamrick-Bradway was charged with one count of burglary in the second degree and one count of theft by control. The jury found her guilty of both charges and the trial court sentenced her as described above. This appeal followed.

Discussion

I. Denial of Mistrial

¶6 Hamrick-Bradway first argues the trial court abused its discretion in denying her motion for a mistrial on the ground of juror misconduct. A mistrial is "the most dramatic remedy for a trial error" and should be granted only when "justice will be thwarted otherwise." *State v. Roque*, 213 Ariz. 193, ¶ 131, 141 P.3d 368, 399 (2006). "'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, ¶ 22,

204 P.3d 1088, 1095 (App. 2009), *quoting State v. Apodaca*, 166 Ariz. 274, 276-77, 801 P.2d 1177, 1179-80 (App. 1990).

¶7 During the jury's deliberations, a juror, J., informed the bailiff that another juror, K., had been sending text messages. The trial court interviewed J., who stated that she "didn't feel [K.] was participating in the events," although J. did not know "anything about the content of the texting" and it did not appear that K. had been texting about the jury's deliberations. The prosecutor suggested replacing K. with an alternate, but defense counsel moved for a mistrial. The court then interviewed the jury foreperson, who agreed one of the jurors was texting and not paying attention, but stated that it was a male juror and not K. The foreperson, in fact, described K. as "very passionate about the whole thing."

¶8 Defense counsel again moved for a mistrial. The trial court instead elected to bring the jury into the courtroom, take away their cellular telephones, and remind them of the importance of taking their deliberations seriously and giving the process their full attention. After the court admonished the jury, defense counsel again moved for a mistrial. The court denied the motion, dismissed J., and replaced her with an alternate because J. was "crying," and the court felt she was too "emotional" and it was not "inclined to believe her perceptions" about K.

¶9 Relying on *State v. Cook*, 170 Ariz. 40, 821 P.2d 731 (1991), Hamrick-Bradway contends that "[w]hen a judge discovers that jurors have been engaged in misconduct that may prejudice the defendant's rights to an impartial jury, the judge is under a duty to excuse them for cause." She argues that here, two jurors were

"[in]capable of rendering a fair verdict" because they were "paying attention to extraneous matters and not deliberating fully." And, she maintains, because there were two such jurors and only one alternate, the trial court had a duty to declare a mistrial.

¶10 Contrary to Hamrick-Bradway's argument, nothing in *Cook* suggests that in all cases of juror misconduct a trial court is required to dismiss the juror or, for that matter, to declare a mistrial. "When an issue of potential juror misconduct arises, 'the court's response should be commensurate with the severity of the threat posed.'" *State v. Garcia*, 224 Ariz. 1, ¶ 31, 226 P.3d 370, 380 (2010), *quoting State v. Miller*, 178 Ariz. 555, 557, 875 P.2d 788, 790 (1994). Here, the court determined that confiscating the jurors' cell phones and reminding them of the importance of giving full attention to the deliberation process was sufficient to solve the problem. We cannot say the court abused its discretion in reaching this decision. *Cook*, 170 Ariz. at 54, 821 P.2d at 745 (trial court has discretion to determine whether discharge necessary, because "[o]nly the trial judge has the opportunity to observe the juror's demeanor . . . first hand").

II. Coerced Verdict

¶11 Hamrick-Bradway next contends the trial court coerced the jury verdict by giving the admonition about cell phone usage and the importance of the deliberation process. She raises this issue for the first time on appeal, so we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, a coerced verdict constitutes fundamental error. *See State v. Lautzenheiser*, 180 Ariz. 7, 10, 881 P.2d 339, 342 (1994).

¶12 After interviewing J. and the jury foreperson, the trial court gave the following admonition to the jury:

> Ladies and gentlemen, early in this case I gave a very comprehensive admonition regarding the use of electronic communication, cell phones, iPods, et cetera. I don't know the names of all of those instruments. I'm not going to learn them all. Apparently I wasn't specific enough. I want all of you to in some way denote all of your electronic devices, and pass them down to be put in this box, and they will not be used in the jury room. If you want to use them, you will contact the bailiff and he will arrange access to your phone. No one is going to use any electronic communication at all during these deliberations.
>
> Now, this is a critical case. Every case that comes before the Superior Court is critical. The use of electronic communication, texting, whatever you want to call it during deliberations is absolutely inappropriate. It would be a basis for, frankly, contempt of court proceedings. It's that serious. When I state these things, I am absolutely in earnest and it's all seriousness about this. When I say no, I mean no. Period. . . . Is anybody confused about that?
>
> Okay. Seeing no hands.
>
> What I want you to do is go back and resume your deliberations in earnest. If you have arrived at a verdict at this point, I want you to revote on that and rediscuss it if you need to with everybody's participation and mind on this subject. Not what's happening outside, not what some friend is doing or member of the family is doing. We have spent three days on this. You owe it to your fellow jurors. You owe it to the litigants. You owe it to this country and that's not an exaggeration.
>
> I gave you what [to] some people is a rather dramatic statement about the importance of jury service to our criminal justice system. I don't think it's overstated at all or I wouldn't be sitting where I'm sitting. I didn't dedicate my life to something I think is a frivolous action. These attorneys did not. The defendant . . . has not placed her future in the

> hands of a group of people who don't really care enough to pay attention. And the victim in [this] case certainly deserves your attention, too.
>
> So I realize I'm making a statement to some of you who don't deserve this statement and I apologize to you. But there are some who do deserve it. So at this point I would like you all to resume your deliberations in earnest, revote on anything for which you've already come to a verdict, and all of you participate.
>
> If there is anybody who feels they cannot participate in this, raise your hand now and I will insert the alternate. Is there anybody who says, I just want out of this, I can't do this. Okay. [J.]. Is there anybody else? Is there anybody else who is unwilling to devote their attention to resolving this case? I don't care what your verdict is, but we will resolve it. Is there anybody else who just can't do this?

On appeal, Hamrick-Bradway argues the court coerced the jury verdict when it "told the jury it had to reach a verdict . . . threatened [the jury] with contempt . . . railed about how jurors' not paying attention harmed the victim, the system, litigants, and himself personally [and] shamed the jurors into thinking they had committed misconduct."

¶13 "Jury coercion exists when 'the trial court's actions or remarks, viewed in the totality of the circumstances, displaced the independent judgment of the jurors,'" *State v. Davolt*, 207 Ariz. 191, ¶ 94, 84 P.3d 456, 478 (2004), *quoting State v. McCrimmon*, 187 Ariz. 169, 172, 927 P.2d 1298, 1301 (1996), "or when the trial judge encourages a deadlocked jury to reach a verdict," *Davolt*, 207 Ariz. 191, ¶ 94, 84 P.3d at 478. "'What conduct amounts to coercion is particularly dependent upon the facts of each case.'" *State v. Fernandez*, 216 Ariz. 545, ¶ 8, 169 P.3d 641, 644 (App. 2007), *quoting State v. Roberts*, 131 Ariz. 513, 515, 642 P.2d 858, 860 (1982).

¶14 The trial court's comments were made in the context of claims that two jurors had not been paying attention to the deliberations process. There is nothing in the record to suggest that the jury was deadlocked or that the court's actions displaced the jurors' independent judgment. And, considering the context of the admonition, we have no basis to conclude the court was telling the jury it had to reach a verdict; rather, it was telling the jurors they had to give the deliberations their full attention.

¶15 Hamrick-Bradway nevertheless contends the trial court's statements "were the functional equivalent of the trial judge's actions" found to be improper in *State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003). She argues the court essentially conveyed to the jurors in the minority that they "should knuckle under to the majority and render a prompt verdict." She bases this argument in part on the fact that "the trial judge knew the split was six to two."

¶16 In *Huerstel*, the trial court prematurely gave an impasse instruction, pursuant to Rule 22.4, Ariz. R. Crim. P., "signal[ing] the jury that it was taking too long to reach a verdict." 206 Ariz. 93, ¶ 25, 75 P.3d at 706. Later, when it became clear the jury was deadlocked, the court gave additional direction "suggesting that the holdout juror should reconsider his position, despite being told twice that the juror's mind was made up." *Id.* Thus, *Huerstel* is distinguishable. Here, the trial court's admonition neither signaled that the jury was taking too long nor suggested any juror should change his or her views. And, although the foreperson mentioned that the jury was split six to two, there was no indication that the jury was deadlocked. A court's mere knowledge of a split jury "does not conclusively establish coercion," but is merely a "factor in the

totality of the circumstances analysis." *Id.* ¶ 19. And, as we have already stated, the court admonished the jury not because they were split or unable to reach a verdict, but because two jurors reportedly were not paying attention. The court did not coerce the jury verdict by giving its admonition.

III. Consecutive Terms of Probation

¶17 Finally, relying on A.R.S. § 13-116 and *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989), Hamrick-Bradway contends the trial court erred in imposing consecutive terms of probation for the burglary and theft charges, claiming that they constituted a single act.[1]

¶18 Section 13-116 states that "[a]n act . . . which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Thus, for the trial court to impose consecutive sentences for the burglary and theft charges, those charges must constitute separate acts. In *Gordon*, our supreme court set out the following test to be applied in determining whether two offenses constitute separate acts:

> [W]e will . . . judge a defendant's eligibility for consecutive sentences by considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the

[1]In its answering brief, the state claims Hamrick-Bradway's objection below lacked specificity as it did not refer to A.R.S. § 13-116, which addresses double punishment. Hamrick-Bradway objected below on the basis that "the stacked probation in this case of consecutive probation is unwarranted." We need not decide, however, whether her objection was specific enough because we would reach the same conclusion under either harmless error or fundamental error review. *See State v. West*, 224 Ariz. 575, n.3, 233 P.3d 1154, 1156 n.3 (App. 2010) (unnecessary to address which standard of review applies when we would reach same conclusion under either).

> one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

Gordon, 161 Ariz. at 315, 778 P.2d at 1211.

¶19 Hamrick-Bradway was convicted of burglary in the second degree and theft. Applying the *Gordon* test to the facts before us, we must first determine the ultimate crime. Although the parties disagree on this issue, we conclude, given the facts of this case, that theft was the ultimate crime because it was the "primary object of the episode."[2] *State v. Alexander*, 175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993).

¶20 To commit theft, a person must knowingly control the victim's property with the intent to deprive the victim of such property. *See* A.R.S. § 13-1802(A)(1). Subtracting these facts from the evidence, we are left with the fact that Hamrick-Bradway entered the victims' residence with the intent to commit a felony or theft—evidence

[2]Even if we characterized burglary as the ultimate crime, Hamrick-Bradway's action in committing theft subjected the victims to a greater harm than inherent in mere residential burglary. To commit the latter, one need only enter with *the intent* to commit a theft or felony. The actual commission of the theft poses an additional harm. For the same reason, it is possible to commit residential burglary (with intent to commit theft) without also committing theft. Thus, the outcome would be the same even if we construed burglary as the ultimate crime.

sufficient to support her conviction for burglary. *See* A.R.S. § 13-1507(A). Application of the first *Gordon* factor supports the conclusion that consecutive sentences were permissible.

¶21 Next, we consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Hamrick-Bradway contends it was impossible to commit theft without committing burglary because she had to enter the residence in order to obtain the stolen property. We disagree. Because a person can commit theft by controlling property of another with the intent to deprive that person of the property, *see* § 13-1802(A)(1), Hamrick-Bradway did not have to enter the residence to be convicted of theft by control—she controlled the property when she loaded it into the vehicle. It was therefore factually possible for her to commit the theft without also committing the burglary. And because our analysis of *Gordon*'s first two factors indicates that Hamrick-Bradway committed separate acts, we need not consider the third *Gordon* factor. *See State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993).

¶22 Hamrick-Bradway nevertheless argues that even if the two offenses constitute separate acts, consecutive probation terms are impermissible under *State v. Pakula*, 113 Ariz. 122, 547 P.2d 476 (1976), and *State v. Bowsher*, 223 Ariz. 177, 221 P.3d 368 (App. 2009). However, both of these cases were overruled by *State v. Bowsher*, 225 Ariz. 586, 242 P.3d 1055 (2010) (*Bowsher II*). In *Bowsher II*, our supreme court held that consecutive terms of probation are permissible whether or not the charges are

included in a single indictment. *Id.* ¶¶ 17-20. The trial court did not err in imposing consecutive probation terms.

Disposition

¶23 For the reasons stated, we affirm Hamrick-Bradway's convictions and sentences.

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

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

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