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.

FILED BY CLERK
JUL 21 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS MANUEL MORAN, Appellant.	2 CA-CR 2010-0121 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20040588

Honorable Edgar B. Acuña, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Emily Danies
Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Jesus Moran was convicted of manslaughter, criminal damage, and nine counts of endangerment with a substantial risk of imminent death. The trial court sentenced him to enhanced, aggravated, concurrent prison terms, the longest of which was twenty-eight years. On appeal, Moran argues the court erred in denying his motion to suppress blood-alcohol evidence obtained pursuant to a search warrant and in denying his motion for a new trial based on juror misconduct. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *State v. Taylor*, 196 Ariz. 584, ¶ 2, 2 P.3d 674, 676 (App. 1999). In November 2002, Moran was involved in a multiple-vehicle accident near Tucson, which resulted in one fatality. He was transported to St. Mary's Hospital, where Arizona Department of Public Safety (DPS) Officer Rede obtained three blood samples pursuant to a telephonic search warrant. Testing of the samples revealed blood-alcohol levels of 0.156, 0.131, and 0.110. Moran was charged and convicted as described above. This appeal followed.

Discussion

Motion to Suppress

¶3 Moran first argues the trial court erred in denying his motion to suppress the blood-alcohol evidence because the officer requesting the search warrant had not been sworn. When reviewing a trial court's denial of a motion to suppress, "we consider only the evidence presented at the suppression hearing . . . and view it in the light most

favorable to upholding the court's ruling." *State v. Blakley*, 226 Ariz. 25, ¶ 5, 243 P.3d 628, 630 (App. 2010). In general, we review the court's ruling for abuse of discretion, but we review legal issues de novo. *Id.*

¶4 At the scene of the accident, Officer Rede noticed the odor of alcohol on Moran's breath and found empty beer "packaging" in and around his vehicle. Rede then telephoned a magistrate to request a search warrant to obtain blood samples from Moran. The following recorded conversation took place:

> OFFICER: Judge Green[,] this is Officer Rede, badge number of 6106 of Arizona Department of Public Safety. Will you swear me in please?
>
> JUDGE: Do you swear or affirm the testimony you give is the truth, the whole truth and nothing but the truth[,] so help you God[?]
>
> OFFICER: I am calling you on this date, 11/24 of 02 at 1228 in the a.m. with Officer Henry Florez of Arizona DPS badge number 3119 standing by as a witness. I am calling for a telephonic search warrant and have just, probable, and reasonable cause to believe that there is now in the body, or on the body[,] blood/fluids, alcohol and articles of clothing located on or in Guadalupe Bustamonte [aka Jesus Moran] . . . .

After Rede presented additional information, none of which Moran challenges, the magistrate found probable cause and issued a telephonic search warrant. On appeal, however, Moran maintains the warrant was invalid because it was based upon unsworn testimony. Essentially, he contends Rede "was not sworn in" because he failed to acknowledge his statement was being given under oath.

¶5 Article II, § 8 of Arizona's Constitution provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." When a law enforcement officer has probable cause to believe a person has caused an accident resulting in death or serious physical injury, the officer may obtain a search warrant authorizing a blood test to determine the person's alcohol concentration. A.R.S. § 28-673(C), (D)(1). "No search warrant shall be issued except on probable cause, supported by affidavit." A.R.S. § 13-3913. "In lieu of, or in addition to, a written affidavit, or affidavits . . . the magistrate may take an oral statement under oath." A.R.S. § 13-3914(C). The statement can be made "in person" or "by telephone, radio or other means of electronic communication." *Id.* And, the "purpose of [the] oath is to impress upon the person taking it that there is some duty or compulsion to tell the truth." *State v. Albe*, 10 Ariz. App. 545, 550, 460 P.2d 651, 656 (1969); *see also* Ariz. Const. art. II, § 7; A.R.S. § 12-2221.

¶6 We have found no cases directly addressing the issue whether an officer's failure to acknowledge he or she is under oath renders the oath invalid. But other cases involving technical defects with warrants are instructive. This court previously has held that "substantial compliance rather than literal compliance does not void [a] warrant." *State v. Hadd*, 127 Ariz. 270, 275, 619 P.2d 1047, 1052 (App. 1980). There, the magistrate issuing the warrant failed to certify the transcription of the telephone conversation with the requesting officer, only a duplicate original warrant was filed with the court, and an original search warrant never was prepared or signed by the magistrate. *Id.* at 273, 274, 619 P.2d at 1050, 1051. We held these errors were technical in nature

and, in the absence of bad faith on the part of the prosecution or lack of neutrality of the magistrate, the warrant was valid. *Id.* at 275, 619 P.2d at 1052; *see also Yuma County Attorney v. McGuire*, 109 Ariz. 471, 472, 512 P.2d 14, 15 (1973) (judge's failure to sign warrant merely technical error and did not render it invalid).

¶7 Here, although Rede failed to swear or affirm directly that he was under oath, his request to be sworn demonstrated his willingness to be placed under oath and, accordingly, an affirmative response was not critical. Rede's request to be sworn, followed by the magistrate's placing him under oath "impress[ed] upon the [officer] that there [wa]s some duty or compulsion to tell the truth." *Albe*, 10 Ariz. App. at 550, 460 P.2d at 656. Thus, at most, Rede's omission was a mere technical error which did not invalidate the warrant.

¶8 Moreover, Moran does not challenge the magistrate's neutrality or argue there was any "misconduct or bad faith on the part of the prosecution." *Hadd*, 127 Ariz. at 275, 619 P.2d at 1052. "The key element in the issuance of a search warrant is the consideration by a neutral and detached magistrate." *McGuire*, 109 Ariz. at 472, 512 P.2d at 15. And, "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officer[] w[as] dishonest or reckless in preparing the[] affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Leon*, 468 U.S. 897, 926 (1984). The trial court did not abuse its discretion in finding the officer was under oath or in denying Moran's motion to suppress. *See Blakley*, 226 Ariz. at ¶ 5, 243 P.3d at 630.

Motion for New Trial

¶9 On January 22, 2010, the day after the jury returned its verdicts, the state gave notice that Juror Number Eleven had been in contact with a law student working at the Pima County Attorney's office during the trial and on January 21 after the jury had reached its verdicts. At a hearing on the issue, Juror Number Eleven testified she was close friends with S.B., who was a third-year law student at the University of Arizona College of Law. Juror Number Eleven stated, however, that she was not aware S.B. was working as a law clerk with the criminal division of the county attorney's office. S.B. also testified at the hearing. The testimony of the two women established that, after the jury panel was sworn in and Moran's trial had begun, Juror Number Eleven sent a text message to S.B. telling her "[she] was going to jury duty." Upon learning Juror Number Eleven was selected for a criminal trial, S.B. told Juror Number Eleven not to "discuss the case with [S.B.]" and not to "tell [her] anything about the case." Two days later, on January 14, the two met for lunch at S.B.'s invitation. They did not discuss the facts of the case, nor did Juror Number Eleven tell S.B. the name of the case in which she had been impaneled. She told S.B. only that she was serving as a juror in a criminal trial at the Pima County Superior Court.

¶10 Juror Number Eleven next contacted S.B. after the jury had returned its verdicts on January 21, 2010. At that time, Juror Number Eleven asked S.B. "what an aggravators trial was." After Juror Number Eleven informed S.B. the trial had ended, S.B. gave a brief description of what an aggravating factor was. Juror Number Eleven then told S.B. she had asked because she had just found out that she "ha[d] to go back on

February 22nd for a sentencing trial." S.B. immediately contacted her supervisor, Bruce Chalk, a prosecutor in Moran's case, who then filed the notice with the trial court.

¶11 Moran subsequently filed a motion for a new trial pursuant to Rule 24.1(c)(3)(iii), Ariz. R. Crim. P., arguing Juror Number Eleven was guilty of misconduct because she "failed to respond fully to th[e] Court's voir dire questions and concealed her close friendship with a law student." After a hearing, the trial court denied the motion, finding no violation by Juror Number Eleven and "no prejudice . . . under the facts of this case." On appeal, Moran argues the court erred in denying his motion for a new trial. He contends Juror Number Eleven's failure to disclose the information was willful and prejudiced him because it "deprived him of the right to intelligently exercise his peremptory challenges."

¶12 Rule 24.1(c)(3)(iii) provides that when a juror "perjur[es] himself or herself or willfully fail[s] to respond fully to a direct question posed during the voir dire examination," the trial court may grant a new trial. We review a court's ruling on a motion for a new trial based on juror misconduct for an abuse of discretion. *See State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003). We find no such abuse here.

¶13 During voir dire the trial court asked prospective jurors, including Juror Number Eleven, the following pertinent questions: "Is there anyone here who knows Mr. Chalk, Barbara LaWall, or anyone in the County Attorney's Office?" "Is there anyone here who has ever studied or practiced law?" "Does anybody have any close friends or relatives who are lawyers?" and "Is there anyone here, themselves or family members or close friends, that are in law enforcement?" Juror Number Eleven testified she did not

respond in the affirmative to any of these questions because at the time she was not aware S.B. was working at the county attorney's office and, although Juror Number Eleven knew S.B was a law student, the court had asked only whether the jurors knew any attorneys. On this record, we cannot say the court, which had the opportunity to observe the juror's testimony firsthand, abused its discretion in finding she had not willfully misled or concealed information from the court and counsel. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995) (appellate court defers to trial court's determination of credibility).

¶14 Additionally, Moran has presented no evidence he was prejudiced; nor are we able to presume prejudice on the record before us. *See State v. Davolt*, 207 Ariz. 191, ¶ 58, 84 P.3d 456, 473 (2004) (juror misconduct warrants new trial only if defendant shows actual prejudice or if such prejudice may fairly be presumed from facts). Juror Number Eleven did not discuss the facts of the case with S.B. during the guilt phase of the trial or before the jury reached its verdicts. And there is no evidence the juror's votes were influenced in any way by her relationship with S.B.

¶15 Likewise, Moran was not prejudiced by Juror Number Eleven's conversation with S.B. about the "aggravators trial." Although we agree Juror Number Eleven's inquiry about the meaning of "aggravators" before the trial had ended constituted misconduct,[1] it did not affect the outcome of the case. After the guilt phase of

[1]After S.B. instructed Juror Number Eleven not to discuss the case with her, the juror should have disclosed her contact with S.B. to the court. The trial court had admonished the jurors on multiple occasions not to discuss the case with anyone. Again,

the proceedings, Moran waived his right to have the jury determine the existence of aggravating circumstances, and the parties stipulated that the trial court could make that determination instead. Because Juror Number Eleven did not participate in the finding of any aggravating factors, her misconduct did not prejudice Moran. We therefore find no abuse of discretion in the court's denial of Moran's motion for a new trial.

Disposition

¶16 For the foregoing reasons, we affirm Moran's convictions and sentences.

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

CONCURRING:

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

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

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however, because there is no showing of prejudice, we find no error in the court's denial of Moran's motion for a new trial.