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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/27/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0182
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DONALD CORY DEHAR,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
)
)
_____)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR200900973

The Honorable Rick A. Williams, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman
Attorney for Appellant

G E M M I L L, Judge

¶1 Donald Cory Dehar appeals from his conviction and

sentence for arson of an occupied structure, a class 2 felony. The conviction stemmed from a fire that destroyed a mobile home belonging to one of Dehar's neighbors. The evidence at trial included eyewitness testimony that Dehar used a Molotov cocktail to set the mobile home on fire. At sentencing, the trial court ruled that arson of an occupied structure was a dangerous offense and imposed an enhanced but mitigated eight-year term of imprisonment. Dehar timely appealed.

¶12 Dehar raises five issues: (1) whether the trial court erred in ruling him competent to stand trial; (2) whether the admission of hearsay evidence violated his rights to confrontation and a fair trial; (3) whether the prosecutor's closing argument violated his rights to due process and a fair trial; (4) whether the trial court erred in denying his motion for mistrial; and, (5) whether the trial court erred in ruling his offense to be dangerous in the absence of a jury finding. For reasons that follow, we affirm.

DISCUSSION

A. Competency Ruling

¶13 Dehar contends the trial court erred in finding him competent to stand trial. Specifically, Dehar argues that the finding was not supported by reasonable evidence. We disagree.

¶14 Due process requires the State "observe procedures adequate to protect a defendant's right not to be tried or

convicted while incompetent." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). The test for competency is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); see also Ariz. R. Crim. P. 11.1 ("A person shall not be tried, convicted, sentenced or punished for a public offense, except for proceedings pursuant to A.R.S. § 36-3707(D), while, as a result of mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense."). We review a trial court's finding on a defendant's competency to stand trial for abuse of discretion. *State v. Glassel*, 211 Ariz. 33, 44, ¶ 27, 116 P.3d 1193, 1204 (2005). In determining whether reasonable evidence supports the finding of competency, we consider the facts in the light most favorable to sustaining the trial court's finding. *Id.*

¶15 Prior to trial, Dehar's counsel moved for, and was granted, a Rule 11 evaluation of Dehar's competency to stand trial. See Ariz. R. Crim. P. 11. Two mental health experts, Dr. Lawrence Schiff and Dr. Mark Harvancik, evaluated Dehar and submitted reports to the trial court. Dr. Schiff diagnosed Dehar with a "delusional disorder of the persecutory type which

is a psychotic illness characterized by vast extensive delusions without the deterioration in self care and functioning seen in schizophrenia." Although Dr. Schiff indicated Dehar understood the nature of the proceedings against him, he opined that Dehar was not competent to stand trial because he was incapable of cooperating with his attorney. He recommended Dehar be sent for treatment with anti-psychotic medications. Dr. Harvancik likewise diagnosed Dehar with delusional disorder, persecutory type, opining that he was suffering from signs and symptoms of serious mental illness and ingrained antisocial personality disorder, but concluded he was competent to stand trial. Dr. Harvancik stated, however, that "caution should be exercised during court proceedings as evidence of antisocial and otherwise disruptive behaviors appeared to be likely particularly when views are presented contrary to Mr. Dehar's."

¶16 After considering both doctors' reports and testimony from Dr. Schiff regarding his diagnosis and conclusion, the trial court ruled Dehar was competent to stand trial. The trial court acknowledged that Dehar's medical records evidenced a long history of mental illness, but observed that in addition to Dr. Harvancik's finding of competency in this case, there had been previous findings by other doctors in 2007 and 2008 that Dehar was competent to stand trial on other charges. In regard to Dr. Schiff's opinion that Dehar was not competent because of his

refusal to cooperate with his attorney, present himself appropriately, and observe courtroom behavior, the trial court concluded from its own observations of Dehar at court hearings that "defendant's behavior in court tends to indicate that he can cooperate when he wants to."

¶17 On the first day of trial, Dehar's counsel moved for reconsideration of the trial court's finding of competency. Counsel argued the finding was against the weight of the evidence and expressed concern that Dehar may react improperly at trial, leading the jury to convict him based on his behavior. The trial court denied the motion to reconsider and reaffirmed the prior ruling.

¶18 Following trial, defense counsel advised the trial court that Dehar had reported having delusions during trial and moved for another competency evaluation. The trial court granted the request and appointed Dr. Christopher Linskey to evaluate Dehar. In his report, Dr. Linskey diagnosed Dehar with delusional disorder, paranoid type, but concluded despite his paranoia and likely delusional disorder he was competent to work with his attorney in regard to sentencing. Dr. Linskey did note Dehar's condition appeared improved as compared to previous reports and speculated that his improved condition was due to treatment with the psychotropic medication Depakote, a mood stabilizer that decreases impulsivity and anxiety. After

considering the report and the argument of counsel, the trial court found Dehar was competent both during trial and for sentencing and proceeded with sentencing.

¶9 The determination of a defendant's competency to stand trial is fundamentally a question for the court. *Bishop v. Superior Court (Royston)*, 150 Ariz. 404, 409, 724 P.2d 23, 28 (1986). Although the trial court may call upon mental health experts to assist in its determination, their opinions are not binding. *State v. Bishop*, 162 Ariz. 103, 107, 781 P.2d 581, 585 (1989). Moreover, the trial judge is not required to accept or reject an expert's opinion in toto, and can also rely on his or her own observations of the defendant in determining competency. *Glassel*, 211 Ariz. at 44, ¶¶ 28-29, 116 Ariz. P.3d at 1204.

¶10 Here, there was sufficient evidence to support the trial court's finding that Dehar was competent to stand trial. Two of the three mental health experts who evaluated Dehar in this case concluded that he was competent. The third stated Dehar understood the proceedings against him, but opined he was incompetent to assist in his defense because of his inability to control himself and cooperate with his attorney. The trial court, however, had the opportunity to observe Dehar in the courtroom and found from its observations that Dehar "can cooperate when he wants to." Consistent with the trial court's observations, there is nothing in the record indicating Dehar

engaged in any improper or disruptive conduct in the presence of the jury of the sort feared by his counsel.

¶11 Further, we reject the claim that the improvement in Dehar's mental condition when evaluated while on medication following the trial establishes that he was incompetent during trial. The improvement of Dehar's condition is not inconsistent with the trial court's original conclusion that Dehar, although suffering from mental illness, was competent to stand trial. See Ariz. R. Crim. P. 11.1 ("The presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial."); *State v. Harding*, 137 Ariz. 278, 286, 670 P.2d 383, 391 (1983) (holding "mere diagnosis of a mental disease or disorder does not mean that the defendant is unable to make rational decisions regarding his case"). On this record, there was no abuse of discretion by the trial court in finding Dehar competent to stand trial. See *Glassel*, 211 Ariz. at 44-45, ¶ 30-31, 116 P.3d at 1204-05 (holding no abuse of discretion by trial court in finding defendant competent based on court's opportunity to observe defendant in court and to evaluate conflicting expert opinions).

B. Hearsay Testimony

¶12 Dehar argues his rights to confrontation and a fair trial were violated by the admission of double hearsay testimony that the victim (who did not testify at trial), reportedly told

a police officer that he heard Dehar threaten to burn down his home. This hearsay testimony, however, was not elicited by the State, but rather by defense counsel during cross-examination of the officer. Although the police officer testified on direct examination that he spoke to the victim, he did not testify to any statement made by the victim. Only on cross examination by defense counsel, did the police officer confirm the statement by the victim regarding the threat to burn down his home.

¶13 Accordingly, to the extent the admission of the hearsay testimony was error, it was invited error. See *State v. Anderson*, 210 Ariz. 327, 340, ¶ 44, 111 P.3d 369, 382 (2005) (holding any error in admission of testimony elicited by defense counsel "plainly invited"). As our supreme court has determined, a defendant who invites error at trial may not then claim that same as error on appeal. *State v. Moody*, 208 Ariz. 424, 453, ¶ 111, 94 P.3d 1119, 1148 (2004); see also *State v. Logan*, 200 Ariz. 564, 566, ¶ 11, 30 P.3d 631, 633 (2001) (holding invited error doctrine protects against a party "injecting error in the record and then profiting from it on appeal") (citation and internal brackets omitted). Thus, "we will not find reversible error when the party complaining of it invited the error." *Logan*, 200 Ariz. at 565-66, ¶ 9, 30 P.3d at 632-33.

C. Closing Argument

¶14 Dehar argues that his rights to due process and fair trial were violated by the prosecutor arguing facts not in evidence during closing argument. At issue are remarks by the prosecutor with respect to a recording of a 911 call placed by S., who testified that while sitting in the bed of his pickup truck with his friend C., he observed Dehar start the fire at the victim's home. During his call to report the fire, S. told the 911 operator that he knows who started the fire, that the person's name is "Cory," and that he watched him go in and out of the home and throw a "Molotov cocktail" type device into the home to start the fire. While S. explained to the 911 operator where Dehar lived in relation to the fire, C.'s voice can be overheard stating, "In an RV."

¶15 In closing argument, the prosecutor noted C.'s voice in the background of the 911 call and argued that her mention of the RV indicates that "she also knows exactly who it is that set the fire" and subsequently argued that both S. and C. saw Dehar set the fire. The trial court overruled Dehar's objection, noting that it was permissible argument based on the evidence.

¶16 On appeal, Dehar contends the prosecutor's argument regarding C.'s remark was improper because C. did not testify at trial and therefore was not available for cross-examination. Dehar contends the argument turned C. into a second eye-witness

without evidentiary support. According to Dehar, C.'s remark merely showed that she knew where Dehar lived, not that she saw the person who started the fire or that she could even identify the person if she did see anyone.

¶17 Although prohibited from commenting on matters not in evidence, counsel are otherwise permitted wide latitude in closing argument. *State v. Blackman*, 201 Ariz. 527, 541, ¶ 59, 38 P.3d 1192, 1206 (App. 2002). Such latitude is allowed because closing arguments are not evidentiary in nature. *State v. Freeman*, 114 Ariz. 32, 45, 559 P.2d 152, 165 (1976). At closing argument, counsel are permitted to comment on the evidence already introduced and argue all reasonable inferences therefrom. *Id.*

¶18 Contrary to Dehar's contention, the prosecutor neither introduced nor commented on matters that had not been placed before the jury at trial. The recording of the 911 call was admitted into evidence without objection and played for the jury. Thus, the contents of the recording, including C.'s remark, were proper subjects for comment by the prosecutor. *Id.* at 46, 559 P.2d at 166. The fact that C. was present with S. when the fire was started and made a reference to where Dehar lived during the 911 call supports an inference that C., like S., saw Dehar start the fire. There was no abuse of discretion by the trial court in ruling that the prosecutor's argument fell

within the wide latitude granted to closing argument.

D. Motion for Mistrial

¶19 Dehar also argues the trial court erred by denying his motion for a mistrial after a deputy, in unsolicited testimony, mentioned transporting Dehar to jail in answering a question about incriminating statements made by Dehar two days after the arson. In moving for a mistrial, Dehar argued that the reference to transporting him to jail related to a separate offense from that of the arson and therefore was prejudicial other act evidence. The trial court denied the motion, and in subsequently denying a motion for new trial raising the same issue, the trial court explained that any possible prejudice from the reference was *de minimus*.

¶20 We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). Because the trial court "is in the best position to assess the impact of a witness's statements on the jury," we defer to its discretionary determination. *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003). 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." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

¶21 The trial court did not abuse its discretion when it concluded that the single nonresponsive reference to Dehar being transported to jail did not warrant a mistrial. Dehar's contention that the police officer's testimony constituted prohibited other acts under Arizona Rule of Evidence 404(b) is not supported by the record. There was no evidence introduced at trial of any crimes or offenses committed by Dehar other than arson. The police officer's reference to taking Dehar to jail simply does not implicate Rule 404(b).

¶22 Furthermore, it is largely within the trial court's discretion to provide a remedy when a witness unexpectedly volunteers an inadmissible statement. *State v. Marshall*, 197 Ariz. 496, 500, ¶ 10, 4 P.3d 1039, 1043 (App. 2000). In deciding whether a mistrial is required due to an unsolicited witness comment, the trial court must consider whether the comment caused the jurors to consider improper matters and the probability that the jurors were influenced by the comment. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). As our supreme court has noted, jurors are aware that defendants are arrested and spend time in jail prior to trial and "[s]uch knowledge is not prejudicial and does not deny defendants the presumption of innocence." *Id.* Here, the trial court could reasonably find that the jury would view the deputy's mention of jail as relating to the charge on which Dehar was being tried as

opposed to some other unrelated offense and that the remark would have no effect on the trial or the jury's consideration of the evidence.

E. Enhanced Sentence

¶23 As his final claim of error, Dehar contends the trial court erred by enhancing his sentence when it found, pursuant to *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981 (App. 2004), that the arson was of a dangerous nature because fire is a dangerous instrument. In *Gatliff*, this court held that fire is inherently dangerous in arson of an occupied structure and, therefore, a "separate jury finding of dangerousness is not required." *Id.* at 365, ¶¶ 16-17, 102 P.3d at 984.

¶24 Dehar contends *Gatliff* court erred by concluding that fire is an inherently dangerous instrument regardless of the circumstances of the case, and the jury should be required to make the finding of dangerousness. Dehar's arguments do not persuade us that we should reconsider the holding of *Gatliff*. In *Gatliff*, we held that a finding of dangerousness is "always true in arson of an occupied structure," because the use of fire is an element of the arson offense. *Id.* at 365, ¶ 16, 102 P.3d at 984 (emphasis in original). Accordingly, we hold the trial court did not err by enhancing Dehar's sentence based on the dangerous nature of the offense.

CONCLUSION

¶25 For the foregoing reasons, we affirm Dehar's conviction and sentence.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
ANDREW W. GOULD, Judge

_____/s/_____
RANDALL M. HOWE, Judge