

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



DIVISION ONE
FILED: 1/3/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0539
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DOUGLAS ERIC ROSS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-130472-001

The Honorable Connie Contes, Judge

AFFIRMED

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

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By Natalee E. Segal
Attorneys for Appellant

D O W N I E, Judge

¶1 Douglas Eric Ross appeals his criminal convictions and sentences. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Ross was indicted for one count of burglary in the first degree, a class 2 dangerous felony (count 1); six counts of kidnapping, all class 2 dangerous felonies (counts 2-7); six counts of armed robbery, all class 2 dangerous felonies (counts 8-13); and one count of misconduct involving weapons, a class 4 dangerous felony (count 14). The charges stemmed from an armed robbery that took place at a Tempe home during a poker game.

¶3 Ross waived his right to counsel and represented himself at trial. A jury returned guilty verdicts on all counts. Ross was sentenced to 13 slightly aggravated terms of 17 years for counts 1-13 and a presumptive 10-year term for count 14. The sentences were ordered to run concurrently, with 390 days' presentence incarceration credit.

¶4 Ross timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21, 13-4031, and -4033.

DISCUSSION

¶5 Ross raises one issue on appeal. He contends the superior court failed to "respond meaningfully" to a juror's question. Ross, however, did not object at trial, so we review

for fundamental error only. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citation omitted).

¶16 "To obtain relief under the fundamental error standard of review, [the defendant] must first prove error." *Id.* at 568, ¶ 23, 115 P.3d at 608. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* at 567, ¶ 19, 115 P.3d at 607 (internal quotation marks omitted).

¶17 On the fourth day of trial, the court received a juror question that read: "Can the jury recall a witness to the stand?" At that point, the jury had heard from eight prosecution witnesses, including six victims and two police officers. Out of the presence of the jury, the court consulted Ross and the prosecutor. The court stated, "I don't think the jury has the power to call witnesses. I think if they ask a more precise question, we might be able to address it. . . . Any objection?" Ross stated that he had no objection. The prosecutor agreed, stating, "as long as we tell them if they have a more precise question, we can answer that." The court thereafter read the juror question in open court and informed the jury:

I've discussed this with the parties. The jury does not have the subpoena power or the right to call witnesses. The parties have that. If there's a more precise question regarding specific information, I can address that with the parties, but the jury in terms of inherent powers does not have the right to call or recall a witness.

¶18 We find no error, fundamental or otherwise. Ross himself concedes the court "was correct that a jury has no subpoena power." The court complied with Arizona Rule of Criminal Procedure 18.6(e) ("Jurors shall be instructed that they are permitted to submit to the court written questions directed to witnesses or to the court"). After receiving the question, the court suggested a possible response and gave Ross (who had advisory counsel) an opportunity to be heard. The court advised jurors they could pose "a more precise question regarding specific information," if desired. Ross cites no authority for the proposition that the court was required to do more, and we are aware of none.

¶19 Additionally, Ross has failed to demonstrate prejudice arising from any arguable error. "To prevail under fundamental error analysis, [the defendant] must show that the error is so substantial that it goes to the foundation of the case and it caused him prejudice." *State v. Lucero*, 223 Ariz. 129, 134, ¶ 12, 220 P.3d 249, 254 (App. 2009).

¶10 Ross asserts he was deprived of his "right to a jury" and his "due process" right. However, he cites no legal authority for these conclusory claims. See *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (appellate courts generally do "not consider arguments posited without authority"). Moreover, even assuming that the juror who authored the question had a specific witness in mind, it is wholly speculative to assume that re-calling a prosecution witness would have assisted the defense. See, e.g., *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993) ("Speculation is not the stuff out of which constitutional error is made."); *State v. Martin*, 225 Ariz. 162, 166, ¶ 15, 235 P.3d 1045, 1049 (App. 2010) ("Speculative prejudice is insufficient under fundamental error review.").

CONCLUSION

¶11 For the reasons stated, we affirm Ross's convictions and sentences.

/s/

MARGARET H. DOWNIE, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge