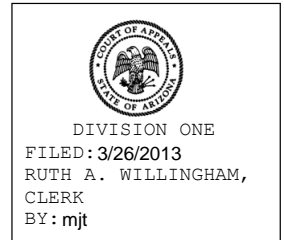


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 11-0561
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JAMES VAN HAGER,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-110918-001

The Honorable Joseph C. Kreamer, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Theresa M. Armendarez Manteo, NC
Attorney for Appellant

D O W N I E, Judge

¶1 James Van Hager appeals his convictions and sentences

for three counts of misconduct involving weapons. He contends the trial court deprived him of a fair and impartial jury by dismissing a juror after a verdict was reached and then denying his mistrial request. He also challenges a jury instruction regarding reasonable doubt. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 While jury deliberations were ongoing, the court received an unsigned note from a juror late in the day on Thursday, stating:

One of the jurors does not write in English and did not take any notes. She stated she understands but has not helped much in deliberation. Would this make a difference?

As the court and counsel were discussing how to respond, the jury announced it had reached a verdict. But when the bailiff went to get the jury, the foreperson asked: "[W]hat about my note?"

¶3 At defense counsel's urging, the court ultimately decided to instruct the jury to return on Monday. However, one juror reported that she had to report to work on Monday, and without objection, the court excused her. Coincidentally, the excused juror was the one referenced in the note. The court advised counsel it would call an alternate juror to come in on Monday.

¶14 The court subsequently decided it should accept the verdict and contacted the excused juror, asking her to return on Monday. Before accepting the verdict on Monday, though, the court learned that defense counsel had contacted this juror after she was excused, speaking with her briefly before learning she was "back on the jury." Based on this contact, the court once again excused the juror and ordered the jury to begin deliberations anew with an alternate juror.

¶15 Defense counsel requested a mistrial, arguing the juror had been improperly excused the preceding Thursday and that because a verdict had been reached, "beginning anew will simply render any verdict invalid." The court denied the mistrial request and sealed the original verdict.

¶16 The reconstituted jury deliberated and returned a guilty verdict on all three counts. The court sentenced Hager to concurrent terms of 4.5 years in prison on each count. Hager filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

¶17 Hager contends the court erred by dismissing the juror on Thursday "without a reasonable ground to believe [she] could not render a fair and impartial verdict," in violation of his right to a fair and impartial jury. Because Hager did not object to the dismissal of the juror, we review the court's

action for fundamental error only. See *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Hager bears the burden of establishing that there was error, that it was fundamental, and that the error caused him prejudice. *Id.* at ¶¶ 23, 26.

¶8 The court did not excuse the juror because she could not be fair or impartial or for any reason relating to her views of the case. It excused her based on "undue hardship" in returning to court the following Monday. The court later decided it had erred "because even if I was going to decide simply to take the verdict, we needed her here to poll the jury or I needed her to come back to make a record if I was going to dismiss her for cause or bring in an alternate juror, and I didn't do that."

¶9 Hager has not established that any error in excusing the juror was of such magnitude that it deprived him of a fair trial, as required for fundamental error. See *Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608 (citation omitted). "[A] defendant's right to a fair and impartial jury does not entitle him to be tried by any particular jury, and, unless the record affirmatively shows that a fair and impartial jury was not secured, the conviction must be affirmed." *State v. Evans*, 125 Ariz. 140, 142-43, 608 P.2d 77, 79-80 (App. 1980). The first verdict, reached by the jury that included the later-excused

juror, was also guilty on all counts. And due to the juror's communication with defense counsel after initially being excused, the court properly excused her again when she returned on Monday.¹

¶10 Hager has not identified anything in the record suggesting the jury that decided his case was anything but fair and impartial. Speculation cannot establish a basis for reversal on fundamental error review. See *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006).

¶11 Hager also argues the court abused its discretion in denying his mistrial request. We disagree. 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. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (internal quotation marks omitted). We review the denial of a motion for mistrial for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000) (citation omitted).

¶12 We find no abuse of discretion. The court appropriately instructed the reconstituted jury to begin deliberation anew and not to "consider any part of your prior deliberations and/or discussions" or "speculate or guess about

¹ Defense counsel conceded below that his contact with the juror "shows unintentionally the appearance of some impropriety."

the reasons for this change" in jury composition. See Ariz. R. Crim. P. 18.5(h) ("In the event a deliberating juror is excused due to inability or disqualification to perform required duties, the court may substitute an alternate juror" and instruct the jury "to begin deliberations anew"). We presume the jury followed this instruction. *State v. Morris*, 215 Ariz. 324, 337, ¶ 55, 160 P.3d 203, 216 (2007) (citation omitted).

¶13 Finally, Hager argues the reasonable doubt instruction approved in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), is unconstitutional and that the trial court erred by giving it. Our supreme court has repeatedly rejected such claims. See, e.g., *State v. Dann*, 220 Ariz. 351, 365, ¶ 65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, 66-67, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Lamar*, 205 Ariz. 431, 440-41, ¶¶ 48-49, 72 P.3d 831, 840-41 (2003) (and cases cited therein). We are bound by supreme court decisions and have no authority to modify or disregard them. *State v. Smyers*, 207 Ariz. 314, 318 n.4, ¶ 15, 86 P.3d 370, 374 n.4 (2004).

