DIVISION ONE
FILED: 6/27/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 12-0183
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
RENETTA KING, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Coconino County

Cause No. S0300CR201000692

The Honorable Joseph J. Lodge, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Section Chief Counsel, Criminal Appeals/Capital Litigation Section
and Matthew H. Binford, Assistant Attorney General
Attorneys for Appellee

Coconino County Public Defender — Flagstaff
By H. Allen Gerhardt
Attorneys for Appellant

G E M M I L L, Judge

¶1 Renetta King appeals her convictions and sentences imposed for two counts of the sale or transfer of dangerous drugs. For the reasons that follow, we affirm the convictions

and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdict. *State v. Cox,* 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007).

¶3 On June 28, 2010, King sold .67 grams of methamphetamine to a police informant in Flagstaff. King received the money from the informant and directed an 18 year-old, C.A., to deliver the drugs. The drug sale was captured on video by a concealed camera worn by the informant. The transaction was also videotaped by undercover police officers who were parked nearby monitoring the situation through a listening device. Two days later, King sold the informant an additional 1.27 grams of methamphetamine. This transaction was also observed and videotaped by police officers.

¶4 King was charged with two counts of the sale or transfer of dangerous drugs (methamphetamine), class two felonies under Arizona Revised Statutes ("A.R.S") section 13-3407(A)(7) (Supp. 2012).[1] At trial, the jury was presented video, audio, and photographs of both transactions. The jury convicted King on both counts and the trial court sentenced King

[1] King was charged with a third count for the sale of dangerous drugs committed on August 12, 2010, which was combined with the first two charges for purposes of trial. The jury found King not guilty on this third count.

to consecutive five year terms. King timely appeals. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1)(2003) and 13-4033(A)(1)(2010).[2]

DISCUSSION

¶5 On appeal King argues that prosecutorial misconduct and structural error require reversal, and, alternatively, that the trial court erred in imposing consecutive sentences.

¶6 King first argues the State committed prosecutorial misconduct when the prosecutor filed a memorandum with the court which cited an unpublished decision. On the second day of trial, the State filed a memorandum as a response to the defense counsel's argument that the State had improperly shifted the burden of proof to the defense. The memorandum discussed several decisions bearing on the issue including an unpublished decision by this court. The motion conceded that this case "does not create binding precedent and is a memorandum opinion, however the State felt it was instructive on the issue before the court."

¶7 "A defendant seeking reversal of a conviction for prosecutorial misconduct must establish that (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the

[2] We cite the current version of statutes when no material revisions have occurred since the events in question.

misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Dixon*, 226 Ariz. 545, 549, ¶ 7, 250 P.3d 1174, 1178 (2011) (internal citation omitted and quotations omitted). In addition, reversal is only required if misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Hughes,* 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998).

¶8 This incident involving the citation of an unpublished decision does not constitute prosecutorial misconduct requiring reversal. King provides no legal support for the contention that citing a memorandum decision constitutes prosecutorial misconduct requiring reversal. More importantly, because the citation was in a memorandum to the court, it was viewed only by the court and defense counsel. There is no likelihood that it affected the jury's verdict.[3]

¶9 Next, King argues both structural error and prosecutorial misconduct because the court began a trial proceeding without the presence of defense counsel and the prosecutor failed to make an objection. On the morning of the

[3] Although we conclude the citation in this case does not constitute prosecutorial misconduct, we note that it remains inappropriate under our rules. Arizona Rule of Criminal Procedure 31.24 states memorandum decisions may be cited for only two reasons: 1) to establish res judicata or similar defenses, and 2) to inform an appellate court of such a decision so that "it can decide whether to publish an opinion." *See also* Ariz. R. Sup. Ct. 111(c). The state did not cite the memorandum decision for either of these reasons.

fifth day of trial, the defense counsel was absent when the court was ready to begin. The court convened at 10:10 a.m. With the jury present, the court addressed the prosecutor on the record stating, "I understand you've tried Mr. James on his cell phone several times." The prosecutor responded that she had called the defense counsel but she did not speak to him. At that point, King volunteered that when she had spoken to the defense counsel earlier "he had [the time] down for 10:30." The judge commented that although the court calendar had 10:30, he had informed everyone they would begin at 10:00, and "apparently . . . at least 14 people . . . got the message." The judge then decided to call the defense counsel from the bench, remarking "this might be fun." The judge called defense counsel in the hearing of the jury, and defense counsel told the court he would "be right there." After the phone call ended, one of the jurors remarked that the judge should have told defense counsel, "love and kisses," to which the judge responded, "Yeah, I'm a love-and-kisses kind of guy." At 10:14, the court recessed the proceedings until defense counsel arrived.

¶10 A criminal defendant has a right to counsel at all critical stages of the criminal process. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24; *State v. Moody,* 208 Ariz. 424, 445, ¶ 65, 94 P.3d 1119, 1140 (2004). The United States Supreme Court has "found constitutional error without any showing of prejudice

when counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Chronic,* 466 U.S. 648, 659 n.25 (1984). Initially, we note that King does not argue, nor does the record show, that she suffered "anything approaching a total absence of counsel." *State v. McKinney,* 185 Ariz. 567, 573, 917 P.2d 1214, 1220 (1996) (holding Rule 609 hearing not a critical stage of trial), *superseded by statute on other grounds*. Accordingly, King is entitled to a presumption of prejudice only if defense counsel was absent from a critical stage of the trial. *Id.* A critical stage is one where the substantial rights of the accused may be affected. *State v. Conner,* 163 Ariz. 97, 104, 786 P.2d 948, 955 (1990) (citations omitted).

¶11 In this case, King was not denied her right to counsel at a critical stage in the criminal process. In fact, the record reflects that the court recessed the proceedings when the court determined that defense counsel would be late. During the defense counsel's absence there was no discussion or activity that affected King's substantial rights. *Cf. Conner,* 163 Ariz. at 104, 786 P.2d at 955 (concluding presence of defense counsel is required at interrogation prior to the withdrawal of a plea agreement). The short time that defense counsel was absent was not a "critical stage" of King's trial. *See U.S. v. Olano,* 62 F.3d 1180, 1193 (9th Cir. 1995) (concluding defendant's right to

counsel was not violated when his attorney arrived late to a mid-trial conference). The prosecutor did not attempt to persuade the court to continue without defense counsel and she had apparently called defense counsel to inquire about his whereabouts. We do not perceive structural error, fundamental error, or prosecutorial misconduct here. And although we do not find reversible error, we do not approve of a trial court making inappropriate, sarcastic, or disparaging remarks in the presence of the jury about defense counsel and counsel's timeliness. If critical or constructive comments are deemed necessary, we encourage the making of such comments outside the presence of the jury, to avoid any possible prejudice to the defendant.

¶12 Lastly, King argues the court erred in imposing consecutive sentences based on a misunderstanding that A.R.S. § 13-711(A) (2010) creates a presumption that sentences run consecutively. A trial court has broad discretion in sentencing and if the sentence imposed is within the statutory limits, we will not disturb the sentence unless there is a clear abuse of discretion. *State v. Cameron*, 146 Ariz. 210, 215, 704 P.2d 1355, 1360 (App. 1985). A refusal or failure to exercise discretion constitutes an abuse of discretion. *State v. Garza*, 192 Ariz. 171, 175, ¶ 16, 962 P.2d 898, 902 (1998).

¶13 After trial, the parties each filed sentencing memoranda. King advocated for concurrent sentences on the

charges, while the State requested consecutive sentences. At sentencing, both counsel agreed that the presumptive term for each count of the sale or transfer of dangerous drugs was ten years. *See* A.R.S. § 13-3407(E).[4] At sentencing, defense counsel confirmed that "regarding the concurrent versus consecutive, that [issue] is entirely in the court's discretion." The court proceeded to sentence King to consecutive five year (mitigated) prison terms.

¶14 When multiple sentences of imprisonment are imposed at the same time, A.R.S. § 13-711(A) provides that the "sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence." It is well settled that this statute does not create a presumption in favor of consecutive sentences. *See Garza,* 192 Ariz. at 174, ¶ 10, 962 P.2d at 901. Trial judges are presumed to know the law and apply it in making their decisions. *State v. Medrano,* 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996). Because King failed to raise this issue below she has forfeited all but fundamental error review on appeal. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

[4] The sentencing chart under A.R.S. § 13-3407(E) (formerly § 13-709.03) imposes a minimum sentence of 5 calendar years, a presumptive of 10 calendar years, and a maximum of 15 calendar years for each count.

¶15 King does not argue, nor have we independently found, that any fundamental error occurred in sentencing. The five-year terms for each count are mitigated and within the allowable sentencing range. King does not point to any discussion in the record to suggest that the court failed to understand its discretion in imposing consecutive sentences. In fact, at sentencing, the arguments from counsel made it very clear that the court had the discretion to order the sentences to be served consecutively or concurrently.

¶16 King also points to the court's statement that the "infinite wisdom" of the State required it to "give Miss King twenty years in prison" as an indication that the court misunderstood its discretion. This statement, however, was offered as clarification to a witness at the sentencing hearing and does not mean that the court abused or misunderstood its discretion. We note, also, that the court did not follow the "recommendation" of the State and imposed a more lenient overall sentence than the State requested. Accordingly, this case is distinguishable from those in which the record clearly reveals a misunderstanding of the law. *See State v. Stroud,* 209 Ariz. 410, 414, ¶¶ 20-21, 103 P.3d 912, 916 (2005) (finding error where court relied on defendant's erroneous statement that consecutive sentences were required); *Garza,* 192 Ariz. at 174, ¶ 14, 962 P.2d at 902 (finding error where trial court "wrongly

felt . . . confined by a non-existent presumption"). We accordingly find no abuse of discretion in the imposition of consecutive sentences.

CONCLUSION

¶17 For the foregoing reasons, we affirm the convictions and sentences.

_____/S/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Presiding Judge

_____/S/_____
MICHAEL J. BROWN, Judge