IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DALE EDWARD GIBSON, *Appellant*.

No. 1 CA-CR 17-0112
FILED 7-31-2018

Appeal from the Superior Court in Yavapai County
No. P1300CR201201052
The Honorable Tina R. Ainley, Judge
The Honorable David L. Mackey, Judge
The Honorable Michael Bluff, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

M. Alex Harris PC, Chino Valley
By M. Alex Harris
Counsel for Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Chief Judge Samuel A. Thumma and Judge Michael J. Brown joined.

T H O M P S O N, Judge:

¶1 Dale Edward Gibson appeals his convictions and sentences for manslaughter and aggravated assault. Gibson argues the trial court erred when it failed to preclude the state's in-court demonstration for lack of proper notice, failed to disqualify the Yavapai County Superior Court (YCSC) and Yavapai County Attorney's Office (YCAO), rejected a claim that the lead detective's misconduct tainted the proceedings, sentenced Gibson as a dangerous, repetitive offender, and requested that the jury continue with deliberations. For the following reasons, we affirm the convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 On September 26, 2012, Gibson attempted to receive treatment for a knee injury, but was turned away. When he arrived back at the home he shared with his girlfriend, S.H., and their roommate, J.B., Gibson appeared frustrated and "out of control." Gibson started drinking alcohol with J.B. and S.H.'s brother, J.M. Multiple witnesses saw Gibson carrying a firearm that day.

¶3 As the night progressed, Gibson complained of knee pain and J.B. agreed to drain fluid from Gibson's knee with a hypodermic needle. After inserting the needle in Gibson's knee, J.B. indicated he could not go through with the procedure. Angered, Gibson hit J.B. with a chair and chased him with a mop. As J.B. fled the home, Gibson pulled out his firearm and yelled, "I'm going to kill that motherfucker." S.H. attempted to stop Gibson, but he threw her to the ground.

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[1] We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

¶4 A neighbor, J.H., saw Gibson follow J.B. outside, place him in a headlock, and shout, "I'll blow your goddamn head off."[2] J.H. heard a gunshot and J.B. fell to the ground. The medical examiner would later determine that J.B. was shot through the back of the neck and killed nearly instantly.

¶5 Gibson asked S.H. to tell officers she committed the murder, but she refused. Gibson called 911, told the dispatcher he shot J.B. out of self-defense, and later provided a similar story to officers.

¶6 The state charged Gibson with one count of first degree murder, two counts of aggravated assault, and two counts of disorderly conduct.[3] Prior to trial, the state alleged that Gibson had thirteen prior felony convictions and that aggravating factors applied.

¶7 The jury found Gibson guilty of one count of the lesser included offense of manslaughter, one count of aggravated assault, and not guilty of the remaining counts. Based on the sentencing enhancements proven by the state, the trial court sentenced Gibson to a total of 60 years' imprisonment.

¶8 Gibson filed a timely appeal and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2018), 13-4031 (2018), and -4033(A)(1) (2018).[4]

DISCUSSION

A. In-Court Demonstration

¶9 Gibson argues the trial court erred in permitting the state's medical examiner to use an in-court demonstration without prior notice.

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[2] Although J.H. passed away prior to trial, the state played his video deposition, his 911 call, and his son's 911 call.

[3] The original indictment listed one count of aggravated assault and included misconduct involving weapons and tampering with a witness counts. The state added a second count of aggravated assault and the parties stipulated to trying the misconduct involving weapons and tampering counts separately.

[4] We cite the current version of any statute unless the statute was amended after the pertinent events and such amendment would affect the result of this appeal.

Gibson further asserts the trial court erred in permitting the use of a demonstration that inaccurately depicted the evidence.

¶10 Prior to trial, the state properly disclosed William Stano, M.D., deputy chief medical examiner with the Yavapai County Medical Examiner's Office, as a potential trial witness. The state also filed a notice that it disclosed all autopsy reports and photographs to Gibson and those items would likely be used at trial. Gibson conducted a pretrial interview of Dr. Stano.

¶11 At trial, Dr. Stano testified that the autopsy of J.B. revealed that "the bullet traveled through the back of the neck in a back-to-front direction; it also went from left to right . . . towards the right side of the face." Dr. Stano used autopsy photographs to demonstrate the trajectory of the bullet. The state then asked Dr. Stano to demonstrate the bullet's trajectory with a styrofoam mannequin head and a ballistic rod. Dr. Stano agreed that the mannequin head was a "reasonable approximation of a human head" and he inserted the ballistic rod into the mannequin to demonstrate the path of the bullet.

¶12 Gibson objected to Dr. Stano's use of the mannequin and moved to strike related testimony, arguing the state failed to disclose their use of the mannequin as an in-court demonstration. Gibson, however, did not object to the mannequin as an inaccurate depiction of the evidence. The trial court refused to strike Dr. Stano's testimony, adding the mannequin could only be used for demonstrative purposes, would not be admitted as evidence, and would not be considered by the jury during deliberations. On cross-examination, the medical examiner testified that the state told him there was a possibility of having an in-court demonstration, but he had never seen the mannequin prior to testifying that day.

¶13 We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, 373, ¶ 122 (2009). We review a trial court's decision to impose sanctions for a disclosure violation for an abuse of discretion. *State v. Stewart*, 139 Ariz. 50, 59 (1984). If a defendant fails to make a particularized objection, we review for fundamental error. *Payne*, 233 Ariz. at 502-03, ¶ 49.

¶14 We have long held that expert testimony is permissible in cases where an expert's specialized knowledge may assist the jury in understanding the evidence or a fact at issue. *See* Ariz. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993); *State v. Escalante-Orozco*, 241 Ariz. 254, 275, ¶ 57 (2017). Likewise, a trial court may permit an in-

court demonstration if it is both relevant and similar to the evidence being duplicated. *See* Ariz. R. Evid. 402; *State v. Mincey*, 130 Ariz. 389, 408 (1981); *State v. Burkheart*, 106 Ariz. 490, 491 (1970).

¶15 Under Arizona Rule of Criminal Procedure 15.1(b)(4), the state must disclose names of its experts, as well as the results of "tests, experiments or comparisons that have been completed."[5] Similarly, Rule 15.1(b)(5) requires that the state disclose an exhibit list of all "tangible objects that the prosecutor intends to use at trial . . . ." Rule 15.1 does not, however, require that the state provide a play-by-play description of its case-in-chief and non-compliance with the rule does not always merit preclusion. *See State v. Guerrero*, 119 Ariz. 273, 276 (App. 1978). The trial court has the discretion to "impose any sanction it finds appropriate" for late disclosure and preclusion is an extreme sanction. Ariz. R. Crim. P. 15.7(a); *see also State v. Towery*, 186 Ariz. 168, 186 (1996); *State v. Smith*, 140 Ariz. 355, 359 (1984). This is particularly true where the exhibit is being used solely for demonstrative purposes. *E.g, State v. Cornman*, 237 Ariz. 350, 356, ¶¶ 23-25 (App. 2015).

¶16 Here, the state disclosed all relevant expert reports and photographs, and gave Gibson the opportunity to conduct a pretrial interview. Gibson had access to all evidence associated with Dr. Stano's use of the mannequin as an in-court demonstration. Moreover, Dr. Stano's use of the mannequin directly reflected information from his autopsy report and photographs, both of which were admitted as evidence. Any harm to Gibson by the state's failure to disclose the mannequin was minimal and speculative at best and the state's in-court demonstration was properly limited. Thus, we find no abuse of discretion in permitting the state to use the mannequin solely for demonstrative purposes.

B. Ex Parte Communications

¶17 Gibson argues the trial court erred in failing to disqualify YCSC and YCAO after the judge and the state's attorney engaged in ex parte communications.

¶18 While the jury was deliberating, at the conclusion of a meeting between the judge and counsel for the state and Gibson, the judge and the

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[5] Although Rule 15.1 and Rule 15.7 were amended in 2017, the 2016 versions were still in effect during this trial.

state's attorney spoke privately regarding the attorney's performance during trial. The judge provided trial advocacy "pointers" regarding the attorney's work in this case.[6] The judge did "99 percent of the talking," she did not reference the sentencing or aggravation phase, and the attorney did not believe the conversation gave him "an advantage." The judge informed the presiding judge of the conversation, recused herself, and the presiding judge reassigned the case to his division.

¶19 Gibson moved to disqualify YCSC and YCAO, arguing the ex parte communications tainted the entire court and prosecution agency. Another judge with no prior knowledge of the case held an evidentiary hearing and denied Gibson's motion, finding that the presiding judge should not be disqualified and the state "didn't gain any special knowledge" from the conversation. The judge, however, found that the state's attorney must be removed from the case and prohibited him from discussing the details of the ex parte conversation. The presiding judge and another attorney from YCAO handled the aggravation and sentencing phase.

¶20 We review a trial court's denial of a motion to disqualify for an abuse of discretion. *State v. Martinez*, 230 Ariz. 208, 220, ¶ 64 (2012). Under the Arizona Code of Judicial Conduct, judges must avoid the appearance of impropriety and act "in the independence, integrity, and impartiality of the judiciary." Ariz. R. Sup. Ct. 81, Canon 1.2. Judicial impartiality is maintained by the prohibition against ex parte contact with an interested party outside the presence of counsel during a pending case. Ariz. R. Sup. Ct. 81, Canon 2.9(A). Similarly, under the Rules of Professional Conduct, attorneys must not "seek to influence a judge" by way of ex parte communications or "knowingly assist a judge . . . in conduct that is a violation of applicable Code of Judicial Conduct." Ariz. R. Sup. Ct. 42, ER 3.5(a)-(b); Ariz. R. Sup. Ct. 42, ER 8.4(a), (f); *see also Matter of Bemis*, 189 Ariz. 119, 121 (1997) (finding an attorney's attempts to meet with two judges ex parte during a pending case violated ethical rules).

¶21 Disqualification can be an appropriate remedy where there is some concern the ex parte contact has improperly influenced the judge. *See* Ariz. R. Sup. Ct. 81, Canon 2.11(A); *State v. Valencia*, 124 Ariz. 139, 141 (1979) (finding disqualification appropriate where sentencing judge spoke ex

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[6] The judge added that she supervised the state's attorney at YCAO prior to becoming a judge, this relationship did not impact her decision to provide advice, and that she would have given similar advice to Gibson's counsel after the trial was over.

parte with the victim's relative). We have held, however, that ex parte communications do not automatically require disqualification. In *McElhanon v. Hing*, 151 Ariz. 403, 411 (1986), the Arizona Supreme Court held that the judge "never lost the appearance of impartiality" and disqualification was not required, even though ex parte contact occurred prior to the close of testimony. The Court noted that the judge made "efforts to remain neutral" by consulting with the presiding judge, the contact occurred outside the presence of the jury, and the record showed no signs of bias or prejudice. *Id.*; *see also Alexander v. Superior Court In & For Maricopa Cty.*, 141 Ariz. 157, 165 (1984) (looking to similar factors in determining whether "appearance of impropriety" concerns required disqualification of counsel).

¶22 In this case, the record shows that the ex parte contact occurred between the original judge and state's attorney, after the close of testimony, and outside the presence of the jury. This ex parte contact should not have occurred. Realizing that after the fact, the trial judge properly consulted with the presiding judge and immediately recused herself. Prior to any remaining substantive proceedings, the state's attorney was disqualified. The record indicates that any possible side effects of ex parte contact lived and died with the original judge and state's attorney. The presiding judge and the new state's attorney were not privy to the ex parte conversation and the state did not gain any advantage from the conversation. Although we in no way condone the judge's behavior, any bias or prejudice created by the ex parte contact dissipated the moment the judge recused herself. Thus, the trial court did not abuse its discretion in rejecting Gibson's motion to disqualify the entire YCSC or YCAO.

C. Newly Discovered Evidence

¶23 Gibson argues the trial court erred in denying his motion for a new trial, contending that the lead detective's behavior "corrupted" the proceedings and the state failed to adequately disclose the detective's misconduct.

¶24 During the aggravation phase, the state's attorney informed the trial court that one of the lead detectives, Detective M.K., was placed on administrative leave. Detective M.K. did not testify during the aggravation phase. Prior to sentencing, the state requested an in camera review of Detective M.K.'s personnel file, notified the parties that the detective had

formally resigned, and added the detective to its *Brady*[7] list. The state also disclosed that the incident giving rise to the internal investigation occurred in April 2016 and involved Detective M.K.'s failure to properly impound evidence and his provision of false information during the internal investigation.

¶25 Although the trial court reviewed the personnel file, Gibson moved for a new trial claiming a *Brady* violation. The trial court held an oral argument where Gibson argued the detective's unethical behavior "permeated" the investigation and trial. Based on its review of the personnel file, the trial court provided the following timeline: 1) the trial started on March 3, 2016; 2) Detective M.K.'s testimony ended on April 7, 2016, 3) the incident causing the internal investigation occurred on April 9, 2016, 4) the jury returned its verdict on April 18, 2016; 5) the internal investigation commenced on April 19, 2016; and 6) the state disclosed that Detective M.K. was under investigation on April 20, 2016. The trial court added the fact that the investigation of Gibson's case "was poorly done and poorly handled by [Detective M.K.] was thoroughly addressed in cross-examination" at trial. The trial court denied Gibson's motion for a new trial, finding that further impeachment based on the new internal investigation would have likely been cumulative, Detective M.K.'s testimony was not critical to the case, and the new evidence would not have changed the verdict.

¶26 We review a trial court's ruling on a motion for a new trial based on newly discovered evidence for an abuse of discretion. *State v. Serna*, 167 Ariz. 373, 374 (1991). The ruling in *Brady* established that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. *Brady* recognized the state's duty to disclose evidence so material to the case that, if presented to the jury, has the potential to create reasonable doubt. *United States v. Agurs*, 427 U.S. 96, 112 (1976). Under *Brady* and its progeny, this duty extends to evidence known only to police, evidence not requested by a defendant, and to impeachment and exculpatory evidence alike. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Kyles v. Whitley*, 514 U.S. 419, 419-21 (1995); *United States v. Bagley*, 473 U.S. 667, 667-68 (1985).

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[7] *See Brady v. Maryland*, 373 U.S. 83 (1963).

¶27 When considering newly discovered evidence, we also look to the United States Supreme Court's ruling in *Giglio v. United States*, 405 U.S. 150, 154 (1972). In *Giglio*, the Court held that a new trial is required if there is a reasonable likelihood the evidence could have impacted the verdict. *Id.* Moreover, the "reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Id.* (citation omitted). Courts, however, have declined to apply *Brady* and *Giglio* in cases where the evidence in question does not exist prior to trial. *See DeMarco v. United States*, 415 U.S. 449 (1974); *United States v. Sanchez*, 251 F.3d 598, 603 (7th Cir. 2001); *United States v. Ramirez*, 608 F.2d 1261, 1267 (9th Cir. 1979).

¶28 Here, the record shows that the incident triggering the internal investigation occurred after Detective M.K. testified, the state notified Gibson when the investigation commenced, and Gibson thoroughly cross-examined the detective. As the trial court indicated, the detective's testimony was not necessarily critical in a case involving multiple eye witnesses and corroborating physical evidence. Although details of the internal investigation would have been relevant impeachment evidence, the new evidence alone would not have changed the jury's verdict. Thus, the newly discovered evidence in this case does not meet the materiality requirement in both *Brady* and *Giglio*. The trial court did not err in denying Gibson's motion for a new trial.

D. Sentencing Enhancement

¶29 Gibson asserts the trial court erred in sentencing him under the dangerous, repetitive offender sentencing range. The jury found Gibson guilty of manslaughter, a class 2 felony, and aggravated assault, a class 3 felony and a dangerous offense. Based on the jury's findings, the trial court recognized that at least two aggravating factors applied to each offense. Out of Gibson's thirteen prior felony convictions, the trial court found that at least three prior felony convictions were historical prior felony convictions that could be used for sentencing him as a repetitive offender and at least four prior felony convictions qualified as additional aggravating factors. *See* A.R.S. §§ 13-703(C), (J) (2012); A.R.S. § 13-701(D)(11), (24) (2012).[8] The trial court noted that none of the prior felony convictions represented dangerous, repetitive offenses.

[8] For sentencing purposes, the trial court used the 2012 versions of A.R.S. §§ 13-701 and -703.

¶30 The trial court sentenced Gibson under the category three non-dangerous, repetitive offender sentencing range pursuant to A.R.S. § 13-703 for both offenses. The trial court sentenced Gibson to 35 years' imprisonment for the manslaughter offense, to run consecutively to the aggravated assault offense. The trial court then sentenced Gibson to 25 years' imprisonment for the aggravated assault offense. The sentencing minute entry also specified that Gibson was sentenced as a non-dangerous but repetitive offender to aggravated, consecutive prison terms.

¶31 Gibson did not object to the sentencing range used by the trial court, nor did he suggest the trial court mistakenly applied the dangerous, repetitive sentencing range. Therefore, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005).

¶32 Contrary to Gibson's argument, the record shows the trial court sentenced him under the category three non-dangerous, repetitive offender sentencing range. Moreover, the trial court imposed the aggravated terms of 35 and 25 years' imprisonment, as set forth in A.R.S. § 13-703. *See* A.R.S. § 13-703(J) (category three non-dangerous, repetitive sentencing range); A.R.S. § 13-703(G) (aggravating factors needed to impose aggravated term).

¶33 Based on Gibson's prior felony convictions and the aggravating circumstances of the offenses, the trial court did not err in imposing aggravated terms under the category three non-dangerous, repetitive sentencing range. *See State v. Trujillo*, 227 Ariz. 314, 322, ¶ 37 (App. 2011) (holding the trial court may "select between the dangerous and repetitive sentencing options.").

E. Jury Deliberations

¶34 Gibson argues the trial court erred in requesting that the jury continue deliberating after a request that one juror be replaced by an alternate juror and indicated the jurors were split eleven to one. Gibson asserts that the trial court improperly pressured the jury to reach a verdict and failed to provide an impasse instruction.

¶35 The morning of the third day of jury deliberations, a juror provided the trial court with the following question:

> Is it possible to call the alternate juror to cover me in taking the final decision? This was just because we were 11 jurors against one and I don't think we are going to make this juror

> change her mind[.] I am not willing to come back to continue arguing the case with just this only juror.

¶36 After the court reviewed the juror question with the parties, the state asked that the trial court inform the juror that they may not be replaced by an alternate juror. Although Gibson agreed with the state, he requested that the trial court "bring the jury in and have the Foreman inform us whether or not further deliberations are fruitful or whether or not they're hung, because I want to make sure we're not coercing any juror." The state argued that an impasse instruction would be premature, but did not object to the trial court making a general inquiry regarding the status of deliberations. Both Gibson and the state cited *State v. Cruz*, 218 Ariz. 149 (2008), in making their recommendations.

¶37 Based on the ruling in *Cruz*, the trial court responded to the juror question with the following: "[i]t's not possible to replace a juror at this time with an alternate. And at this time I would ask you to continue your deliberations to attempt to resolve any differences." The court noted that this response was not "singling anybody out" or commenting on their deliberation status. The court denied Gibson's request to provide an impasse instruction, but added, "if they are at an impasse, we'll probably hear back from them fairly soon and that's when I would go to the next step." Gibson objected to the court providing the jury with a "let's-soldier-on instruction." That same day, prior to the afternoon recess, the jury returned a verdict and no impasse instruction was needed.

¶38 We review a trial court's decision to provide further instruction to the jury for an abuse of discretion. *Cruz*, 218 Ariz. at 167, ¶ 112. Reversible error occurs if the court improperly coerced the jury's verdict. *State v. McCrimmon*, 187 Ariz. 169, 172 (1996). Moreover, in making this determination, we must look to "the actions of the judge and the comments made to the jury based on the totality of the circumstances and attempts to determine if the independent judgment of the jury was displaced." *State v. Huerstel*, 206 Ariz. 93, 97, ¶ 5 (2003) (citations omitted).

¶39 When addressing issues of coercive conduct by the trial court during jury deliberations, we have found error where the court improperly suggested jurors reconsider their position during deliberation by singling out a "holdout" juror in an instruction, through ex parte communications, or during the polling process. *E.g., Huerstel*, 206 Ariz. at 97-101, ¶¶ 7-26 (2003); *McCrimmon*, 187 Ariz. at 172-74; *State v. Lautzenheiser*, 180 Ariz. 7, 9-11 (1994); *State v. McCutcheon*, 150 Ariz. 317, 320-21 (1986) (*McCutcheon I*).

¶40 In *Cruz*, the trial court received a juror question indicating there was an 11-1 numerical split between the jurors and asked, "[i]s this a hung jury? If so what happens next?" *Cruz*, 218 Ariz. at 166-67, ¶ 108. The trial court responded, "[a]t this time I would ask you to continue your deliberations to attempt to resolve any differences." *Id*. at 167, ¶ 109. The Arizona Supreme Court held that, even if the jury was hung, the trial court's instruction "did not improperly coerce or influence the jury. It neither asks the jury to reach a verdict nor suggests that any juror should change his or her views." *Id*. at 167, ¶ 115. Although the Court noted the trial court must use caution when it is both aware of the numerical split of jurors and tasked to provide an instruction to the jury, these facts alone do not constitute coercion. *Id*. at 167, ¶¶ 114-15.

¶41 Using the exact language from *Cruz*, the trial court requested that the jury continue deliberations without the use of an alternate juror. *See id*. at 167, ¶ 109. Nothing about the trial court's response asked that the jury reach a verdict, singled out a "holdout" juror, or suggested that a juror "change his or her views." *Id.* at 167, ¶ 115. Moreover, instead of providing what would have been a premature impasse instruction under Arizona Rule of Criminal Procedure 22.4, the trial court followed appellate precedent in providing a neutral response. *See Huerstel*, 206 Ariz. at 97-101, 99, ¶ 17 (holding the trial court erred when it gave the impasse instruction without evidence of an impasse). Under these facts, the trial court did not improperly coerce or influence the jury's verdict a nd it did not abuse its discretion in asking the jury to continue with deliberations.

CONCLUSION

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

AMY M. WOOD • Clerk of the Court
FILED: AA