IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

TARA SHERAE HATCHER, *Appellant.*

No. 1 CA-CR 17-0154
FILED 3-13-2018

Appeal from the Superior Court in Yavapai County
No. P1300CR201501013
The Honorable Michael R. Bluff, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

Law Offices of Stephen L. Duncan PLC, Scottsdale
By Stephen L. Duncan
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Peter B. Swann and Judge James P. Beene joined.

T H O M P S O N, Presiding Judge:

¶1 Appellant, Tara Sherae Hatcher (Hatcher), appeals her convictions and sentences for hindering prosecution in the first degree, a class 5 felony; tampering with physical evidence, a class 6 felony; and conspiracy to commit tampering with a witness, a class 6 felony. *See* Ariz. Rev. Stat. (A.R.S.) §§ 13–1003 (2010) (conspiracy), –2804 (2014) (tampering with a witness), –2512 (2010) (hindering prosecution in the first degree), –2809 (2010) (tampering with physical evidence). Hatcher argues the trial judge should have recused himself from the case. She also contends the court erred in denying a motion for mistrial, in admitting text message evidence, and in permitting a minor witness's testimony. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On the night of July 26, 2015, Hatcher and X.C.[1] were riding as passengers in a Toyota 4-Runner driven by Hatcher's boyfriend, Joseph Charles Butitta (Butitta), when Butitta began following a pickup truck that had passed him. Butitta drove aggressively, repeatedly flashed his hi-beams on the truck, and eventually fired a handgun, hitting the truck several times. One of the bullets also struck a nearby house. None of the truck's occupants were injured.

¶3 Investigation led police to focus on a black 4-Runner parked behind Butitta's home. Butitta's neighbors informed police the vehicle belonged to Butitta, and that glass technicians had visited Butitta's home to replace the 4-Runner's windshield a day or two after the shooting. Neighbors additionally noted that Butitta typically parked the 4-Runner in the front drive-way.

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[1] X.C. is Joseph Charles Butitta's young son from a previous relationship.

¶4 After executing a search warrant on Butitta's home, officers found a document indicating Butitta's title and ownership of the 4-Runner, and a receipt for a handgun and ammunition matching the caliber of shells found at the crime scene. Officers also obtained text messages between Hatcher and Butitta, and Butitta and X.C.'s mother (M.C.), regarding the shooting. The messages between Hatcher and Butitta documented their attempt to prevent X.C. from discussing the incident, and included statements directing each other to delete communications about the shooting. Police also located the discarded windshield, and forensic testing confirmed the presence of gunshot residue on the driver's side. The state charged Hatcher with three felony counts: conspiracy to commit tampering with a witness; hindering prosecution in the first degree; and tampering with physical evidence. Hatcher and Butitta were tried together, and the jury found Hatcher guilty on the three charged counts. Hatcher received 30 days' incarceration, with one-day credit for time served; a suspended sentence; and 3 years' supervised probation. Hatcher timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12–120.21(A)(1) (2018), 13–4031 (2010), and –4033(A) (2010).

DISCUSSION

¶5 We view the facts in the light most favorable to upholding the verdicts and resolve all reasonable inferences against Hatcher. *See State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

I. Recusal/Judicial Bias

¶6 Hatcher claims the trial judge erred in failing to recuse himself, after she and her co-defendant, Butitta, requested he do so because of an alleged appearance of impropriety. Hatcher and Butitta based their request on the argument that the judge had a prior business and supposedly personal relationship with Butitta's aunt.

¶7 Butitta's aunt is a real estate agent who the judge remembered listing a commercial building with from January 2011 until October 2012. The property was not sold, and the judge explained he had not been in contact with Butitta's aunt since then, and that he had spoken to her "less than a half a dozen times." Defense counsel countered with a message from Butitta's aunt, which stated:

> I had his building listed in Clarkdale. [The trial judge] and his wife . . . got a divorce while I had the listing, so they split

> property and he kept the building. His brother works out of it. They own a construction company. I have been in the back offices of the [courthouse] . . . countless with [sic] [another judge]. . . . [The trial judge] always gives me a hug.

Beyond the message, Butitta's aunt had no other involvement in the case. She was neither a litigant, nor a witness.

¶8 The trial judge ultimately found no basis to withdraw, and additionally that the motion for recusal was untimely. We review for an abuse of discretion. *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 37 (App. 2005).

¶9 Pursuant to Arizona Rule of the Supreme Court 81, Canon 2.11, a judge must disqualify himself for ethical reasons where his "impartiality might reasonably be questioned." Disqualification is generally required when the judge's conduct gives rise to the appearance of impropriety. Ariz. Code of Judicial Conduct, Canon 2, R. 2.11 (Ariz. R. Sup. Ct. 81). Nonetheless, "[a] trial judge is presumed to be free of bias and prejudice." *State v. Hurley*, 197 Ariz. 400, 404, ¶ 24 (App. 2000). This presumption may be overcome when a party requesting recusal "set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced." *State v. Medina,* 193 Ariz. 504, 510, ¶ 11 (1999). The party requesting recusal must establish "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *In re Guardianship of Styer,* 24 Ariz. App. 148, 151 (1975).

¶10 Hatcher has not carried her burden to overcome the presumption. Hatcher fails to provide sufficient evidence to show how the alleged relationship between Butitta's aunt and the trial judge gave rise to any bias, ill-will, hostility, or favoritism towards Hatcher or the state. The fact that the property was not sold, or that the judge may have given hugs to Butitta's aunt, falls short, and are merely speculative regarding the issues of bias and prejudice.[2] We find the court did not abuse its discretion in denying the recusal request, and need not address the additional untimeliness basis for the denial.

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[2] A speculation of bias is insufficient to overcome the presumption. *See State v. Carver*, 160 Ariz. 167, 173 (1989).

II. Motion for Mistrial

¶11 Hatcher argues the trial court procedurally abused its discretion by delaying ruling on her motion for mistrial after the state allegedly improperly referenced evidence in its opening statement[3] that had not been admitted. Hatcher contends the delayed ruling was judicial overreaching. We find no abuse of discretion. *See State v. Adamson*, 136 Ariz. 250, 263 (1983) (stating a motion for mistrial is reviewed for an abuse of discretion).

¶12 As a preliminary matter, we consider whether it was improper for the state to refer to the relevant evidence, Exhibit 126, in its opening remarks. Given that Exhibit 126 was presented at trial, and we conclude *infra* it was admissible evidence, we find it was not improper for the state to refer to it. *See, e.g.*, *State v. Bowie*, 119 Ariz. 336, 339–40 (1978) (finding no error where evidence was referred to by the state in its opening remarks "because the remarks referred to crimes presently before the jury, and there was justification for believing [the] evidence . . . would be presented"). Additionally, any potential prejudice that may have resulted from the opening statement was cured by the court's instruction to the jurors, directing them to consider only evidence presented to them and that statements by the attorneys were not evidence. *See id.* at 340 ("Any possible prejudice from the opening statement was overcome by the court's cautionary instructions that evidence did not come from the attorneys and that the verdict must be determined only by reference to the evidence.").

¶13 We likewise disagree with Hatcher's claim that the court's decision to delay ruling on the motion for mistrial, until the state presented its case to see whether or not the evidence would have otherwise come in, amounted to judicial overreach. To support this argument, Hatcher cites *State v. Marquez*, 113 Ariz. 540 (1976), *State v. Aquilar*, 217 Ariz. 235, ¶ 10 (App. 2007), and *U.S. v. Dinitz*, 424 U.S. 600 (1976) for the proposition that "prosecutorial and judicial overreach can bar re-prosecution on double jeopardy grounds." However, these cases are factually distinct. *See Marquez*, 113 Ariz. at 542 (indicating double jeopardy bars re-prosecution

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[3] The opening statements are not in the record. However, the record indicates Hatcher's, and her co-defendant's, motion for mistrial after opening statements concluded. They argued that it was "improper for the State in its opening argument to tell the jurors what evidence is and indeed read the [text messages] to the jurors without [them] first having been received by the Court."

of a defendant who successfully seeks a mistrial due to prosecutorial or judicial overreach designed to cause or provoke a mistrial); *Aguilar*, 217 Ariz. at 238-39, ¶¶ 10–12 (same); *Dinitz*, 424 U.S. at 600, 611–612 (same). Hatcher cites no other authority, much less any authority to support an argument that the trial court could not delay its ruling on the motion. However, Rule 31 of the Arizona Rules of Criminal Procedure requires Hatcher to support her contentions with reasons and with citations of legal authorities. *See* Ariz. R. Crim. P. 31.10(a)(7)(A). Hatcher has failed to establish an abuse of discretion.

III. Admissibility of Exhibit 126[4]

¶14 Exhibit 126 set forth the following text messages between Hatcher and her co-defendant, Butitta:

> [Butitta]: I am so sorry Tara
>
> [Butitta]: I'm fucking freaking out babe
>
> [Butitta]: I'm so fucking stupid . . . God please don't let this catch up to me. Please
>
> [Hatcher]: This goes to the grave with us
>
> [Butitta]: I really hope so. I can't believe I [put] you guys through that. I'm a horrible father.
>
> [Hatcher]: Ot [sic] had to been [sic] a stolen vehicle. We just need to at this point manipulate X[C.]

[4] Two other exhibits, Exhibits 149 and 150, where challenged by Hatcher and Butitta at trial. On appeal, Hatcher does not challenge particular exhibits in her argument, but instead generally challenge the text messages. However, her opening brief's fact section identifies only Exhibit 126. Moreover, our review indicates that Exhibits 149 and 150 are more complete records relating to Hatcher's and Butitta's cell phones, from which a detective "carved out the relevant text messages" to create Exhibit 126. As we reject Hatcher's challenge to Exhibit 126, to the extent Hatcher's general objection concerns Exhibits 149 and 150, we also conclude Exhibits 149 and 150 were admissible.

[Butitta]: I'm just really really worried that someone got a look at my truck. I'm fucking terrified

[Butitta]: I just told him that we can't talk about that ever again and made him promise me

[Hatcher]: Yikes well all we can do is hope and pray he keeps his mouth shut

[Hatcher]: [It] probably wouldn't hurt to park your truck in the back for a while

[Hatcher]: Shit this isn't looking good on Prescott area uncensored

[Butitta]: I can't breathe

[Hatcher]: If someone was behind us then they would have had to [see] your logo but nothing is coming up about that, it will be forgotten about by tomorrow, people are gossiping at this point

[Butitta]: I really hope so baby. I'm fucking shaking uncontrollably and my chest hurts so bad. I'm so so so sorry tara.

[Butitta]: If all else fails I'm going to lie my ass off and say then [sic] the truck had [to have] been stolen cause we were home sleeping when that happened

[Hatcher]: I'm deleting all of them

[Butitta]: Headlight fixed

[Hatcher]: Delete all of our messages

[Hatcher]: Aubrey said the windshield is ordered but won't be here till [W]ed

[Hatcher]: Jared saw us with no headlight…

[Hatcher]: They . . . still think it's a jeep

[Hatcher]: Just don't ever feed into it. Tell her we've been practicing a lot (and we usually have some of the kids with

> us) due to all the bullshit that has been going on with break ins and car thefts and armed robberys [sic] and shootings, and that you sold it a few weeks ago cause you need money to move.
>
> [Hatcher]: At least your windshield comes tomorrow :)
>
> [Hatcher]: Delete all our messages
>
> [Butitta]: And deactivate your [Facebook account].
>
> [Hatcher]: I think I did, gonna try to sleep I'm home.

¶15 Hatcher argues the court erred in admitting the text messages because they were allegedly "uncorroborated" (lacked sufficient authentication and foundation as to the authors and recipients of the text messages). We review for an abuse of discretion, *State v. Chavez*, 225 Ariz. 442, 445, ¶ 5 (App. 2010), and find none.

¶16 Evidence is authenticated when there is "evidence sufficient to support a finding that the item is what its proponent claims it is." Ariz. R. Evid. 901(a); *see also State v. Damper*, 223 Ariz. 572, 576, ¶ 18 (App. 2010) (quotation omitted) (noting the superior court "does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could conclude that it is authentic").

¶17 Here, that the text messages were sent between phone numbers assigned to Hatcher and Butitta was established at trial by testimony and phone records admitted into evidence. Hatcher's phone was password protected, suggesting only she could access it for use. Butitta's ex-wife (C.C.) testified that Butitta never let anyone use his phone. And, the messages in Exhibit 126, directly and circumstantially identified Hatcher and Butitta as the individuals sending the messages. Accordingly, there was sufficient basis from which the jury could have reasonably concluded the messages contained in the exhibit were authentic, and were sent by Butitta and Hatcher. The court did not abuse its discretion in admitting Exhibit 126 into evidence at trial.

IV. Minor Witness Testimony

¶18 Hatcher contends the trial court erred in permitting minor—six years old—witness, X.C., to testify at trial. Hatcher argues (1) X.C. was incompetent to testify, and (2) the court was required to, but did not, *sua*

sponte conduct a preliminary inquiry to ascertain X.C.'s competence and reliability.

¶19 On appeal, we accord deference to a trial court's determination regarding a witness's competency to testify. *Zimmer v. Peters*, 176 Ariz. 426, 429 (App. 1993); *see also State v. Melendez*, 135 Ariz. 390, 394 (App. 1982). We will overturn the court's decision only if after review we conclude there has been a clear abuse of discretion. *See State v. Garner*, 116 Ariz., 443, 446 (1977). Questions of law are reviewed de novo. *See, e.g.*, *Stafford v. Burns*, 241 Ariz. 474, 481–82 (App. 2017) (citations omitted).

A. Whether the trial judge needed to conduct a preliminary Inquiry as to competence and reliability

¶20 The trial court was not required to conduct a preliminary inquiry to ascertain X.C.'s competence or reliability to testify. Hatcher cites A.R.S. § 12-2202(2) (2003), and *State v. Schossow*, 145 Ariz. 504, 507 (1985) to support her position that the court was required to undertake such an inquiry, however, her reliance on that decision is misplaced. **[OB at 14-15]**

¶21 Section 12-2202 expressly concerns the competency of witnesses in civil actions. Regarding minor witnesses, this section provides that "[c]hildren under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are to testify, or relating them truly []" shall not be witnesses in civil actions. A.R.S. § 12-2202(2). *Schossow* noted that the version of A.R.S. § 13–4061 (competency of a witness in a criminal matter) existing at the time made § 12–2202 applicable to criminal matters. *Schossow*, 145 Ariz. at 505 n.1. Accordingly, *Schossow* held that under § 12–2202, a trial court was required to *sua sponte* determine the competency of a child witness, under the age of ten. *Id.* at 507.

¶22 However, the version of A.R.S. § 13–4061 relied on by *Schossow* to extend § 12–2202 to criminal matters was amended in 1985. A.R.S. § 13-4061 (Historical Note). The current version of A.R.S. § 13-4061 does not reference § 12-2202, and provides that "[i]n any criminal trial every person is competent to be a witness." *See also Escobar v. Superior Court (Maricopa Cty.)*, 155 Ariz. 298, 302 (1987) (acknowledging the 1985 amendment to § 13–4061 and finding erroneous an argument that presumed a minor witness was incompetent to testify). Therefore, in the regard A.R.S. § 12–2202 was rendered applicable to criminal matters, that is no longer of merit.

¶23 Beyond X.C.'s competence, it was for the jury to assess X.C.'s reliability (or credibility). *See State v. Nottingham*, 231 Ariz. 21, 26, ¶ 12

(App. 2012) (acknowledging that it is the role of the jury, not the judge, to determine the reliability of a witness's testimony); *State v. Superior Court (Pima Cty.)*, 149 Ariz. 397, 401 (App. 1986) (holding it was for the jury to judge the minor witness's credibility).

B. Whether the court abused its discretion in allowing X.C. to testify

¶24 In challenging X.C.'s competence to testify, Hatcher highlights X.C.'s age of six years old, the nature of the proceedings—presumably that it is a criminal matter, that all questions were conducted by the state, and that the prosecutor nodded his head when asking X.C. questions. Hatcher also alleges X.C. provided contradictory answers as to whether or not he *would* tell the truth.

¶25 To clarify in the preliminary, as to the latter, X.C. relevantly first testified that he had told the truth to "Danny" about the shooting incident, but that he was not going to tell the truth in court. X.C. stated that he could not testify about what he had told Danny because [Butitta] instructed him not to do so. Nonetheless, at the end of his testimony X.C. testified that he had told the truth in court. Hatcher's qualm regarding whether or not X.C. intended to, or in fact told the truth, is a question that goes to X.C.'s credibility, not X.C.'s competence. As previously noted, the matter of credibility is for the jury to assess. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6 (App. 2004); *Pima Cty.*, 149 Ariz. at 401.

¶26 Regarding the prosecutor's head nodding, and that all questions of X.C. was conducted by the state,[5] Hatcher provides no authority indicating that either was impermissible. Nor does Hatcher denote how the matter goes to competence, and is not merely another issue of credibility.

¶27 In any event, the trial court's "observations" regarding X.C.'s testimony were that the state did not cross the line in soliciting answers from X.C., and "[t]here was clearly leading questions, but I think those are

[5] Hatcher's co-defendant, Butitta, requested that the state asked X.C. questions on his behalf, partly because he did not "want to antagonize the situation further."

allowed for a child his age."[6] We give great deference to the trial courts determination. *See State v. Winegar*, 147 Ariz. 440, 445 (1985) (noting great deference is given to the trial court's "determinations of conflicting procedural, factual or equitable considerations . . . because [it] has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and . . . can better assess the impact of what occurs before [it]") (internal quotation marks and citations omitted); *see also State v. Godsoe*, 107 Ariz. 367, 370–71 (1971) ("[I]t is not an abuse of discretion to permit leading questions to be asked of witnesses who are minors or where the delicate nature of the subject matter prevents detailed answers to general questions."). Even if either noted conduct amounted to error, Hatcher does not establish, or even argue, that she was prejudiced.

¶28 As to X.C.'s age and the nature of the proceedings, we have already indicated above, age does not determine a witness's competence to testify in a criminal proceeding. A.R.S. § 13–4061 ("In any criminal trial every person is competent to be a witness."); *see also Pima Cty.*, 149 Ariz. at 399 ("Neither age, mental capacity nor feeble-mindedness renders a witness incompetent to testify."). Instead, competency depends on a witness's ability to observe, recollect, and communicate about the event in question. *State v. Brown*, 102 Ariz. 87, 89 (1967). "In instances of extreme youth, to find a lack of competency, the judge must be convinced that no trier of fact could reasonably believe that the prospective witness could have observed, communicated, remembered or told the truth with respect to the event in question." *Pima Cty.*, 149 Ariz. at 401.

¶29 Pertinently, on appeal Hatcher does not directly argue there was an issue with X.C.'s ability to observe, recollect, or communicate about the shooting. In fact, X.C.'s testimony confirmed the occurrence of the shooting: X.C. testified his father, Butitta, shot a gun, that he told his mother about the shooting after it happened, and that he had spoken to prosecutors about the event, X.C. also testified that Hatcher was in the vehicle with them.

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[6] Although the trial court did not expressly make a finding regarding X.C.'s competency, we affirm a conviction even where the wrong reason leads to the right result. *See State v. Maldonado*, 164 Ariz. 471, 474 (App. 1990) (affirming conviction where "trial court reached the right result" but "for the wrong reason"); *State v. Cantu*, 116 Ariz. 356, 358 (App. 1977) ("Where the trial court announces the right result for the wrong reason this court will not reverse the judgment.").

¶30 We find the court did not abuse its discretion in permitting X.C. to testify, and Hatcher has failed to establish how X.C. was incompetent to do so.

CONCLUSION

¶31 For the foregoing reasons, we affirm Hatcher's convictions and sentences.

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