

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BENITO VILLAREAL, *Appellant*.

No. 1 CA-CR 21-0113
FILED 5-10-2022

Appeal from the Superior Court in Maricopa County
No. CR2015-158548-002
The Honorable Katherine Cooper, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jana Zinman
Counsel for Appellee

Ortega & Ortega PLLC, Phoenix
By Alane M. Ortega
Counsel for Appellant

MEMORANDUM DECISION

Judge Angela K. Paton delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Vice Chief Judge David B. Gass joined.

P A T O N, Judge:

¶1 Benito Villareal appeals his convictions and sentences for first-degree felony murder, armed robbery, and assisting a criminal street gang. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Mendoza*, 248 Ariz. 6, 11, ¶ 1, n.1 (App. 2019). As the victim talked with two women at a park, Villareal—a local gang member—and two others approached and began fighting with him. Villareal shot and killed the victim before taking his car, which police found “wiped down and stripped” in an alley the next day. The State charged Villareal with first-degree felony murder, armed robbery, and assisting a criminal street gang. The State also charged Villareal with one count of misconduct involving weapons. The superior court granted Villareal’s pretrial motion to sever the weapons misconduct count from the other charges.

¶3 The remaining counts proceeded to trial. During jury selection, Villareal moved to strike Juror 14 for cause, arguing her expressed concerns about COVID-19 would prevent her from sufficiently focusing on the trial. The superior court denied the motion, and Juror 14 served on the jury that returned the verdicts.

¶4 R.R. testified for the State. When counsel finished its questioning and the jurors were preparing questions for R.R., R.R. discovered a threatening text message on his cell phone sent by Villareal’s cousin. Villareal’s cousin also sent R.R. an image captured from the trial’s live internet stream showing R.R. walking toward the witness stand to begin his testimony. R.R. immediately asked to be excused “to go to [his] family.” The court excused the jury before discussing the apparent real-time witness intimidation with counsel.

STATE v. VILLAREAL
Decision of the Court

¶5 The next morning, and again outside the jury’s presence, Villareal moved for a mistrial, arguing R.R. was “actively texting” with an unknown person as he testified. The court denied the motion. During the lunch recess, the court learned that Juror 5 “could overhear our conversation on the record this morning about the texting issue.” Upon informing counsel of this development, Villareal requested a mistrial (Second Mistrial Motion). The court spoke with the jurors individually to determine what, if anything, they overheard that morning. The court subsequently denied the Second Mistrial Motion.

¶6 The jury found Villareal guilty of the charged offenses. The superior court sentenced Villareal to concurrent sentences, the longest being a life term of imprisonment with the possibility of release after 25 years for the first-degree murder conviction. Villareal timely appealed. This court has jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. Denial of Motion to Strike

¶7 Villareal challenges the superior court’s denial of his motion to strike Juror 14 for cause. He contends the juror could not “dedicate her attention to the evidence” based on her “constant” fear of transmitting COVID-19 from her co-workers to individuals at court.

¶8 The superior court is in the best position “to assess whether prospective jurors should be allowed to sit” because the trial judge has the opportunity to observe the juror’s demeanor and the tenor of his or her answers firsthand. *State v. Blackman*, 201 Ariz. 527, 533, ¶ 13 (App. 2002). We therefore review a superior court’s rulings on motions to strike prospective jurors for an abuse of discretion. *Id.* “The defendant is not entitled to a particular jury, but only a fair one . . . and unless the record affirmatively shows that defendant was not tried by a fair and impartial jury, then there is no error.” *State v. Thomas*, 133 Ariz. 533, 537 (1982) (citation omitted). Villareal carries the burden of establishing error. *State v. Purcell*, 199 Ariz. 319, 323, ¶ 9 (App. 2001).

¶9 Villareal identifies nothing in the record that affirmatively shows Juror 14 could not fairly consider the trial evidence. Indeed, the only relevant reference in the record to Juror 14 after voir dire shows otherwise. While addressing an unrelated issue on the trial’s ninth day, the court noted that Juror 14 was “a very dutiful, compliant, timely juror, no problems.”

STATE v. VILLAREAL
Decision of the Court

¶10 Instead of demonstrating Juror 14's purported inability to serve as a juror fairly, Villareal focuses on Juror 14's equivocation during voir dire when the court asked whether, despite her fear of potentially transmitting COVID-19 from her workplace to the courthouse, she would "try" to serve on the jury. But "a juror's assurances of impartiality need not be couched in absolute terms . . . and we will not set aside a trial court's ruling absent a clear showing of abuse of discretion." *State v. Hoskins*, 199 Ariz. 127, 139, ¶ 37 (2000).

¶11 On this record, we discern no clear abuse of discretion. The superior court, therefore, did not err by denying Villareal's motion to strike.

II. Denial of Second Mistrial Motion

¶12 Villareal argues the court improperly denied his Second Mistrial Motion. We review for an abuse of discretion. *State v. Dann*, 205 Ariz. 557, 570, ¶ 43 (2003) (citation omitted).

¶13 A 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. Speer*, 221 Ariz. 449, 462, ¶ 72 (2009) (quoting *Dann*, 205 Ariz. at 570, ¶ 43). Thus, we will only reverse a ruling on a mistrial motion if it was "palpably improper and clearly injurious." *State v. Walton*, 159 Ariz. 571, 581 (1989) (citation omitted).

¶14 The superior court did not err in denying Villareal's Second Mistrial Motion. After questioning the jurors individually, the court determined Juror 5 was the only one who overheard "a few words" of the court's discussion with counsel regarding the texts R.R. received while on the witness stand, and she did not share what she heard with the other jurors. The record supports that finding. The court then promptly excused Juror 5 "as one of the alternates," terminating her jury service in this case. Under these circumstances, a mistrial was not warranted.

¶15 Nonetheless, Villareal contends the superior court should have inquired further whether Juror 5 "tainted" the other jurors. Because Villareal did not request such an inquiry, we review for fundamental error. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

¶16 No error occurred because the superior court asked Juror 5 whether she told other jurors what she overheard and she responded, "No." Villareal's assertion of error thus requires that we evaluate Juror 5's credibility. We decline to do so. *See Pima County Juv. Action No. 63212-2*,

STATE v. VILLAREAL
Decision of the Court

129 Ariz. 371, 375 (1981) (“One of the most important principles in our judicial system is the deference given to the finder of fact who hears the live testimony of witnesses because of his opportunity to judge the credibility of those witnesses.”) (quoting *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980)).

CONCLUSION

¶17 We affirm.



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