IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

EFRAIN OLAGUE VALDEZ, *Appellant*.

No. 1 CA-CR 21-0329
FILED 9-20-2022

Appeal from the Superior Court in Maricopa County
No. CR2013-001169-001
The Honorable Geoffrey H. Fish, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza Ybarra
Counsel for Appellee

Maricopa County Office of the Legal Advocate, Phoenix
By Michelle DeWaelsche
Counsel for Appellant

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Michael J. Brown joined.

M O R S E, Judge:

¶1 Efrain Olague Valdez appeals his convictions and sentences on three counts of first-degree murder. For the following reasons, we affirm his convictions and sentences as modified.

FACTS AND PROCEDURAL BACKGROUND

¶2 In November 2011, a resident of a Phoenix trailer park called 911 and reported that a man, later identified as Valdez, had repeatedly fired a handgun at people inside a parked Jeep. When the police arrived, they found three men in the Jeep, all of whom had been shot in the head: the deceased driver Miguel,[1] the deceased front passenger Octavio, and the rear passenger Salvador, who died a week later. Several neighborhood residents witnessed someone leaving the crime scene while wearing a white puffy jacket with bloodstains on the shoulder.

¶3 Police found the murder weapon—a .25 caliber semiautomatic handgun—lying on the ground next to the Jeep. Valdez's DNA was located on the handgun's exterior and its magazine. Police also recovered Valdez's DNA from beer bottles inside the Jeep. The following week, the trailer park's manager recognized a bloodstained white puffy jacket found at the trailer park as the one worn by the shooter. Police discovered Valdez's DNA on the jacket's collar and Salvador's blood on its shoulder.

¶4 In the ensuing investigation, detectives learned that Salvador and Miguel were longtime friends, and Salvador and Octavio were brothers-in-law and neighbors. Valdez, who went by the nickname "Guero," had recently become Octavio's roommate. The morning of the shooting, Salvador visited Valdez, who was wearing the white puffy jacket, and Octavio.

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[1] We use pseudonyms to protect the victims' privacy.

¶5 A grand jury indicted Valdez on three counts of first-degree murder. Three weeks before trial, the superior court informed the parties of its proposed plan, in accordance with Covid-19 protocols, to conduct voir dire over the first two trial days—which fell on a Wednesday and a Thursday—using several smaller venire panels each day. The parties agreed with the plan.

¶6 During voir dire, the superior court repeatedly reminded the jurors and counsel that it intended to complete jury selection on Thursday. In questioning the venire panels, the superior court asked the prospective jurors standard questions regarding hardship, trial availability, physical ability to serve on the jury, juror qualifications, and pandemic-related concerns. After the court finished, defense counsel asked the entire venire general questions, and asked multiple follow-up questions to individual jurors. The court never interrupted or stopped defense counsel's questioning. When defense counsel finished, and after hearing argument from the parties, the court excused or struck numerous prospective jurors.

¶7 Despite the superior court's plan to finish by Thursday, the court continued jury selection the following Monday. That morning, Valdez moved for additional voir dire, citing concerns about the potential bias of several jurors. Denying the motion, the court noted that it had not restricted Valdez's questions "regarding anything that the jurors may have said during the court voir dire."

¶8 The same day, Seated Juror Two told the bailiff that she had heard Seated Juror Three refer to defense counsel as a "dumb bitch." After informing the trial judge, the bailiff instructed Juror Two to report any further incidents. At that time, however, the court did not notify the parties about Juror Three's comment. Several days later, Seated Juror Five told the bailiff that Juror Two had again heard Juror Three make disparaging comments "under his breath" about defense counsel. This time, Juror Two felt uncomfortable reporting the incident, so she asked Juror Five to do so.

¶9 At a hearing to address Juror Three's comments, the superior court disclosed to the parties Juror Two's reports, and the parties agreed to excuse Juror Three. Defense counsel did not request to question the jurors but expressed "concern" that Juror Three could be tainting the other jurors. Valdez later unsuccessfully moved for a mistrial based on Juror Three's comments. Juror Two ultimately participated in deliberations, but Juror Five was excused as an alternate.

¶10 During deliberations, three unidentified jurors "stepped out" because of "a difference of opinion," stating they were "not being allowed to participate with the larger group." The bailiff instructed the jurors to take a 30–minute break. Valdez moved for a mistrial after learning of the dispute, arguing the other jurors had been "trying to intimidate" the three jurors who walked out. The court denied the mistrial motion, deciding instead to monitor the situation once they resumed deliberations and see if the problems persisted.

¶11 Following the break, the jurors deliberated for approximately two more hours without any further complaints before finding Valdez guilty as charged. When the superior court polled the jury, all jurors individually affirmed that they had given their "true verdicts." During the aggravation phase of the trial, the court denied Valdez's renewed motion for a mistrial based on the three jurors' complaints during deliberations. More than a week later, the court also denied Valdez's motion for a new trial based on juror misconduct. The court also denied Valdez's motion to disclose the jurors' contact information but clarified that it did "not preclude the defense from seeking [such] information from public sources or using an investigator."

¶12 Valdez hired a private investigator to assist in his juror-misconduct examination, and the superior court granted his two requests to continue the sentencing hearing so that he could investigate the allegations. Valdez did not seek additional time following the second continuance, and the sentencing hearing proceeded as scheduled. At the hearing, defense counsel explained that they had contacted "a limited number of jurors" and "spoke to a few of them." After defense counsel had summarized the investigation, the court sentenced Valdez to three consecutive terms of natural-life imprisonment. We have jurisdiction over Valdez's timely appeal under A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. Request for Additional Voir Dire.

¶13 Valdez argues the superior court improperly denied his motion to conduct additional voir dire, thereby impairing his right to an impartial jury. He further asserts the court's decision prevented him from discovering Juror Three's potential bias. We review the court's ruling for an abuse of discretion. *State v. Thompson*, 252 Ariz. 279, 293, ¶ 45 (2022). To prevail, Valdez must "demonstrate not only that the voir dire examination

was inadequate, but also that, as a result of the inadequate questioning, the jury selected was not fair, unbiased, and impartial." *State v. Moody*, 208 Ariz. 424, 451, ¶ 95 (2004). Prejudice must "appear affirmatively from the record." *State v. Riley*, 248 Ariz. 154, 174, ¶ 51 (2020) (quoting *State v. Hoskins*, 199 Ariz. 127, 141, ¶ 48 (2000)); *see also State v. Payne*, 233 Ariz. 484, 510, ¶ 100 (2013) (presuming jurors are "impartial absent evidence to the contrary").

¶14 As recounted *supra* ¶¶ 5-7, the record refutes Valdez's contention that the superior court "arbitrarily" limited voir dire. During voir dire, defense counsel asked numerous general and follow-up questions, without court-imposed restrictions, before voluntarily ending her questioning. The court's voir dire sufficiently covered the personal background areas listed in Valdez's request for additional questioning. Valdez fails to identify any questions he was prevented from asking, much less explain why he could not have asked such questions in the allotted time. Accordingly, the court did not abuse its discretion by denying Valdez's late request.

¶15 Even if Valdez could show the superior court impermissibly limited his questioning, he has not demonstrated that the seated jury was biased. To support his claim, he asserts (1) his additional voir dire would have revealed Juror Three's alleged partiality; (2) the court would have struck Juror Three for cause; and (3) because the court denied his motion for additional voir dire, he was not tried by a fair, unbiased, and impartial jury. His conclusory argument is speculative and therefore insufficient. *See Riley*, 248 Ariz. at 174, ¶ 51. Juror Three did not participate in deliberations and the remaining jurors' unequivocal confirmations of their verdicts during polling nullify Valdez's contention that he suffered prejudice from the court's ruling. *See State v. Olague*, 240 Ariz. 475, 480, ¶ 19 (App. 2016) ("Polling in open court normally provides the opportunity for jurors 'to communicate directly with the court if any of them felt unfairly coerced, harassed, intimidated, or felt themselves to be in physical danger.'" (quoting *Jacobson v. Henderson*, 765 F.2d 12, 15 (2d Cir. 1985))).

II. Juror-Misconduct Allegations.

¶16 Valdez next contends the superior court erroneously denied his mistrial and new-trial motions alleging juror misconduct. He also argues the court should have granted his requests to interview the jurors and to hold an evidentiary hearing on his juror-misconduct claims. We review his challenges for an abuse of discretion. *State v. Hall*, 204 Ariz. 442, 447, ¶ 16 (2003).

A. Motions for a Mistrial and a New Trial.

¶17 Juror misconduct warrants a mistrial or a new trial when the defendant demonstrates actual prejudice or if prejudice may be fairly presumed from the facts. *State v. Vasquez*, 130 Ariz. 103, 105 (1981). But "[p]rejudice cannot be presumed without the requisite showing that the jury received and considered extrinsic evidence on the issues." *State v. Davolt*, 207 Ariz. 191, 208, ¶ 59 (2004); *see also Hall*, 204 Ariz. at 447, ¶ 16 (explaining the jury's receipt and consideration of extrinsic evidence creates a rebuttable presumption of prejudice). Extrinsic evidence is any information "obtained from or provided by an outside source," even if such evidence would have been otherwise admissible. *State v. Dickens*, 187 Ariz. 1, 15 (1996), *abrogated in part on other grounds by State v. Ferrero*, 229 Ariz. 239 (2012). "Extrinsic evidence does not include a juror's pretrial beliefs or experiences." *Olague*, 240 Ariz. at 481, ¶ 21.

¶18 Valdez does not show he suffered actual prejudice from any alleged juror misconduct. *See Davolt*, 207 Ariz. at 206, ¶ 49 ("To establish actual prejudice, the defendant must show that 'the jurors have formed preconceived notions concerning the defendant's guilt and that they cannot leave those notions aside.'" (quoting *State v. Chaney*, 141 Ariz. 295, 302 (1984))). Valdez also does not argue that we should presume prejudice based on the three jurors' walkout during deliberations. *See Moody*, 208 Ariz. at 452, ¶ 101 n.9 (recognizing that a claim is abandoned and waived if a party fails to argue it and "[m]erely mentioning an argument is not enough"). Therefore, because Valdez has failed to show prejudice from the three jurors' brief protest, he is not entitled to a new trial on that ground.

¶19 Turning to Valdez's remaining claim, in the absence of actual prejudice, he cites *Hall* and *State v. Lang*, 176 Ariz. 475 (App. 1993), to argue prejudice must be presumed from Juror Three's derogatory remarks. His reliance on those cases is misplaced.

¶20 *Hall* and *Lang* support the proposition that prejudice is presumed only when the jurors have received and considered extrinsic information. *See Hall*, 204 Ariz. at 447-48, ¶¶ 17-18 (presuming prejudice when the jurors received and considered improper extrinsic evidence from the bailiff); *Lang*, 176 Ariz. at 483-84 (presuming prejudice when a key law-enforcement witness repeatedly "fraternized with the jurors," producing a "definite but subtle effect on the assessment of credibility"). Although Juror Three's comments were offensive and inappropriate, they do not qualify as extrinsic information and did not relate to the merits of the case. *See State v. Miller*, 178 Ariz. 555, 557 (1994) (presuming prejudice if an "outside

influence" compromises a jury trial's integrity); *see also State v. McLoughlin*, 133 Ariz. 458, 461 n.2 (1982) (distinguishing juror's receipt of evidence from outside source that may warrant new trial from reliance on own "common sense and experiences"); *State v. Benge*, 110 Ariz. 473, 479 (1974) ("[W]e recognize that all jurors develop opinions of counsel based upon their performance during the trial."). Nor does Valdez argue otherwise. *See Moody*, 208 Ariz. at 452, ¶ 101 n.9. Valdez is not entitled to the presumption of prejudice under these circumstances and thus his claim fails.

¶21 Moreover, the overwhelming evidence of Valdez's guilt renders any hypothetical error harmless beyond a reasonable doubt. *See Hall*, 204 Ariz. at 447, ¶ 16; *see also State v. Anthony*, 218 Ariz. 439, 446, ¶ 41 (2008) ("We can find error harmless when the evidence against a defendant is so overwhelming that any reasonable jury could only have reached one conclusion."). The State's evidence established that (1) Valdez's DNA was recovered from the murder weapon's exterior and the magazine; (2) his DNA and Salvador's blood were on the beer bottles inside the Jeep and the white puffy jacket; and (3) multiple witnesses confirmed that the shooter was wearing the white puffy jacket Valdez wore the morning of the shooting when he was with two of the victims. Accordingly, the superior court did not err by refusing to grant Valdez a new trial.

B. The Investigation of the Juror-Misconduct Allegations.

¶22 Valdez also faults the superior court for failing to question the jurors or conduct an evidentiary hearing on his juror-misconduct claims. We review the court's investigation of such allegations for an abuse of discretion. *Davolt*, 207 Ariz. at 208, ¶ 56.

¶23 "A trial court's duty to investigate alleged incidents of juror misconduct arises only if there is an allegation that . . . relate[s] to a material fact or law at issue in the case." *Id.* "[B]are allegations of juror misconduct are insufficient to trigger the trial court's duty to investigate the matter further." *Id.* at ¶ 57. A court's response to a threat of juror bias need only be "commensurate with the severity of the threat posed." *Miller*, 178 Ariz. at 557 (quoting *United States v. Thomas*, 463 F.2d 1061, 1063 (7th Cir. 1972). The superior court is in the "best position to determine the effect, if any, of a juror's misconduct." *Stafford v. Burns*, 241 Ariz. 474, 481, ¶ 22 (App. 2017).

1. Juror Three's Remarks.

¶24 As the superior court acknowledged after trial, it erred by not immediately disclosing Juror Two's initial report to the parties. *See, e.g., Perez v. Comty. Hosp. of Chandler, Inc.*, 187 Ariz. 355, 359 (1997) ("A long line

of Arizona cases holds that a judge errs by responding to significant juror inquiries without consulting the parties."). Despite that error, the court's remedy was proportionately tailored to address the threat of potential juror bias. *See id.* at 358 (applying harmless-error analysis to improper ex parte communications between the jury and the superior court).

¶25 First, only Juror Two ever reported hearing Juror Three's remarks, and she gave no indication that the incident affected her ability to decide the case fairly. To the contrary, by reporting Juror Three, Juror Two indicated her disapproval of the remarks. Second, given the absence of similar reports from other jurors, the court could reasonably conclude questioning the jury on the matter risked escalating the issue, thereby creating the possibility of bias when none otherwise would have existed. *See infra* ¶ 28. Third, Juror Three's remarks did not indicate a premature expression of belief in Valdez's guilt, and nothing in the record suggests his comments influenced the other jurors. Dismissing Juror Three thus sufficiently protected Valdez's right to an impartial jury. *Cf. State v. Arvallo*, 232 Ariz. 200, 202, ¶ 8 (App. 2013) (explaining courts need not dismiss jurors who form a premature opinion on a defendant's guilt if that juror "retains a willingness to alter the opinion after hearing all of the evidence").

¶26 Valdez relies on *Miller* to assert "[w]ithout an investigation or evidentiary hearing, the court could not possibly have known whether other jurors heard comments of Juror 3 or were improperly influenced by them." In *Miller*, an excused alternate juror gave a note to a deliberating juror that stated either "He's guilty" or "My vote is guilty." 178 Ariz. at 557. After learning of the note following the trial, the superior court denied the defendant's motion for a new trial without holding an evidentiary hearing or questioning any jurors. *Id.* Our supreme court held that the superior court erred by failing to inquire into the note's influence on the jurors, explaining "prejudice necessarily results if an alternate juror aids a jury in its deliberations." *Id.* at 560.

¶27 Though it may have been prudent to question Juror Three upon learning of his comments, the incident here falls well short of the circumstances in *Miller*. Unlike the situation in *Miller*, Juror Three's remarks did not (1) comment on the defendant's guilt, nor (2) constitute extrinsic information entitling the defendant to the presumption of prejudice. And despite Valdez's assertion that the superior court "refused" to question the jurors, he never made such a request.

¶28 Furthermore, because of Covid-19 protocols during trial, the jurors wore face masks in the courtroom and were seated according to

social-distancing requirements. The front and back jury rows were also separated by a Plexiglass shield. Juror Three sat in the back row; Jurors Two and Four were seated on each side of Juror Three. Juror Four, who served as the jury's foreperson, never reported hearing Juror Three's comments. The court described the acoustics in the courtroom as "terrible" and "kind of atrocious," explaining the masks made it "that much worse." During trial, the court, counsel, witnesses, the interpreter, and several jurors repeatedly expressed difficulty hearing questions and testimony. In addition, the court noted that the jury was very "active" and "involved" during trial, submitting "over 300 jury questions during the trial itself." Given these circumstances, the superior court reasonably determined that questioning the jurors about the comments was unnecessary and risked escalating the issue. Therefore, the court did not abuse its "broad discretion in selecting methods to detect and protect against potential juror bias." *State v. Burns*, 237 Ariz. 1, 26, ¶ 110 (2015).

2. The Walkout During Deliberations.

¶29 Valdez also challenges the superior court's response to the three jurors' deliberations protest. Citing *State v. Rojas*, 177 Ariz. 454 (App. 1993), he argues that once the court was confronted with the jurors' complaint, it was required to immediately stop deliberations and question the jury before determining whether deliberations could proceed.

¶30 *Rojas* involved "unusual" circumstances. The day before deliberations began, a juror asked one of the trial judge's staff members whether the defendant would be sentenced "right away" after the jury returned its verdicts. *Id.* at 456. The next day, the same juror handed the bailiff a twenty-dollar bill to deliver to the victims along with a note praising their "courage" and hoping they would "overcome this mess." *Id.* Although the court learned of these events at the start of deliberations, it waited until after the verdicts to question the juror, and when it did so, it used leading questions to elicit the juror's expression of impartiality, which was "on its face irreconcilable" with the events. *Id.* at 458-59. On that record, we concluded that the court erred by failing to "stop the deliberations, question the juror, and make a determination whether deliberations could then proceed." *Id.* at 458.

¶31 The facts here, which involve only a brief dispute among deliberating jurors with no allegation or evidence of partiality, bear no resemblance to *Rojas*. *See Olague*, 240 Ariz. at 480, ¶ 19 ("'[A]rticulate jurors may intimidate the inarticulate, [and] the aggressive may unduly influence the docile,' but such dynamics are an accepted part of the deliberative

process." (quoting *Jacobson*, 765 F.2d at 15)). The jurors who walked out also did not report being bullied or coerced into a decision. And importantly, the jury never indicated that further deliberations would be futile. Moreover, allowing the jurors to resolve their conflict independently rather than immediately intervening in the dispute avoided the risk of improperly involving the court in the juror's deliberations, influencing the verdicts, or inquiring into the jurors' deliberative process. *See Burns*, 237 Ariz. at 33, ¶ 158 ("Improperly coercing a verdict from the jury constitutes reversible error."); *Olague*, 240 Ariz. at 480, ¶ 18 (noting courts are prohibited from considering the jury's subjective motives or mental processes leading to a verdict).

¶32 We also reject Valdez's contention that the superior court's chosen remedy "ensured that [he] would not be able to show prejudice in a Rule 24 motion for new trial or on appeal." The court's decision to monitor the events did not limit the jurors' opportunities to report any further complaints after they resumed deliberations, when they were polled, or in post-trial discussions with Valdez's private investigator. Thus, we find no error.

III. Penalty Assessment.

¶33 Finally, Valdez argues, and the State concedes, the superior court erroneously imposed a two-dollar penalty assessment under A.R.S. § 12-116.09(A). We agree. Because Valdez committed the charged offenses in November 2011 and § 12-116.09(A) did not become effective until January 1, 2015, we vacate the two-dollar assessment. *See State v. Raffaele*, 249 Ariz. 474, 481-82, ¶¶ 27-28 (App. 2020) (vacating the same penalty assessment when the defendant committed his crimes before the statute's effective date).

CONCLUSION

¶34 We affirm Valdez's convictions and his sentences as modified, omitting the requirement that he pay the two-dollar assessment.

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