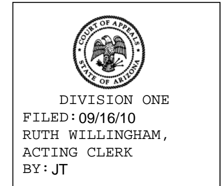
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24


DIVISION ONE
FILED: 09/16/10
RUTH WILLINGHAM,
ACTING CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0353
v.	)	DEPARTMENT A
MICHAEL CELAYA, Appellant.	)	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-005600-002 DT

The Honorable Rosa Mroz, Judge
The Honorable Glenn M. Davis, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Melissa M. Swearingen, Assistant Attorney General

Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry J. Adams, Deputy Public Defender

Attorneys for Appellant

K E S S L E R, Presiding Judge

¶1 Appellant Michael Celaya ("Celaya") appeals his conviction and sentence for two counts of trafficking in

stolen property in the first degree and one count of trafficking in stolen property in the second degree. For the reasons that follow, we affirm Celaya's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the conviction." *State v. Burdick*, 211 Ariz. 583, 584, ¶ 3, 125 P.3d 1039, 1040 (App. 2005).

¶3 Celaya was tried on four counts: one count of leading or participating in a criminal street gang, a class two felony; two counts of trafficking in stolen property in the first degree, class two felonies; and one count of trafficking in stolen property in the second degree, a class three felony.

¶4 From May to September of 2007, Officer E.F. was working undercover for the special projects unit of the Phoenix Police Department. During this time, E.F. was specifically responsible for purchasing stolen property, and she participated in an investigation ultimately comprised of ten separate transactions involving stolen vehicles. Celaya was present on two occasions and negotiated the sale of a 1998 Ford truck, 2002 Chevy Avalanche, and 2003 Mercury Mountaineer. E.F.'s testimony

was corroborated by another detective who participated in the operation and video suveillence footage.

¶5 The State presented additional evidence to support its contention that Celaya was the leader of the Yuk[1] Faction of the East Side Ninth Street Gang, and the crimes were committed in furtherance of that organization. Evidence included Celaya's own statements to E.F., gang member identification criteria cards documented by Phoenix police officers, and expert testimony by Detective J.N. of the Phoenix Police Department's Night Gang Enforcement Unit.

¶6 Celaya testified on his own behalf, stating that although he was born into the East Side Ninth Street Gang, he was neither its leader nor a current member. He also admitted to felony convictions in 1991, 1998, and 2008.

¶7 Celaya further testified that he was responsible for setting up the sale of the Ford truck and Chevy Avalanche, but received no compensation for his role. He claimed the only transaction he profited from was the sale of the Mercury Mountaineer, and the car was not stolen but given to him as collateral for a debt.

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[1] The gang is named after Celaya, who also goes by the name "Yuk."

¶8 A jury convicted Celaya of two counts of trafficking in stolen property in the first degree and one count of trafficking in stolen property in the second degree. With respect to the charge of leading or participating in a criminal street gang, the jury was unable to reach a verdict and the court declared a mistrial. The superior court sentenced Celaya to an aggravated term of sixteen years on each count. The court ordered the sentences to run concurrent to each other but consecutive to the sentence imposed for CR2007-156245.

¶9 Celaya timely appealed. *See* Ariz. R. Crim. P. 31.3. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, as well as Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), -4033(A)(1) (2010).

DISCUSSION

¶10 On appeal, Celaya contends that the superior court erred in denying his motion for a mistrial based on a misstatement that allegedly tainted the prospective jury panel. In addition, Celaya argues that the court erred in imposing an enhanced sentence using aggravators not found by a jury beyond a reasonable doubt. We address each issue in turn.

I. MOTION FOR MISTRIAL

¶11 Celaya argues that the trial court erred in failing to grant his motion for a mistrial after the court announced two criminal cause numbers to the prospective jury panel:

> THE COURT: This is the time set for trial in Criminal Cause Number CR 2007-156245-001[2] and CR 2008-005600-002. Actually, which of the cause numbers are we on? I'm confused on which one.

A bench conference was held wherein Celaya's attorney moved for a mistrial: "Judge, you've announced to the jury that there's multiple case numbers at this point. I'd move for a mistrial. The jury may be tainted wondering why they're here on more than one case when there are multiple case numbers." The court decided it was unnecessary to start over and corrected the statement on the record in front of the jury pool:

> THE COURT: All right. Let me – the correct Cause Number is CR 2008-005600-002.

Celaya argues the initial statement was prejudicial, and the court erred in failing to make further inquiries or admonish the jury regarding the comment. The State claims

[2] Celaya was also facing separate charges in CR2007-156245-001 for misconduct involving weapons and possession of dangerous drugs, both class four felonies.

that the statement was unremarkable and any theoretical prejudice is pure speculation.

¶12 "[T]he declaration of a mistrial is the most dramatic remedy for a trial error and should be granted only if the interests of justice will be thwarted otherwise." *State v. Roque*, 213 Ariz. 193, 224, ¶ 131, 141 P.3d 368, 399 (2006) (citing *State v. Moody*, 208 Ariz. 424, 456, ¶ 126, 94 P.3d 1119, 1151 (2004)). "The responsibility for determining whether a juror can render a fair and impartial verdict lies with the trial court, and we will not disturb that exercise of discretion absent a clear showing of an abuse of discretion." *State v. Tison*, 129 Ariz. 526, 533, 633 P.2d 335, 342 (1981).

¶13 Relying on *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998), *amending and superseding* 129 F.3d 495 (9th Cir. 1997), Celaya submits that the court erred in denying the motion without conducting additional voir dire of the jury panel. We find *Mach*, however, to be clearly distinguishable:

> *Mach* involved charges of sexual conduct with a minor. The prospective juror had worked many years with sexual assault victims and stated, in response to lengthy questioning, that "she had never known a child to lie about sexual abuse." The court concluded that this individual's statements were "expert-like," dealt with material issues of the defendant's guilt and the victim's

> truthfulness, were delivered with certainty, and were repeated several times.

State v. Doerr, 193 Ariz. 56, 62, ¶ 19, 969 P.2d 1168, 1174 (1998) (citations omitted). The Ninth Circuit held that "[a]t a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by [the juror's] expert-like statements." *Mach*, 137 F.3d at 633.

¶14 We find the court's statement here did not rise to the same level of error as in *Mach*. *See id*. The court's initial announcement of the two cause numbers was brief and in no way commented on the material issue of Celaya's guilt or innocence.

¶15 In addition, "[u]nless there are objective indications of jurors' prejudice, we will not presume its existence." *Tison*, 129 Ariz. at 535, 633 P.2d at 344. There is nothing in the record to suggest that the misstatement compromised the jury's ability to be fair and impartial. *See State v. Reasoner*, 154 Ariz. 377, 384, 742 P.2d 1363, 1370 (App. 1987) ("[W]hat appellant asks this court to do is indulge in an assumption that the panel was tainted by the isolated remark expressing appreciation by the excused juror. This we will not do.").

¶16 Furthermore, although the court did not admonish the jury to ignore the statement at different times during trial, it instructed the jury to consider only evidence produced in court when deliberating the facts. It is assumed that juries follow instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996); *see State v. Duffy*, 124 Ariz. 267, 274, 603 P.2d 538, 545 (App. 1979) ("In the context of the entire lengthy trial proceedings and in view of the court's instructions to the jury panel that Only [sic] evidence adduced in court could be considered by them in their deliberation, we are of the opinion that the possible prejudice from [a] singular remark by a venireman is too remote and speculative to support a finding of error."); *Doerr*, 193 Ariz. at 62, ¶ 22, 969 P.2d at 1174 ("Although the court did not specifically admonish the jury to ignore either man's comments . . . he did instruct the jurors that they should determine the facts 'only from the evidence produced here in court.'").

¶17 Here, the superior court was confident that the panel would remain fair and impartial in rendering a verdict. "Without a showing of unqualified partiality of the [jury], we will not upset a determination so clearly within the province of the court." *Tison*, 129 Ariz. at

533, 633 P.2d at 342. Therefore, we find the court did not abuse its discretion in denying Celaya's motion for mistrial.

II. SENTENCING

¶18 Celaya was convicted of two class two felonies and one class three felony. Celaya having testified about a 1998 conviction for aggravated assault, the superior court sentenced him based on his having one prior historical felony.[3] In addition, the court used the following aggravating factors to further enhance the sentence: (1) criminal history;[4] (2) involvement of accomplices; (3) history of violence; and (4) pecuniary gain. The court sentenced Celaya to concurrent terms of sixteen years for all three counts. Although defense counsel sought clarification regarding the court's use of aggravators, no formal objection was made. Celaya contends that the trial court erred in imposing enhanced sentences

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[3] Pursuant to the statutory scheme in place at the time of the underlying events, class two felonies had a presumptive term of 9.25 years, a maximum term of 18.5 years, and an aggravated term of 23.25 years. Class three felonies had a presumptive term of 6.5 years, a maximum term of 13 years, and an aggravated term of 16.25 years. A.R.S. §§ 13-702.01(C) and -702.02(B)(4) (2006).

[4] The court clarified that "criminal history" was in reference to Celaya's admitted 1991 conviction for solicitation to commit robbery. During the trial, the court concluded that the conviction constituted a historical prior as incarceration periods tolled the ten year limitation.

using aggravators not found by a jury beyond a reasonable doubt. We disagree.

¶19 The Sixth Amendment guarantees the right to a trial by jury in all criminal prosecutions. U.S. Const. amend. VI. "This right . . . is not confined to the determination of guilt or innocence, but continues throughout the sentencing process." *State v. Martinez*, 210 Ariz. 578, 580, ¶ 7, 115 P.3d 618, 620 (2005). Pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), with the exception of prior convictions or facts admitted by the defendant on the stand, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Martinez*, 210 Ariz. at 581, ¶ 10, 115 P.3d at 621 (quoting *Apprendi*, 530 U.S. at 490).

¶20 Nothing, however, in Arizona's non-capital sentencing statutes indicates that the "legislature intended to vest responsibility for finding all aggravating facts in a single factfinder." *Id.* at 585, ¶ 25, 115 P.3d at 625. "[O]nce a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum

prescribed in that statute." *Id.* at 585, ¶ 26, 115 P.3d at 625. Accordingly, once Celaya admitted his prior convictions the court was permitted to consider any additional legal aggravating factor in imposing the sentence. *See id.* As a result, we find no error occurred.[5]

CONCLUSION

¶21 For the above reasons, we affirm the superior court's judgment and affirm Celaya's convictions and sentences.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
JON W. THOMPSON, Judge

[5] The State conceded that a super-aggravated sentence was erroneous for the class three felony on which Celaya was convicted. We are not bound by that concession. *State v. Sanchez*, 174 Ariz. 44, 45, 846 P.2d 857, 858 (App. 1993). As explained in n.3, *supra*, the sentences imposed were within the permissible statutory range.