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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0356
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JERROD LEN BOOTH,) Rule 111 Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-169067-001 DT

The Honorable Steven K. Holding, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Jerrod Len Booth appeals his conviction and sentence
for resisting arrest. Booth argues the superior court violated

a procedural rule governing the polling of a jury and coerced the guilty verdict by improperly questioning a juror about her verdict. For reasons that follow, we disagree and affirm Booth's conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND

¶12 The State charged Booth with one count of aggravated assault and one count of resisting arrest stemming from a confrontation with police officers. The charges were tried to a jury, and the jury's verdicts were returned in accordance with Arizona Rule of Criminal Procedure 23.1. As read by the clerk, the jury found Booth not guilty on the aggravated assault charge and guilty on the resisting arrest charge.

¶13 Defense counsel requested the court poll the jury. At the superior court's direction, the clerk asked the jurors individually, "are these your true verdicts?" After the first three jurors responded "Yes," Juror Four answered "No." The superior court stopped the polling and excused the jury except for Juror Four. The following exchange occurred:

THE COURT: Miss, you're Juror No. 4?

JUROR NO. 4: Yes.

THE COURT: In polling the jury we like to make sure everyone, that is their true and correct verdict. You answered "no," this was not your verdict.

Can you tell me why you answered "no"?

JUROR NO. 4: To be honest with you, I was kind of, like, confused with the whole situation with him being taken down and everything like that. I wasn't too sure --

THE COURT: Slow down.

JUROR NO. 4: I wasn't too sure, at the point, which officer told him that he was under arrest. But in speaking with the other jurors, they confirmed with me that once the officer tells you you're under arrest, the defendant should have been complying.

THE COURT: Do you agree with that?

JUROR NO. 4: Yes.

THE COURT: Are -- then please, as to Count 1, the jury came back "not guilty." Is that your verdict as to Count 1?

JUROR NO. 4: Yes.

THE COURT: As to Count 2, Resisting Arrest: What was your vote, "guilty" or "Not guilty"?

JUROR NO. 4: The first time or the second time because --

THE COURT: When the whole jury came to a conclusion, what was your vote, conclusion?

JUROR NO. 4: My conclusion would have been "guilty" of Resisting Arrest.

THE COURT: Thank you.

State, did I overreach the juror in my questioning?

MR. LEITER: No, Your Honor.

THE COURT: Defense, did I overreach the juror in my questioning?

MR. WALTON: No, Your Honor. But can I have brief follow-up?

THE COURT: Absolutely.

MR. WALTON: Ma'am, you said that the other jurors assured you or convinced you that he was told he was under arrest.

Do you have -- I don't know, let me just have you explain a little bit more. What w[ere] your doubts, as far as the Resisting Arrest charge?

THE COURT: Well counsel, as far as her mind-set, as far as her thought process, I believe that's outside our privy. What we are privy to ask is whether or not she made that decision with her free will or was her free will overborne.

Would you please rephrase?

MR. WALTON: Okay.

On your second vote, did you -- was your second vote, initially, still for "not guilty"?

JUROR NO. 4: Yes.

MR. WALTON: Okay. And did the others, telling you that he was guilty, affect your will on how you voted?

JUROR NO. 4: Based upon the confirmation they gave me, they reviewed their notes. Because I was confused at the time of when he went outside, you know, what happened when he was taken to the ground. At what point was he told that he was under arrest? And based upon reading the instructions or whatever that is, that is what we went back to.

MR. WALTON: Okay.

JUROR NO. 4: Basically, my understanding is, once an officer tells you, regardless of what the situation was or whatever, or take down, once they tell you, you are under arrest, you need to comply at that time. And I think he was told more than once that he was under arrest.

THE COURT: Miss, this is not your chance to ask us questions.

JUROR NO. 4: Okay.

THE COURT: Miss, you are the fact finder. What was your conclusion after discussing with the jury as to Count 2, what was your conclusion?

JUROR NO. 4: My conclusion would be "guilty."

After defense counsel stated he had no further questions, the rest of the jury returned to the courtroom and the clerk polled the other jurors. They confirmed the verdicts.

DISCUSSION

¶14 Booth argues the superior court's questioning of Juror Four violated Arizona Rule of Criminal Procedure 23.4,¹ and also coerced her to change her verdict to guilty on the resisting

¹Rule 23.4 provides, in pertinent part:

After the verdict is returned and before the jury is discharged, it shall be polled at the request of any party or upon the court's own initiative. If the responses to [sic] the jurors do not support the verdict, the court may direct them to retire for further deliberations or they may be discharged.

arrest charge. Because Booth did not object to the court's questioning of the juror, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under this standard of review, Booth must show fundamental error and establish the error caused him prejudice. *Id.* at ¶ 20.²

¶15 The superior court did not, as Booth contends, violate Rule 23.4. Although Rule 23.4 does not specifically authorize a court to question a juror about a response to polling, neither does it expressly prohibit such action. Rather, it simply describes two permissible actions for the superior court if responses from the jurors "do not support the verdict." See *State v. McCrimmon*, 187 Ariz. 169, 173, 927 P.2d 1298, 1302 (1996) (Rule 23.4 "provides the safest alternatives"); *State v. Lewis*, 1 CA-CR 09-0127, 2010 WL 2274754, at *3, ¶ 18 (Ariz. App. June 8, 2010) (use of term "may" in procedural rule implies rule

²As an initial matter, we reject the State's contention the error asserted by Booth was invited by his counsel. The invited error doctrine, which precludes even fundamental error review, applies only "if the party complaining on appeal affirmatively and independently initiated the error." *State v. Lucero*, 223 Ariz. 129, ___, ¶ 31, 220 P.3d 249, 258 (App. 2009). Here, the questioning of the juror was initiated by the superior court without consultation with counsel. See *State v. Logan*, 200 Ariz. 564, 566, ¶ 11, 30 P.3d 631, 633 (2001) ("source of the error" is examined in deciding whether error was invited). Mere acquiescence by counsel in the action by the superior court, as occurred in the present case, "is not the stuff of which invited error is made." *Lucero*, 223 Ariz. at ___, ¶ 33, 220 P.2d at 259.

is intended to be permissive and does not limit options). Accordingly, when a juror's response to being polled raises a question as to whether the juror supports the verdict, the superior court is not prohibited from questioning the juror to determine what action is appropriate. See, e.g., *State v. Hernandez*, 147 Ariz. 312, 312, 709 P.2d 1371, 1371 (App. 1985) (court questioned juror after juror "indicated" he agreed with the verdict but had reservations).

¶16 Here, Juror Four's initial response of "No" was equivocal, not unequivocal as Booth argues, and raised a question as to whether Juror Four supported the verdict on the resisting arrest charge. Because the jury returned two verdicts -- one "guilty" and the other "not guilty" -- and the clerk asked the jurors "are these your true verdicts," the superior court was not in a position to determine what Juror Four's "No" response meant without questioning. The court's questioning revealed Juror Four had become confused as to what was being asked in the polling process. Juror Four then confirmed she supported the verdict on the resisting arrest charge and had reached this conclusion during the deliberations with the other jurors. Because the superior court could reasonably conclude Juror Four's response was ambiguous under the circumstances of this case, the court did not violate Rule 23.4 in asking Juror Four about her response.

¶17 Neither did the superior court's questioning of Juror Four displace her independent judgment and coerce her guilty verdict on the resisting arrest charge, as Booth also contends. "[F]undamental error is present 'whenever a judge improperly influences or coerces a verdict.'" *State v. McAnulty*, 184 Ariz. 399, 404, 909 P.2d 466, 471 (App. 1995) (quoting *State v. Lautzenheiser*, 180 Ariz. 7, 10, 881 P.2d 339, 342 (1994)). "The test of coerciveness is whether the trial court's actions or remarks, viewed in the totality of circumstances, displaced the independent judgment of the jurors." *McCrimmon*, 187 Ariz. at 172, 927 P.2d at 1301 (quoting *State v. McCutcheon*, 150 Ariz. 317, 320, 723 P.2d 666, 669 (1986)). "What conduct amounts to coercion is particularly dependent upon the facts of each case." *State v. Roberts*, 131 Ariz. 513, 515, 642 P.2d 858, 860 (1982).

¶18 There is no question communicating with an individual member of the jury "is pregnant with possibilities for error." *McCrimmon*, 187 Ariz. at 173, 927 P.2d at 1302 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 442, 460, 98 S. Ct. 2864, 2885, 57 L. Ed. 2d 854 (1978)). Here, however, the communication occurred as part of polling the jury, which is designed to

give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain with

certainty a unanimous verdict has in fact been reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.

State v. Kiper, 181 Ariz. 62, 68, 887 P.2d 592, 598 (App. 1994) (quoting *Miranda v. United States*, 255 F.2d 9, 17 (1st Cir. 1958)). The superior court questioning of Juror Four was confined to this purpose and directed solely to determining the meaning of her response and whether she agreed with the two verdicts as returned by the jury.

¶19 The polling process can, we acknowledge, become coercive. See generally *McCrimmon*, 187 Ariz. at 172-73, 927 P.2d at 1301-02 (judge told juror in ex parte meeting she had to decide whether she agreed with the guilty verdict). But here, at no point did the superior court indicate to Juror Four, either explicitly or implicitly, it was unacceptable for her to either disagree with or remain undecided regarding the announced verdicts. Nor did the court communicate with Juror Four on an ex parte basis. Although the superior court questioned Juror Four in the absence of the other jurors, the questioning occurred in open court in the presence of the parties and defense counsel was given the opportunity to further question the juror regarding her assent to the verdicts. Considering the totality of the circumstances, the record fails to support Booth's argument the superior court displaced the independent

judgment of Juror Four. To the contrary, the record evidences the verdict of guilty confirmed by Juror Four was the result of the exercise of this juror's own free will based on her consideration of the evidence in consultation with the other jurors during deliberations.

¶10 We recognize there may be circumstances not reflected on the cold record that might create an "atmosphere of coercion" even when not intended by the superior court. *Id.* at 173, 927 P.2d at 1302. In this case, however, the court asked counsel if the court's questioning had "overreached the juror" and both the prosecutor and defense counsel agreed it had not, which suggests the existence of a noncoercive environment. Given this record, Booth has failed to meet his burden of establishing the court's questioning coerced or otherwise improperly influenced Juror Four to find him guilty on the resisting arrest charge. Accordingly, the superior court did not commit fundamental error in questioning Juror Four and accepting the unanimous guilty verdict upon conclusion of the jury poll.

CONCLUSION

¶11 For the foregoing reasons, we affirm Booth's conviction and sentence.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

MAURICE PORTLEY, Judge