DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. NATALIE VELARDE ESTRADA, Appellant.	)	1 CA-CR 09-0688 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-006642-004 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

The Law Offices of Mark L. Williams — Nogales
by Mark L. Williams
Attorneys for Appellant

K E S S L E R, Presiding Judge

¶1 Natalie Velarde Estrada appeals her convictions for conspiracy to commit possession of marijuana for sale,

transportation of marijuana, and possession of marijuana for sale.

¶2 A grand jury indicted Estrada and nine others on the charges arising from their various roles between December 8 and 12, 2008 in a conspiracy to transport several hundred pounds of marijuana from Organ Pipe National Park near the Mexican border to Maricopa County for sale. The evidence at the joint trial of Estrada with co-defendant Judith Rodriguez, viewed in the light most favourable to sustaining the convictions,[1] showed that on December 12, 2008, police discovered hundreds of pounds of marijuana in bales in secret compartments of white cargo trailers the two defendants, their boyfriends, and their children had hauled behind two separate recreational vehicles ("RVs") rented from Cruise America. Police discovered hundreds more pounds of marijuana in bales in an identical secret compartment of a white cargo trailer hauled by another defendant and his family in a privately-owned RV from Organ Pipe on the same date.

¶3 An inoperable off-road vehicle occupied each of the non-secret compartments of the white cargo trailers. The trailers reeked of gasoline, which police believed was designed to disguise the smell of marijuana. The five hundred twenty-

[1] *State v. Moody*, 208 Ariz. 424, 435 n.1, 94 P.3d 1119, 1130 n.1 (2004) (citation omitted).

eight pounds of marijuana found in the trailer hauled by Estrada's family was valued at about $260,000. The four hundred thirty pounds of marijuana found in the trailer hauled by Rodriguez's family was valued at about $215,000. The four hundred sixty-seven pounds of marijuana found in the trailer hauled behind the privately-owned RV was valued at about $230,000.

¶4 Police had attached a GPS tracker to an RV rented at Cruise America's Surprise location by two suspected traffickers on December 8, 2008, and another GPS tracker on a privately owned RV that police also suspected was used in this drug trafficking conspiracy. They also conducted surveillance on the RV rented at Cruise America's Tucson location by Maria Velarde, for which Estrada agreed per the rental agreement to be the authorized driver.

¶5 Police concluded that the RVs made two trips to Organ Pipe near the Mexican border and then back to Maricopa County twice in three days. The RVs changed white cargo trailers before and after the trips in parking lots of local businesses. A blue Dodge pickup truck transported the white cargo trailers from the parking lots to houses that police believed were used to unload and store the marijuana bales prior to distribution. The same truck transported empty trailers to where the RVs were parked to hook them up for the return trips to Organ Pipe.

Estrada sat inside the RV when unidentified persons hooked the white cargo trailer to the RV occupied by her family before it left for Organ Pipe on December 11, 2008.

¶6 Estrada told police after she was arrested that she figured they were transporting something illegal, because "they would just go to . . . the locations they were going to, sleep, and then immediately come back," but she did not know that it was marijuana. She said she did not leave the RV when they arrived at their destination, but heard other people outside. She said her role was to rent the RV, because she was the one who had the driver's license. She told the officer that other people paid the bill for the credit card she used to pay to rent the RV, as well as several personal bills of hers. She told the officer she did not know the identity of the persons who paid her bills.

¶7 The jury convicted Estrada of conspiracy to commit possession of marijuana for sale, sale or transportation of more than two pounds of marijuana, and possession of more than four pounds of marijuana for sale. The judge imposed concurrent terms of four years on each count. Estrada timely appealed.

Denial of Motion for New Trial

¶8 Estrada contends that the judge erroneously denied her motion for new trial. The motion contended that the judge erred in his response to a jury question on whether Estrada had to

know that the substance in the trailer was marijuana for a conviction of the crime of sale or transportation of marijuana. She argued this error improperly coerced the jury into convicting her.

¶9 During deliberations, the jury forwarded to the judge the following questions regarding Count Two, sale or transportation of more than two pounds of marijuana:

> Did the defendants have to know they were, in fact, transporting marijuana [] in order to convict on Count 2, not just transporting something illegal?
>
> * * *
>
> In Count No. 2, can the defendants be considered either defendants or accomplices, i.e., could Judith and Natalie be guilty if their boyfriends knew, but they did not know?
>
> Count No. 2, bottom of. [sic]

Estrada asked the judge to respond to the first question by simply saying "yes," or by referring the jurors to the instructions as a whole. Over Estrada's objection, the judge determined to respond to the first question by referring the jurors to the standard instructions he had already given on the elements of the offense of transportation or sale of marijuana and the effect of ignorance or mistake on criminal liability. With respect to the second question, Estrada again asked the judge to refer the jury to the instructions as a whole rather than singling out any instruction. Over Estrada's objection,

the judge determined to respond to the second question by referring the jurors to the standard accomplice liability instruction that he had already given. The judge provided the responses to the jury in the absence of the attorneys. The record does not contain an instrument memorializing the judge's response to the jury. The judge informed counsel during the argument on Estrada's motion for new trial, however, that he had done exactly what he had told them he would do, which was to refer the jurors to the instructions he had singled out as the direct response to their questions.

¶10 Within an hour, the jury returned a verdict of guilty on all counts. Estrada subsequently filed a motion for new trial, arguing that the judge had improperly responded to the juror questions by singling out these instructions and failing to also refer the jury to the final instructions on "knowingly," "mere presence," and "reasonable doubt." She argued that the judge should conduct an evidentiary hearing and grant a new trial because a post-verdict interview revealed that one juror had been a "hold out" and had changed his mind only after misunderstanding the governing law from the judge's response to the jury's question. The judge denied the motion for new trial.

¶11 We review a trial court's decision denying a motion for new trial for abuse of discretion. *State v. Melcher,* 15 Ariz. App. 157, 158 n.1, 487 P.2d 3, 4 n.1 (1971) (citation

omitted). We review a trial court's response to a jury question for abuse of discretion. *State v. Ramirez,* 178 Ariz. 116, 126, 871 P.2d 237, 247 (1994) (citing Ariz. R. Crim. P. 22.3). We review the legal adequacy of an instruction *de novo*. *State v. Martinez*, 218 Ariz. 421, 432, ¶ 49, 189 P.3d 348, 359 (2008) (citation omitted). We will not reverse "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (citation and internal quotations omitted).

¶12 We find no abuse of discretion either in the judge's responses to the jury questions or his denial of a motion for new trial. The instructions that the judge singled out were responsive to the jury's questions. The jury asked whether the State must prove that the defendants knew the substance being transported was marijuana and whether it was sufficient for the defendants' boyfriends to know that the substance was marijuana. The judge referred the jury to the standard instructions he had already given on the elements of the offense, mistake of fact, and accomplice liability. The judge did not abuse his discretion in referring the jury to these instructions. *See Ramirez,* 178 Ariz. at 126, 871 P.2d at 247 ("Thus, '[w]hen a jury asks a judge about a matter on which it has received adequate instruction, the judge may in his or her discretion

refuse to answer or may refer the jury to the earlier instruction.'") (citation omitted).

¶13 The instruction on the elements of the offense included the *mens rea* that the defendant or an accomplice had "knowingly" transported marijuana. Had the jury not understood what "knowingly" meant, it could have specifically asked that question. It did not. If the jury became uncertain about the meaning of "knowingly" after the judge responded to its questions, it could also have referred to the instruction defining "knowingly". The mistake of fact instruction tracked the language of the statute and specifically instructed the jury that ignorance of fact does not relieve a person of criminal liability unless it negates the culpable mental state. *See* A.R.S. § 13-204(A)(1) and (B) (2010). The accomplice liability instruction accurately incorporated the language of A.R.S. § 13-301 (2010). Neither the "mere presence" instruction nor the "reasonable doubt" instruction was responsive to the questions asked.

¶14 We also reject Estrada's argument that the judge's reference to these specific instructions coerced the jury in a manner "more extreme than the overt pressuring of the holdout jurors in *Huerstel* and *Lautzenheiser.*" "Jury coercion exists when the trial court's actions or remarks, viewed in the totality of the circumstances, displaced the independent

judgment of the jurors, or when the trial judge encourages a deadlocked jury to reach a verdict." *State v. Davolt,* 207 Ariz. 191, 213, ¶ 94, 84 P.3d 456, 478 (2004) (internal citations and quotations omitted). The judge did not impermissibly single out a lone "hold out" juror and suggest he reconsider his position to allow the jury to reach a verdict, conduct that our supreme court cited as reversible error in *State v. Huerstel,* 206 Ariz. 93, 101, ¶ 25, 75 P.3d 698, 706 (2003), and in *State v. Lautzenheiser,* 180 Ariz. 7, 8-11, 881 P.2d 339, 340-43 (1994). Estrada interviewed the jurors *after* they reached a verdict and concluded from one juror's comments that this juror had been a "hold out" juror and had changed his mind only after misunderstanding the governing law from the judge's response to the jury's question.

¶15 The judge appropriately denied Estrada an evidentiary hearing to determine whether the juror had in fact changed his mind based on a misunderstanding of the judge's instruction and denied Estrada's motion for new trial on this basis. A court may not inquire into the deliberative processes of a juror. *See* Ariz. R. Crim. P. 24.1(d) ("No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict."). Nor has Estrada persuaded us that the judge's reference to specific instructions he had previously given that

were specifically responsive to the jury's questions "displaced the independent judgment of the jurors." *See Davolt,* 207 Ariz. at 213, ¶ 94, 84 P.3d at 478. We accordingly find no merit in Estrada's argument that the judge's responses to the jury questions coerced the jury.

¶16 We similarly reject Estrada's argument for the first time on appeal that, in the absence of any record of precisely what the judge told the jury, he might have coerced the jury by the manner in which he conveyed to them the responses to their questions.[2] A trial judge may not communicate with a deliberating jury unless the parties have been notified and have an opportunity to be present. *State v. Dann*, 220 Ariz. 351, 368, ¶ 86, 207 P.3d 604, 621 (2009); *State v. Shumway*, 137 Ariz. 585, 587, 672 P.2d 929, 931 (1983). In this case, however, the parties were notified of the jury question, were present in court to discuss the appropriate response, and, insofar as the record reveals, were not expressly denied an opportunity to be present when the judge gave the response.

¶17 We decline to reverse on this basis because the record shows beyond a reasonable doubt that the absence of counsel during the judge's repetition of a prior instruction was not prejudicial. *See State v. Freeney*, 223 Ariz. 110, 114, ¶ 26,

[2] Although it is not reversible in this case, the better practice is to include the court's response to the jury question in the record to facilitate appellate review.

219 P.3d 1039, 1043 (App. 2009); *Dann*, 220 Ariz. at 368, ¶ 86, 207 P.3d at 621. The judge told the attorneys that he would simply refer the jurors to the instructions that he had determined were appropriate responses to their questions and he reiterated that he had done exactly that at the hearing on Estrada's motion for new trial. As we have concluded, *supra*, the instructions were an appropriate response to the jury's questions. The instructions were legally correct, and Estrada has not argued otherwise. On this record, the judge's failure to provide the response in the presence of Estrada and the attorneys was not reversible error. *See Dann*, 220 Ariz. at 368, ¶ 87, 207 P.3d at 621 ("Because Dann and counsel were not notified of the jurors' request, the judge's communication was error. The communication did not cause Dann prejudice, however, because the court's answer to the jury question was legally correct and appropriate."). Estrada's argument that the judge inserted inappropriate comments in his response to the jury relies on sheer speculation, contrary to what the judge informed the parties he did. Speculation is insufficient to establish the requisite prejudice. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006). We decline to reverse on this basis.

Sufficiency of Evidence

¶18 Estrada also argues that the judge abused his discretion by denying her a directed verdict. Estrada contended the admissible evidence was insufficient to support her convictions because it failed to demonstrate that she knew that there was marijuana in the trailer, had agreed to assist in its transport by renting the RV, or possessed the marijuana. She specifically argues that the judge abused his discretion in admitting a late-disclosed copy of the Cruise America rental agreement signed by Estrada and including a copy of her driver's license and her responses to post-arrest police questions which were vague and ambiguous as to time and scope. She contended the answers were not relevant, were unfairly prejudicial, lacked foundation, and may have related to prior acts.[3]

¶19 In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Credibility determinations are for the fact finder, not this court. *See State v. Dickens,* 187 Ariz. 1, 21,

[3]Estrada also argued below in part that the statements lacked foundation because the officer who questioned her in Spanish and testified at trial to her answers had not been certified by the Glendale Police Department as a Spanish translator. By not specifically arguing this issue on appeal she has abandoned and waived it, and we do not consider it. *See State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

926 P.2d 468, 488 (1996). "There is, of course, no distinction between the probative value of direct and circumstantial evidence." *State v. Bible*, 175 Ariz. 549, 560 n.1, 858 P.2d 1152, 1163 n.1 (1993). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶20 Estrada argues that the evidence failed to demonstrate that she knew that there was marijuana in the trailer, had agreed to assist in its transport by renting the RV, or possessed the marijuana. The State was required to prove that Estrada knew that the trailer she and her boyfriend were hauling contained marijuana. *See* A.R.S. §§ 13-3405(A)(2), (4) (2010), & -1003(A)(2010); *State v. Fierro*, 220 Ariz. 337, 339, ¶ 5, 206 P.3d 786, 788 (App. 2009). The knowledge necessary to support these convictions "can be established either by direct or circumstantial evidence." *State v. Diaz,* 166 Ariz. 442, 445, 803 P.2d 435, 438 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363, 813 P.2d 728 (1991). "It can be established by

showing that appellant was aware of the high probability that the packages contained [marijuana] and that [s]he acted with a conscious purpose to avoid learning the true contents of the packages." *Id.* (citation omitted); *see also Fierro,* 220 Ariz. at 339, ¶¶ 5-9, 206 P.3d at 788 (finding no error in instruction on deliberate ignorance and accordingly affirming conviction of defendant who admitted that he knew there were drugs in the bed of the truck, but claimed "he did not know what type of drugs he was transporting"). Similarly, "[c]riminal conspiracy need not be, and usually cannot be, proved by direct evidence. The common scheme or plan may be inferred from circumstantial evidence." *Arredondo*, 155 Ariz. at 317, 746 P.2d at 487. Finally, it is not necessary with respect to the element of knowing possession to show that any one person had exclusive or actual possession of the drugs at issue; it is sufficient that the drugs were found in a place under a person's dominion or control "and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the [drugs]." *State v. Cox*, 214 Ariz. 518, 520, ¶¶ 9-10, 155 P.3d 357, 359 (App. 2007) (citation and internal quotations omitted), *aff'd*, 217 Ariz. 353, 358, 174 P.3d 265, 270 (2007); *see also State v. Teagle*, 217 Ariz. 17, 27-28, ¶ 41, 170 P.3d 266, 276-77 (App. 2007).

¶21 Viewing the evidence and all reasonable inferences in

the light most favorable to supporting the verdict, we find that the State offered sufficient circumstantial evidence to support Estrada's convictions. Estrada was arrested on December 12, 2008, in an RV that was pulling a trailer in which police discovered more than five hundred pounds of marijuana hidden in a secret compartment behind an inoperable sand buggy. The trailer reeked of gasoline used to mask the smell of the marijuana. Estrada admitted to the officer immediately after her arrest that her role in the operation was to agree to be the authorized driver for the RV when it was rented because she was the one with the driver's license. She admitted that unidentified persons paid the bill for the RV rental and other bills of hers. She admitted that she knew that she and her boyfriend were transporting something illegal because they drove to a location, stayed a few hours, and drove back. Police observed her sitting in the RV when the men hooked up the white cargo trailer with the secret compartment to the RV prior to one of those trips south to pick up the marijuana near the Mexican border. Police observed a blue Dodge pickup truck bringing the white cargo trailer for hookup. The same truck had performed the same operation with the other two RVs with identical white cargo trailers that had made similar trips to Organ Pipe National Park and back to Maricopa County with hundreds of pounds of marijuana.

¶22 The State offered sufficient circumstantial evidence to show that Estrada had conspired with her boyfriend and the person who paid to rent the RV to commit the charged offenses. The State presented evidence that she had been an accomplice in the charged offenses by acting as the authorized driver for the RV and accompanying her young son and boyfriend on the overnight trips to bring back the marijuana hidden in the secret compartment of the trailer hauled behind the RV. It was for the jury, not this Court, to evaluate the credibility of her denials to police that she specifically knew the illegal substance was marijuana in light of her admission that she knew they were hauling something illegal in the trailer. *See Dickens*, 187 Ariz. at 21, 926 P.2d at 488. On this record, we find the circumstantial evidence was sufficient to convict her of the charged crimes.

¶23 Estrada additionally argues that the evidence would not have been sufficient had the judge not erred in admitting her post-arrest statements, which she argued below should have been excluded in their entirety because the officer did not pinpoint the time period he was asking her about. The judge overruled Estrada's objections, because the absence of reference to specific dates "goes to the weight, not the admissibility of the statement." However, Estrada was free to argue that "she wasn't making reference to the crimes charged." The judge

further advised her counsel, "If there's a specific statement you're objecting to where she clearly is referring to something else, bring it my attention, but the fact that it's ambiguous means it goes to the jury, and the jurors determine what it is, in fact, she is describing." The interviewing officer subsequently testified to the content of the videotaped interview, which had been conducted in Spanish at Estrada's request, and was not shown to the jury.

¶24 We find no merit in Estrada's argument that her statements should have been precluded because, in the absence of reference to specific dates, she may have been referring to other offenses for which she was not on trial. Because Estrada cites no legal authority for her argument that her post-arrest statements were inadmissible on this basis, she has arguably abandoned and waived it. *See Carver,* 160 Ariz. at 175, 771 P.2d at 1390. In any case, we find the argument has no merit. The officer asked Estrada questions about her role in transporting marijuana for sale immediately after she was arrested in an RV hauling more than five hundred pounds of marijuana. It is reasonable to conclude that her responses related to the conduct for which she was caught. Moreover, to any extent that she may have been referring to prior conduct, the conduct was relevant to show her knowledge of the illegal activity in which she was involved, a key issue at trial. Ariz. R. Evid. 404(b). We

accordingly find no abuse of discretion in the judge's admission of her statements at trial over Estrada's objections as to vagueness of the time period discussed.[4]

¶25 Finally, she argues that the evidence would not have been sufficient had the judge not erred in admitting the untimely disclosed, signed rental agreement. The judge allowed the late-disclosed document to be admitted on the condition that the State would reinstate a plea offer made before trial. The court reasoned that its admission would not cause Estrada significant prejudice because the "information contained in the disclosed document clearly is consistent with the information contained in the document that was disclosed last week." We review a trial court's imposition of sanctions for discovery violations for abuse of discretion. *State v. Lee*, 185 Ariz. 549, 555-56, 917 P.2d 692, 698-99 (1996). We will not find an abuse of discretion in a discovery ruling unless a defendant shows that he suffered prejudice as a result of the nondisclosure. *State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985). Finally, we will not find that a

[4]We also reject Estrada's claim that the judge abused his discretion in overruling her hearsay objection to the officer's testimony that he asked Estrada whether it was true, as another person had told him, that she knew they were transporting marijuana. The statement embedded in the question was not offered for the proof of the matter asserted, but rather to elicit her response. It accordingly was not hearsay. Ariz. R. Evid. 801.

trial court has abused its discretion "unless no reasonable judge would have reached the same result under the circumstances." *State v. Armstrong*, 208 Ariz. 345, 353-54, ¶ 40, 93 P.3d 1061, 1069-70 (2004) (citation and internal quotation omitted).

¶26 We find no such abuse of the court's considerable discretion in imposing this sanction for the State's discovery violations. The prosecutor explained that she had previously disclosed a "plethora" of documents obtained from Cruise America, and had not known of the existence of the signed agreement until it came to light during defense counsel's recent interview of Cruise America's custodian of records. The judge's finding that the late-disclosed document did not cause Estrada significant prejudice because it was similar to a previously-disclosed document is supported by the record. The record shows that the unsigned agreement differed from the late-disclosed document admitted at trial only by virtue of the absence of Estrada's signature and a copy of her driver's license. The record shows that the previously disclosed document contained Estrada's driver's license information, a cell phone number, an address, and a date of birth.[5] In light of the prior disclosure

[5]Estrada has failed to ensure that a copy of the previously-disclosed document, marked Ex. # 122, is in the record on appeal. We accordingly refer to the discussion in the record as to the difference between the late-disclosed document, Ex. #

of a rental agreement similar to the late-disclosed rental agreement, we decline to find that the judge abused his discretion in admitting it contingent on the reinstatement of the pre-trial plea offer. *Armstrong*, 208 Ariz. at 353-54, ¶ 40, 93 P.3d at 1069-70.

Conclusion

¶27 For the foregoing reasons, we affirm Estrada's convictions and sentences.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
JON W. THOMPSON, Judge

163, and the previously disclosed document, Ex. # 122.