DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. CARLOS ESTEBAN CORTES-GUERRERO, Appellant.	)	No. 1 CA-CR 09-0764 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-107431-003 SE

The Honorable Steven P. Lynch, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

Hock Law Group, L.L.C. — Phoenix
By Alan R. Hock
Attorney for Appellant

B R O W N, Judge

¶1 Carlos Cortes-Guerrero ("Defendant") appeals from his convictions on four counts of sale or transportation of dangerous drugs. He maintains that the trial court erred by denying his challenge for cause of a prospective juror, failing to address a violation of the witness exclusionary rule, and conducting the trial in his absence. For the reasons that follow, we affirm.

BACKGROUND[1]

¶2 In early January 2007, an informant introduced undercover Officer M. to Defendant, who worked at a Mesa restaurant. Defendant told Officer M. if he called him or came in to the restaurant, he could "hook him up" with either "goods" or "powder," which Officer M. understood to mean methamphetamine and cocaine.

¶3 Officer M. testified that he would go to the restaurant and inquire if Defendant was working. When the Defendant came to his table, Officer M. would order "a dozen wings, [and] a Coke" and say something like, "I need a half ounce of goods." He would pay Defendant $350 "right then" for the methamphetamine, and Defendant would tell him it would take about twenty minutes. In Officer M.'s experience, this response

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

indicated that Defendant did not have the drugs himself, but needed to get them from someone with whom Defendant most likely split the profits.

¶4 The food and drink would arrive first. Later, Defendant would return with a Styrofoam cup, handing it to Officer M. and telling him that "the goods" were inside. Officer M. bought a small baggie with 13.58 grams of methamphetamine on January 9, 13.27 grams on January 17, and 13.62 grams on January 23.

¶5 On January 31, Officer M. gave Defendant $700 in marked bills to purchase one ounce of methamphetamine. Defendant returned shortly with a cup containing 27.03 grams of methamphetamine. He was arrested a short time later, and was in possession of $200 of the $700 given him by Officer M., and a baggie containing 2.54 grams of cocaine. The State charged Defendant with four counts of the sale or transportation of dangerous drugs (methamphetamine) above the threshold amount, and one count of possession of narcotic drugs (cocaine) for sale. A jury found Defendant guilty of four counts of sale or transportation of dangerous drugs but acquitted him of the fifth count, possession of narcotic drugs for sale. The trial court sentenced the Defendant to four concurrent six-year mitigated terms in prison. Defendant timely appealed.

DISCUSSION

I. Failure to Excuse Juror 32

¶6 During voir dire, the trial court asked the jury panel whether any of them had any relatives or close friends who had ever been arrested, charged, or convicted of any type of crime other than a minor traffic offense. The following exchange occurred:

> JUROR # 32: I have a nephew that was arrested for drug use; and I also have a brother-in-law that's been put in jail for DUI cases.
>
> THE COURT: Anything about this (sic) experiences do you think would affect your ability to be fair in this case?
>
> JUROR # 32: I'd have to say yes because of the relationship.
>
> THE COURT: Well, that's fair. For example, do you think either of them was treated unfairly by the system?
>
> JUROR # 32: I don't know.
>
> THE COURT: But you are not sure?
>
> JUROR # 32: (No response.)

When the trial court completed its questioning, it permitted the prosecutor and defense counsel to ask additional questions. The prosecutor asked the jurors some questions; defense counsel did not.

¶7 After the trial court recessed the prospective jurors to finalize the panel, the court made a list of jurors to be

dismissed for cause. Defense counsel asked to be allowed some follow-up questions with Juror 32 because he was "not so sure whether [he] would be fair and impartial." The trial court denied defense counsel's request, noting that counsel had chosen to forego the opportunity to question him during voir dire.

¶8 Though defense counsel was concerned about Juror 32, the prosecutor argued that Juror 32 "thought that both family members were treated fairly" and that she had nothing noted that indicated the juror said he would not be able to be fair and impartial. The prosecutor was concerned that Juror 15 had a previous negative experience with law enforcement and was unsure whether he could be fair, while defense counsel argued that he said he could. After considering the matter further, the trial court decided to keep both jurors, explaining "32 really sort of thought that he would be okay." The court did strike sixteen other jurors for cause.

¶9 The court directed the parties to make their peremptory strikes, and the process was completed off the record. The prosecutor struck Juror 15 but the defense did not strike Juror 32, who was seated on the jury panel and ultimately participated in the deliberations and verdicts.

¶10 On appeal, Defendant argues that the trial court's failure to dismiss Juror 32 is reversible error. He has waived

this argument, however, by failing to use one of his peremptory strikes to remove Juror 32.

¶11 In *State v. Rubio*, 219 Ariz. 177, 181, ¶ 12, 195 P.3d 214, 218 (App. 2008), we adopted the "cure-or-waive rule," holding that when an error occurs in the jury selection process and the trial court fails to eliminate a potentially biased or unqualified juror, a defendant is required to use an available peremptory strike to remove the objectionable juror to preserve the issue for appeal. We noted that defense counsel is in the best position to correct any error by the trial court in denying a challenge for cause by striking the juror and thereby avoiding a new trial. *Id*. at 180, ¶ 10, 195 P.3d at 217. Additionally, we noted that defense counsel should not be "encouraged to allow a 'demonstrably biased juror' to remain on the jury—deliberately exposing his or her client to the risk of an unfair trial—and then obtain a reversal if the outcome is unfavorable." *Id*. (citation omitted).

¶12 Here, as in *Rubio*, although Defendant's attorney did not create the alleged error, he had both the means and opportunity to correct it. *Id*. at 181, ¶ 13, 195 P.3d 218. At the very least, defense counsel could have questioned Juror 32 further about his responses to the trial court's questions during voir dire, but he declined to do so. In any event, by choosing to use his six peremptory strikes to eliminate jurors

that he did not challenge for cause and passing the panel with Juror 32 seated, Defendant has waived any error in the trial court's denial of his for-cause challenge to Juror 32.

II. Violation of the Rule of Exclusion

¶13 Defendant argues that the trial court incorrectly held that the exclusionary rule applied only after a witness had testified and that the court's refusal to address a potential violation of the rule in this case was the equivalent of a denial of his motion to exclude. He contends that the court abused its discretion by not conducting a hearing to determine the extent of the violation and that we must presume prejudice and reverse.

¶14 Arizona Rule of Criminal Procedure 9.3(a) provides in relevant part that, at the request of either party, the trial court "shall[] exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses" and also "direct them not to communicate with each other until all have testified." However, the admission of a witness's testimony after a violation of Rule 9.3 remains within the trial court's discretion. *State v. Gulbrandson*, 184 Ariz. 46, 63, 906 P.2d 579, 596 (1995). Reversal on appeal is proper only when a defendant shows an abuse of discretion by the trial court and resulting prejudice. *State v. Perkins*, 141 Ariz. 278, 294, 686 P.2d 1248, 1264 (1984), *overruled on other grounds by State v.*

Noble, 152 Ariz. 284, 731 P.2d 1228 (1987). To establish prejudice, a defendant must show that a witness's testimony was obtained by coercion or intimidation or that witnesses were induced to testify falsely or share information in order to have their stories conform. *Gulbrandson,* 184 Ariz. at 64, 906 P.2d at 597.

¶15 Prior to the start of the trial testimony, defense counsel invoked Rule 9.3 to exclude witnesses from the courtroom. After the State's opening statement, defense counsel informed the trial court that he had "observed Officer [Officer M.] and another officer sitting next to each other on the bench outside the courtroom, and they were going over some documents that had Tempe——I'm assuming, Tempe Police Department records." Counsel stated that he "just wanted to clarify and make it clear to the State to determine if they were actually discussing the case when they were asked not to discuss the case."

¶16 The trial court stated that no testimony had been offered yet, so it did not believe that the witnesses were precluded from talking about the case because the rule only precluded witnesses from "talking about the substance of their testimony after they have testified." Defense counsel replied, "That's fine, Your Honor," and no further action was taken.

¶17 Officer M. and Officer B. were the State's principal witnesses. When each had completed his testimony, defense

counsel again raised the issue, stating that he had reviewed Rule 9.3 and his understanding was that the officers were precluded from discussing the case once the State gave its opening statement. The trial court noted defense counsel's concerns but stated that counsel was not able "to explain to the Court that [he] actually [heard] them talking about the case" or that anything improper was done by either officer. The trial court did not question the officers about defense counsel's observation.

¶18 Though Defendant argues that the trial court had an obligation to question the officers about whether they discussed the facts of this case, it was his burden to show that the officers had violated the rule. *Id*. at 63, 906 P.2d at 596. Here, defense counsel simply assumed that the documents he saw were records related to his case and that the officers were talking about it.

¶19 Furthermore, defense counsel had the opportunity to cross-examine both officers about a possible rule violation and did not do so. Counsel therefore failed to establish for the court that anything improper was done by the officers. *See State v. Reyes*, 146 Ariz. 131, 134, 704 P.2d 261, 264 (App. 1985) (holding that counsel who declined the opportunity to cross-examine witnesses about the nature of a conversation and

thus provide information to the trial court cannot complain of the court's inaction on appeal).

¶20 Even if Defendant had established a violation, in *State v. Schlaefli*, our supreme court noted that, while in most cases a violation of the rule might subject a witness to contempt proceedings and would certainly affect his or her credibility, it did not render the witness completely incompetent to testify. 117 Ariz. 1, 4, 570 P.2d 772, 775 (1977), *overruled on other grounds by State v. Roberts*, 126 Ariz. 92, 612 P.2d 1055 (1980). In *Schlaefli*, one police officer admitted on cross-examination that he and another officer had reviewed a police report and discussed the facts of the case even though they knew that Rule 9.3 had been invoked. *Id*. at 3, 570 P.2d at 774. Despite this clear violation of the rule, the supreme court found that the trial court had not abused its discretion in denying defendant's motion for mistrial. *Id*. at 4, 570 P.2d at 775. The court concluded that the defendant had failed to establish prejudice because "the officers' testimony was not identical," presumably dispelling any inkling of collusion. *Id*. The same reasoning applies in the present case.

¶21 Here, even assuming that the officers did discuss the facts of the case, the testimony given was not duplicative. Officer M. testified about his negotiations with Defendant and

the four in-person drug transactions. Officer B. was present for the final buy only and testified about his observations of Defendant's actions on that occasion as well as his subsequent arrest and search of Defendant when Officer M. was not present.

¶22 Defendant relies on our supreme court's decision in *State v. Roberts*, 126 Ariz. 92, 94, 612 P.2d 1055, 1058 (1980), to argue that we must "presume" that prejudice occurred in this case because of the violation of the rule. However, *Roberts* stands for the proposition that a judge may not deny counsel's request to invoke the exclusionary rule or there will be a presumption of prejudice. *State v. Perkins*, 141 Ariz. 278, 294, 686 P.2d 1248, 1264 (1984) ("*Roberts* . . . concerns the situation in which a court refuses a party's request to invoke the rule, and not the situation in which the rule is invoked and then violated by a witness."). The present case does not involve the denial of a request to invoke Rule 9.3 and thus *Roberts* does not apply here. Our review of the record reveals no abuse of discretion by the trial court and no prejudice to Defendant.

III. Trial in Absentia

¶23 We often review a trial court's determination to proceed *in absentia* based on its finding that a defendant has voluntarily absented himself from trial for an abuse of discretion. *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914

P.2d 1353, 1354 (App. 1996). Here however, there was no objection in the record to the trial proceeding in absentia. We therefore only review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Our first determination must be whether the trial court committed some error. *Id.* at ¶ 20. Here we find the trial court committed no error, let alone fundamental error.

¶24 The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear. Ariz. R. Crim. P. 9.1; *see also Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354.

¶25 Defendant argues that the trial court abused its discretion because it made no finding he was voluntarily absent, and made no record that he was "advised of the time of the proceeding and warned that the trial would go forward without him." We disagree.

¶26 The record shows that Defendant received adequate notice of the trial date more than once. He was advised by the court at an initial pretrial conference that his failure to appear at a status conference or trial "MAY RESULT IN A BENCH WARRANT BEING ISSUED FOR HIS OR HER ARREST AND THE [FINAL TRIAL MANAGEMENT CONFERENCE] AND TRIAL BEING CONDUCTED IN THE

[D]EFENDANT'S ABSENCE." Defendant subsequently failed to appear for a trial management conference and a bench warrant was issued for his arrest. The bench warrant was later quashed and Defendant signed a superior court release order that contained an attachment with the following statement:

> WARNING TO THE DEFENDANT: You have a right to be present at all pretrial and trial proceedings concerning this case. If you fail to appear, a warrant will be issued for your arrest and the proceeding may go forward in your absence.

The record also shows that Defendant was present in the courtroom when the firm trial date was calendared.

¶27 Defendant did not appear for trial. Defense counsel confirmed that he had "valid contact numbers" for Defendant, that he had made "many efforts" to contact him, and that he had "left numerous messages on his voice mail" to tell him about the date. The court noted that Defendant had been present at all prior court appearances. It therefore determined that Defendant had voluntarily absented himself from trial and proceeded with the trial in his absence.

¶28 Based on this record, the trial court committed no error in inferring that Defendant's absence was voluntary and in ordering that trial would proceed in his absence.

CONCLUSION

¶29 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
JOHN C. GEMMILL, Judge