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



DIVISION ONE
FILED: 07/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0822
)
Appellee,) DEPARTMENT D
)
v.) MEMORANDUM DECISION
)
DELL RAINBOW VANDERSCHUIT,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-009278-001 DT

The Honorable Steven K. Holding, Commissioner

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals Section/
Capital Litigation Section
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Dell Rainbow Vanderschuit (Defendant) appeals his conviction of one count of attempted child prostitution, a class two felony and dangerous crime against children, and sentence of ten years of imprisonment. He contends that the trial court erred by denying his motions for a mistrial and new trial. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In December 2008, Defendant was indicted on one count of attempted child prostitution, a dangerous crime against children. At trial, Phoenix Police Officer Amanda Herman testified that she had initiated three telephone calls to Defendant while posing as a caretaker to a fictional ten or eleven year old female. Officer Herman and Defendant discussed Defendant paying for the child to engage in sexual acts with him. The telephone calls were recorded and subsequently played for the jury during the trial. At the conclusion of Officer Herman's testimony, a juror asked the court if the "transcripts or the phone calls [were] available for jury review[.]" Commissioner Steven Holding responded in open court:

What is available for the jury is your notes, as well as all the evidence that has been admitted at this point in time. We have all three of the phone calls in evidence on CD form. Should you wish to review those recording devices, playing devices will be provided which will be monitored by my staff. They will be replayed, should you wish. The staff cannot talk to you during those replaying of any of the phone

calls and then the device itself and the CD will then be preserved at the clerk's desk.

¶13 The court instructed the jury before they deliberated that "[i]n their opening statements and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence." The jurors reviewed the three telephone calls during their deliberation. Prior to announcing their verdict, Defendant's attorney stated:

It's come to my attention that the tape recordings that [the jury was] listening to, they were listening to on the State's laptop, and also, the State's closing argument [was] on that laptop. I know that [court staff] went in and turned it off for them and then left, but [the jury] had [the laptop] there by themselves. So I think that, although I'm saying that that gives the appearance of unfairness, if they had access to [the State's] PowerPoint presentation of her closing argument.

¶14 The State responded:

With respect to the laptop computer, [Defendant's attorney and Defendant] were present when this was being discussed and I asked about the computer. There was discussion about me showing it, Theo had to work with it. So this is not something that just recently came to our attention. I was very candid in open court about providing a laptop or something. And there was no objection as to that, at the time.

¶15 Defendant's attorney replied:

Actually, there was an objection. I requested if the jury wanted to hear the tape, that we all be brought back in and listen to the tapes in the courtroom. And then they could return and deliberate. And I did make that objection, Your Honor. I did make an objection

to them listening to that by themselves.^[1] And I certainly didn't know that it was going to be on the same laptop that had her closing argument. I would have objected.

I'm not saying she tried to hide it from me, but I didn't know it was going to be in there with them, so I would have objected to that. And I'm objecting to that to preserve my record on that issue and would ask for a mistrial based on the fact that I don't think that he has received a fair trial in that respect.

¶6 The court denied Defendant's request for a mistrial. The jury found Defendant guilty of attempted child prostitution, a dangerous crime against children. Following the verdict, Defendant moved for a new trial, arguing, in part, that the jury was permitted to deliberate with the State's laptop in the room, which contained a PowerPoint presentation of the State's closing argument. Defendant did not ask the court, in his motion or otherwise, to question the jury as to whether they had touched, manipulated, attempted to access anything on the laptop, or actually reviewed anything on the laptop other than the recorded telephone conversations. The State responded to the motion for a new trial that:

After the jury retired to the jury room to begin deliberations, a discussion in open court was held in which it was decided that Counsel for the State's laptop (office issued, not personal) would be handed over to the Court's Judicial Assistant and Counsel for

¹ A bench conference was held regarding the juror question of whether the jury could listen to the telephone calls or read the transcripts of the telephone calls during deliberations. This bench conference was not reported. However, as noted *infra* ¶ 6, the State conceded that Defendant indeed objected.

the State was asked to show the Court's Judicial Assistant how to operate the laptop. At no time did Defendant further object to the laptop going back with the jury.

Defendant actually knew before the verdict was returned that the State's closing argument [PowerPoint] presentation was on said laptop. The jury had no way of knowing where this [PowerPoint] was being stored on the computer, however. There was no other information related to the case contained on that laptop. Moreover, this [PowerPoint] was shown to the jury during closing argument.

The State acknowledged in its response that "Defense counsel did object to the jury being allowed to listen to the phone calls in the jury room. However, this objection was overruled by the Court."

¶7 The court denied Defendant's motion for a new trial and sentenced Defendant to a presumptive prison term of ten years for one count of attempted child prostitution, a class two felony and a dangerous crime against children. Defendant timely appealed. Defendant subsequently moved for this court to remand the matter to the trial court in order for the State to reconstruct the PowerPoint presentation because it was not part of the record on appeal. We stayed the appeal and remanded it for the trial court to "settle the record."

¶8 The trial court held a status conference regarding the remanded matter in November 2010. Theo McCalvin², judicial

² We will consider McCalvin's testimony because we ordered the trial court to hold a hearing to reconstruct the record and his testimony was part of that reconstruction.

assistant to Commissioner Steven Holding during Defendant's trial, testified that he placed the laptop on a separate table from the jurors, instructed them not to touch it, and played the recorded telephone calls for the jurors. McCalvin testified that although a "couple engineer[]" jurors initially attempted to "access the computer," he instructed them not to. He stated that he did not open up a PowerPoint presentation on the laptop when it was in the jury room. McCalvin testified that although he was not permitted to remain in the jury room during the deliberation period, he "checked in every ten or [fifteen] minutes with the jury to see if they needed anything" while they listened to the recorded telephone calls. McCalvin removed the laptop from the jury room at the conclusion of the recordings and noted at that time that "[t]o [his] knowledge" he was "the only one that handled the" laptop and "[n]othing ha[d] been touched" on the laptop. The trial court ordered the State to reconstruct the PowerPoint presentation because it no longer had the original presentation.

¶19 This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033 (2010).

DISCUSSION

¶10 Defendant argues that the trial court erred by denying his motions for a mistrial and a new trial because the State's laptop contained extrinsic evidence and was temporarily placed in the unsupervised jury room.

¶11 We view the facts in the light most favorable to upholding the verdict. *State v. Hall*, 204 Ariz. 442, 445 n.1, 65 P.3d 90, 93 n.1 (2003). We review the denial of a motion for a mistrial or a motion for a new trial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000); *Hall*, 204 Ariz. at 447, ¶ 16, 65 P.3d at 95. That "discretion is broad . . . because [the trial court] is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Jones*, 197 Ariz. at 304, ¶ 32, 4 P.3d at 359. (citations omitted). These motions are "disfavored," *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996), and "should be granted only when . . . justice [otherwise] will be thwarted[.]" *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

¶12 The court may grant a new trial if the jurors "receiv[ed] extrinsic evidence not properly admitted during the trial" and "it cannot be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict." Ariz. R. Crim. P. 24.1(c)(3)(i); *Hall*, 204 Ariz. at 447, ¶ 16,

65 P.3d at 95 (citation omitted). The defendant bears the initial burden of proving that the jury received and considered extrinsic evidence. *Hall*, 204 Ariz. at 447-48, ¶¶ 16-17, 65 P.3d at 95-96. If the defendant meets this burden then prejudice must be presumed and a new trial granted, unless the State proves beyond a reasonable doubt that the extrinsic evidence did not affect the verdict. *Id.*; *State v. Aguilar*, 224 Ariz. 299, 301, ¶ 6, 230 P.3d 358, 360 (App. 2010).

¶13 The court explicitly instructed the jurors that closing arguments were not evidence. Even assuming that the PowerPoint presentation was akin to extrinsic evidence, Defendant failed to make any showing that the jury received and considered extrinsic evidence. First, Judicial Assistant McCalvin testified that he instructed the jurors, in his professional capacity as a representative of the court, not to touch or manipulate the laptop that contained the recorded telephone calls and the State's PowerPoint presentation. He placed the laptop on a separate table from where the jurors were seated, frequently checked on the jurors while the recordings were played, and he believed the jurors followed his instructions. Second, Defendant did not request that the court recall the jurors back to the courthouse to ascertain whether they had viewed the PowerPoint presentation. Thus, because there is nothing in the record to indicate that the jury

received and considered extrinsic evidence, prejudice is not presumed and the court did not err by denying Defendant's motion for a new trial or a mistrial.

CONCLUSION

¶14 For the foregoing reasons, we affirm Defendant's conviction and sentence for one count of attempted child prostitution.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PATRICIA K. NORRIS, Judge