DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ROBERT TY VAUGHN, Appellant.	)	1 CA-CR 10-0124 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-007659-001DT

The Honorable Lisa M. Roberts, Judge Pro Tempore

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Defendant, Robert Ty Vaughn, appeals from his convictions and the sentences imposed for possession of dangerous drugs, possession of drug paraphernalia, and possession of marijuana. He argues that the trial court erred when it denied his motions for mistrial and for a new trial. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On April 21, 2008, Glendale Police Officers J.M. (Officer M.) and R.P. (Officer P.) contacted Defendant at his apartment about a matter unrelated to the present case. Immediately upon entering the apartment, Officer M. "smelled an odor . . . of burning marijuana." Officer M. conducted a "safety sweep" of the apartment during which he observed a burning, hand-rolled cigarette sitting on top of a soda can on a dresser in the master bedroom. The burning cigarette was "emitting the odor of burned marijuana." Sitting next to the burning cigarette was "a small clear plastic baggie" containing a "green leafy substance" that was marijuana.

¶3 Officer M. returned to the living room where Defendant and his wife (Wife) were sitting and informed them that he had smelled burning marijuana and then seen marijuana on the dresser

[1] We view the evidence in the light most favorable to sustaining the jury's convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

in the bedroom. He asked them "if there were any other drugs inside the house." Defendant replied that "there was not" and that Officer M. could "look inside the apartment." Officer M. read Defendant and Wife their *Miranda*[2] rights in order to insure that they understood those rights before he conducted an investigation into the drugs; both Defendant and Wife indicated that they understood their rights. Officer M. then asked Defendant "who's [sic] marijuana was in the bedroom," and Defendant replied that his marijuana was "on top of the dresser" and that he "believed he had a roach . . . in the bedroom as well," which was the one burning on top of the soda can.

¶4 Initiating a search in the master bedroom, Officer M. located another hand-rolled marijuana cigarette inside a small purple box located on a shelf above the dresser. Alongside the baggie of marijuana on top of the dresser, Officer M. found a package of rolling papers consistent with the type of papers used to roll both the burning hand-rolled cigarette and the hand-rolled cigarette inside the purple box. Under some clothing in a dresser drawer, Officer M. found a "small pocket digital scale" of the type often employed by drug users to weigh the drugs they buy. In the bottom drawer of the dresser, under a few pairs of men's jeans, Officer M. found "a small plastic baggie" containing a white crystalline substance, he believed to

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

be methamphetamine and a "small glass pipe" of the type commonly used to smoke methamphetamine. The pipe felt warm to the touch, as though it had been recently used. In the pocket of a pair of men's khaki shorts, lying between the dresser and the bed, Officer M. also found another package of rolling papers.

¶5 While Officer M. was searching the master bedroom, Defendant came into the room and stated that he "had a really bad meth problem and that any meth that [police] found in the house would be his." Defendant admitted the drawers that contained the scales, methamphetamine, and warm pipe were his drawers, but denied any knowledge of the drug related items in them. Instead, Defendant directed Officer M. to the pipe he used to smoke methamphetamine, which, Defendant indicated he kept underneath the dresser so his children would not find it. Officer M. located the pipe under the dresser and observed that it was "similar" to the pipe previously found in the dresser drawer. Defendant also admitted that the jeans in the dresser drawer and the khaki shorts were his.

¶6 Officer M. next searched the apartment kitchen and dining room. Inside a drawer next to the kitchen sink, Officer M. found another glass pipe of the type used to smoke methamphetamine that contained a white crystalline residue. An armoire in the dining room was "scattered across" with marijuana "shake," which consists of the "small bits and . . . pieces of

marijuana that are . . . left over after the user breaks apart the stems and the seeds." Officer M., found "shake" "pretty much scattered throughout the house." He also found another baggie of marijuana in an armoire drawer.

¶7 After completing his search of the apartment, Officer M. asked Defendant to whom the drugs belonged. Defendant told Officer M. that "he was the only drug user in the house" and that he was also "the only methamphetamine user" and that his wife "did not use methamphetamine." Defendant also told Officer M. that "they" had "just finished smoking marijuana" when police knocked on the apartment door.

¶8 Because one of Defendant's children was seriously injured and in the hospital at that time, Officer M. did not arrest Defendant. The State later charged Defendant with possession or use of dangerous drugs (methamphetamine), a Class 4 felony; possession of drug paraphernalia (methamphetamine pipe), a Class 6 felony; and possession or use of marijuana in an amount weighing less than two pounds, a Class 6 felony.

¶9 From testimony at trial, Defendant established that Wife was never questioned by either officer about her involvement with the drugs or the paraphernalia found in the apartment and also, that Defendant told officers about recent break-ins into the apartment that Defendant contends officers

chose not to investigate.[3] Defendant argued officers conducted a "faulty investigation" regarding Wife's or the alleged intruders' involvement, which "faulty investigation" should have given rise to reasonable doubt concerning Defendant's guilt. Defendant further suggested he falsely confessed to the crimes in order to protect Wife as they dealt with a hospitalized child.

¶10 At the conclusion of the trial, the jury found Defendant guilty as charged. The trial court sentenced Defendant to "slightly mitigated" terms of imprisonment of 3.5 years on Count 1 and of 1.25 years each on Counts 2 and 3, and ordered that all the sentences be served concurrently.

¶11 Defendant timely appealed. This Court has jurisdiction pursuant to Aritcle 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 and -4033 (2010).

DISCUSSION

Denial of Motions for Mistrial

¶12 In December 2008, the State noticed Wife as a potential witness in its Rule 15.1 disclosure statement. Ariz. R. Crim. P. 15.1. Almost one year later, on the first day of

[3] Both officers testified that they inspected the back arcadia doors through which Defendant indicated the alleged intruders had made entry but neither saw any signs of forced entry into Defendant's apartment.

voir dire, Defendant advised the trial court that she had also "recently noticed" Wife "[s]o she could be a witness." The State asked Defendant whether the notice indicated he intended to call Wife as a witness. Defendant was unsure if Wife would be called; but advised that in any event, neither she nor the State was required to say whom they intended to call as a witness so long as they had noticed them. The trial court asked Defendant whether, given the circumstances, Defendant desired Wife's name read to the jury during *voir dire*, as a possible witness. Defense counsel replied, "Yes."

¶13 Jury selection did not conclude on the first day, and the entire panel was subsequently excused for reasons not germane to this case. A new panel of prospective jurors was called the following day. During jury selection the trial court accordingly included Wife's name in the list of "possible witnesses," stating, "[a]ll of these persons may not be called to testify, but any of them might be." A jury was empanelled on the second day, shortly before the court recessed for the day.

¶14 The following day, the trial proceeded with opening statements and testimony from Officers M. and P. The State intended to call the criminalist as its next witness; however Wife was called to the stand. Defendant asked for a bench conference and objected to Wife being called to testify, arguing that the State had never noticed Wife as a witness. The State

correctly informed the trial court that *both* parties had noticed Wife as a possible witness. The trial court called Wife to the witness stand and swore her in.

¶15 Before the State began questioning Wife, Defendant again asked to approach the bench. This time Defendant stated he thought Wife might need a lawyer. The trial court commented that the matter of Wife's representation "should have been discussed before this moment," and because it was at the end of the day, adjourned trial and dismissed the jury. Once the jury was dismissed the trial court stated "[t]his was something that should have been resolved before springing it on everybody in front of the jury." The following exchange occurred:

> [Defense Counsel]: I agree, Your Honor. [The prosecutor] never advised me that she was intending to call [Wife]. I said I may call her. I was not intending to call her. If I was intending to call her I would have addressed this issue long ago and I do not think it should have been sprung at the last minute in front of the Jury.
>
> [Prosecutor]: Well, I apologize. It wasn't my intention to spring it – I mean it wasn't my intention to call her. I wasn't trying to taint the Jury in any way by calling her. So, in the future, I'll obviously address the Court when I plan on calling a witness that I hadn't initially planned on calling. It's just that testimony came out in cross-examination that I wanted to rebut because I do have an interview with her where she states contrary – she makes contrary statements. That's why I wanted to call her. It wasn't my intention to taint this case . . .

> THE COURT: You have the right to call her. The bigger concern is that she has the right to be told outside the presence of the Jury that she has a right to have an attorney.

The trial court then agreed that it would "get an attorney for [Wife] if she wants an attorney."

¶16 At that point, Defendant moved for a mistrial, arguing that the jury had "already been tainted" because it knew that "something was wrong" when Wife "took the stand and then we had to approach and decide." The trial court denied the motion, and asked the State if they intended to call Wife as a witness after all. When the State indicated that they did, the court ordered the State[4] to make arrangements for an attorney to be appointed for Wife and for both counsel to consult with Wife and her attorney before trial resumed. Before adjourning for the day, the trial court also addressed Wife directly and advised her of her right to consult with an attorney and confirmed that Wife did want to have an attorney represent her.

¶17 Trial resumed on the following Monday. Before jurors were brought into the courtroom, Defendant for the first time invoked the Anti-Marital Fact Privilege. Based on that privilege, Wife was prevented from testifying. A.R.S. § 13-4062.A.1. Defendant again moved for a mistrial, arguing that

[4] Before so doing, the court confirmed the State had not made any promises to Wife in exchange for her testimony and that Wife at that point had not been charged with any crimes.

"what happened the other day was completely improper and extremely prejudicial." Counsel postulated that the jury would infer that Defendant was guilty from the fact that he had twice objected and prevented Wife from testifying after she was called to the stand.

¶18 The trial court again denied the motion for mistrial, and asked the parties to advise the court concerning how they wanted to deal with the obvious fact that Wife would not be testifying. The trial judge offered the parties two options: "I can say nothing or I can give them some kind of instruction or statement." After discussing some proposed language, the parties ultimately agreed to the trial court instructing the jury as follows:

> Pursuant to a ruling by this Court, [Wife] will not be testifying. You are not to infer that the Defendant is guilty because she did not testify. You are not to draw any conclusions or inferences from the fact that she did not testify, and are not to consider that factor in your deliberations.

¶19 On appeal, Defendant argues that the fact that Wife was called to the stand, followed by the hurried bench conference in the jury's presence, followed by her failure to testify after the weekend recess, effectively constituted a comment by the State on his failure to call Wife as a witness and, consequently, a violation of his statutorily protected right to exercise the marital privilege. Defendant contends the

trial court therefore abused its discretion when it denied his motions for mistrial.

¶20 A mistrial is "the most dramatic remedy for trial error" that should be granted "only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Lamar*, 205 Ariz. 431, 439, ¶ 40, 72 P.3d 831, 839 (2003) (citation omitted). This court "will only reverse a trial court's decision to deny a mistrial if a clear abuse of discretion is demonstrated." *State v. McCutcheon*, 162 Ariz. 54, 59, 781 P.2d 31, 36 (1989) (citation omitted). Furthermore, we "give great deference to a trial court's decision" to grant or deny a mistrial because the trial court is in the best position to determine whether the error being alleged would actually affect the outcome of the trial. *State v. Lamar*, 205 Ariz. at 439, ¶ 40, 72 P.3d at 839. We conclude that the trial court did not abuse its discretion in denying Defendant's motions for mistrial in this case.

¶21 Defendant complains that, in denying his motions for mistrial, the trial court improperly relied on its mistaken belief that Defendant had waived the marital privilege merely because he listed Wife as a potential witness in his 15.2 disclosure. However, Defendant did not base his initial motion for mistrial on a violation of the marital privilege claim. In fact, Defendant did not invoke marital privilege when the State

first called Wife to the stand. Instead, Defendant's first request for a bench conference occurred because Defendant contended that the State had failed to notice Wife as a witness. The trial court correctly recalled that both the State and Defendant had noticed her and that "both counsel" had asked that Wife's name be read to the jury as a potential witness.

¶22 Defendant's second request for a bench conference occurred because he was concerned that, given the facts of the case, Wife was entitled to be informed of her right to an attorney and to have counsel before she made any statements under oath.

¶23 Defendant's first motion for mistrial was based on Defendant's contention that the jury was "tainted" simply because the jury might think that "something was wrong" given the two bench conferences and the fact that Wife's testimony was temporarily postponed while she consulted an attorney. As the State notes, these interruptions had nothing to do with marital privilege or with the fact that Wife was married to Defendant, but could have occurred during the testimony of any witness. We cannot say that the trial court abused its discretion in denying Defendant's motion for mistrial at that point due to a violation of the marital privilege. *McCutcheon*, 162 Ariz. at 59, 781 P.2d at 36.

¶24 Furthermore, the fact that Defendant decided to invoke the marital privilege three days *after* the State called Wife as a witness does not spontaneously convert the State's earlier actions into an improper comment on Defendant's invocation of that privilege. Defendant's second motion for mistrial, made at that time, simply reiterated his concerns that the jury would impute guilt to him because he had twice interrupted the proceedings after the State had called Wife as a witness.

¶25 The Anti-Marital Fact Privilege generally provides that a defendant's spouse cannot testify against him or her, without his or her consent, as to events that occurred during the marriage. A.R.S. § 13-4062.A.1. We have previously held that a State violates the privilege when the State "comments on the defense's failure to call the defendant's spouse as a witness." *State v. Womack*, 131 Ariz. 158, 159, 639 P.2d 348, 349 (App. 1981). That is because the "inference that the excluded testimony would be unfavorable" to the defendant/spouse who suppressed it is "inconsistent with the full exercise of the (marital) privilege." *State v. Holsinger*, 124 Ariz. 18, 24, 601 P.2d 1054, 1060 (1979) (citation omitted).

¶26 In *Holsinger*, on which Defendant relies, the State specifically confronted the defendant, during cross-examination, with the fact that her husband had not come in to testify on her behalf even though the defendant knew that he was available to

do so. 124 Ariz. at 23, 601 P.2d 1059. Our supreme court held that that was an impermissible comment on the defendant's failure to call her spouse as a witness. *Id*. at 24, 601 P.2d at 1060.

¶27 The State's actions in this case in no way resemble those of the prosecutor in *Holsinger*. Simply calling Wife to the stand when Defendant himself had not only not invoked the marital privilege but had also indicated that he considered Wife a potential witness, cannot be seen as the State's improper attempts to draw the jury's attention to Defendant's failure to call Wife as a witness.

¶28 Defendant made no specific objections on the two occasions he interrupted the State from initiating Wife's testimony but merely asked the court if counsel could approach the bench. Defendant also invoked the marital privilege out of the presence of the jury, prior to the seating of the jury on the third day of trial. Furthermore, when the jury was finally seated, the trial court instructed, as Defendant previously agreed it should, that Wife would not be testifying "pursuant to a ruling *by the Court.*" Under these circumstances, there is simply no indication that the jury would even have perceived Wife's failure to testify as based on an invocation of the marital privilege. Given the testimony presented up to that point, it is arguably more likely the jury might have suspected

that Wife was not going to testify in order to keep from incriminating herself, which might have weighed in Defendant's favor. Nor would the jury have perceived the State's actions as a comment on Defendant's failure to call his wife as a witness.

¶29 Furthermore, the trial court also instructed the jury that it was not to draw any inferences concerning Defendant's guilt based on the court's ruling that Wife would not testify, or even to consider it at all in its deliberations. Our supreme court has held that jurors are presumed to follow the trial court's instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Furthermore, we are not aware of anything in the record to indicate the jurors did not follow their instructions, in this case. We conclude that the trial court did not abuse its discretion in denying Defendant's motions for mistrial.

Denial of Motion for New Trial

¶30 After the jury returned its guilty verdicts, Defendant filed a motion for new trial. In it, he again argued that the trial court had erred in denying his motions for mistrial. Defendant also argued that "juror number four or five (undersigned counsel cannot remember the exact number), looked directly at undersigned counsel and asked her "Why didn't you have/let his wife testify?" According to Defendant, this question alone merited granting Defendant a new trial because it

formed "the basis for believing that substantial prejudice to [Defendant] resulted from [Wife's] being sworn in front of the jury and not testifying]." Prior to sentencing Defendant, the trial court denied the motion for new trial.

¶31 On appeal, Defendant argues that the juror's question essentially proves that the jury ignored the trial court's "cautionary instruction" to not consider Wife's failure to testify in their deliberations. According to Defendant the question establishes that the jury improperly considered "extraneous" information in reaching its guilty verdicts and that the trial court therefore erred in not granting his motion for new trial on that basis.

¶32 We review a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *State v. Valdez*, 167 Ariz. 328, 332, 806 P.2d 1376, 1380 (1991). Like motions for mistrial, motions for new trial should be granted only "with great caution." *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). The trial court is in the best position to determine whether or not to grant a new trial. *Valdez*, 167 Ariz. at 332, 806 P.2d at 1380. We will therefore reverse a trial court's denial of a motion for new trial "only when there is an affirmative showing that the trial court abused its discretion and acted arbitrarily." *State v. Mincey*, 141

Ariz. 425, 432, 687 P.2d 1180, 1187 (1984) (citation omitted). Defendant has made no such showing.

¶33 The State did not dispute that a juror asked a question concerning Wife, but it did dispute Defendant's representation that the juror had "looked directly" at defense counsel when asking it or that the juror had specifically asked "why the defense attorney" had prevented Wife from taking the stand. Thus, even assuming that the State "stipulated" that "a" question was asked regarding Wife's ultimate failure to testify, as Defendant argues on appeal, the record does not establish that this question was necessarily accusatory, as Defendant suggests. Nor does it unequivocally establish that the juror necessarily violated the trial court's instructions.

¶34 As the State points out, it is well settled that even "affidavits of third parties as to unsworn statements of jurors are not competent evidence of juror misconduct." *State v. McMurtrey*, 136 Ariz. 93, 98, 664 P.2d 637, 642 (1983). This includes the affidavits of defense counsel regarding unsworn juror statements, which are "hearsay" and, consequently, not competent evidence of misconduct. *State v. Marvin*, 124 Ariz. 555, 559, 606 P.2d 406, 410 (1980); *see also State v. Williams*, 169 Ariz. 376, 380, 819 P.2d 962, 966 (App. 1991) (allegations of juror misconduct in motion for new trial are "unsubstantiated" where no affidavits were attached to motion

and defense counsel failed to request individual *voir dire* of jurors at any time).

¶35 Defendant's motion for new trial was not supported by a sworn affidavit containing the actual juror's question. In fact, in the motion, Defendant could not even state with certainty which juror had asked the question. Furthermore, the motion contained only defense counsel's unverified perceptions, which were disputed by the State, that the question was addressed specifically to her. All of this constitutes insufficient evidence of any latent bias against Defendant. In light of Defendant's unsubstantiated allegations, we cannot say that the trial court abused its discretion in denying his motion for new trial.

¶36 Even had the juror's question been presented to the court via a sworn juror affidavit, we do not find an abuse of discretion by the trial court in denying the motion for a new trial. Rule 24.1.d specifically prohibits consideration of a juror question when determining if a new trial is warranted, if that consideration "inquires into the subjective motives or mental processes" of the juror.

CONCLUSION

¶37 For the foregoing reasons, we find that the trial court did not abuse its discretion when it denied Defendant's

motions for mistrial and motion for new trial. We therefore affirm Defendant's convictions and sentences.

/S/
_____
PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
_____
PATRICIA K. NORRIS, Presiding Judge

/S/
_____
JOHN C. GEMMILL, Judge