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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/26/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0468
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
CAMERON RAY BRAXTON,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-115945-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Natalee Segal Phoenix
Attorney for Appellant

N O R R I S, Judge

¶1 Cameron Ray Braxton timely appeals his convictions for first-degree murder, attempted armed robbery, and first-degree burglary. He argues the superior court committed fundamental error in responding to a written question from the jury during

deliberations. We disagree; the superior court accurately stated the law in responding to the question and Braxton cannot show any prejudice even if we were to assume the court's response was, in some respect, inaccurate. Thus, we affirm Braxton's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND¹

¶12 Braxton's convictions stem from an attempted home-invasion robbery in which a man was shot to death. On the third day of deliberations,² Friday, April 23, 2010, the jury sent a question to the court: "Can jury change charges State has brought against Defend[a]nts!"³ After consultation with counsel for the parties, the court responded: "No. The only issue before you is whether the [S]tate has proven the charges beyond a reasonable doubt." The jury continued its deliberations that day after receiving the court's response.

¶13 Over the weekend, one of the jurors became ill and could not continue to deliberate. On Monday, April 26, the

¹We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Braxton. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

²Although it was the third day, the jury had only deliberated for six and a half hours to that point. The jury deliberated for 30 minutes on April 21, 2010, six hours on April 22, and then sent the question at the beginning of deliberations on April 23.

³The superior court tried Braxton along with a co-defendant who is not involved in this appeal.

superior court excused the sick juror and replaced her with an alternate. After the replacement, the superior court gave a reconstituting jury instruction: "You are to start your deliberations anew starting with selection of a jury foreperson. Any preliminary or final decisions you may have made about any aspect of the case must be set aside and discussed anew. You should not consider any part of your prior deliberations and/or discussions."

¶14 On Tuesday, April 27, the reconstituted jury, after more than five and a half hours of deliberating over two days, returned guilty verdicts against Braxton.

DISCUSSION⁴

¶15 Braxton argues that "once the jury asked about the possibility of changing the charges, the judge had the obligation to hear them out -- to find out what it was that they were considering." We disagree; the superior court appropriately responded by informing the jury it could only consider whether the State had proven beyond a reasonable doubt

⁴Because Braxton did not object at trial, our review is for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). Further, the error must be prejudicial. *Id.* at ¶ 20.

that Braxton had committed the offenses charged.⁵ See Ariz. R. Crim. P. 23.2(a) (jury must find “defendant either guilty or not guilty”).

¶6 Further, we disagree with Braxton that *Francis v. Sanders*, 222 Ariz. 423, 215 P.3d 397 (App. 2009), supports his argument the superior court should have asked the jurors what other charges “they were considering.” In *Francis*, a prosecutor’s response to a grand juror’s question misstated the elements of entrapment and incorrectly suggested entrapment was an issue to be considered only by the trial court. 222 Ariz. at 426, ¶ 11, 215 P.3d at 400. Because of the prosecutor’s errors, this court remanded to the grand jury for a redetermination of probable cause. *Id.* at 427-28, ¶ 18, 215 P.3d at 401-02.

¶7 *Francis* is clearly distinguishable from this case for two reasons: first, the court’s response here did not misstate the law, see *supra* ¶ 5, and, second, a grand jury and a petit

⁵The State argues Braxton invited any error here and is thus precluded from any appellate review of the court’s response to the jury question. The invited error doctrine does not, however, apply here. Invited error precludes review if “the party complaining on appeal affirmatively and independently initiated the error.” *State v. Lucero*, 223 Ariz. 129, 138, ¶ 31, 220 P.3d 249, 258 (App. 2009); see *State v. Logan*, 200 Ariz. 564, 566, ¶ 11, 30 P.3d 631, 633 (2001) (courts look to “the source of the error, which must be the party urging the error”). Here, the court proposed the response to the jury question, and Braxton’s counsel, rather than initiating any alleged error, merely agreed with the court’s response. See *Lucero*, 223 Ariz. at 137, ¶ 26, 220 P.3d at 257 (acquiescing to error does not trigger invited error doctrine).

jury serve different purposes. A grand jury initiates and controls the questioning in deciding whether probable cause exists for charging a person with a crime. Ariz. R. Crim. P. 12.1(d)(4); *Francis*, 222 Ariz. at 427, ¶ 14, 215 P.3d at 401. A petit jury, however, simply decides whether a defendant is guilty or not guilty of the crime charged by the State; it does not decide what crimes should be charged. Ariz. R. Crim. P. 23.2(a); see *State v. Lavers*, 168 Ariz. 376, 398, 814 P.2d 333, 355 (1991) (“prosecutors traditionally have had great discretion in determining what crimes to charge and what penalties to seek”). In light of these differences, *Francis* is distinguishable, and Braxton’s reliance on that case is misplaced.

¶18 Even if the superior court’s response to the jury question was incorrect and it should have asked the jurors what “they were considering,” Braxton cannot show fundamental error because he cannot show the response caused him any prejudice. Although he argues the court’s response was prejudicial because “[c]learly the jury was not considering greater charges, it could only have been considering lesser[] charges,” we disagree.

¶19 The superior court’s response to the jury question occurred before the court replaced the sick juror with the alternate and reinstructed the jury it would have to “start [its] deliberations anew” and “should not consider *any part* of

[its] prior deliberations and/or discussions." (Emphasis added.) See Ariz. R. Crim. P. 18.5(h). Because the court's response was part of the "prior deliberations," we must presume the jury followed the court's instruction and did not consider the discussions that led to and immediately followed the question. *State v. Newell*, 212 Ariz. 389, 403, ¶ 69, 132 P.3d 833, 847 (2006) (jurors presumed to follow instructions). Further, the jury deliberated more than five and a half hours over two days after the court gave the reconstituting instruction, which strongly suggests the jury followed the court's instruction. Accordingly, the alleged error could not have prejudiced Braxton.

CONCLUSION

¶10 For the foregoing reasons, we affirm Braxton's convictions and sentences.

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

_____/s/_____
PHILIP HALL, Judge

_____/s/_____
DONN KESSLER, Judge