FILED BY CLERK
FEB 29 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RONALD KELLY YOUNG, Appellant.	2 CA-CR 2010-0164 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084012

Honorable Christopher C. Browning, Judge

AFFIRMED IN PART
VACATED AND REMANDED IN PART

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Ronald Young was convicted after a jury trial of conspiracy to commit first-degree murder and first-degree murder. He was sentenced to consecutive prison terms of natural life for the first-degree murder conviction and life with the possibility of parole after twenty-five years for the conspiracy conviction. Young argues on appeal that his convictions and sentences should be reversed because the trial court erred by denying his pretrial motions to dismiss and to suppress evidence, by admitting evidence about a shotgun, and by denying his motions for a mistrial and a new trial. He also argues there was insufficient evidence to support his convictions. For the following reasons, we vacate Young's sentence on count one, conspiracy to commit first-degree murder, and remand for resentencing consistent with this decision.

Factual and Procedural Background

¶2 We view the facts and the inferences to be drawn from them in the light most favorable to sustaining the convictions. *State v. Cotten*, 228 Ariz. 105, n.1, 263 P.3d 654, 656 n.1 (App. 2011). In November 1996, Gary T. was killed by a bomb that had been placed on the passenger seat of his car. Although Pamela Phillips, Gary's former spouse, was considered one of several possible suspects in the killing, law enforcement officials identified no evidence conclusively linking her or anyone else to the crime, and the case remained unsolved for nearly ten years.

¶3 Phillips and Gary had dissolved their marriage in November 1993, but Phillips remained the owner and beneficiary of a policy insuring Gary's life for $2

million.[1] Phillips moved from Tucson to Aspen, Colorado, in May 1994. In Aspen, Phillips became friends with her neighbor, Young; he acted as her business consultant and helped her develop a website for a company she planned to start. Young and Phillips also periodically had an intimate relationship.

¶4 Young left Aspen suddenly in March or April of 1996. Sometime in April, apparently after Young had left, Aspen Police detective James Crowley attempted to interview Young as the suspect in a "fraud case." Phillips's attorney had reported the fraud to the police, and Phillips initially had wanted to assist in pursuing the charges but a few weeks later had refused to cooperate. Unable to locate Young, Crowley obtained a search warrant for his house. The warrant specified Crowley could search for "computer equipment, computers, computer files, optical storage, business documents and things related to the fraud case." After gathering additional evidence from several financial institutions, Aspen police obtained a warrant for Young's arrest in August 1996.

¶5 In October 1996, a few weeks before Gary was killed, law enforcement officers found a van Young had rented from the Aspen airport parked near Young's parents' house in California. Because the van had been reported stolen, local police impounded it and contacted the Aspen Police Department. Crowley searched the van and found numerous documents in Young's name. When Crowley later learned about Gary's murder, he remembered he had seen a map of Tucson and paperwork from Gary and Phillips's marital dissolution among the documents in the van. The van also contained a

[1]In January 1997, Phillips received over $2 million as proceeds from the policy.

list of the names of some of Gary's friends and family members and a note with more identifying information about two of the people on the list, as well as evidence that in July 1996, under an assumed name, Young had stayed in a hotel in the same area of Tucson where Gary had lived. Crowley contacted the Pima County Sheriff's Department (PCSD) with the information he had obtained. PCSD, however, was unable to locate Young.

¶6 Young eventually was arrested in Florida in 2005 on the Colorado fraud warrant. Searches of his residence, hotel room, storage unit, and vehicle, as well as of a laptop computer seized during his arrest, revealed evidence that Young regularly had been receiving money from Phillips since Gary's death. Specifically, Young had maintained loan amortization schedules showing payments made on a debt of $400,000 owed to him. A forensic accountant examined that evidence, as well as Young's and Phillips's bank statements and Federal Express shipping records, and concluded the loan schedules were consistent with payments Phillips had been making to Young out of the proceeds of the life insurance policy. He also concluded the two had attempted to conceal the transactions.

¶7 Additionally, Young had recorded hours of telephone conversations with Phillips in which they exhaustively discussed the payments. During those conversations, they referred to their financial dealings both explicitly and implicitly as an illegal arrangement, and they expressed concern about detection. The two discussed news stories about Gary's death, and in one conversation when Phillips told Young she would not send him more money, he threatened that she would go to prison for murder. Finally,

the jury heard testimony from a fellow jail inmate of Young's that Young had confessed to being responsible for Gary's death.

¶8 Young and Phillips each were charged with first-degree murder and conspiracy to commit first-degree murder. Young was convicted of both charges and sentenced to two life terms of imprisonment. This timely appeal followed.

Sufficiency of Evidence

¶9 Young argues there was insufficient evidence supporting his convictions. We review the sufficiency of evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). In doing so, we determine whether there is substantial evidence supporting the conviction. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Rodriguez*, 192 Ariz. 58, ¶ 10, 961 P.2d 1006, 1008 (1998); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If reasonable jurors could fairly disagree about whether evidence establishes a fact at issue, the evidence is considered substantial. *Rodriguez*, 192 Ariz. 58, ¶ 10, 961 P.2d at 1008.

¶10 Relying on cases from other jurisdictions, Young contends that when a case is based entirely on circumstantial evidence, the government must disprove every reasonable theory of innocence consistent with the evidence. *See, e.g.*, *United States v. Marable*, 574 F.2d 224, 228-29 (5th Cir. 1978); *Daniels v. State*, 777 So. 2d 1113, 1116 (Fla. Dist. Ct. App. 2001). Although that once was the law in Arizona, it is no longer. *See State v. Olivas*, 119 Ariz. 22, 23, 579 P.2d 60, 61 (App. 1978); *accord State v.*

Harvill, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970). Rather, our supreme court has held that "the probative value of direct and circumstantial evidence are intrinsically similar; therefore, there is no logically sound reason for drawing a distinction as to the weight to be assigned each." *Harvill*, 106 Ariz. at 391, 476 P.2d at 846. And here, there was sufficient evidence from which the jury could have found Young first conspired with Phillips to kill Gary and then carried out the killing.

¶11 Young contends the evidence established only that he was blackmailing Phillips and that no evidence connects him to Gary's murder. He contends the evidence that he was in Tucson the summer before Gary was killed only shows that he "[was] investigating [Gary]'s hiding assets in order to avoid paying child support on behalf of Phillips." But the jury was entitled to draw different inferences from that evidence. *See State v. Arce*, 107 Ariz. 156, 161, 483 P.2d 1395, 1400 (1971) ("It was the function of the jury to decide what reasonable inferences could be drawn from the evidence."). Moreover, a fellow inmate testified that Young had confessed to killing Gary. And some of Young's own statements in his recorded conversations with Phillips suggest he was responsible for Gary's death. In one conversation, for example, he told her that he had "tried to help [her] on something that was . . . beyond what anybody else in the world would probably do" and now she is "living off the benefits of it." There was sufficient evidence, both circumstantial and direct, from which a reasonable jury could have concluded Young conspired to commit, and then committed, the murder.

Pre-Indictment Delay

¶12 Young argues the trial court erred in denying his motion to dismiss the case for pre-indictment delay. He argues his due process rights were violated by the nearly twelve-year delay between when the state identified him as a suspect and his indictment in 2008. We review a court's ruling on a motion to dismiss an indictment for an abuse of discretion, *State v. Pecard*, 196 Ariz. 371, ¶ 24, 998 P.2d 453, 458 (App. 1999), but we review constitutional issues de novo. *See State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶13 "To establish that pre-indictment delay has denied a defendant due process, there must be a showing that the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, and that the defendant has actually been prejudiced by the delay." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988); *accord State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996). Relying primarily on *United States v. Lovasco*, 431 U.S. 783, 790 (1977), Young argues "the United States Supreme Court's controlling decisions do not require a finding of intentional prosecutorial delay," and thus, he contends, our supreme court actually has restricted due process rights in the context of pre-indictment delay "far more than the United States Supreme Court authorized in *Lovasco*."[2] But, the Court in *Lovasco* simply held that "to prosecute a defendant following investigative delay does not deprive him of

[2]Contrary to the state's argument, the United States Supreme Court is the final word on matters of federal constitutional interpretation. *See State v. Roberson*, 223 Ariz. 580, ¶ 16, 225 P.3d 1156, 1159 (App. 2010).

due process, even if his defense might have been somewhat prejudiced by the lapse of time," and the Court expressly refused to adopt a requirement that a prosecutor file an indictment immediately after securing sufficient evidence to prove a defendant's guilt. 431 U.S. at 792, 795. And although Young suggests otherwise, the Court also expressly declined to decide whether anything less than intentional delay to gain a tactical advantage, i.e., a reckless disregard that a delay might "impair the ability to mount an effective defense," is sufficient to prove a due process violation. 431 U.S. at 795 n.17, 796-97.

¶14 Nevertheless, even if Young need not prove intentional prosecutorial delay to show a due process violation, he nonetheless must prove actual prejudice from the delay.[3] *See id*. at 789-90; *Broughton*, 156 Ariz. at 397, 752 P.2d at 486. Young argues he suffered prejudice by having to defend a "wrongful death civil suit prior to and concurrently with his criminal prosecution." He contends the state "gained a tactical advantage by waiting until the civil case was filed . . . so that it could learn from Young's and Phillips' answers to pleadings and discovery requests." But he does not specify what the state learned from Young's responses or exactly how this prejudiced him. *See*

[3]He argues he presumptively was prejudiced by the delay, relying on *Doggett v. United States*, 505 U.S. 647, 651-52 (1992), and *Humble v. Superior Court*, 179 Ariz. 409, 416, 880 P.2d 629, 636 (App. 1994). But those cases do not apply to pre-indictment delay. Rather, they involve post-indictment speedy trial rights. *See Doggett*, 505 U.S. at 651-52; *Humble*, 179 Ariz. at 416-17, 880 P.2d at 636-37. And the Supreme Court expressly has "declined to extend th[e] reach of the [speedy trial provision of the Sixth Amendment] to the period prior to arrest." *United States v. Marion*, 404 U.S. 307, 321 (1971). Moreover, the law is abundantly clear that a defendant must prove actual prejudice from pre-indictment delay. *Id*. at 323-24, 326.

Broughton, 156 Ariz. at 398, 752 P.2d at 487 (no prejudice based on mere speculation some witnesses' memories might have diminished or earlier testing of weapon could have been exculpatory); *State v. Hall*, 129 Ariz. 589, 592-93, 633 P.2d 398, 401-02 (1981) (no prejudice without specification of information lost by reason of delay), *overruled on other grounds by State v. Bass*, 198 Ariz. 571, 12 P.3d 796 (2000); *State v. Torres*, 116 Ariz. 377, 379, 569 P.2d 807, 809 (1977) (no prejudice when defendant failed to show how testimony of unavailable witness would have helped defense).

¶15 Thus, even assuming arguendo Young did not have to prove intentional prosecutorial delay to show a due process violation, he has not sustained his burden to show he suffered actual prejudice from the delay. The trial court did not abuse its discretion in denying his motion to dismiss.

Motions to Suppress Evidence

Inventory Search

¶16 Young argues the trial court erred in denying his motion to suppress evidence seized at the time of his arrest. The facts set forth in each of the following sections relating to Young's motions to suppress are taken from the evidence presented at the suppression hearings. *See State v. Carlson*, 228 Ariz. 343, ¶ 2, 266 P.3d 369, 370 (App. 2011) ("When reviewing a suppression order entered after a hearing, we consider only the evidence presented at the hearing, which we view in the light most favorable to upholding the trial court's order."). In late 2005, Young was featured on an episode of the television show, "America's Most Wanted," as a suspect in Gary's death. As a result, Young was arrested as he was leaving a medical appointment in Broward County,

Florida.[4] After asking if he had any weapons, an arresting officer, Sergeant Mary Tiger, seized two bags belonging to Young from the taxicab that had been waiting for him during his appointment. As Young had informed Tiger, a handgun was inside one of the bags. A laptop computer was also inside one of them.

¶17 Tiger testified she had taken Young's property out of the taxicab because it was valuable and she wanted to prevent it from being lost or stolen. A detective at the scene prepared an inventory sheet for Young's property, but the property—including the contents of the computer—was not otherwise searched at that time. Rather, it was given to the agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) who detained Young for questioning. The trial court denied the motion, finding as to this issue "that law enforcement lawfully seized the Defendant's property, conducted a lawful inventory of it and did not perform an unreasonable search of the same."

¶18 Young argues the trial court erred in denying his motion to suppress the evidence he asserts was wrongfully seized from the taxicab. When reviewing the denial of a motion to suppress, we defer to the trial court's factual findings but review de novo the court's ultimate legal conclusion that the search was constitutional. *State v. Davolt*, 207 Ariz. 191, ¶ 21, 84 P.3d 456, 467 (2004). Young emphasizes the state did not prove his belongings would have been lost in the taxicab, and thus, no valid inventory search occurred. However, the standard for a valid inventory search does not include a determination of whether the belongings otherwise would have been lost. Rather, to be

[4]At that time, Young was only arrested on the Colorado fraud warrant.

valid under the Fourth Amendment, inventory searches "must not be a pretext for a search for evidence, . . . they must occur according to standardized procedures, and . . . evidence of these standardized procedures must be in the record to uphold a conviction." *State v. Rojers*, 216 Ariz. 555, ¶ 20, 169 P.3d 651, 655 (App. 2007); *accord South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976). The purposes of an inventory search are to protect the owner's property while it is in police custody, to protect the police against claims of lost or stolen property, and to protect the police from danger. *Opperman*, 428 U.S. at 369.

¶19 Young does not dispute the search here occurred in accordance with standardized procedures or that evidence of those procedures was in the record. He implicitly contends, however, that this inventory search was a pretextual evidence search, relying on the fact that Tiger had checked the "evidence" box on the inventory sheet rather than the box marked "safekeeping." But Tiger testified that the safekeeping category only applied to property that was to remain at the sheriff's office. Young's property, on the other hand, was given to the ATF agents once they had detained Young for questioning. We defer to the trial court's determination of credibility, *see State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996), and the court here expressly found Tiger's testimony about why she checked the box on the form marked "evidence" was credible.

¶20 Young also contends the seizure of his property from the taxicab did not fall within one of the "'few well-delineated exceptions'" to the warrant requirement, *see Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (plurality opinion), *abrogated*

on other grounds by Horton v. California, 496 U.S. 128, 130 (1990), because he "can find no case involving the proper application of the inventory search exception where the items to be searched are an automobile not being towed or property that is not abandoned." But the Supreme Court also has applied the inventory search exception to an arrestee's belongings at the police station before he is booked into jail. *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). And Tiger testified it is standard procedure for the sheriff's department to take custody of and inventory the personal property of a defendant arrested on the street and taken into custody. We find no error in the trial court's conclusion that the routine administrative search of Young's bags qualified as an inventory search.[5]

Scope of Consent[6]

¶21 Young also argues his motion to suppress evidence should have been granted because the search of his digital media surpassed the scope of his consent. ATF special agents Richard Coes and Hugh O'Connor interviewed Young after he was arrested. The agents were investigating him for being a fugitive in possession of a firearm, based on the gun found in the taxicab, and for Gary's homicide. During the interview, they spoke to Young extensively about his relationship with Phillips and Gary's death. The agents asked him for consent to search his vehicle, storage locker, and hotel room for "illicit materials," and Young gave both verbal and written consent. The

[5]Importantly, the evidence Young has focused on—the contents of his laptop computer—were not searched at the time of his arrest.

[6]Young filed numerous motions to suppress evidence on different issues.

consent forms Young signed broadly state that he "authorize[s] ATF . . . to conduct a complete search of [his] residence, place of business, vehicle, and/or other listed property," and he "agree[s] that the [agents] may search any property, items, or containers found . . . [and] may take any property which is deemed contraband or has other evidentiary value." As a result of the searches, agents seized computer "zip discs," microcassettes, floppy disks, and a digital recorder, among other things.

¶22 Voluntarily given consent is a well-established exception to the requirement for a search warrant. *State v. Ahumada*, 225 Ariz. 544, ¶ 6, 241 P.3d 908, 910 (App. 2010). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

¶23 Young contends his general consent to search did not include the digital media the officers seized. Although he has cited no Arizona case on point, he relies on cases from other jurisdictions in which courts have found the search of a computer exceeded the scope of consent. But the cases he relies upon do not support his argument. First, microcassettes or even removable storage devices for computer files are more like containers than an entire computer and Young consented to the search of any containers found.[7] *See, e.g.*, *United States v. Gomez-Soto*, 723 F.2d 649, 654-55 (9th Cir. 1984)

[7]The trial court expressly found the digital media devices were containers, but the consent form also broadly allowed the search of any "property [or] items" found. Young has argued only that the devices should not be considered containers. Because the

(microcassettes searchable when not specified in warrant but part of personal effects that might contain items described in warrant); *cf. United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001) (noting desktop computer holding "a library's worth of information" not easily analogized to physical object like dresser or file cabinet). Second, the officers in cases Young relies on for support clearly and expressly had limited their request for consent to search in ways the agents here did not. *See United States v. Turner*, 169 F.3d 84, 87-89 (1st Cir. 1999) (officers' limiting words when gaining consent rendered scope of consent only for physical evidence linked to crime scene); *United States v. Richardson*, 583 F. Supp. 2d 694, 710-12 (W.D. Pa. 2008) (search for images on hard drive exceeded scope of consent to search given by defendant based on his belief he was investigated solely as victim of identity theft).

¶24 Young emphasizes that the agents informed him they were looking only for "illicit materials," which he contends are only "objects that are plainly illegal on their face." But we must consider the totality of the circumstances surrounding the giving of consent to determine its scope, *see State v. Swanson*, 172 Ariz. 579, 583, 838 P.2d 1340, 1344 (App. 1992). And, as the trial court found, it was clear from the entire six-hour interview that Young knew the agents were investigating him for multiple crimes, including fraud and Gary's murder. *See id.* (scope of consent determined by substance of officer's discussion with defendant before search). Therefore, the meaning of "illicit materials" must be understood in that context. The forms Young signed broadly gave the

---

consent forms were so broad, we need not decide specifically how the devices should be categorized.

agents the right to search "any property, items, or containers found" and to seize any items of evidentiary value. Young placed no "explicit limitation on the scope of the search." *Jimeno,* 500 U.S. at 251. Thus, the trial court correctly concluded he "should reasonably have understood that the items which he gave consent to seize and to search . . . would potentially be examined for any or all of the various acts of illicit conduct, which were referenced by law enforcement throughout the course of his interview."

¶25 We similarly conclude the search and seizure of the digital media did not fall outside the scope of what an objectively reasonable person would have understood was covered by Young's consent under these circumstances. The trial court did not err in denying the motion to suppress on that ground.

Independent Source

¶26 Young argues the trial court erred when it denied his motion to suppress digital evidence based on a law enforcement officer's "material omissions and misleading statements to the magistrate who issued the search warrant." But the court never denied Young's motion on this ground; rather, it originally suppressed the laptop evidence on this basis.[8] The court later denied the motion to suppress after the state had filed a

[8]Young now argues the "digital evidence," and not just the evidence from the laptop computer, should be suppressed on this ground. However, in granting his motion, the trial court stated that it was only suppressing "any materials obtained from a search of the Defendant's laptop computer," finding "that the primary motivation underlying the search of the Defendant's computer was largely, if not exclusively, related to a desire to obtain information related to [Gary's] homicide." Because we already have determined Young's consent covered a search of the other "digital evidence," we only address the court's ruling on this issue as it pertains to the laptop computer.

motion to reconsider its ruling based on the inevitable discovery exception to the exclusionary rule.

¶27 Under the inevitable discovery doctrine, if the state can establish that the illegally obtained evidence inevitably would have been acquired by lawful means, the evidence is admissible. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *accord State v. Lamb*, 116 Ariz. 134, 138, 568 P.2d 1032, 1036 (1977). Here, the evidence actually was acquired later by lawful means: a valid second warrant. Thus, the independent source doctrine applies to this situation rather than inevitable discovery. *See United States v. Herrold*, 962 F.2d 1131, 1140 (3d Cir. 1992) (inevitable discovery applies when evidence "would have been discovered through lawful means"; independent source applies when evidence "was in fact discovered lawfully"); *accord United States v. Markling*, 7 F.3d 1309, 1318 n.1 (7th Cir. 1993); *State v. Wagoner*, 24 P.3d 306, 311 (N.M. Ct. App. 2001).

¶28 But we can affirm the trial court's ruling if it is correct for any reason. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). Young has challenged the legality of the second warrant only to the extent he argues the evidence obtained from it is the illegal fruit of the first warrant. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). And, as the court correctly found, there was ample evidence discovered pursuant to the lawful search to which Young had consented, such as the recorded telephone conversations and loan spreadsheets, that provided probable cause to believe additional incriminating evidence would be found on the laptop computer. Accordingly, the second warrant was "obtained on the basis of information from sources independent

of the prior illegal [search]," and the evidence obtained pursuant to that warrant is not "'fruit of the poison tree'" requiring suppression under the exclusionary rule. *State v. Bolt*, 142 Ariz. 260, 265, 689 P.2d 519, 524 (1984); *accord Segura v. United States*, 468 U.S. 796, 814 (1984); *see also State v. Hackman*, 189 Ariz. 505, 508, 943 P.2d 865, 868 (App. 1997) (evidence legitimately acquired when obtained not through exploitation of illegality but rather from independent source). Thus, we find no error in the trial court's admission of the laptop evidence.

Shotgun Evidence

¶29 Young argues the trial court erred in denying his motion to preclude irrelevant other-act evidence prohibited by Rule 404(b), Ariz. R. Evid., that related to a modified shotgun found in the rented van. Absent an abuse of discretion, we will not disturb a trial court's decision to admit evidence. *State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992). The state moved to admit the shotgun on the ground it was part of the evidence of Young's "preparation for the homicide." In doing so, it argued the evidence was intrinsic to the crime and therefore not subject to Rule 404(b). In the alternative, it argued the evidence was admissible under the preparation and planning exception to Rule 404(b). The court found the presence of the shotgun in the van was relevant because there was evidence connecting it to the conspiracy to kill Gary even though it was not used in his death.

¶30 Although Young complains the trial court's basis for admitting the evidence was unclear, we need not decide whether the admission of the evidence was proper and under what specific ground because, even if error, its admission was harmless.

First, the jury heard evidence Young had a gun in his possession when he was arrested in Florida. Consequently, even if, as Young argues, the evidence was not relevant and only used to show his character trait of possessing a gun, the evidence was cumulative in that regard. *See State v. Shearer*, 164 Ariz. 329, 339-40, 793 P.2d 86, 96-97 (App. 1989) (finding harmless error when challenged evidence cumulative to, and consistent with, properly admitted evidence). Second, as stated above in the discussion about the sufficiency of the evidence, there was substantial other evidence Young committed the crimes. Therefore, the state established beyond a reasonable doubt the shotgun evidence "did not contribute to or affect the verdict." *State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009). Young is not entitled to relief on this ground.

Juror Misconduct

¶31 Young argues the trial court erred in denying his motion for a new trial based on juror misconduct. "A trial court's decision to grant or deny a new trial based on alleged jury misconduct generally will not be reversed absent an abuse of discretion." *State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003). Before voir dire, prospective jurors filled out a jury questionnaire asking, *inter alia*, whether they or any family members or close friends had "ever been accused or convicted of a crime," and if so, whether the criminal justice system had treated the person fairly.

¶32 After the verdicts, Young learned a juror had answered that question in the negative when, in fact, he had been convicted of a domestic-violence-related misdemeanor two years before. Rule 24.1(c)(3)(iii), Ariz. R. Crim. P., allows the court to order a new trial if a juror commits misconduct by "[p]erjuring himself or herself or

willfully failing to respond fully to a direct question posed during the voir dire examination." However, a defendant is entitled to a new trial based on juror misconduct only if he "'shows actual prejudice or if prejudice may be fairly presumed from the facts.'" *State v. Lehr*, 227 Ariz. 140, ¶ 49, 254 P.3d 379, 390 (2011), *quoting State v. Dann*, 220 Ariz. 351, ¶ 115, 207 P.3d 604, 624 (2009). "The trial court is in the best position 'to determine what effect, if any, alleged misconduct might have had upon other jurors' and whether a new trial should be granted." *Brooks v. Zahn*, 170 Ariz. 545, 549, 826 P.2d 1171, 1175 (App. 1991), *quoting Cota v. Harley Davidson, a Division of AMF, Inc.*, 141 Ariz. 7, 10, 684 P.2d 888, 891 (App. 1984).

¶33 In denying the motion, the trial court found that the juror's incorrect answer to one of the questions on the questionnaire did not rise to the level of perjury. The court found no evidence "that the juror's answer was made with [his] knowledge that it was false and with [his] intention that it enhance [his] probability of being selected to serve as a member of the trial jury." The court further found the incorrect answer had not resulted in prejudice to Young. And, the court concluded that the existence of the juror's conviction, even if it had been known, would not have been a sufficient basis to strike him for cause.

¶34 Young contends he has shown prejudice because knowledge about the juror's history with domestic violence would have affected how he used his peremptory strikes. But this court has held that is an insufficient basis to prove prejudice entitling a defendant to a new trial. *Catchings v. City of Glendale*, 154 Ariz. 420, 422-23, 743 P.2d 400, 402-03 (App. 1987). As long as the jury that decided the case ultimately was fair

and impartial, we will not reverse a conviction based on the inability to exercise a peremptory strike on a particular juror. *See State v. Eddington*, 226 Ariz. 72, ¶¶ 18-19, 244 P.3d 76, 83 (App. 2010), *aff'd*, 228 Ariz. 361, 266 P.3d 1057 (2011).

¶35 Young emphasizes that Phillips and Gary had a similar history of domestic violence and therefore the juror in question "could be considered more likely to believe that Phillips, the victim of abuse, was getting her due (and by extension, so was her new boyfriend Young)." But Young's speculation is insufficient to show the juror was partial when deciding his case. And had Young been concerned with discovering potential jurors' biases or prejudices toward domestic violence victims, he could have inquired specifically about this topic during voir dire.

¶36 Young concedes in his reply brief that the argument boils down to "whether the juror made a mistake on his questionnaire or whether he withheld information." That determination is best left to the trial court. *See Brooks*, 170 Ariz. at 549, 826 P.2d at 1175. We find no abuse of discretion in the court's denial of Young's motion for a new trial.

Mistrial

¶37 Finally, Young argues the trial court erred in denying his motion for a mistrial based on witness testimony. We review the court's denial of a motion for a mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). When a witness "unexpectedly volunteers information, the court must decide whether a remedy short of mistrial will cure the error." *Id*. The court has broad discretion in such circumstances because he or she "is in the best position to determine

whether the evidence will actually affect the outcome of the trial." *Id*. Moreover, a mistrial is the most drastic remedy for trial error and is appropriate only when justice will be otherwise thwarted. *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003).

¶38 While incarcerated at a federal detention center in Miami, Florida, in 2005, Young met Andre Mims, a fellow inmate. Mims had provided legal assistance to Young, and the two also became friendly. In a written statement in June 2006, Mims stated, "Young told me of his involvement in the car bombing and murder of Gary T[.] and stated that mother fucker got what he dese[rv]ed, I got it done." Mims took a polygraph examination about his written statement, and the examiner found Mims "was attempting deception regarding his answers." Mims admitted in his post-test interview that he was not sure Young had made the statement, "I got it done," and conceded "he may have been trying too hard in his efforts to help investigators with the case." The trial court allowed Mims to testify, over Young's objection, but precluded him from using the phrase, "I got it done," as attributed to Young.

¶39 At trial, in accordance with the trial court's order, Mims did not testify that Young told him, "I got it done"; however, he testified that Young "looked [him] in [the] face, and he said[, ']Andre, I blew that fucker up in his car.[']" Young immediately moved for mistrial, arguing the testimony was a surprise and violated the court's order. The court denied the motion, but granted the parties leave to brief the issue and also allowed Young to present evidence of Mims's polygraph examination that showed he had been untruthful.

¶40 The state contends Mims did not violate the trial court's order and, therefore, the denial of the motion for a mistrial was proper. Young insists Mims did, arguing the court's pretrial preclusion ruling actually precluded "any testimony where Young supposedly confesses to being responsible for the bombing." But the plain language of the court's ruling makes clear it was precluding only the statement, "I got it done." And, in denying the motion for mistrial, the court reiterated its reasons for precluding the statement "I got it done" and allowing the remainder of Mims's testimony. Specifically, the court noted that Mims had conceded the "got it done" wording may not have been accurate but he had affirmed the rest of his statements. The court also emphasized that Young was able to cross-examine Mims about the fact he is a convicted felon testifying in an attempt to get a benefit from the government and that it was ultimately up to the jury to decide his credibility. The court also noted it had afforded Young the extraordinary remedy for any error of allowing the polygraph results. The court found there was no evidence the state knew Mims would make that statement but that it was not materially different in substance than Mims's prior statements, and the court concluded a mistrial was not warranted. We find no abuse of discretion in the court's ruling.

Resentencing

¶41 Finally, we address an error apparent from our review of the record. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (addressing unraised sentencing error found in review of record); *cf. State v. Orendain*, 188 Ariz. 54, 55, 932 P.2d 1325, 1326 (1997) (recognizing "fundamental nature" of structural error).

After the trial court granted Young's motion to vacate his natural life sentence on the conspiracy count, it resentenced him in chambers by minute entry order in Young's absence. The court concluded it did not have to conduct a resentencing hearing with Young present because, by the plain language of the relevant statute, he could be sentenced to a term of imprisonment only for life with the possibility of release in twenty-five years. *See* A.R.S. § 13-1003(D). We note, however, the court retained some discretion in pronouncing Young's sentence, as it had the ability to order the sentences be served concurrently or consecutively to each other. *See* A.R.S. § 13-711(A). Indeed, the court reconsidered that decision in its ruling and ultimately reaffirmed the prior judgment ordering consecutive sentences.

¶42 A criminal defendant has the right to be present at a resentencing hearing. *See State v. Davis*, 105 Ariz. 498, 502, 467 P.2d 743, 747 (1970) ("'Where a person convicted of a criminal offense or offenses is to be resentenced, as was the case here, the presence of the defendant is as necessary as it was at the time of the original sentence.'"), *quoting Williamson v. United States*, 265 F.2d 236, 239 (5th Cir. 1959); *see also* Ariz. R. Crim. P. 26.9; *State v. Forte*, 222 Ariz. 389, ¶ 7, 214 P.3d 1030, 1033 (App. 2009). A defendant can waive the right to be present at sentencing, *see Forte*, 222 Ariz. 389, ¶ 12, 214 P.3d at 1034, but when a trial court pronounces sentence in a defendant's absence without his waiver, it constitutes structural error. *Hays v. Arave*, 977 F.2d 475, 482 (9th Cir. 1992); *accord State v. Mann*, 188 Ariz. 220, 230, 934 P.2d 784, 794 (1997). Here, there is no evidence Young waived his right to be present at the resentencing. Thus, the error was structural, and we need not find actual prejudice. *See State v. Garcia-*

Contreras, 191 Ariz. 144, ¶ 22, 953 P.2d 536, 541 (1998). We thereby vacate Young's sentence on the conspiracy conviction and remand the case to the trial court, which is directed to conduct the resentencing hearing in Young's presence. *See State v. Anderson*, 171 Ariz. 34, 36, 827 P.2d 1129, 1131 (1992) ("[T]he proper method of correcting an illegal sentence is not by minute entry, but in open court with the defendant present.").

¶43 For the foregoing reasons, Young's convictions and natural life sentence are affirmed. As stated, we vacate Young's sentence on count one, conspiracy to commit first-degree murder, and remand for resentencing consistent with this decision.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge