IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSHUA MICHAEL LEON,
Appellant.

No. 2 CA-CR 2011-0395
Filed December 3, 2013

Appeal from the Superior Court in Pima County
No. CR20094042001
The Honorable Terry L. Chandler, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Kelly and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Joshua Leon was found guilty of second-degree murder and sentenced to an aggravated, eighteen-year prison term. On appeal, he argues the trial court erred by permitting his cellmate to testify at trial and by denying his motion for a new trial based on gang-related references at trial, which he contends caused juror apprehension and misconduct. For the following reasons, we affirm in part and vacate in part.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to upholding the jury's verdict." *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). One evening in October 2009, Maxine S., Amina R., and Kalette M. approached Leon's girlfriend, Claudia R., on a corner in South Tucson. The women asked to buy drugs and, when Claudia agreed, they proceeded to beat and rob her. Claudia yelled for Leon and, as he approached, the three women fled. Leon pursued them and when the women stopped running, he punched one or more of them and stabbed Maxine in the chest. Maxine's heart was punctured and she later died. The weapon was not recovered.

¶3 After being charged with first-degree murder, Leon was convicted and sentenced as described above and now appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Cellmate Testimony

¶4 Leon first argues the trial court erred by denying his motion to dismiss or to preclude testimony of his former cellmate,

Elvin L. Leon and Elvin were housed together from March 22 to April 11, 2011. On Friday, April 8, Elvin telephoned his attorney, K. Sweeney, an assistant public defender, and said he had information about "a murder." Sweeney met with Elvin on Sunday, April 10, and Elvin told her he wanted to be a witness against Leon and requested a meeting with prosecutors.

¶5 According to Elvin, Sweeney told him he "needed to know the people, the places and the names[,] . . . to have specifics." At some point during the meeting, Sweeney realized that Leon was a former client. Sweeney testified she had served as "second chair" in Leon's defense against the current charges "for probably the first two weeks," before the public defender's office withdrew due to a conflict.[1] That office, with D. Edminson-O'Brien as Leon's appointed attorney, had represented Leon for approximately two months from November 2, 2009 to January 5, 2010.

¶6 Sweeney made arrangements for Elvin to meet with prosecutors on Monday, April 11, the day before Leon's trial was scheduled to begin. At the meeting, Sweeney sat with Elvin and sometime that day, according to Elvin, informed him she would not be able to continue to represent him "and that the public defender's office would [not] be able to represent [him] any longer because they had handled something in Mr. Leon's behalf." Sweeney denied telling Elvin any details about Leon's case, which Elvin confirmed.

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[1]According to the state below, and not contradicted by our review, "Sweeney's name was not on any of the paperwork, even in the beginning of this case, when the Public Defender's Office was handling it. . . . there's nothing objectively in the record that would indicate she was actually participating . . . Sweeney [was] never actually . . . a listed attorney in that case." According to the prosecutor, "the one hearing [Sweeney] did cover, . . . she had to bump it over so that Ms. Edminson-O'Brien, who was the attorney of record, could be there at the next hearing." The trial court took "judicial notice of the fact that in a large office, such as the County Attorney's office and the Public Defender's office, attorneys cover hearings for other attorneys in their office."

Later that day, the prosecution informed counsel for Leon that the state intended to introduce Elvin as a witness, and the following morning Leon's attorney orally moved to preclude Elvin's testimony. When the motion was denied, Leon requested a continuance, which was granted.

¶7 Leon subsequently moved to dismiss the case or preclude Elvin's testimony, contending his constitutional right to counsel had been violated by Sweeney's conduct. He asserted the prosecution ignored Sweeney's conflict in its "rush to get [Elvin] signed up before the trial was to start" despite its duty to see "a defendant's rights are not thoroughly trampled, even when the defendant's [former] attorney is blind to those rights." Leon maintained that "fundamental fairness . . . dictat[ed] dismissal of the[] charges as the only fair remedy."

¶8 After a hearing on Leon's motion at which both Sweeney and Elvin testified, the trial court found that Sweeney had "violat[ed her] ethical responsibilities" and made "a serious mistake." However, it explicitly found no wrongdoing by the prosecution. "The Court [did] not believe [the prosecutor] remembered that the Public Defender's office was involved as counsel for the defendant at some point, nor would the State have necessarily known or remembered that Sweeney was specifically representing the defendant." The court decided dismissal was "not an appropriate sanction in a case of this magnitude," and noted, "the remedy isn't to dismiss a murder case against Mr. Leon because Ms. Sweeney made a mistake." The court denied Leon's motion to dismiss and his motion to preclude Elvin's testimony.

Motion to Dismiss Based on Cellmate Testimony

¶9 Leon argues "[g]iven the egregious nature of the conduct of the defense counsel and the prosecutor, the Court should have dismissed the case as a warning to counsel in similar cases not to engage in this type of conduct in the future," and further asserts that the court should have dismissed the case "to cure any possible conflict." We review a ruling on a motion to dismiss for abuse of discretion, *State v. Boggs*, 218 Ariz. 325, ¶ 50, 185 P.3d 111, 122 (2008),

and defer to the trial court's factual findings unless clearly erroneous, *State v. O'Dell*, 202 Ariz. 453, ¶ 8, 46 P.3d 1074, 1077-78 (App. 2002).

¶10 Leon asserts he was prejudiced by Sweeney's conduct because, had she "not promptly advised Elvin . . . on how to effectively approach the prosecutor's office to peddle his testimony, if she had not taken the trouble to visit [Elvin] in jail on a Sunday, and if she had not immediately contacted the prosecutor[']s office to arrange for a [meeting] the very next morning, [Elvin] would not have been available for trial that was to start that Tuesday." And, Leon maintains the prosecutor's office knew Sweeney had previously represented Leon yet "vigorously pursued [Elvin] as a witness." He concludes both the public defender's office and the state "acted in concert" to deprive him of "a fair trial with effective assistance of counsel," and this conduct should be "meaningfully cens[ured]."

¶11 Dismissal as a sanction is rare, *see State v. Young*, 149 Ariz. 580, 585, 720 P.2d 965, 970 (App. 1986), and necessarily directed at improper conduct by the state. Indeed, Leon cites *United States v. Aguilar*, 831 F. Supp. 2d 1180 (C.D. Cal. 2011), for the proposition that dismissal may be an appropriate remedy "where prejudice to the defendant results and the prosecutorial misconduct is flagrant." *Id*. at 1208. But dismissal of an indictment with prejudice due to prosecutorial misconduct occurs only "when the evidence is irrevocably tainted or there exists a pattern of misconduct that is prevalent or continuous." *Young*, 149 Ariz. at 585, 720 P.2d at 970; *see also State v. Pecard*, 196 Ariz. 371, ¶ 39, 998 P.2d 453, 461 (App. 1999) ("even when the government intrusions are intentional, dismissal of the indictment is neither automatic nor favored as the primary remedy"). We need not conduct that analysis, however, because the trial court expressly found no wrongdoing on the part of prosecutors. Accepting that finding as we must based on the record before us, *see O'Dell*, 202 Ariz. 453, ¶ 8, 46 P.3d 1077-78, dismissal for prosecutorial misconduct was clearly not appropriate, and we find no abuse of discretion by the trial court.

Motion to Preclude Cellmate Testimony

¶12 Leon next argues the trial court erred by denying his motion to preclude Elvin's testimony, and asks this court to remand the case for "a new trial with the testimony of Elvin . . . precluded," because Leon "was denied a fair trial and his right to uncompromised legal representation." This court reviews a trial court's decision to permit a witness to testify for an abuse of discretion, *see State v. Carlos*, 199 Ariz. 273, ¶ 10, 17 P.3d 118, 122 (App. 2001), but reviews de novo alleged violations of a defendant's constitutional right to counsel, *see State v. Martinez*, 221 Ariz. 383, 386, 212 P.3d 75, 78 (App. 2009).

¶13 The trial court found no evidence that Sweeney had provided Elvin with any details about Leon's case, despite testimony that she assisted him in preparing for his meeting with prosecutors.[2] As Leon notes, Sweeney arranged for the meeting and apparently appeared with him for a least a portion of it. The court permitted Elvin to testify at trial, finding that the "information would have come before the Court in any event."[3]

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[2]Leon does not argue here that Sweeney provided Elvin with specific information about Leon's case, but instead asserts: "The extent of the detail can only lead to the conclusion that [Elvin] had access to the discovery and other legal materials which [Leon] had stored under his bunk in the cell with [Elvin]."

[3]Elvin's testimony at trial was mixed, but generally adverse to Leon. He testified Leon told him he had swung a knife at Maxine, and "just reached out and hit her like that, and she went down." Elvin also testified to the size of the knife, which never was located, and that Leon said "all the women had knives . . . and . . . when he hit the woman, she could have fallen on her knife." He further stated Leon was concerned Claudia would make the same statement at trial that she had made to police following the incident, namely that Leon had said to her, "Why didn't you stop me? I stabbed that girl." He also testified that Leon told him "he didn't mean for Maxine . . . to die."

¶14 The Sixth Amendment of the United States Constitution, the Arizona Constitution, art. II, § 24, and Rule 6.1, Ariz. R. Crim. P., assure a defendant the right to assistance of counsel. That right includes the effective assistance of counsel to ensure a fair trial, *see State v. Jenkins*, 148 Ariz. 463, 465, 715 P.2d 716, 718 (1986), and "contemplates the services of an attorney devoted solely to the interests of his client." *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948); *see also Maricopa Cnty. Public Defender's Office v. Superior Court*, 187 Ariz. 162, 165, 927 P.2d 822, 825 (App. 1996) ("The guarantees of the Sixth Amendment include the right to an attorney with undivided loyalty."). "Counsel must be free to zealously defend the accused in a conflict-free environment." *Maricopa Cnty. Public Defender's Office*, 187 Ariz. at 165, 927 P.2d at 825. A defendant thus has a constitutional right to conflict-free counsel.

¶15 To establish a violation of effective assistance of counsel due to a conflict, our supreme court requires a defendant to show: (1) an "actual conflict" existed and (2) "that his attorney's conflict reduced his effectiveness." *Jenkins*, 148 Ariz. at 467, 715 P.2d at 720; *see State v. Martinez-Serna*, 166 Ariz. 423, 425, 803 P.2d 416, 418 (1990) (similar); *State v. Padilla*, 176 Ariz. 81, 83, 859 P.2d 191, 193 (App. 1993) (adverse effect showing "concerns lawyer performance"); *see also United States v. Christakis*, 238 F.3d 1164, 1168-1169 (9th Cir. 2001) ("[t]o establish a Sixth Amendment violation based on a conflict of interest, a defendant must show . . . that counsel actively represented conflicting interests"). Our supreme court has noted approvingly the First Circuit's test for conflict of interest as stated in *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982):

> [Defendant] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued . . . . He need not show that the defense would necessarily have been successful if it had been used, but merely that it possessed sufficient substance to be a viable alternative. Second, he must establish that

> the alternative defense was inherently in conflict with the attorney's other loyalties or interests.

Jenkins, 148 Ariz. at 466 n.1, 715 P.2d at 719; *see Martinez-Serna*, 166 Ariz. at 425, 803 P.2d at 418. The state asserts that Leon "was represented by conflict-[free] counsel at all critical stages of the prosecution" and "cannot establish that Sweeney's representation of [Elvin] had an adverse effect on her representation of [Leon]." Our review of the record leads us to agree.

¶16 As noted above, the trial court expressly found that Sweeney had imparted no information about the case to Elvin, and it observed that any attorney representing him would have immediately sought a meeting with prosecutors. Thus, Sweeney's conflict had no effect on Leon's trial because any conflict-free attorney would have arranged for Elvin to speak with prosecutors. Sweeney's ethical lapse, according to the trial court, could be addressed, not through Leon's trial, but rather by the state bar. Finally, the trial judge permitted Sweeney to be made a witness, subject to cross examination at trial. Given that Leon was represented by non-conflicted trial counsel and was no worse off for his former counsel's conflict, we cannot say Leon's constitutional right to effective representation was infringed or that the trial court abused its discretion by allowing Elvin's testimony.

¶17 Leon correctly points out that under the rules of professional conduct Sweeney owed him a duty as a former client, but he cites ER 1.7, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, and *Jenkins*, 148 Ariz. at 467, 715 P.2d at 720 (discussing ER 1.7), which pertain to an attorney's obligation to current clients. *See* ER 1.7 (applicable to "Current Clients"); *Jenkins*, 148 Ariz. at 467, 715 P.2d at 720 (citing ER 1.7 in connection with a conflict involving defense counsel's representation of a prosecution witness). Sweeney's obligation to Leon was as a former client, pursuant to ER 1.9, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. In his reply brief, Leon appropriately cites that rule and argues Sweeney's actions were "plainly a violation of the duty of loyalty established by E.R. 1.9[, and,] where counsel violates a duty of loyalty and the violation

adversely affects the client, then a fair trial has been denied under the Sixth Amendment." However, a "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986); *cf. Jenkins*, 148 Ariz. at 467, 715 P.2d at 720 (conflict of interest under Arizona Rules of Professional Conduct does not necessarily mean actual conflict of interest for purposes of determining ineffective assistance of counsel). As noted above, the trial court found that Sweeney's professional breach had no adverse impact on Leon's trial and that finding is supported by the record. Accordingly, the trial court did not err in permitting Elvin to testify.

Motion for New Trial

¶18 In June 2011, Leon filed a motion for new trial and four days later filed an amended motion in which he contended that because the trial court had "erroneously ruled [gang-related] testimony admissible," his counsel "made a necessary strategic decision" to voir dire the jury concerning gangs. He asserted that questioning caused jurors to be apprehensive, resulting in safety concerns by one juror and inappropriate juror comments to Leon's sister and also overheard by her. After a three-day hearing on Leon's motion, the trial court denied it. Motions for new trial are disfavored and should be granted with great caution. *State v. Chaney*, 141 Ariz. 295, 311, 686 P.2d 1265, 1281 (1984). Absent an abuse of discretion, we will not disturb the court's ruling. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶19 Prior to trial, Leon filed a motion in limine to "preclude or appropriately limit testimony regarding [his] alleged gang affiliations." He argued any such testimony was not relevant under Rule 402, Ariz. R. Evid., and even if relevant, the court should preclude or limit the evidence because of its "clear prejudicial effect." At a pre-trial hearing on the motion, prosecutors argued the evidence was necessary to "place . . . into context" a statement by a potential witness that "at exactly the moment of the stabbing, as soon as Mr. Leon stabs the victim, he then yells [']Libre,[' the name of a South Tucson gang]." They alleged that additional evidence would show that a cry of "Libre" indicated "they're trying to

promote their gang, that's their power, that's their source." And, "in the wake of an act like a stabbing, that sort of profession is relevant to show that mind set" and would be relevant to showing "premeditation, some sort of intent to kill."

¶20 The trial court deferred ruling on the motion, but noted it was inclined to allow the testimony with a limiting instruction based on the understanding "there will be evidence that he said it," which "might come from three relatively unreliable witnesses." The prosecutor averred that if there was no eyewitness testimony that "Leon yelled[] [']Libre['] immediately at the stabbing," he would not present the context evidence. Leon subsequently filed a "second supplement" to his motion to preclude gang testimony, which the court denied after determining the evidence to be "probative" and "relevant for the purposes of the state of mind" and any "risk of prejudice and misuse by the jury" would be "deal[t] with [by] the limiting instruction."

¶21 During voir dire, defense counsel informed members of the venire that "there may be testimony about someone or some people involved in gangs," and asked:

> If you find out someone is involved in a gang, does that, because of that fact, and that fact alone, do any of you feel that such a person is less likely to be truthful because they're involved in a gang? . . . [I]f you found out . . . the defendant was a gang member[, w]ould that fact alone cause you to think . . . he's more likely to have done this crime because he's in a gang?

Of the six venire members that responded with concerns, five stated they could be fair, one was removed for cause, and only one of the remaining five was selected to serve as a juror. Leon's request to strike that juror for cause was denied.

¶22 At trial, the state's witness did not testify as expected, and the prosecution did not introduce its context evidence

concerning Leon's gang affiliation. The only gang-related testimony came from Claudia who testified that "Libre" is a "neighborhood in South Tucson" and "a gang." The court found that testimony "very mild," and concluded, "[t]here is nothing that's too prejudicial or tainting so far." There also was testimony that Leon had the nickname "Kaos" or "Chaos," but the name was not linked to any gang affiliation.

¶23 Leon asserts that the introduction of gang references caused one juror apprehension. On the third day of trial, Juror Nine reportedly asked the bailiff the identities of three women sitting in the back of the gallery, saying: "Just for my own safety, I would like to know." Out of the presence of other jurors, the judge questioned Juror Nine about whether she had "concerns for [her] safety as a juror on this case." She answered: "Not really. . . . [W]e weren't told who they were, so I was just wondering." The judge stated, "the way the system works here in the criminal courts in Pima County. . . . They're open courtrooms. Anybody can come and watch." Defense counsel followed with a further question to Juror Nine, "so you're saying that no one has done anything in particular that made you feel uncomfortable?" The juror answered: "No. No. I was just curious. That's all." Juror Nine ultimately was designated an alternate and excused before deliberations.

¶24 Leon also asserts the gang references caused juror misconduct. During a hearing on his motion for new trial, Leon called three witnesses to support his claims of juror misconduct, his sister Sybil, his cousin Maricela, and his mother Sylvia, none of whom had been witnesses at his trial. Sybil testified that, while in the restroom on the second day of trial, Juror One asked her about her tattoos. She said she had responded that they had "personal meanings" and she would "rather not explain them to anybody." She testified Juror One "kind of got mad, looked at . . . [J]uror [Two], and they laughed their way out of the restroom." Sybil acknowledged that none of her tattoos were gang-related. She also claimed to have on another occasion heard Juror Two say on the telephone, while in a restroom stall, "all gang members were guilty

no matter if their families were present and they always live up to their reputations no matter what."

¶25 Maricela, Leon's cousin, who had been in the restroom with Sybil, corroborated that Jurors One and Two asked Sybil about her tattoos, but testified the conversation was friendly. Maricela indicated the discussion involved Sybil's "Semper Fidelis" and Marilyn Monroe tattoos. Juror One "was asking [Sybil] where she got [th]em done and . . . just about them," and "asked the second one if she liked [th]em, and she was . . . just smiling and nodding her head." Maricela also reported hearing someone speaking on a telephone in a restroom stall say, "if you're related to a gang member[,] you're most likely a gang member yourself." But Maricela did not know who was speaking or if the comment was related to Leon's trial.

¶26 Sylvia, Leon's mother, testified that she too had heard some of the conversation about Sybil's tattoos. And she stated that prior to deliberations, she heard six jurors having telephone conversations indicating in some fashion that Leon was "guilty no matter what."

¶27 The trial court expressly "did not find Sylvia . . . to be credible at all," noting she had "testified . . . that she heard upwards of five jurors saying that the . . . defendant was guilty when talking about the case outside court. That is just simply not credible, and I disregard that completely." The court also found Sybil incredible, saying: "She contradicted her own affidavit. She's . . . a very aggressively loyal sister to her brother, and wanted to assist him with the request for a new trial." Regarding the conversation about Sybil's tattoos, the court found it to be "idle chit chat," observing that "[t]here's no indication that the juror even knew who Sybil . . . was." Finally, concerning the comment made on the telephone in the restroom stall, the court noted that Maricela was unable to say that the speaker was a juror, and that it did not find Sybil credible. "So I don't find that to be something . . . that one of these jurors said or did."

Juror Safety Concerns

¶28 Due process requires a criminal defendant be given a fair trial before an unbiased and impartial jury. U.S. Const. amend. XIV; Ariz. Const. art. II, §§ 4, 24; *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."). However, "the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" *Rushen v. Spain*, 464 U.S. 114, 118 (1983), *citing Smith*, 464 U.S. at 217. Juror misconduct warrants a new trial when the defense shows actual prejudice or if prejudice may be fairly presumed from the facts. *State v. Eastlack*, 180 Ariz. 243, 256, 883 P.2d 999, 1012 (1994).

¶29 Here, although Juror Nine expressed some concern for her safety to the bailiff, there was no evidence or indication other jurors were influenced by it. The trial court questioned her outside the presence of the other jurors, and she did not repeat any concern when given the opportunity, but merely expressed curiosity as to the identities of three women in the gallery. She was told the court was open and anyone could enter and hear the case, and she ultimately was made an alternate and did not sit on the jury. Moreover, there was no evidence that any of the juror's concerns had arisen from the isolated gang reference, or that any other juror shared her concerns. Based on this record, we cannot say Leon was deprived of a "fair and impartial trial" due to Juror Nine's concerns or conduct regardless of their source. *See Eastlack*, 180 Ariz. at 256, 883 P.2d at 1012 (where prospective juror made improper comments to one juror who was excused as an alternate, and another juror who did not sit, mere assertion that conversation prejudiced defendant did not warrant a mistrial).

¶30 Leon asserts, however, that "[s]ince gang testimony was permitted in this case and a juror showed an apprehension, the Court should have interrogated [her] to determine whether she had

communicated this concern to other jurors." But Leon never asked the trial court to do so when the court questioned Juror Nine, nor did he question her on the subject when he was given the opportunity. Moreover, Juror Nine told the court she had no concerns for her safety, thus it would have been illogical for the court to ask her if she had shared concerns she denied having.[4] Finally, with the stipulation of counsel, the juror became an alternate and was excused prior to the jury's deliberations. We find the court's response to Juror Nine's comments was "commensurate with the severity of the threat posed," *State v. Miller*, 178 Ariz. 555, 557, 875 P.2d 788, 790 (1994), *quoting United States v. Thomas*, 463 F.2d 1061, 1063 (7th Cir. 1972), and we conclude the court did not abuse its discretion in denying Leon's motion for a new trial on this basis.

Alleged Juror Misconduct

¶31 Under Rule 24.1(c)(3), Ariz. R. Crim. P., a new trial is authorized if a juror is guilty of misconduct by "[p]erjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination."[5] To merit a new trial

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[4]In his reply brief, Leon also contends "the [c]ourt should have polled the jurors to ensure that the gang evidence had not had a negative effect on their consideration of the case." But Leon did not request any polling at trial and we note that such a procedure might have injected prejudice where there was none. The trial court apparently did not find polling merited, and we defer to its appraisal of the situation. *See, e.g.*, *State v. McDaniel*, 80 Ariz. 381, 390, 298 P.2d 798, 804 (1956) (where possibly inappropriate comment made within hearing of several jurors, counsel did not request hearing nor that court admonish jury to disregard remarks, and no evidence any juror heard the remark, issue likely "much ado about nothing"; "the trial court, knowing all the parties, was in a better position to appraise the situation than is this court from the reading of the cold record").

[5]Rule 24.1(c), Arizona Rules of Criminal Procedure, provides that a new trial may be authorized under several circumstances, including if:

"based on a juror's lack of candor during voir dire," a party must show that misconduct occurred and that it resulted in probable prejudice. *Richtmyre v. State*, 175 Ariz. 489, 490, 858 P.2d 322, 323 (App. 1993). We will not set aside a court's ruling on a motion for new trial absent a clear showing of abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, ¶ 37, 14 P.3d 997, 1009 (2000).

¶32 Leon argues that although "the jurors swore that they could deal with the gang issues and tattoo issues fairly and provide both sides a fair trial despite testimony in that regard[,] . . . it is clear that at least two of the jurors could not do what they said they could do."[6] And he asserts they "apparently had significant issues with

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> (3) A juror or jurors have been guilty of misconduct by:
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> (i) Receiving evidence not properly admitted during the trial or the aggravation or penalty hearing;
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> . . . .
>
> (iii) Perjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination; and
>
> . . . .
>
> (vi) Conversing before the verdict with any interested party about the outcome of the case.

[6]The state contends Leon's argument concerning juror misconduct should be disregarded, noting that he cites subsection Rule 24.1(c)(4), "which does not concern jury misconduct," but does not cite subsection Rule 24.1(c)(3), identifying types of misconduct. Given that Leon does cite Rule 24.1 and states facts that if true would qualify as a violation of Rule 24.1(c)(3)(iii), we consider his argument. *See Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966) (noting preference for deciding cases on their merits).

tattoos[,] causing them to interrogate [Sybil] regarding her tattoos early in the case and, there has been no examination by the court below of these jurors to determine whether they communicated their concerns about the tattoos and/or gang affiliations to the other jurors."

¶33 The state counters that the trial court found Sybil, Sylvia, and Maricela not credible and that Leon "now asks this Court to second-guess" that assessment. The state is correct that we do not second-guess a trial court's credibility determination. *See State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007) ("we will defer to the trial court's assessment of witness credibility because [it] is in the best position to make that determination"). We observe, however, that although the court did not find Sybil and Sylvia credible, it did not make the same determination with regard to Maricela.

¶34 Accepting Maricela's testimony as credible, two jurors had a conversation with Sybil about her tattoos. Although jurors were not questioned regarding their sentiments about tattoos, [7] they were asked whether they could be fair regardless of gang affiliation. All empanelled jurors responded that they could be fair. Contrary to Leon's suggestion, we see no reason to assume that tattoos necessarily invoke gang affiliation. Such body art currently is commonplace in the public at large and, additionally, Sybil's tattoos were not gang-related. Further, the jurors would have been aware that observers were permitted in the courtroom, and Sybil's relationship to Leon was not identified to jurors. Finally, according to Maricela, the conversation with the jurors about the tattoos was friendly; apparently they admired the tattoos and wanted to know where Sybil had them done.

¶35 We see no evidence to support Leon's assertion that "the testimony of Mr. Leon's sister concerning questions that she

[7]Although Leon repeatedly asserts the jurors were questioned on voir dire about tattoos, he does not cite to the record and we see no indication of such questioning from our review. The state does not respond to Leon's assertions.

was asked about her tattoos by juror members makes plain that the gang issue was on the jury's mind." And "[s]peculation as to juror bias is insufficient to establish that the defendant was denied a fair trial." *See State v. Soule*, 164 Ariz. 165, 169, 791 P.2d 1048, 1052 (App. 1989). In contrast, however, there clearly was evidence supporting the trial court's conclusion that the conversation about Sybil's tattoos was "idle chit chat." We therefore cannot say the court abused its discretion by denying Leon's motion for a new trial based on juror misconduct. *Cf. State v. Vasquez*, 130 Ariz. 103, 107, 634 P.2d 391, 395 (1981) (declining to presume prejudice where juror-witness conversation concerned subjects unrelated to case).

Criminal Restitution Order

¶36 Finally, although the issue is not raised on appeal, we find fundamental error with regard to the trial court's reduction of "all fines, fees, and assessments" imposed during sentencing to a Criminal Restitution Order (CRO). *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (appellate court will not ignore fundamental error if apparent). Although the court ordered that "no interest, penalties or collection fees [are] to accrue while [Leon] is in the Department of Corrections," the imposition of such a CRO pursuant to A.R.S. § 13-805 before a defendant's sentence has expired nonetheless "'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'"[8] *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

Disposition

¶37 For the foregoing reasons, we vacate the CRO entered at sentencing; Leon's conviction and sentence in all other respects are affirmed.

[8]A.R.S. § 13-805 has since been amended. *See* 2012 Ariz. Sess. Law, ch. 269, § 1.