

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0085
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
TONY CRUZ SR.,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR201100434

Honorable Robert Duber II, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Amy Pignatella Cain

Tucson
Attorneys for Appellee

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V Á S Q U E Z, Presiding Judge.

¶1 Appellant Tony Cruz Sr. was charged with three counts of aggravated assault and one count each of weapons misconduct, criminal damage, and cruelty to

animals. A jury found him guilty of all charges and, after he was sentenced, he filed a notice of appeal. Thereafter, Cruz filed a pro se motion to set aside the convictions pursuant to Rule 24.2, Ariz. R. Crim. P., on the ground his federal constitutional rights to due process and a fair trial were violated because two jurors knew his son and did not disclose this during trial, as well as the fact there was animosity between his son and one of the jurors. This court stayed the appeal and revested jurisdiction in the trial court so that it could rule on the motion, which it did, denying the motion after an evidentiary hearing. Cruz challenges that order in this appeal.

¶2 Rule 24.2(a)(2) and (a)(3) provide, respectively, that within sixty days of the entry of judgment of conviction and sentence and before an appeal is perfected, a defendant may file a motion seeking to set aside the judgment based on newly discovered material facts under the standards set forth in Rule 32.1, Ariz. R. Crim. P., or the convictions had been obtained in violation of the defendant's state or federal constitutional rights. "Motions [to vacate judgment] based on newly discovered evidence are disfavored" and are to be granted "cautiously." *See State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991). This court will not disturb the trial court's ruling on such a motion unless that court has abused its discretion. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 90, 25 P.3d 717, 743 (2001), *overruled on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). And when a trial court conducts an evidentiary hearing on the motion, it is given broad discretion in assessing the credibility of the witnesses and determining whether the outcome of the trial probably would have been different had the new evidence come to light before trial. *See Serna*, 167 Ariz. at 374-75, 807 P.2d at 1110-11.

¶3 In his motion, Cruz maintained he had learned after the verdicts were rendered that “at least one” juror had not been honest during voir dire because he had failed to disclose he was familiar with and did not like Cruz’s son, Tony. After Cruz was sentenced, Tony, who apparently was present during voir dire, told Cruz that one or two of the jurors had not disclosed the fact that they knew him and that there was animosity between them, particularly with respect to one juror. Cruz conceded the ten-day time limit for motions pursuant to Rule 24.1 had passed, but stated the juror’s failure to disclose the animosity violated his federal constitutional rights and gave rise to a claim under Rule 24.2(a)(3). The trial court also considered whether Cruz’s claim fell within Rule 24.2(a)(2), as being based on newly discovered material facts. The court denied the motion after an evidentiary hearing at which Tony was the only witness.

¶4 At the beginning of the hearing, the trial court stated that, to the extent the motion was one for a new trial based on juror misconduct, it fell under Rule 24.1(c)(3), and, as the state had argued, was time-barred. And, the court added, to the extent Cruz was arguing, based on the substance of his motion, that his conviction should be vacated on the ground of newly discovered evidence under Rule 24.2, it did not qualify. Referring to the relevant portions of the trial transcript, the court rejected the claim as it related to juror number nine, finding the juror had disclosed the fact that he knew Tony. But, as to S., juror number twenty-five, defense counsel asserted there was an issue and called Tony as a witness to support the claim.

¶5 Tony testified he went to the first day of Cruz’s trial and recognized two of the jurors but knew the name of only one of them, S. He explained that he and S. both worked at the same place and volunteered for a program called Safe Life Kids, which involved mentoring children. Tony explained that once a week he spoke to his group of

fifth-grade children about a variety of topics, such as safety issues related to guns and camping, bullying at school, and drugs, and at the end of the program period, he would take them on a field trip to the copper smelter where he worked. Tony stated he had contact with S. through the program because he attended meetings and participated in the field trip. When asked what kind of relationship the two men had, Tony responded, “not very good.” He explained this was because S. did not like the way Tony looked, and believed Tony should not be talking to children. Tony later admitted S. had never said this to Tony directly and, in fact, he had never spoken to S. but rather that he had heard this “second hand from other people” and inferred it from S.’s conduct, such as interrupting Tony at meetings and speaking over him, and by looking at him in a certain way. Tony described himself as bald, “a shaved head,” with tattoos, and stated S. was uncomfortable with his appearance and had vocalized this at a meeting, apparently commenting sarcastically that Tony should be teaching children “how to do drive-bys or something like that.” As Tony explained, this was a reference to Tony’s previous gang affiliation, which Tony admitted was apparent from the way he looked.

¶6 Tony also stated that he and S. did not speak otherwise and that Tony avoided S. They normally would not see one another, in any event, because of their different positions and schedules. Tony testified further that S. knew Tony was Cruz’s son. The two men never spoke about the trial. Although Tony was concerned S. might be biased against Cruz as soon as Tony recognized S., Tony did not inform Cruz until after Cruz had been sentenced, claiming he had waited because he did not realize there was anything wrong with S. serving on the jury until other people started making comments about it.

¶7 Cruz presented no additional evidence in support of his motion. At the beginning of the hearing the state had informed the trial court that, if necessary, it would secure the attendance of S. to testify. But after Tony testified, the court stated Cruz had not sustained his burden of proving the necessary grounds for granting the motion. The court stated the motion was based on speculation as to the animosity between the men, there had been no explanation why the matter had not been raised earlier, and there was no evidence S. had made any hostile remarks “directly to the defendant.” And, the court found there was no confirmation of Tony’s perception that S. was hostile towards him or anything else that “would impact [S.’s] decision making in the case.”

¶8 On appeal Cruz contends the trial court erred in denying the motion because S. had been guilty of misconduct by not informing the court he knew Tony and of his animosity toward Tony. He contends this resulted in a violation of his federal constitutional rights to a fair trial. But Cruz’s contention that S. intentionally withheld information during voir dire is based on speculation and is contrary to the court’s findings. Cruz presumes S. saw Tony, recognized him, knew Tony’s last name, and made the connection between Tony and Cruz. Nothing in the record supports these assertions.

¶9 Similarly, Cruz’s contention that S. failed to disclose that he bore animosity towards Tony is premised on the actual existence of such animosity. But the trial court found that, given the only evidence presented to it in support of the motion, which was Tony’s testimony, Tony’s belief that S. disliked him was based on speculation and conjecture. The court’s finding in this regard is supported by Tony’s own testimony that S. never made statements directly to Tony reflecting such animosity, indeed, according to Tony the two men had never spoken directly to one another. Rather, Tony’s belief was based on statements made by other people and a feeling Tony had, neither of which was

ever confirmed by S. But even assuming S. harbored some ill will toward Tony, as the court found, there was no evidence before it establishing S. bore any hostility or animosity toward Cruz.

¶10 Based on the record before this court, and deferring to the trial court, as we must, with respect to both its express and inferable findings of fact, we cannot say the court abused its discretion by denying Cruz’s motion to set aside the judgment of convictions and sentences. The court’s denial of the Rule 24 motion is therefore affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge