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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID SCOTT SELBY, Appellant.	2 CA-CR 2012-0180 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201100727

Honorable John F. Kelliher Jr., Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Attorneys for Appellee

Marc J. Victor, P.C.
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Attorneys for Appellant

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

¶1 After a jury trial, appellant David Selby was convicted of possession of marijuana for sale. He was sentenced to a mitigated term of three years' imprisonment. Selby argues the trial court erred by denying his request for a lesser-included-offense instruction and his motion for new trial based on juror misconduct. For the following reasons, we affirm his conviction and sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction. *State v. Fontes*, 195 Ariz. 229, ¶ 2, 986 P.2d 897, 898 (App. 1998). While on patrol in September 2011, Douglas Police Department officer Paul Barco and Arizona Department of Public Safety officer Antonio Morales observed a traffic violation and conducted a traffic stop on a vehicle. The driver of the vehicle was Ricky Laun, and Selby was the passenger. Laun immediately told the officers there was marijuana in the vehicle, and the officers found ninety pounds in the trunk. During an interview with Barco and Morales, Laun admitted he had arranged to pick up two big bundles of marijuana at "Mile post 4" on a rural highway. When he arrived there, he stopped the vehicle, some "drug mules" jumped a fence on the side of the road and threw the bundles into the trunk, took some fast food and bottles of water, and jumped back over the fence. Laun then drove back into town, where he was stopped by the officers for a traffic violation.

¶3 In his interview, Selby stated he had been simply "tagging along" with Laun and was not going to be paid for his participation, but he admitted he had known they "were going to pick up marijuana." When asked if Laun was going to give him "at least something," Selby replied, "I would hope so, right?" He was arrested and charged

with possession and transportation for sale.[1] At trial, Laun and Selby testified Selby had only intended to buy an amount of marijuana for personal use and had not been a part of the transaction that actually occurred. The jury found him guilty of possession for sale but not guilty of transportation for sale. He was sentenced as set forth above, and this timely appeal followed.

Discussion

Lesser-Included Offense Instruction

¶4 During trial, Selby requested a lesser-included-offense instruction on "attempted personal possession of marijuana" based on his and Laun's testimony that he had only intended to buy a small amount to use. The court denied the instruction, reasoning there was no "corpus" supporting it. Selby requested the instruction again at the close of the evidence and the court affirmed its prior ruling. Finally, he moved for a new trial, again arguing the jury should have been given the lesser-included-offense instruction for attempted simple possession and the "bizarre and inconsistent verdict," acquitting him of transporting marijuana for sale but convicting him of possessing it for sale, "seems to suggest that if Mr. Selby could have been convicted of the lesser form of possession [the jury] would have chosen to do so." The court denied the motion.

¶5 An offense is lesser included if it is "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Celaya*, 135 Ariz. 248, 251,

[1]Selby was also charged with conspiracy to commit transportation of marijuana for sale, but that count was dismissed on the state's motion before trial.

660 P.2d 849, 852 (1983). "The court must instruct the jury on every lesser-included offense to the one charged if the evidence supports the giving of the instruction." *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989). The evidence supporting a lesser-included offense need only be such that a rational juror could conclude the defendant committed only the lesser offense. *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006); *accord Keeble v. United States*, 412 U.S. 205, 208 (1973).

¶6 Selby now argues for the first time on appeal that the trial court should have instructed the jury on simple personal possession.[2] He specifically argues that "[b]ecause there was evidence which supported the giving of an instruction on simple possession as the lesser included of possession for sale, the trial court's refusal to do so constituted an abuse of discretion." We construe his opening brief as abandoning the argument he made below that he was entitled to an attempt instruction.[3] *See State v. Bonnewell*, 196 Ariz. 592, n.3, 2 P.3d 682, 684 n.3 (App. 1999); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Because he did not request an instruction on simple

[2]Both parties presume Selby requested a possession instruction as well as an attempt instruction below. But it is clear from the transcript, the actual packet of requested instructions, and his motion for new trial that he only asked for an instruction on attempt.

[3]Despite Selby's conflation of the issues in his opening brief, we note that a request for an instruction on attempted possession of marijuana involves distinct legal issues from a request for an instruction on simple possession. Indeed, Selby recognized the distinction below when he stated that he was "not asking for possession, we're asking for an attempt to possess marijuana [instruction]. That makes a world of difference." Given Selby's belated inclusion of the issue in his reply brief, we conclude Selby waived the issue on appeal when he failed to properly argue it in his opening brief. *See State v. Aleman*, 210 Ariz. 232, ¶ 9, 109 P.3d 571, 575 (App. 2005) (issues raised for first time in reply brief untimely and may be disregarded by court).

possession below, and he has not requested that we review the claim for fundamental error, we do not address this issue further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008).

Juror Misconduct

¶7 Selby argues the jury committed misconduct when it considered extrinsic evidence and rendered a "verdict by compromise," and he contends the trial court abused its discretion when it denied his motion for new trial on those grounds. We review the denial of a motion for new trial for an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). A defendant is entitled to a new trial based on jury misconduct if the jury receives extrinsic evidence pursuant to Rule 24.1(c)(3)(i), Ariz. R. Crim. P., or renders a "verdict by lot" in violation of Rule 24.1(c)(3)(ii). *See State v. Chaney*, 141 Ariz. 295, 311, 686 P.2d 1265, 1281 (1984) (juror misconduct listed in Rule 24.1(c)(3) provides exclusive grounds for motion).

¶8 First, we address Selby's contention that the jury's compromise verdict "represents a quotient verdict" or verdict by lot. As stated above, the jury found Selby guilty of possession for sale but not guilty of transportation for sale. The day after the verdicts, the court received a message from a juror, Irma P., who stated that the verdicts "were not unanimous but more of a compromise." According to Irma, another juror was "dead-set in his opinion" that the state had presented insufficient evidence, and the rest of the jurors did not want to "be[] there (deliberating) forever." She also filed an affidavit stating, "[T]he jury's decision to convict the defendant of possession of marijuana for sale was not the result of a unanimous decision but a compromise so that deliberations

would conclude." The affidavit also stated, however, that "the jury concluded that the defendant must have been guilty of possession of marijuana for sale."

¶9 Selby acknowledges that "typically a quotient verdict is a verdict by chance or by lot in which the jury randomly picks a verdict." He contends, however, that "it has been expanded beyond such a strict definition." But the case he relies upon, *Hull v. Larson*, 14 Ariz. 492, 131 P. 668 (1913), does not support his position. In *Hull*, a civil case, the jurors each wrote down an amount they believed was fair and then awarded judgment for the plaintiff in an amount equal to the average of those figures. *Id*. at 495, 131 P. at 669. Without granting a new trial, our supreme court implied this was a quotient verdict and juror misconduct. A compromise verdict occurs, on the other hand, when the jury issues inconsistent verdicts on different counts in an effort to seek leniency or appease reluctant jurors. *See State v. Zakhar*, 105 Ariz. 31, 32-33, 459 P.2d 83, 84-85 (1969); *State v. Estrada*, 27 Ariz. App. 38, 40, 550 P.2d 1080, 1082 (1976). Such inconsistent verdicts are legal in Arizona. *See Zakhar*, 105 Ariz. at 32, 459 P.2d at 84; *State v. Lewis*, 222 Ariz. 321, ¶ 10, 214 P.3d 409, 413 (App. 2009). Selby has not shown the jurors' "compromise" verdict constituted misconduct under Rule 24.1(c)(3)(ii). *Cf. State v. Franklin*, 130 Ariz. 291, 294, 635 P.2d 1213, 1216 (1981) (mere possibility of compromise verdict not reversible error when conviction supported by evidence).

¶10 Selby also asserts the jurors committed misconduct by considering his criminal history, potential sentences, and the procedural consequences if they could not reach a verdict, in violation of Rule 24.1(c)(3)(i). Specifically, according to the affidavit of juror Irma P., the jury considered that it was Selby's first offense and that the judge

might be able to place him on probation or give him a more lenient sentence than Laun, and they considered whether Selby would be retried at taxpayer expense if they failed to reach a verdict. He contends on appeal, as he did below, that the jury's considerations constituted impermissible extrinsic evidence. In denying his motion for new trial, the trial court found the jurors could only have engaged in "speculation about Mr. Selby's criminal history and possible punishment" because there was no such evidence presented. The court stated it "would tend to draw a distinction of what is information, going on the Internet and doing research, . . . reading the newspaper, taking a legal book in, digitally or a hard cover, versus: I wonder what the penalty is? The[y are] just speculating about that."

¶11 As the state contended below, it argues on appeal that the jury's considerations of Selby's criminal history, possible punishment, and the consequences of failing to reach a verdict fell within the jurors' subjective motives or mental processes and were not extrinsic evidence. *See* Ariz. R. Crim. P. 24.1(d) ("No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict."). Selby supports his argument that the jury did consider extrinsic evidence by relying on *State v. McLoughlin*, 133 Ariz. 458, 652 P.2d 531 (1982), and *State v. Glover*, 159 Ariz. 291, 767 P.2d 12 (1988). But in each of those cases, a juror or jurors had received information from an outside source and passed it along to the rest of the jury. *See Glover*, 159 Ariz. at 293, 767 P.2d at 14 (juror asked medically trained wife about effect of prescription drugs and alcohol defendant testified he had consumed; another juror asked law enforcement officer effect of hung

jury and was told defendant would go free); *McLoughlin*, 133 Ariz. at 460, 652 P.2d at 533 (juror told by third party that if defendant found not guilty by reason of insanity he would go free).

¶12 Here, there was no such evidence the jury received any information from an outside source. Rather, the record shows that the jury simply speculated and/or made inferences from evidence admitted at trial.[4] *See McLoughlin*, 133 Ariz. at 461 n.2, 652 P.2d at 534 n.2 (Rule 24.1(c)(3)(i) only applies "when the jury receives information from an outside source during the course of the trial or during deliberations"); *cf. State v. Dickens*, 187 Ariz. 1, 16, 926 P.2d 468, 483 (1996) (not extrinsic evidence when jurors draw inferences from basic facts in evidence based on own personal knowledge), *abrogated in part on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (2012). For the foregoing reasons, the trial court did not abuse its discretion when it denied Selby's motion for new trial based on juror misconduct.

Disposition

¶13 Selby's conviction and sentence are affirmed.

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

[4]Selby testified he did not know how the legal system works. In addition, the former prosecutor in the case testified, in response to defense counsel's questions, about the possible punishment Laun faced, and Laun was charged with the same crimes as Selby. Arizona clearly disallows juries to consider the possible punishment a defendant faces in determining his guilt or innocence, *McLoughlin*, 133 Ariz. at 461, 652 P.2d at 534. Having invited any error in the admission of the prosecutor's testimony by his questioning, however, Selby cannot now claim on appeal that the testimony was improperly admitted. *See State v. Anderson*, 210 Ariz. 327, ¶ 44, 111 P.3d 369, 382 (2005).

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge