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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. JARRETT CHESYLE CARTER, Appellant.	)	2 CA-CR 2012-0182 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103122001

Honorable Paul E. Tang, Judge

AFFIRMED IN PART; VACATED IN PART

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M I L L E R, Judge.

¶1 Jarrett Carter was convicted after a jury trial on one count of first degree murder and two counts of attempted armed robbery. Carter argues juror misconduct

requires a new trial and, alternatively, all sentences should have run concurrently. He also argues the attempted armed robbery charges were duplicitous and Arizona's felony murder statute is unconstitutional. Finding no error, we affirm the convictions and sentences, but vacate the criminal restitution order.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In August 2010, Carter accompanied Mario Acedo to sell marijuana to victim C.V. C.V. and his passenger, C.M., drove to the meeting location in C.V.'s car. Acedo got in the back seat of C.V.'s vehicle while Carter remained outside. Acedo then displayed a weapon and said, "[W]hat you got?" C.V. answered, "I don't know, I don't know what I got." Acedo got out of the car, pointed the gun back in through the passenger window and demanded C.V.'s cell phone. Carter broke the driver's side window and reached for the car keys, cutting his arm on glass. At the same time, Acedo shot C.M. through the passenger-side window. C.V. managed to escape in the car and transport C.M. to the hospital. C.M. gave a statement to police but later died in surgery. The police investigation led to Carter, who had large cuts on one arm, and whose DNA[1] matched blood found in the car.

¶3 Carter was convicted of first degree felony murder and two counts of attempted armed robbery.[2] The trial court denied his motion for a new trial and imposed

[1]Deoxyribonucleic acid.

[2]Carter was charged and tried with Aereth Hubert, who was accused of setting up the drug deal. Acedo was tried separately.

concurrent sentences of life on the murder count and 11.25 years for the attempted armed robbery of C.M. It imposed a consecutive term of 11.25 years for the attempted armed robbery of C.V. Carter filed a delayed appeal so as to include his unsuccessful motion requesting the court run all sentences concurrently.

Discussion

I. Improper Juror Communications

¶4 Carter first argues that the trial court erred in denying his motion for a new trial after a juror ("Juror Two") violated the admonition against improper communications on several occasions. He contends Juror Two's violations of the admonition, his failure to self-report, and the failure of other jurors to report the communications constituted perjury, suggested consideration of outside evidence, and deprived him of a fair trial.[3]

¶5 We review the trial court's denial of a motion for a new trial under Rule 24.1, Ariz. R. Crim. P., for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982). To have abused its discretion, the trial court must have committed an error of law in reaching its decision, or made a discretionary finding of fact that is not justified by reason. *State v. Aguilar*, 224 Ariz. 299, ¶ 6, 230 P.3d 358, 359-60 (App. 2010). Although potentially cumulative in effect, *see*

[3]Carter also argued that Juror Two consulted with an "interested party" and thereby engaged in juror misconduct under Rule 24.1(c)(3)(vi) but withdrew the argument in his reply brief.

State v. Roberts, 131 Ariz. 513, 515, 642 P.2d 858, 860 (1982), we address each communication separately.

¶6 The first communication occurred during a break in voir dire when Juror Two asked Carter's attorney about the expected length of the trial. After counsel reported the communication, the trial court questioned Juror Two about it, and later reminded all jurors about the admonition against direct communications with the attorneys. No party objected, and Juror Two was selected to serve on the jury.

¶7 The second communication occurred on the third day of trial during the lunch recess. Juror Two informed an investigator for Carter that the hallway door to the jury room was locked. No objections were made and the trial proceeded.

¶8 The trial court was informed about another communication on the first full day of deliberations. Juror Two asked a police officer in the court elevator whether the person who made a phone call setting up a drug deal was guilty if someone was killed during that drug deal. The officer declined to answer the question. Another defense attorney happened to overhear the conversation and reported it to trial counsel. The court questioned the defense attorney and then questioned the juror. Juror Two reluctantly admitted he had posed a question to the police officer. Juror Two explained he was trying "to clarify in [his] mind" whether the intention to commit a small crime could lead to responsibility for a greater crime. The parties agreed that in light of Juror Two's improper conduct, he should be released and an alternate juror substituted in his place. They also agreed each of the remaining eleven jurors should be individually questioned as to whether the dismissed juror attempted to discuss any matters not properly introduced during the

trial. The jurors individually denied that anyone had introduced outside matters during their deliberations.[4]

¶9 The final juror communication was brought to the trial court as part of the motion for a new trial and an order to show cause hearing (OSC) regarding Juror Two. At the OSC, the trial court questioned Juror Two about any communications violating the admonition. Juror Two acknowledged he had posed a question to Juror One—similar to the one he asked the police officer—outside the courtroom during a break from deliberations. Juror One reminded him of the admonition and nothing further was discussed between them.

Perjury

¶10 Carter argues Juror Two committed perjury by not immediately admitting having addressed the police officer and by failing to mention he had spoken with other jurors in violation of the admonition. He also contends the other jurors violated their oath by failing to report Juror Two's violations.

¶11 Under Rule 24.1(c)(3)(iii), a trial court may grant a new trial if a juror is found 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." This portion of Rule 24.1 has been strictly limited to voir dire examination. *See State v. James*, 175 Ariz. 478, 479, 857 P.2d 1332, 1333 (App. 1993) ("[B]y express language, Rule 24.1(c)(3)(iii)

[4]At some point during the process of determining what had occurred, but before the trial court questioned Juror Two, the jury informed the bailiff that it had reached a verdict. The verdict forms were sealed and placed in the vault.

only addresses perjury committed 'during the voir dire examination.'"). Carter acknowledges "there was not a single instance of perjury during the voir dire to determine whether [the jurors] were qualified to serve." But he contends Rule 24.1(c)(3)(iii) should apply to any untrue statements by a juror. Statements outside of voir dire, however, including lunch breaks or statements regarding juror conduct after voir dire, are simply not perjury under the rule, which must be strictly applied. *See James*, 175 Ariz. at 479, 857 P.2d at 1333; Ariz. R. Crim. P. 24.1(c)(3)(iii) & cmt. ("Paragraph (3) lists 6 explicit types of jury misconduct and is intended to be construed to exclude all others.") The trial court did not err in denying the motion for a new trial on this basis.

Juror Two's Possible Consideration of Outside Evidence

¶12 Carter also argues the trial court erred in denying his motion for a new trial on the basis of Juror Two's potential consideration of outside evidence.[5] Ariz. R. Crim. P. 24.1(c)(3)(i) (court may grant new trial if juror receives evidence not properly admitted during trial). Carter bears the initial burden of proving that Juror Two received and considered outside evidence. *State v. Hall*, 204 Ariz. 442, ¶¶ 16-17, 65 P.3d 90, 95-96 (2003). Carter admits there is no direct evidence of his claim, arguing only that it is implied by Juror Two's other violations of the admonition. Most important, because Juror Two did not participate in the final verdict, any outside evidence he may have considered is irrelevant. Carter cannot meet his burden and we find no abuse of discretion.

[5]Carter did not raise the issue of outside evidence in his motion for new trial, but the trial court raised it *sua sponte* during the hearing, before denying the motion.

Fair Trial

¶13 Carter next argues the trial court erred in denying his motion for a new trial pursuant to the catch-all provision in Rule 24.1(c)(5), because all of Juror Two's communications, even if they did not fit within the enumerated grounds for a new trial, made a "mess" of the trial. Rule 24.1(c)(5) states that the trial court may grant a new trial "[f]or any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial."

¶14 "Juror misconduct warrants a new trial only if 'the defense shows actual prejudice or if prejudice may be fairly presumed from the facts.'" *State v. Davolt*, 207 Ariz. 191, ¶ 58, 84 P.3d 456, 473 (2004), *quoting State v. Miller*, 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994) (emphasis omitted); Ariz. R. Crim. P. 24.1(c) cmt. ("The 'harmless error' rule is applicable to all" grounds for a motion for new trial.). Prejudice can be presumed where there is "'any private communication, contact or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.'" *State v. Miller*, 178 Ariz. 555, 558-59, 875 P.2d 788, 791-92 (1994), *quoting State v. Remmer*, 347 U.S. 227, 229 (1954). The state has the burden to rebut the presumption by showing that the communications did not taint the verdict. *Id*. at 559.

¶15 To rebut a presumption of taint, the state relies on the removal of Juror Two, the individual questioning of the remaining jurors about communications with Juror Two, and the absence of any evidence suggesting the jury considered extrinsic evidence. Carter concedes the trial court removed Juror Two at his request and acknowledges the remaining

jurors' denials about extrinsic evidence or improper influence by Juror Two, but he contends the continuing jury deliberations created a situation that could not be remedied.

¶16 Although the jury had reached a verdict before Juror Two was removed, the trial court never saw it, did not accept it, and ordered it sealed. At that stage, three of the four communications by Juror Two were known by all parties.[6] The parties also knew that the jury had reached a verdict. Carter's co-defendant, Hubert, immediately moved for a mistrial, but Carter declined to join in the motion stating that he "[didn't] agree with the necessity of a mistrial, at [that] point."

¶17 To the extent Carter's Rule 24.1(c)(5) argument relies on juror misconduct that was known at that point, he has forfeited all but fundamental error review. *State v. Pandeli*, 215 Ariz. 514, ¶ 7, 161 P.3d 557, 564 (2007); *see also State v. Spratt*, 126 Ariz. 184, 187-88, 613 P.2d 848, 851-52 (App. 1980) (defense counsel's failure to take curative action on alleged juror misconduct during trial waived any error); *State v. Adams*, 27 Ariz. App. 389, 391, 555 P.2d 358, 360 (1976) (defendant "must object when he learns of misconduct by a juror" and "is not permitted to wait until after an unfavorable verdict is returned and then complain."). Carter does not argue that errors up to this point in the trial were fundamental, thereby waiving fundamental error review. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Therefore, we

[6]Carter learned of this communication during an off-the-record conversation with the jurors after the verdicts were read; further details were elicited during the hearings on the motion for a new trial.

turn to the remaining communication between Jurors One and Two, which we review for abuse of discretion.

¶18 When initially questioned about Juror Two's comments outside of deliberations, Juror One did not mention the comment regarding felony murder. We note, however, that the trial court and attorneys were focused on whether Juror Two "introduced" law, opinions, or evidence not discussed during trial. Months after the trial ended, Juror One was asked about "any contact outside the jury room" with Juror Two. Juror One acknowledged in response to that line of questioning that Juror Two had briefly asked him a question about felony murder while walking to lunch. Juror One stated that the comment had not affected his deliberations and he had reminded Juror Two about the admonition. Juror Two described his conversation with Juror One as a "dead issue."

¶19 The trial court was in the best position to assess the responses of the jurors when questioned about Juror Two. *See State v. Blackman*, 201 Ariz. 527, ¶ 13, 38 P.3d 1192, 1198 (App. 2002) (trial judge in better position than appellate judges to assess prospective jurors due to opportunity to observe them firsthand). Moreover, the removal of Juror Two and the court's instruction that the jury was to start deliberations from the beginning with the alternate juror support the conclusion that Carter received a fair and impartial trial. We conclude the court did not abuse its discretion in denying the motion for a new trial.

¶20 Carter also argues that even if the Arizona Rules of Criminal Procedure do not address Juror Two's conduct, the cumulative effect denied him a fair trial under *Chambers v. Mississippi*, 410 U.S. 284 (1973). We disagree. In *Chambers*, the lower

court excluded reliable hearsay testimony based on the state's evidentiary rules, which if admitted would have exculpated the defendant. *Id.* at 294, 302-03. The Supreme Court found "quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." *Id.* at 302-03. Unlike the situation in *Chambers*, the trial court here took corrective action by removing Juror Two and questioning the remaining jurors to determine whether the verdict was based only on evidence and law presented during the trial. This action preserved Carter's right to a fair and impartial trial.

II. Consecutive Sentences

¶21 Carter contends the trial court erred when it ordered the sentence for attempted armed robbery of C.V. to be served consecutively to those imposed for felony murder and attempted armed robbery of C.M. We review the trial court's imposition of consecutive sentences de novo. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). Further, we must affirm a trial court ruling if it is "legally correct for any reason," and we may consider the state's arguments to uphold that ruling even if not raised below. *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012).

¶22 Arizona law requires concurrent sentences where "[a]n act or omission which is made punishable in different ways by different sections of the laws." A.R.S. § 13-116. To determine if concurrent sentences are required under § 13-116, Arizona courts apply the three-step *Gordon* test. *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). First, the trial court must consider the facts of each crime and subtract from the factual transaction the evidence necessary to convict on the ultimate

crime, often the most serious charge. *Id*. If the remaining evidence is sufficient to support the additional charge, the court may impose consecutive sentences. *Id*. Next, the court considers whether it is factually impossible to commit the more serious offense without the less serious offense. *Id*. And finally, the court considers whether the defendant's conduct "caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Id*.

¶23 Carter argues, as he did before the trial court, that under the *Gordon* test, both of the attempted armed robbery charges should have been sentenced concurrently, primarily because there is no evidence left to support a second attempted armed robbery conviction once all of the evidence supporting the felony murder conviction is subtracted from the transaction. In response to the motion to modify, the state argued there were two distinct armed robberies, (1) Carter and Acedo flanking the car and Carter reaching for the car keys, and (2) Acedo getting in the car, pulling out his gun and making demands of the victims. The trial court applied the *Gordon* test and found that there were separate robberies as well as separate victims. As explained further in the next section, we conclude there was just one transaction with two victims, but uphold the sentence. *See Boteo-Flores*, 230 Ariz. 551, ¶ 8, 288 P.3d at 113.

¶24 As noted in *Gordon*, § 13-116 "has never been interpreted literally," 161 Ariz. at 312 n.4, 778 P.2d at 1208, n.4, and courts have repeatedly held that consecutive sentences may be imposed when a single act harms multiple victims, even though no distinction is made in the statute, *see, e.g.*, *State v. Hampton*, 213 Ariz. 167, ¶ 65, 140 P.3d 950, 965 (2006) (consecutive sentences upheld due to multiple deaths from one bullet);

State v. Riley, 196 Ariz. 40, ¶¶ 20-21, 992 P.2d 1135, 1141-42 (App. 1999) (Section 13-116, A.R.S. inapplicable to single armed robbery with multiple victims). Further, robbery is a crime against a person, not against property. *See Riley*, 196 Ariz. 40, ¶¶17-18, 992 P.2d at 1140-41 (despite only one taking of property, six separate convictions upheld for six victims of bank robbery).

¶25 Here, the jury found Carter guilty of two counts of attempted armed robbery, one against each victim. Since there were two victims, those convictions could result in consecutive sentences. *See Riley*, 196 Ariz. 40, ¶¶ 20-21, 992 P.2d at 1141-42. It does not follow that the addition of the ultimate crime of felony murder would require strict application of the *Gordon* test and disallow consecutive sentencing on both attempted armed robberies. *See State v. Vaughn*, 147 Ariz. 28, 31, 708 P.2d 453, 456 (1985) (consecutive sentences for felony murder and underlying armed robbery do not violate A.R.S. § 13-116); *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983) (consecutive sentences for felony murder and underlying arson do not violate A.R.S. § 13-116); *see also State v. Runningeagle*, 176 Ariz. 59, 67, 859 P.2d 169, 177 (1993) (citing *Girdler* and noting that consecutive sentences could have been imposed whether ultimate crime of murder was decided on premeditation theory or felony theory). To hold that sentences related to additional victims must be served concurrently would ignore the fact that C.V. was separately harmed as the second victim of attempted armed robbery. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (noting relevance of risk of additional harm to victim in determining whether sentences should be concurrent). The trial court did not err in imposing consecutive sentences.

III. Duplicitous Charges

¶26 Carter argues the two attempted armed robbery charges were duplicitous, creating the risk of a non-unanimous jury verdict. Carter failed to raise this issue when the evidence was introduced, forfeiting the objection absent fundamental error. *See State v. Butler*, 230 Ariz. 465, 470 n.4, 286 P.3d 1074, 1079 n.4 (App. 2012) ("A duplicitous charge . . . may be timely objected to when the presentation of evidence first creates the problem."). A violation of the right to a unanimous verdict constitutes fundamental error. *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d 900, 907-08 (App. 2009).

¶27 A duplicitous charge, as opposed to a duplicitous indictment, occurs if the evidence shows multiple offenses within a single count. *Butler*, 230 Ariz. 465, ¶ 13, 286 P.3d at 1079. A duplicitous charge risks the possibility of a non-unanimous jury verdict. *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). There is no risk of a non-unanimous verdict, however, when the different acts occur as part of a larger episode, defendant offers only one defense to all acts, and there is no other reasonable basis for distinguishing between them. *Id*. ¶¶ 32-36.

¶28 Carter contends there were three instances of attempted armed robbery to support each charge: Acedo's actions in the back seat, Acedo pointing the gun through the window, and Carter breaking the driver's side window. At trial, however, the evidence was presented as parts of a single episode with two victims. Carter, likewise, presented only one defense—that the victims concocted the story of the attempted armed robbery as a cover-up.

¶29 Robbery is a continuous offense, which "includes any of the defendant's acts beginning with the initiation and extending through the flight from a robbery." A.R.S §§ 13-1901(2), 13-1904; *see also South Carolina v. Moore*, 649 S.E.2d 84, 90 (S.C. Ct. App. 2007) (reviewing and listing states with "continuous offense" robbery statutes); *Model Penal Code* § 222.1 cmt. ("in the course of committing a theft" defined to include "conduct occurring during the attempt to commit a theft or in flight after its attempt or commission"). The threats, broken window, and raised guns were all part of just one continuous attempted armed robbery of two people that did not end until Carter and Acedo were separated from the victims.[7] *See State v. Solano*, 187 Ariz. 512, 520, 930 P.2d 1315, 1323 (App. 1996) (finding a single assault as to each victim where there were two threats of force on each victim with a car chase in between threats).

¶30 Even if the acts could be separated from each other, Carter offered only one defense, reducing the risk of a non-unanimous verdict. *Cf. State v. Davis*, 206 Ariz. 377 ¶¶ 58-59, 79 P.3d 64, 76-77 (2003) (when acts occurred eleven days apart and defendant offered an alibi defense for one and not the other, non-unanimous verdict possible); *Klokic*, 219 Ariz. 241, ¶ 37, 196 P.3d at 852 (non-unanimous verdict possible where defendant denied drawing handgun on two separate occasions and alternatively asserted different justifications for each occasion). On appeal, Carter offers suggestions for how the jury may have been non-unanimous, such as if they disagreed about whether Carter had been

[7]We acknowledge the trial court concluded the facts supported multiple armed robberies as well as multiple victims and denied the motion to modify. We are not bound by the court's reasoning and may affirm its ruling if legally correct for any reason. *See State v. Martinez*, 221 Ariz. 383, ¶ 29, 212 P.3d 75, 83 (App. 2009).

present when Acedo approached the car, but Carter never presented a defense based on whether he was present from the beginning.[8] Likewise, Carter offers no other reasonable basis for why the acts should have been distinguished in the indictment. The robbery was a single transaction with two victims. We find no error in the charges as presented, let alone fundamental error.

IV. Felony-Murder Statute

¶31 Finally, Carter contends Arizona's felony-murder statute is unconstitutional on its face because it "dispenses with the mens rea to commit murder." We are bound by the decisions of the Arizona Supreme Court, *State v. McPherson*, 228 Ariz. 557, ¶ 13, 269 P.3d 1181, 1186 (App. 2012), which has repeatedly upheld the felony-murder statute, s*ee State v. Herrera*, 176 Ariz. 21, 30, 859 P.2d 131, 140 (1993), *reaffirming State v. McLoughlin*, 139 Ariz. 481, 485-86, 679 P.2d 504, 508-09 (1984). The felony murder rule is not unconstitutional.

V. Criminal Restitution Order

¶32 Although Carter has not raised the issue on appeal, we find fundamental error associated with the criminal restitution order (CRO). *See* A.R.S. § 13-805.[9] In the sentencing minute entry, the trial court ordered that "all fines, fees and assessments are

[8]Carter contends on appeal that he would have presented more than one defense had he known the state's theory of multiple armed robberies, which did not become apparent until the motion to modify sentence. The facts supporting the state's contentions in the motion to modify, however, were known to Carter by the time the state rested.

[9]Section 13-805, A.R.S., has been amended three times since the date of the crime. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. We apply the version in effect at the time of the crimes. *See* 2005 Ariz. Sess. Laws. ch. 260, § 6. *State v. Lopez*, 231 Ariz. 561, n.1, 298 P.3d 909, 910 n.1 (App. 2013).

reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Carter] is in the Department of Corrections." The court's imposition of the CRO before the expiration of Carter's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *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). This remains true even though the court ordered that the imposition of interest be delayed until after Carter's release. *See id.* ¶ 5.

Disposition

¶33 For the foregoing reasons, we affirm Carter's convictions and sentences and vacate the CRO.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

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

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