IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FAUSTINO QUINTERO,
Appellant.

No. 2 CA-CR 2013-0269
Filed December 29, 2014

Appeal from the Superior Court in Pima County
No. CR20093166001
The Honorable Clark Munger, Judge

AFFIRMED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Katherine A. Estavillo, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Faustino Quintero appeals his conviction and sentence for one count of intentional or knowing child abuse, under circumstances likely to produce death or serious physical injury, a class two felony. The trial court imposed a slightly mitigated sentence of fourteen years' imprisonment. Quintero argues the court abused its discretion in denying his motion for new trial based on juror misconduct. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Pursuant to Quintero's indictment, the state separately alleged the offense was a dangerous crime against children, and a domestic violence offense against a person under fifteen. Quintero's first trial ended in a mistrial after the jury could not reach a verdict.

¶3 Before Quintero's second trial, prospective jurors signed and submitted answers to a jury questionnaire under oath. The questionnaire instructed in relevant part:

> 2. Do not conduct any research on this case, including on the Internet[;]
>
> . . . .
>
> 4. Do not discuss this case or this questionnaire with anyone, including family[;]
>
> 5. Do not allow anyone to discuss the case in your presence[;]

> 6. If you are present when someone discusses the case, report the circumstances and the content of the discussion to the Court when you return.

Once the jury was empanelled and sworn, the trial court read the admonition, which reiterated its earlier orders in further detail. On May 8, 2012, after a month of trial, the jury found Quintero guilty of child abuse as alleged in the indictment.

¶4 Following the reading of the verdict, the trial court informed the jury that the state had alleged "some aggravating factors that must be considered by the jury" and instructed them to return the next day for "presentation of some additional evidence." The court further instructed the jurors they were not released from service, reminding them "[t]he admonitions remain[ed] in effect."

¶5 After escorting the jury back to the jury room, the trial court's law clerk notified the court that he overheard a comment by a juror suggesting she had received extraneous information regarding the aggravation hearing. Quintero's counsel was notified, and the following day, the court interviewed each juror individually to determine whether the comment had been overheard, and if so, whether it had any effect on the jurors' verdicts. The court also inquired whether other information had been received. During the interviews, the court learned the juror had received the information from an "attorney friend" after being empaneled, and had shared it with one other juror prior to deliberating. The court ordered the Pima County Attorney's Office to conduct a search of several jurors' cellular telephones, continued the aggravation phase, and discharged the jury without lifting the admonitions.

¶6 Quintero brought a motion for new trial, arguing the jury had received and considered extraneous information, and the state could not show beyond a reasonable doubt that the information did not taint the verdict and deprive him of a fair trial. Following several hearings, the trial court denied the motion, finding "beyond a reasonable doubt that [Quintero] did receive a fair trial." The allegations of aggravating factors eventually were

dismissed, and Quintero was sentenced as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033.

Discussion

¶7 On appeal, Quintero alleges that misconduct under Rule 24.1(c)(3)(i) and (c)(5), Ariz. R. Crim. P., tainted the jury's verdict because it had "recei[ved] evidence not properly admitted," and the "external pressures" experienced by individual jurors to find Quintero guilty, together with the "alliance" formed by two jurors, deprived him of a fair and impartial trial.

Structural Error

¶8 First, without elucidation, Quintero urges that the juror misconduct during his trial constituted structural error, mandating automatic reversal. He has not, however, alleged any error that is regarded as structural. *See State v. Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d 915, 933 (2003).[1] Instead, juror misconduct alleged under Rule 24.1(c) is subject to harmless error review. *See* Ariz. R. Crim. P. 24.1(c) cmt. ("The 'harmless error' rule is applicable to all" grounds for new trial set forth in Rule 24.1(c)); *see also Estrada v. Scribner*, 512 F.3d 1227, 1238 (9th Cir. 2008) (juror misconduct subject to "harmless error" analysis). Accordingly, we do not address this claim further.

Rule 24.1(c)(3)(i)—Extrinsic evidence

¶9 We will not reverse the trial court's decision to deny a new trial based on alleged jury misconduct absent an abuse of discretion. *State v. Aguilar*, 224 Ariz. 299, ¶ 6, 230 P.3d 358, 359 (App. 2010). Motions for new trial are disfavored, *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996), and the trial court's ruling

[1]There are relatively few circumstances where error is regarded as structural, *Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d at 933, and in all such instances, "the error infected 'the entire trial process' from beginning to end," *id., quoting Neder v. United States*, 527 U.S. 1, 8 (1999).

is accorded "broad discretion" because it "sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record," *State v. Lukezic*, 143 Ariz. 60, 63, 691 P.2d 1088, 1091 (1984), *quoting Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978).

¶10 A trial court may order a new trial if jurors receive extrinsic evidence "not properly admitted during the trial." Ariz. R. Crim. P. 24.1(c)(3)(i). A new trial must be granted if "the jury receives extrinsic evidence and 'it cannot be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict.'" *State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003), *quoting State v. Poland*, 132 Ariz. 269, 283, 645 P.2d 784, 798 (1982). "Any private communication, contact or tampering with a juror gives rise to a strong presumption that the verdict has been tainted," and a defendant is entitled to a new trial where actual prejudice is shown, or if prejudice may be fairly presumed from the facts. *State v. Miller*, 178 Ariz. 555, 557-58, 875 P.2d 788, 790-91 (1994). But, "the 'presumption is rebuttable, and the burden rests with the government to show that the third party communication did not taint the verdict.'" *State v. Roque*, 213 Ariz. 193, ¶ 103, 141 P.3d 368, 395 (2006), *quoting Miller*, 178 Ariz. at 559, 875 P.2d at 792.

¶11 The trial court's law clerk testified that he overheard Juror B. "announce[] to the other members of the jury that she knew [the subsequent trial on aggravating factors] was going to happen." Juror B. apparently "recalled that she had been speaking to a friend, an attorney" who had advised her of the possibility of a post-verdict aggravation hearing. Two judicial staff members from another trial division also overheard Juror B.'s comment in the hallway.[2] Upon

[2]Both staff members recalled Juror B.'s comment as relaying information in more general terms. They both testified that Juror B. said "she [asked] . . . an attorney friend" if the jurors would be done with jury service after rendering their verdict, to which the attorney responded, "no, not necessarily."

learning this information, the trial court decided to question each juror individually under oath.

¶12 Juror B. initially provided evasive responses to the trial court's questioning, but eventually admitted making the comment in the hall, claiming she had asked an attorney friend about the post-verdict procedure "a long time ago when [she] was starting the case." Initially, she "[did not] remember" to whom she was speaking in the hallway, but ultimately revealed it was Juror T. Juror B. also provided the name of the attorney (Attorney C.) and acknowledged learning about the possibility of an aggravation hearing after she was sworn in as a juror. Finally, she admitted discussing the information with other jurors, stating "everyone was just speculating," but insisting she did not say anything about post-verdict proceedings until after the verdict was read in open court. She also told the court she sent a text message to Attorney C. after the verdict was read.

¶13 Juror T. recalled Juror B.'s comment in the hallway and an earlier occasion where they had discussed the possibility of aggravation proceedings. She also acknowledged receiving a text from Juror B. containing similar information. Of the six remaining jurors, two overheard Juror B.'s comment in the hallway. Two other jurors remembered Juror B. making a similar statement in the jury room the morning of May 9, but did not hear the hallway comment.

¶14 A search of Juror B.'s cell phone revealed the following exchange between her and Attorney C. on May 8 after the verdict was read:

> Q. Hi [Attorney C.] so explain again please about the reasons that a judge might keep a jury after a verdict. I forgot. lol.
>
> A. If there is additional evidence or witnesses for sentencing purposes. Any factor, except a prior conviction, that might increase a sentence beyond the presumptive (normal) must be found by a

> jury unless waived by a defendant. Are you finished yet? Hang in there!

Juror B. forwarded the message to Juror T., who responded: "Thanks for the info, helps. We probably should not repeat this to everyone . . . may look like independent research." Juror B. replied, "just general info nothing else but yes."

¶15 The trial court learned Attorney C. was an assistant Attorney General who previously had worked as a Deputy County Attorney and ordered that she be deposed. At her deposition, Attorney C. admitted to sending Juror B. the text, stating Juror B. was "a teacher at [her] son's daycare," whom she had known for "about a year." Approximately two weeks into Quintero's trial, Attorney C. met Juror B. for lunch. They discussed the trial schedule and the possibility of post-conviction proceedings while "walking to lunch," but "at lunch the whole conversation was personal." Though the record indicates Attorney C. knew Juror B. was involved in a criminal trial, she testified she did not "know what the trial was about," stating she "[n]ever hear[d] any specifics about th[e] case." Attorney C. and Juror B. had other conversations over the course of the trial, including at least one telephone call and several exchanges via text message and social media, but Attorney C. testified they had no further discussions "about anything having to do with the trial." A search of Juror B.'s cell phone and social media account supported that testimony.

¶16 Here, at least two jurors received outside information about criminal trial procedure before the verdict was read. *See State v. Dickens*, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996) (extrinsic information is any "obtained from or provided by an outside source," regardless of admissibility), *abrogated in part on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). We therefore must decide whether the trial court erred in finding beyond a reasonable doubt that the information did not contribute to the verdict. *See State v. Davolt*, 207 Ariz. 191, ¶ 58, 84 P.3d 456, 473 (2004) (prejudice may be presumed from any private communication with a juror about the matter pending before the jury).

¶17 Our supreme court has identified several considerations in evaluating whether extrinsic evidence has contributed to a verdict. *See Hall*, 204 Ariz. 442, ¶ 19, 65 P.3d at 96. Relevant factors here are "the trial context" and "whether the statement was insufficiently prejudicial given the issues and evidence in the case." *Id.* Whether extrinsic information contributed to the verdict is a decision within the sound discretion of the trial court. *See State v. Schackart*, 175 Ariz. 494, 503, 858 P.2d 639, 648 (1993); *cf. Hall*, 204 Ariz. 442, ¶ 23, 65 P.3d at 97 (judge holding evidentiary hearing in best position to assess effect of extrinsic evidence).

¶18 The trial court employed exhaustive measures to investigate whether Quintero's trial was tainted in any way by the extrinsic information. The court properly heard testimony from each juror regarding whether the juror had heard Juror B.'s comment in the hall or the jury room, and allowed the attorneys for both sides to ask questions. The jurors who had heard the comment stated unequivocally that it had no bearing on their deliberations or verdict. We see no basis for saying the court erred in finding their responses credible, particularly in light of the fact that the comment was made after the verdict was read, and its content involved only a procedural matter. Juror B. stated in general terms that she had known the jury might not be "done" because Attorney C. told her "sometimes there [are] other things" a jury must consider. The jury did not receive any information regarding Quintero's guilt or innocence, nor was the information even specific to Quintero's case; instead, it regarded general trial scheduling and procedure. It also was speculative, because Juror B. did not know for certain that an aggravation hearing would occur.

¶19 After considering all the evidence presented at several hearings, the trial court concluded that the extrinsic information "was not of a nature that it had any bearing [on] the verdict." On this record, we cannot say the court abused its discretion in so ruling. *See Spears*, 184 Ariz. at 289, 908 P.2d at 1074.

Rule 24.1(c)(5)—Fair and impartial trial

¶20 Quintero also alleges he was deprived of a fair trial because several jurors were "feeling pressure to convict [him] from outside sources" and "an alliance [formed] between Jurors B. and T." rendered them partial jurors. Rule 24.1(c)(5), Ariz. R. Crim. P., provides that a new trial may be granted if "[f]or any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial."

¶21 Juror E. explained in a letter to the trial court dated May 8 that his employer had not been supportive of his jury service, which had caused him "considerable stress." The executive director at his employment apparently told him to "hurry up and . . . find [Quintero] guilty," on more than one occasion. Quintero argues the pressure Juror E. received from his employer "likely influenced deliberations," even if Juror E. was unable to perceive the effect of this pressure.

¶22 Though Juror E. admitted to feeling "bother[ed]" by the executive director's comments and feeling "stressed" and "pressured" due to a lack of support at work, he testified he "absolutely did not base [his] decision on such . . . stupid remark[s]." He reiterated several times, under oath, that the executive director's comments did not enter into his thoughts or deliberations, stating he took jury service "very seriously." Ultimately, the court was satisfied with Juror E.'s response, and the record supports the court's finding that any pressure Juror E. might have felt from his employer had no impact on the verdict.

¶23 The trial court eventually learned that Juror B., and to a lesser extent, Juror T., discussed the case in violation of the admonition on other occasions. Throughout trial, Juror B. made several comments on the Internet relating to her jury service. On April 13, 2012, she posted on social media that she was on her way to jury duty, and later that day, she wrote: "It [wa]s heart-wrenching." Two hours later, Juror B. posted, "Another day down. It was heart-wrenching." Attorney C. commented, "If you ever need a ride, then call me. And please let's have lunch one of these days.

It'll give me something to look forward to . . . ." On May 2, Juror B. wrote, "Think my emotions hit a wall today. Almost done with my civic duty, praise the lord." Juror B. regularly made comments of a similar nature over the course of the entire trial.

¶24 Juror B. also spoke about her service with at least two co-workers at the preschool. Co-worker C. said Juror B. discussed her jury service on a few occasions in general terms, stating "she missed being [at work]," and "she couldn't talk about the case . . . but . . . it would be something that would be hard for [Juror B.'s co-workers]." Co-worker C. "assumed that [the trial] must [have] something to do with children," "[b]ecause of what [they] do for a living and because [they are] both mothers." Co-worker A. said Juror B. talked about jury service "to a small extent," but "didn't give . . . any specifics," only mentioning "it was emotionally hard for her," and "[i]t was a difficult situation to be in."

¶25 Jurors B. and T. became friends and exchanged several texts and phone calls during the trial, but there is no indication they discussed any substantive matters before deliberations. Juror T. also sent several texts to third parties about her service, but they mostly mentioned the trial schedule or relayed that she had been selected as a juror. An exception was a text that read, "I swear it's the trial that never ends!!!" to which a third party responded, "Guilty I say! Guilty!!!!!" Juror B. also received a similar text from a third party asking, "Guilty?," but Juror B. never responded.

¶26 Quintero contends these third-party communications reveal "how desperate [Juror B.] was to be released from duty" and demonstrate that she and Juror T. had reason to anticipate a guilty verdict before deliberations began. Although Juror B. acted in direct violation of the admonition by sending text messages and posting on social media, and we in no way condone her misconduct, we defer to the trial court's determination that her behavior did not affect the verdict. *See State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984) (We do "not reweigh the evidence to decide whether we would reach the same conclusion as the trier of fact."). The court observed that Juror B. struggled with the "emotional[] . . . challeng[es]" of the case, but found no indication that she discussed

the facts or evidence with anyone. The record supports that determination and reveals no basis for saying the court abused its discretion or acted arbitrarily in finding that the third-party communications had no bearing on the verdict.[3] *See id.*

Nor can we say the trial court erred in finding no "alliance" had formed between Jurors B. and T. While it is clear that Jurors B. and T. formed a friendship over the course of their month-long jury service, no evidence suggests they colluded or deliberated as a "team." Accordingly, the trial court did not abuse its discretion in finding Quintero received a fair trial and in denying his Rule 24.1(c)(5) motion. *See State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (whether to grant or deny new trial within sound discretion of trial court and will not be disturbed absent abuse of discretion).[4]

Disposition

¶27 For the foregoing reasons, Quintero's conviction and sentence are affirmed.

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[3]Though the trial court did not directly address Juror T.'s actions on the record during the new trial hearing, given that her misconduct did not rise to the level of Juror B.'s, we cannot say the court erred in denying Quintero's motion based on Juror T.'s misconduct as well.

[4]In affirming the trial court, we recognize that three jurors received social pressure to return guilty verdicts, two as a result of their own misconduct. We do not suggest that such events could never justify a mistrial or new trial. As here, each case will depend on its own unique facts and a determination whether jury deliberations were affected beyond a reasonable doubt.