IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MANUEL ARMANDO REYNA JR.,
Appellant.

No. 2 CA-CR 2014-0039
Filed March 26, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20123455001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Frank P. Leto, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Manuel Reyna Jr. challenges his convictions and sentences for various counts of drug- and weapon-related offenses. Because we find no error, we affirm.

Factual and Procedural Background

¶2 In September 2012, a Pima County Sheriff's deputy stopped a van in which Reyna was a passenger in the front seat. Deputies searched the van and found heroin, a handgun, methamphetamine, and baggies near the front passenger seat. Reyna was arrested and during a search of his person, a deputy found a cell phone, approximately $600 cash, and a small bag of a crystalline substance believed to be methamphetamine. Deputies downloaded text messages and voice mail from the cell phone. A detective with experience in narcotics investigation and familiarity with "the vernacular that drug dealers and drug addicts use" testified that the messages concerned drug sales.

¶3 After a jury trial, Reyna was convicted of possession of a narcotic drug for sale (heroin), possession of a dangerous drug for sale (methamphetamine), possession of drug paraphernalia, possession of a deadly weapon during the commission of a felony drug offense, use of a wire or electronic communication in a drug- or narcotic-related transaction, and possession of a deadly weapon by a prohibited possessor. He was sentenced to enhanced, concurrent prison terms, the longest of which was nineteen years. This appeal followed.

Motion to Suppress

¶4 Reyna first claims law enforcement officers lacked reasonable suspicion to stop the van, and that the trial court therefore erred in denying his motion to suppress all evidence resulting from the stop. We review de novo whether reasonable suspicion existed to justify a traffic stop, and we defer to the trial court's factual findings. *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008). In reviewing a motion to suppress, "we review only the evidence presented at the hearing on the motion to suppress, and we view it in the light most favorable to sustaining the trial court's ruling." *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007) (citation omitted).

¶5 As the Pima County Sheriff's deputy was traveling north on La Cholla Boulevard, he entered the left turn lane. A van exited a private driveway and turned left across the northbound lanes of La Cholla, stopping in the break in the median and preventing the deputy from making his left turn. The deputy followed the van and initiated a traffic stop. The deputy did so based on a violation of A.R.S. § 28-774, which requires a vehicle turning "from a private road or driveway" to "yield the right-of-way to all closely approaching vehicles." Reyna claims that, because the deputy's vehicle was "stationary and not moving," it was not "closely approaching" under the terms of the statute. In his reply brief, Reyna clarifies that his challenge to the application of the statute is not based on whether the deputy's vehicle was in motion, but the fact that the deputy was in the left turn lane.

¶6 Reyna cites no case law or statutory authority to support the proposition that a vehicle that has entered the left turn lane is not "closely approaching," and we can find none. Reyna cites only the definition of the word "approach": "to move nearer to." *Accord Webster's Third New Int'l Dictionary* 106 (1971). When the deputy's vehicle entered the turn lane, it nonetheless continued "to move nearer to" Reyna's vehicle. We find no merit in Reyna's contention that § 28-774 did not apply, and we thus conclude reasonable suspicion supported the traffic stop. The trial court did not err in denying Reyna's motion to suppress.

¶7 Reyna also asserts, for the first time on appeal, that "[t]he search of the cell phone without a warrant" violated his rights under the Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution. The state, however, in fact did obtain a warrant prior to searching Reyna's cell phone. Reyna argues the state should not be able to rely on the warrant on appeal, as it did not present the warrant to the trial court.

¶8 In general, under Rule 16.2(b), Ariz. R. Crim. P., the state bears the burden of proving that evidence is lawfully obtained. However, under certain circumstances, "the prosecutor's burden of proof shall arise only after the defendant has come forward with . . . a prima facie case that the evidence taken should be suppressed." *Id.* One such circumstance is when "the defense is entitled . . . to discover the circumstances surrounding the taking of any evidence by . . . search and seizure." *Id.* The existence of a search warrant is a fact subject to discovery by a defendant. Ariz. R. Crim. P. 15.1(b)(10). The state, therefore, had no burden to establish the lawfulness of the search absent Reyna's making a prima facie case for its unlawfulness, which Reyna did not do. Moreover, an appellant always carries the burden of showing an error, and that error must affirmatively appear from the complete record. *State v. Diaz*, 223 Ariz. 358, ¶¶ 11, 13, 224 P.3d 174, 176-77 (2010). Because the state in fact obtained a warrant to search the cell phone, no error occurred here, and Reyna is not entitled to relief.

Designation of Juror as Alternate

¶9 Reyna's second contention is that he was deprived of a "fair and impartial jury" because a juror who violated the admonition not to speak to witnesses was not designated an alternate. We will not disturb a trial court's decision on whether a juror can render a fair and impartial verdict absent an abuse of discretion. *State v. Cook*, 170 Ariz. 40, 54, 821 P.2d 731, 745 (1991).

¶10 At the beginning of the trial, the jury was admonished not to speak with any of the witnesses in the case. On the second day of trial, the prosecutor brought it to the court's attention that a juror had spoken to one of the state's witnesses, a detective. The detective testified that the juror, ultimately determined to be

Juror 11, "asked if [the detective] knew how many witnesses we still had." The detective replied that he did not know, and the juror responded, "[Y]ou don't know or you are not allowed to tell me?" The detective said "both," and said the juror "sounded like he had a timing issue."

¶11 Reyna asked the trial court if the juror might be designated an alternate, and the court agreed, noting that it would "probably" be done "by stipulation." The court asked if anyone believed the communication had been prejudicial, and Reyna agreed that it had not. Later that day, the state declined to stipulate to the designation of Juror 11 as an alternate. The court stated that it did not believe there was cause to remove Juror 11 from the panel, and Reyna agreed.

¶12 To the extent Reyna argues the trial court abused its discretion because it "reneged on [its] promise" to designate Juror 11 as an alternate, the court made no such promise. Rather, the court stated that it would do so only by the state's stipulation. Furthermore, the court erred when it suggested the juror could be designated an alternate by stipulation—a court has no discretion to designate which juror will be the alternate, by stipulation or otherwise. *See* Ariz. R. Crim. P. 18.5(h); *State v. Cota*, 229 Ariz. 136, ¶¶ 43-44, 272 P.3d 1027, 1038 (2012). A court cannot abuse discretion that it does not possess. To the extent Reyna argues Juror 11 should have been dismissed for cause, he not only failed to request this in the trial court; he explicitly disclaimed this argument. Accordingly, by acquiescing in the continued participation of the juror, he has limited our appellate review to fundamental, prejudicial error. *See State v. Lucero*, 223 Ariz. 129, ¶ 31, 220 P.3d 249, 258 (App. 2009).

¶13 A juror should be excused pursuant to Rule 18.4(b), Ariz. R. Crim. P., only when "there is reasonable ground to believe that [he] cannot render a fair and impartial verdict." And a defendant bears the burden of demonstrating such. *State v. Blackman*, 201 Ariz. 527, ¶ 13, 38 P.3d 1192, 1198 (App. 2002). Here, although Juror 11 violated the court's admonition not to speak to any of the witnesses, our supreme court has recognized that not every violation of the court's admonitions requires dismissal of the

juror involved. *See State v. Trostle*, 191 Ariz. 4, 13, 951 P.2d 869, 878 (1997), *citing Cook*, 170 Ariz. at 54, 821 P.2d at 745. The court stated that "some discussion by jurors of their pending cases may be inevitable," and noted that "casual utterances regarding, for example, the length of the trial or similar matters" generally do not demonstrate a juror's inability to be fair and impartial. *Cook*, 170 Ariz. at 54, 821 P.2d at 745. Reyna has not shown that Juror 11's conduct was anything more than a "casual utterance[] regarding . . . the length of the trial," *id.*, nor that it demonstrated an inability to be impartial. We therefore conclude the trial court did not err, much less err fundamentally, in not dismissing Juror 11 for cause.

Sentencing

¶14 The state has called to our attention the fact that, although Reyna was convicted of possession of a deadly weapon by a prohibited possessor, he was not sentenced for this offense. The state suggests, without citing any authority, that we are therefore required to remand this case to the trial court for sentencing on that count. We do not agree. *See State v. Ballez*, 102 Ariz. 174, 175, 427 P.2d 125, 126 (1967) (hearing appeal where no sentence had been entered as to one of the convictions); *cf. State v. Moya*, 129 Ariz. 64, 65 n.1, 628 P.2d 947, 948 n.1 (1981) (acknowledging jurisdiction of court of appeals where no sentence had been entered). Instead, we consider this, essentially, an illegally lenient sentence, which we will not modify in the absence of a cross-appeal by the state. *State v. Dawson*, 164 Ariz. 278, 282-83, 792 P.2d 741, 745-46 (1990).

Disposition

¶15 For the foregoing reasons, Reyna's convictions and sentences are affirmed.