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.

FILED BY CLERK
OCT 30 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ISRAEL MATA-CAMACHO, Appellant.	2 CA-CR 2009-0087 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701457

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Israel Mata-Camacho was convicted of two counts of child molestation and a single count of sexual conduct with a minor, all dangerous crimes against children. The trial court sentenced him to enhanced, presumptive, consecutive prison terms totaling sixty-nine years. On appeal, Mata-Camacho argues the court erred by denying his motions for mistrial and for a new trial on the ground of juror coercion and by conferring with two jurors outside his presence. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 Mata-Camacho was indicted on two charges of child molestation and one charge of sexual conduct with a minor involving the same victim, his girlfriend's seven-year-old granddaughter. At trial, on the first day of jury deliberations, the bailiff notified the judge of a verbal message from the jury foreperson that one of the jurors "was just way too close to this and he just could not do this." The court informed the parties of its intention to call in the foreperson and the juror separately to investigate further. The court then did so without objection and in the presence of two attorneys from the County Attorney's office and Mata-Camacho's two attorneys from the Public Defender's office.

¶3 The foreperson told the trial court that Juror Six had requested to speak with the judge because "he feels that he's too close to the case. And he mentioned that he has a 7-year old granddaughter that he took custody of." The foreperson also stated that the jury could not "go forward because he keeps thinking that the children . . . were being led by the prosecutor's . . . line of questioning." The court then called in Juror Six and asked about his

"state of mind . . . with regard to whether [he was] able to complete [his] duties as a juror in this case." He spontaneously responded, "[C]an I say that I'm the hold out? Or the problem?" He said he doubted the credibility of key testimony, and therefore his decision was "made up," and noted that other jurors disagreed with him. But he also stated that the other jurors had not suggested he be removed and that although there was a situation in his personal life that brought him close to the case, there was "nothing preventing [him]" from fulfilling his duties. The court assured him that he would not be removed unless he requested it, and in response to his question about what would happen if there was an impasse, stated there were "specific instructions that [it could] give if that's a concern."

¶4 At defense counsel's request, the trial court then sent a written directive instructing the jury to continue with their deliberations. Later the same afternoon, the court consulted with the attorneys and, with their consent, sent the jury a written impasse instruction pursuant to Rule 22.4, Ariz. R. Crim. P., making "some suggestions to help [its] deliberations," and offering help with "issues, questions, law, or facts [it] would like [the attorneys and the court] to assist [it] with." The instruction stated that the court "did not wish or intend to force a verdict," and that any agreement should be made "without sacrificing individual judgment." In response, the jury sent a message to the court stating some of the jurors were hesitant to base a verdict on a single witness given the lack of physical evidence and requesting clarification on the law on this issue and on reasonable doubt. Without

objection, the court reread its instructions to the jury on reasonable doubt, the credibility of witnesses, and direct and circumstantial evidence.

¶5 The jury resumed its deliberations the following day and ultimately returned guilty verdicts on all counts. After polling the jury, the trial court called in the jurors one at a time and asked, "[D]uring your deliberations, did you at any time have any concern that you or someone else in the group was being coerced into a certain decision with regard to the final verdict?" And defense counsel asked each juror whether the individual meetings with the two jurors or the court's impasse instruction had affected the deliberations. None of the jurors gave a positive response to either question, and Juror Six said he had not been "stampeded" by any other jurors, that the guilty verdict was his and his alone, and that the impasse instruction had not influenced his decision.

¶6 Mata-Camacho moved for a mistrial before the jury had returned its verdicts, arguing the trial court's conference with Juror Six, followed by its submission of the impasse instruction to the jury, amounted to juror coercion. The court delayed its ruling until after the jury returned a verdict, and Mata-Camacho renewed his motion after the jurors had been polled. After questioning the jurors individually, the court denied the motion, and Mata-Camacho subsequently filed a written motion for a new trial. The court denied the motion for new trial and sentenced Mata-Camacho as noted above. This appeal followed.

Discussion

¶7 Mata-Camacho argues the trial court erred in denying his motions for a mistrial and for a new trial on the ground of juror coercion. We review a trial court's denial of a motion for mistrial for a clear abuse of discretion. *State v. McCrimmon*, 187 Ariz. 169, 172, 927 P.2d 1298, 1301 (1996). "The test of coerciveness is whether the trial court's actions or remarks, viewed in the totality of circumstances, displaced the independent judgment of the jurors." *State v. McCutcheon*, 150 Ariz. 317, 320, 723 P.2d 666, 669 (1986). Thus, "[w]hat conduct amounts to coercion is particularly dependent upon the facts of each case." *State v. Roberts*, 131 Ariz. 513, 515, 642 P.2d 858, 860 (1982).

¶8 In *State v. Sabala*, 189 Ariz. 416, 418, 943 P.2d 776, 778 (App. 1997), "[t]he jury spontaneously told the trial court it was split seven to one in favor of conviction." The court then "'inquire[d] of the jurors . . . whether and how court and counsel c[ould] assist them in their deliberative process,'" as permitted by Rule 22.4, Ariz. R. Crim. P. , 189 Ariz. at 419, 943 P.2d at 779, *quoting* Ariz. R. Crim. P. 22.4. It gave an instruction that was based on the language recommended by the comment to that rule, including the statement that the court did "not wish or intend to force a verdict." *Id.*; *see* Ariz. R. Crim. P. 22.4 cmt. The jury resumed deliberations the following day and asked for further advice on a specific issue. 189 Ariz. at 420, 943 P.2d at 780. After the reporter read back relevant portions of testimony on this issue and counsel from both sides presented brief additional arguments, the jury resumed deliberations for another thirty minutes before returning a verdict. *Id.* Another

department of this court concluded these facts suggested that "the holdout juror changed position as a result of receiving clarifying information, not that he or she surrendered 'honest convictions' due to overbearing pressure from the court." *Id.* Under these circumstances, the court concluded the jury had not been coerced.

¶9 In *State v. Huerstel*, 206 Ariz. 93, ¶ 19, 75 P.3d 698, 705 (2003), our supreme court recognized that *Sabala* "stands for the proposition that offering assistance to a jury that has reached an impasse, even when the trial court knows the jury's split, is not per se coercive." However, it noted that after giving a Rule 22.4 impasse instruction, the trial court in *Huerstel* had twice given further instructions "specifically focused on the holdout juror,"[1] despite knowing "the jury was split eleven to one . . . [and] the holdout juror had clearly expressed the opinion that no further discussions would change the juror's mind." 206 Ariz. 93, ¶ 20, 75 P.3d at 705. And the court was not persuaded that the mere fact of the jury's continued deliberation after it received these instructions suggested the juror had not been coerced, because the instructions had merely advised the jury that further help was available and had provided them no substantive assistance. *Id.* ¶¶ 20, 21. Given these facts, our supreme court concluded the trial court's actions "'displaced the independent judgment of the jurors." *Id.* ¶ 25, *quoting McCrimmon*, 187 Ariz. at 172, 927 P.2d at 1301.

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[1]The first of these instructions directed the jury to "list the specific issues that are a problem with the juror who allegedly refuses to deliberate any further," and the second asked whether "the juror in question . . . would like anything reargued." *Huerstel*, 206 Ariz. 93, ¶¶ 12, 15, 75 P.3d at 703-04 (emphasis omitted).

¶10 The facts here are more like those in *Sabala* than *Huerstel*. The trial court gave its Rule 22.4 impasse instruction after it inadvertently had become aware of the apparent split among the jury. Not only did the court's instruction state that it did not wish or intend to force a verdict, it also—unlike the instructions in either *Sabala* or *Huerstel*—advised the jurors not to sacrifice their individual judgments. *See Huerstel*, 206 Ariz. 93, n.5, 75 P.3d at 706 n.5 (recommending courts offering assistance during deliberations advise jurors not to give up honestly held beliefs). The jury did not reach a verdict until the following day, after it had asked for further advice and the court had reinstructed it on reasonable doubt, the credibility of witnesses, and direct and circumstantial evidence. This suggests the change in Juror Six's position was a result of receiving this clarifying information rather than pressure from the court or other jurors. *See Sabala*, 189 Ariz. at 420, 943 P.2d at 780. Moreover, Juror Six himself confirmed this version of events, stating the guilty verdict was his and his alone, he had not been "stampeded" by the other jurors, and the impasse instruction did not influence his decision. *See State v. Lautzenheiser*, 180 Ariz. 7, 10, 881 P.2d 339, 342 (1994) (court's "pertinent inquiry" of jurors following verdict factor in determining coercion).

¶11 Although these events were set in motion by the trial court's separate meeting with Juror Six, he did not request the meeting "in the hope that it would help h[im] decide how []he should vote," the meeting was not ex parte, and the court did not give him the "implicit message" that his position was unacceptable. *See McCrimmon*, 187 Ariz. at 173, 927 P.2d at 1302 (court's meeting with juror under such circumstances coercive). Rather,

the meeting, held in the presence of both parties' counsel, was intended to ascertain whether Juror Six believed his closeness to the circumstances of the case prevented him from being fair and impartial, and the court affirmed his right to continue to participate in the jury's deliberations if he felt able to do so. And, unlike *Huerstel*, the court's subsequent communications with the jury were not specifically focused on Juror Six. Thus, while we recognize "the inherent pressure associated with being a lone dissenter," we do not find under the totality of the circumstances that the court coerced the verdict. *See Sabala*, 189 Ariz. at 419, 943 P.2d at 779. It therefore did not abuse its discretion in denying Mata-Camacho's motions for a mistrial and a new trial.

¶12 Mata-Camacho also argues the trial court erred in "conduct[ing] conferences with two jurors outside [his] presence, without any waiver on the record." *See McCrimmon*, 187 Ariz. at 171, 927 P.2d at 1300 (absence of defendant during court's communications with jury separate issue from juror coercion). A defendant has "the right . . . 'to be present at every stage of the trial.'" *State v. Dann*, 205 Ariz. 557, ¶ 53, 74 P.3d 231, 245 (2003), *quoting* Ariz. R. Crim. P. 19.2. However, this right "applies only to those proceedings in open court 'whenever [the defendant']s presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981), *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934). Thus, although our supreme court has cautioned that "proceedings in criminal cases held outside the defendant's presence are fraught with danger," *McCrimmon*, 187 Ariz. at 171,

927 P.2d at 1300, it has held that defendants have no absolute right to be personally present during a trial judge's communications with the jury during its deliberations, *Christensen*, 129 Ariz. at 38, 628 P.2d at 586. Therefore, when such a communication "is reported in the record and preserved for appeal, the error, if any, is reviewed to determine if [it] is prejudicial, requiring reversal of the conviction." *State v. Moya*, 138 Ariz. 12, 15, 672 P.2d 964, 967 (App. 1983).

¶13 Although this case involved a "personal interaction between judge and jury, with its attendant dangers of untoward influence," Mata-Camacho's "legal position was represented and protected by the presence of counsel [and] . . . there was a meticulously maintained record which would reflect any prejudice to the defendant." *See State v. Pawley*, 123 Ariz. 387, 390, 599 P.2d 840, 843 (App. 1979). Because Mata-Camacho has not articulated how his absence from the meetings prejudiced him, and we cannot conjure how his presence could have possibly assisted his counsel during the court's meetings with the jurors, we find no such prejudice. Reversal of his conviction is not warranted on this ground. *See Moya*, 138 Ariz. at 15, 672 P.2d at 967.

Disposition

¶14 For the reasons stated above, we affirm Mata-Camacho's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge