

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

JUL 21 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0318
	)	DEPARTMENT A
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
OMAR B. CASTILLO,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CR09271

Honorable James A. Soto, Judge

AFFIRMED

\_\_\_\_\_  
Emily Danies

\_\_\_\_\_  
Tucson  
Attorney for Appellant

\_\_\_\_\_  
B R A M M E R, Judge.

¶1 Appellant Omar Castillo was charged with one count of theft of means of transportation, two counts of fraudulent schemes and artifices, and one count of trafficking in stolen property. A jury found him guilty of all charges. The trial court sentenced Castillo to concurrent, presumptive prison terms, the longest of which were five-year terms on counts two and three, and ordered him to pay nearly \$8,000 in restitution. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing she reviewed the record and found no arguable issue to raise, and requesting that we search the record for fundamental error. Castillo has filed a supplemental brief.

¶2 The issues Castillo raises in his supplemental brief appear to be couched as claims of ineffective assistance of the three court-appointed attorneys who represented him at various points during the prosecution of the charges. Many of the issues relate to Castillo's contention that his attorneys neither investigated the case thoroughly nor discovered witnesses and evidence that would have supported his defense. Others relate to counsel's failure to raise various objections to the jury panel. Our supreme court has made it clear, however, that appellate courts will not address such claims on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Rather, claims of ineffective assistance of counsel are better suited for and must be brought pursuant to Rule 32, Ariz. R. Crim. P., in a post-conviction proceeding. *Id.* Therefore, although we do not address whether counsel was ineffective, we do address Castillo's claims to the extent they are severable from and independent of the ineffective assistance claims. Having done so, we conclude he has not established any ground for relief on appeal.

¶3 Castillo seems to suggest, for example, that the jury panel was “contaminated” because a potential juror who ultimately was excused had commented in the presence of the entire panel that Castillo was on “work release,” a statement he contends was untrue and implied he was a convicted criminal. The record establishes the potential juror told the court her sister was friends with Castillo and that they “hang out” when they “go out on work release.” The judge immediately called the potential juror to the bench to discuss the matter outside the rest of the panel’s hearing. Because there was no objection, Castillo forfeited the right to seek relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We will not grant relief based solely on Castillo’s speculation that the remark had tainted the entire jury panel. *See State v. Doerr*, 193 Ariz. 56, ¶ 18, 969 P.2d 1168, 1173 (1998).

¶4 No error on this ground affirmatively appears from the record before us, much less error that could be characterized as both fundamental and prejudicial. *See State v. Diaz*, 223 Ariz. 358, ¶ 13, 224 P.3d 174, 177 (2010) (error justifying reversal cannot be based on speculation but must appear affirmatively from record). Nothing in the record establishes or even suggests this isolated comment so infected the proceeding that any resulting error could be regarded as fundamental, which is error that goes to the foundation of the case, deprives the defendant of a right essential to his defense, and has so infected the proceeding that the defendant could not have had a fair trial. *See State v. Cornell*, 179 Ariz. 314, 329, 878 P.2d 1352, 1367 (1994).

¶5 We also reject Castillo’s contentions that the jurors had discussed the case during breaks, in particular his use of his cellular telephone. He has not cited the portions

of the record that support this claim, nor has he developed the argument adequately as an independent claim in any respect. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Therefore, we need not address it separately. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004). In any event, in reviewing the record we have found no reversible error on this ground. To the extent Castillo acted inappropriately during trial, such as by using his telephone, he was responsible for the effect that might have had on jurors' perceptions of him. Additionally, Castillo has not established such an isolated remark about his having used his cellular telephone deprived him of a fair trial, given the abundance of evidence supporting the verdicts.

¶6 Castillo also contends the jury was prejudiced because one juror knew Cesar Ramirez, the police officer, who had investigated the charges when they first were reported and who testified at trial. That juror had disclosed before trial that she knew the officer, and the record shows the two merely greeted one another, contrary to Castillo's claim that she had talked to the officer during breaks. And, although counsel called this to the trial court's attention, he made clear nothing improper had occurred and that he was not requesting that the officer or the juror be admonished. There was no error on this ground.

¶7 Castillo also contends the panel was tainted because defense counsel owed one of the jurors money for survey work rendered, a fact he contends the trial court and counsel had known but did not share with him. The record establishes that, during voir dire, defense counsel asked for a bench conference and told the court and the prosecutor that he believed the panel member was a surveyor hired in connection with a land dispute

involving defense counsel's client and another party. To the best of counsel's recollection, opposing counsel had recommended that they retain the surveyor and the parties had agreed to share the expense, although counsel did not believe the bill had been paid. Defense counsel was not certain the panel member would even recognize him or his name. The prosecutor had no objection to keeping the prospective juror on the panel, and the court decided to do nothing at that point, "unless he bring[s] it to your attention." The juror, who was selected to serve, did not mention the matter. We see no error, much less error that could be characterized as fundamental. Clearly, any connection between the juror and defense counsel was insignificant; indeed, it appears the juror was not aware of that connection.

¶8 Castillo contends other members of the panel had conflicts or otherwise were unable to serve fairly either because they previously had been victims of a crime, had been involved with or knew people in law enforcement, or knew the bailiff or the testifying police officer. But the trial court questioned all of the jurors thoroughly about their experiences and connections to persons involved in the trial. All assured the court that, despite their individual circumstances, they could hear the case and consider the evidence fairly. A trial court is required to dismiss a juror for cause only when "there is [a] reasonable ground to believe that [the] juror cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). "In assessing a potential juror's fairness and impartiality, the trial court has the best opportunity to observe prospective jurors and thereby judge the credibility of each." *State v. Hoskins*, 199 Ariz. 127, ¶ 37, 14 P.3d 997, 1009 (2000). We therefore review a trial court's determination for a clear abuse of

discretion. *Id.* Given the court’s questioning of the panel members and their assurances, we see no abuse of discretion.

¶9 We reject, too, Castillo’s contention that he was deprived of a fair trial because the notary public who had notarized a power of attorney held by Castillo did not produce the log books relating to the transfer of title to the victim through that power. Although this claim appears to be the basis for the claim of ineffective assistance of counsel, Castillo has not established reversible error occurred in this regard even if the claim of error was regarded as independent. The notary testified her notarial seal had been used but the signature was not hers and that the State of Arizona had revoked her commission because of this incident—holding her responsible for the seal being used by another person and not having been applied correctly. She stated there was no entry in her log for that transaction, that she had looked for the log “thoroughly,” and that, although she normally would retain a copy of the power of attorney, she did not have one in her office. She denied having told Officer Ramirez that she had not started a log book for the year 2008 and claimed such a log book did exist and was at her office.

¶10 Defense counsel requested that the trial court order the notary to produce the 2008 log book she had referred to during her testimony. The court granted the request and ordered the notary to produce it and the corresponding receipt book by the next morning. Thereafter, Officer Ramirez testified; his testimony was consistent with the notary’s in that he stated she had admitted the seal on the document was hers but had denied she had notarized the power of attorney. She also had told him the signature on the power of attorney was not hers. Ramirez also testified the notary had been unable to

produce a 2008 log book when he had asked her to see one for that transaction. He stated she had told him her former husband had used the seal and had signed the document. His testimony conflicted with the notary's in this regard; she claimed this person was not her husband and denied having told Ramirez he had used the seal and had signed the power of attorney. The officer stated, too, that she had shown him a receipt charging \$10 for the transaction, but the copy was unclear and he was not certain it was for this transaction. He added that the notary had admitted that the required copies of the person's identification had not been obtained when the power of attorney had been notarized.

¶11 The notary returned and testified the next day. She produced a receipt book but claimed she could not find the 2008 log files. The receipt of the notarization of the power of attorney was not among the receipts she had found and had brought with her. The notary still insisted there was a 2008 log book and denied having told Ramirez she did not have one, but claimed she did not find it among the items in the storage room she had searched. She explained she had searched twenty-five out of sixty boxes of documents. Defense counsel requested that the trial court find her in contempt and asked the court to delay the trial so that the notary could be compelled to search the remaining boxes. The court refused to continue the trial on the ground that the witness had been disclosed and the issue could have been addressed long before the trial had commenced. The court noted that counsel for the parties could argue to the jury whatever inferences were permitted by the notary's testimony.

¶12 After the trial court denied the motion to continue the trial, the notary explained that she had searched all the documents in her possession thoroughly and

believed she had complied with the court's order. When asked by defense counsel whether she was confident, based on her search, she did not have the 2008 log book, she responded, "yes." She testified during cross-examination by the state that when the Secretary of State investigated her in 2009 in connection with the revocation of her notary commission, she had not been able to produce her log books then either. Although she insisted the documents existed, she conceded she could not produce them at either that time or during the 2009 investigation.

¶13 A trial court has broad discretion in determining whether to continue a trial and we will not reverse a conviction unless the court clearly abused its discretion and the defense thereby was prejudiced. *See State v. Reynolds*, 123 Ariz. 117, 118, 597 P.2d 1020, 1021 (App. 1979). To the extent Castillo is challenging the court's denial of the requested continuance, we cannot say, based on the record now before us, that the court abused its discretion when it refused to continue the trial so the notary could review the remaining boxes that she had not yet searched. The notary had been fully cross-examined and it was for the jury to decide whether she was telling the truth about whether there ever existed log books relating to this transaction. Indeed, during closing argument the prosecutor told the jury that it was to decide whether the notary had looked for the log book and whether she had it, arguing the fact remained that the notary had testified repeatedly that she had not notarized the power of attorney and that the signature was not hers. Based on the record before us, it does not appear it would have made any difference if the notary had been given additional time to search for the missing log



books. And for the same reason, to the extent Castillo is arguing the court erred by not finding the notary in contempt, we see no error.

¶14 As requested, we have reviewed the entire record for reversible error but have found none. The record contains substantial evidence establishing Castillo took possession of and sold the victim's vehicle without authorization by forging a power of attorney, thereby committing the charged offenses. The sentences are within statutory limits and were imposed in a lawful manner. Therefore, we affirm the convictions and the sentences imposed.

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge