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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THE STATE OF ARIZONA, Appellee, v. AREN LEE PERRYMAN, Appellant.	2 CA-CR 2009-0378 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200800461

Honorable Janna L. Vanderpool, Judge

AFFIRMED

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

Harriette P. Levitt — Tucson
Attorney for Appellant

B R A M M E R, Presiding Judge.

¶1 Aren Perryman appeals from his conviction and sentence for misconduct involving a weapon. He argues the trial court committed fundamental error in presiding

over his trial after previously having presided over a settlement conference in the same case. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Perryman's conviction. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). After an unsuccessful settlement conference was held in June 2008, the case was reassigned for trial to the judge who had conducted the settlement negotiations. Perryman did not request a change of judge or otherwise object to the reassignment. On September 9, 2009, after a two-day trial, the jury found Perryman guilty as charged. On November 12, the court entered judgment and sentenced him to a presumptive prison term of 4.5 years.

¶3 On October 29, 2009, Perryman filed a "motion to vacate judgment and motion for a new trial" pursuant to Rules 24.1 and 24.2, Ariz. R. Crim. P. He argued that, because he had changed counsel after the settlement conference, his trial counsel only recently had learned the trial judge had presided over the settlement conference. At the hearing on the motion, the court noted it did not "recall any settlement conference and [was not] aware of any information [it] had going into trial" as a result of having conducted the settlement negotiations. The trial court denied the motion as untimely.

Discussion

¶4 Effectively conceding he failed to object below, Perryman asserts the trial court committed fundamental error by presiding over both his settlement conference and

trial.[1] Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2006), *quoting State v. Hunter*, 142 Ariz. 88, 90, 699 P.2d 980, 982 (1984). Such error must be "'clear, egregious, and curable only via a new trial.'" *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), *quoting State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). To obtain relief on appeal under fundamental error review, "a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶5 Perryman argues it was fundamental error for the trial court to preside over both his settlement conference and trial. We need not decide whether this constituted fundamental error, however, because Perryman has failed to establish prejudice. *See id.*

[1]Assuming, without deciding, that Perryman could have raised this issue properly in a posttrial motion, the posttrial motions he did file nonetheless were untimely. A motion for a new trial must be filed no later than ten days after the verdict is rendered. Ariz. R. Crim. P. 24.1(b). Perryman's motion to vacate the judgment and for a new trial was filed fifty days after the verdict and therefore was untimely. A trial court has no jurisdiction to consider an untimely motion made pursuant to Rule 24.1. *See State v. McCrimmon*, 187 Ariz. 169, 172, 927 P.2d 1298, 1301 (1996); *see also* Ariz. R. Crim. P. 24.1(b) cmt. Additionally, Perryman's motion to vacate the judgment pursuant to Rule 24.2, Ariz. R. Crim. P., was premature because the judgment of conviction and sentence had not yet been entered. *See State v. Saenz*, 197 Ariz. 487, ¶ 6, 4 P.3d 1030, 1032 (App. 2000). In any event, to the extent Perryman relies on the fact his attorney did not learn of the settlement conference until after trial, we observe that "'[e]vidence known to the defendant is not newly discovered evidence, even if it is not known to his counsel.'" *Id.* at ¶ 13, *quoting Commonwealth v. Osorno*, 568 N.E.2d 627, 631 (Mass. App. Ct. 1991).

He contends he was prejudiced because the court presided over a settlement conference at which a prior conviction and presumptive sentencing had been discussed and the court spoke with Perryman and his counsel off the record. Through counsel, Perryman asserts that, because the court spoke with him and his attorney for twenty-one minutes, "[t]hey had to have discussed something substantive" and it is "difficult to imagine" that the court did not remember Perryman and his circumstances. These speculative assertions, however, do not establish Perryman suffered actual prejudice. *See State v. Martin*, 225 Ariz. 162, ¶ 15, 235 P.3d 1045, 1049 (App. 2010) ("Speculative prejudice is insufficient under fundamental error review."); *see also Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (burden on defendant to demonstrate prejudice); *State v. Rossi*, 154 Ariz. 245, 247, 741 P.2d 1223, 1225 (1987) ("A trial judge is presumed to be free of bias and prejudice."). The mere participation of a trial judge in settlement negotiations does not establish that a defendant has been prejudiced. *See* Ariz. R. Crim. P. 17.4(a) (trial judge permitted to participate in settlement negotiations with parties' consent).[2]

[2]We need not decide whether Perryman waived his right to withhold consent to the trial judge's participation in settlement negotiations under Rule 17.4(a) because Perryman did not raise a timely objection. Therefore, his failure to prove fundamental error on appeal is dispositive. *See Henderson*, 210 Ariz. 561, ¶ 19, 155 P.3d at 607.

Disposition

¶6 For the foregoing reasons, we affirm Perryman's conviction and sentence.

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

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

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