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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NOT FOR PUBLICATION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. 31.19(e).
Court of Appeals of Arizona, Division 2.

The STATE of Arizona, Appellant/Cross-Appellee,
v.
Harold Lee HIGH Jr., Appellee/Cross-Appellant.

No. 2 CA-CR 2017-0343
|
Filed September 25, 2018

Appeal from the Superior Court in Pima County; No. CR20161858002; The Honorable Kenneth Lee, Judge.
REVERSED AND REMANDED

Attorneys and Law Firms

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

Harold Lee High Jr., Tucson, In Propria Persona

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Eppich concurred.

MEMORANDUM DECISION

VÁSQUEZ, Presiding Judge:

***1** ¶ 1 In this appeal, the state challenges the trial court's order granting Harold High's motion for a new trial based on the jury's viewing of digital images projected on a screen during deliberations—as it had during trial—when only the hard copies of those photographs were admitted into evidence. Because the digital images and the admitted hard-copy images were the same photographs, we reverse the court's order, reinstate the guilty verdicts, and remand for sentencing. [1]

Factual and Procedural Background

¶ 2 A grand jury indicted High for **burglary** in the first degree, theft of property or services, and possession of a deadly weapon by a prohibited possessor. Those charges were based on an incident in April 2016, when K.B. observed two individuals—a male and a female—jump over her neighbor's wall, enter the home, and leave with a black bag. As the male was jumping back over the wall, K.B. used her cell phone to photograph him. The state asserted that High, a convicted felon whose rights had not been restored, was the person depicted in the photographs and that he had stolen several guns and pieces of jewelry from the home.

¶ 3 At trial, the court admitted five hard copies of K.B.'s photographs. The court also allowed the state to "publish" the photographs by digitally projecting them onto a screen in the courtroom. High did not object to the photographs' admission or publication. [2] During deliberations, the jury asked, "Can we see the original prosecution pictures. Not blown up or enlarged. We want to see the digital pictures that the prosecution showed previously—of the person jumping the fence." When discussing the question with the parties, the court remarked that the jurors had the admitted hard copies but thought they wanted the photographs "projected ... as they saw in the courtroom" because those images were "a little bit sharper and clearer." The state agreed the jury could view the digital images again "so long as ... there [was] no one else in the courtroom while they d[id] their deliberations." High objected, arguing the jury could only use the admitted hard copies. The court granted the jury's request, reasoning that the jurors "simply want[ed] to view the same thing they saw in trial."

***2** ¶ 4 The prosecutor and High waived their presence as the trial court explained to the jury the process for re-viewing the digital images: The court's law clerk would queue up the first photograph and then leave the courtroom for the jurors to "look at the picture" and "deliberate however [they] want." The law clerk would wait in the hallway, and when the jurors were finished viewing the first photograph, the foreperson would get her. The law clerk would then re-enter the courtroom, queue up the next photograph, and leave. The court advised it would use the same procedure for each of the photographs and the jurors could "go back and take

a look at another picture" after going through all five photographs the first time. The jury re-viewed the digital images and subsequently convicted High as charged.

¶ 5 High filed a motion for a new trial, arguing, in part, that the jurors were "guilty of misconduct by ... receiving evidence not property admitted at trial," specifically, the digital images projected on the screen during deliberations. He further maintained the court erred as a "matter of law" in allowing such review because he was not "given [an] opportunity to cross-examine the presentation during deliberations." The state responded that no misconduct occurred because the jury "specifically requested to see the admitted photographs in digital format" and those images did not constitute "evidence not properly admitted during trial." After hearing argument, the court granted High's motion for a new trial, explaining, "I don't think it was appropriate, in retrospect, allowing the jurors to see the digital photos even though they had seen them throughout the course of the trial, given that a digital format had not been admitted." This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4032(2).

Motion for a New Trial

¶ 6 The state argues, "[T]here were no grounds for granting a new trial" because "the jurors did not receive evidence that was not admitted during trial." The state further contends, "[E]ven if the photographs are considered to be different evidence, there was no prejudice." We review an order granting a new trial for abuse of discretion. *State v. Fischer*, 242 Ariz. 44, ¶ 26 (2017). An abuse of discretion occurs if the trial court errs in applying the law or the record does not support its decision. *Merlina v. Jejna*, 208 Ariz. 1, ¶ 6 (App. 2004); *see also State v. Villalobos*, 114 Ariz. 392, 394 (1977). "Motions for new trial are disfavored and should be granted with great caution." *State v. Rankovich*, 159 Ariz. 116, 121 (1988).

¶ 7 A new trial may be granted if, among other things, "one or more jurors committed misconduct by ... receiving evidence not admitted during the trial," "the court erred in deciding a matter of law," or "for any other reason, not due to the defendant's own fault, the defendant did not receive a fair and impartial trial." Ariz. R. Crim. P. 24.1(c). High relied on each of these grounds in his motion for a new trial below, but he suggests on appeal that juror misconduct was the basis of the trial court's order. In granting High's motion, the court did not expressly indicate on which ground it was relying; however, it did seem to agree with High that the jury had received evidence not admitted during the trial. Accordingly, we address the issue from this standpoint.[3] *See* Ariz. R. Crim. P. 24.1(c)(3)(A).

¶ 8 A defendant requesting a new trial based on misconduct under Rule 24.1(c)(3)(A) "bears the initial burden of proving that jurors received and considered extrinsic evidence." *State v. Olague*, 240 Ariz. 475, ¶ 21 (App. 2016). "Once the defendant shows that the jury has received and considered extrinsic evidence, prejudice must be presumed and a new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict." *State v. Hall*, 204 Ariz. 442, ¶ 16 (2003).

***3** ¶ 9 As a preliminary matter, we fail to see how this situation constitutes juror misconduct. *See Misconduct*, Black's Law Dictionary (10th ed. 2014) ("juror misconduct" defined as "[a] juror's violation of the court's charge or the law, committed either during trial or in deliberations after trial, such as ... bringing into the jury room information relating to the case but not in evidence"). The jury asked if it could view during deliberations the digital images that it had previously observed during trial, and the trial court granted its request. Decisions in which courts have discussed Rule 24.1(c)(3)(A) do not contemplate situations in which the jury received evidence requested from and provided by the trial court after discussion with the parties. *See State v. Aguilar*, 169 Ariz. 180, 182 (App. 1991) (Rule 24.1(c)(3)(A) applies only when "jury receives information from an outside source during the course of the trial or deliberations"); *cf. State v. Glover*, 159 Ariz. 291, 293 (1988) (one juror asked wife for information and another consulted with law enforcement); *State v. Poland*, 132 Ariz. 269, 282 (1982) (juror looked up information in phone book); *State v. McLoughlin*, 133 Ariz. 458, 460 (1982) (juror learned of information from "unidentified third party").

¶ 10 Even imagining this situation could somehow be construed as juror misconduct, *cf. Hall*, 204 Ariz. 442, ¶ 18 (trial court's bailiff provided extrinsic evidence triggering rule), a new trial is not warranted because

the jury did not "receiv[e] evidence not admitted during the trial," Ariz. R. Crim. P. 24.1(c)(3)(A). Rule 24.1(c)(3)(A) "refers to outside information a juror collects after being empaneled." *Olague*, 240 Ariz. 475, ¶ 21. It "encompasses both information received by the jury that could generally be admissible but was not admitted at the trial in question and information that is always inadmissible." *McLoughlin*, 133 Ariz. at 460-61.

¶ 11 An original photograph "is required ... to prove its content," Ariz. R. Evid. 1002, but "[a] duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate," Ariz. R. Evid. 1003.[4] "For electronically stored information, 'original' means any printout—or other output readable by sight—if it accurately reflects the information," and "[a]n 'original' of a photograph includes the negative or a print from it." Ariz. R. Evid. 1001(d). In contrast, "[a] 'duplicate' means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." Ariz. R. Evid. 1001(e).

¶ 12 Because the photographs were taken using K.B.'s cell phone, they were "electronically stored." Ariz. R. Evid. 1001(d). High does not argue that the digital images and the hard-copy images differed in any way.[5] Consequently, the "originals" of those photographs include "any printout," like the hard-copy images, and any "other output readable by sight," like the digital images projected on the screen in the courtroom. *Id.* Thus, the hard-copy images and the digital images were equally admissible. *See* Ariz. R. Evid. 1002.

***4** ¶ 13 Even if the differing formats necessitate that we designate one set of photographs—either the hard-copy images or the digital images—as the originals, the other set would be the duplicates. The different sets were produced by a "process or technique that accurately reproduces the original[s]." Ariz. R. Evid. 1001(e). The duplicates would therefore be admissible, just like the originals. *See* Ariz. R. Evid. 1003.

¶ 14 As the state points out, these rules do not distinguish "between the different formats of photographs, unless they depict something different." That was not the case here. There is nothing in the record suggesting the admitted hard-copy images differed in any way from the digital images. The trial court therefore did not err in allowing the jury to view the digital versions of admitted photographs during deliberations. *See State v. Manuel*, 229 Ariz. 1, ¶ 35 (2011) (rulings with respect to answering jury questions reviewed for abuse of discretion); *see also State v. Ellison*, 213 Ariz. 116, ¶ 42 (2006) (evidentiary rulings reviewed for abuse of discretion).

¶ 15 Distinguishing between the two formats of the images, as the trial court did here, elevates form over substance—something we avoid in this context. *See State v. Hopson*, 112 Ariz. 497, 498-99 (1975) ("We will not exalt form over substance in the use of the rules of criminal procedure."); *cf. State v. Harrison*, 195 Ariz. 1, ¶ 12 (1999) (avoiding result that raises form over substance). Notably, this situation is akin to a trial court allowing the court reporter to read back a portion of a witness's testimony in response to a jury question—a procedure that is expressly permitted. *See* Ariz. R. Crim. P. 22.3(a); *see also State v. Campbell*, 146 Ariz. 415, 418 (App. 1985) (no error in re-reading detective's testimony to jury).

¶ 16 Moreover, the trial court followed the proper procedure in allowing the jury to re-view the digital images. Reading Rules 22.2 and 22.3 together, "it is contemplated that jurors may need to ... re-view evidence during their deliberations." *State v. Lopez*, 157 Ariz. 23, 25 (App. 1988). Consistent with the procedure in Rule 22.3, the court properly notified the parties of the jury's request, discussed it with them, and then recalled the jury to the courtroom and ordered the images re-viewed in the same manner in which they had been published during trial.

¶ 17 Contrary to High's suggestion otherwise, the record contains no evidence of ex parte communications between the state and the jury. Because both had waived their presence, neither the prosecutor nor High were present in the courtroom when the court instructed the jury on the procedure for re-viewing the digital images. And only the jurors were present during the actual viewing and deliberations. *See State v. Rocco*, 119 Ariz. 27, 29 (App. 1978) (only empaneled jurors present during deliberations). Although the state provided the tablet used to display the digital images—which was apparently the process used during the trial—the court's law clerk queued them up one-by-one for the jury during deliberations.[6] In addition, High previously had the opportunity during trial to confront and cross-examine K.B. regarding the

photographs. *See* U.S. Const. amend. VI; Ariz. Const. art. II, § 24; *see also State v. Riggs*, 189 Ariz. 327, 331 (1997) (right to confront adverse witnesses includes right to cross-examine).

***5** ¶ 18 But even assuming the jury received and considered extrinsic evidence, a new trial is not warranted because we are confident beyond a reasonable doubt that the evidence did not taint the verdicts. *See Hall*, 204 Ariz. 442, ¶ 16. The jurors saw the same digital images projected on the screen during deliberations that they previously had seen during trial without objection by High. In addition, those same digital images were admitted as hard copies, again without objection by High, and the jury had those photographs with them as part of their deliberations. The digital images were therefore cumulative of properly admitted evidence. *See State v. Williams*, 133 Ariz. 220, 226 (1982) (erroneous admission of entirely cumulative evidence constitutes harmless error). Accordingly, the trial court erred in granting High's motion for a new trial. *See Fischer*, 242 Ariz. 44, ¶ 26.

Disposition

¶ 19 For the foregoing reasons, we reverse the trial court's order granting High a new trial, reinstate the guilty verdicts, and remand for sentencing.

All Citations

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Footnotes

1 High filed a cross-appeal, challenging the sufficiency of the evidence to support his convictions and requesting "a judgment of acquittal on all counts." However, High cannot appeal from the order granting his motion for a new trial. *Compare* A.R.S. § 13-4033(A)(2) (defendant can appeal "order denying a motion for a new trial"), *with* A.R.S. § 13-4032(2) (state can appeal "order granting a new trial"). Moreover, the issue raised in High's cross-appeal relates to the underlying convictions, which are not final because sentencing has not yet occurred. Accordingly, we lack jurisdiction over High's cross-appeal. *See* § 13-4033(A)(1) (defendant can appeal "final judgment of conviction"); *see also* Ariz. R. Crim. P. 31.2(a)(2) (notice of appeal from judgment of conviction must be filed within twenty days of oral pronouncement of sentence); *State v. Whitman*, 234 Ariz. 565, ¶ 20 (2014) (time for filing notice of appeal "begins to run on the date of oral pronouncement of sentence").

2 Upon his motion, High represented himself at trial.

3 Because we find no error in allowing the jury to re-view the digital images during deliberations, we reject the other two grounds as well.

4 "A 'photograph' means a photographic image or its equivalent stored in any form." Ariz. R. Evid. 1001(c). Under this definition, both the hard-copy images and the digital images in this case constitute "photographs."

5 High suggests he does not know whether the digital images displayed during deliberations were different from those displayed during trial. He points out the prosecutor retained possession of the tablet containing the digital images and cites Rule 1.14(B), Pima Cty. Super. Ct. Loc. R. P., which provides that "[e]very exhibit offered or admitted in evidence will be held in the Clerk of the Court's custody." Although the digital images are not part of our record on appeal, the admitted hard-copy images, which were retained by the clerk pursuant to Rule 1.14(B), are. High waived his right to be present when the trial court instructed the jury on the procedure for the viewing during deliberations, and he did not request to re-view the digital images himself. *Cf. State v. Mills*, 196 Ariz. 269, ¶ 15 (App. 1999) (issue raised for first time in motion for new trial was too late and waived). Moreover, the court noted that the digital images projected during deliberations were the same as those the jury had "seen ... throughout the course of the trial."

6 When initially discussing the issue with the parties, the trial court indicated that the state's technician could queue up the photographs for the jury, while the law clerk would be present in the courtroom to ensure no communication between the technician and the jury. However, during the viewing, the record shows no technician was involved and the law clerk queued up the images herself.