RESPONSE TO MOTION FOR NEW TRIAL

Unsupported allegations of juror misconduct are not sufficient grounds for a new trial. The State properly alleged the defendant's historical prior felony convictions.

The State of Arizona, by and through the undersigned Deputy County Attorney, respectfully requests that this Court deny the defendant's Motion for a New Trial for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On July 30, 1996, trial in this case began. The jury returned a guilty verdict. During the trial, the State filed two written allegations of prior felony convictions. The defendant received copies of both allegations, and the court received a copy of one allegation. The State filed a new allegation of priors, or, in the alternative, moved to amend the previous allegation.

In his motion for new trial, the defendant has alleged that a juror's spouse was present during some of the proceedings held outside of the jury's presence during the trial. He claims that this resulted in tainting the jurors' deliberations and thus precluded the defendant from receiving a fair and impartial trial. However, the defendant did not establish that the person present during these hearings was, indeed, a spouse of a juror, nor did he establish that the person communicated with any juror during the trial.

LAW:

Rule 24.1(c), Arizona Rules of Criminal Procedure, gives the grounds on which a court may order a new trial:

> c. Grounds. The court may grant a new trial for any of the following reasons:

> (1) The verdict is contrary to law or to the weight of the evidence;
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> (2) The prosecutor has been guilty of misconduct;
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> (3) A juror or jurors have been guilty of misconduct by:
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> > (i) Receiving evidence not properly admitted during the trial;
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> > (ii) Deciding the verdict by lot;
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> > (iii) Perjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination;
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> > (iv) Receiving a bribe or pledging his or her vote in any other way;
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> > (v) Becoming intoxicated during the course of the deliberations; or
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> > (vi) Conversing before the verdict with any interested party about the outcome of the case;
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> (4) The court has erred in the decision of a matter of law, or in the instruction of the jury on a matter of law to the substantial prejudice of a party;
>
> (5) For any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial.

A. Claim concerning a juror's spouse under Rule 24.1 (c)(3)(i)

The defendant first alleges that the spouse of one of the jurors observed most of the proceedings held outside of the presence of the jury and discussed those proceedings with the juror, giving cause for a new trial pursuant to Rule 24.1(c)(3)(i), Ariz. R. Crim. P.

In Arizona, juror misconduct warrants a new trial if the defense shows actual prejudice or if prejudice may be fairly presumed from the facts. *State v. Miller*, 178 Ariz.

555, 875 P.2d 788 (1994). In a criminal case, “Any private communication, contact or tampering with a juror gives rise to a strong presumption that the verdict has been tainted.” *Id*. at 557, 875 P.2d at 790, citing *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954). This presumption is rebuttable, and the burden rests with the government to show that the third-party communication did not taint the verdict. *Id*.

In this case, the defendant has alleged that (1) the person who was present was actually a juror’s spouse; (2) that the person and the juror communicated about something having to do with the trial; and (3) that the communication between the juror and the person was prejudicial to the defendant. But the defendant has not shown any proof of any of those three allegations or provided any support for his claims.

A new trial is not required every time a juror has been placed in a potentially compromising situation. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988*); State v. Garcia*, 141 Ariz. 580, 583, 688 P.2d 206, 209 (App. 1984). The defendant has shown no impropriety by any of the jurors, and there is no evidence in the record that any juror was guilty of any misconduct. The defendant did assert to the court that a juror had committed misconduct; however, he never called the person to testify and never offered any evidence that any misconduct occurred. The defendant’s unsupported speculations do not establish any grounds for a new trial. Because there is no showing of any prejudice to the defendant, this Court should deny the motion for new trial.

B. Claim concerning amendment to allegation of historical prior felony convictions

The defendant next alleges that the court erred in allowing the State to amend the charges to allege historical prior felony convictions. The defendant alleges that the priors were not formally alleged and that the offenses were more than five years old.

The State did not merely orally allege the priors. The State filed two written allegations of priors. The defendant received a copy of both written allegations; however, the Court received a copy of only one allegation. To correct the Court's file, the State filed a new allegation of priors; in the alternative, the State moved on the record to amend the original allegation of priors. Because the defendant had timely notice of the allegation of the prior conviction, no prejudice resulted in the Court's decision to allow the State to amend the allegation. Accordingly, this Court should deny the defendant's motion for a new trial.

The priors were alleged under A.R.S. § 13-604(V)(1)(a), which reads as follows:

1. "Historical prior felony conviction" means:

    (a) Any prior felony conviction for which the offense of conviction:

        (i) Mandated a term of imprisonment except for a violation of chapter 34 of this title involving a drug below the threshold amount; or

        (ii) Involved the intentional or knowing infliction of serious physical injury; or

        (iii) Involved the use or exhibition of a deadly weapon or dangerous instrument; or

        (iv) Involved the illegal control of a criminal enterprise; or

        (v) Involved aggravated driving under the influence of intoxicating liquor or drugs, driving while under the influence of intoxicating liquor or drugs with a suspended, canceled, revoked

> or refused driver license or driving under the influence of intoxicating liquor or drugs with two or more driving under the influence of intoxicating liquor or drug convictions within a period of sixty months; or
>
> (vi) Involved any dangerous crime against children as defined in § 13-604.01.

In this case, the prior convictions were properly alleged because the offenses mandated imprisonment and involved a violation of A.R.S. § 28-1383. In *Zamora v. Reinstein*, 185 Ariz. 272, 915 P.2d 1227 (1996), the Arizona Supreme Court specifically addressed the issue of historical priors that may be alleged regardless of their age. The defense argued in *Zamora* that the State could not allege historical prior felony convictions unless they both mandated a term of imprisonment **and** met one of the listed criteria. The Arizona Supreme Court held that the State may allege a historic prior felony conviction, regardless of its age, if the conviction either mandated a term of imprisonment **or** met any one of the listed criteria. In this case, the alleged conviction involved a violation of A.R.S. § 28-1383, aggravated DUI. Therefore, the State could allege the aggravated DUI conviction regardless of its age.

The State also notes that one of the historical prior felony convictions was in fact less than five years old. Certified copies from the Superior Court of California, County of Los Angeles, show that the defendant was committed to a state prison for two years beginning October 31, 1990. The documents show that the defendant was allowed a credit of 401 days, leaving 330 days left to serve. The instant crime occurred September 19, 1995. Five years before that date would be September 19, 1990. With 330 days left to serve beginning October, 1990, the time is well with in the five years required by A.R.S. 13-604(V)(1).

CONCLUSION:

The defendant has failed to show any juror misconduct or any prejudice. The 1989 California prior was alleged in court, on the record. The defendant had been notified of the prior and the prior was alleged properly pursuant to A.R.S 13-604(U). For these reasons, the State requests that the court deny the defendant's Motion for New Trial.