CRIMINAL YEAR SEMINAR

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Webinar

Criminal Rules Update

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2020 Criminal Year in Review
Criminal Procedure Update
Presented by APAAC and CLE West
Case summaries prepared by Gary Shupe

1. *State v. Dunbar*, 249 Ariz. 37 (App. 2020), *rev. denied*

Issue

Did the trial court err when it denied Dunbar's third request to represent himself, which occurred on the first day of trial?

Background

Dunbar shot his ex-girlfriend at least four times causing serious injury. A grand jury indicted him on five felony counts, including attempted first-degree murder.

Well before trial, Dunbar requested to represent himself. The trial court granted Dunbar's request but appointed advisory counsel.

About a year later, advisory counsel informed the court that Dunbar might want representation. Dunbar initially agreed; later he said that he wanted to represent himself until he received rulings on special actions he had filed. At the end of the proceeding, the court allowed Dunbar to represent himself.

Once the special actions were decided, advisory counsel again told the court that Dunbar wanted representation. The court spoke to Dunbar about the issue and appointed advisory counsel as lead counsel without objection from Dunbar. But during discussions with the court about witnesses would be called, Dunbar raised a concern. Then, despite his waiver of self-representation, he claimed that he hadn't agreed to having lead counsel. In the end, the court warned Dunbar that he would not be allowed to go back and forth on the issue. The court again allowed Dunbar to self-represent, with advisory counsel.

Less than a week later, however, Dunbar filed a motion with the assistance of advisory counsel asking the court to appoint lead counsel. Dunbar waived his right to self-representation in the motion and acknowledged that the court might not allow self-representation if he changed his mind again. The court once again appointed advisory counsel as lead counsel. The court informed Dunbar that, going forward, it would only consider those motions filed by lead counsel.

On the morning of trial, Dunbar presented a motion to the court. The court declined to accept it because he was represented by counsel. That led to a conversation in which Dunbar claimed not to recollect waiving the right to self-representation. Regardless, he told the court that he objected to being represented and that, if he couldn't represent himself, he wanted to go back to jail (rather than attend his trial). The court denied Dunbar's request to self-represent himself; Dunbar chose to remain in the courtroom. The jury ultimately convicted Dunbar on four of five counts.

Right to counsel

6th Amendment

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

ARCrP 6.1(a)

> A defendant has the right to be represented by counsel in any criminal proceeding. The right to be represented by counsel includes the right to consult privately with counsel, or the counsel's agent, as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow counsel to adequately prepare for the proceeding.

General legal principles

- **The stakes:** a court commits structural error (i.e., error that results in *automatic reversal*) if it erroneously denies a request for self-representation at trial. *Dunbar*, 249 Ariz. at 44, ¶ 10.
- Both the U.S. and Arizona Constitutions guarantee the right to self-representation. *Dunbar*, 249 Ariz. at 44, ¶ 11.
- A defendant invokes this right with a "timely and unequivocal" waiver of the right to be represented by counsel. If timely and unequivocal, the trial court must generally grant a knowing, intelligent, and voluntary waiver of counsel and permit the defendant to proceed *pro se*. *Id.*
  - A waiver will ordinarily be deemed timely if made before the jury is empaneled. *Id.*; *State v. De Nistor*, 143 Ariz. 407, 412–13 (1985).
  - The court can however deny an otherwise timely request for self-representation if the court finds that it was made to cause delay or made in bad faith. *Dunbar*, 249 Ariz. 37, 45, ¶ 12.
  - A waiver of counsel is unequivocal when made unambiguously or clearly, i.e., free from uncertainty. Conversely, a waiver is equivocal when it ambiguous, questionable, subject to more than one meaning. Black's Law Dictionary (11th ed. 2019).

- "The right to self-representation is not unqualified and must be balanced against the government's right to a fair trial conducted in a judicious, orderly fashion." *Dunbar*, 249 Ariz. at 44, ¶ 11 (cleaned up).
- A defendant may forfeit the right to self-representation by persistently vacillating between self-representation and being represented by counsel. *Dunbar*, 249 Ariz. 37, 45, ¶ 15.

This case serves as a good summary of the relevant law on the subject.

Analysis

Dunbar's request for self-representation was timely. Although the state argued otherwise, Dunbar had made his request before the jury was empaneled. In addition, Dunbar had not sought to delay the proceedings, and the record contained no evidence that he had made the request in bad faith. (The trial court hadn't asked Dunbar why he wanted to represent himself.) *Id.*, 249 Ariz. at 44–45, ¶ 12.

The pivotal question was whether Dunbar's request was unequivocal. Dunbar argued that it didn't matter that he had gone back and forth about representing himself since he had clearly reinvoked the right to represent himself just before trial began. The court of appeals rejected this theory. It considered instead whether a defendant who "persistently vacillated" between self-representation and representation by counsel might waive or forfeit the right to self-representation. *Id.*, 249 Ariz. at 45, ¶¶ 13–15. Because this was an issue of first impression in Arizona, the court looked outside the state for authoritative guidance.

The court observed that requiring an unequivocal request averted at least two harms. First, it kept a defendant from inadvertently waiving the right to counsel "while thinking aloud about the pros and cons of self-representation." *Id.* at ¶ 14. Second, it prevented a defendant from knowingly or unknowingly injecting structural error into the record by making an equivocal request for self-representation. *Id.* The court noted that the right to counsel was paramount to the right to self-representation. *Id.* at ¶ 16.

The court of appeals found that Dunbar "forfeited his right to self-representation through his vacillating positions." *Id*, 249 Ariz. at 47, ¶ 17. The trial court had warned Dunbar that he would not be allowed to go back and forth on the issue. Dunbar had acknowledged that warning. He had signed a document waiving his right to self-representation just a month before trial, and he had acknowledged that the court might not let him withdraw the waiver. Dunbar's behavior, said the court of appeals, suggested that he was attempting to manipulate the proceedings through his vacillating position. *Id.* Thus, the trial court properly denied Dunbar's request for self-representation.

2. *State v. Jaramillo*, 248 Ariz. 329 (App. 2020)

Issue

Whether the trial court erred by denying Jaramillo's motion to sever where Jaramillo and the codefendant presented antagonistic defenses?

Background

The state charged Jaramillo and a codefendant, Islas, with several drug-related offenses stemming from the following facts. On several occasions, Islas sold heroin to undercover agents. The sales were consummated across the street from a store owned by Jaramillo. During three of the sales, Islas entered Jaramillo's store before completing the sales.

For the final sale, a separate undercover agent went into Jaramillo's store and pretended to be a customer. The agent saw Islas come into the store and go to a back room. A few minutes later, Islas came out and spoke to Jaramillo, who accompanied Islas to the back room. When the two men exited the back room together, Jaramillo remained in the store while Islas went across the street to finish the drug sale. After Islas finished the sale—for which he had been paid in marked bills, Islas returned to the store and sat behind the counter with Jaramillo.

Two days later, police searched Jaramillo's store. They found $400 in marked bills in or near the cash register and a case containing baggies of heroin and drug paraphernalia in the back room.

The state presented all of this evidence plus a surveillance video during Jaramillo's and Islas's joint trial. The video showed Jaramillo counting money after Islas had returned from the last drug sale with the marked bills.

A month before trial, Islas moved to sever his trial from Jaramillo's. He asserted that he and Jaramillo had antagonistic defenses. Islas claimed that the heroin belonged to Jaramillo and that he had acted only as a delivery man with no knowledge that he was actually delivering drugs. Jaramillo later joined Islas's motion, stating that he and Islas would be blaming each other during the trial. Jaramillo told the court that he intended to argue that he had rented the back room of his store to Islas and had no idea that Islas kept drugs there or sold them from the store. The two defendants repeatedly sought severance during the trial, without success. The jury convicted each defendant of multiple felony offenses.

Joinder and Severance

ARCrP 13.3. Joinder

* * *

> (b) Of Defendants. Two or more defendants may be joined if each defendant is charged with each alleged offense, or if the alleged offenses are part of an alleged common conspiracy, scheme, or plan, or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others.
>
> (c) Consolidation. If offenses or defendants are charged in separate proceedings, the court, on motion or on its own, may wholly or partly consolidate the proceedings in the interests of justice.

ARCrP 13.4. Severance

> (a) Generally. On motion or on its own, and if necessary to promote a fair determination of any defendant's guilt or innocence of any offense, a court must order a severance of counts, defendants, or both.

* * *

General legal principles

- An appellate court reviews a trial court's denial of a motion to sever for an abuse of discretion. *Jaramillo*, 248 Ariz. at 333, ¶ 10.
  - A trial court commits an abuse of discretion when it denies the motion even though the defendant has established that his defense would be prejudiced unless his matter should be severed from the other. *Id.*
- Joint trials are generally favored because they preserve judicial resources. *Id.* at ¶ 11.
- But cases should not be joined where the defendants offer antagonistic, mutually exclusive (i.e., irreconcilable) defenses. *Id.*
  - "[D]efenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the codefendant." *State v. Cruz,* 137 Ariz. 541, 545 (1983).

Analysis

The trial court erred by denying Jaramillo's motion to sever, a motion that he made repeatedly before and during trial. *Jaramillo*, 248 Ariz. at 334, ¶ 13. The core of Jaramillo's and Islas's defenses were completely incompatible; the jury could not have believed both. *Id.* ("The jury could not rationally accept both theories. That is the hallmark of antagonistic, mutually exclusive defenses."). Islas defended against the charges by claiming to be a delivery man who was ignorant of Jaramillo's criminal activity. Jaramillo countered that he was a struggling store owner who had rented the back room to a friend, unaware that the

friend was using the room to sell drugs. The finger-pointing became more pronounced as the trial progressed. Adversarial cross-examination by both defense counsel emphasized the antagonistic nature of the defenses. The trial became more of a contest between the codefendants than between Jaramillo and the prosecution. *Id.*, 248 Ariz. at 335, ¶ 21 ("Thus, as Jaramillo accurately points out, by closing arguments, 'it was clear that the codefendants were defending more against each other than against the State.' ").

3. *State v. Smith*, 250 Ariz. 69 (App. 2020), *cert. denied*, 2021 WL 1240961 (April 5, 2021)

Issue

Did the trial court err in denying Smith's *Batson* challenges?

Background

This is a capital case. Smith shot and killed his ex-girlfriend and shot and injured their two-month old daughter. The state charged Smith with murder and child abuse.

After voir dire, the state attempted to use peremptory challenges on the only two African American jurors in the panel. Smith objected to the strikes. The prosecutor told the trial court that Juror 14 showed hesitation when asked if he would impose the death penalty. (He said that "had to do a lot of soul searching," that he "couldn't make a decision," and that he "did not want the weight" of sentencing the defendant to death.). The prosecutor moved to strike Juror 211 because she had appointments related to a recent surgery that conflicted with the anticipated trial schedule, and because she suffered from migraines for which she took medicine every day. The court permitted the State to use its peremptory challenges on both jurors.

Peremptory challenges

ARCrP 18.4(c). Peremptory Challenges

> (1) Generally. The court must allow both parties the following number of peremptory challenges:
>
> (A) 10, if the offense charged is punishable by death;
>
> (B) 6, in all other cases tried in superior court; and
>
> (C) two, in all cases tried in limited jurisdiction courts.
>
> (2) If Several Defendants Are Tried Jointly. If there is more than one defendant, each defendant is allowed one-half the number of peremptory challenges allowed to one defendant. The State is not entitled to any additional peremptory challenges.
>
> (3) Agreement Between the Parties. The parties may agree to exercise fewer than the allowable number of peremptory challenges.

General legal principles

- An appellate court generally defers to the trial court's ruling on a *Batson* challenge, "which is based largely upon an assessment of the prosecutor's credibility." *Smith*,

250 Ariz. at __, ¶ 62 (cleaned up). The appellate court will not reverse that ruling absent clear error. *Id.*

- Race-based strikes of jury-panel members violates the Equal Protection Clause. *Id.* at ¶ 63.
- Contested strikes are analyzed under *Batson's* three-step test: "(1) the defendant must make a *prima facie* showing of discrimination, (2) the prosecutor must offer a race-neutral reason for each strike, and (3) the trial court must determine whether the defendant proved purposeful racial discrimination." *Id.* (cleaned up).
- When the prosecutor strikes a juror based on demeanor, the trial court is tasked with assessing the juror's demeanor to ascertain whether the prosecutor's evaluation of the demeanor is credible. *Id.* at ¶ 67. (This behooves the prosecutor to make a contemporaneous record of the observed demeanor, bringing it to the trial court's attention.)

Analysis

The trial court properly denied Smith's *Batson* challenges. *Id.* at 74. Smith did make a *prima facie* showing of discrimination: the prosecutor struck the only two African American panel members. *Id.* at ¶ 64.

But in response, the prosecutor offered race-neutral reasons for the strikes. *Id.* at ¶ 66. The prosecutor cited Juror 14's reluctance to impose the death penalty. And the prosecutor pointed to Juror 211's health problems and her doctor appointments that conflicted with the trial schedule.

Smith failed to establish that the prosecutor's reasons were pretextual. *Id.* at ¶¶ 68–69. Juror 14's reluctance about imposing the death penalty was amply demonstrated through the prosecutor's questioning and through the court's private conversation with the juror. At one point, Juror 14 agreed that he shouldn't serve on the jury due to his feelings about the death penalty. The record also supported the prosecutor's stated reasons (health problems and conflicting medical appointments) for moving to strike Juror 211.

Batson developments to be aware of

- *State v. Porter*, 248 Ariz. 392 (App. 2020), *rev. granted* (Nov. 3, 2020).
- *State v. Ross*, 39 Arizona Cases Digest 46, 2021 WL 869049 (March 9, 2021).
- Central Arizona National Lawyers Guild's proposed petition to add ARCrP 24, which would have amended Arizona's *Batson* procedure by adopting a process used in Washington State. *See* https://www.azcourts.gov/Rules-Forum/aft/1081. The petition was submitted in January 2020.
- Central AZ NLG withdrew its petition in May 2020 in lieu of a review by a State Bar working group (comprised of the Civil Practice & Procedure Committee, the Criminal Practice & Procedure Committee, and other stakeholders). The State Bar's

goal is to submit a petition "aimed at reforming Arizona's Batson procedures for this Court's consideration in August 2021." *See* Comment of the State Bar of Arizona, filed May 1, 2020, available at https://www.azcourts.gov/Rules-Forum/aft/1081.

- Recently, the authors of both the majority and dissenting opinions in *State v. Porter* submitted a petition seeking to eliminate the use of peremptory challenges in civil and criminal jury trials. *See* Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure, available at https://www.azcourts.gov/Rules-Forum/aft/1208. Comments are due May 3, 2021; replies by June 1, 2021.

4. *State v. Hernandez*, 250 Ariz. 28 (2020)

Issue

Is a *Willits* instruction required when an officer fails to collect fingerprint and DNA evidence that isn't obviously material at the time it's accessible?

Background

A car ran a stop sign and nearly collided with a sheriff's vehicle. The deputy made eye contact with the car's driver for a few seconds, stating later that it was a face he'd never forget. The deputy pursued the car to an apartment complex where three men bailed out. Though he searched for the men, the deputy could not find them.

At the complex, federal marshals contacted the deputy and explained that they had been pursuing a car. They showed the deputy a picture with Hernandez's name on it. The deputy recognized Hernandez as the man driving the car he had tried to stop. He used the computer in his police vehicle to view a second picture of Hernandez, which he also identified as the driver of the car he had been following.

The sheriff's department impounded the car driven by Hernandez, which had been reported stolen. The owner recovered the car about a week later. No officer collected evidence from the car during the impoundment.

Hernandez was later arrested and charged with unlawful flight. He defended against the charge by claiming not to be the driver. Before trial, he asked that the trial court give a *Willits* instruction. Hernandez argued that he had been prejudiced by the department's failure to obtain fingerprint or DNA evidence from inside the car, which allegedly would have bolstered his claim that he hadn't driven the car. The trial court denied the request. The court found that it was unclear whether the evidence complained about ever existed. In addition, the court concluded that the evidence—if it existed—was as likely to be inculpatory as exculpatory. Hernandez was convicted as charged.

A majority of the court of appeals found that the trial court erred by failing to give a *Willits* instruction and reversed. *State v. Hernandez*, 246 Ariz. 543, 549, ¶ 21 (App. 2019), *vacated*, 250 Ariz. 28 (2020). The majority reasoned that the fingerprint and DNA evidence within the driver's compartment of the car was material given the disputed evidence of identification. *Id.* The dissent disputed the assertion that Hernandez had shown that fingerprint or DNA evidence existed: "Hernandez expected the trial court to assume that collectible and usable fingerprint or DNA evidence was present in the subject car." *Id.*, 246 Ariz. at 550, ¶ 26 (Brearcliffe, J., dissenting). Moreover, the dissent contended that Hernandez hadn't offered a defense that the evidence would have support; thus, he had failed to show prejudice. *Id.* at ¶ 25.

Willits instruction

ARCrP 21.1 refers to ARCP 51 for instructing a jury about the applicable law.

ARCP 51(b)

> *Generally*. Jury instructions should be as readily understandable as possible by individuals unfamiliar with the legal system. Each juror must be provided with a copy of the court's preliminary and final instructions on the law before they are read to the jury and before the jury retires to deliberate.

Standard Criminal 42—Lost, Destroyed, or Unpreserved Evidence

> If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.

See Revised Arizona Jury Instructions—Criminal, 5th, available at https://www.azbar.org/media/ctofoj0k/criminal-jury-instructions-2020-revisions.pdf.

General legal principles

- Generally, the state has no obligation to seek or obtain potentially exculpatory evidence for a defendant. *Hernandez*, 250 Ariz. at __, ¶ 11.
- But a trial court will provide a *Willits* instruction to the jury when "(1) the state failed to preserve obviously material and reasonably accessible evidence that could have had a tendency to exonerate the accused; and (2) there was resulting prejudice." *Hernandez*, 250 Ariz. at __, ¶ 10.
- Obviously material means that, "at the time the state encounters the evidence during its investigation, the state relies on the evidence or knows the defendant will use the evidence for his or her defense." *Hernandez*, 250 Ariz. at __, ¶ 16.
- *Tendency to exonerate* requires more than speculation. "[T]here must be a real likelihood that the evidence would have had evidentiary value." *State v. Glissendorf*, 235 Ariz. 147, 150, ¶ 9 (2014); *Hernandez*, 250 Ariz. at __, ¶ 10. In other words, the defendant must show "that the lost evidence would have been material and potentially useful to a defense theory supported by the evidence." *Glissendorf*, 235 Ariz. at 150, ¶ 10.
- The loss of evidence need not result through bad faith; even an innocent loss warrants a *Willits* instruction. *Hernandez*, 250 Ariz. at __, ¶ 10.

Analysis

The trial court properly denied Hernandez's request for a *Willits* instruction. *Hernandez*, 250 Ariz. at __, ¶ 19. When the sheriff's department impounded the car, the deputy had identified Hernandez as the driver, comparing his personal observation to the two available pictures of Hernandez. Thus, the department did not need to collect any existing fingerprint

or DNA evidence to prove identification. Nor did the department know that the evidence was obviously material to a defense that Hernandez might offer at trial. *Hernandez*, 250 Ariz. at __, ¶ 19. The Supreme Court concluded that the "practical effect of the court of appeals' decision would require the state to gather evidence based upon any number of possible defenses an accused might later proffer at trial." *Hernandez*, 250 Ariz. at __, ¶ 18. Such a rule contravenes the state's duty to preserve evidence for a defendant only when it is obviously material and reasonable accessible. *Id.* The state's failure to gather every conceivable piece of physical evidence does not require a *Willits* instruction. *Hernandez*, 250 Ariz. at __, ¶ 23.

In addition, the Supreme Court determined that Hernandez failed to show that any unpreserved evidence would have been beneficial for him. *Hernandez*, 250 Ariz. at __, ¶ 20–21. If fingerprint or DNA evidence had matched Hernandez, it would have inculpated him. If such evidence hadn't matched Hernandez, that would not have necessarily exculpated him. Hernandez might not have left behind usable prints or DNA. *Id.*

The Court went on to note that, in instances where the state fails to preserve evidence that is not obviously material at the time of the state's investigation *but later turns out to be material,* the trial court must determine whether the state's failure to appreciate the evidence's materiality was reasonable. If the state's assessment of the evidence's nature was unreasonable, a *Willits* instruction is appropriate. *Hernandez*, 250 Ariz. at __, ¶ 24.

5. *State v. Smith*, 250 Ariz. 69 (App. 2020)

Issue

Did the trial court coerce a death verdict by giving an impasse instruction after the jury told the court that it couldn't reach a verdict?

Background

This is a capital case. Smith shot and killed his ex-girlfriend and shot and injured their two-month old daughter. The state charged Smith with murder and child abuse.

About two and a half hours into deliberations in the aggravation phase, the jury advised the bailiff that it was deadlocked. The trial court decided to speak to the foreperson. The court twice asked the foreperson if additional deliberations would yield a verdict. The foreperson first said, "No." But after learning that the jury hadn't deliberated a particularly lengthy time, the foreperson said, "It's possible."

The court then read two instructions. The first was the Duty to Consult with One Another instruction, which encouraged jurors to deliberate to reach a verdict but not at the expense of giving up their honest beliefs. Next, the court read the Impasse instruction, telling the jurors how to obtain additional assistance with their deliberations if desired. The court then reassured the jury that it could decide when deliberations were at an end:

> All right. And having said that, there are no time limits. Whatever you think is appropriate. If you think that the amount of time that you've spent already is appropriate, that's fine. And we will accept that. And if you discuss this amongst yourselves and feel that you don't need to deliberate further, let us know that and we'll take the next step at that point. Okay. So just consider this instruction. Take it into consideration. Let us know how you want us to proceed.

The jury left the courtroom. Fifty minutes later, the jury returned a death sentence.

Deliberations

ARCrP 22.4. Assisting Jurors at Impasse

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the parties' presence, ask the jury to determine whether and how the court and counsel can assist the jury's deliberations. After receiving the jurors' response, if any, the court may direct further proceedings as appropriate.

Standard Criminal 53—Impasse Instruction

> This is offered to help you, not to force you to reach a verdict.
>
> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a just verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your belief concerning the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You may wish to identify areas of agreement and disagreement and then discuss the law and the evidence as they relate to the areas of disagreement.
>
> If you still disagree, you may wish to tell the attorneys and me which issues, questions, law or facts you would like us to assist you with. If you decide to follow these steps, please write down the issues where further assistance might help bring about a verdict and give the note to the bailiff. The attorneys and I will then discuss your note and try to help you.
>
> I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is possible that you could reach a verdict as a result of this procedure, you should consider doing so.
>
> Please take a few minutes and discuss this instruction among yourselves. Then advise me in writing of whether we can attempt to assist you in the manner indicated above or whether you do not believe that such assistance and additional deliberation would assist you in reaching a verdict.

See Revised Arizona Jury Instructions—Criminal, 5th, available at https://www.azbar.org/media/ctofoj0k/criminal-jury-instructions-2020-revisions.pdf.

General legal principles

- An appellate court reviews claims of jury coercion to determine whether the trial court's actions or comments displaced the independent judgment of the jury. *Smith*, 250 Ariz. at __, ¶ 151.
- Important factors considered by the appellate court are whether the trial court knew the numerical split in the jury, and how long the jury had been deliberating before coming to an impasse. *Id.*

Analysis

The trial court did not coerce the jury's verdict. *Id.* at ¶152. The court did not know the split in the jury. The jury had deliberated a relatively short time before impasse. The court repeatedly showed that it was not trying to displace the judgment of the jury (saying, for instance, take "however long that you feel that you need to deliberate," "there are no time limits," and that they could end deliberations if they wanted). In addition, two instructions read by the court helped ensure the jury's independence. The Duty to Consult with One Another instruction encouraged the jurors to deliberate but not to sacrifice their honest beliefs. The Impasse instruction told the jurors that the court and counsel were prepared to provide assistance if asked, and reminded the jurors that the court was not attempting to force it to reach a decision.

State v. Sahagun-Llamas, 248 Ariz. 120 (App. 2020), *rev. denied*

Issue

Was the record on appeal adequate where the portion of the transcript containing the testimony of the defense witnesses was missing?

Background

This case involved a 2003 drug exchange at a Tucson car wash. Both sides exchanged gunfire. A bullet from the exchange struck a nearby school bus driver who was transporting thirteen kindergarten and first-grade students. Officers fingered Sahagun-Llamas as the one responsible for injuring the bus driver. The state charged Sahagun-Llamas with aggravated assault, thirteen counts of endangerment, and drug offenses.

On day four of what turned out to be a week-long trial, Sahagun-Llamas's friend testified. He had been at the car wash with Sahagun-Llamas. A defense ballistics expert also testified, to counter the state's identification of Sahagun-Llamas as the one whose bullet had struck the passing bus, hitting the driver. The primary issue at trial was whether Sahagun-Llamas or another party had fired the bullet entering the bus and striking the driver.

The jury convicted Sahagun-Llamas mostly as charged. But he was not sentenced, as he had absconded some time during the trial. Officers did not apprehend him for thirteen years.

When Sahagun-Llamas's counsel began reviewing the record on appeal (in 2017), she noticed that the transcript for day four was missing. An investigation revealed that the court reporter had not filed her notes for that day with the court. The reporter died in 2007.

Since day four of the trial was a pivotal day, the parties and the court met several times in an attempt to reconstruct the record. Sahagun-Llamas's counsel told the court that she didn't believe reconstruction was possible. The court's own notes were unhelpful, providing no detail about the friend's or ballistics expert's testimonies. The state submitted a narrative statement along with some exhibits. Sahagun-Llamas objected to it, calling it grossly inadequate. The trial court countered that the state's attempt was the most complete and accurate record given the circumstances and approved it.

Record on Appeal

ARCrP 31.8

> (e) Narrative Statement if No Record Is Available.
>
> (1) Clerk's Duty. If the court did not make a record of evidence or of an oral proceeding at trial, or if the transcript is unavailable, the superior court clerk must promptly notify the parties and the appellate clerk.
>
> (2) Narrative Statement.
>
> (A) Preparation. If no record of evidence or transcript of an oral proceeding is available, the appellant may prepare and file a narrative

> statement of the evidence or proceeding from the best available means, including the appellant's recollection.
> (B) Filing and Service. The appellant must file the narrative statement in the superior court no later than 30 days after filing a notice of appeal and must serve it on all other parties.
> (C) Objections. Any other party may file objections or proposed amendments to the narrative statement no later than 10 days after the statement is served.
> (D) If the Appellant Does Not File a Statement. If the appellant does not file a narrative statement within the time specified in (2)(B), any other party may prepare, file, and serve such a narrative statement. The appellant may file objections or proposed amendments to that statement no later than 10 days after the statement is served.
> (E) Court Review and Transmittal. After considering a narrative statement and any objections or proposed amendments, the superior court must settle and approve the narrative statement. The superior court clerk must then include it in the record transmitted to the appellate court under Rule 31.9(c).

General legal principles

- A defendant has a constitutional right to a record adequate enough to provide a meaningful appeal. *Sahagun-Llamas*, 248 Ariz. at 123, ¶ 11.
- This means that the existing record must permit the appellate court to consider any issues raised by the defendant. *Id.*
- In the absence of a transcript, the parties may have to provide a written statement as contemplated by ARCrP 31.8(d). *Id.*

Analysis

The written statement prepared by the prosecutor was inadequate. *Id.*, 248 Ariz. at 124–25, ¶¶ 14–19. The prosecutor submitted a two-and-a-half-page document that did not, and could not have, sufficiently detailed—thirteen years later—a day's worth of testimony, objections, etc. That day was crucial for the defendant because it included the heart of the defendant's case at trial. Much of what the state submitted wasn't a summary of testimony but came from a report prepared by Sahagun-Llamas's expert. Where it had attempted to describe testimony, the state "made assumptions about the content of the witness testimony based on the opening and closing arguments of counsel." *Id.* In addition, the trial judge who had presided over Sahagun-Llamas's trial could provide little help due to the passage of time and limited documentation.