

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AERATH CAPIEN HUBERT,
Appellant.

No. 2 CA-CR 2012-0151
Filed October 28, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20103122002
The Honorable Paul E. Tang, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

MILLER, Presiding Judge:

¶1 Aerath Hubert was convicted after a jury trial of one count of first-degree murder and two counts of attempted armed robbery and sentenced to concurrent terms, the longest of which was life imprisonment without the possibility of release for twenty-five calendar years.¹ On appeal, he asserts various procedural and evidentiary trial court errors, as well as insufficient evidence to support his role as an accomplice. For the following reasons, we affirm Hubert’s convictions against these claims of error.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury’s verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In August 2010, Hubert telephoned victim C.V. and asked if he would like to buy marijuana. C.V. had bought marijuana from Hubert in the past, and he usually picked it up in an apartment complex where Hubert stayed. This time, C.V. initially said no, but he later called Hubert back and told him he wanted to buy twenty dollars’ worth. Twenty minutes later, Hubert called C.V. and told him that someone else would be calling him to set up the deal and that the pickup location would be different. C.V. then received a call from a different person about when and where to meet the seller.

¶3 C.V. drove to his friend C.M.’s house and asked if he would come with him to the pickup spot, stating he was going to meet someone and did not feel comfortable going by himself. C.M.

¹See A.R.S. § 13-751(A)(3). The trial court referred to this sentence as “25 years to life.”

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accompanied C.V. to the meeting location near a hotdog stand, where they were confronted by Mario Acedo and Jarrett Carter, Hubert's brother and roommate. Acedo displayed a gun and attempted to rob C.M. and C.V., while Carter broke the driver's window and reached for the car keys. Acedo shot C.M. through the passenger-side window. C.V. drove away and took C.M. to the hospital. C.M. gave a partial statement to police, but later died in surgery.

¶4 Hubert was charged with felony murder and two counts of attempted armed robbery. He was tried with Carter and was convicted and sentenced as described above. Hubert appealed his judgment and sentence. After filing his notice of appeal, Hubert unsuccessfully moved to vacate the judgment on the basis that he could not be guilty of felony murder without being "an actual participant" in the attempted armed robbery. Hubert also appeals that ruling. We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1), (3) and 13-4033(A)(1), (3).

Admissibility of Victim's Statements

¶5 Hubert argues the trial court erred in denying his motion to preclude a police sergeant's testimony about C.M.'s statement to him. Hubert contends the statement did not fit into any hearsay exception and he was denied his right to confrontation because the statement was testimonial. We generally review a trial court's decision to admit hearsay evidence for an abuse of discretion, *State v. Franklin*, 232 Ariz. 556, ¶ 10, 307 P.3d 983, 986 (App. 2013); however, we review de novo claims of Confrontation Clause violations, *State v. Shivers*, 230 Ariz. 91, ¶ 6, 280 P.3d 635, 636 (App. 2012).

¶6 While we would be inclined to conclude Hubert has not demonstrated the trial court erred in the admission of the testimony, we need not dwell on his arguments because even had any error occurred in the admission of C.M.'s statement, it would have been harmless. *See State v. Bocharski*, 218 Ariz. 476, ¶ 38, 189 P.3d 403, 413 (2008) (hearsay and Confrontation Clause violations reviewed for harmless error). An error is harmless if we can say beyond a reasonable doubt that it did not affect the verdict. *State v. Bible*, 175

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Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). We agree with the state that C.M.'s statement was cumulative to C.V.'s testimony. *See State v. Bass*, 198 Ariz. 571, ¶ 40, 12 P.3d 796, 806 (2000) (tainted fact established by other evidence is cumulative and curative). Moreover, Hubert neither identifies prejudice from C.M.'s statement nor does he respond to the state's argument in his reply brief.

¶7 The sergeant testified that he spoke to C.M. in the hospital while C.M. was awaiting transfer to another hospital for surgery. According to the sergeant, C.M. said he and C.V. had stopped at a hotdog stand when a man approached the passenger side of the car where C.M. was sitting, pointed a revolver at him, and demanded his cellular telephone, wallet, and the car keys. C.M. indicated that he handed over his phone, wallet, and money clip. He described the man who shot him, but did not know him. He also stated there was a second perpetrator he did not see and that the driver's window had been shattered. C.M. told the sergeant, without explanation, that C.V. knew the shooter. In court, C.V. provided a longer, more detailed version of the same events; however, C.V. was not asked to identify the shooter, and his version of the shooter's statements differed slightly.

¶8 Most importantly, C.M.'s statement to the sergeant did not implicate Hubert. Instead, Hubert was implicated by C.V.'s testimony about the telephone calls he had made and received before the shooting. Because C.M.'s statement did not provide any link to Hubert and was merely cumulative to C.V.'s testimony and the physical evidence, any error was harmless beyond a reasonable doubt. *See State v. Hausner*, 230 Ariz. 60, ¶ 61, 280 P.3d 604, 621 (2012) (hearsay statement describing shooter harmless where testifying witness identified shooter by name); *State v. Luzanilla*, 179 Ariz. 391, 398-400, 880 P.2d 611, 618-20 (1994) (harmless error where other witness corroborated statements, defendant verified statements then retracted them, and other evidence linked defendant to crime scene).²

²Hubert also argues C.M.'s statement should not have been admitted pursuant to Rule 403, Ariz. R. Evid., because it was not probative due to its being cumulative to C.V.'s statement and the

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Motion to Sever

¶9 Hubert argues the trial court abused its discretion when it denied his motion to sever his trial from Carter's. The state responds that Hubert has waived this claim.

¶10 Pursuant to Rule 13.4(c), Ariz. R. Crim. P., a motion to sever must be made at least twenty days before trial, and if denied, it must be renewed during trial at or before the close of evidence. The purpose of the renewal requirement is to allow the trial court to reassess the need for separate trials after evidence is introduced. *State v. Flythe*, 219 Ariz. 117, ¶ 10, 193 P.3d 811, 814 (App. 2008). Appellate review is limited so that a defendant may not strategically refrain from renewing his motion and then, if he is dissatisfied with the outcome at trial, argue on appeal that severance was necessary. *Id.* ¶ 9.

¶11 Here, Hubert filed a timely motion to sever before trial, but only renewed the motion on the first day of trial before jury selection. When the trial court denied the renewal, it noted Hubert could "renew the request in the event there are additional facts later." Hubert did not do so.

¶12 Hubert's renewed request for severance was made before trial began and before any evidence had been introduced. *See State v. Johnson*, 122 Ariz. 260, 269, 594 P.2d 514, 523 (1979) (trial commences when jury impaneled); *see also Klinefelter v. Superior Court*, 108 Ariz. 494, 495, 502 P.2d 531, 532 (1972) (same). Therefore, Hubert's severance argument is waived. *See State v. Bruni*, 129 Ariz. 312, 316, 630 P.2d 1044, 1048 (App. 1981) (severance issue waived where motion renewed prior to commencement of trial). And Hubert has not argued the trial court's refusal to grant a severance constituted fundamental error. *See Flythe*, 219 Ariz. 117, ¶ 4, 193 P.3d

"inherent falsity of at least his excuse for being at the market." Hubert did not make this argument below and does not argue on appeal that the error was fundamental; therefore, we decline to review it. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008).

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at 813; *State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008) (declining to review for fundamental error when appellant failed to raise claim in trial court and failed on appeal to address whether alleged error was fundamental).

¶13 In any event, no prejudice exists. Because Hubert was tried as an accomplice to Carter, the evidence against Carter was intertwined with the evidence against Hubert, and would have been admissible against Hubert even in a separate trial, *see State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993). Additionally, Hubert and Carter did not testify or present antagonistic defenses,³ and the jury was instructed to consider the evidence against each defendant separately, *see State v. Murray*, 184 Ariz. 9, 25-26, 906 P.2d 542, 558-59 (1995).⁴

Vicarious Liability Jury Instruction

¶14 Hubert next contends the trial court erred in failing to instruct the jury that felony murder does not extend to an accomplice who is not an “actual participant” in the predicate felony. He argues the issue was preserved for appeal in his motion to vacate judgment, but because he did not raise this issue until the post-verdict motion, we review for fundamental, prejudicial error. *See State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995)

³Carter’s defense was that the shooting happened during an argument over the twenty-dollar marijuana deal and that there was never an attempted armed robbery.

⁴Hubert also suggests that excluding evidence that Hubert and Carter were brothers “might have been enough to cure the inherent prejudice of trying the two together.” Although Hubert noted the relationship in his motion to sever, he never moved to preclude evidence of the relationship. Further, he does not cite any case law or develop this argument; accordingly, it is waived. *See Ariz. R. Crim. P. 31.13(c)(1)(vi)* (argument “shall contain . . . citations to the authorities, statutes and parts of the record relied on”); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (“Failure to argue a claim on appeal constitutes waiver of that claim.”).

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(where defendant raised issue for first time in motion to vacate judgment, issue forfeited for all but fundamental error review). Instructing a jury on a non-existent legal theory is fundamental error. *State v. Ontiveros*, 206 Ariz. 539, ¶ 17, 81 P.3d 330, 333 (App. 2003).

¶15 Hubert relies on the plain language of the statutes for accomplice liability and felony murder to argue that a person charged with felony murder “must himself actually be committing or attempting to commit the predicate felony.” He also relies on *Evanchyk v. Stewart*, 202 Ariz. 476, ¶ 14, 47 P.3d 1114, 1118 (2002), to urge that “a defendant cannot be convicted of felony murder committed by a co-defendant unless the defendant was both an accomplice and a participant in the underlying felony.”

¶16 We have previously rejected both of these arguments. *State v. Rios*, 217 Ariz. 249, ¶ 11, 172 P.3d 844, 847 (App. 2007). In *Rios*, we concluded the plain meaning of the statutes did not “impose an additional undefined requirement of ‘participation’ in the underlying felony for a conviction of felony murder.” *Id.* ¶ 10. We also found the defendant’s reliance on *Evanchyk* misplaced, concluding that case did not “stand for the proposition that a defendant must be present at the scene of, and participate in the underlying felony, to be convicted of felony murder based on the theory of accomplice liability.” *Id.* ¶ 16.

¶17 Hubert does not contest our holding in *Rios*; therefore, his argument is inadequate to require us to abandon our precedent. *See State v. Patterson*, 222 Ariz. 574, ¶ 19, 218 P.3d 1031, 1037 (App. 2009) (we only overturn precedent if firmly convinced prior decision based on clearly erroneous principles or conditions have changed to render prior decision inapplicable). The trial court did not err in instructing the jury on vicarious liability.

Sufficiency of the Evidence

¶18 Hubert also argues there was insufficient evidence to support the jury’s finding that he was an accomplice to attempted armed robbery. We review the sufficiency of the evidence de novo to determine whether there is evidence from which “any rational

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trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. West*, 226 Ariz. 559, ¶¶ 15-16, 250 P.3d 1188, 1191 (2011). We consider both direct and circumstantial evidence, and we do not reweigh the evidence, considering it in the light most favorable to the prosecution. *Id.* A person is liable as an accomplice to an offense if, “with the intent to promote or facilitate the commission of an offense” he:

1. Solicits or commands another person to commit the offense; or
2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense.
3. Provides means or opportunity to another person to commit the offense.

A.R.S. § 13-301. An accomplice may be held criminally accountable for “any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.” A.R.S. § 13-303(A)(3). A predicate offense of attempted armed robbery requires intent to commit armed robbery and an overt act toward committing it. *State v. Clark*, 143 Ariz. 332, 334, 693 P.2d 987, 989 (App. 1984); *see also* A.R.S. § 13-1001(A).

¶19 Here, the circumstantial evidence rests on Hubert’s close connection with one of the direct perpetrators, Carter, and a comparison of the past dealings between C.V. and Hubert with the arrangements that preceded the armed robbery. C.V. testified that Hubert had previously sold him marijuana. In those previous instances, C.V. had picked up the marijuana at Hubert’s apartment, which Hubert shared with his brother and roommate, Carter. This time, Hubert called him to set up a deal, and then when C.V. agreed, Hubert said someone else would be meeting him, it would be in a different area of town, and he would give his phone number to this other person. Ultimately, this other person was Acedo, who attempted to rob C.V. and C.M. before shooting C.M. Carter, meanwhile, was connected to the scene with DNA evidence, and broke out the car window in an apparent attempt to reach the car

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keys. A reasonable juror could find that Hubert called C.V. not to sell him marijuana, but to set up an armed robbery that would be carried out by Carter and Acedo.

¶20 Hubert concedes that a person need not be present at the scene of the crime to be an accomplice. *See Rios*, 217 Ariz. 249, ¶ 10, 172 P.3d at 846. However, he distinguishes his case from several others in which an accomplice was not present, arguing that in those cases the accomplice's participation was contemporaneous with the crime. *See, e.g., State v. Dickens*, 187 Ariz. 1, 7-8, 27, 926 P.2d 468, 474-75, 494 (1996) (affirming felony murder convictions of defendant who waited in vehicle while other person robbed and killed victims); *State v. Axley*, 132 Ariz. 383, 385, 394, 646 P.2d 268, 270, 279 (1982) (affirming felony murder conviction of defendant who waited in getaway car while codefendant killed victim during attempted robbery); *Rios*, 217 Ariz. 249, ¶¶ 2, 17, 172 P.3d at 845, 848 (affirming felony murder conviction of defendant who set up robbery of marijuana dealer, talked to dealer, then walked away before friend shot and killed dealer). But in none of those cases does the court make note of the contemporaneous nature of the accomplice's involvement. *Dickens*, 187 Ariz. at 7-8, 926 P.2d at 474-75; *Axley*, 132 Ariz. at 385, 646 P.2d at 270; *Rios*, 217 Ariz. 249, ¶¶ 9-12, 172 P.3d at 846-47. Hubert points to no authority indicating that the overt step toward committing the predicate offense cannot occur before the offense is actually carried out, as occurred here with the phone calls, and we are aware of none.

¶21 Hubert also relies on *State v. Asaeli*, 208 P.3d 1136 (Wash. Ct. App. 2009), to argue the evidence is insufficient because it does not establish that he knew about or was complicit in any planned armed robbery. In *Asaeli*, the evidence only established that the defendant was at the park where the shooting took place, had driven some members of his group to the park, and was aware some members of his group were trying to locate the victim. 208 P.3d 1136, ¶¶ 56-57. The court focused on the lack of evidence about conversations the defendant may have had or overheard or evidence that any conversations had related to a plan to kill the victim. *Id.* It concluded the defendant's mere presence at the scene and

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knowledge that other people were looking for the victim was not sufficient to support his conviction. *Id.*

¶22 Here, there is similarly no evidence about the content of any communications Hubert may have had with Carter and Acedo to determine if he assisted in planning an armed robbery. But, as noted above, there was circumstantial evidence, because Hubert sought out the marijuana deal and then, in contrast with previous deals with C.V., told him the location and dealer would be different. Additionally, Hubert had a close relationship with Carter, who was present for the armed robbery. There is reasonable evidence from which a juror could conclude that Hubert intended to provide an opportunity for Acedo and Carter to commit an armed robbery. *See* A.R.S. §§ 13-301, 13-303(A)(3), 13-1001(A).

Juror Misconduct

¶23 Hubert contends the trial court abused its discretion by denying his motion for mistrial on the basis of juror misconduct. He argues he was denied a fair trial because a juror introduced outside evidence into deliberations and deliberated with the rest of the jury before he was excused.

¶24 We review the denial of a mistrial on the basis of juror misconduct for an abuse of discretion. *State v. Stover*, 220 Ariz. 239, ¶ 22, 204 P.3d 1088, 1095 (App. 2009). Juror misconduct necessitates a new trial if the defense shows actual prejudice, or if prejudice may be fairly presumed from the facts. *State v. Cruz*, 218 Ariz. 149, ¶ 68, 181 P.3d 196, 210 (2008). The defendant bears the initial burden of proving jurors received and considered extrinsic evidence. *State v. Hall*, 204 Ariz. 442, ¶ 17, 65 P.3d 90, 95-96 (2003). If that burden is met, “any private communication, contact or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial” *State v. Miller*, 178 Ariz. 555, 558-59, 875 P.2d 788, 791-92 (1994), quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954). The state may rebut this presumption by proving any communications did not taint the verdict. *Id.*

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¶25 In this case, Juror Two violated the admonition against improper communications several times. First, during a break in voir dire, Juror Two asked co-defendant Carter's attorney about the expected length of the trial. The trial court questioned Juror Two about the communication and later reminded all jurors about the admonition against direct communications with the attorneys. No party objected, and Juror Two was selected to serve on the jury.

¶26 On the third day of trial, Juror Two informed an investigator for Carter that the hallway door to the jury room was locked. No objections were made, and the trial proceeded.

¶27 On the first full day of deliberations, Juror Two asked a police officer in the court elevator whether the person who made a phone call setting up a drug deal was guilty if someone was killed during that drug deal. The officer did not answer. An attorney in court on another matter overheard the conversation and reported it to trial counsel. The trial court questioned the attorney and the juror. Juror Two explained he was trying "to clarify in [his] mind" whether the intention to commit a small crime could lead to responsibility for a greater crime. Juror Two also admitted that he had asked a friend if the friend knew the trial judge and that, one day during lunch, he told a grand juror he was at the courthouse to serve as a juror.

¶28 Hubert moved for a mistrial, which the trial court denied. Juror Two was released and an alternate juror substituted in his place. The court individually questioned the other eleven jurors about whether the dismissed juror attempted to discuss any matters not properly introduced during the trial. Each juror denied that anyone had introduced outside matters during their deliberations. At some point earlier in the day, the jury had reached verdicts. While the court was conducting its hearing about Juror Two, the jury informed the bailiff that its deliberations had been completed. The verdict forms were sealed and placed in the court's vault.

¶29 At later hearings on a motion for new trial and order to show cause regarding the juror communications, Juror Two admitted he had asked Juror One the same question he asked the police officer about felony murder, and Juror One admitted the

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communication had occurred. But Juror One testified he had not answered, instead reminding Juror Two of the admonition.

¶30 Hubert concedes there is no direct evidence that any outside evidence was introduced to the jury. He argues, however, that circumstantial evidence of Juror Two's inability to abide by the admonition indicated that he did not follow the rest of the rules, either.

¶31 Even assuming Juror Two obtained outside evidence, there is no evidence he provided it to any other jurors, and he was not on the jury that delivered the verdict. Although the jury reached a verdict before Juror Two was removed, the trial court never saw it, did not accept it, and ordered it sealed.⁵ Each juror was questioned individually about Juror Two, and each juror said no extrinsic evidence was introduced to them. The jurors were told not to discuss the case until the alternate juror was called back, and when the alternate juror arrived, the jury was told to "start all over again."

¶32 The trial court was in the best position to determine whether a mistrial was necessary. *State v. Brown*, 195 Ariz. 206, ¶ 12, 986 P.2d 239, 242 (App. 1999). Hubert was not prejudiced by the actions of Juror Two, and the trial court did not err in denying Hubert's motion for mistrial. *See id.* ¶ 13 (no abuse of discretion in denying mistrial where witness interaction with jurors did not touch on trial issues); *see also State v. Brewer*, 26 Ariz. App. 408, 416-17, 549 P.2d 188, 196-97 (1976) (no abuse of discretion on denial of mistrial where juror spoke to bailiff about watching sentencing in front of other jurors, where jurors were alternates and did not participate in verdict).

⁵A verdict is not binding until the court accepts it and discharges the jury. *State v. Martinez*, 198 Ariz. 5, ¶ 11, 6 P.3d 310, 313 (App. 2000). The court did not accept the verdict or discharge the jury here. *Id.*; *see also* Ariz. R. Crim. P. 22.5 (court shall discharge jurors when verdict recorded, when jury cannot agree upon verdict after certain amount of time, or when a necessity exists for discharge). The court may substitute an alternate juror during deliberations. Ariz. R. Crim. P. 18.5(h).

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¶33 Hubert also argues that Juror Two's deliberations with other jurors violated his constitutional right to a unanimous verdict, citing *State v. Rocco*, 119 Ariz. 27, 579 P.2d 65 (App. 1978). In *Rocco*, an alternate juror briefly entered the jury room with the other jurors when they retired to deliberate. *Id.* at 29, 579 P.2d at 67. On appeal, the court found no error in the trial court's failure to declare a mistrial, concluding the defendant had not shown prejudice, in part because the jury had not yet begun deliberations when the alternate juror left. *Id.* Hubert argues Juror Two's presence during the first round of deliberations necessitated a mistrial.

¶34 Here, as in *Rocco*, Hubert has not shown prejudice. *Id.* After Juror Two was dismissed and the alternate recalled, the jury was instructed to begin deliberations again from the beginning. Each juror testified that Juror Two did not introduce extrinsic evidence. The trial court did not err by denying Hubert's motion for mistrial.

Criminal Restitution Order

¶35 Although Hubert has not raised the issue on appeal, we find fundamental error associated with the CRO, and we will correct such error when it is apparent. See A.R.S. § 13-805; *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). In its sentencing minute entry, the trial court ordered several fees and assessments and ordered that "all fines, fees and assessments are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." The imposition of that order prior to the expiration of Hubert's sentence "constitutes an illegal sentence, which is necessarily fundamental, reversible error." *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), quoting *State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Accordingly, the CRO cannot stand.

Disposition

¶36 For the foregoing reasons, we affirm Hubert's convictions and sentences but vacate his CRO.