

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 23 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0440
	)	DEPARTMENT A
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
PEDRO MARRUFO ONTIVEROS,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103285001

Honorable Christopher C. Browning, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General  
By Joseph T. Maziarz and Nicholas Klingerman

Tucson  
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender  
By Michael J. Miller

Tucson  
Attorneys for Appellant

HOWARD, Chief Judge.

¶1 After a jury trial, appellant Pedro Ontiveros was convicted of one count of possession of a deadly weapon by a prohibited possessor. He was sentenced to a mitigated term of three years' imprisonment. On appeal, he argues the trial court erred by denying his motion to suppress evidence without holding an evidentiary hearing and by excluding him from the courtroom during an investigation into potential juror misconduct. Because we find no reversible error, we affirm.

### **Factual and Procedural Background**

¶2 We view the facts in the light most favorable to upholding the conviction. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). On September 14, 2010, at around 6:45 p.m., Officer Legarra observed a car driving without its headlights on. Legarra initiated a stop and identified Ontiveros as the driver. He conducted a search of the vehicle, which revealed a loaded gun underneath the driver's seat. Subsequent DNA<sup>1</sup> testing showed Ontiveros's DNA matched DNA found on the gun.

¶3 Ontiveros was charged with and convicted of one count of knowing possession of a deadly weapon by a prohibited possessor. He was sentenced to a mitigated term of three years in prison. Ontiveros appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

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<sup>1</sup>Deoxyribonucleic acid.

## Motion to Suppress

¶4 Ontiveros first argues the trial court erred by denying his motion to suppress evidence without conducting an evidentiary hearing. He reasons that because the state bore the burden of proof, it could not have sustained its burden without a hearing. Because he did not raise this argument below, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). But because he does not argue on appeal that the alleged error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue fundamental error on appeal waives argument); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶5 Moreover, as the state argues, Ontiveros filed his motion to suppress after the deadline set by the trial court. Therefore, the court could have refused to consider the motion at all. *See Ariz. R. Crim. P. 16.1(b), (c)*. By imposing the lesser sanction of refusing a hearing, the court acted within its discretion. *See State v. Pickett*, 121 Ariz. 142, 144-45, 589 P.2d 16, 18-19 (1978) (under Rule 16.1(c), court has discretion to impose lesser sanction rather than simple denial of untimely motion).

## Exclusion During Juror Questioning

¶6 Ontiveros next argues the trial court erred by excluding him from the courtroom while it questioned a juror about that juror's contact with a witness in the case,

violating his right to be present at trial under the United States and Arizona Constitutions. The state responds that no error occurred because Ontiveros had no constitutional right to be present during the questioning, but even if his exclusion were error, it was harmless. Because he objected below, we review for harmless error. *See State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009). We will affirm a conviction under this standard of review if the state can establish beyond a reasonable doubt “that the error did not contribute to or affect the verdict.” *Id.* We review de novo whether a constitutional or legal error occurred. *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶7 A criminal defendant generally has a constitutional right to be present at all trial proceedings. *Morehart v. Barton*, 226 Ariz. 510, ¶ 13, 250 P.3d 1139, 1142 (2011). Even when the defendant is not actually confronting witnesses or evidence against him, the Due Process Clause of the Fourteenth Amendment still protects his right to be present for the proceeding. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). Therefore “a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” *Id.* We have held that when the jury asks the court for substantive instructions during its deliberations about the trial or its procedure, “a personal confrontation occurs between the court and the jury potentially touching upon the fundamental relationship between an accused, the court, and the people who judge him.” *State v. Pawley*, 123 Ariz. 387, 390, 599 P.2d 840, 843 (App. 1979). In these situations, we held, the defendant has a right to be present. *Id.*

¶8 But the right is not absolute, and it “‘applies only to those proceedings in open court whenever [a defendant’s] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’” *State v. Dann*, 205 Ariz. 557, ¶ 53, 74 P.3d 231, 245 (2003), quoting *State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981) (internal quotation marks removed; alteration in *Dann*). The United States Supreme Court has held that an ex parte conversation between the court and a juror, by itself, “‘does not constitute a deprivation of any constitutional right.’” *United States v. Gagnon*, 470 U.S. 522, 526 (1985), quoting *Rushen v. Spain*, 464 U.S. 114, 125 (1983) (Stevens, J., concurring). But we need not resolve whether a constitutional violation occurred here because even assuming the court had violated Ontiveros’s rights by excluding him, the error was harmless.

¶9 During the jury’s deliberations, the trial court received a note from the jury that stated, “[juror B.] asked a witness a question in the hallway. It was the DNA specialist. It was before deliberations and after [closing] statement. . . . Can he do this[?]” The court decided to excuse everyone but the attorneys and the juror while it questioned the juror to determine if declaring a mistrial was necessary. Ontiveros objected to being excluded, but the court overruled his objection and he left the courtroom. Upon inquiry from the court, juror B. stated that while he was walking away from the courtroom at the end of a previous day he saw the DNA specialist and asked her, “[I]s this what you do,” by which he meant “[did] she testif[y] often,” to which she responded, “yes.” He told the court that was the entirety of their interaction and that he had neither told the other jurors about the interaction nor been asked by them about it

before the deliberations or during a break in deliberations. The DNA specialist, after telephonic questioning by the judge and attorneys, corroborated juror B.'s account of the interaction. Ontiveros then returned to the courtroom.

¶10 Unlike in the jury selection process, where the parties work with the court to eliminate bias from the jury pool by striking jurors for cause and peremptorily, here it was solely the trial court's responsibility to decide whether the juror was biased by his interaction with the DNA specialist. *See* Ariz. R. Crim. P. 18.5(f), (g) (challenges for cause and peremptory strikes); *State v. Givens*, 161 Ariz. 278, 279, 778 P.2d 643, 644 (App. 1989) (trial court in superior position to determine if mistrial necessary and that decision left to its sound discretion). Other than observing the juror and reaching his own personal conclusion about bias—a conclusion not relevant to the proceeding—Ontiveros could have done nothing if he had been at the conference. The court consulted with the attorneys about what questions to ask, but the attorneys themselves were not allowed to ask the juror questions. Moreover, the court's questioning was cautious and precise, revealing the minor extent of the juror's interaction with the DNA specialist without touching upon the jury's ongoing deliberations. Ontiveros's attorney agreed after consulting with Ontiveros that there was no need for a mistrial. Under these circumstances, the state has shown beyond a reasonable doubt that Ontiveros's exclusion from this conference could not have contributed to or affected the verdict. *See Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236. Accordingly, any error the court made in excluding Ontiveros was harmless.

**Conclusion**

¶11 For the foregoing reasons, we affirm Ontiveros’s conviction and sentence.

*/s/ Joseph W. Howard*

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

*/s/ Garye L. Vásquez*

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GARYE L. VÁSQUEZ, Presiding Judge

*/s/ Michael Miller*

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MICHAEL MILLER, Judge