

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

JULIAN OLIVAS,  
*Appellant.*

No. 2 CA-CR 2013-0082  
Filed January 28, 2014

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NOT FOR PUBLICATION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

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Appeal from the Superior Court in Pima County  
No. CR20110656001  
The Honorable Richard S. Fields, Judge

**AFFIRMED IN PART; VACATED IN PART**

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COUNSEL

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**MEMORANDUM DECISION**

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

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MILLER, Judge:

¶1 Julian Olivas was convicted after a jury trial of two counts of aggravated assault and sentenced to concurrent prison terms of five years. On appeal, he contends the trial court erred in failing to grant a new trial on the basis of juror misconduct and in denying a motion to vacate judgment due to Olivas’s inability to hear the trial proceedings due to a hearing impairment. He also contends the court made multiple errors related to dangerous nature allegations. We affirm the convictions and sentences, but vacate the criminal restitution order entered at sentencing.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the jury’s verdicts and resolve all inferences against Olivas. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). In February 2011, E.B. was driving with L.C. as his passenger, waiting to make a left turn onto Broadway. They both noticed loud music and talking coming from the car to their left, in the inside left-turn lane. There were three men in the car. As both cars turned, someone in the other car threw a soda or beer can at E.B.’s vehicle. When E.B. turned to look at the other car, he heard people saying, “[W]hat are you looking at,” and, “[W]hat the F.”

¶3 Both cars continued west on Broadway, with E.B.’s car in the center lane and the other car slightly ahead in the left lane. E.B. and L.C. then saw the front passenger, Olivas, blow a kiss that E.B. believed was directed at L.C. Later, as both cars approached a traffic light, E.B. saw the barrel of a shotgun pointed out the passenger window at E.B. and L.C. L.C. called 911 and gave the dispatcher the license plate number and description of the other car,

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which eventually sped off. Minutes later, police pulled over a car matching that description and called E.B. and L.C. to identify the person who pointed the shotgun. E.B. and L.C. each separately identified Olivas. Olivas was charged, convicted, and sentenced with two counts of aggravated assault. This timely appeal followed.

**Juror Misconduct**

¶4 Olivas first contends the trial court erred when it denied his motion for a new trial in which he claimed a juror introduced extrinsic evidence when he told the bailiff—in the presence of the rest of the jury—that he thought he might not be able to be impartial after overhearing Olivas’s family talking during lunch.

¶5 We review the denial of a motion for a new trial based on alleged juror misconduct for an abuse of discretion. *State v. Manuel*, 229 Ariz. 1, ¶ 40, 270 P.3d 828, 835 (2011). Juror misconduct requires a new trial only if the defendant shows actual prejudice or if we can fairly presume prejudice from the facts. *State v. Lehr*, 227 Ariz. 140, ¶ 49, 254 P.3d 379, 390 (2011). To the extent the misconduct results in the jury receiving and considering extrinsic evidence, “the defendant is entitled to a new trial unless the appellate court can conclude beyond a reasonable doubt that the extraneous information did not contribute to the verdict.” *State v. Glover*, 159 Ariz. 291, 294, 767 P.2d 12, 15 (1988). Prejudice cannot be presumed, however, “without the requisite showing that the jury received and considered extrinsic evidence on the issues.” *State v. Davolt*, 207 Ariz. 191, ¶ 59, 84 P.3d 456, 473 (2004).

¶6 When the jury retired to deliberate, one juror, A.C., asked to speak privately with the bailiff. The bailiff informed A.C. that any questions must be asked with the jury present. A.C. then explained he had overheard a conversation between the defendant and his family at lunch. He said what he heard “may persuade [his] decision one way or the other.” The bailiff told him to “hold on” and informed the trial court. While the bailiff was out of the room, another juror told A.C., “[Y]ou know the inside scoop,” and A.C. did not respond. The bailiff also reported hearing a juror say, “[T]hank you for letting us know.”

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¶7 The trial court and counsel questioned A.C. He explained that while he was eating lunch at a restaurant, the defendant's family sat near him. He heard them speaking generally about the case and also thought he heard someone in the defendant's family make a reference to lying under oath. A.C. told the court he did not say anything to the jury until he informed the bailiff and he did not say anything more after the bailiff left.

¶8 The trial court excused A.C. and called the alternate to begin deliberations the next morning. After explaining to the jury that they would start deliberations with the alternate in the morning, the judge asked them as a group if they had any concerns about "what's happened today," and whether it would "affect[] their ability to serve as fair and impartial jurors." No juror indicated that it would affect their deliberations.

¶9 Olivas moved for a mistrial, which was denied. After the verdict, Olivas moved for a new trial. The trial court held a hearing and denied the motion, concluding:

You made a very, very clear record with the jury after I excused this particular juror, that if there was anything that they thought would affect their ability to serve as impartial jurors for the balance of the trial, that I needed to know that. I was met with deafening silence.

¶10 On appeal, Olivas contends the trial court erred because it did not adequately consider A.C.'s failure to immediately report what he heard, which "presumably contaminat[ed] [the] jurors," and A.C.'s statement to the bailiff in front of the rest of the jury, which, he argues, "conveyed an inference of information obtained from [Olivas's] family, that could not possibly have been in his favor."

¶11 Regarding Olivas's argument that A.C. contaminated the jury panel by waiting to report his concerns when the jury retired to deliberate at 4:00 p.m. rather than right after lunch, Olivas fails to demonstrate actual prejudice, and prejudice may not be fairly

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assumed, from the facts in the record. *See Lehr*, 227 Ariz. 140, ¶ 49, 254 P.3d at 390. A.C. was questioned about why he waited to report what he heard, and he explained that he was not sure how to raise the issue, but wanted to be sure to mention it before deliberations began. A.C. also said he did not tell the other jurors anything before informing the bailiff. Olivas claims the tainted juror remained on the jury for several hours longer than if he had immediately reported, but there is no evidence in the record that anything happened in the interim to prejudice Olivas. The trial court did not err in denying the motion for a new trial on the basis of juror misconduct regarding the delayed reporting.

¶12 Olivas also contends the jury heard extrinsic evidence when A.C. explained he overheard Olivas's family talking at lunch. But, based on the evidence, A.C. is the only juror who heard extrinsic information implicating Olivas, and he was dismissed. The rest of the jury only heard A.C. say he overheard Olivas's family talking over lunch, and that he thought he might not be able to remain impartial. Although Olivas argues the implication is that what A.C. heard was negative, the vague statement, which did not include specifics about what had been said at lunch, was not enough to qualify as extrinsic evidence. *See Davolt*, 207 Ariz. 191, ¶¶ 56-57, 84 P.3d at 473 (newspapers carried by jurors not extrinsic evidence without evidence newspapers contained articles concerning trial); *see also State v. Dickens*, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996) (defining extrinsic evidence as "*information obtained from or provided by an outside source, whether admissible but not admitted at trial or inadmissible for some legal reason*") (emphasis added), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). Further, before deliberations, the jury was instructed that it should determine facts "only from the evidence produced in court," and after A.C. was dismissed, no juror spoke up when asked if they could not be impartial. We assume the jury follows the court's instructions. *State v. Dann*, 205 Ariz. 557, ¶ 46, 74 P.3d 231, 244

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(2003). The trial court did not err in denying the motion for a new trial on the basis of the juror's receipt of extrinsic information.<sup>1</sup>

**Motion to Vacate Judgment**

¶13 Olivas argues the trial court erred in denying the motion to vacate judgment on the basis that his “profound hearing loss prevented him from understanding the proceedings, and . . . actively participating in the presentation of his defense.” Because Olivas did not raise this issue until the motion to vacate judgment, we review for fundamental, prejudicial error. *See State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995) (where defendant raised issue for first time in motion to vacate judgment, issue forfeited for all but fundamental error review); *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005) (under fundamental error standard of review, defendant must establish that error caused him prejudice). Further, on appeal, Olivas did not argue the alleged error was fundamental, therefore that argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶14 Even if it were not waived, Olivas has not met his burden of showing he was prejudiced by the trial court's denial of his motion to vacate judgment. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. His brief on appeal does not indicate what, if any, portion of the trial he was unable to understand. Further, the court reviewed the medical evidence of Olivas's hearing loss, and considered Olivas's interactions with the court during trial as well as a jailhouse call between Olivas and an associate on the third day of

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<sup>1</sup>Olivas includes, without application or analysis, a brief argument that the consideration of extrinsic evidence violated his Sixth Amendment right to due process. We do not consider this argument on appeal. *See Ariz. R. Crim. P. 31.13(c)(1)(vi); State v. Sanchez*, 200 Ariz. 163, ¶ 8, 24 P.3d 610, 613 (App. 2001). Further, because Olivas has failed to show the jury received or considered any extrinsic evidence, we need not consider whether receipt of evidence would have violated his right to due process. *Glover*, 159 Ariz. at 294, 767 P.2d at 15; *see also Davolt*, 207 Ariz. 191, ¶ 59, 84 P.3d at 473.

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trial, in which the associate said he would call Olivas's lawyer and tell him Olivas was "deaf and incompetent";<sup>2</sup> the court concluded that the problem was not Olivas's hearing, but "that he was listening to the wrong people." Olivas provides no guidance as to what portions of the trial he was unable to understand, and has not shown he was prejudiced by his alleged inability to hear the proceedings.

### Dangerous Nature Allegation

#### Failure to dismiss allegation

¶15 Olivas contends the trial court erred in relying on his use of a deadly weapon as both an element of the offense of aggravated assault and a sentence-enhancement factor under A.R.S. § 13-704.<sup>3</sup> Olivas raises this issue for the first time on appeal; therefore it is forfeited for all but fundamental error review. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. He did not argue in his opening brief that this issue caused fundamental error; therefore, that argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

¶16 Moreover, the trial court did not err in imposing an enhanced sentence. A defendant's use of a deadly weapon may be used both to increase the charge against him from simple assault to aggravated assault and to enhance his sentence. *See State v. Snead*, 175 Ariz. 197, 198, 854 P.2d 1183, 1184 (App. 1993), *citing State v.*

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<sup>2</sup>The state quoted from the recorded phone calls in its response to the motion to vacate judgment and in its answering brief on appeal, but the audio files were not included in the record on appeal. We presume the record supports the trial court's decision to deny the motion for a new trial. *See State v. Geeslin*, 223 Ariz. 553, ¶ 5, 225 P.3d 1129, 1130 (2010).

<sup>3</sup>In his opening brief, Olivas repeatedly uses the phrase "aggravating factor" in discussing his sentencing. We assume this was in error, as the trial court did not consider any aggravating factors in sentencing, and sentenced Olivas to the enhanced, mitigated term of five years.

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*Lara*, 171 Ariz. 282, 283-85, 830 P.2d 803, 804-06 (1992) (if intended by legislature, elements of crimes may be used for enhancement and aggravation purposes).<sup>4</sup> Further, neither A.R.S. § 13-704(A) – under which Olivas’s sentence was enhanced on the basis of his having been “convicted of a felony that is a dangerous offense” – nor A.R.S. § 13-105(13) – which defines “dangerous offense” as one involving the “use or threatening exhibition of a deadly weapon or dangerous instrument” – explicitly disallow enhancement when the use of a deadly weapon is also an essential element of a crime. *Cf.* A.R.S. § 13-701(D)(2) (expressly disallowing use of deadly weapon as aggravating factor where it is essential element of offense or utilized to enhance sentence under A.R.S. § 13-704).

**Failure to bifurcate allegation**

¶17 Olivas contends the dangerous nature allegation should not have appeared on the verdict forms; rather, the allegation should have been tried separately by the jury only after guilty verdicts were returned. We review the trial court’s decision regarding the content of the verdict forms for an abuse of discretion, but review questions of law *de novo*. *State v. Larin*, 233 Ariz. 202, ¶ 29, 310 P.3d 990, 998-99 (App. 2013).

¶18 Olivas relies on Rule 19.1(b), Ariz. R. Crim. P., which provides that in prosecutions involving non-capital sentencing allegations required to be found by a jury, “[t]he trial shall proceed initially as though the sentencing allegations were not alleged,” and upon a guilty verdict, the issue of the allegation may then be tried before the jury. The rule, however, also contains an exception, and does not require the bifurcation if “such conviction or allegation is an element of the crime charged.” *Id.*; *see also Larin*, 233 Ariz. 202, ¶ 36, 310 P.3d at 1000.

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<sup>4</sup>Olivas cites *State v. Montoya*, 204 Ariz. 526, 65 P.3d 475 (App. 2003), for the argument that *Lara* is no longer good law. *Montoya*, however, was ordered depublished in 2004. *State v. Montoya*, 206 Ariz. 557, 557, 81 P.3d 1016, 1016 (2004).

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¶19 Here, Olivas was charged with aggravated assault pursuant to A.R.S. § 13-1204(A)(2), which states that a person commits aggravated assault if he or she commits assault “us[ing] a deadly weapon or dangerous instrument.” The statutory language for a dangerous offense includes “use . . . of a deadly weapon or dangerous instrument.” § 13-105(13). The use of the firearm was an essential element of the crime charged, and therefore bifurcation was not required pursuant to Rule 19.1(b). *See Larin*, 223 Ariz. 202, ¶ 36, 310 P.3d at 1000.

**Criminal Restitution Order**

¶20 Although Olivas has not raised the issue on appeal, we find fundamental error associated with the criminal restitution order (CRO). *See* A.R.S. § 13-805.<sup>5</sup> In the sentencing minute entry, the trial court ordered that “all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Olivas] is in the Department of Corrections.” The court’s imposition of the CRO before the expiration of Olivas’s sentence “constitute[d] 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). This remains true even though the court ordered that the imposition of interest be delayed until after Olivas’s release. *See id.* ¶ 5.

**Disposition**

¶21 For the foregoing reasons, we affirm Olivas’s convictions and sentences, but vacate the CRO.

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<sup>5</sup>Section 13-805 has been amended three times since the date of the crimes. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. We apply the version in effect at the time of the crimes. *See* 2005 Ariz. Sess. Laws, ch. 260, § 6; *State v. Lopez*, 231 Ariz. 561, n.1, 298 P.3d 909, 910 n.1 (App. 2013).