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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-031021-001 DT 11/13/2013

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
C. Harrington
Deputy

STATE OF ARIZONA

JUAN M MARTINEZ

v.

JODI ANN ARIAS (001)

KIRK NURMI
JENNIFER L WILLMOTT

MINUTE ENTRY

The Court has considered the Motion for Change of Venue filed August 27, 2013, the Objection to Motion for Change of Venue filed September 11, 2013, the Defendant's Reply to Motion for Change of Venue filed September 25, 2013, the exhibits admitted on October 4, 2013, and the oral argument conducted on November 1, 2013. In the motion, Defendant Arias requests a change of venue pursuant to Rule 10.3, *Arizona Rules of Criminal Procedure*, and the Fifth, Sixth, Eighth, and Fourteenth Amendment to the *United States Constitution* and Article 2, sections 4, 10, 15 and 24 of the *Arizona Constitution*. Defendant claims the pretrial publicity will affect her right to a fair sentencing proceeding.

A criminal defendant is entitled to a change of venue if there is a probability the dissemination of prejudicial information will deprive the defendant of a fair and impartial trial. Rule 10.3(b), *Arizona Rules of Criminal Procedure*. The court must determine whether, under the totality of the circumstances, the publicity attendant to defendant's trial was so pervasive that it caused the proceedings to be fundamentally unfair. *State v. Davolt*, 207 Ariz. 191, 206, 84 P.3d 456 (2004); *State v. Bigger*, 227 Ariz. 196, 254 P.3d 1142 (App. 2011). Prejudice may be presumed or actual. *State v. Blakley*, 204 Ariz. 429, 434, 65 P.3d 77 (2003). "The analysis of pretrial publicity involves two inquiries: '(1) Did the publicity pervade the court proceedings to the extent that prejudice can be presumed? If not, then (2) did defendant show actual prejudice

among members of the jury?'" *State v. Cruz,* 218 Ariz. 149, ¶14, 181 P.3d 196, 203 (2008), *quoting State v. Murray,* 184 Ariz. 9, 26, 906 P.2d 542, 559 (1995).

Presumed Prejudice

Prejudice may be presumed if the defendant can show that the pretrial publicity was so extensive or outrageous that it permeated the proceeding or created a carnival-like atmosphere. *Davolt,* 171 Ariz. at 206. In this circumstance, prejudice will be presumed without examining the publicity's actual influence on the jury.

The adverse publicity must be so extensively pervasive and prejudicial that "the court cannot give credibility to the jurors' attestations, during voir dire, that they could decide fairly." *State v. Nordstrom,* 200 Ariz. 229, 239, 25 P.3d 717 (2001). Media coverage must be so "extensive or outrageous that it permeated the proceedings or created a 'carnival-like' atmosphere." *Cruz,* 218 Ariz. at ¶15, *quoting State v. Atwood,* 171 Ariz. 576, 631, 832 P.2d 593, 648 (1992), *overruled on other grounds by Nordstrom, supra*. Alternatively, the publicity must be so outrageous that it turned the trial into a "mockery of justice or a mere formality." *State v. George,* 206 Ariz. 436, ¶23, 79 P.3d 1050, 1059 (App. 2003), *quoting State v. Jones,* 197 Ariz. 290, ¶44, 4 P.3d 345, 362 (2000). The mere exposure of jurors to publicity resulting in knowledge of the case will not create a presumption of prejudice when jurors can set aside acquired information and render a verdict based on the evidence. *Cruz,* 218 Ariz. at ¶14. "Even knowledge of the case or an opinion concerning the defendant's guilt will not disqualify a juror if the juror can set aside such knowledge or opinion in evaluating the evidence presented at trial." *Id*.

This is a high standard and it is rarely met by the defendant. The Arizona Supreme Court repeatedly has stated the quantity of publicity alone will not justify a presumption of prejudice. *See, e.g., Cruz,* 218 Ariz. at ¶13 ("We consider the effect of pretrial publicity, not merely its quantity."); *Nordstrom,* 200 Ariz. at ¶14 ("In considering a motion for change of venue, the court is concerned with the effect of pretrial publicity, rather than its quantity."). The Court also has "been reluctant to presume prejudice when the publicity was primarily factual and non-inflammatory or if the publicity did not occur close in time to the trial." *Nordstrom*, 200 Ariz. at ¶15, *citing Jones,* 197 Ariz. at 307; *State v. Bible,* 175 Ariz. 549, 563-64, 858 P.2d 1152 (1993); *State v. Bedford,* 157 Ariz. 37, 39, 754 P.2d 1141 (1988)).

In *Cruz*, the defendant was charged with killing a police officer, the first one from the Tucson Police Department killed in the line of duty in 21 years. The media extensively covered the officer's death and Cruz's apprehension. Hundreds of television broadcasts and newspaper articles reported the crime and Cruz's suspected guilt. Local radio stations and grocery stores raised money for Officer Hardesty's family; a billboard was erected on a major Tucson street that

proclaimed, "Officer Patrick K. Hardesty, Your service to Tucson will never be forgotten"; flags were flown at half-staff; and a local police substation was named for Hardesty. The Supreme Court found that although the publicity was extensive, it was not "outrageous" and did not create a "carnival-like atmosphere." It also found that the information disseminated to the public was not nearly as sensational as that circulated before the *Bible* trial. 218 Ariz. at ¶¶16-18.

In *Bible*, the defendant was accused of kidnapping, molesting and murdering a nine-year-old girl in Flagstaff. He had been released from prison a year earlier after serving sentences for kidnapping and sexual assault. There was extensive pretrial publicity during the several years before trial, including that the defendant committed other crimes, failed a polygraph test, and attempted to escape. Due to the size of Flagstaff and Coconino County (respective populations of approximately 45,000 and 100,000), nearly all potential jurors had some knowledge of the case and half had formed an opinion about the defendant's guilt. The Supreme Court found that for the most part, the reports were factually based, and nearly all of the factual information reported in the articles was admitted at trial. The few inaccurate and possibly outrageous items were reported months apart and appeared months before trial began. For these reasons, the court decided that these items were exceptions. The court held that the circumstances of the case fell short of those rare and unusual cases where the difficult showing of presumed prejudice has been made. 175 Ariz. at 564-65.

In *Blakely*, the defendant was accused in Mohave County of sexually assaulting and murdering a 16-month-old girl. In its motion for change of venue, the defense provided the trial judge with approximately 33 newspaper articles from Kingman, Mohave Valley, Bullhead City, and Lake Havasu City, as well as transcripts of 10 radio clips concerning the case. The Supreme Court found that although some reports used inflammatory language, there was no evidence that they significantly affected the proceedings or the atmosphere surrounding the trial. Many of the articles appeared at or near the time of the crime in July 1998 or during the pretrial stages, rather than close to the trial, which began in February 2000. The court found that based on this record, prejudice could not be presumed. 204 Ariz. at 434.

Similarly, in *Davolt*, the court held that prejudice could not be presumed from news reports published more than 15 months before trial. The court found the majority of media coverage was generated at the time of the crime and was factual in nature. 207 Ariz. at 206.

Opinion Poll

In *Cruz*, the defendant also claimed that the trial court should have presumed prejudice based on an opinion poll of 100 potential Pima County jurors that showed that 79% had heard of Hardesty's murder and of those 79%, 51% thought Cruz was likely guilty of the crime. The Supreme Court found the poll data failed to create this presumption. 218 Ariz. at ¶¶19-20.

Actual Prejudice

In the absence of presumed prejudice, the defendant must demonstrate that the pretrial publicity was actually prejudicial and likely deprived her of a fair trial. *Cruz*, 218 Ariz. at ¶21; *Davolt*, 207 Ariz. at ¶49; *State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265 (1984). "The relevant inquiry for actual prejudice is the effect of the publicity on the objectivity of the jurors" actually seated. *Murray*, 184 Ariz. at 26, 906 P.2d at 559 (citing *Bible*, 175 Ariz. at 566, 858 P.2d at 1169). The defendant must show that "the jurors have formed preconceived notions concerning the defendant's guilt and that they cannot leave those notions aside." *Chaney*, 141 Ariz. at 302.

Prior knowledge of the case alone is insufficient to disqualify a juror. *State v. Carlson*, 202 Ariz. 570, 577-78, 48 P.3d 1180 (2002); *State v. Jones*, 197 Ariz. 290, 307, 4 P.3d 345 (2000). The critical inquiry is the *effect* of publicity on a juror's objectivity. *Id*.; *State v. LaGrand*, 153 Ariz. 21, 34, 734 P.2d 563 (1987). In *Carlson*, the defendant was charged with murdering her boyfriend's physically handicapped mother for money. The Supreme Court found that because the jurors with knowledge of the case said, without qualification, that they were able to keep an open mind about the case and to be fair and impartial toward the defendant, actual prejudice had not been proven. 202 Ariz. at 577-78.

In *Cruz*, 218 Ariz. at ¶22, the Supreme Court noted:

> Aside from reasserting the findings of the poll, Cruz presents no evidence of actual prejudice and we see none. The record shows that the voir dire of the jury pool was extensive; it lasted seven days and included individual questioning by counsel of each prospective juror to weed out potentially biased jurors. Cruz offers no example of an actually prejudiced juror who served on this panel. The trial court did not abuse its discretion by declining to move the trial.

See also, *State v. Eastlack*, 180 Ariz. 243, 253, 883 P.2d 999 (1994)(no finding of actual prejudice, even though 10 jurors had prior knowledge of case, when all jurors expressed the ability to determine guilt from evidence presented at trial); *Murray*, 184 Ariz. at 26 (despite some prospective jurors' having heard about case, defendants failed to show actual prejudice when jury questionnaire and voir dire thoroughly covered publicity, only prospective jurors who assured court of fairness and impartiality remained on panel, and court repeatedly advised empaneled jurors to avoid news coverage of trial).

In this case, the Court finds the defendant has failed to establish the publicity about this case pervaded the court proceedings to the extent that prejudice can be presumed. While the

defendant did provide the court with statistics regarding the media coverage of the case and the sources of that coverage, there was no poll to show how many Maricopa county residents had heard of this case or believed the defendant was likely guilty. Nor did the defendant provide any evidence to support a claim that residents of other Arizona counties knew less about the case or were exposed to less media information about it. See *State v. Cruz*, 218 Ariz at 19.

The Court cannot presume the pretrial publicity and publicity from the first trial will actually influence potential jurors to such an extent they will be unable to render a fair and just verdict. At jury selection for the new sentencing proceeding, the potential jurors will be informed that the defendant has been found guilty of first degree murder and that another jury determined the murder was committed in an especially cruel manner, making the defendant eligible for a death sentence. The jury will be instructed they must accept the previous verdicts finding the defendant's guilty of First Degree Premeditated Murder and the prior finding of the aggravating circumstance. The only decision for this jury will be whether the defendant should be sentenced to life imprisonment or death.

The Court has no basis for finding the publicity about this case has been so outrageous that it will turn the new sentencing proceeding into a mockery of justice or mere formality. The mere exposure to publicity resulting in knowledge of the case does not create a presumption of prejudice when jurors can set aside the acquired information and render a verdict based upon the evidence. This Court will not be in a position to make such a determination until the jury selection process commences and potential jurors are questioned. The Court will inquire about a potential juror's exposure to, and effects of, the pretrial publicity on that juror. Jurors with preconceived notions about the appropriate sentence will be excused. See *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828 (1981).

The Court finds the Maricopa County jury pool is sufficiently large to assure impartial jurors can be found. A change of venue would create logistical issues for the parties, witnesses, court and involve substantial expense to the taxpayers of Maricopa County. No good cause appearing,

IT IS ORDERED denying the defendant's Motion for Change of Venue.