

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)
)
 Appellee,) 2 CA-CR 2008-0051
) DEPARTMENT B
 v.) SUPPLEMENTAL OPINION
)
 ANGEL ELEUTERIO DIAZ,)
)
 Appellant.)
)
 _____)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20002597

Honorable Howard Hantman, Judge

MOTIONS FOR RECONSIDERATION AND
MOTION TO SUPPLEMENT RECORD
DENIED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner

Tucson
Attorneys for Appellant

BRAMMER, Judge.

¶1 On April 7, 2009, we issued our opinion reversing Angel Diaz's convictions for first-degree burglary, attempted armed robbery, and aggravated assault. *State v. Diaz*, No. 2 CA-CR 2008-0051, ¶ 15, 2009 WL 922476 (Ariz. Ct. App. April 7, 2009). Relying

on the trial transcript showing only eleven jurors had returned the verdicts against Diaz, we concluded he had been deprived of his right to a twelve-person jury. *Id.* ¶ 14. Approximately one week later, court reporter Deborah Moore filed with this court a “corrected transcript,” attempting to modify the trial transcript of the jury poll to show that twelve jurors had, in fact, delivered the verdicts. In an affidavit submitted with the transcript, Moore stated that, three days after we issued our opinion, she had “received a call from [the state’s appellate counsel] requesting [Moore to] check [her] notes to see perhaps if there was an error in the transcription” of the jury poll. We asked the parties to file supplemental briefs suggesting what action, if any, this court should take in response to Moore’s filings. We also held oral argument on the matter.

¶2 The state contends that, in light of the modified transcript, “this Court should vacate its opinion and issue a memorandum decision finding that [Diaz] has not borne his burden of proving only eleven jurors convicted him.” Diaz asserts we should ignore Moore’s filings and decline the state’s request to reconsider our decision, because any attempt to amend the record after we have issued our opinion is untimely. We agree with Diaz.

¶3 In *Crouch v. Truman*, 84 Ariz. 360, 328 P.2d 614 (1958), our supreme court addressed a similar issue that had arisen in a civil matter. There, the appellee “had full knowledge” from the appellant’s opening brief on appeal that the appellant had relied on an apparent deficiency in the trial record to support his request for appellate relief. *Id.* at 363, 328 P.2d at 616. The appellee had made “no effort . . . to have the record then corrected.” *Id.* After the court had rendered its opinion in favor of the appellant, however, the appellee

attempted to supplement the record pursuant to former Rule 75(h), Ariz. R. Civ. P., to show no error had occurred and requested that the court reconsider its decision.¹ *Crouch*, 84 Ariz. at 363, 328 P.2d at 616.

¶4 The supreme court noted that, although Rule 75(h) was intended to provide a method for presenting [an appellate] court a true record as a basis for its decision on appeal[,] [i]t was not intended that parties with knowledge of a possibly incorrect record could sit by and allow a decision to be made and mandate to go down and thereafter attempt to correct [the] record.

Id. at 363, 328 P.2d at 616. Rather, the court concluded, “such proceedings [must] be taken prior to the time of decision on appeal.” *Id.* The court then declined to amend the record or reconsider its decision. *Id.*

¶5 Our courts have since applied *Crouch*’s reasoning in criminal cases as well. In *State v. Esquer*, 26 Ariz. App. 572, 573, 550 P.2d 240, 241 (1976), *rejected on other grounds by State v. Lopez*, 27 Ariz. App. 626, 557 P.2d 558 (1976), Division One of this court reversed the defendant’s conviction based on his guilty plea because the transcript of the plea hearing showed the trial court, inter alia, had failed to advise the defendant of his constitutional rights. After the reversal, the state moved to correct the transcript of the plea hearing pursuant to Rule 31.8(h), Ariz. R. Crim. P., and moved for rehearing, arguing the

¹Rule 75(h), Ariz. R. Civ. P., has since been transferred in substantial part to Rule 11(e), Ariz. R. Civ. App. P., which permits parties to an appeal in a civil matter to stipulate or move to correct or modify the appellate record “to conform to the truth.” *See* Ariz. R. Civ. App. P. 11(e) cmt.

corrected transcript showed the plea hearing had, in fact, been conducted properly. *Esquer*, 26 Ariz. App. at 573, 550 P.2d at 241.

¶6 The court in *Esquer* observed, “When a question arises as to the correctness of a record after it has been certified to the Court of Appeals, an appropriate correction is proper, provided that a timely motion is made.” *Id.*; *see* Ariz. R. Crim. P. 31.8(h). Because Rule 31.8(h) “incorporates the [same] principle” as Rule 75(h), Ariz. R. Civ. P., the court found *Crouch*’s reasoning instructive. *Esquer*, 26 Ariz. App. at 573-74, 550 P.2d at 241-42. Relying on *Crouch*, the court concluded that, after an appellate court has rendered its decision, it “should not entertain a further proceeding in order to permit a party to do what he should have done in the first place.” *Esquer*, 26 Ariz. App. at 574, 550 P.2d at 242. The court then denied the state’s motions, emphasizing that the state had been “fully aware that the now-disputed portions of the transcript were the grounds urged for reversal by appellant in his opening brief” and had “had full opportunity to develop its case on appeal prior to the time the case was decided, but did not do so.” *Id.* Faced with a similar situation one year later in *State v. Davis*, 117 Ariz. 5, 8, 570 P.2d 776, 779 (App. 1977), this court likewise concluded that “a motion to correct the record[, pursuant to Rule 31.8(h),] after issuance of the appellate court’s opinion . . . [is] untimely.”

¶7 As it did in *Esquer*, “the State is now challenging the very portions of the record [that Diaz] urged as grounds for [his] appeal, upon which the Court relied in its decision, and which the State had ample opportunity to challenge prior to this Court’s decision.” 26 Ariz. App. at 574, 550 P.2d at 242. Here, the original trial transcript had been

filed over a year before we issued our opinion. Diaz had filed his opening brief, in which he relied heavily on that transcript as a ground for seeking appellate relief, approximately six months before we rendered our decision. Despite arguing in its answering brief that the transcript was incorrect, the state appears to have made no attempt to investigate its suspicion or do anything to correct the transcript until after we issued our opinion in Diaz’s favor. And, although the state’s subsequent inquiry prompted Moore’s filings and the state in its supplemental brief argued we should reconsider our opinion based on the “corrected record,” the state did not move to amend the record on appeal until May 20, 2009, the day after the oral argument in this court on the supplemental briefs. *See* Ariz. R. Crim. P. 31.8(h). Our case law is clear that such a motion is untimely and that we will not amend the record on appeal after our opinion has been issued.² *See Davis*, 117 Ariz. at 8, 570 P.2d at 779; *Esquer*, 26 Ariz. App. at 574, 550 P.2d at 242; *see also Crouch*, 84 Ariz. at 363, 328 P.2d at 616.

¶8 At oral argument, the state insisted that article VI, § 27 of the Arizona Constitution precludes us from following *Davis*, *Esquer*, and *Crouch*. Pursuant to § 27, “[n]o cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.” The state at oral argument neither explained how that section applies to the issue before us nor cited any authority supporting its argument. In its supplemental brief, however, the state suggested that the “corrected

²We acknowledge that Rule 31.8(h) allows this court to modify the appellate record on “[our] own initiative.” However, because Arizona courts have concluded in similar situations that it is improper to modify the record after an appeal has been decided, we may not do so here. *See Davis*, 117 Ariz. at 8, 570 P.2d at 779; *Esquer*, 26 Ariz. App. at 574, 550 P.2d at 242.

record” showed “a mere transcription error” had occurred and that article VI, § 27 precluded reversal of Diaz’s convictions for such an error. But that argument presupposes that the record on appeal may be corrected based on the court reporter’s filings. As we have already explained, our case law does not allow us to amend the record at this juncture.

¶9 Insofar as the state intended to assert at oral argument that article VI, § 27 requires us to overlook the state’s failure to file a timely motion to correct the appellate record, that argument was raised for the first time at oral argument. Generally, arguments first raised at oral argument are waived. *See State v. Edmisten*, 552 Ariz. Adv. Rep. 3, ¶ 19 (Ct. App. Mar. 23, 2009). In any event, the argument is unavailing. Article VI, § 27 relates to an appellate court’s review of errors committed in the trial court and espouses the principle that, even if error occurred, we will not reverse if that error otherwise is harmless. *See State v. Randall*, 8 Ariz. App. 72, 74, 443 P.2d 434, 436 (1968); *State v. Stotts*, 8 Ariz. App. 340, 342, 446 P.2d 244, 246 (1968). Neither article VI, § 27 nor the cases interpreting it suggest that we must overlook a party’s failure to comply with the rules governing appellate procedure.

¶10 We share our dissenting colleague’s discomfort with resting our decision on what now appears to be a faulty record. But, in that respect, our situation is no different than that faced by the courts in *Davis*, *Esquer*, and *Crouch*. As that jurisprudence commands, we cannot consider additions to the factual record, offered after we have rendered our decision, without undermining the most basic procedural requirements necessary for our appellate courts to function properly. The state argues this conclusion “elevates form over substance.”

To the extent we are required to choose procedural regularity (form) over factual accuracy (substance), that is a dilemma the state has forced upon us. And, although the state may complain that our insistence on procedural regularity comes at too great a cost, the state incurred that cost by ignoring its opportunity to ensure this matter would be decided on an accurate appellate record. Nor is our adherence to the rules of procedure, to the detriment of a party in a criminal matter, extraordinary or unfair. Indeed, our courts often dismiss a defendant's appeal or disregard an appellate argument for a defendant's failure to comply strictly with procedural rules, regardless of how compelling the substance of his appeal or argument may be. *See, e.g., State v. Lopez*, 217 Ariz. 433, n.5, 175 P.3d 682, 687 n.5 (App. 2008) (declining to address defendant's argument that did not comply with Rule 31.13(c)(1)(vi), Ariz. R. Crim. P.); *State v. Littleton*, 146 Ariz. 531, 533, 707 P.2d 329, 331 (App. 1985) (dismissing defendant's appeal of reckless endangerment conviction when notice of appeal inadvertently untimely filed); *see also State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.3d 1177, 1178 (App. 2006) (when defendant fails to challenge indictment before trial, appellate "claims of error concerning a defect in the charging document might not be subject to review of any kind").

¶11 We are aware, moreover, that the state's counsel has previously, in at least one case before this court, timely investigated suspected errors in the appellate record and moved to correct it when necessary. We are troubled by the state's lack of diligence in doing so here. Additionally, in its supplemental brief, the state neither offered an excuse for its lack of diligence nor addressed in any way the apparently controlling precedent Diaz cited in his

supplemental brief in support of his position that we may not correct the record after we have issued our opinion. Rather, the state suggested our reversal of Diaz’s convictions was an “absurdity.” When asked at oral argument why the state had failed to move to amend the record either before our April 7 opinion issued or by the date of the May 19 argument, counsel for the state merely replied that it had not moved to amend the record before our decision issued because it “did[not] anticipate the opinion saying what it said” and had not since so moved because “it seem[ed] like a rather futile thing to [do].” We assume this latter comment was prompted by language in the draft decision similar to that contained in ¶¶ 3-7 of this supplemental opinion.³ But we are puzzled and frankly disappointed by the state’s refusal to acknowledge its role in creating the unfortunate dilemma it has forced upon us.

¶12 Only after oral argument did the state move to amend the record, citing only Rule 31.8(h) and presenting no explanation or argument. Because any attempt to amend the record at this juncture is untimely, we decline the state’s invitation to reconsider our opinion based on Moore’s filings.

¶13 In addition to their supplemental briefs regarding the court reporter’s filings, both parties have filed motions to reconsider our previous opinion. The state contends that, rather than reversing Diaz’s convictions, we should remand the issue to the trial court and

³It is the practice in this division, when possible and appropriate in cases in which oral argument has been granted, to have one member of the assigned panel prepare a draft decision on the merits. The draft is provided to counsel in advance of the argument in the hope that it will help focus the parties’ arguments. The draft clearly discloses that it is the work product of only one panel member and is subject to being “changed entirely” after argument.

“instruct[] [it] to hold a hearing to determine if [Diaz]’s right to a 12-person jury had been violated.” Diaz, in turn, asks us to reconsider our conclusion that he may not appeal the denial of his motion for judgment of acquittal made before a mistrial was declared. Alternatively, he urges us to depublish that portion of our opinion. We deny both motions, as well as the state’s motion to supplement the record on appeal.

¶14 For the foregoing reasons, we reaffirm our reversal of Diaz’s convictions and sentences, deny both parties’ motions for reconsideration, and deny the state’s motion to supplement the record on appeal.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

Howard, Judge, specially concurring in part and dissenting in part.

¶15 I concur with the majority that the state waited too long to present this court with a complete factual record. *See State v. Esquer*, 26 Ariz. App. 572, 573-74, 550 P.2d 240, 241-42 (1976), *rejected on other grounds by State v. Lopez*, 27 Ariz. App. 626, 557 P.2d 558 (1976). But we now have conclusive proof that the legal principle on which the original opinion in this matter is based is erroneous and should be reconsidered. *See In re Dean*, 212

Ariz. 221, ¶ 1, 129 P.3d 943, 943 (2006) (court must sometimes “confront the consequences of our fallibility”).

¶16 “An inference is a fact which may be presumed from the proof of the existence or non-existence of other facts. It is a conclusion from a proven fact o[r] facts.” *Martin v. Schroeder*, 209 Ariz. 531, ¶ 15, 105 P.3d 577, 581 (App. 2005), quoting *Buzard v. Griffin*, 89 Ariz. 42, 48, 358 P.2d 155, 159 (1960). The failure to poll one of the jurors, or an error in the transcription of the polling, may be some evidence of how many jurors deliberated. But that evidence—with or without the transcript—will not support an inference that an insufficient number of jurors deliberated in the face of other evidence in the record that the correct number of jurors did deliberate. And, without that inference, Diaz has failed to satisfy his burden to show that fundamental error occurred at his trial. See *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Therefore, the original opinion should be vacated, and I respectfully dissent.

JOSEPH W. HOWARD, Judge