DIVISION ONE
FILED: 8/22/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | 1 CA-CR 12-0442 |
| | ) | |
| Appellee, | ) | DEPARTMENT A |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | |
| CARLOS GONZALES, | ) | (Not for Publication – |
| | ) | Rule 111, Rules of the |
| Appellant. | ) | Arizona Supreme Court) |
| | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-151248-001

The Honorable Robert E. Miles, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Section Chief Counsel
Attorneys for Appellee

Bruce F. Peterson, Legal Advocate — Phoenix
By Consuelo M. Ohanesian, Deputy Legal Advocate
Attorneys for Appellant

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G E M M I L L, Judge

**¶1** Carlos Gonzales appeals his convictions and sentences for first degree felony murder, theft, kidnapping, and first degree burglary. He argues the trial court erred in denying his

motions to sever and post-verdict motion for new trial. We affirm.

## BACKGROUND

**¶2** "We view the facts in the light most favorable to sustaining the convictions." *State v. Musgrove*, 223 Ariz. 164, 166, ¶ 2, 221 P.3d 43, 45 (App. 2009).

**¶3** Gonzales and Dylan Noack (collectively, "Defendants") were tried jointly as accomplices on charges of first degree felony murder, armed robbery, kidnapping, and burglary in the first degree, all dangerous offenses. The charges stemmed from an incident at A.G.'s apartment where L.O., A.G.'s roommate, was selling marijuana to Defendants and their mutual friend, Sylvia. Before the transaction was completed, Noack said, "You guys are getting robbed[,]" and Defendants shot L.O. multiple times killing him. Gonzales had forced A.G., who was present in the apartment but not involved in the marijuana sale, to the floor at gunpoint and ordered him to face the wall. Defendants fled, taking the marijuana and money they had brought with them to purchase the drugs.

**¶4** Gonzales testified at trial and admitted to shooting L.O., but explained he did so out of self-defense after seeing L.O. pull out a gun and begin firing. Gonzales denied restraining or threatening A.G., and he stated there was no plan to commit any crime at the apartment aside from purchasing

marijuana. Gonzales further testified that he did not "take any money" or marijuana.

**¶5** The jury found Defendants guilty of first degree murder, kidnapping, and first degree burglary. The jury returned not-guilty verdicts for the armed robbery charges, but found Defendants guilty of the lesser-included offense of theft. Gonzales subsequently moved for a new trial pursuant to Arizona Rule of Criminal Procedure 24.1(c)(1). The court denied the motion.

**¶6** For the murder conviction, the trial court sentenced Gonzales to life imprisonment without the possibility of release for twenty-five years. The court imposed presumptive prison terms for the remaining convictions and ordered all sentences run concurrently. Gonzales appealed,[1] and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, -4033(A).

## DISCUSSION

### *I. Motion for New Trial*

**¶7** Gonzales argues the trial court erred in denying his new trial motion because the weight of the evidence does not support the verdicts. We review this denial of the motion for new trial for an abuse of discretion. *State v. Landrigan*, 176

[1] This court affirmed Noack's convictions in *State v. Noack*, 1 CA-CR 12-0315, 2013 WL 485266 (Ariz. App. Feb. 7, 2013).

Ariz. 1, 4, 859 P.2d 111, 114 (1993); *State v. Neal*, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984). Generally, we will find that the superior court abused its discretion only when "the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004). Rule 24.1(c)(1), Rules of Criminal Procedure, provides that the court may grant a new trial if "the verdict is contrary to law or to the weight of the evidence."

A. The Armed Robbery Charge: Felony Murder

**¶8** In relevant part, Arizona's felony murder statute states:

> A person commits first degree murder if . . . [a]cting alone or with one or more other persons commits *or attempts to commit* . . . *kidnapping* under § 13–1304, *burglary* under § 13–1506, 13–1507, or 13–1508 . . . *robbery* under § 13–1902, 13–1903, or 13–1904 . . . and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

A.R.S. § 13–1105(A)(2) (West 2013)[2] (emphasis added).

**¶9** As mentioned, the jury found Gonzales not guilty of the charged offense of armed robbery but instead found him guilty of the lesser-included offense of theft. Gonzales thus

[2] We cite the current versions of applicable statutes when no revisions material to this decision have occurred since the events in question.

argues, without citation of authority, that the armed robbery charge cannot serve as the predicate offense for his felony murder conviction. He does not assert, however, the evidence was insufficient for the jury to reasonably conclude that, although Defendants may not have committed the completed crime of armed robbery, they *attempted* to do so.

**¶10** An attempt to commit an enumerated offense, including robbery, is sufficient under § 13–1105(A)(2) to establish the requisite predicate offense for securing a felony murder conviction. *State v. Lacy*, 187 Ariz. 340, 350, 929 P.2d 1288, 1298 (1996) ("A.R.S. § 13–1105 does not require that the defendant be charged and convicted of the underlying felony. The jury must simply find that the defendant committed or attempted to commit it."); *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995) ("The state need only prove that defendant, either as a principal or as an accomplice, committed or attempted to commit robbery and that someone was killed in the course of and in furtherance of the robbery."). Consequently, on this record and based on the arguments presented, we conclude that the trial court did not abuse its discretion in denying the motion for new trial on the felony murder conviction that was predicated upon the armed robbery offense.[3]

[3] Gonzales's felony murder conviction is also properly based on the predicate offenses of kidnapping and burglary.

B. Kidnapping

**¶11** To convict Gonzales of kidnapping as charged in this case, the State was required to prove he knowingly restrained A.G. with the intent to "[i]nflict death, physical injury or a sexual offense on [A.G.], or to otherwise aid in the commission of a felony." A.R.S. § 13-1304(A)(3) (West 2013).

> "Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by . . . [p]hysical force, intimidation or deception[.]

A.R.S. § 13-1301(2)(a) (West 2013).

**¶12** As Gonzales concedes, the trial evidence supporting the kidnapping conviction is "contradictory." On the one hand, A.G. testified that, in the midst of the drug transaction, the white male (Noack) began punching L.O. and said, "You guys are getting robbed" while the other assailant, later identified as Gonzales,

> pointed [his firearm] right towards me . . . [and] told me, as he was walking me to the wall and to the floor, not to move, not to say -- to stay quiet and not to move at all and turn my head, to keep on staring towards the floor and the wall . . . . I was placed at gunpoint and asked to slowly go down to the ground. Keep my face and eyes faced towards the floor and the wall. [After getting on the floor,] I felt the gun roughly flush against the back of my head.

**¶13** Gonzales, on the other hand, testified that he did not point a gun at A.G., threaten him, or direct him to the wall, nor did he even recall A.G.'s location in the apartment during the incident. Gonzales also asserts that Sylvia's testimony and the physical evidence at the crime scene support his version of events.

**¶14** The jury presumably found A.G.'s testimony more credible than Gonzales's and afforded it sufficient weight to conclude that Gonzales was guilty of kidnapping. *See State v. Bronson*, 204 Ariz. 321, 328, ¶ 34, 63 P.3d 1058, 1065 (App. 2003) (reiterating that a jury is free to give credit to or discredit witness testimony, and the appellate court should not guess what the jury relied on to reach its decision (citation omitted)). A.G.'s testimony clearly supports the kidnapping conviction, notwithstanding Gonzales's testimony and whatever exculpatory inferences one might draw from Sylvia's testimony and the physical evidence.[4] The trial court had the same

[4] Despite Gonzales's argument to the contrary, the physical evidence and Sylvia's testimony do not necessarily contradict A.G.'s testimony regarding the kidnapping. For example, Gonzales stresses the location of his spent shell casings found near the front door -- not in the area where A.G. testified Gonzales restrained him -- as evidence refuting the kidnapping charge. The location of the casings, however, is consistent with A.G.'s testimony that he did not hear gunshots until after Gonzales "had already token [sic] steps away from me." Further, Sylvia merely testified that she did not observe the kidnapping although she was in the apartment at the time of the incident. Even if the jury believed Sylvia's testimony, which it was not

opportunity as the jury to observe the witnesses as they testified, and the court by its denial of Gonzales's motion for new trial has rejected Gonzales's argument that his conviction was contrary to the weight of the evidence. Such a ruling was well within the court's discretion regarding the kidnapping count.

C. First Degree Burglary

**¶15** First degree burglary requires that a person or an accomplice commit either second or third degree burglary while possessing explosives, a deadly weapon, or a dangerous instrument. A.R.S. § 13-1508(A) (West 2013). Second degree burglary occurs when a person enters or remains unlawfully in a residential structure "with the intent to commit any theft or any felony." A.R.S. § 13-1507(A) (West 2013). In this case, the jury found Gonzales guilty of first degree burglary because he possessed a weapon while burglarizing a residence.

**¶16** Gonzales argues the evidence does not support his burglary conviction because nothing adduced at trial demonstrates Defendants planned "what was to happen in the

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obligated to do, her failure to observe the kidnapping can be explained by her testimony that she did not "stop and try to figure out what was going on . . . [because she was] [t]rying to get out of there as fast as [she] could." *See State v. Bass*, 198 Ariz. 571, 582, ¶ 46, 12 P.3d 796, 807 (2000) ("Because a jury is free to credit or discredit testimony, we cannot guess what they believed, nor can we determine what a reasonable jury should have believed.").

apartment, except a drug purchase." Gonzales further asserts no evidence shows he entered the apartment unlawfully.

**¶17** Gonzales misconstrues the intent element of the burglary charge. The State was not required to prove Defendants had previously planned to rob L.O. of the marijuana and entered the apartment without the victims' consent; rather, evidence that Defendants *remained* in the apartment with the intent to commit the robbery is sufficient. *See State v. Altamirano*, 166 Ariz. 432, 435, 803 P.2d 425, 428 (App. 1990) (in context of the elements of a burglary charge, noting: "It is clear that although a person enters another's premises lawfully and with consent, his presence can become unauthorized, unlicensed, or unprivileged if he remains there with the intent to commit a felony."). Here, the trial evidence overwhelmingly shows Defendants intended to rob L.O. at least as early as when Noack stated, "You guys are getting robbed." Defendants thereafter remained in the apartment, kidnapped A.G., and shot and killed L.O. before stealing the marijuana.[5] The trial court did not

[5] Gonzales summarily argues the trial evidence does not support the theft conviction because the drug transaction was "concluded" before Defendants fled the apartment. The evidence shows, however, that the police did not locate the purchase money at the apartment during their investigation. Considering this evidence in conjunction with the kidnapping, the killing of L.O., and especially Noack's statement to the victims regarding the robbery, the jury could reasonably conclude Defendants did not leave the purchase money at the apartment as payment for the marijuana.

abuse its discretion in denying Gonzales a new trial on the first degree burglary charge.

*II. Motion to Sever*

**¶18** Before trial, Gonzales moved to sever his and Noack's trial arguing Noack had made admissions and other statements during police interviews and recorded jail phone calls that would prejudice Gonzales and result in an unfair trial. In response, the State asserted it would not introduce evidence of those statements. The court denied the motion. At trial, Gonzales renewed his severance motion after Noack's counsel cross-examined A.G. and presented his account to police that both Defendants, while committing the alleged offenses, were yelling "You guys are getting robbed," which contradicted A.G.'s trial testimony on direct that Noack alone made the statement. The court again denied the motion. Gonzales contends the court's denial of his severance motions is reversible error. We disagree.

**¶19** Arizona Rule of Criminal Procedure 13.4(a) requires a court to sever the trials of joint defendants on motion of a party if "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." "[I]n the interest of judicial economy, joint trials are the rule rather than the exception." *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). Generally, if co-defendants present defenses

that are sufficiently antagonistic to be "mutually exclusive," severance will be required. *See State v. Kinkade,* 140 Ariz. 91, 93–94, 680 P.2d 801, 803–04 (1984). We review a trial court's decision denying a severance motion for an abuse of discretion. *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). To succeed in challenging a trial court's denial of a motion to sever, "a defendant must demonstrate compelling prejudice against which the trial court was unable to protect." *Id.*

**¶20** No abuse of discretion occurred regarding the court's denial of Gonzales's pre-trial motion to sever. The State avowed it would not introduce at trial evidence of Noack's statements that formed the basis for Gonzales's motion. Gonzales does not point to anything in the record indicating the State subsequently violated or acted contrary to its avowal.

**¶21** Also, the court acted within its discretion in denying Gonzales's motion to sever based on A.G.'s testimony on cross-examination. Read in context, this testimony was elicited for impeachment purposes as evidence of a prior inconsistent statement. Noack's counsel never referred to those prior statements as evidence of a defense that was antagonistic to Gonzales, and in any event, whether only Noack or both Defendants said "You are getting robbed" is not an issue that rises to the level of antagonism necessary to order severance. *See Cruz,* 137 Ariz. at 545, 672 P.2d at 474 (holding defenses

are mutually exclusive if "in order to believe the core of the evidence offered on behalf of one defendant, [the jury] must disbelieve the core of the evidence offered on behalf of the co-defendant."); *cf. Kinkade,* 140 Ariz. at 94, 680 P.2d at 804 (where co-defendants presented testimony that each other was the gunman, "the trial is more of a contest between the defendants rather than between the defendants and the prosecution," and separate trials are required). Further, contrary to Gonzales's argument, he and Noack did not otherwise present antagonistic defenses at trial.[6] Indeed, the record reflects Noack and Gonzales presented consistent defenses, and each argued the other was not guilty.

**¶22** Finally, the following instruction from the court to the jury should have minimized whatever prejudice the joint trial had on Gonzales's defense:

> There are two defendants. You must consider the evidence in the case as a whole. However, you must consider the charges against each defendant separately. Each defendant is entitled to have the jury determine the verdict as to each of the crimes charged based upon that defendant's own conduct and from the evidence which

[6] Noack argued the drug deal "just went tragically awry" and the Defendants shot L.O. "to protect their lives." Similarly, Gonzales argued he shot L.O. out of self-defense when either Noack or L.O. fired the first shot because they "got twitchy, . . . got nervous." Gonzales denied committing the kidnapping and robbery/theft, and argued the dispositive issue was A.G.'s credibility, which Noack extensively impeached during cross-examination.

> applies to that defendant, as if that defendant were being tried alone.

Our supreme court has held that juries are presumed to follow the instructions given them, in the absence of indication to the contrary. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 69, 132 P.3d 833, 847 (2006); *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994); *State v. Herrera,* 174 Ariz. 387, 395, 850 P.2d 100, 108 (1993).

**¶23** Additionally, on this record Gonzales has not established that the trial court's denial of his motion to sever resulted in compelling prejudice. For these reasons, no reversible error occurred.

**CONCLUSION**

**¶24** The trial court did not abuse its discretion in denying Gonzales's motions for severance and motion for new trial. The convictions and sentences are affirmed.

/s/
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JOHN C. GEMMILL, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
KENT E. CATTANI, Judge