DIVISION ONE
FILED: 01/21/2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0715
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOHN BALLA PIERCE,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-013269-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and William S. Simon, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 John Balla Pierce challenges his convictions and sentences for first-degree murder, attempted armed robbery,

burglary in the first degree, conspiracy to commit armed robbery, and aggravated assault. He contends that the trial court should have struck the entire jury panel during *voir dire*. He also argues he should have been tried separately from his three codefendants. Finally, he contends that his natural life sentence for the first-degree murder conviction is unconstitutional because he was sixteen years old at the time of the offense.[1] For the reasons stated below, we affirm.

FACTS[2]

¶2 D.S.[3] was contacted by Michael Carey on December 21, 2006, to give him a ride to "pick up money." D.S. and her friend, C.C., first picked up Sarah Duran from school, then went to Angel "Moyo" Smiley's apartment complex. The girls left the complex but returned, and Pierce, Carey, and Smiley got into the car. Pierce told D.S. that he was going to be giving them "directions." When she saw Carey placing a "big, black, long case" into the trunk of the car, she asked him what it was and he told her it was a guitar or violin case that he "needed to drop . . . off to pick up the money."

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[1] We address the challenge to the natural life sentence in an opinion pursuant to Arizona Rule of Civil Appellate Procedure 28(g).

[2] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Pierce. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

[3] We refer to the witnesses by their initials.

¶3 D.S. was directed to a different apartment complex where the boys talked with another friend. She was then directed to drive to an area near the victim's house. Once the car was parked near some mailboxes, Carey asked Duran if she would "go up to the door and do [him] a favor." She agreed. She, along with Pierce, Carey, and Smiley got out of the car. Carey told D.S. to "pop the trunk," went to it, pulled out the case and closed the trunk. He had a bandana over his face. The four then walked around the corner towards the house.

¶4 The victim was inside his house with his teenage son, his teenage daughter and her eight-month-old child. Because his daughter was expecting some friends to come by, the victim opened the door when Duran rang the doorbell. She then moved out of the way and the victim's daughter saw "the kid with the shotgun pop[] around the corner." The daughter described "the kid with the shotgun" as a black male with a purple bandana covering his face.

¶5 The victim's daughter saw her father grab for the shotgun as she ran down the hallway to find her brother. She heard more than one gunshot as she fled down the hall. After she woke her brother up, he quickly found his gun, and pulled his sister out of the hallway after a shot was fired at her. Looking through her screaming daughter's window, she saw three people running away from the house. Once D.S. heard gunshots,

she started driving away. C.C. asked her to stop as she saw Duran running to the car. Duran then told D.S. to stop as Pierce, Smiley, and Carey were running towards the car with their bandanas still covering their faces. Carey banged on the trunk, D.S. opened it, and threw in the shotgun. D.S. drove away quickly because the victim's son was shooting at the car.

¶6 The victim had been shot in the face and back. He died in his home. Police found evidence that two handguns and a shotgun were fired. After being informed of his juvenile *Miranda*[4] rights, Pierce agreed to be interviewed and stated the plan was to take guns, money and "weed" from the victim's house. He explained his job was to get in the house to "go grab the s**t," and he tried to gain access to the house to "do what I needed to do," which included shooting someone if necessary "[for] my safety." He said "the dude f****d up" by grabbing Carey's shotgun. He further explained he had been shown the victim's house three days before the incident, and he was told which rooms to search.

¶7 After a trial with codefendants Smiley, Carey, and Duran, the jury convicted Pierce of first-degree murder, attempted armed robbery, burglary in the first degree, conspiracy to commit armed robbery, and aggravated assault against the victim's daughter. The jury also found that each

[4] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

count was a dangerous offense. Pierce was acquitted of any aggravated assault against the victim's son.

¶8 Before the jury was released, Pierce stipulated to the aggravating factor of emotional and financial harm to the victim's family. After the appropriate colloquy, the court found that he knowingly, intelligently and voluntarily entered into the stipulation. He was subsequently sentenced to natural life in prison for murder, an aggravated term of ten years for attempted armed robbery, and aggravated terms of fifteen years each for first-degree burglary, conspiracy to commit armed robbery, and aggravated assault. The sentences for attempted armed robbery, first-degree burglary and conspiracy to commit armed robbery were concurrent with each other but consecutive to the fifteen-year sentence for aggravated assault; and all of these sentences were ordered consecutive to the sentence of natural life. Pierce filed an appeal, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001) and -4033 (Supp. 2008).

DISCUSSION

I. Jury Selection

¶9 Pierce argues that the trial court erred when it denied his motion to strike the jury panel. He contends that comments made by potential jurors #73, #79 and #80 during *voir*

dire improperly influenced others on the panel and resulted in a jury that was not fair or impartial. The comments the three potential jurors made reflected improper preconceptions of the defendants' guilt based on race or other factors.[5] We review a trial court's ruling on a motion to strike the jury panel for abuse of discretion. *State v. Glassel*, 211 Ariz. 33, 45, ¶ 36, 116 P.3d 1193, 1205 (2005).

¶10 Although a criminal defendant has a constitutional right to be tried by a fair and impartial jury, he is not entitled to be tried by any particular jury. *State v. Greenawalt*, 128 Ariz. 150, 167, 624 P.2d 828, 845 (1981). The party who challenges a jury panel has the burden of showing that the jurors could not be fair and impartial. *State v. Reasoner*, 154 Ariz. 377, 383-84, 742 P.2d 1363, 1369-70 (App. 1987). To warrant reversal, we will not assume remarks made during *voir dire* tainted the panel; rather, the record must affirmatively show that a fair and impartial jury was not secured. *Id.*; *Greenawalt*, 128 Ariz. at 167, 624 P.2d at 845.

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[5] For example, either juror #73 or #79 made a comment that "95 percent of the people that are in court are black or Hispanic." Number 80 appeared to agree with the comment, and he informed #41 that he was a bigot. Number 80 also made inappropriate comments to #34 regarding the defendants' implicit guilt because charges were brought against them. However, #80 also said the fact that the State was not pursuing the death penalty means the case against defendants must not be "very good."

¶11 Pierce has not satisfied his burden to prove the jury was not fair and impartial. The record indicates that potential jurors #73, #79 and #80 were excused for cause. The trial court then questioned the entire panel about whether anyone heard the comments. Those who responded affirmatively were further questioned as to whether the comments would impact their ability to remain fair and impartial. Two of the panel members – #27[6] and #34 – whom Pierce claims heard the improper statements, were excused for cause. The only other venire person Pierce challenged was #41; but that juror informed the court and the parties he could remain fair and impartial despite the fact that juror #80 admitted he was a bigot. *See Ross v. Oklahoma*, 487 U.S. 81, 86 (1988) ("Any claim that the jury was not impartial, therefore, must focus not on [a dismissed juror], but on the jurors who ultimately sat."); *see also State v. Clabourne*, 142 Ariz. 335, 344, 690 P.2d 54, 63 (1984) ("The trial judge may use the voir dire to convince a juror of [the] responsibility [to set aside opinions and weigh the evidence lawfully], thereby rehabilitating an initially suspect venireman.").

¶12 Pierce, nonetheless, claims that "[t]he jury that ultimately sat in this case was comprised of the same individuals that very possibly could have been influenced by

[6] Number 27 indicated he could not remain fair or impartial in light of hearing the racist comments.

[the improper comments]." His speculation, however, is insufficient to satisfy his burden to affirmatively show the jury was not fair or impartial.[7] *See State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981) ("Unless there are objective indications of jurors' prejudice, we will not presume its existence."), *cert. denied*, 459 U.S. 882 (1982); *see also Reasoner*, 154 Ariz. at 383-84, 742 P.2d at 1369-70; *Greenawalt*, 128 Ariz. at 167, 624 P.2d at 845. Accordingly, we conclude that the trial court handled the matter professionally and did not abuse its discretion in denying Pierce's motion to strike the jury panel. *See, e.g.*, *State v. Davis*, 137 Ariz. 551, 558, 672 P.2d 480, 487 (App. 1983) (finding defendant failed to meet his burden of showing the jury panel was prejudiced by potential jurors' remarks when record demonstrated trial court questioned

[7] Pierce's reliance on *State v. Miller*, 178 Ariz. 555, 875 P.2d 788 (1994), is misplaced. There, an alternate juror left a note on the car of a deliberating juror to the effect that he believed the defendant was guilty. 178 Ariz. at 557, 875 P.2d at 790. Under such circumstances, the Arizona Supreme Court reasoned prejudice is presumed and remanded for an evidentiary hearing for the trial court to determine whether the note actually prejudiced the jury. *Id*. at 558-60, 875 P.2d at 791-94 (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)). Here, there were no inappropriate comments made to a juror during deliberations. Rather, some potential jurors made improper comments that were overheard by other panel members, and, when confronted with such a situation, the trial judge engaged in a proper examination of the panel to further the purpose of *voir dire*; that is, to preliminarily determine the suitability of prospective jurors to actually serve on the jury. *See* Black's Law Dictionary 1605 (8th ed. 2004). Thus, the presumption of prejudice found applicable in *Miller* does not apply here.

entire panel regarding the comments' impact and excused the only person who stated remarks would be prejudicial).

II. Joint Trial

¶13 Pierce next claims the trial was unfair because he was tried jointly with Smiley, Carey, and Duran. He argues his defense was antagonistic to his codefendants' defenses and the court should have granted his motion to sever, even though it was initially filed on the first day of trial[8] and subsequently renewed unsuccessfully during trial.

¶14 We review a trial court's denial of severance for an abuse of discretion. *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). Arizona Rule of Criminal Procedure 13.4(a) "requires a court to sever the trials of defendants on motion of a party if 'necessary to promote a fair determination of the guilt or innocence of any defendant of any offense.'" *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995) (quoting Ariz. R. Crim. P. 13.4(a)). However, in 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). To succeed in challenging a denial of severance, Defendant "must demonstrate compelling prejudice against which

[8] Because Pierce's severance motion was untimely, the State argues Pierce has waived this issue. *See* Ariz. R. Crim. P. 13.4(c) (severance motions must be made at least 20 days before trial). In the exercise of our discretion, however, we address the merits.

the trial court was unable to protect." *Id.* (quoting *Cruz*, 137 Ariz. at 544, 672 P.2d at 473). Prejudice occurs when codefendants present antagonistic "mutually exclusive" defenses. *Murray*, 184 Ariz. at 25, 906 P.2d at 558. "Mutually exclusive" defenses justifying severance are those that "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." *Cruz*, 137 Ariz. at 545, 672 P.2d at 474.

¶15 Pierce does not argue his defense was mutually exclusive of his codefendants' defenses. Rather, he merely contends he was "put at a disadvantage" because: (1) some unspecified "exculpatory statements" were redacted from his recorded confession; (2) Smiley's counsel elicited testimony that Pierce brought the long, black case from Carey's apartment to D.S.'s car and Pierce did not appear to be under the influence of cocaine; and (3) Pierce's counsel was limited in his cross-examination of trial witnesses on matters that may have tended to implicate the other defendants.

¶16 His arguments are insufficient to demonstrate prejudice to the extent that a new trial is warranted. "It appears well settled that the mere presence of hostility between co-defendants, or the desire of each co-defendant to avoid conviction by placing the blame on the other does not require

severance." *Cruz*, 137 Ariz. at 544, 672 P.2d at 473 (citing federal circuit court decisions).

> [T]he ultimate question is whether under all of the circumstances, it is within the capacity of the jurors to follow the court's admonitory instructions and, correspondingly whether they can collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements, and conduct. . . . "Conflicting and antagonistic defenses being offered at trial do not necessarily require granting a severance, even if hostility surfaces or defendants seek to blame one another."

United States v. Lutz, 621 F.2d 940, 945 (9th Cir. 1980) (quoting *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978), *overruled on another grounds by Bourjaily v. United States*, 483 U.S. 171 (1987)).

¶17 Moreover, any prejudice that may have existed was eliminated by the court's instructions to the jury. In *Lutz,* the Ninth Circuit Court of Appeals case cited by the Arizona Supreme Court in *Cruz,* the defendant argued that severance was warranted because his codefendant "sought to shift all of the blame to him." *Lutz,* 621 F.2d at 945. The court held that the jury instructions were "sufficient to avoid any prejudice to the defendants from their joint trial." *Id.* Similarly, in this case, the judge instructed the jury to consider the evidence against each defendant separately:

> There are four 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 applies to that defendant, as if the defendant were being tried alone.

We find that this jury instruction and all the instructions were sufficient to dispel any prejudice resulting from the joint trial.[9] *See Murray*, 184 Ariz. at 25, 906 P.2d at 558 (when properly instructed, jury presumed to have considered evidence against codefendants separately). Accordingly, the trial court did not err in denying the motions to sever.

CONCLUSION

¶18 Based on the foregoing, we affirm Pierce's convictions and sentences.

/s/_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge

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[9] Not only did the final jury instructions include the proper instruction regarding the jury's duty to consider defendants' guilt separately, but the court similarly instructed the jury when the State presented evidence of Pierce's and Smiley's confessions. Furthermore, during closing arguments, the prosecutor and Pierce's counsel asked the jury to treat each defendant separately.