NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0189
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
DEE DEE DIAZ-SANTOS,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-006553-001 DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Dee Dee Diaz-Santos appeals from her conviction of one count of burglary in the third degree. She argues the superior

court abused its discretion when it denied her requests to sever her trial from that of a co-defendant. For the following reasons, we affirm her conviction and resulting sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 M.C. was moving to a new address on West Wayland Avenue with the help of several family members.[1] She left boxes of her belongings on the patio in the backyard of the Wayland Avenue house and went to her old residence to bring more. The backyard was surrounded by a six-foot block wall with two latching gates.

¶3 When M.C. and her family members returned to the Wayland Avenue house with a second load of belongings, M.C. opened the gate to the backyard for her grandson. Her grandson entered the yard, then yelled, "Nana, Nana, there's somebody in your yard." M.C. ran through the gate and saw a man holding a milk crate full of her property and a woman holding some of M.C.'s clothes. The two intruders dropped what they had in their hands and ran through the other gate into the alley behind the house. M.C. followed them into the alley, where the pair split up and ran in different directions. M.C. then saw boxes of her property from the patio stacked in the alley, along with her locking mini-refrigerator.

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[1] We view the facts in the light most favorable to upholding the jury's verdict. *State v. Huffman*, 222 Ariz. 416, 418, ¶ 2, 215 P.3d 390, 392 (App. 2009).

¶4 After following the pair into the alley, M.C. noticed a dog tied to a tree in her yard and a backpack in the alley. She looked inside the backpack and saw papers bearing the name of Rodolfo Dominguez. M.C. remained in the alley with her property while her two daughters and one granddaughter went to the front of the house to look for the intruders. A man walked up to the front of the house and told the women that the dog was his. M.C.'s daughter asked him if he was "Rodolfo," and he answered, "yes." He took the dog and walked away.

¶5 As the man walked down the street, one of M.C.'s daughters followed him while on the phone with the police. She saw the man meet a woman, after which the man and woman put the dog in a shopping cart and continued walking. Another of M.C.'s daughters arrived in a van and the two sisters followed the pair until the police arrived. At trial, M.C. and her two daughters identified the two people they had seen in the backyard and followed in the van as Diaz-Santos and her co-defendant, Rodolfo Dominguez.

¶6 Police officers interviewed Diaz-Santos and Dominguez. Diaz-Santos admitted to an officer that she entered the backyard of the Wayland Avenue house, but said she did so "to get her dog," which she claimed had run into the yard. During a search of Dominguez incident to his arrest, an officer found in his

pocket the key to the refrigerator M.C. said had been moved from her patio to the alley.

¶7 Diaz-Santos was charged with one count of third degree burglary. Before trial, she filed a motion to sever her trial from that of Dominguez, which the superior court denied. Diaz-Santos re-urged the motion to sever immediately following jury selection and the court again denied it. At the close of the State's case-in-chief, she made an offer of proof of the evidence she would have introduced had the trial been severed. The jury convicted Diaz-Santos of the charge, after which she filed a motion for new trial based on the court's denial of her motion to sever. The court denied the motion and sentenced Diaz-Santos to two years of supervised probation.

¶8 Diaz-Santos timely appealed. 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 (2010) and -4033 (2010).

DISCUSSION

A. Legal Principles.

¶9 On motion of a party, the superior court may sever a defendant's trial when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." Ariz. R. Crim. P. 13.4(a). Whether to grant severance is within the court's discretion, and in deciding

whether to sever, the court must "balance the possible prejudice to the defendant against interests of judicial economy." *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995). A defendant challenging the court's denial of a motion to sever "must demonstrate compelling prejudice against which the trial court was unable to protect." *Id.* We review the superior court's ruling on a motion to sever for clear abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003).

B. The Superior Court Acted Within Its Discretion in Denying the Motions to Sever.

¶10 Generally, prejudice requiring severance exists when:

> (1) evidence admitted against one defendant is facially incriminating to the other defendant; (2) evidence admitted against one defendant has a harmful "rub-off effect" on the other defendant; (3) there is a significant disparity in the amount of evidence introduced against each of the two defendants; or (4) co-defendants present defenses that are so antagonistic that they are mutually exclusive, or the conduct of one defendant's defense harms the other defendant.

Grannis, 183 Ariz. at 58, 900 P.2d at 7; *see also State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶11 Diaz-Santos first argues she suffered prejudicial "rub-off" from evidence admitted against Dominguez. Rub-off occurs when evidence properly admitted against one defendant influences the jury's view of the other defendant. *State v.*

Lawson, 144 Ariz. 547, 555, 698 P.2d 1266, 1274 (1985). To determine whether severance is required in such a case, the court must determine whether the jury can separate the relevant evidence against each defendant and render a "fair and impartial" verdict as to each. *Grannis*, 183 Ariz. at 59, 900 P.2d at 8. "[S]everance is not required when the evidence on which a claim of rub-off relies would be admissible in a separate trial." *State v. Van Winkle*, 186 Ariz. 336, 340, 922 P.2d 301, 305 (1996).

¶12 Diaz-Santos contends that the abundance of evidence against Dominguez and the relative lack of evidence against her, combined with the State's portrayal at trial of the two as a "unit," led the jury to conclude she was guilty merely because of the overwhelming evidence against Dominguez. We conclude, however, that the evidence against Dominguez did not prejudice Diaz-Santos. The evidence against Dominguez consisted of M.C.'s identification of him as the man she saw in her yard, that M.C.'s daughter found his backpack at the scene, his admission to a witness that the dog was his, his admission to a witness of his identity and that he was found with the refrigerator key. The evidence against Diaz-Santos consisted of M.C.'s identification of her as the woman she saw in the backyard and Diaz-Santos's admission to a police officer that she had been in

the backyard.[2] On this record, there is no indication the jury was unable to keep the evidence separate; the issues were not complex and the evidence was not complicated. *See id.* Moreover, though Diaz-Santos contends the strength of the evidence against Dominguez improperly rubbed-off onto her, she does not argue the jury was incapable of keeping the evidence separate.

¶13 Additionally, Diaz-Santos argues she was prejudiced due to a rub-off effect because the court failed to instruct the jury to evaluate the evidence and consider the charges against each defendant separately. *See Lawson*, 144 Ariz. at 556, 698 P.2d at 1275 (no prejudice from rub-off effect when jury was able to keep evidence separate and the court instructed the jury to evaluate defendants separately). Because Diaz-Santos did not request an appropriate instruction in the superior court, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prove fundamental error the defendant must show that error occurred, that the error was fundamental and that the error caused prejudice. *Id.* at 567–68, ¶ 19–20, 115 P.3d at 607–08.

¶14 We conclude the court's failure to give the instruction caused no prejudice. The court instructed the jury

[2] Though Diaz-Santos told the officer she entered the yard to retrieve her dog after it had run away, M.C. testified that the dog was tied to a tree.

on mere presence, stating, "Mere association with another person at a crime scene or mere knowledge that a crime is being committed, the fact that the defendant may have been present or knew that a crime was being committed does not, in and of itself, make the defendant guilty of the crime charged." This instruction adequately protected Diaz-Santos from prejudice because it informed the jury that it could not convict her based solely on the evidence against Dominguez and her presence during the burglary.

¶15 Moreover, because Diaz-Santos was charged as an accomplice, the evidence against Dominguez would have been admissible at her trial even if it were severed. *State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993). Finally, as noted above, the simplicity of the issues and evidence allowed the jury to keep separate the evidence against each defendant. As a result, the court's failure to give the instruction did not result in prejudice.

¶16 Diaz-Santos also argues she was prejudiced by a disparity in the amount of evidence offered against her and against Dominguez. When a disparity in the amount of evidence exists, "severance is required only if the jury is unable to compartmentalize the evidence as it relates to separate defendants." *Grannis*, 183 Ariz. at 59, 900 P.2d at 8 (quotations omitted). Here, as we concluded above, the evidence

offered was specific as to each defendant; also, the issues were simple and the evidence not complex. The evidence against Dominguez did not implicate Diaz-Santos. As a result, there is no indication that the jury was unable to compartmentalize the evidence as it related to Diaz-Santos and Dominguez.

¶17 Diaz-Santos next argues she and Dominguez presented mutually antagonistic defenses. To require severance, "defenses must be irreconcilable; they must be antagonistic to the point of being mutually exclusive." *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). In other words, to meet this standard the defendant must show that to believe the "core" of the evidence offered on behalf of one co-defendant, the jury must necessarily disbelieve the "core" of the evidence offered on behalf of the other co-defendant. *Id.* Unrelated defenses, for example, where the jury could believe both, one or neither, are not so antagonistic as to require severance. *Runningeagle*, 176 Ariz. at 69, 859 P.2d at 179 (1993) (defenses not antagonistic where one defendant argued he was home during the murder and co-defendant argued evidence was insufficient to convict him).

¶18 Diaz-Santos contends the defenses were antagonistic because Dominguez admitted at trial to being in the yard retrieving his dog, while Diaz-Santos defended on the basis that she had not been in the yard. These defenses fail to meet the

standard for mutual exclusivity requiring severance. The jury easily could believe that Dominguez was in the yard and that Diaz-Santos was not; it could have believed, for example, that M.C. was incorrect and that the woman she saw in the yard with Dominguez was someone other than Diaz-Santos. Thus, the defenses were not antagonistic.

¶19 Additionally, Diaz-Santos argues she would have defended herself differently had the trial been severed. Tried alone, she contends, she would have offered into evidence a recorded 9-1-1 call in which one of M.C.'s daughters suggested that the home's previous residents were responsible for the burglary. She does not explain, however, why she was precluded from offering that evidence in the joint trial with Dominguez, nor is the reason apparent from the record. As a result, we find no prejudice.

¶20 Finally, we cannot conclude that the conduct of Dominguez's counsel prejudiced Diaz-Santos. A defendant may be prejudiced by the conduct of a co-defendant's counsel. *Cruz*, 137 Ariz. at 545, 672 P.2d at 474. In *Cruz*, the court held co-defendant's counsel's conduct prejudiced Cruz when counsel elicited testimony from the State's witness on cross-examination that Cruz was linked to organized crime and had ordered others to commit crimes, including murder. *Id.* at 545-46, 672 P.2d at 474-75. Significantly, the evidence would not have come out had

the trial been severed and would not have been admissible in the State's case in a separate trial. *Id.* at 546, 672 P.2d at 475.

¶21 Here, the conduct of Dominguez's counsel that Diaz-Santos asserts prejudiced her was his eliciting testimony that while M.C.'s daughters followed Dominguez and Diaz-Santos in their van, Diaz-Santos struck the van with the shopping cart. On direct examination, the witness had testified that it was Dominguez who had used the cart to ram the van. Diaz-Santos argues the testimony on cross-examination prejudiced her because the State had little evidence against her and much against Dominguez; the testimony bolstered the State's case against her because it showed Diaz-Santos and Dominguez "acted in concert" by taking turns ramming the van; the State argued in closing that the cart's purpose was to carry away the belongings stacked in the alley; and because the same witness used the plural "they" rather than "he" when describing who rammed the van.

¶22 We find no prejudice, however. Unlike in *Cruz*, Diaz-Santos does not argue, nor is it apparent from the record, that the testimony that she rammed the van with the shopping cart would have been inadmissible in a separate trial against her alone. Also, as Diaz-Santos admits, before the witness stated that it was Dominguez who had rammed the van with the cart, the witness testified, "They rammed the shopping cart into my van." Thus, also contrary to *Cruz*, the fact that both defendants

rammed the van was offered in the State's case and as a result, very likely also would have come out if the trial had been severed. Accordingly, we conclude the testimony elicited in Dominguez's defense did not compel severance of the trial.

CONCLUSION

¶23 For the foregoing reasons, we affirm the conviction and resulting sentence.

/s/_____
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/_____
PATRICK IRVINE, Judge

/s/_____
PHILIP HALL, Judge