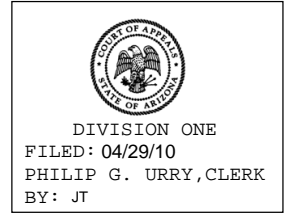


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,)	1 CA-CR 09-0244
)	
Appellee,)	DEPARTMENT C
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication -
RODOLFO DOMINGUEZ,)	Rule 111, Rules of the
)	Arizona Supreme Court)
Appellant.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-006553-002 DT

The Honorable Kristin Hoffman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Theresa M. Armendarez, P.L.C. Phoenix
By Theresa M. Armendarez,
Attorney for Appellant

K E S S L E R, Judge

¶1 This appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Rodolfo Dominguez's ("Dominguez") conviction of burglary in the

third degree, a class four felony. Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. Dominguez was given the opportunity to, but did not file, a *pro per* supplemental brief.

¶12 After reviewing the entire record, we conclude the evidence is sufficient to support the verdict and there is no reversible error. Therefore, we affirm Dominguez's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶13 We view the facts in the light most favorable to sustaining the conviction. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶14 Dominguez was charged with burglary in the third degree in connection with his actions on March 31, 2008. The afternoon of the 31st the victim ("M.C.") was moving into a home in Phoenix. Because painters were working in her new home, M.C. and her daughters left a load of boxes on the back porch when they left to get more of M.C.'s things. After picking up another load of belongings, M.C. and her daughters returned to the property. Before M.C. started unloading her property from the moving truck her grandson entered the backyard and shouted that "there [was] somebody in [M.C.'s] yard."

¶15 M.C. entered her backyard and saw an individual she later identified as Dominguez pulling her belongings toward an alley behind the house. M.C. yelled at Dominguez and his female accomplice. The individuals "dropped everything and . . . went running" out of an open gate into the alley behind M.C.'s home. M.C. followed the pair into the alley where she saw boxes containing her property lined up along a wall abutting her backyard. Among the property in the alley was a small refrigerator, which M.C. had left on the porch. The refrigerator had a locking mechanism on it and was only able to be opened with a key; however the key was missing when M.C. found the fridge in the alley.

¶16 In addition to her belongings, M.C. also found a backpack containing documents bearing Dominguez's first and last name. When M.C. returned to her yard she noticed a dog, which did not belong to her, tied to a tree. One of the victim's daughters ("T.B.") testified at trial that a short time after M.C. chased Dominguez and his partner out of the backyard Dominguez returned, this time at the front of the house, asking for his dog. T.B., who had seen the backpack and papers bearing Dominguez's name in the alley, asked "[a]re you Rodolfo?" to which Dominguez answered affirmatively. T.B. gave Dominguez his dog and followed him as he walked away. As she followed Dominguez, T.B.

dialed 911 and told the operator Dominguez's location and the direction he was traveling. T.B. pursued Dominguez through the neighborhood, continuously updating the 911 operator as to the path that Dominguez and his partner were taking.

¶17 Officers eventually arrived on scene and found T.B. and her sister (who followed the assailants in a van) pointing out Dominguez and his partner as the suspects. After interviewing the suspects and M.C.'s daughters, officers placed Dominguez in custody for burglary. When officers searched Dominguez they found a key in his possession that fit the lock to M.C.'s refrigerator.

¶18 At the close of the State's evidence the superior court denied defense counsel's Rule 20 motion for judgment of acquittal. A jury convicted Dominguez of burglary in the third degree. The trial court suspended Dominguez's sentence and ordered him to serve two years of probation and to pay \$550 in restitution to M.C.

¶19 Dominguez timely appealed. See Arizona Rules of Criminal Procedure ("Ariz. R. Crim. P.") Rule 31.3. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, as well as Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (2010).

DISCUSSION

I. Standard of Review

¶10 This Court has reviewed the entire record for fundamental error. *State v. Barraza*, 209 Ariz. 441, 447, ¶ 19, 104 P.3d 172, 178 (App. 2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain reversal, the defendant must also show the fundamental error prejudiced him. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. On review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against the appellant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998) (citation omitted). Dominguez did not raise any issues for this court to examine on appeal. Searching the record, we find only one issue that needs to be addressed.

II. Severance

¶11 Before trial, Dominguez's co-defendant moved to sever the two cases. The motion was denied. Co-

defendant's counsel again raised the issue after the jury had been empanelled. Counsel argued that he and Dominguez's counsel had "reached something of an impasse when it comes to strategy and approach to the case" concerning the use of 911 tapes during cross-examination of certain witnesses.¹ Dominguez's attorney, while not objecting to the motion to sever, does not appear from the record in front of this Court to have had a strong inclination either in favor of or opposed to severance. The trial court denied the renewed motion to sever.

¶12 Ariz. R. Crim. P. 13.4, subsection (a) reads:

Whenever . . . 2 or more defendants have been joined for trial, and severance of . . . any or all defendants . . . is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

Ariz. R. Crim. P. 13.4(a).

¶13 "A trial court's decision to grant or deny a severance will not be disturbed absent an abuse of discretion."

State v. Murray, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¹ This Court does not have the pre-trial motion to sever or the response from the State, in front of it. However, from what the court can glean from the trial transcripts, it appears that Dominguez's counsel prevailed at the "impasse when it comes to strategy" regarding the 911 tapes. It appears that Dominguez did not want the 911 tapes introduced and his co-defendant did. The tapes were not admitted.

In *Murray*, the Arizona Supreme Court explained that "a clear abuse of discretion is established only when a defendant shows that, at the time he made his motion to sever, he had proved that his defense would be prejudiced absent severance." *Id.* See also, *Henderson*, 210 Ariz. at 567, ¶ 20 ("To prevail under [fundamental error] standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.")

¶14 Prejudice to a defendant requires severance when: (1) evidence admitted against one defendant incriminates a co-defendant; (2) evidence admitted against one defendant has a harmful rub-off effect on a co-defendant; (3) there is a significant disparity in the amount of evidence introduced against the two defendants; or (4) the defenses of each of the co-defendants are so antagonistic that they are mutually exclusive. *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995).

¶15 Dominguez was not prejudiced by the denial of his co-defendant's motion to sever. The dispute prompting the motion was based on Dominguez's desire to exclude the 911 tapes and his co-defendant's desire to introduce the tapes into evidence. The tapes were not admitted, so Dominguez got what he wanted. Additionally, Dominguez did not even

bring the motion to sever, his co-defendant did. While Dominguez did not object to the motion to sever he did not vigorously argue in favor of it either. Additionally, none of the four *Grannis* circumstances where prejudice is often found are present here. Nor is there another circumstance, outside of the *Grannis* four that compels us to find Dominguez was prejudiced. Because Dominguez's defense appears to have been unaffected by the trial court's decision, we hold the denial of the severance motion did not prejudice Dominguez.

CONCLUSION

¶16 After reviewing the record we find no grounds for reversal of Dominguez's conviction. The record reflects Dominguez had a fair trial, was present and represented by counsel at all critical stages prior to and during trial, as well as during the verdict and at sentencing. Additionally, the jury was comprised of eight members as required by A.R.S. § 21-102(B) (2002). The evidence is sufficient to support the verdict and the trial court imposed a proper sentence for Dominguez's offense.

¶17 We affirm Dominguez's conviction and sentence. Upon the filing of this decision, Dominguez's counsel shall inform him of the appeal's status and his future options. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154,

156-57 (1984). On the court's own motion, Dominguez shall have thirty days from the date of this decision to file a *pro per* motion for reconsideration or petition the Arizona Supreme Court for review. See *id.*

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
PATRICK IRVINE, Presiding Judge

/S/
MICHAEL J. BROWN, Judge