DIVISION ONE
FILED: 05-06-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0376
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
MICHAEL DEANDRE WOODS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR2008-006027-002 DT

The Honorable Pendleton Gaines, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals Section
Attorneys for Appellee

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

T H O M P S O N, Judge

¶1 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Michael Deandre Woods (defendant) has advised us that, after searching the entire record, she has

been unable to discover any arguable questions of law and has filed a brief requesting this court to conduct an *Anders* review of the record. Defendant has been afforded an opportunity to file a supplemental brief *in propria persona*, and he has not done so. At defendant's request, however, his counsel asks this court to search the record for error with regard to three issues: (1) the state's alleged "use of perjured testimony," (2) whether defendant's trial should have been severed from his co-defendant's trial; and, (3) juror bias. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Defendant was charged by indictment with one count of attempted first degree murder, a class 2 dangerous felony, or, in the alternative, one count of aggravated assault, a class 3 dangerous felony. The following evidence was presented at trial.[1]

¶3 Defendant and his brother went to a friend's apartment. Defendant drank heavily at the apartment. Defendant and his brother accepted a ride home from the victim, M.T. During the drive, an altercation ensued. Once they arrived at the apartment complex, defendant and his brother fired multiple shots at M.T. M.T. was shot in his stomach and his leg. Defendant ran from the scene. Police recovered six .40 caliber casings, one 9mm casing, and a handgun.

[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against defendant. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶4 At trial, the investigating detective testified that defendant confessed to her in an interview that he shot the victim. The detective further testified that she did not include defendant's statement in her report because the interview was audio and video recorded. Defendant did not move to suppress the statements, nor did he object to the detective's testimony at trial. Defendant testified that he remembered drinking at his friend's apartment but that he did not remember anything about the ride from M.T. or the shooting. Defendant's brother testified that he shot M.T. in self-defense.

¶5 A jury convicted defendant of attempted second degree murder, a class 2 dangerous felony. Count 2 was dismissed. The court sentenced defendant to 12.5 years imprisonment with 621 days of presentence incarceration credit. Defendant timely appealed his conviction and sentence. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(1) (2010).

DISCUSSION

¶6 In *Anders* appeals, we review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). Defendant asks, through counsel, that we consider three issues, which we discuss in turn.

1. The detective's testimony

¶7 Defendant claims the state knowingly used perjured testimony when the detective testified that defendant confessed to the shooting during a recorded interview. At no time did defendant object to the admissibility of or move to suppress his confession to the detective. Credibility determinations of witnesses are for the jury. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004). Nothing in the record suggests that the detective's testimony was false. Accordingly, this claim is without merit.

2. Severance

¶8 Defendant also argues his trial should have been severed from his co-defendant's trial. Defendant failed to move for severance and therefore has waived this claim. *See* Ariz. R. Crim. Pro. 13.4(c). Thus, we review for fundamental error only. *See State v. Laird,* 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996) (holding that failure to renew motion to sever during trial waived issue absent fundamental error). To succeed on a claim of fundamental error, defendant must show the error caused him prejudice, such as by depriving him of a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

¶9 Under Rule 13.3(b) of the Arizona Rules of Criminal Procedure, "[t]wo or more defendants may be joined when each defendant is charged with each offense included." Rule 13.4(a)

provides that "the court may on its own initiative, and shall on motion of a party," order severance if "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." Rule 13.4 does not require the court to order severance; the court has discretion to sever on its own initiative. *State v. Longoria*, 123 Ariz. 7, 10, 596 P.2d 1179, 1182 (App. 1979).

¶10 Defendant contends that the court should have severed the trial because his defense was that he was too intoxicated to form the requisite intent, unlike his brother who claimed self-defense. Defendant apparently claims he was prejudiced because "based on the testimony of his older brother, the co-defendant, the state was able to argue that the co-defendant was merely trying to take the blame." In *State v. Cruz,* our supreme court addressed the question of when the existence of antagonistic defenses becomes so prejudicial that severance is required:

> [A] defendant seeking severance based on antagonistic defenses must demonstrate that his or her defense is so antagonistic to the co-defendants that the defenses are mutually exclusive. Moreover, defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.

137 Ariz. 541, 545, 672 P.2d 470, 474 (1983).

¶11 In this case, the jury could have believed both theories of defense. The defenses are not so antagonistic that they are mutually exclusive. We find no error, much less fundamental error,

in the trial court's failure to order severance sua sponte.

3. Juror 33

¶12 Finally, defendant argues it was error to allow Juror 33 to sit as a juror because the trial court ruled that Juror 33 was stricken for cause. Defendant apparently is referring to the following dialogue in the record:

> Court: Let me go over the excuses for cause and hardship and see where we are. And, Anita, on thse [sic], 33, 2, [], all excused for cause; 5, 6, [], 8, [], 11, [], 13, [], 26, [], 43, [], 36, [], 42, [], 40, [], 45, [], 53, [], 54, Mr. [], and 55, [].
>
> ...
>
> Defense Counsel: I'm sorry, did you say 39?
>
> Court: Didn't we?
>
> Defense Counsel: I know you mentioned 42.
>
> Court: 42 and 33. I didn't mean to excuse the same juror twice.

Juror 33 was empanelled as a juror. At first glance, the excerpt above seems to indicate that Juror 33 was excused for cause, as defendant argues. However, our thorough review of the record suggests that the excerpt reflects either a misstatement by the court or a transcription error. Our reasoning is supported by numerous references to the record. First, the jury list itself does not suggest that Juror 33 was excused for cause. Second, as defense counsel pointed out, Juror 39, not Juror 33, was excused for cause. Juror 39 raised his hand when the court asked if he, a

family member, or a close friend had been the victim of a crime of violence. When the court asked whether he could be fair and impartial, he answered that he could not, and the court excused him. Third, neither party objected when Juror 33 was called as a juror. Finally, nothing in the record suggests that Juror 33 was biased or should have been excused for cause. We therefore ascribe the seeming error to either the court's misspeaking or to a transcription inaccuracy and find no fundamental error on this issue.

CONCLUSION

¶13 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, defendant was adequately represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits. Pursuant to *State v. Shattuck,* 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), defendant's counsel's obligations in this appeal are at an end.

¶14 We affirm the conviction and sentence.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge