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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALFRED MORONES CANO, Appellant.	2 CA-CR 2010-0178 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093681001

Honorable Edgar B. Acuña, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt — Tucson
Attorneys for Appellee

John William Lovell — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Alfred Cano was convicted of second-degree burglary; aggravated domestic violence; kidnapping, domestic violence; and aggravated assault on an incapacitated victim, domestic violence. The trial court sentenced him to four

concurrent prison terms, the longest of which was 15.75 years. On appeal, Cano argues the court committed fundamental, prejudicial error by failing to sever the aggravated-domestic-violence charge from the other charges and not giving the jury a limiting instruction regarding his past convictions. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997). Between May 2008 and September 2009, Cano and R.H. were in a tumultuous romantic relationship punctuated by "countless" breakups. Although they previously had lived together, in September 2009 Cano and R.H. lived apart. On September 12, the two argued at length over the telephone, and late that night R.H. awakened to the sound of Cano kicking in her apartment door. Cano, who was intoxicated, threw R.H. on the bed, held her down, and prevented her from breathing by covering her nose and mouth, all while repeatedly threatening to kill her. R.H. was able to move enough of Cano's hand to allow her to breathe and avoid losing consciousness, and eventually Cano "passed out" on R.H.'s bed. R.H. was frightened and lay there with him the remainder of the night. Although she did not immediately alert the police the next morning, R.H. eventually asked her sister to call them after Cano informed her he was going to take her to Mount Lemmon.

¶3 Cano was charged with second-degree burglary; aggravated domestic violence; kidnapping, domestic violence; and aggravated assault on an incapacitated

victim, domestic violence. Prior to trial, he moved to sever the aggravated-domestic-violence count from the other counts on the ground it required admission of evidence of prior domestic-violence convictions that otherwise would be inadmissible at a trial on the other three counts. The trial court denied the motion, and Cano failed to renew it at trial. After the first trial ended in a mistrial, a second jury convicted him of all four counts, and he was sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Motion to Sever

¶4 Cano argues the trial court erred by denying his motion to sever the aggravated-domestic-violence charge from the other counts. He acknowledges he failed to renew his motion at trial as required by Rule 13.4(c), Ariz. R. Crim. P., thereby waiving review for all but fundamental, prejudicial error.[1] *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object at trial to alleged error waives review for all but fundamental, prejudicial error); *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996) (denial of motion to sever reviewed for fundamental error where defendant failed to renew motion at trial). Fundamental error is that "'going to the

[1]Cano failed to file his motion to sever at least twenty days before his first trial, as required by Rule 13.4(c), Ariz. R. Crim. P., although it was filed over twenty days before the start of his second trial. But because Cano waived review for all but fundamental, prejudicial error by failing to renew the motion at trial, *see State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005), we need not determine whether it was timely in the first instance.

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.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Under this standard of review, the defendant has the burden of establishing "both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶5 We address the issue of prejudice first because it is dispositive. Even if we assume, without deciding, that Cano could show the trial court's denial of his motion to sever was fundamental error, he has not shown "'compelling prejudice against which the trial court was unable to protect.'" *State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (2003), *quoting State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). As the state points out, at the commencement of the first trial, the court expressly asked Cano's counsel if she wished to be heard with respect to the motion to sever, an invitation she declined. Although the second trial is the subject of this appeal, Cano's failure to renew the motion at the first trial—despite the court's express invitation—and subsequent failure to renew the motion at the second trial, "'suggests that the prejudice now asserted to have resulted from the joinder may not have seemed so substantial to [Cano] in the context of [the] trial.'" *State v. Pierce*, 27 Ariz. App. 403, 406, 555 P.2d 662, 665 (1976), *quoting Williamson v. United States*, 310 F.2d 192, 197 (9th Cir. 1962) (second alteration in *Pierce*).

¶6 Quoting *State v. Beasley*, Cano relies on the general principle that prior convictions are inadmissible on the question of guilt and argues that the danger of unfair prejudice "'is at its highest when the witness being impeached is the defendant in a criminal case and the prior conviction is the same as, or similar to, the crime for which the defendant [is] on trial.'" 205 Ariz. 334, 338, 70 P.3d 463, 467 (App. 2003), *quoting* Joseph M. Livermore et al., *Arizona Law of Evidence* § 609.1(I), at 236 (4th ed. 2000). However, our supreme court has repeatedly held that "a defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *Prince*, 204 Ariz. 156, ¶ 17, 61 P.3d at 454; *see, e.g.*, *State v. Johnson*, 212 Ariz. 425, ¶ 13, 133 P.3d 735, 740 (2006) (same); *State v. Atwood*, 171 Ariz. 576, 613, 832 P.2d 593, 630 (1992) (same), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *State v. Comer*, 165 Ariz. 413, 419, 799 P.2d 333, 339 (1990) (same).

¶7 Here, the trial court instructed the jury "the State must prove each element of each charge beyond a reasonable doubt" and "[y]ou must decide each count separately . . . uninfluenced by your decision on any other count." Although Cano challenges the evidence against him and speculates the introduction of his prior convictions "tipped the scale" to convict him, he ignores the well-established rule stated in *Prince*, 204 Ariz. 156, ¶ 17, 61 P.3d at 454, and has not demonstrated the court's instructions were inadequate to cure any prejudice or that the jury failed to follow them, *see State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (jury presumed to follow court's instructions).

Because Cano has not established prejudice, this argument does not provide grounds for reversal.[2]

Limiting Instruction

¶8 Cano also contends the trial court erred in failing to instruct the jury not to consider his past convictions—admitted to prove the aggravated-domestic-violence count—when rendering a verdict on the other three counts.[3] A trial court, however, does not err in failing to give a limiting instruction if trial counsel does not request one. *Nordstrom*, 200 Ariz. 229, ¶ 51, 25 P.3d at 735; *see also State v. Taylor*, 127 Ariz. 527, 530, 622 P.2d 474, 477 (1980) ("'It has long been the rule in this jurisdiction that unless . . . a request for an instruction is made, error cannot be predicated on . . . the failure to give such an instruction.'"), *quoting State v. Francis*, 91 Ariz. 219, 222, 371 P.2d 97, 99 (1962); *State v. Haley*, 87 Ariz. 29, 31, 347 P.2d 692, 693 (1959) (trial court has no duty to issue limiting instruction *sua sponte*); *State v. Miles*, 211 Ariz. 475, ¶ 31, 123 P.3d 669, 677 (App. 2005) (same). Furthermore, our supreme court has upheld a conviction, despite the trial court's erroneous denial of a motion to sever, where the court's curative

[2]Cano also argues the denial of severance deprived him of due process rights under the Fifth Amendment to the United States Constitution; however, for the same reasons discussed above—particularly because Cano has not shown any prejudice—we find no deprivation of due process. *See State v. Stuard*, 176 Ariz. 589, 596, 599-600, 863 P.2d 881, 888, 891-92 (1993) (summarily rejecting due process argument where defendant established no prejudice arising from denial of motion to sever).

[3]Although Cano attenuates his argument by asserting "research indicates that juries have great difficulty in following limiting instructions about the use of prior convictions," we nonetheless interpret the argument as assigning error to the trial court's failure to give a limiting instruction *sua sponte*.

instruction "caution[ed] the jury about the need to consider the evidence separately on each charge," even though the instruction "did not directly address the impropriety of using the other act evidence to prove Defendant's bad character and actions in conformity with that character." *State v. Stuard*, 176 Ariz. 589, 599, 863 P.2d 881, 891 (1993). Cano never requested the instruction he now argues the trial court should have given. Additionally, as noted above, the jury was instructed to consider each charge separately. Accordingly, the trial court committed no error in not giving a limiting instruction *sua sponte*.

Disposition

¶9 For the foregoing reasons, Cano's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge