DIVISION ONE
FILED: 2/5/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0489
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
ERIC SHAW GIBSON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-048032-001

The Honorable Sherry K. Stephens, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Defendant, Eric Shaw Gibson, appeals from his convictions on two counts of robbery, each a Class 4 felony.

The convictions stem from two robberies Defendant committed in Tempe on January 8, 2010, and January 14, 2010, of, respectively, an Arizona Federal Credit Union, and a Bank of America.[1] Defendant argues on appeal that the trial court erred when it (1) failed to advise him before accepting his waiver of counsel that he would be waiving his right to "effective" assistance of counsel; (2) denied his motion to suppress the warrantless seizure and search of his cell phone; and (3) denied his motion to sever the two robbery counts for trial.

¶2 We have jurisdiction pursuant to A.R.S. sections 12-120.21(A)(1), 13-4031 and 13-4033. For reasons set forth below, we affirm.

DISCUSSION

I. WAIVER OF RIGHT TO COUNSEL

¶3 Before trial, Defendant filed a Motion to Change Counsel in which he asked that his two appointed attorneys withdraw and that he be allowed to represent himself.[2] The trial court held a hearing during which it reviewed Defendant's request and its consequences with Defendant and his two trial attorneys. The court then obtained a signed waiver form from

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

[2] In addition to this case, Defendant had two other cases pending at the time and moved to represent himself in all three.

Defendant. Based on the totality of the circumstances, the trial court then found that Defendant "knowingly, intelligently and voluntarily" waived his right to representation by an attorney and granted his request to represent himself at trial with the assistance of advisory counsel.

¶4 On appeal, Defendant argues that his waiver of counsel was not "knowing and intelligent" because the trial court did not specifically advise him that he was also waiving his "constitutional right to the *effective* assistance of counsel standard to protect him from his errors" –- a right he would have had if his attorney, rather than he, committed any trial errors. He contends reversal is required as a matter of law.

¶5 We review a trial court's determination that a defendant made a voluntary knowing and intelligent waiver of his right to counsel for abuse of discretion. *State v. Dann*, 220 Ariz. 351, 360, ¶ 25, 207 P.3d 604, 613 (2009). We review purely legal issues de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶6 "A prospective pro se litigant must understand (1) the nature of the charges against him, (2) the dangers and disadvantages of self-representation, and (3) the possible punishment upon conviction." *Dann*, 220 Ariz. at 360, ¶ 24, 207 P.3d at 613 (citation omitted). "Although a court should warn of the dangers and disadvantages generally inherent in self-

representation, . . . it is not reversible error to fail to warn of every possible strategic consideration." *Id*. (citations omitted). Whether a waiver of counsel is knowingly and intelligently made depends, "in each case, 'upon the particular facts and circumstances surrounding that case.'" *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (citations omitted).

¶7 Defendant cites no authority for the proposition that a waiver of counsel cannot be valid unless a defendant is also informed that he is waiving "the constitutional protection of effective assistance of counsel standard" to protect him from his own trial errors. It is hardly surprising that no such authority exists. When a defendant elects to proceed without counsel, it is logically inescapable that he will have no "effective" counsel.

¶8 At the outset of the hearing, the trial court cautioned Defendant that an attorney would be of "great value and assistance in a criminal case." When it became apparent that Defendant's desire to represent himself was the result of disagreements with his attorneys over trial tactics, the trial court specifically warned Defendant that their differences of opinion "may well have to do with the fact that they are trained in the law . . . and are experienced in the law and they know what will work and what will not work." Defendant stated, "I

have taken that into consideration, but this is . . . what I'm requesting."

¶9 The court then advised Defendant that, if he chose to represent himself, he would have "the sole responsibility" for certain trial matters, such as "asserting legal defenses, interviewing witnesses, doing investigation, doing legal research, filing and arguing motions, examining and cross-examining witnesses, giving opening statement and final argument to the jury," and that "being in jail," for many of those things, "particularly investigation," might cause difficulties for him in executing his case. The court further advised him that, if he represented himself, he would be "held to the same standard as an attorney regarding the presentation of [his] case," including "knowledge of courtroom procedure, applicable case law, Arizona Rules of Evidence, [and] Arizona Rules of Criminal Procedure," and it would be assumed that he "know[s] all of that." In addition, the trial court confirmed with Defendant that he had read and understood the waiver of counsel form that he signed, which also contains many of the court's oral warnings. Throughout the colloquy, Defendant avowed to the trial court that he understood the perils involved but desired, nonetheless, to represent himself.

¶10 We find that the trial court fully advised Defendant of the charges against him and the possible punishment he faced

if convicted, as well as of the "serious dangers and disadvantages" of self representation, as it was required to do.[3] *Dann*, 220 Ariz. at 360, ¶ 24, 207 P.3d at 613. The court specifically apprised Defendant of the fact that he would be held to the same legal standard as an attorney and assumed to know the applicable law, whether or not he did know it, and Defendant explicitly acknowledged and accepted those conditions in choosing to represent himself. Nothing in the colloquy in any way could be interpreted to have misled Defendant into believing that he would have a right to relief from a conviction if his own self-representation proved ineffective.

¶11 The trial court was not required specifically to advise Defendant that he was waiving the right to the effective assistance of counsel. Because the court's colloquy was more than sufficient to ensure that Defendant knowingly and intelligently waived his right to counsel, we find no error.

II. DENIAL OF MOTION TO SUPPRESS CELL PHONE RECORDS

¶12 Before trial, Defendant moved to suppress his cell phone records and the evidence derived from those records[4] based

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[3] One of Defendant's attorney also stated, "for the record," that he had spoken with Defendant and they had "discussed some of the perils [of self representation]," and that, while he did not recommend "choosing that route," he respected Defendant's decision.

[4] The cell phone records established that, on the night of the Arizona Federal Credit Union robbery, cell phone towers showed

on the fact that he had not given Tempe Police permission to take his cell phone and obtain the security code to "try and search through it." After a hearing on the motion at which Tempe Police Detective David Crites was the sole witness, the trial court denied Defendant's motion. Defendant maintains that this ruling was an abuse of the trial court's discretion.

¶13 We review a trial court's ruling on a motion to suppress solely based on the evidence presented at the suppression hearing, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996) (citation omitted), and view that evidence in the light most favorable to sustaining the trial court's ruling. *State v. Teagle*, 217 Ariz. 17, 20, ¶ 2, 170 P.3d 266, 269 (App. 2007). We review the factual findings underlying the determination for abuse of discretion but review the court's legal conclusion de novo. *State v. Moody*, 208 Ariz. at 445, ¶ 62, 94 P.3d at 1140. We will affirm a trial court's ruling if it is legally correct for any reason. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶14 Defendant concedes that the "facts before the trial court [at the suppression hearing] were not in dispute." The testimony established that Defendant's cell phone was placed into Maricopa County Jail property after Defendant was arrested

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Defendant's cell phone was activated in the vicinity of the credit union shortly after the robbery. The phone also contained incriminating text messages.

on an unrelated offense and that Detective Crites retrieved the cell phone within 48 hours of Defendant's arrest, while it was still in the possession of the jail authorities. The testimony further established that bank surveillance video showed Defendant with an orange-colored cell phone that appeared similar to the one in jail property.

¶15 Information pertaining to the cell phone, its subscriber records and its content came in three stages. First, Detective Crites removed the rear cover and battery from the phone, and observed the IMEI number printed on a sticker on the inside back of the phone. Second, Detective Crites used that number to obtain a court order permitting disclosure of subscriber information. Finally, he obtained a search warrant for the contents of the phone using independently obtained evidence as the basis for the warrant.

¶16 The visual examination of the telephone to obtain the IMEI number was not an impermissible search. *See U.S. v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012). In view of the fact that the remaining information was obtained pursuant to valid court orders, the trial court was justified in denying Defendant's motion to suppress on this basis alone, and we need not address the other reasons considered by the court. *Perez*, 141 Ariz. at 464, 687 P.2d at 1219.

III. DENIAL OF MOTION TO SEVER

¶17 Before trial Defendant moved to sever the two counts of robbery for trial, arguing that "the two robberies occurred on two separate days," and if he were tried for both at the same time, he would not "get a fair trial." The state opposed the motion, noting that the two counts were properly joined pursuant to Arizona Rule of Criminal Procedure ("Rule") 13.3(a) because the evidence that established the identity of the robber as Defendant in both robberies was intertwined and would thus be relevant to the trial of both crimes. The trial court denied Defendant's motion for "fail[ure] to set forth a sufficient factual or legal basis for the relief requested."

¶18 Defendant filed a subsequent pre-trial "motion to reurge [sic]" severance, in which he argued that he was entitled to severance as a matter of right pursuant to Rule 13.4(b). This motion focused on discrepancies in the eyewitnesses' descriptions of the robber and on alleged factual errors in the state's prior response. The state responded again that the offenses were properly joined pursuant to Rule 13.3(a)(1) because they were "otherwise connected in their commission" and the evidence was so "intertwined and connected together . . . that much of the same evidence would be relevant in both trials and would connect defendant to both crimes." It also argued that "[t]he similarity [of the crimes] and modus operandi

tend[ed] to prove identity" and also made the evidence cross-admissible at both trials pursuant to Ariz. R. Evid. 404(b). The trial court again denied the motion to sever "for all of the reasons stated in the State's response."

¶19 On appeal, Defendant claims that the trial court abused its discretion when it denied his motion to sever and that he is entitled to a new trial. Defendant focuses primarily on the state's Rule 404(b) argument and maintains that a "common scheme or plan" basis for joinder was inapplicable in his case. Ariz. R. Crim. P. 13.3(a)(3).

¶20 We conclude that reversal for retrial is not warranted. First, we note that Defendant failed to renew his severance motion "during trial at or before the close of the evidence" as he was required to do. Ariz. R. Crim. P. 13.4(c). He has therefore waived this issue on appeal absent fundamental error. *See* Ariz. R. Crim. P. 13.4(c) ("Severance is waived if a proper motion is not timely made and renewed."). *See also State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996) (failure to renew motion to sever at trial waives issue; court reviews only for fundamental error). Our courts have strictly applied the Rule 13.4(c) waiver provisions, "particularly the explicit requirement that motions for severance be renewed during trial," because (1) it is not an undue burden on defendants; and (2) doing so might direct the trial court's attention to a unique

aspect of a defendant's severance argument that it might have overlooked and could still address. *State v. Flythe*, 219 Ariz. 117, 120, ¶ 10, 193 P.3d 811, 814 (App. 2008). "By limiting appellate review . . . Rule 13.4(c) prevents a defendant from strategically refraining from renewing his motion, allowing a joint trial to proceed, then, if he is dissatisfied with the outcome, arguing on appeal that severance was necessary." *Id.* at ¶ 9, 193 P.3d at 814.

¶21 In a fundamental error review, the burden is squarely on the defendant to "establish both that fundamental error exists and that error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). However, on appeal Defendant does not claim that the trial court's denial of severance constitutes fundamental error in his case, let alone show how it caused him prejudice in his case. Where a defendant fails to renew his severance motion at trial *and* also does not specifically request a fundamental error review, this court may decline to reach the merits of the case. *Flythe*, 219 Ariz. at 120, ¶ 11, 193 P.3d at 814. We do so now.[5]

[5] We have received Defendant's December 31, 2012 motion to file a pro per supplemental brief in his appeal. Defendant was represented by counsel on appeal, and we therefore deny the motion.

CONCLUSION

¶22 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/
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PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SAMUEL A. THUMMA, Judge