

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,) 1 CA-CR 09-0451
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JERDEN MONTGOMERY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-169705-001 DT

The Honorable John R. Hannah, Jr., Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Stephen R. Collins
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Jerden Montgomery appeals his convictions
and sentences. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 N.C.² was home alone on November 7, 2008, when she heard someone knocking incessantly at the door. When the door was kicked open, N.C. ran into the backyard, hid behind a bush, and called 911.

¶3 The police arrived four minutes later. As they were standing outside the front door, it opened and Defendant was in the doorway. Defendant had placed property he wanted to take in a comforter, and police discovered the bundle behind the front door. They also found N.C.'s watch, a pipe, and crack cocaine inside a dental floss container, in Defendant's pocket.

¶4 Defendant was charged with burglary in the second degree and possession of narcotic drugs. The jury convicted him on both counts. Defendant admitted to four prior felony convictions, and the trial court sentenced him to an aggravated prison term of fifteen years for burglary, and three years probation for possession of narcotic drugs. Defendant appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes

¹ We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against Defendant. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

² We use the initials of the victim throughout this decision to protect her privacy. See *State v. Maldonado*, 206 Ariz. 339, 341 n.1, ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and -4033 (2010).

DISCUSSION

¶15 Defendant argues the trial court erred by not severing his two counts. Prior to trial, Defendant unsuccessfully moved to sever the counts arguing that they were not related and a joint trial would be unduly prejudicial.

¶16 Generally, we review a trial court's denial of a motion for severance for an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). Because Defendant did not renew his motion to sever during trial, he waived the issue absent fundamental error.³ Ariz. R. Crim. P. 13.4(c) (waiver of severance unless motion is renewed before close of evidence); *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996). Fundamental error requires Defendant to establish: (1) an error; (2) that the error was fundamental; and (3) that the error resulted in prejudice. See *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

³ Defendant argues that the motion should not be considered waived "if it can be shown that renewing the motion to sever would have been an unnecessary formality" and cites a Ninth Circuit Court of Appeals case for support. Arizona Rule of Criminal Procedure 13.4(c), however, specifically dictates "[s]everance is waived if a proper motion is not timely made and renewed." Accordingly, we find the issue waived.

¶17 Two or more offenses can be properly joined if they: "(1) Are of the same or similar character; or (2) Are based on the same conduct or are otherwise connected together in their commission; or (3) Are alleged to have been a part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a). Here, the trial court denied the motion because "the charges are based on the same conduct, or otherwise connected together, in their commission." See Ariz. R. Crim. P. 13.3(a)(2).

¶18 When joinder is pursuant to Rule 13.3(a)(2), the offenses will be considered connected when "the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps." *State v. Garland*, 191 Ariz. 213, 216-17, ¶ 14, 953 P.2d 1266, 1269-70 (App. 1998) (quoting *State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985)). Offenses are also properly joined when the charged crimes "were all part of a continuing series of events." *State v. Mincey*, 115 Ariz. 472, 483, 566 P.2d 273, 284 (1977), *rev'd on other grounds*, 437 U.S. 385 (1978).

¶19 Here, the trial court properly denied the severance motion. The crack cocaine was found in a search incident to Defendant's arrest for burglary. The underlying facts of the burglary charge were necessary to explain the search. Because the offenses were connected together in their commission and "the evidence as to each count . . . overlaps," the trial court

did not err in denying Defendant's motion to sever. See *Garland*, 191 Ariz. at 216-17, ¶ 14, 953 P.2d at 1269-70 (quoting *Martinez-Villareal*, 145 Ariz. at 446, 702 P.2d at 675).

¶10 Moreover, Defendant was not prejudiced by the court's ruling.⁴ Defendant argues he was prejudiced because a juror, during voir dire, answered affirmatively when defense counsel asked, "Do you think that if you do drugs or do crack cocaine, that you're more likely to commit a burglary?" The court, however, instructed defense counsel to re-word the question. When the jurors were asked whether they could consider the counts separately from each other, there was no indication that they could not consider the counts separately.

¶11 Furthermore, during the final instructions the trial court instructed the jury that, "[e]ach count charges a separate and distinct offense" and "[y]ou must consider each [count] and decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count" and "[y]ou may find the State has proved beyond a reasonable doubt all, some, or none of the charged offenses." We presume the jury followed the instructions. *State v. Newell*,

⁴ Defendant relies on *State v. Bojorquez*, to support his argument that the evidence of drug possession created prejudice in his burglary trial. 151 Ariz. 611, 729 P.2d 965 (App. 1986). *Bojorquez*, however, is distinguishable because it addresses improperly admitted evidence and not a denial of severance. See *id.* at 612-13, 729 P.2d at 966-67. Because the offenses were properly joined in this case, *Bojorquez* is inapposite.

212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). In fact, “[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.” *State v. Prince*, 204 Ariz. 156, 160, ¶ 17, 61 P.3d 450, 454 (2003); see also *State v. Johnson*, 212 Ariz. 425, 430, ¶ 13, 133 P.3d 735, 740 (2006) (holding the trial court reduced prejudice from the joinder by instructing the jury to consider the counts separately). Because the jury was properly instructed, we find no prejudice.

CONCLUSION

¶12 For the foregoing reasons, we affirm Defendant’s convictions and sentences.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Judge

/s/

MARGARET H. DOWNIE, Judge