IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GILBERTO SAUL JARAMILLO,
Appellant.

No. 2 CA-CR 2018-0259
Filed February 28, 2020

Appeal from the Superior Court in Pima County
No. CR20161117007
The Honorable James E. Marner, Judge

REVERSED AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Heather A. Mosher, Assistant Attorney General, Tucson
Counsel for Appellee

Law Offices of Erin E. Duffy P.L.L.C., Tucson
By Erin E. Duffy
Counsel for Appellant

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Gilberto Jaramillo appeals from his convictions and sentences for various drug-related offenses, money laundering, conspiracy, and conducting a criminal enterprise. Jaramillo contends the trial court abused its discretion in denying his repeated motions to sever his trial from that of his co-defendant, Juan Manuel Islas, because their defenses were antagonistic. We agree, and we therefore reverse Jaramillo's convictions and sentences and remand for a new trial.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the trial court's ruling. *See State v. Vasquez*, 233 Ariz. 302, ¶ 2 (App. 2013). On multiple occasions in late 2015 and early 2016, Jaramillo's co-defendant, Islas, delivered heroin to undercover agents through a broker known as "Nono."[1] Each time, Islas delivered the heroin to Nono. In each case Nono had been waiting for him at the agents' undercover vehicle in a parking lot across the street from a Boost Mobile store owned by Jaramillo. On two of these occasions, after Islas arrived, the agents requested more heroin than Islas initially brought. Both times, Islas indicated he would check to see if he could provide more, left the parking lot, entered the Boost Mobile store, and returned with the remainder of the requested heroin. Islas also entered the Boost Mobile store following the third sale, during which agents had not requested additional heroin.

¶3 During the final sale, one undercover agent was stationed inside the Boost Mobile store, presenting herself as a customer, at the time Islas entered to retrieve the additional heroin. She initiated a conversation with Jaramillo, who was behind the counter. Islas entered the store and walked directly to the back room. He then returned to the front of the store and interrupted Jaramillo. Both men then entered the back room together and shut the door. The agent testified that she could hear what "sound[ed] like plastic paper, a plastic bag, shuffling of plastic bags" on the other side of the wall. Jaramillo then returned to the counter and Islas left the store. About ten minutes later, Islas re-entered the store, briefly examined some merchandise, and sat behind the counter near Jaramillo.

[1]Nono was also charged in connection with this case. Prior to trial, Nono pleaded guilty and was sentenced to 3.5 years in prison to be followed by five years of probation.

¶4 Police searched the Boost Mobile store two days later. From the cash-register area in the front of the store, they seized $400 in marked bills that had been used in the final drug transaction. From a desk drawer in the back room, they seized a case containing two baggies of heroin and items of drug paraphernalia. The jury also viewed and heard testimony regarding a surveillance video showing Jaramillo counting money shortly after he and Islas returned from the back room during the final heroin sale, after Islas had collected cash from the undercover agents.

¶5 At the conclusion of a six-day trial, the jury found Jaramillo guilty of two counts of possession of a narcotic drug, three counts of money laundering, and one count each of possession of a narcotic drug for sale, transporting narcotic drugs for sale, conspiracy, and conducting a criminal enterprise. The trial court sentenced him to six years in prison, followed by four years of probation. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶6 A month before trial, Islas moved to sever his case from Jaramillo's pursuant to Rule 13.4, Ariz. R. Crim. P., maintaining that they would present antagonistic, mutually exclusive defenses.[2] Specifically, Islas argued Jaramillo would "shift the blame" by asserting that Islas "was the source of the heroin and the person in charge," and that Islas would then have to make the same assertion against Jaramillo, such that a joint trial would "be more of a contest between these two defendants, rather than between the defendants and the State." Islas also argued: "It will be impossible for the jury to believe one of these defendants without excluding the defense of the other defendant." Then, before a hearing on the motion was held, the parties filed their respective settlement conference memoranda. In his filing, Islas asserted that Jaramillo was the "source of the heroin" for all the transactions at issue in the case and that "Mr. Islas was nothing more than a delivery driver for Mr. Jaramillo," minimizing his own involvement in any illegal activity.

[2]Jaramillo had earlier moved for severance from all co-defendants, citing their "mutually exclusive" and "diametrically opposing" defenses involving "each plac[ing] blame on the other," as well as the risk of unfair prejudice from "the 'rub-off' effect of the evidence" relating to the other defendants. Although the trial court granted Jaramillo's motion as to one co-defendant, it denied the motion as to Islas.

¶7 Jaramillo joined Islas's severance motion, contending that Islas's settlement conference memorandum made "clear that Mr. Islas' defense is adversarial and prejudicial to Mr. Jaramillo." At a hearing on the motion, Jaramillo explained that it had become clear that he and Islas would both be "pointing a finger" at each other at trial. After hearing from the parties, the court denied the motion. During trial, Jaramillo and Islas repeatedly renewed their requests for severance, each time without success.[3] Jaramillo now challenges these refusals to sever his case.

Forfeiture

¶8 The state first contends that, because the heading in Jaramillo's opening brief relating to severance sounds in federal and state constitutional theories and he did not argue for severance on a constitutional theory at the trial level, Jaramillo has forfeited this claim. We disagree.

¶9 As an initial matter, Islas's motion to sever, which Jaramillo joined, did seek severance in part pursuant to the Sixth Amendment to the United States Constitution and article II, §§ 23-24 of the Arizona Constitution. Moreover, the right to request severance arises out of state procedural law and is not generally characterized as a constitutional claim. *See* Ariz. R. Crim. P. 13.3–4.[4] Like the severance argument in his opening brief, Jaramillo's motions at trial discussed severance under the relevant state standards and case law, providing the trial court with ample

[3]On the second day of trial, Jaramillo's counsel discussed with the judge that he expected to "be having a continuing objection as to the issue of severance" whenever "information has been elicited that is so mutually exclusive or antagonistic." Counsel requested permission to use "a little code for that," so as to avoid focusing the jury's attention on the particular piece of evidence in question.

[4]The controlling Arizona cases regarding a defendant's right to sever due to antagonistic defenses do not uniformly identify that right as sounding in state procedural law. *See, e.g.*, *State v. Turner*, 141 Ariz. 470, 473 (1984); *State v. Cruz*, 137 Ariz. 541, 543-46 (1983); *cf. State v. Murray*, 184 Ariz. 9, 25 (1995); *State v. Robles*, 182 Ariz. 268, 272 (App. 1995). Rather, when they address the basis of a severance claim, they generally tether it to state procedural rules, not to the state or federal constitutions. *See, e.g.*, *Murray*, 184 Ariz. at 25 (citing Ariz. R. Crim. P. 13.4(a)). Federal appellate courts likewise anchor their reasoning in the Federal Rules of Criminal Procedure. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 535, 537-39 (1993).

opportunity to consider the precise argument now before us. We thus conclude that Jaramillo properly preserved the issue for appeal. *See State v. Kinney*, 225 Ariz. 550, ¶ 7 (App. 2010) ("To preserve an argument for review, the defendant must make a sufficient argument to allow a trial court to rule on the issue.").

Antagonistic Defenses

¶10 On appeal, Jaramillo challenges the trial court's repeated refusals to sever the cases, arguing that each time he and Islas moved to sever, their defenses "had become more and more antagonistic." The state urges us to affirm the court's conclusion that there was no "antagonism" requiring severance. We review a trial court's decision to grant or deny severance for an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 25 (1995). "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.*

¶11 Joint trials are favored in the interests of judicial economy. *Id.*; *see also* Ariz. R. Crim. P. 13.3(b) (joinder appropriate if "each defendant is charged with each alleged offense, or if the alleged offenses are part of an alleged common conspiracy, scheme, or plan, or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others"). However, certain categories of criminal cases must be severed because they involve "unusual features" that might cause prejudice to one or more defendants. *Murray*, 184 Ariz. at 25; *see also* Ariz. R. Crim. P. 13.4(a) (court must sever defendants "if necessary to promote a fair determination of any defendant's guilt or innocence"). One such group of cases is those in which "co-defendants present antagonistic, mutually exclusive defenses." *Murray*, 184 Ariz. at 25. This is because a trial involving antagonistic defenses "is more of a contest between the defendants rather than between the defendants and the prosecution." *State v. Kinkade*, 140 Ariz. 91, 94 (1984).

¶12 Our supreme court first "specifically addressed the question of when the existence of antagonistic defenses becomes so prejudicial that severance is required" in *State v. Cruz*, 137 Ariz. 541, 544 (1983). That decision clarified that "the mere presence of hostility between co-defendants, or the desire of each co-defendant to avoid conviction by placing the blame on the other does not require severance." *Id.* Indeed, "[i]t is natural that defendants accused of the same crime and tried together will attempt to escape conviction by pointing the finger at each other" such that "the co-defendants are, to some extent, forced to defend against their

co-defendant as well as the government." *Id.* But such a scenario requires severance only "when the competing defenses are so antagonistic at their cores that both cannot be believed." *Id.* at 544-45. In other words, for severance to be required, defenses must be "irreconcilable" or "mutually exclusive." *Id.* at 544; *see also State v. Turner*, 141 Ariz. 470, 473 (1984) (for antagonistic defenses, need "case of 'I didn't do it, the co-defendant did it'" such that jury can only believe one side; no antagonism where jury could find core of each defense true).

¶13 Although we recognize that this threshold is a high one, Jaramillo has cleared it. The core of his defense was that he was merely a struggling shopkeeper who had rented space in the back room of his Boost Mobile shop to his friend, Islas, to store some tools, and he had no knowledge that Islas was actually "warehousing drugs" there or "dealing drugs out of his store." Conversely, the core of Islas's defense was that Jaramillo was the drug supplier and took advantage of Islas, who had been "nothing more than a delivery driver" for Jaramillo, with no knowledge he was delivering Jaramillo's drugs. Each defendant squarely argued that the other had singular knowledge of the heroin being stored in and sold from the Boost Mobile store. The jury could not rationally accept both theories. That is the hallmark of antagonistic, mutually exclusive defenses. *State v. Rigsby*, 160 Ariz. 178, 180 (1989) ("To be mutually exclusive, defenses must be so antagonistic that the jury cannot believe both.").

¶14 It cannot plausibly be argued that these defenses were "unrelated," *State v. Runningeagle*, 176 Ariz. 59, 69 (1993), or that there was "nothing contradictory" about them, such that "the jury could easily believe" both theories of the case, *State v. Grannis*, 183 Ariz. 52, 59 (1995). Rather, the two defenses were wholly inconsistent. In order for the jury to believe the core of Islas's defense (that he was "nothing more than a blind mule for Mr. Jaramillo," the drug supplier who took advantage of Islas and was now trying to shift the blame to him), it necessarily had to disbelieve Jaramillo's testimony on his own behalf (that he was not involved in the drug transactions in any way and had not known that Islas was dealing drugs out of his Boost Mobile store). In other words, this was not a case "where the jury could find the core of [Jaramillo's] defense true and still find the core of [Islas's] defense true." *Turner*, 141 Ariz. at 743; *see also Kinkade*, 140 Ariz. at 94 (concluding that when "both defendants admit they were present at the crime but each charges the other with the crime, the trial is more of a contest between the defendants rather than between the defendants and the prosecution," defenses are antagonistic, and severance is required).

¶15 In ruling on the final request for severance, the trial court reasoned that Jaramillo had not "pointed a finger at anybody." But by the time of this ruling, Jaramillo had taken the stand in his own defense.[5] During that testimony, Jaramillo's counsel asked him explicitly if he knew "that Mr. Islas was storing drugs in that back room" and "that Mr. Islas was using [Jaramillo's] store to keep heroin." Counsel also asked why Islas was "keeping his drugs in the desk." Thus, even if Jaramillo himself had not affirmatively pointed a finger at Islas, his counsel certainly had, and Jaramillo did not dispute those characterizations.

¶16 Indeed, in renewing the motion to sever on day five of the trial, Islas argued that Jaramillo's defense was "to go after" Islas, which "became crystal clear" when Jaramillo's counsel "had his client testify and accuse Mr. Islas of not only renting space from him but hiding drugs from him and using this alleged rental agreement as a ruse to hide drugs from him that he was supposedly dealing out of there." She urged the court to grant severance on the ground that "[t]he defenses in this case are clearly antagonistic towards one another and especially when Mr. Jaramillo took the stand and made the statements that he made."

¶17 The antagonism was emphasized when Islas's counsel cross-examined Jaramillo. Her questions characterized Jaramillo as "finally" getting "busted" for "selling drugs," as well as his getting "arrested for dealing drugs out of [his] store." And she sought to undercut the credibility of Jaramillo's defense, asking such questions as:

- "A couple hundred bucks to store some luggage at your place is that what you are telling the jury?"
- "And that was your desk in the back where the drugs were found, correct?"
- "And is it your testimony that although that is your desk, although that is your store, and although you are the only one that has the keys to it, you weren't aware of what was in the desk, is that your testimony today?"
- "And it is your testimony that somebody would just leave $1,800 of drugs in an open space without your knowledge?"

[5]Unlike Jaramillo, Islas did not testify at trial.

It was after and in light of this adversarial cross-examination that Jaramillo made one of his many unsuccessful attempts to sever.

¶18 Early on the next day of trial, Jaramillo explained to the trial court that his and Islas's closings were "going to be completely antagonistic," stating: "Given that the tone of this trial has been antagonistic now for five days straight between Mr. Islas and Mr. Jaramillo, we are both renewing our motions for severance." Islas's counsel agreed, advising the court that, during her closing argument, she was "going to have to attack Mr. Jaramillo" for what she believed were false statements during his testimony in which he accused Islas of "hiding drugs" in the Boost Mobile store and "dealing out of there."

¶19 Given this warning—together with his pre-trial filing in which Islas asserted that Jaramillo was the "source of the heroin" while Islas himself "was nothing more than a delivery driver for Mr. Jaramillo"—it can hardly have come as a surprise to the trial court when this was Islas's primary argument during summation. His counsel asserted that she and the prosecution were in agreement that "Jaramillo is the supplier for No[n]o"—something she claimed "Jaramillo himself pretty much confirmed . . . when he took the stand" by testifying "the drugs were hidden in a desk in my store that I own and that I am the only one that has the keys to." She then repeatedly argued "Islas is nothing more than a delivery driver for Mr. Jaramillo"—"nothing more than a blind mule for Mr. Jaramillo"—whom she called Islas's "boss." Finally, she argued Jaramillo had taken advantage of Islas, and that his story "to make the blame go downhill to blame Mr. Islas" was "ridiculous" and "d[id]n't make any sense," highlighting the questions she had raised during her adversarial cross-examination of Jaramillo.

¶20 Jaramillo's summation followed, during which his counsel argued that Islas "was warehousing drugs" in the Boost Mobile store because he could "turn around and pin it on somebody else just like what [the jury] heard [Islas's counsel] argue" in closing. He also suggested Jaramillo did not know "Mr. Islas was selling [the heroin] and was bringing the money back and that the money he received from him [for rent] was the proceeds of a drug transaction." Jaramillo's counsel further suggested Jaramillo did not know "that Mr. Islas was dealing drugs out of his store." Stressing the possibility that Jaramillo "was just somebody who got overwhelmed with running a business and allowed somebody [i.e., Islas]

to take advantage of him,"[6] Jaramillo exhorted the jury not to "hold [Jaramillo] responsible for the acts of Mr. Islas."

¶21 Thus, as Jaramillo accurately points out, by closing arguments, "it was clear that the co-defendants were defending more against each other than against the State." Although both Jaramillo and Islas also argued during trial that the state had failed to conduct a thorough investigation and prove the elements of the charges against them beyond a reasonable doubt, the clashing defenses were the core defenses, not "tangential," *Turner*, 141 Ariz. at 472, or "peripheral," *Cruz*, 137 Ariz. at 545, to otherwise compatible core defenses.[7]

¶22 The state appears to argue that claims made by one co-defendant's counsel, no matter how antagonistic, cannot require severance in the absence of "affirmative evidence" supporting those claims. We cannot agree. Our supreme court has identified four circumstances that require severance because they might involve prejudice to one or more defendants. *Murray*, 184 Ariz. at 25. Those four situations are:

> when (1) evidence admitted against one defendant is facially incriminating to the other defendant, (2) evidence admitted against one defendant has a harmful rub-off effect on the other defendant, (3) there is significant disparity in the amount of evidence introduced against the defendants, or (4) co-defendants present

[6]This narrative was not a novel one that arose for the first time during closing arguments. To the contrary, Jaramillo's counsel told the jury as early as his opening statement that there would "be a very innocent explanation as to how these drugs ended up in Mr. Jaramillo's store," namely that Jaramillo "is a bumbling kind of businessman who got in over his head trying to run a Boost Mobile store and to make a few dollars, he made a deal" to allow Islas to store his tools in the "back room that Mr. Jaramillo was basically using as a junk room." Then, the bulk of Jaramillo's direct examination focused on establishing this story.

[7]As we have previously held, even when a party's "defense was based largely on the state's failure to prove its case against him beyond a reasonable doubt," severance may still be necessary when "he also contended that [his co-defendant], not he, was responsible" for the crime in question. *State v. Fernane*, 185 Ariz. 222, 227 (App. 1995) (reversing and remanding for new trial due to such an "alternative defense").

> antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant.

Id. Only the first three describe situations anchored in the "evidence" presented. The fourth—the circumstance at issue in this case—relates more broadly to the nature of the "defenses" presented. The state's contention overlooks that defendants may assert their defenses without presenting affirmative evidence of their own, as our courts routinely instruct jurors.[8] Further, defendants often support their defense theories exclusively through cross-examination of the state's witnesses. And, the only opportunity our trial process provides for any litigant to comprehensively advance their theory of the case is through opening statements and summation. The contents of such statements provide an indispensable context for evaluating whether co-defendants' defenses are antagonistic. *See State v. Fernane*, 185 Ariz. 222, 227 (App. 1995) (basing need for severance on co-defendant's counsel's arguments to jury). Even assuming *arguendo* that a claim of antagonistic defenses must be supported by more than conflicting arguments from defense counsel, here those conflicting theories were presented and bolstered through counsel's respective examinations of Jaramillo and the undercover officers involved in the operation.

Judicial Economy

¶23 The state contends that, even if their defenses were mutually antagonistic, judicial economy nevertheless compelled a joint trial because Jaramillo and Islas "were charged with conspiracy, conducting an illegal enterprise, and for being involved in the same exact series of drug transactions . . . and severance would have resulted in two trials where the State would have presented the same witnesses, evidence, and testimony to two different juries." But our supreme court has explained that it adopted the high threshold for defining "mutually exclusive defenses" because that approach "strikes a proper balance between a defendant's interest in a fair trial and considerations of judicial economy." *Cruz*, 137 Ariz. at 544. In other words, the bar is set high in the interests of judicial economy, but once that bar is cleared, severance is required. *Rigsby*, 160 Ariz. at 180 ("our cases

[8]*See* Rev. Ariz. Jury Instr. (RAJI) Stand. Crim. 9 (5th ed. 2019) ("The defendant is not required to produce evidence of any kind. The defendant's decision not to produce any evidence is not evidence of guilt."); RAJI Prelim. Crim. 18 ("A defendant in a criminal case has a constitutional right to not testify at trial, and the exercise of that right cannot be considered by the jury in determining whether a defendant is guilty or not guilty.").

require severance when the codefendants have mutually exclusive defenses," as defined by *Cruz* (emphasis added)). Because we find that Jaramillo and Islas presented "antagonistic, mutually exclusive defenses" that met the high threshold established in *Cruz*, severance was required. *Murray*, 184 Ariz. at 25.

Prejudice

¶24 *Cruz* and its immediate progeny suggest that the existence of mutually exclusive defenses inherently subjects a defendant to reversible prejudice. *See, e.g.*, *Cruz*, 137 Ariz. at 544-45 ("compelling prejudice requiring reversal" occurs when co-defendants' core defenses are mutually exclusive). However, more contemporary jurisprudence instructs us to separately consider whether the court's erroneous failure to sever co-defendants could have affected the outcome of the case. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005) (articulating general prejudice standards for trial court error); *see also Runningeagle*, 176 Ariz. at 69 (citing *Zafiro v. United States*, 506 U.S. 534, 538 (1993), for proposition that "mutually antagonistic defenses are not prejudicial *per se*").

¶25 "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Henderson*, 210 Ariz. 561, ¶ 18. When the state fails to carry this burden, we must reverse and remand for retrial. *E.g.*, *State v. Dansdill*, 246 Ariz. 593, ¶¶ 52, 62 (App. 2019).

¶26 Here, the state does not squarely address whether any erroneous failure to sever co-defendants would be harmless. To the extent it addresses prejudice, the state argues only one theory: that any prejudice to Jaramillo was cured by the trial court's "proper limiting instruction" that the jury was required to consider the evidence separately as to each co-defendant.

¶27 It is true that our courts have found limiting instructions curative in certain severance cases when the evidence against one defendant may have caused prejudice to the other in some fashion. *E.g.*, *Runningeagle*, 176 Ariz. at 68 (risk that stronger evidence against one co-defendant "rubbed off" on other minimized by jury instruction); *State v. Tucker*, 231 Ariz. 125, ¶ 43 (App. 2012) ("proper instruction and presentation of evidence enabled the jury to weigh the evidence against each defendant in this case and effectively cured any potential prejudice due to rub-off"); *State v. Robles*, 182 Ariz. 268, 272 (App. 1995) (given limiting instruction,

"risk of any evidence against the codefendants 'rubbing off' on appellant was minimal").

¶28 However, jury instructions are not always sufficient to protect a defendant from the prejudice caused by an erroneous denial of severance. *Runningeagle*, 176 Ariz. at 68 ("[T]here could be instances where a curative instruction may be inadequate."). And we are not aware of any Arizona case finding limiting instructions sufficient to cure error arising from a court's failure to sever for mutually exclusive defenses. *See Fernane*, 185 Ariz. at 228 (limiting instructions to "decide separately whether each of the two defendants is guilty or not guilty" insufficient to cure prejudice).

¶29 This reflects a fundamental difference between the prejudice caused by antagonistic defenses versus the prejudice that arises in the other three evidence-based categories of severance cases identified by our supreme court: "when (1) evidence admitted against one defendant is facially incriminating to the other defendant, (2) evidence admitted against one defendant has a harmful rub-off effect on the other defendant, [or] (3) there is significant disparity in the amount of evidence introduced against the defendants." *Murray*, 184 Ariz. at 25. When error thus arises from the effect of inculpatory evidence that is admissible as to one co-defendant but not another, the court's instruction—that the jury consider evidence separately as to each defendant—squarely addresses the potential harm and may substantially reduce any prejudicial impact. *Id.* ("With such an instruction, the jury is presumed to have considered the evidence against each defendant separately in finding both guilty.").

¶30 The same instruction, however, provides no remedy for the primary harm arising from co-defendants presenting antagonistic defenses: defendants are forced to defend against two adverse parties rather than one. *See, e.g.*, *Kinkade*, 140 Ariz. at 94. Because the state has not directed us to any instruction that addressed the specific prejudice arising from the error here, we cannot find such error harmless on that basis.[9]

[9]Islas's counsel highlighted this problem during trial. She noted that, although the trial court would instruct the jury to judge Jaramillo and Islas "individually based on the facts and evidence," she was concerned that "the way this trial is turning out, it is not going to be that way" because it would not "be that crystal clear to the jury and it is all going to get confused and muddled when everybody is pointing fingers at each other."

¶31 Nor can we conclude that the evidence against Jaramillo, while substantial, was overwhelming. Jaramillo maintained that he had permitted Islas to store tools in the back room of the Boost Mobile store, and that he had no knowledge that drugs were being stored there or sold out of the store. Although the state presented some circumstantial evidence to rebut Jaramillo's claims, Jaramillo responded to each aspect of that evidence. For example, Jaramillo testified that Islas had paid him for renting the storage space in cash the day of the final drug transaction. This was presented to explain both why Islas met with Jaramillo in the back room that day and why Jaramillo's register contained some of the marked bills shortly thereafter. Further, Jaramillo plausibly challenged the undercover officer's ability to distinguish the alleged drug packaging noises emanating from behind a closed door during what he asserted was actually a rental transaction. If the jury credited these claims, to which Jaramillo testified under oath, it could have harbored a reasonable doubt about his guilt. And, because the state has not argued this theory of harmlessness, we do not further analyze the strength of the prosecution's case against Jaramillo. *See State v. Bible*, 175 Ariz. 549, 588 (1993) (state has burden of demonstrating error harmless).[10]

Disposition

¶32 We agree that the trial court abused its discretion in refusing to grant severance, and the state has not carried its burden of establishing that error to be harmless. We therefore reverse Jaramillo's convictions and sentences and remand his case for a new trial.

[10]Jaramillo also contends the trial court demonstrated judicial bias against him, prejudicing the jury and denying him due process. Because we reverse on other grounds, and because the issue is not likely to recur on remand, we need not address it here.