IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MACHO JOE WILLIAMS,
Appellant.

No. 2 CA-CR 2013-0038
Filed December 23, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20112971003
The Honorable Paul E. Tang, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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Counsel for Appellee

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Macho Joe Williams was convicted of three counts of aggravated assault, two counts of kidnapping, and one count each of armed robbery, aggravated robbery, and weapons misconduct. The trial court sentenced him to a combination of consecutive and concurrent, enhanced prison terms totaling 51.5 years. On appeal, Williams argues the court erred by denying his motions to sever and by failing to discharge a codefendant's attorney who had previously represented Williams. He also contends the state presented insufficient evidence to support his convictions. For the reasons stated below, we vacate the criminal restitution order but otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Williams's convictions. *See State v. Brown*, 233 Ariz. 153, ¶ 2, 310 P.3d 29, 32 (App. 2013). In August 2011, D.R. was working at a Tucson dry cleaner when he observed a man, later identified as Juan Valenzuela, pacing outside the store. Thinking that Valenzuela was "panhandling or just a druggie walking around," D.R. continued working. While D.R. was helping a customer, M.S., a masked man, later identified as Williams, entered the store, pulled out a gun, and told D.R. and M.S. to get on the floor. Valenzuela ran into the store and began emptying money from the cash drawer.

¶3 Williams "stepped on the back of [M.S.'s] head, smashed [his] face," and yelled at D.R. to open the safes in the back of the store. Williams followed D.R. to the back of the store, where D.R. opened one safe and explained that he did not know the combination to the other. After searching the safe and taking a metal box used to store money, Williams walked to the front of the

store, told Valenzuela "let's go," and left. Valenzuela grabbed the cash drawer before leaving. D.R. then ran to the front of the store, looked out the window, and saw a two-door, white Mercury Cougar. He saw a third person in the driver's seat and watched as Valenzuela got in the back seat and Williams got in the front passenger seat. D.R. then called 9-1-1.

¶4 Shortly thereafter, officers who were responding to an unrelated call in the area observed the car. The officers activated their patrol vehicles' lights and sirens and began following the car, but it did not stop, and a high-speed pursuit ensued. The car came to a stop only after one of the patrol vehicles hit it, causing the car to spin. A second patrol vehicle parked next to the car, pinning the front passenger side door shut. The driver, later identified as Steven Soto, ran from the car but officers apprehended him. Williams tried to exit through the driver's side door, but after a struggle, an officer ultimately detained him. During the struggle to detain Williams, Valenzuela climbed out of the front passenger side window and fled on foot, but he was quickly tackled to the ground. Officers found a gun, a mask, loose dollar bills, and the cash drawer inside the car.

¶5 All three men were charged with various offenses under this cause number and were tried together. Williams was convicted as charged and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Motions to Sever

¶6 Williams first argues the trial court erred by denying his motions to sever his trial from Valenzuela's and Soto's. "[I]n the interest of judicial economy, joint trials are the rule rather than the exception." *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). However, Rule 13.4(a), Ariz. R. Crim. P., requires severance when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." We will not disturb a trial court's decision denying a motion to sever absent a clear abuse of

discretion. *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996).

¶7 In order to demonstrate an abuse of discretion, the defendant must show that, at the time he moved to sever, his defense would be prejudiced absent severance. *See State v. Blackman*, 201 Ariz. 527, ¶ 39, 38 P.3d 1192, 1202 (App. 2002); *see also State v. Roper*, 140 Ariz. 459, 461, 682 P.2d 464, 466 (App. 1984) (abuse of discretion based on showing at time motion made and not what ultimately transpires at trial). A defendant is prejudiced to such a significant degree that severance is required 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 antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant.

Murray, 184 Ariz. at 25, 906 P.2d at 558. Here, Williams argues that severance was required because the "defenses were clearly antagonistic."

¶8 As a preliminary matter, we address whether Williams has properly preserved this issue. Rule 13.4(c) provides that a defendant's motion to sever must be made at least twenty days before trial and, "if denied, renewed during trial at or before the close of the evidence." This requirement "prevents defendants from 'playing fast and loose with the trial court' and allows the court to reassess the need for separate trials as the evidence is developed." *State v. Flythe*, 219 Ariz. 117, ¶ 5, 193 P.3d 811, 813 (App. 2008), *quoting State v. Pierce*, 27 Ariz. App. 403, 406, 555 P.2d 662, 665 (1976). "Severance is waived if a proper motion is not timely made and renewed." Ariz. R. Crim. P. 13.4(c).

¶9 Here, Valenzuela timely filed a motion to sever more than twenty days before trial. However, Williams did not request to join that motion until one week before trial. Williams's motion therefore was untimely. *See* Ariz. R. Crim. P. 13.4(c). Williams nevertheless argues that he joined Valenzuela's motion the same day he "became aware of the need for severance," after a hearing in which he learned that Valenzuela had signed an affidavit exculpating Soto.[1] In support of his argument, Williams points to Rule 16.1(c), Ariz. R. Crim. P., which provides that "[a]ny motion . . . not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it." But, in Valenzuela's motion to sever, filed almost two weeks before the hearing at which Williams learned of the affidavit, Valenzuela argued that his defense was antagonistic to Williams's defense. Williams was thus alerted of the potential issue at that time and, with reasonable diligence, could have filed the motion sooner. *See* Ariz. R. Crim. P. 16.1(c).

¶10 Even assuming Williams had timely filed his motion to sever before trial, he also failed to renew his motion "during trial at or before the close of the evidence." Ariz. R. Crim. P. 13.4(c). Williams maintains he renewed his motion on the second day of trial after opening statements and again on the fourth day of trial after closing arguments. We disagree. On the second day of trial, Soto renewed his motion to sever, and Valenzuela explicitly joined. However, when the trial court asked Williams if he "want[ed] to add anything," his counsel responded, "[n]o," and then briefly explained their theory of the case. The court then denied the renewed motion "as to both defendants," presumably Soto and Valenzuela, and not all three. *See Flythe*, 219 Ariz. 117, ¶ 8, 193 P.3d at 813 ("[W]e cannot presume that one defendant speaks on behalf of his codefendant in moving to sever trials."). And, although Williams did renew his motion for a mistrial on the fourth day of trial, this request was untimely because it occurred after, not at or before, the close of

[1]The affidavit was not admitted at trial.

evidence as required by Rule 13.4(c).[2] *See* Ariz. R. Crim. P. 19.1(a) (order of trial proceedings); *State v. Jackson*, 144 Ariz. 53, 53-54, 695 P.2d 742, 742-43 (1985) (describing close of evidence as preceding closing arguments).

¶11 Because Williams did not properly renew his motion, "[s]everance [wa]s waived." Ariz. R. Crim. P. 13.4(c). Therefore, that claim is subject only to review for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996) (when severance waived, appellate court reviews for fundamental error). But, because Williams has not argued any error constitutes fundamental error, that argument is waived on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal if not argued).

¶12 In any event, we find no error—let alone fundamental error—in the trial court's refusal to sever the trials. In *State v. Cruz*, 137 Ariz. 541, 545, 672 P.2d 470, 474 (1983), our supreme court held that "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." The court further explained that "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." *Id.*

¶13 In ruling on the defendants' pretrial motions to sever in this case, the trial court concluded that "each Defendant's defense is

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[2] To the extent Williams suggests this request was timely because it was in response to Soto's closing argument, we also disagree. Rule 13.4(c) provides that "[i]f a ground not previously known arises during trial, the defendant must move for severance at or before the close of the evidence," suggesting that the motion cannot be based solely on closing arguments. *See also Murray*, 184 Ariz. at 25, 906 P.2d at 558 (in considering motion to sever, focused on evidence not arguments).

[not] antagonistic or mutually exclusive." The court explained "[a]side from Soto, who claims mere presence, Williams and Valenzuela claim failure by the State to meet [the] burden of proof" and Williams "may present this claim without prejudice or fear of the other Defendants presenting any antagonistic or mutually exclusive defenses." We agree. *See Roper*, 140 Ariz. at 461, 682 P.2d at 466.

¶14 On appeal, Williams nevertheless asserts that the defenses were antagonistic because "Valenzuela and Soto presented similar defenses claiming that Williams was the culpable party and they were being manipulated and/or forced to participate," while his defense was that "he never left the vehicle and lacked knowledge of the robbery." He therefore argues "[t]he jury was left in the position that they could not believe all three defenses." We disagree with Williams's characterization of his defense. As the trial court pointed out, the thrust of Williams's defense was in fact that the state had failed to prove beyond a reasonable doubt that he was the masked man who robbed the dry cleaners.

¶15 We acknowledge, as Williams suggests, that severance may also be warranted where a defendant is "prejudiced by the actual conduct of his or her co-defendant's defense." *Cruz*, 137 Ariz. at 545, 672 P.2d at 474. For example, in *Cruz*, Robert Cruz and Ed McCall were tried together and convicted of various offenses, including first-degree murder. *Id.* at 543, 672 P.2d at 472. Our supreme court reversed Cruz's convictions, concluding McCall's cross-examination of a witness, which resulted in the "admission of testimony suggesting that [Cruz] was linked with organized crime and that he had, in the past, hired people to commit crimes, including murder," was highly prejudicial and that Cruz had, as a result, "suffered prejudice against which the trial court did not provide sufficient protection." *Id.* at 546, 672 P.2d at 475. Although the court stated this testimony was "proper cross-examination," it concluded that the "evidence would not have come out if [Cruz] had not been tried with McCall and it would not have been admissible in the state's case at a separate trial." *Id.*

¶16 Here, Williams asserts that the cross-examination of D.R. by Soto similarly prejudiced him. According to Williams,

during cross-examination, after D.R. stated that he did not remember what the masked man had worn, Soto's counsel "reminded DR . . . that he had told one of the officers" he was wearing a gray shirt and showed D.R. a photograph of Williams wearing a gray shirt. But this mischaracterizes counsel's question, in which she said, "[y]ou made mention of somebody with a gray shirt"; she was trying to determine if that statement was in reference to the masked man. And, in response to the photograph of Williams, D.R. testified that he "remember[ed] a gray shirt, not that shirt." We fail to see how this prejudiced Williams. Moreover, this case is distinguishable from *Cruz* because evidence about what the masked man had worn and what Williams was wearing upon arrest would have been admissible even if the defendants were tried separately.

¶17 Additionally, under the state's theory of the case, accomplice liability, each defendant is criminally accountable for the other defendants' acts. *See* A.R.S. § 13-303(A); *State v. Jobe*, 157 Ariz. 328, 332, 757 P.2d 604, 608 (App. 1988). Thus, even if severed, the evidence against Soto and Valenzuela, including their roles in the robbery and positions in the car, would have been admissible at Williams's trial. *See State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993).

¶18 Furthermore, at the close of evidence, the trial court instructed the jury:

> [Y]ou must consider the charges against each defendant separately.
>
> Each defendant is entitled to have the jury determine the verdict as to each of the crimes charged based upon that defendant's own conduct and from the evidence which applies to that defendant, as if that defendant were being tried alone.

"With such an instruction, the jury is presumed to have considered the evidence against each defendant separately in finding [Williams] guilty." *Murray*, 184 Ariz. at 25, 906 P.2d at 558. For all these reasons, Williams has not established that the trial court fundamentally erred in denying his motions for severance, or that any alleged error caused him prejudice.

Conflict of Interest

¶19 Williams next argues "[t]he trial court committed reversible error when [it] failed to discharge Soto's attorney due to her previous representation of [Williams]." He contends that "this was a conflict of interest or presented at least the appearance of impropriety." However, Williams did not raise this issue in the trial court. Notably, at a hearing in January 2012, Williams's trial counsel indicated that she had discussed the issue with Williams and he did not believe there was a conflict of interest. Williams has therefore forfeited this issue absent fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d at 607. Because Williams does not argue the error is fundamental,[3] and because we find no error that can be so characterized, the argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (fundamental error review waived when defendant fails to argue fundamental error on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error when found).

Sufficiency of Evidence

¶20 Williams lastly argues the trial court erred by denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., because the state presented insufficient evidence to support his convictions.[4] The sufficiency of the evidence is a question of law

[3]Williams contends that the error was fundamental in his reply brief. But arguments raised for the first time in a reply brief are waived. *Brown*, 233 Ariz. 153, ¶ 28, 310 P.3d at 39.

[4]Williams also contends the trial court erred by denying his motion for a new trial, pursuant to Rule 24.1, Ariz. R. Crim. P., for

we review de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). We will reverse only if no substantial evidence supports the convictions. *State v. Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d 1020, 1024 (App. 2009). "Substantial evidence is proof that 'reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980) (alteration in *Bearup*). Evidence sufficient to support a conviction can be direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005).

¶21 Rather than challenging the sufficiency of the evidence for any of his convictions in particular, Williams argues the state failed to present substantial evidence that he was the masked man who robbed the dry cleaners. In support of his argument, Williams maintains that neither D.R. nor M.S. identified him or provided an accurate physical description of him, that the testimony "differed regarding where Williams and the masked man were sitting in the vehicle," and that "[n]o forensic evidence was presented tying Williams to the offense."

¶22 The jury reasonably could have inferred that Williams was the masked man. Although D.R. initially told officers that the masked man was "heavyset," which Williams contends does not match his physical description, D.R. also testified that "he might have had on a couple layers of clothes." And, the arresting officer described Williams as "big boned" and "stocky." D.R. also testified that the masked man got in the front passenger seat of the car. When officers subsequently stopped the car, the front passenger door was blocked by a patrol car. After the driver fled, the front passenger attempted to exit the driver's side door, where he was detained and then identified as Williams. Moreover, the mask and

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the same reason. However, he did not challenge the sufficiency of the evidence in his motion for a new trial below or argue that the error is fundamental on appeal. The argument is therefore waived. *See Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d at 607; *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

the gun, both of which were used by the masked man during the robbery, were found on the front passenger seat.

¶23 We also reject Williams's argument that the state was required to produce forensic evidence linking him to the crime. *See State v. Cañez*, 202 Ariz. 133, ¶ 42, 42 P.3d 564, 580 (2002) ("Physical evidence is not required to sustain a conviction where the totality of the circumstances demonstrates guilt beyond a reasonable doubt."). There was sufficient evidence from which a reasonable factfinder could conclude beyond a reasonable doubt that Williams was the masked man. *See Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d at 688. Accordingly, the trial court did not err by denying his motion for a judgment of acquittal.

Criminal Restitution Order

¶24 Although Williams has not raised the issue on appeal, we find fundamental error in the sentencing minute entry, which states "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order [(CRO)], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." *See Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650. "[T]he imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). The error is not cured even when, as here, the trial court delayed the accrual of interest. Nothing in A.R.S. § 13–805,[5] which governs the imposition of CROs, "permits a court to delay or alter the accrual of interest when a CRO is 'recorded and enforced as any civil judgment' pursuant to § 13–805(C)." *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

[5] Section 13-805 has been amended since the date of the offense. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1. The changes are not material here.

Conclusion

¶25 For the reasons stated, we affirm Williams's convictions and sentences but vacate the criminal restitution order.