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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THE STATE OF ARIZONA, Appellee, v. GROVER LEE HODGE, Appellant.	2 CA-CR 2008-0185 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070357

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
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E C K E R S T R O M, Presiding Judge.

¶1 A jury found appellant Grover Hodge guilty of possessing the following illegal items: methamphetamine for sale, drug paraphernalia, and a deadly weapon during the commission of a felony drug offense. The jury also found him guilty of manufacturing, possessing, transporting, selling, or transferring a prohibited weapon; fleeing from a law enforcement vehicle; and endangerment. The trial court sentenced him to concurrent terms of imprisonment on each count, the longest of which was a presumptive, ten-year term for possession of methamphetamine for sale. On appeal, Hodge argues the court erred when it denied his motions to sever the case from that of his codefendants. For the following reasons Hodge's convictions and sentences are affirmed.

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Huffman*, 222 Ariz. 416, ¶ 2, 215 P.3d 390, 392 (App. 2009). Officer Kyle Kohlmeyer of the Tucson Police Department was part of a team of officers conducting surveillance on a home as part of an investigation into illegal drug sales. During the surveillance, officers observed a white Ford Taurus leave the house. After the driver of the Taurus, later identified as Hodge, committed a traffic violation, the officers asked Kohlmeyer, a uniformed officer in a marked police car, to conduct a traffic stop. Kohlmeyer witnessed Hodge commit several more traffic violations before activating his vehicle's overhead lights. Hodge appropriately stopped the car on the right shoulder of the road, but as Kohlmeyer was stepping out of his patrol vehicle, Hodge "accelerate[d] hard" and left the scene of the traffic stop.

¶3 A short time later, Hodge drove toward the house officers had been watching earlier. Kohlmeyer was waiting in his patrol car across the street from the house. Hodge then executed a U-turn and drove across Kohlmeyer's lane of traffic, heading straight toward Kohlmeyer's vehicle. Kohlmeyer testified he "had to take a real emergency turn to get out of the way." He followed Hodge's vehicle into an alley where Hodge exited and began to run toward the house. The officers conducting surveillance on the house then apprehended Hodge and took him into custody.

¶4 At the house, in plain view from the open front door, Kohlmeyer observed a scale, plastic bags consistent with packaging material, and a "sawed off shotgun" propped against a safe.[1] On that basis, the officers conducted a protective sweep of the house. After obtaining a search warrant and searching the home, officers found in various locations, numerous firearms, a "digital scale with suspected narcotic residue," syringes, plastic bags, and a large quantity of methamphetamine. In the same room where much of the methamphetamine was located, the officers found a document bearing Hodge's name and two photographs of him.

¶5 As a result of the search, police arrested two other men: Douglas Schmid, who resided at the home and was encountered holding a small pouch containing methamphetamine, and Bobby Balentine, who was found in a padlocked room inside the

[1]A "sawed off shotgun" is one that is cut shorter than eighteen inches and is illegal to possess.

home during the initial protective sweep. In the room containing much of the contraband, officers discovered numerous documents bearing Balentine's name; most of the documents were in a safe. Officers also found over $1,000 cash in Balentine's pockets.

¶6 A Pima County Grand Jury indicted Hodge and Balentine jointly with manufacturing, possessing, transporting, selling, or transferring a prohibited weapon; and possessing methamphetamine for sale, drug paraphernalia, and a deadly weapon during the commission of a felony offense. Based on the pouch of methamphetamine found in his hand when he was arrested, the grand jury charged Schmid with possession of methamphetamine and possession of drug paraphernalia. Hodge was separately charged with fleeing from a law enforcement vehicle and endangerment.[2] After a joint trial of all three codefendants, the jury found Balentine guilty of all four charges and Hodge guilty of all counts except for felony endangerment.[3] It found Schmid guilty only of possessing paraphernalia. Hodge now appeals from his convictions and sentences.

¶7 Hodge argues the trial court erred when it denied his motions to sever his case from that of codefendants Schmid and Balentine. "The decision to grant or deny a motion to sever is within the sound discretion of the trial court and will be reversed only if that discretion is abused." *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). Rule

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[2]Hodge was also charged with possessing a deadly weapon as a prohibited possessor, but the charge was dismissed upon motion by the state.

[3]Hodge was, however, found guilty of the lesser included offense of endangerment with a substantial risk of physical injury, a misdemeanor. *See* A.R.S. § 13-1201.

13.3(b), Ariz. R. Crim. P., provides that defendants may be tried jointly "when the several offenses are part of a 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." And, it is well settled that "'in the interest of judicial economy, joint trials are the rule rather than the exception.'" *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996), *quoting State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). However, a trial court must order a severance if it is necessary for a fair trial or if any "unusual features of the crime or case" might cause prejudice to the defendant. *Cruz*, 137 Ariz. at 543, 672 P.2d at 472; *see also* Ariz. R. Crim. P. 13.4(a).

¶8 Our supreme court has held a defendant suffers prejudice from a joint trial under certain specific circumstances, including when "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. At trial, Schmid argued that, although he lived in the home, insufficient evidence linked him to any of the contraband. Balentine argued he had merely been visiting Schmid, who is a nurse, to treat a chronic illness; Hodge similarly argued he did not reside at the house and there was insufficient evidence to connect him to any of the contraband.

¶9 Hodge contends his mere presence defense was antagonistic to Balentine's same defense because "each accused the other of renting the contraband room." But "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." *Cruz*, 137 Ariz. at 544, 672 P.2d at 473. In *Cruz*, 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. Moreover, 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. at 545, 672 P.2d at 474.

¶10 Hodge specifically contends that because "both defendants were present at the house and had property in the contraband room, the jury could logically acquit only one defendant but not the other." However, that contention overlooks the jury's actual verdict in this case. The jury convicted both Hodge and Balentine of possessing the contraband, concluding both men had exercised control over the items in the room. Nothing about the evidence or defenses presented by either defendant forced the jury to choose Balentine or Hodge as the sole possessor of the items in the room. Nor did the evidence require the jury to conclude one of them was guilty simply because they were tried together.

¶11 Similarly, in *Cruz*, "the core of each defendant's defense was his own non-involvement," and because "the jury could have rationally accepted the defense theory of both, or only one, or of neither defendant," the court concluded the core of the defenses was not mutually exclusive and severance was not required. *Id.*; *see also State v. Lawson*, 144 Ariz. 547, 557, 698 P.2d 1266, 1276 (1985) (where codefendants had "essentially similar

defenses" and "jury was not forced to believe one defendant at the expense of the other," defenses not "mutually exclusive" requiring severance). We find the trial court did not err when it found Hodge's and Balentine's defenses were not mutually exclusive.

¶12 However, "[e]ven in a case where the nature of the defenses do not compel a severance, a defendant may be prejudiced by the actual conduct of his or her co-defendant's defense." *Cruz*, 137 Ariz. at 545, 672 P.2d at 474. Hodge contends counsel for both his codefendants acted as extra prosecutors against Hodge by "supplying crucial evidence of [his] guilt, objecting to exculpatory evidence the trial judge found prejudicial to the codefendants, . . . and exculpatory evidence that showed Balentine rented a room in the house." Hodge argues the foregoing conduct caused him prejudice, relying on *Cruz* and *State v. Fernane*, 185 Ariz. 222, 914 P.2d 1314 (App. 1995).

¶13 But in *Fernane* we concluded other-act evidence had been admitted improperly and the "error was compounded by the trial court's denial of appellant's motion to sever her trial from [codefendant]'s." 185 Ariz. at 227, 914 P.2d at 1319. And, in *Cruz*, the codefendant's attorney elicited other-act testimony that "would not have come out if appellant had not been tried with [the codefendant] and it would not have been admissible in the state's case at a separate trial." *Cruz*, 137 Ariz. at 546, 672 P.2d at 475. The potential prejudice to Cruz from the evidence was great, and the judge's instructions about the proper use of the evidence were incomplete. *Id.* For all these reasons, the court reversed Cruz's

convictions and sentences, concluding Cruz had "suffered prejudice against which the trial court did not provide sufficient protection." *Id.*

¶14 Here, the inculpatory evidence the codefendants actually presented—that Schmid knew Hodge was a renter in his home and knew of an agreement between Hodge and his wife to that effect—was not other-act evidence, and it was relevant to an issue in the case—who possessed the items in the contraband room. *See* Ariz. R. Evid. 401 (relevant evidence has "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Thus, it would have been admissible at a separate trial. *See* Ariz. R. Evid. 402 (relevant evidence generally admissible). Moreover, Schmid's testimony was not the only evidence that connected Hodge to the room and the contraband it contained. Schmid's testimony therefore did not require the severance of his trial from Hodge's. *See Lawson*, 144 Ariz. at 557, 698 P.2d at 1276 (codefendant's use of defendant's statement at trial did not require severance where statement could have been introduced in state's case-in-chief and statement "did not affirmatively or obviously lay blame for the crimes on defendant").

¶15 Hodge also complains about the trial court's preclusion of evidence tending to show Balentine had control over the contraband room and evidence of alleged drug activities at the house.[4] First, the court precluded the alleged drug activity evidence as insufficiently

[4]Hodge also complains about comments made by cocounsel out of the presence of the jury. We fail to see how either of those comments could have caused Hodge to suffer prejudice.

proven, and Hodge has not contended the court erred in this conclusion. Thus, we need not further address this contention. Second, the state presented other substantial evidence that allowed the jury to conclude Balentine had exerted control over the contraband items, yet the jury nonetheless concluded Hodge had also exerted control. Hodge has not shown how the admission of cumulative evidence of Balentine's control would have been so exculpatory to him that he was prejudiced by its omission. *See Cruz*, 137 Ariz. at 544, 672 P.2d at 473 (defendant's burden to show "compelling prejudice" in joint trial when challenging denial of severance).

¶16 Because Hodge has not shown the joint trial caused him to suffer prejudice that the trial court was unable to protect against, we find no abuse of discretion in the court's denial of his motion for a severance. Accordingly, Hodge's convictions and sentences are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge