FILED BY CLERK
MAR -1 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STERLING DEVON MOORE, Appellant.	2 CA-CR 2008-0331 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20062255

Honorable Hector E. Campoy, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 A jury found appellant Sterling Moore guilty of transportation of marijuana for sale. The trial court sentenced him to a substantially mitigated three-year term of imprisonment. He argues the court erred in admitting certain evidence, in finding his absence from trial was voluntary, and in denying his motion to sever his case from his codefendant's. For the following reasons, we affirm Moore's conviction and sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In June 2006, Moore's codefendant, William Flythe, drove a tractor-trailer to a freight distribution center in Tucson, accompanied by Moore as his codriver. As freight handlers loaded the trailer, they discovered marijuana in one of two boxes already inside it and alerted police officers to the presence of the contraband. Officers conducted a traffic stop and canine sniff search of the tractor-trailer, and Flythe and Moore were arrested and charged with transporting marijuana for sale. After a joint trial that Flythe attended but Moore did not, a jury found both men guilty. *See generally State v. Flythe*, 219 Ariz. 117, ¶¶ 2-3, 193 P.3d 811, 813 (App. 2008). Moore was arrested over a year later and, after he was sentenced, filed this timely appeal.

Absence from Trial

¶3 Moore argues "his constitutional right to be present at trial was violated" because his absence was not voluntary. We review for an abuse of discretion a trial court's determination that a defendant's absence from trial was voluntary. *State v. Reed*, 196 Ariz. 37, ¶ 2, 992 P.2d 1132, 1133 (App. 1999). Moore's trial originally was set for

December 2006.[1] The day before trial, because one of the state's witnesses had become unavailable for medical reasons, the court continued the trial to March 2007. The court ordered Moore released from custody, advised him of the trial date, and warned him the trial would proceed in his absence if he failed to appear. The court was informed Moore planned to spend the time at home in North Carolina, but Moore stated he would return to Tucson for his trial.

¶4 On the morning of trial, while still in North Carolina, Moore moved for a continuance based on a family medical emergency and lack of funds. The trial court denied the motion, finding "no extraordinary circumstances . . . justify the case being delayed," and the trial proceeded as scheduled. The next morning, Moore's counsel told the court Moore wished to attend trial via the Internet or by telephone, but the court denied that request. The jury found Moore guilty in absentia in April 2007. He ultimately was arrested in August 2008 and sentenced one month later.

¶5 The right to be present at trial is guaranteed by both the United States and Arizona Constitutions. *See Illinois v. Allen*, 397 U.S. 337, 338 (1970); *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 8, 953 P.2d 536, 538 (1998). However, a defendant may waive the right to be present at trial by his voluntary absence. *See State v. Bohn*, 116 Ariz. 500, 502-03, 570 P.2d 187, 189-90 (1977). Rule 9.1, Ariz. R. Crim. P., provides that "[t]he court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the

[1]Trial had been first set for November, but the trial court granted the defendants' request for a continuance.

proceeding would go forward in his or her absence should he or she fail to appear." Here, as the record shows and Moore does not dispute, the trial court gave him the necessary warnings and informed him of the trial date.

¶6 Because the trial court complied with Rule 9.1, Moore has the burden of showing his absence was involuntary. *See Reed*, 196 Ariz. 37, ¶ 3, 992 P.2d at 1134; *State v. Suniga*, 145 Ariz. 389, 392, 701 P.2d 1197, 1200 (App. 1985). Moore repeatedly emphasizes that he had stayed in contact with his counsel, contrasting that with cases in which courts found a defendant's absence voluntary under Rule 9.1 even without actual notice of the trial date when the reason for lack of notice was the defendant's failure to communicate with counsel and the court.[2] *E.g.*, *State ex rel. Romley v. Superior Court*, 183 Ariz. 139, 144-45, 901 P.2d 1169, 1174-75 (App. 1995); *State v. Cook*, 115 Ariz. 146, 564 P.2d 97 (App. 1977), *supp. op.*, 118 Ariz. 154, 155, 575 P.2d 353, 354 (App. 1978), *overruled in part on other grounds by State v. Fettis*, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983). Additionally, although acknowledging a defendant's remote participation is not allowed for trial, *see* Ariz. R. Crim. P. 1.6(c),[3] Moore nonetheless points to his desire to participate by telephone or Internet as evidence that his absence was involuntary.

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[2]Moore relies in part on *State v. Walker* (*Walker I*), 208 Ariz. 491, ¶¶ 19, 20, 95 P.3d 555, 558-59 (App. 2004), which is no longer controlling law in Arizona. *See State v. Walker*, 210 Ariz. 232, 109 P.3d 571 (2005) (depublishing *Walker I*).

[3]We cite to the current version of the rule, which became effective in January 2010. The relevant portions of the rule in effect at the time of Moore's trial are materially the same. *See* 196 Ariz. XLI.

¶7 Moore argues the foregoing circumstances show his "intent was clear: he wanted to attend and participate in his trial and was trying to attend." But the record also shows that, on the morning of trial, he had made only "last-minute" efforts to attend at the "urging" of his attorney. Although the family medical emergency had occurred a month earlier, Moore waited until the day of trial to move for a continuance on that basis. Moreover, Moore's counsel noted that, when he spoke to Moore the day before trial, Moore had "said he would not be able to make it out for financial reasons at this point." Before releasing him from custody, the trial court had warned Moore that financial difficulties were not a sufficient reason not to attend trial and that Moore should "figure out immediately how [he would] get back to Tucson" for his trial. At that time, Moore assured the court finances would not prevent him from returning to Tucson.

¶8 Although Moore states the trial court "fail[ed] to afford sufficient consideration to the issue of the involuntariness of his absence," we presume the court considered all the information available surrounding Moore's absence from trial.[4] *See Reed*, 196 Ariz. 37, ¶ 4, 992 P.2d at 1134 (trial court must consider evidence defendant presents to overcome inference of voluntary absence); *see also State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) (trial court presumed to know and follow law); *cf. Fuentes v. Fuentes*, 209 Ariz. 51, ¶¶ 18, 29, 97 P.3d 876, 880-81, 882 (App. 2004)

[4]We note the trial court did not make an express finding at the hearing on the motion to continue that Moore's absence was voluntary but later ruled that "implicit in the [ruling on the] motion to continue was the Court's finding that the defendant had voluntar[il]y absented himself from this trial, the defendant knowing of the trial date and willfully choosing to not attend."

(assuming trial court considered all competent evidence presented during bench trial in arriving at final judgment); *State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App. 1995) (presuming trial court considers all evidence defendant presents in mitigation). And, the existence of conflicting evidence about Moore's absence means we must defer to the trial court's determination. *See State v. Holm*, 195 Ariz. 42, ¶ 2, 985 P.2d 527, 528 (App. 1998) (finding of voluntary absence involves question of fact), *disapproved in part on other grounds by State v. Estrada*, 201 Ariz. 247, 34 P.3d 356 (2001); *see also State v. Pecard*, 196 Ariz. 371, ¶ 24, 998 P.2d 453, 458 (App. 1999) ("This court does not retry conflicts in the evidence.").

¶9 In sum, Moore has not met his burden to show either his finances or a family medical situation rendered his absence from trial involuntary.[5] *Cf. State ex rel. Thomas v. Blakey*, 211 Ariz. 124, ¶¶ 11-12, 118 P.3d 639, 642 (App. 2005) (defendant's elective return to Mexico under federal immigration law voluntary absence from state criminal trial); *Reed*, 196 Ariz. 37, ¶ 7, 992 P.2d at 1134 (defendant's hospitalization following suicide attempt constituted voluntary absence). Accordingly, the trial court did not abuse its discretion in finding Moore had been voluntarily absent from trial, and his right to be present was not violated.[6]

[5]Moore's passing statements that the continuance granted to the state caused his inability to later attend trial could have been raised on appeal as an assignment of error to the trial court's granting of the continuance. *E.g.*, *State v. Kennedy*, 122 Ariz. 22, 26, 592 P.2d 1288, 1292 (App. 1979) (reviewing grant of continuance under Rule 8.5(b), Ariz. R. Crim. P., for abuse of discretion). Moore has not done so.

[6]Moore contends in his reply brief that he has preserved adequately a separate argument on appeal that the trial court abused its discretion when it denied his motion to

Admission of Deposition Testimony

¶10 Moore argues the trial court erred in admitting the deposition testimony of one of the state's witnesses, Officer Robert Telles. Moore contends it was not admissible because Moore was not present during the deposition and because the state failed to show the witness was unavailable. But Moore did not object to the admission of the deposition below, and we therefore review this issue solely for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).[7]

¶11 The state disclosed Officer Telles as a witness shortly after Moore was indicted. Telles had conducted a traffic stop and a canine sniff search of the tractor-trailer. Shortly before the December 2006 trial date, Telles suffered a medical emergency, and the state moved to continue the trial based on his unavailability. Moore objected to the continuance but acknowledged Telles was "certainly necessary" as a witness and suggested Telles testify by deposition instead. At that time, the court affirmed the trial date but gave the state leave to supply more information about Telles's medical condition. And, a few days later, at a status conference the day before trial was

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continue the trial. However, he has not cited the appropriate standard of review or otherwise adequately developed the argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Thus, we need not separately address that contention. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004).

[7]The state contends Moore has waived even fundamental error review by not arguing it in his opening brief. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue fundamental error on appeal waives argument). Moore, however, responds to the state's contention in his reply brief and argues the error was fundamental. In our discretion, we address the merits of his argument.

set to begin, the trial court granted the state's motion and reset the trial to late March 2007. For reasons not entirely clear from the record, Telles testified by deposition on March 16, 2007.

¶12 On the second day of trial, the parties stipulated to admit part of an interview Telles had given before his deposition. In that portion of the interview, Telles acknowledged that he usually informs suspects of the reason for their arrest and, therefore, may have told Moore on the scene he was under arrest for transporting marijuana. Moore sought to present such evidence for two reasons: to establish he knew the reason for his arrest at the time he stated to another officer, "[W]hat did they find and how much did they find?" and to rebut Telles's deposition testimony that Telles did not remember telling Moore the reason for his arrest.

¶13 On the next day of trial, Telles's deposition was read into the record, but Flythe withdrew his stipulation concerning the interview. In a final attempt to get the evidence from the interview before the jury, Moore moved to subpoena Telles again to testify at trial. The trial court ultimately denied the motion, finding it would be unfair to Telles after he had given a deposition in lieu of live testimony. In so ruling, the court emphasized that Moore had "already established . . . that the person that makes the arrest that's kind of in charge of the investigation, as a matter of normal course, would normally tell the suspect what they're under arrest for, [which was] about all [he was] wanting to offer this witness for anyway."

¶14 Assuming, without deciding, that the admission of Telles's deposition was error, we cannot find that Moore was prejudiced by its admission. *See Henderson*, 210

Ariz. 561, ¶ 20, 115 P.3d at 607 (defendant must prove fundamental error and prejudice). Moore suggests admitting the deposition caused him prejudice because, had Telles been present, Moore "may well have wanted to ask [the witness] questions bearing on Moore's knowledge or lack thereof of the boxes of marijuana in the trailer." But, as noted, Moore sought to cross-examine Telles at trial for a different reason—solely to elicit testimony that he probably had informed Moore of the reason for his arrest before he made any statements. And Moore was ultimately able to elicit similar testimony from another officer. That officer conceded it was possible Moore had overheard Telles's instruction that Moore be detained because drugs had been found in the vehicle.

¶15 Moreover, Moore's contention that further examination of Telles could have provided additional exculpatory information regarding Moore's mental state finds little support in the record. Indeed, Telles testified in his deposition that he barely interacted with Moore, had no conversations with him, and was not focused much on Moore throughout the encounter. And, mere speculation about what trial counsel might have asked the witness or how the witness might have responded does not satisfy Moore's burden to show prejudice. *See State v. Towery*, 186 Ariz. 168, 178-79, 920 P.2d 290, 300-01 (1996) (to show prejudice from excluded testimony, "something more than speculation about possible answers is required"); *State v. Gerhardt*, 161 Ariz. 410, 413, 778 P.2d 1306, 1309 (App. 1989) ("[A] showing of prejudice depend[e]nt on speculation as to the potentially exculpatory value of lost evidence is insufficient to justify a dismissal."); *see also State v. Soloman*, 125 Ariz. 18, 23, 607 P.2d 1, 6 (1980) ("To indulge in such speculation would be to obviate the requirement that defendant must

demonstrate prejudice resulting from the loss of evidence."). In short, Moore has not shown the necessary prejudice to entitle him to relief for fundamental error.

¶16 Last, Moore contends that, if we find Telles's testimony was not prejudicial to him, the state must have misrepresented the importance of Telles's testimony when seeking a continuance in December 2006. Consequently, he argues, he must prevail on his argument that his right to be present at trial was violated. However, we find no support in the record for the contention that the state intentionally misrepresented the importance of Telles's testimony to gain a continuance of the trial.

¶17 Moore himself characterizes the situation in his opening brief as "the State's perceived criticality [sic] of the importance of Telles's in person testimony," belying his contention that the state intentionally misrepresented its importance to the case. And below, during the hearing on the state's motion to continue the trial, Moore's counsel noted he "underst[oo]d [the prosecutor's] dilemma" and "would be doing the same thing" in the state's position. Further, Moore has not provided us with a clear record explaining why Telles ultimately testified by deposition. The occurrence of the deposition itself counters Moore's argument that the state intentionally and persistently misrepresented the necessity for Telles's presence at trial. And, as noted, Moore has not raised the trial court's granting a continuance as an issue on appeal. We find no error in the admission of Telles's deposition testimony.

Severance

¶18 Moore argues the trial court erred in denying his motion to sever his trial from his codefendant's. Before trial, both Flythe and Moore moved to sever their cases

on the ground that their common defenses—lack of knowledge—were antagonistic. At the hearing on the motions, Moore's counsel emphasized that the differing accounts each man had given about the events at the distribution center might cause the jury to think both men were "liars and convict them both." The court denied the motions finding any "inherently incompatible defense" was "hypothetical and there [wa]s no basis to grant the severance." The court urged counsel to renew the motion if pretrial discovery revealed any evidence of a truly antagonistic defense. At a pretrial hearing on March 5, 2007, Moore's counsel attempted to orally renew his motion to sever and was instructed to renew it in writing, which he apparently did not do.

¶19 The trial went forward in Moore's absence; Flythe, however, was present throughout the trial. In Flythe's opening statement, his counsel argued, "The evidence will suggest . . . who knew that the marijuana was there. The evidence could suggest to you that Mr. Moore knew and that is why he held back. And there will be other evidence suggesting that Mr. Moore knew." After describing some "unidentified other actors" involved with the contraband, Flythe argued that Moore could have been involved in a conspiracy with those other actors and that Flythe had been "set up" and "used by others." In renewing his severance motion, Moore argued: "It's becoming very obvious that the defenses are antagonistic. And I think that will frankly become more so throughout the case." At that point, Flythe argued they "just ought to stay the course" and that the defenses were not mutually exclusive. The state acknowledged "there [wa]s some finger pointing[,] clearly," but nothing that had reached the level of making the codefendants' contentions mutually exclusive. The trial court denied the motion.

¶20 After the close of the state's case, Flythe called as a witness sheriff's detective Keith Barnes, who had investigated the forfeiture of the tractor-trailer that had been carrying the marijuana. Moore objected to the testimony on the ground he believed it would be based largely on hearsay, but noted he had been "led to believe" that "evidence of a larger conspiracy" would not be presented at trial, and admitting Barnes's testimony "just deepens the reason, frankly, for the severance motion that I've made and renewed several times." The trial court limited Barnes's testimony to his personal knowledge of the forfeiture but did not rule on the severance issue.

¶21 Finally, in closing argument, Flythe emphasized Moore's involvement and suggested Moore and some unknown persons were responsible. Counsel argued, "Flythe was their canary in the mine shaft." Moore's counsel moved for a mistrial on the ground Flythe's counsel had mentioned several times his own client's presence at trial; the trial court denied the motion. On the last day of trial, Moore renewed his motion to sever, citing the same ground upon which he had moved for a mistrial—that Flythe's counsel had implicitly highlighted Moore's absence from trial—as an alternative "ground[] for renewing [the] severance motion" because it showed the "inherent antagonism between the two defenses." The court again denied the motion.

¶22 We review a trial court's decision to grant or deny a severance for an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). Rule 13.3(b), Ariz. R. Crim. P., allows defendants to be tried jointly "when each defendant is charged with each offense included, or 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." But under Rule 13.4(a), codefendants' trials must be severed when necessary to a fair determination of guilt or innocence. *See also State v. Cruz*, 137 Ariz. 541, 543, 672 P.2d 470, 472 (1983) ("A trial court is required to grant a defendant's motion to sever if necessary to promote a fair determination of guilt or innocence of any defendant, or if the court detects the presence or absence of unusual features of the crime or case that might prejudice the defendant.").

¶23 Despite the possibility of confusion from the joinder of defendants, joint trials are favored in the interest of judicial economy. *Murray*, 184 Ariz. at 25, 906 P.2d at 558. When a defendant challenges a trial court's denial of a severance, he or she "must demonstrate compelling prejudice against which the trial court was unable to protect." *Cruz*, 137 Ariz. at 544, 672 P.2d at 473. A defendant suffers prejudice requiring severance when evidence that either is facially incriminating to one defendant or has a harmful "rub-off effect" is admitted against the other defendant, when the amount of evidence introduced against one of the defendants is significantly greater than the amount admitted against the other, when the defendants' defenses "are so antagonistic that they are mutually exclusive, or [when] the conduct of one defendant's defense harms the other defendant." *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995) (citation omitted).

¶24 Moore argues the defenses were mutually exclusive and Flythe's conduct at trial harmed him. Defenses are only mutually exclusive when the jury must disbelieve the core of the evidence on behalf of one defendant in order to believe the core of the evidence offered on behalf of the codefendant. *E.g., State v. Kinkade*, 140 Ariz. 91, 93-94, 680 P.2d 801, 803-04 (1984) (each defendant claimed other had fired gun).

¶25 Here the core of each man's defense was his own noninvolvement. Because it was not necessary for the jury to decide that only one of the defendants had alone possessed the marijuana and, as the state points out, because "the jury could have logically rendered any combination of guilt or innocence between the two defendants," Moore's and Flythe's defenses were not mutually exclusive. *See State v. Turner*, 141 Ariz. 470, 473, 687 P.2d 1225, 1228 (1984) (finding defenses not mutually exclusive when jury could have found core of both defenses true); *see also Cruz*, 137 Ariz. at 545, 672 P.2d at 474.

¶26 However, even if defenses are "not so antagonistic as to be mutually exclusive, severance may be warranted where 'a defendant may be prejudiced by the actual conduct of his or her co-defendant's defense.'" *State v. Fernane*, 185 Ariz. 222, 227-28, 914 P.2d 1314, 1319-20 (App. 1995) (citation omitted), *quoting Cruz*, 137 Ariz. at 545, 672 P.2d at 474. In *Cruz*, our supreme court reversed the defendant's convictions, finding 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." 137 Ariz. at 546, 672 P.2d at 475. In *Fernane*, after the trial court had allowed the codefendant to present evidence the defendant had abused her other children, this court held the trial court's limiting instructions were insufficient to alleviate the prejudice caused by joint trials. 185 Ariz. at 227-28, 914 P.2d at 1319-20. In both cases, a severance was warranted because the trial court had admitted highly prejudicial other-act evidence of violent crimes the defendant

had committed and likely would not have been admissible in his or her separate trial. *See Cruz*, 137 Ariz. at 546, 672 P.2d at 475; *Fernane*, 185 Ariz. at 227, 914 P.2d at 1319.

¶27 Here, Moore complains about the testimony given by Flythe's witnesses. Although Flythe called Detective Barnes as a witness, we fail to see how Barnes's testimony that Larry Williams claimed ownership of the truck could have been prejudicial to Moore. The jury heard other evidence that Larry Williams owned the truck and was Flythe's and Moore's employer. And, although Moore had made a statement to police officers that Williams had paid for the hotel room where he stayed in Phoenix—a statement that connected him to Williams—he made other statements suggesting Flythe was also staying in the same hotel. Thus, Barnes's testimony did not unfairly portray Moore as the only one of the two men associated with Williams.

¶28 Second, Flythe called Officer Eric Hickman to testify that he had transported arrestee Moore to the substation and he had not transported Flythe. But the jury heard other evidence of Flythe's arrest. And Moore does not expound upon any other prejudicial impact this testimony might have had, nor does he contend it would have been inadmissible in a separate trial. In addition, Moore's counsel was able to elicit testimony from Hickman that was favorable to Moore: Hickman testified on cross-examination that Moore may have overheard Officer Telles yelling that he had found drugs, which mitigated the effect of Moore's having asked another officer, "[W]hat did they find and how much did they find?"

¶29 Finally, Moore claims the testimony of Sergeant Michael Bannister, elicited by Flythe, "was squarely directed against Moore," although Moore does not explain how

it was so directed. Bannister testified he saw two "black males" near the tractor-trailer during his surveillance of the Triple-T truck stop; one was wearing a white tank top and the other a regular white T-shirt. There was evidence Moore had been wearing a white shirt when he was arrested and Flythe had been wearing a blue shirt. But Bannister was unable to identify either Flythe or Moore at trial as either of the two males he had seen from a distance.

¶30 None of this testimony remotely approaches the level of prejudice arising from the testimony admitted in *Cruz* and *Fernane* that entitled the defendants in those cases to a severance. *See Cruz*, 137 Ariz. at 546, 672 P.2d at 475; *Fernane*, 185 Ariz. at 227, 914 P.2d at 1319. And, importantly, the trial court here instructed the jury to consider the evidence against each defendant separately. *See State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993) (limiting instruction often cures risk of prejudice in joint trial). In short, Moore has not shown he suffered prejudice that the court's instructions did not remedy. *See Cruz*, 137 Ariz. at 546, 672 P.2d at 475.

¶31 In so holding, we acknowledge that the joinder of Moore's trial with that of his codefendant presented challenges for him that a separate trial would not. As noted, Flythe's counsel squarely contended Moore was guilty, and Flythe withdrew a stipulation to the admission of certain evidence that Moore had hoped to elicit. Thus, Moore unquestionably faced more than one adversarial voice among the respective parties at trial. But, as our supreme court has held:

> It is natural that defendants accused of the same crime and tried together will attempt to escape conviction by pointing the finger at each other. Whenever this occurs the co-

> defendants are, to some extent, forced to defend against their co-defendant as well as the government. This situation results in the sort of compelling prejudice requiring reversal, however, only when the competing defenses are so antagonistic at their cores that both cannot be believed.

Id. at 544-45, 672 P.2d at 473-74. As noted above, the jury here could have accepted both defendants' defenses, one defendant's defense, or neither. We therefore conclude the trial court did not err when it denied Moore's motion for severance.

Admission of Witness Testimony

¶32 Moore argues the trial court erred when it admitted the testimony of Detective Keith Barnes. Barnes testified the tractor-trailer Flythe and Moore had been driving in June 2006 was owned by Larry Williams of Let's Get It, LLC, and that it had been seized under state forfeiture laws for being used in marijuana trafficking. Moore objected to admission of the testimony on relevance, hearsay, and Confrontation Clause grounds. The trial court found the evidence was relevant and sustained Moore's hearsay and Confrontation Clause objections while limiting Barnes's testimony to his personal knowledge that Williams owned the vehicle and that it had been forfeited.

¶33 Moore now argues the evidence was improperly admitted under Rule 404(b), Ariz. R. Evid., and was unfairly prejudicial under Rule 403, Ariz. R. Evid. But he did not object on those grounds below, and we thus review the issue only for fundamental, prejudicial error.[8] *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at

[8]Moore has not argued he is entitled to fundamental error review on appeal, which would generally waive the issue. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error waived on appeal when not argued). However,

607. We have already found Moore did not suffer prejudice from the admission of Barnes's testimony. Accordingly, he has not sustained his burden to show he is entitled to relief on appeal. *See id.*

Disposition

¶34 For the foregoing reasons, we affirm Moore's conviction and sentence.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

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we need not apply the waiver principle here because we already have decided Moore was not prejudiced by the admission of Barnes's testimony.