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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STATE OF ARIZONA, Appellee, v. NESTOR CRISTOBAL SILVA, Appellant.	2 CA-CR 2010-0025 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083010

Honorable Charles S. Sabalos, Judge

AFFIRMED IN PART; REVERSED IN PART

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Nestor Silva was convicted of one count of possession of more than four pounds of marijuana for sale. The trial court sentenced him to a substantially mitigated three-year prison term. On appeal, Silva contends the court erred in 1) denying his motion to sever his trial from that of his codefendant; 2) denying his motion for a new trial; and 3) failing to give him proper credit for his presentence incarceration. For the reasons stated below, we affirm the conviction but modify the sentence.

Factual and Procedural History

¶2 On June 20, 2008, the Counter Narcotics Alliance (CNA), a multi-agency drug task force, was conducting undercover surveillance of a suspected stash house in Tucson. At about 7:10 p.m., the garage door opened and a gray sedan pulled out and drove away. At the same time, two dark-haired men walked out of the residence and drove away in a white car that had been parked on the street. The white car returned to the house at 8:23 p.m., the garage door opened, the car pulled inside, and the garage door closed behind it. About four minutes later, a man walked out of the house and drove away in a green pick-up truck. CNA officers contacted Officer Keith Duckett, of the Arizona Department of Public Safety, and requested that he conduct a traffic stop of the green truck in order to identify the driver. Duckett completed the stop and identified the driver as Omar Sainz. Officers confirmed later that Sainz lived at the residence.

¶3 At about 9:00 p.m., two officers approached the front door of the house to conduct a "knock-and-talk," but no one answered. After a drug dog alerted to the odor of marijuana at the exterior of the garage, CNA officers obtained a search warrant and

entered the house. They found seven wrapped bales of marijuana weighing 104 pounds in the living room, along with wrapping material, a set of scales, and a ledger.

¶4 Upon entering the garage from inside the house, officers found Silva and his cousin José Silva (hereafter José) sitting in the white car—José in the driver's seat and Silva in the front passenger seat. Officers later determined that Silva's mother owned the white car. When Silva and José were searched, officers discovered Silva had $200 in cash on his person and José had slightly over $1,100. A handgun which had been purchased by José about a month earlier was found in the master bedroom closet.

¶5 Silva, José, and Sainz were charged with possession of more than four pounds of marijuana for sale. About one month before the original trial date, José moved to sever his trial from that of Silva and Sainz; Silva joined in this motion.[1] Before ruling on the motion, the trial court granted a defense motion to remand the case to the grand jury. A second grand jury indicted Silva and José for possession of more than four pounds of marijuana for sale and possession of drug paraphernalia.[2] The trial court then denied both defendants' motions to sever.

¶6 On the first day of trial, prior to jury selection, Silva again moved to sever, and the court again denied the motion. The jury found both defendants guilty of possession of more than four pounds of marijuana for sale. Silva filed a motion for new

[1]Sainz subsequently pled guilty to an amended charge of conspiracy to possess marijuana for sale.

[2]The state dismissed the drug paraphernalia charge the day before trial.

trial, arguing the court had erred in refusing to sever the trials. The court denied the motion and Silva was sentenced as described above. This timely appeal followed.

Discussion

I. Severance

¶7 Silva first argues the trial court erred in denying his motion to sever his trial from that of his codefendant and in denying his motion for new trial on the same grounds. "[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 severance or a new trial absent an abuse of discretion. *See Murray*, 184 Ariz. at 25, 906 P.2d at 558 (severance); *State v. Hoskins*, 199 Ariz. 127, ¶ 53, 14 P.3d 997, 1012 (2000) (new trial). In order to demonstrate an abuse of discretion, the defendant must show that, at the time he made his motion 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 on what ultimately transpires at trial).

¶8 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 [or] (2) evidence admitted against one defendant has a harmful "rub-off effect"

> on the other defendant [or] (3) there is a significant disparity in the amount of evidence introduced against each of the two defendants . . . or (4) co-defendants present defenses that are so antagonistic that they are mutually exclusive . . . or the conduct of one defendant's defense harms the other defendant . . . . Sometimes, however, a curative jury instruction is sufficient to alleviate any risk of prejudice that might result from a joint trial.

State v. Grannis, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995) (internal quotations omitted), *overruled in part on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010). Here, Silva contends the trial court should have granted severance because José's defense was antagonistic to his and evidence admitted against José had a prejudicial rub-off effect on Silva.

¶9 Preliminarily, we address whether Silva has preserved this issue for appeal. José first moved to sever on April 17, 2009. Silva joined, and the trial court denied the motion about one month before trial. On the first day of trial, before jury selection, Silva reurged the motion, restating his concern that evidence admissible against José regarding the gun found in the residence would have a harmful rub-off effect on Silva. In denying the motion to sever, the trial court stated that "this [wa]sn't a case where there is . . . a lot of damaging evidence against one Defendant and . . . the kind of spillover or rub-off that the cases talk about, especially if . . . an appropriate limiting instruction [was given]." The court informed Silva's counsel that "you have the right to renew . . . at any time during the trial or all the way through the trial if something changes where you believe the spillover or the rub-off effect has become more than what I think it is going to be at

this point." Although counsel stated that he "may renew the motion during trial," he did not do so.

¶10 Rule 13.4(c) provides that a defendant's motion to sever must be made prior to trial and, if denied, "renewed during trial at or before the close of the evidence." In *State v. Flythe*, 219 Ariz. 117, ¶ 5, 193 P.3d 811, 813 (App. 2008), this court explained that the purpose of Rule 13.4(c)'s requirement that motions to sever be renewed during trial is to "prevent[] defendants from 'playing fast and loose with the trial court' and allow[] the court to reassess the need for separate trials as the evidence is developed." *Id.*, *quoting State v. Pierce*, 27 Ariz. App. 403, 406, 555 P.2d 662, 665 (1976).

¶11 When Silva reurged the motion to sever on the first day of trial, he identified no new evidence that would warrant reassessment of the appropriateness of severance. *See Roper*, 140 Ariz. at 461, 682 P.2d at 466 (abuse of discretion based on showing at time motion made and not on what ultimately transpires at trial). Instead, Silva argued essentially the same grounds for severance that had been presented in his initial motion. Given counsel's assertion after the trial court's ruling that he "may renew the motion during trial," it appears counsel was aware of the need for renewal at or before the close of evidence under Rule 13.4(c). Additionally, we observe his failure to do so could have been for strategic reasons if he believed the trial was proceeding favorably with José joined.

¶12 Under *Flythe*'s reasoning, Silva's renewal of the motion to sever, made before jury selection, was not made "during trial," and the argument is forfeited for all but fundamental error review. 219 Ariz. 117, ¶ 11, 193 P.3d at 814 (failure to renew

motion to sever during trial waives issue for appellate review); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (issues not raised below reviewed for fundamental, prejudicial error). And here, because Silva does not argue the trial court's denial of his motion was fundamental error, we generally would not address the issue at all. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). However, the state does not argue that Silva has waived the issue. We therefore exercise our discretion and address the merits of Silva's argument to determine whether the trial court committed fundamental error in denying Silva's motion for severance. *See State v. Aleman*, 210 Ariz. 232, ¶ 24, 109 P.3d 571, 579 (App. 2005) ("[W]aiver is a procedural concept that courts do not rigidly employ in mechanical fashion.").

A. Antagonistic Defenses

¶13 Silva maintains that José's defense was antagonistic to his because the latter's testimony was "so incredible that no reasonable person could do anything but find both defendants guilty." "[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." *State v. Cruz*, 137 Ariz. 541, 545, 672 P.2d 470, 474 (1983). "[D]efenses 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 trial, José testified that he had no knowledge of the marijuana inside the residence and that he went there only to meet Sainz's brother, who had agreed to help José with some repair work on Silva's mother's car. Although he did not testify, Silva presented

evidence that he went to Tucson to "participate in a recording session" and "shoot[] a music video" at another residence later in the evening. Silva asserts that his own defense was one of mere presence.

¶14 Indeed, both defenses appear to be variations on the same theme, as "[t]he core of each defendant's defense was his own non-involvement." *Cruz*, 137 Ariz. at 545, 672 P.2d at 474. And, unlike the codefendant in *Cruz*, none of José's statements implicated Silva in any way. *See id.* We cannot say the defenses were antagonistic, much less mutually exclusive, or that the "actual conduct" of José's defense prejudiced Silva's. *Id.* It was possible for the jury to believe José's testimony and still believe Silva's defense that he was merely present at the house and knew nothing about the marijuana. "Thus, the jury could have believed the core of the evidence offered by either defendant without disbelieving the core of the evidence offered by the other. Both defendants could have been found innocent." *Id.* Because the defenses were not mutually exclusive, the trial court did not err on that basis in denying Silva's motion to sever.

B. Prejudicial Rub-Off Effect of Evidence Admitted Against Codefendant

¶15 Silva maintains the evidence that José's gun had been found inside the house had a prejudicial "rub-off effect" on him. *See Grannis*, 183 Ariz. at 58, 900 P.2d at 7. He contends "[e]vidence of the gun indicates that José . . . had entered the house where the marijuana was found." Silva asserts that "[t]here was no independent evidence, however, which placed [him] inside the house"; the evidence showed only that he had been in the garage. Thus, Silva argues, "without the gun evidence[] there was no

evidence" that he had possessed the marijuana. And, he cites *State v. Van Winkle*, 186 Ariz. 336, 922 P.2d 301 (1996), in support of his argument that the state improperly "treated both defendants as a unit" based on José's testimony and the gun evidence admitted against José. Silva asserts the prosecutor "had a field day" with this evidence in her closing argument. We disagree.

¶16 In *Van Winkle*, the prosecutor erroneously suggested to the jury that Van Winkle had participated in all of her codefendant's abuse of the victims, even though a number of those offenses were committed before the defendants had met. *Id*. at 305. In reversing Van Winkle's convictions, our supreme court concluded the trial court erred in failing to sever the trials because the prosecutor invited the jury to hold Van Winkle responsible for crimes for which she had not been charged and could not have been involved in. *Id*. Here, as Silva correctly points out, during closing argument the prosecutor focused on José's testimony, arguing it lacked credibility and, in recounting the substance of that testimony, she referred to the codefendants collectively. But, although the prosecutor argued that Silva and José were acting in concert, *Van Winkle* does not suggest the argument was improper. Unlike Van Winkle, Silva was charged with the same crime as his codefendant and the prosecutor did not invite the jury to hold Silva responsible for José's conduct committed when Silva was not present. When the prosecutor referred to the codefendants collectively, she referred only to events where officers had seen them together or could infer they had been together. For example, she stated, "their contention is that they're sitting in the garage of this house . . . and they're

just hanging out sitting in the garage . . . that's the story they want you to believe." *Van Winkle* does not support Silva's argument that the prosecutor's statements were improper.

¶17 In a related argument, Silva contends the prosecutor improperly argued that because the handgun had been found inside the residence, Silva had been inside. Silva mischaracterizes the prosecutor's statements. During closing argument, the prosecutor stated that both defendants had been in the house before the police arrived, and when the defendants realized police officers were outside, José decided to hide his gun and then both defendants "distance[d] themselves" from the marijuana by locking themselves in the garage. Thus the prosecutor did not actually base Silva's presence in the house on the fact that the gun was found there, but rather drew an inference, based on all the evidence, that Silva had in fact been in the house.

¶18 Moreover, the prosecutor's argument that Silva had been inside the house was supported by the evidence. The record discloses evidence that CNA officers had observed two dark-haired men walk out of the residence, get into the vehicle owned by Silva's mother, and drive away. Later that evening, the same vehicle returned to the residence, the garage door opened, the vehicle drove inside, and the garage door closed. When officers entered the garage, Silva and José, both of whom had dark hair, were found sitting inside the car. Based on this evidence, it was not unreasonable for the prosecutor to argue that José and Silva were the two dark-haired men that officers had seen leaving the residence earlier. Nor was it unreasonable for the jury to make this same inference. There was thus sufficient evidence for the prosecutor to argue that Silva had been inside the residence. And, contrary to Silva's argument, she plainly stated that José

was the owner of the gun and had been the one to hide it.[3] "Prosecutors have 'wide latitude' in presenting their arguments to the jury." *State v. Morris*, 215 Ariz. 324, ¶ 51, 160 P.3d 203, 215 (2007), *quoting State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000). And, they are permitted to "argue all reasonable inferences from the evidence." *State v. Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d 1184, 1197 (1998).

¶19 Furthermore, "[t]he test for severance based on rub-off is whether the jury can 'keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict' as to each." *Van Winkle*, 186 Ariz. at 339, 922 P.2d at 304. Here, the trial court instructed the jury to "give separate personal consideration to the case of each individual Defendant . . . [and] analyze what the evidence in the case show[ed] with respect to that individual leaving out of consideration entirely any evidence admitted solely against [the] other defendant . . . ," and that "[e]ach Defendant [wa]s entitled to have his case determined from the evidence as to his own acts and statements and conduct and any other evidence which may [have been] applicable to him." "With such an instruction, the jury is presumed to have considered the evidence against each defendant separately in finding both guilty." *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). The trial court did not abuse its discretion in denying Silva's motion to sever. Accordingly, Silva has failed to demonstrate error, much less fundamental,

[3]In her rebuttal closing, the prosecutor asked rhetorically "why [would they] throw a gun, but then leave the bales of marijuana where they are and just get into the garage as soon as they can." Although this statement arguably connects Silva to the gun, we conclude he was not prejudiced by this statement, given the context of the prosecutor's overall argument and the trial court's limiting instructions.

prejudicial error. And because it raises the same issues, we need not separately address Silva's argument that the trial court erred in denying his motion for new trial.

II. Presentence Incarceration Credit

¶20 Finally, Silva claims the trial court erred in giving him credit for only thirty-four days of presentence incarceration instead of forty. Because he raises this issue for the first time on appeal, we review only for fundamental, prejudicial error.[4] *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. An illegal sentence constitutes fundamental error, *see State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009), and the state concedes fundamental error occurred here.

¶21 "All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment otherwise provided for by this chapter." A.R.S. § 13-712(B). Silva was taken into custody on December 11, 2009. He was sentenced on January 20, 2010. Thus he was entitled to credit for forty days of presentence incarceration, and the trial court erred in crediting him with only thirty-four days. We therefore modify the trial court's sentence pursuant to A.R.S. § 13-4037. *See also State v. Karr*, 221 Ariz. 319, ¶ 20, 212 P.3d 11, 12 (App. 2008).

[4]Silva does not argue fundamental error on appeal. We would therefore normally deem this issue waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). However, because we correct fundamental error when we see it, we address this issue. *See State v. Brown*, 191 Ariz. 102, 103 n.1, 952 P.2d 746, 747 n.1 (App. 1997).

Disposition

¶22 For the reasons stated above, we affirm Silva's conviction. We modify his sentence to give him credit for forty days of presentence incarceration and, accordingly, direct the trial court to reissue a corrected commitment order, but otherwise affirm the sentence imposed.

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

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge