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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THE STATE OF ARIZONA, Appellee, v. MICHAEL GARFIELD ROSE, Appellant.	2 CA-CR 2008-0115 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20071530

Honorable Gus Aragón, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Emily Danies
Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 After a jury trial, appellant Michael Rose was convicted of conspiracy to possess or transport marijuana for sale and possession of more than four pounds of marijuana for sale. The trial court sentenced Rose to concurrent, mitigated prison terms of four years on each count. On appeal, he contends the court abused its discretion by denying his motions to sever his trial from that of one of his codefendants. He also contends the court abused its discretion by denying his motion for mistrial after a witness purportedly violated the court's order limiting the scope of her testimony. We affirm for the reasons stated below.

¶2 On appeal, we view the evidence and the inferences arising from that evidence in the light most favorable to sustaining the guilty verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). So viewed, the evidence established that Rose and various codefendants had been involved in a marijuana-distribution operation. Marijuana would be brought to a stash house, where it was weighed, packaged, and shipped to various locations. Preceding Rose's arrest, officers had been conducting surveillance of a house on East Roget Drive (the Roget house). They brought a trained drug-detection dog to the house, and the officers implicitly interpreted the dog's reaction as an alert to the presence of drugs.

¶3 As the parties stipulated during trial, on April 5, 2007, a package containing about nine pounds of marijuana that had been sent from Tucson to New York was intercepted in Louisville, Kentucky. On April 11, officers saw Jermaine Fray leave the Roget house in a rented minivan and drive to Rose's apartment on East Stella. Fray later left the apartment

with Rose and another codefendant, Shane Martin. Fray drove back to the Roget house in the minivan, and Rose and Martin later joined him there, arriving in a separate car. The three men later emerged from the house with Fray's fiancée, Faith Melville. Fray and Melville subsequently left in the minivan, and Rose and Martin left in their car. Shortly thereafter, officers stopped both vehicles and arrested the three men.

¶4 When officers stopped Fray and approached the minivan, they noted the strong smell of marijuana coming from the vehicle. Fray identified himself as Jalil Anderson and said he and Melville had gone to the Roget house so Melville could rest because she had not been feeling well. When Rose was stopped, he possessed the title to a Ford Excursion that was in the name of Jalil Anderson; the Ford was subsequently found at the Roget house. Rose denied being involved in a marijuana-distribution operation.

¶5 Officers searched both the Roget house and Rose's apartment pursuant to warrants. At Rose's apartment, they found and seized shipping receipts, including one that matched the package intercepted in Louisville; other receipts with tracking numbers on them; shipping bills with weight and cost; airline tickets in Rose's name; a utility bill in Rose's name; a marijuana pipe; a small quantity of marijuana; and a ledger. At the Roget house, they found about forty-four pounds of marijuana. Rose was listed as the contact person on utility records for the Roget house. Fray, Martin, and Rose were charged with conspiracy to possess or transport marijuana for sale and possession of marijuana for sale.

¶6 Rose first challenges the trial court's denial of his motions to sever his trial from Fray's. Rule 13.4(a), Ariz. R. Crim. P., "requires a court to sever the trials of defendants on motion of a party if 'necessary to promote a fair determination of the guilt or innocence of any defendant of any offense.'" *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995), *quoting* Ariz. R. Crim. P. 13.4(a). Codefendants' cases must be severed when their defenses are so antagonistic that they are mutually exclusive. *State v. Cruz*, 137 Ariz. 541, 545, 672 P.2d 470, 474 (1983). And even when defenses are not so antagonistic as to be mutually exclusive, severance may still be warranted when "a defendant may be prejudiced by the actual conduct of his or her co-defendant's defense." *Id*. In the interest of judicial economy, however, joint trials are the rule rather than the exception. *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). We will not disturb the trial court's denial of a motion for severance absent an abuse of discretion. *Cruz*, 137 Ariz. at 544, 672 P.2d at 473. The defendant "must demonstrate compelling prejudice against which the trial court was unable to protect." *Id*.

¶7 On the first day of trial, Rose moved to sever his trial from Fray's, claiming Fray's defense would be "harmful and antagonistic" to Rose's. Rose was concerned that Fray would testify Rose had keys to the Roget house, which had not yet been disclosed and which Rose argued would be inconsistent with his defense. But Fray's counsel stated Fray was not expected to "point[] the finger" at Rose in order to exculpate himself. Rather, counsel anticipated Fray would testify he had not been involved in a marijuana-distribution

operation; his defense was that he was merely present because he was going to sell a car. The trial court denied Rose's motion, concluding the codefendants' anticipated testimony was not "so antagonistic at its core that the testimony of either defendant could not be believed."

¶8 On the second day of trial, apparently after the codefendants' attorneys spoke, Rose filed a "renewed motion to sever trials," again insisting the codefendants' anticipated testimony would result in mutually exclusive defenses. The trial court denied the motion but told the parties it would examine the matter more thoroughly after considering the codefendants' anticipated testimony. Fray's counsel then filed a notice outlining what Fray's anticipated testimony would be: he had no knowledge of a marijuana-distribution operation at the Roget house; he had gone to Tucson from Phoenix to sell the Ford Excursion to Rose; and Rose had taken Fray and Melville to the Roget house so Melville could rest because she was not feeling well. After reviewing the anticipated testimony, the court again denied Rose's motion to sever, finding the proposed testimony of each defendant not "so antagonistic at its core" that their defenses would be mutually exclusive and finding the "contradictions in their [anticipated] testimony . . . to be collateral at best."

¶9 Fray's testimony the following day was consistent with what counsel had stated it would be. Fray added that he and Rose had gone to Rose's apartment briefly, leaving the Ford at the Roget house, and then had gone back to the Roget house to get Melville so they could return to Phoenix. Fray testified Rose and Martin had arrived at the Roget house about

an hour later and someone had used a key to get into the house, although he was not sure who. Rose and Martin then left in one car, and he and Melville left in another car. On cross-examination, Fray was questioned about having told police he had gone to Tucson to visit friends but never having told them he had gone to Tucson to sell the Ford Excursion to Rose.

¶10 After testifying, Fray entered a guilty plea, and Rose moved again for severance and for a mistrial. The trial court asked Rose if he would like a continuance and the chance to re-present evidence. Declining, he instead requested a limiting instruction, which the court gave. It instructed the jury that Fray was no longer in the courtroom because he had pled guilty but admonished the jurors that Rose's "guilt or innocence is not affected by the fact that Mr. Fray ha[d] pleaded guilty and [was] no longer on trial." The jury was further instructed that it was required to "determine . . . whether the State has proven [Rose] guilty beyond a reasonable doubt."

¶11 Rose contends, as he did below, that Fray's defense and his own became so antagonistic that they were mutually exclusive and the trial court abused its discretion by denying his motions to sever. He asserts his defense was that he had nothing to do with the Roget house and had not been there before April 11. He claims that defense was undermined by Fray's testimony that Rose and Martin had keys to the Roget house and had offered the house to Fray as a place where Fray and Melville could stay. Fray's testimony would and did suggest Rose had authority and control over the Roget house.

¶12 As we noted above, the trial court was provided with a synopsis of Fray's anticipated testimony and concluded it was not "so antagonistic at its core that the testimony of either defendant would have to be believed at the cost of completely disbelieving the other defendant." The court regarded the contradictions as "collateral at best." On this record we cannot say the court abused its discretion. The mere fact that one defendant's testimony conflicts with that of another does not require severance. Fray's defense was not that Rose, rather than he, was the one involved in distributing marijuana. Rather, Fray simply defended on the ground that he had not been involved and had merely gone to Tucson to sell Rose a car. Similarly, Rose's defense was not that Fray was the culpable party, but that the operation was run by his roommate, Michael Coleman. We note that Fray was not sure who had the keys to the Roget house. The defenses were not on a "'collision course'"; therefore, the court was not required to sever the defendants' trials. *State v. Turner*, 141 Ariz. 470, 472, 687 P.2d 1225, 1227 (1984), *quoting State v. Kinkade*, 140 Ariz. 91, 93, 680 P.2d 801, 803 (1984).

¶13 Rose also contends the prejudice resulting from the trial court's refusal to sever the trials was exacerbated when Fray pled guilty and "left the trial." But that event could not have been anticipated, and it did not somehow render more antagonistic the codefendants' defenses. Nor does it mean the court abused its discretion by refusing to sever their trials. Given the differences in their defenses, Fray's pleading guilty did not necessarily implicate Rose. Moreover, by instructing the jury it was not to draw any inferences from Fray's guilty

plea in determining whether Rose was guilty, the court mitigated any potential prejudice. We presume jurors follow the instructions they are given. *State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006).

¶14 Rose also contends the trial court abused its discretion when it denied his motion for mistrial based on a witness's testifying in violation of the court's order that limited her testimony. The witness, Laffaris Boudreaux, had been Rose's girlfriend for the three years before he was arrested. On the fourth day of trial, Rose filed a motion to limit her testimony to those statements she previously had made or those that had been made to police officers and to preclude prosecutors from eliciting testimony from Boudreaux that Rose was a drug dealer. The prosecutor agreed she would not be questioned about that statement, but only about the kinds of activities she had personally witnessed while living with Rose, which included the fact that people often visited him at the apartment and Boudreaux would be told to leave the room so that she could not hear what they were discussing. The court's order was essentially consistent with that agreement; the state was permitted to ask Boudreaux what she had personally observed in regard to his marijuana dealings. Rose then successfully objected to Boudreaux's testifying beyond the scope of information she had given during an initial pretrial interview. Thus, the court precluded her from testifying about activities she had witnessed at an address on Golf Links Road.

¶15 Boudreaux testified she had lived with Rose and Coleman at an apartment on Stella, and before that, they had lived on Golf Links Road. When asked whether she had

seen "activity, people coming and going and that sort of thing" at the Golf Links address, she said, "[Y]es." She said she saw the same activity at the apartment on Stella. The trial court noted this was part of what had been precluded, and Rose moved for a mistrial because the activity on Golf Links had never been disclosed and was unduly prejudicial. The court denied the motion but gave counsel the opportunity to submit a limiting instruction, after which the state clarified its questions and said Boudreaux was only to answer with respect to the Stella apartment. Boudreaux then testified Rose had people come to the house, she had to leave the room or the apartment, and he did not want her to know what was going on. She then gave information she had not previously disclosed, which was that she had on occasion mailed suspected packages of marijuana for Rose. The prosecutor stopped questioning her and stated this was the first he had ever heard that information from her. Rose's counsel suggested Boudreaux needed counsel; in response, the state agreed to grant her immunity for her testimony. The court permitted Boudreaux to be immunized and suggested Rose's counsel could cross-examine her "as [he] saw fit."

¶16 After receiving immunity, Boudreaux testified she had shipped packages for Rose. Cross-examining her, Rose's counsel asked, "[Y]ou would agree you never saw him with any large amount of marijuana?" She agreed. She also admitted she had previously denied having ever seen Rose "do anything with regard to criminal activity." On redirect, the prosecutor elicited testimony that she had seen Rose ship "about a pound" of marijuana from the Golf Links address and that she knew about his being involved in criminal activity.

Overruling Rose's objections, the trial court ruled the testimony was admissible because Rose had "opened" "the door[]" to it during cross-examination. The court subsequently denied Rose's motion for mistrial, which was based on the fact that the testimony was unanticipated and not previously disclosed.

¶17 "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). In deciding whether to grant a mistrial based on a witness's testimony, the trial court must consider whether the testimony called to the jury's attention matters it would not be justified in considering and whether it was probable that the testimony influenced the jury. *State v. Simms*, 176 Ariz. 538, 541, 863 P.2d 257, 260 (App. 1993). We will not disturb the court's ruling on a motion for mistrial absent a clear abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995).

¶18 Even assuming as true that some of Boudreaux's statements did exceed the scope of the trial court's order and that defense counsel had not actually opened the door to such testimony, any error clearly was harmless. Much of Boudreaux's testimony about drug activity at the Golf Links address was essentially cumulative to what she stated about such activity at the apartment on Stella. Moreover, there was other, overwhelming evidence of Rose's guilt, particularly the evidence that was seized from his apartment, his apparent connection to the Roget house, and the evidence seized there. Additionally, it appears that

not only the defense but also the state was surprised by some of Boudreaux's testimony. That fact was among the reasons the court gave for denying a mistrial; it found there was "no reason to believe that there was anything by way of concealment on the part of the State in this matter." On this record, we simply cannot say the court abused its discretion in denying the motion for mistrial or that Rose is entitled to a new trial.

¶19 Nor has Rose established he is entitled to relief based on his claim the state did not follow proper immunity procedures—specifically, that it did not comply with A.R.S. § 13-4064. We agree with the state that the statute does not appear to be implicated here because Boudreaux did not refuse to testify. Moreover, even assuming it applies, nothing more than possible technical error occurred, and any such error was harmless.

¶20 The convictions and the sentences imposed are affirmed.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge