

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CARMEN LOMELI,
Appellant.

No. 2 CA-CR 2014-0017
Filed May 1, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Santa Cruz County
No. CR12102
The Honorable James A. Soto, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

STATE v. LOMELI
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

MILLER, Presiding Judge:

¶1 Carmen Lomeli was convicted after a jury trial of conspiracy, money laundering, fraudulent schemes and artifices, and six counts of theft. On appeal, she contends the trial court erred by denying her motion to sever her trial from that of her co-defendant husband, Horatio, and in denying a motion for new trial on that basis. For the following reasons, we affirm Lomeli's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Flythe*, 219 Ariz. 117, ¶ 2, 193 P.3d 811, 813 (App. 2008). Lomeli was the long-time bookkeeper for her employer. In 2009, the day before a scheduled audit, she confessed to the chief operating officer (COO) that she had stolen thousands of dollars from the company, and threatened to harm the company by revealing adverse information if she was reported to authorities. The COO reviewed the company's records and discovered many records were missing. It was eventually determined that Lomeli stole more than \$136,000 using fraudulent expense checks that were deposited in a checking account she shared with her husband. She also stole approximately \$37,000 in cash from sales, which she did not deposit into the account.

¶3 Lomeli was charged with conspiracy, money laundering, fraudulent schemes and artifices, residential mortgage fraud,¹ and six counts of theft. She was convicted as described

¹The jury found Lomeli guilty of residential mortgage fraud, but the state dismissed the charge after the trial court granted a motion for new trial on that count only.

STATE v. LOMELI
Decision of the Court

above and sentenced to mitigated, concurrent prison terms, the longest of which were eight years, followed by five years' probation. This timely appeal followed.

Discussion

¶4 Lomeli contends the trial court erred by failing to sever her trial from that of her husband. The state responds initially that Lomeli waived this argument because she failed to renew her motion to sever "during trial at or before the close of the evidence." Ariz. R. Crim. P. 13.4(c); *Flythe*, 219 Ariz. 117, ¶ 11, 193 P.3d at 814. Lomeli maintains in her reply brief that the issue was preserved because she essentially renewed her motion when she objected to the admission of certain evidence and requested a mistrial after Horatio testified.

¶5 Before trial, Lomeli filed an unsuccessful motion to sever arguing evidence against Horatio would "rub off" on her, there was a disparity of evidence against them, and their defenses were antagonistic. During trial, when Horatio was examined about conversations with Lomeli, she objected that such conversations were privileged. In the context of that argument, her counsel stated, "I just want to put on the record, and, Judge, also, I filed a motion to sever, and now the testimony is coming out; it's damaging to my client. I'm going to ask for a mistrial."² Although it might have been preferable to make a more formal request to renew the motion to sever, the state cites no cases supporting the proposition that Lomeli was required to do something more to preserve her objection. Therefore, the issue was not waived, and we review the trial court's ruling for an abuse of discretion. *See State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (2003). Likewise, a motion for a new

²Lomeli also raised the issue of severance again in the context of another motion for mistrial regarding state's cross-examination of Horatio. Although it was technically several days after the close of evidence, it was arguably the first opportunity for counsel to raise the issue "at . . . the close of evidence," because the court recessed immediately after testimony in the case was completed. Rule 13.4(c).

STATE v. LOMELI
Decision of the Court

trial is reviewed for an abuse of discretion. *State v. Larin*, 233 Ariz. 202, ¶ 6, 310 P.3d 990, 994 (App. 2013).

¶6 To be entitled to relief based on the trial court's denial of her severance request, Lomeli "must demonstrate compelling prejudice against which the trial court was unable to protect." *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). A defendant is prejudiced to a degree requiring severance when (1) "evidence admitted against one defendant is facially incriminating to the other defendant"; (2) such evidence has a "harmful 'rub-off effect' on the other defendant"; (3) there is a disparity in the volume of evidence against each defendant; (4) the co-defendants' defenses are "so antagonistic that they are mutually exclusive"; or (5) "the conduct of one defendant's defense harms the other defendant." *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995), *overruled in part on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

¶7 Lomeli contends, as she did below, severance was necessary because she was harmed by the rub off effect of evidence against Horatio, there was a disparity in the amount of evidence against them, and she and Horatio had antagonistic defenses. We address each argument in turn.

¶8 A defendant is harmed by "rub-off" when "'the jury's unfavorable impression of the defendant against whom the evidence is properly admitted influence[s] the way the jurors view the other defendant.'" *State v. Tucker*, 231 Ariz. 125, ¶ 42, 290 P.3d 1248, 1265 (App. 2012), *quoting State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996) (alteration in *Tucker*). But severance is not generally required when the other defendant was not involved in the conduct giving the unfavorable impression. *Id.*

¶9 At trial, the state asked Horatio—a law enforcement officer—if he had ever been disciplined at work due to dishonesty. He said he had never been disciplined for dishonesty because that would be a ground for dismissal. There was no implication that Lomeli was involved in Horatio's alleged workplace dishonesty. More specifically, Horatio explicitly denied the claim, and the state did not press the issue or attempt to prove its claim with documents.

STATE v. LOMELI
Decision of the Court

Moreover, the trial court gave the jury the following curative jury instruction, which Horatio requested:

The State in this case asked [Horatio] if it was true that he had been suspended for 5 days in 2003 for dishonesty. [Horatio] answered that this was not true, and that dishonesty would be grounds for dismissal. On September 3, 2003, Officer Horacio Lomeli received a 5 day suspension without pay for “Improper procedure or tactic.” There was no finding of dishonesty, and the words “dishonest” or “dishonesty” do not appear in the Department of Public Safety Director’s order.

We presume jurors follow the trial court’s instructions.³ *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006); *see also Grannis*, 183 Ariz. at 58, 900 P.2d at 7 (recognizing curative jury instruction may be sufficient to alleviate risk of prejudice from joint trial). Lomeli has not demonstrated she was prejudiced by any rub-off effect of the state’s having asked Horatio about his workplace discipline.

¶10 The disparity-of-evidence factor requires overwhelming evidence against one defendant that will cloud the jury’s ability to compartmentalize the evidence as it relates to the other defendant. *State v. Lawson*, 144 Ariz. 547, 556, 698 P.2d 1266, 1275 (1985), *citing United States v. Singer*, 732 F.2d 631, 635 (8th Cir. 1984); *see also Tucker*, 231 Ariz. 125, ¶¶ 44-45, 290 P.3d at 1265-66. Here, the majority of the evidence, which was overwhelming, was against Lomeli. Horatio was tried as an accomplice on the basis that he knew or had reason to know he spent stolen money that was deposited into the bank account he and Lomeli shared. Aside from the disciplinary issue, Lomeli points to no evidence against Horatio that the jury would not have been able to compartmentalize as it

³The jury was also instructed that questions are not evidence.

STATE v. LOMELI
Decision of the Court

related to her. Further, the jury was instructed to consider each offense separately and distinctly. Lomeli has not shown she suffered prejudice due to the disparity of the evidence.

¶11 Lomeli further maintains Horatio's defense was antagonistic to her because he testified that she was in charge of the family finances, she frequently asked him to work overtime to earn more money, and she made extravagant purchases. "Defenses are mutually antagonistic if 'in order to believe the core of the evidence offered on behalf of one defendant, [the jury] must disbelieve the core of the evidence offered on behalf of the co-defendant.'" *Grannis*, 183 Ariz. at 59, 900 P.2d at 8, quoting *Cruz*, 127 Ariz. at 545, 672 P.2d at 474 (alteration in *Grannis*).

¶12 Here, Lomeli admitted she had written and cashed the subject checks, but claimed her employer was aware of the scheme and approved of it. Horatio's defense was that he had no knowledge of what was going on because he did not keep track of the family finances. Lomeli did not contradict Horatio's factual defense that she was in charge of the finances. More important, Horatio's defense did not contradict Lomeli's defense that the checks were employer-approved bonuses.⁴ See *State v. Turner*, 141 Ariz. 470, 472, 687 P.2d 1225, 1227 (1984) (where one defendant argues he did not know of crime and other argues mistaken identity, defenses not mutually exclusive); cf. *State v. Kinkade*, 140 Ariz. 91, 94, 680 P.2d 801, 804 (1984) (defenses antagonistic where each defendant argued he was present but other fired fatal shot). We conclude the trial court did not abuse its discretion in denying Lomeli's pretrial motion to sever, and nothing introduced during trial required the court to grant a later motion.

⁴Lomeli cites *United States v. Tootick*, 952 F.2d 1078 (9th Cir. 1991), a case in which the Ninth Circuit Court of Appeals concluded co-defendants had mutually exclusive defenses and the trial should have been severed. But in that case, each defendant argued the other had committed an assault alone; the acquittal of one defendant, therefore, necessitated the conviction of the other. *Id.* at 1081. Here, both defendants could have been acquitted.

STATE v. LOMELI
Decision of the Court

¶13 Lomeli does not provide any separate arguments supporting her motion for a new trial. Thus, for the same reasons we uphold the denial of her motion to sever, we conclude the trial court did not abuse its discretion by denying the motion for new trial. *See Larin*, 233 Ariz. 202, ¶ 6, 310 P.3d 994 (motion for new trial reviewed for abuse of discretion).

Disposition

¶14 For the foregoing reasons, we affirm Lomeli's convictions and sentences.