DIVISION ONE
FILED: 10/01/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0060
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
JOSE LUIS CARRILLO,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-006436-001

The Honorable Michael D. Jones, Retired Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Section Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

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by Cedric Martin Hopkins
Attorney for Appellant

T H U M M A, Judge

¶1 Defendant Jose Luis Carrillo appeals from his convictions and sentences for one count of second degree murder,

a Class 1 dangerous felony, and three counts of aggravated assault, Class 3 dangerous felonies. Carrillo argues the superior court erred in denying his motion to dismiss a second indictment based on prosecutorial vindictiveness. Finding no error in that denial, his convictions and sentences are affirmed as modified.

FACTS[1] AND PROCEDURAL HISTORY

¶2 The charges arise out of a May 2008 fatal brawl in a parking lot across from The Sky Lounge in Phoenix. The State initially charged Carrillo with one count of first degree murder of G.G. and one count of aggravated assault of J.C., and charged three co-defendants, Christian Molina, Oscar Morales-Carrillo and Walter Villaescusa, with one count of aggravated assault of G.G. The first trial, at which Carrillo, Molina, and Morales-Carrillo were tried together,[2] ended in a mistrial for Carrillo alone on June 27, 2011 after juror misconduct reduced the number of jurors from 12 to 11. At that time, the court set August 26, 2011 as the new "last day" without objection. On June 11, 2011, the court set a retrial to start August 15, 2011.

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[1] On appeal, facts are viewed in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008). Initials are used to protect the victims' privacy. *State v. Maldonado*, 206 Ariz. 339, 341 n.1, 78 P.3d 1060, 1062 n.1 (App. 2003).

[2] Villaescusa absconded, was tried separately in absentia and found guilty of aggravated assault in April 2010.

¶3 On July 8, 2011, a new indictment issued charging Carrillo with one count of first degree murder and three counts of aggravated assault. As with the original indictment, the new indictment alleged Carrillo committed aggravated assault by the use of a gun, a Class 3 dangerous felony, against J.C. (Count 3), but changed the theory of the offense from an allegation that he "caused a serious physical injury" to an allegation that he "caused a physical injury." The new indictment included two new counts of aggravated assault with the use of a handgun, each a Class 3 dangerous felony, alleging (in Count 1) that Carrillo placed J.C. "in reasonable apprehension of imminent physical injury" and (in Count 2) that Carrillo had "caused a physical injury" to G.G.

¶4 On July 25, 2011, Carrillo filed a motion to dismiss, claiming the new indictment was (1) "presumptively vindictive" by containing new, changed charges that increased the penalties that the State had not pursued previously and (2) intended to avoid Ariz. R. Crim. P. 8.2(c) speedy trial requirements and the August 15, 2011 new trial. Carrillo asked that the new indictment be dismissed with prejudice or, in the alternative, that the new indictment be consolidated for trial with the original indictment "with Counts 1, 2, and 3 [of the new indictment] dismissed." The State argued Carrillo had not made a *prima facie* showing of presumptive vindictiveness because the

State was still prepared to go to trial on August 15 and because the mistrial was caused by juror misconduct. The State also provided what it described as objective, non-vindictive reasons for the new charges and the change in theory on the aggravated assault in Count 3.

¶5 After hearing argument, the superior court denied Carrillo's motion, finding that, "even though it may appear at first glance that a presumption of vindictiveness should be imposed," considering "the totality of the circumstances," the presumption "dissipates, evaporates."

¶6 The case went to trial on the new indictment starting August 15, 2011. After considering the evidence, instructions and argument, the jury rendered a verdict on October 24, 2011. Although finding Carrillo guilty of the three aggravated assaults as charged, for the murder charge, the jury found him guilty of the lesser included offense of second degree murder. After sentencing, Carrillo filed this timely appeal. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1)(1992), 13-4031 and 13-4033 (2010).[3]

[3] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

DISCUSSION

¶7 A ruling on a motion to dismiss for vindictive prosecution is reviewed for an abuse of discretion. *State v. Mieg*, 225 Ariz. 445, 447, ¶ 9, 239 P.3d 1258, 1260 (App. 2010). An abuse of discretion occurs when the reasons given by the court are legally incorrect, clearly untenable or otherwise constitute a denial of justice. *See State v. Penney*, 229 Ariz. 32, 34, ¶ 8, 270 P.3d 859, 861 (App. 2012) (citing authority).

¶8 Carrillo relies on a "presumption of vindictiveness," not a claim of actual vindictiveness. Due process protects a defendant from prosecutorial decisions motivated by a desire to punish something the law permits a defendant to do (such as exercising a protected legal right) by subjecting the defendant to more severe charges. *Mieg*, 225 Ariz. at 447, ¶ 10, 239 P.3d at 1260. A defendant can show prosecutorial vindictiveness by "rely[ing] on a presumption of vindictiveness if the circumstances establish a 'realistic likelihood of vindictiveness.'" *Id.* at 447-48, ¶ 11, 239 P.3d at 1260-61 (citing authority). "If a defendant makes a prima facie showing that a charging decision is 'more likely than not attributable to vindictiveness by [a] prosecutor,' the[n] the burden shifts to the prosecutor to overcome [that] presumption" by providing "objective evidence justifying the prosecutor's action." *Id.* at 448, ¶ 12, 239 P.3d at 1261.

¶9 Arizona looks at the "totality of the circumstances" in evaluating whether a presumption of vindictiveness applies. *Id.* at 448-49, ¶¶ 14-16, 239 P.3d at 1261-62. This "approach is particularly appropriate in evaluating whether to apply a presumption of vindictiveness" following a mistrial. *Id.* at 449, ¶ 16, 239 P.3d at 1262. A presumption of vindictiveness does not arise unless the totality of the circumstances demonstrates the prosecutor's actions in seeking the more severe indictment is "more likely than not explainable only as a penalty imposed on defendant for obtaining a mistrial." *Id.* at 449, ¶ 16, 239 P.3d at 1262. As applied, on this record, there was no abuse of discretion in finding the totality of the circumstances did not give rise to a presumption of vindictiveness.

¶10 First, prosecutorial vindictiveness requires that a prosecutor act with the purpose of penalizing a defendant "for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Here, the mistrial did not occur because Carrillo asserted a protected statutory or constitutional right. Instead, the superior court sua sponte declared a mistrial when fewer than the constitutionally-mandated number of jurors remained to decide the charges against Carrillo. There is no hint in the record that the juror misconduct was attributable to Carrillo. Accordingly, this record does not suggest that the prosecutor

would have a motive or desire to punish Carrillo because of the mistrial. *See, e.g.*, *United States v. Perry,* 335 F.3d 316, 324 (4th Cir. 2003) (no reason to presume prosecutor acted to punish defendant where unopposed mistrial granted due to "trial events largely beyond [defendant's] control" and not "exercise of a protected right"); *United States v. Contreras,* 108 F.3d 1255, 1263 (10th Cir. 1997) ("Generally, where . . . a modification in a charging decision follows a mistrial occurring for neutral reasons, such as a hung jury . . . there is no reason why the prosecutor would consider the defendant responsible for the need for a new trial."); *Mieg*, 225 Ariz. at 450, ¶ 20, 239 P.3d at 1263 (similar for mistrial caused by hung jury) (citing *United States v. Mays*, 738 F.2d 1188, 1190 (11th Cir. 1984)). As the superior court observed, while "at first glance" it might appear that a "presumption of vindictiveness" applied due to the new charges, looking at the totality of the circumstances, that presumption "evaporates."

¶11 Apart from the reason for the mistrial, the prosecutor presented non-vindictive reasons for seeking the new indictment. The prosecutor had considered amending the original indictment but had not done so given the superior court's indication that Carrillo's case might be severed from his co-defendants' case if new charges were added and the prosecutor did not want to subject the victim's family to multiple trials. The sua sponte

mistrial resulted in Carrillo being tried separately, obviating the concern about multiple trials.

¶12 The prosecutor also explained that new charges were pursued to counter defense arguments that the acts alleged were uncharged, inadmissible "other act evidence." The change in theory on Count 3 also was meant to counter the defense's attack on the "severity" of the victim's physical injury and that change in theory did not expose Carrillo to any more serious punishment. The prosecutor further noted that, while it was "arguable" that the two new charges increased Carrillo's sentencing exposure, because the maximum sentence for first degree murder was life in prison, the increase in punishment could only result if Carrillo (1) was not sentenced to life in prison on that count and (2) received consecutive sentences on all counts.[4]

¶13 In considering this explanation, the superior court acknowledged that prior rulings discussing severance could have been construed as deterring any amendment to the original charges, given the court's concern "not to violate any particular defendant's rights by admitting evidence that would

[4] While not specifically addressing this issue, the superior court's ruling impliedly suggested agreement with the State's argument that the new indictment did not increase the possible punishment. Given that Carrillo faced a possible life sentence for the murder charge if convicted as charged under either indictment, the record supports this inference.

not be admissible as a prior act." The court credited the fact that the co-defendants were not being retried as an additional appropriate reason for adding the new charges and the State's change in strategy.

¶14 The superior court also took measures to ensure the new indictment did not compromise Carrillo's speedy trial rights. The court applied the time limits applicable to the original charges to the new indictment, and the State was prepared to go to trial within that time limit. As the court noted, the circumstances forming the basis for the changes in the new indictment were known to the defense from the prior trial and not a "surprise." Therefore, the court properly rejected Carrillo's contentions that the State's actions were motivated by an attempt to avoid speedy trial limits.

¶15 Despite the new indictment and the new charges, the circumstances in this case did not give rise to a "presumption of vindictiveness" by the State. Moreover, even if such a presumption had arisen, the State provided appropriate non-vindictive reasons for seeking the new indictment that the superior court found reasonable and supported by the record. The same judge presided over both trials, had a full grasp of the situation both before and after the mistrial and was in a position to assess the parties' arguments in light of the totality of the circumstances. In doing so, and noting the

deference owed to such determinations, the superior court did not abuse its discretion in denying Carrillo's motion to dismiss the new indictment. *See Mieg*, 225 Ariz. at 447, ¶ 9, 239 P.3d at 1260.[5]

[5] Carrillo also argues, and the State agrees, that the sentencing minute entry should reflect the oral pronouncement of sentence for Count 3 as "slightly aggravated." The minute entry also lists the conviction in Count 4 as first degree, not second degree, murder. Where the written judgment is inconsistent with the oral pronouncement of sentence, the oral pronouncement controls. *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989). Accordingly, the January 20, 2012 sentencing minute entry is amended to reflect that (1) the sentence for Count 3 is "slightly aggravated" and (2) the conviction for Count 4 is for "second degree murder." *See State v. Ovante*, 231 Ariz. 180, 188, ¶ 37, 291 P.3d 974, 982 (2013) (noting such corrections are proper when discrepancy between oral pronouncement of sentence and written minute entry can be clearly resolved from the record).

CONCLUSION

¶16 Carrillo's convictions and sentences are affirmed as modified. The superior court's January 20, 2012 sentencing minute entry is amended to reflect that: (1) the sentence for Count 3 is "slightly aggravated" and (2) the conviction for Count 4 is "second degree murder."

/S/_____
SAMUEL A. THUMMA, Presiding Judge

CONCURRING:

/S/_____
JON W. THOMPSON, Judge

/S/_____
KENT E. CATTANI, Judge