NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0629
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JERRY PAUL KEY,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	**FILED 08-12-2010**

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-137069-001 DT

The Honorable Pendleton Gaines, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorney for Appellee

Maricopa County Public Defender's Office — Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Appellant Jerry Paul Key appeals from his convictions of second-degree burglary and first-degree criminal trespass. Key's counsel filed a brief in compliance with *Anders v.*

California, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. *See Smith v. Robbins*, 528 U.S. 259 (2000). Additionally, Key has filed a supplemental brief *in propria persona*. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On June 7, 2007, at 3:30 in the afternoon, M.H. was in his home in Surprise when he heard someone knocking at the front door. When he looked through the peephole, he saw a man walking off the front porch with a dog on a leash. A few seconds later, M.H. saw through the blinds on his back door that the man and dog were in the back yard. M.H. asked the man what he was doing, and the man responded that his dog had gotten loose. M.H. thought this was unlikely because the dog was still on its leash and the entrance to the back yard was through an automatically-closing gate. M.H. told the man to leave, and the man did.

¶3 That same day, sixteen-year-old N.C. was home alone in her parent's house in Surprise, just a short walk from M.H.'s

[1] We are required to view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the verdicts. *State v. Powers,* 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

home. At about 3:40 in the afternoon, she heard someone knocking at the front door. She looked through the peephole and saw a man holding a leash, although she could not see the dog. The man knocked very loudly and continuously at the door for about a minute. N.C. went into a bedroom at the rear of the home and called her mother, who was at work. While she was on the phone, she saw through the blinds that the man was in the back yard. She then went into the bathroom and closed the door.

¶4 N.C.'s mother, while on the phone with N.C., used another phone to dial 9-1-1. She relayed to the dispatcher information she received from N.C. A few moments later, N.C. heard glass breaking and then heard the footsteps of someone walking around inside the home. She heard a dog sniffing under the bathroom door, and also the sound of someone going from room to room in the house and rummaging in each room. Ten minutes later, N.C. heard sirens and then the sound of the front door shutting, and she "figured that [the man] left."

¶5 Surprise Police Officer C.T. was on duty that day, and he responded to a call reporting the incident at N.C.'s home. As he drove toward that address, he saw Key crossing the street about three houses away from N.C.'s home. Key was carrying a duffle bag and walking a dog on a leash. Officer C.T. stopped Key and questioned him. Other officers arrived soon thereafter and went into N.C.'s home to investigate and to secure the

scene.

¶6 M.H. heard the sirens from the responding officers, and he drove in their direction. He told the officers about the incident at his home that had occurred a few minutes earlier. Eventually, both M.H. and N.C. were driven in patrol cars, at separate times, to where Officer C.T. had detained Key. Both M.H. and C.T. positively identified Key as the man they had seen knocking at their front doors and walking in their back yards. It was later determined that the duffle bag Key was carrying belonged to N.C.'s brother and that it contained the following items taken from the home of N.C. and her brother: stereo speakers, a CD player, an amplifier, a video camera, and cologne.

¶7 Key was indicted on one count of burglary in the second degree, a class three felony, and one count of criminal trespass in the first degree, a class one misdemeanor. Following a jury trial, he was convicted of both counts. The trial court found Key had two historical prior felony convictions and sentenced him to concurrent, presumptive terms of 11.25 years' imprisonment for count one and six months in the county jail for count two. Key was awarded 315 days of pre-sentence incarceration credit and was ordered to pay $300.00 in restitution. Key filed a timely appeal, and we have jurisdiction pursuant to the Arizona Constitution, Article 6,

Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

¶8 Key's first trial ended when the trial court declared a mistrial. During the jury selection phase, the trial court mentioned to the panel of jurors that an "Arizona Department of Corrections Officer" and a "Parole Officer" were potential witnesses for the State. Key moved for a mistrial on the ground the jurors could improperly infer that Key had previously been in prison, and the trial court granted his motion. During the second trial, Key was represented by different trial counsel.

¶9 In his supplemental brief, Key argues that the trial court was biased against his first trial counsel and that this bias unfairly prejudiced Key's second trial. As evidence of the alleged bias against his first trial counsel, Key points to an exchange between his counsel and the trial court that occurred while the court was ruling on Key's renewed motion for recusal on the day the trial court declared a mistrial. The court stated:

> You know, Carissa, I don't know whether to take your renewed motion for – seriously, but if you're serious about it, it's denied. I'm not going – I don't need any discussion. I'm not an unfair Judge. You may not like me, but we try cases in front of a lot of judges that we don't like, but it doesn't go to my fairness.

> And you don't have to say anything for the record; it would be an irresponsible act of cowardice, in my opinion, and there is no factual basis for it. And you can take me up on appeal, if you want to. So that's the ruling.

Key also states that the trial judge was, in his personal capacity, a potential witness against Key's counsel in a separate civil action, although Key cites no portion of the record that supports this assertion and we have found none.

¶10 Key next points to the following comments the trial court made to the jury during his second trial.

> Centuries ago, it was the practice of the English Crown sitting in the Court of the Star Chamber to think it was a great idea to drag people in off the street and torture them until they would confess to a crime. Well, under enough torture, anybody will confess to any crime, we all know that. And the founders of our Constitution were so offended at that practice, that they built in the right not to testify against yourself at trial.

Key argues in his brief that the court improperly stated that he had the right "not to testify against himself."

¶11 We find nothing improper with the court's statements to the jury. It seems that Key is arguing the court improperly suggested to the jury that any testimony Key might offer would necessarily be "against himself" rather than exculpatory and that Key was therefore probably guilty of the charged offenses. We disagree with such an interpretation of the court's comments,

as the disputed statement very closely follows the language of the Fifth Amendment to the United States Constitution. *See* U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness *against himself* . . . .") (emphasis added). We have found no other evidence in the record that indicates the trial court was biased against Key, and he has cited none.

¶12 Key also contends in his supplemental brief that the trial court erred when it denied his motion to sever counts one and two for trial and that this caused him unfair prejudice. We review the denial of a motion to sever for an abuse of discretion. *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). We find no abuse of discretion here.

¶13 Arizona Criminal Procedure Rule 13.3(a) provides that two or more offenses may be joined in a single indictment if they: (1) "Are of the same or similar character"; or (2) "Are based on the same conduct or are otherwise connected together in their commission"; or (3) "Are alleged to have been a part of a common scheme or plan." Here, it was proper that counts one and two were initially joined in a single indictment because the offenses were of a similar character and were connected together in their commission. *See State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985) (offenses are connected when they arose out of series of connected acts, when most of the

evidence admissible in proof of one offense also admissible in proof of the other, or when there are common elements of proof in joined offenses).

¶14 Under Rule 13.4(a), a trial court shall, on motion of a party, sever two or more offenses for trial when doing so "is necessary to promote a fair determination of the guilt or innocence of [the] defendant of any offense." Key had the burden of showing he would be prejudiced by the court's refusal to grant separate trials, however, and "[s]uch prejudice, if any, must be balanced against the countervailing consideration of judicial economy." *State v. Via*, 146 Ariz. 108, 115, 704 P.2d 238, 245 (1985). This burden is not met when, as here, even if there had been separate trials, evidence as to one set of charges would have been admissible at the trial on the other set of charges. *See id*. As the trial court implicitly found in denying Key's motion to sever, evidence of each offense would have been admitted during the trial for the other under Arizona Evidence Rule 404(B). Thus, the court did not err in denying Key's motion to sever.

¶15 In his brief filed in compliance with *Anders*, Key's counsel states that Key requested that he raise several additional issues. We summarily reject each of these claims. Neither counsel nor Key has provided any legal argument in their support. And we find that there was sufficient evidence to

support the convictions, that the trial court did not erroneously permit evidence of prior bad acts, and that there is no evidence the State used false police reports to obtain the convictions.

¶16 Having considered defense counsel's brief and Key's supplemental brief, and having examined the record for reversible error, *see Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentence imposed falls within the range permitted by law, and the evidence presented supports the conviction. As far as the record reveals, Key was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶17 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Key of the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Key has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶18 The convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
SHELDON H. WEISBERG, Presiding Judge

___/s/_____
PHILIP HALL, Judge