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

DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ISAAC POPOCA, Appellant.	No. 1 CA-CR 08-0950 1 CA-CR 08-0951 1 CA-CR 08-0952 1 CA-CR 08-0953 1 CA-CR 08-0954 1 CA-CR 08-0955 1 CA-CR 08-0956 1 CA-CR 08-0957 1 CA-CR 08-1006 1 CA-CR 09-0063 (Consolidated) DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause Nos. CR2006-007252-002 DT
CR2006-007850-001 DT
CR2006-009592-001 DT
CR2006-011304-002 DT
CR2006-030809-001 DT
CR2006-121757-002 DT
CR2006-124041-001 DT
CR2007-005420-001 DT
CR2007-005476-001 DT
CR2008-006137-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Liza-Jane Capatos, Assistant Attorney General
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T H O M P S O N, Judge

¶1 Isaac Popoca appeals his convictions and sentences on thirty counts of burglary in the third degree, twenty-four counts of criminal trespass in the second degree, seven counts of theft, one count of criminal damage, one count of possession of burglary tools, and one count of participation in a criminal syndicate. Popoca argues the trial court erred by (1) granting the state's motion to consolidate, (2) denying his motion for mistrial for juror misconduct, and (3) denying his motion to dismiss for prosecutorial vindictiveness. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Beginning in the fall of 2005, detectives at police departments throughout the Phoenix metropolitan area began noticing a distinctive pattern of nighttime burglaries at strip malls. The usual method of entry involved prying open a door to a vacant suite that was not alarmed and then breaking through the side walls separating the suites until reaching the target

suite, primarily check cashing and payday loan businesses. The burglars would often cut through the drywall in the bathrooms because they were frequently located on adjacent walls of the businesses and ordinarily did not have motion sensors in this area. Furthermore, the alarm control panels were commonly located in the bathrooms, offering the burglars the opportunity to disable the alarms by cutting the wires after gaining entry. When the burglars reached a target business with a safe, the burglars would use power tools to cut or peel the safe to remove the door, or simply steal the safe. In investigating these burglaries, the police would repeatedly find three sets of distinct shoeprints at the crimes scenes. The police referred to the three dissimilar shoeprints as the "hyphen shoe," the "wishbone shoe," and the "bullseye shoe" because of their readily-identified patterns and dubbed this burglary ring the "safe drywall burglars."

¶3 When these burglaries continued to occur with some frequency, the police organized a task force and commenced surveillance on possible target businesses. During the early morning hours of April 8, 2006, a detective watching a Phoenix strip mall observed a gold Toyota 4Runner with four occupants stop at the rear of the building. The same type vehicle had been seen at the scene of a Tempe strip mall burglary one month earlier. Three men exited the 4Runner, pried open a back door,

and entered the building. The driver of the 4Runner drove off, but returned a short time later and picked up the three men.

¶4 Police officers followed the 4Runner as it left the rear of the strip mall. When the men in the 4Runner became aware they were being followed, they sped up in an attempt to evade the police. After a brief chase, all four were apprehended and identified as Popoca, Alonzo Villegas, Mark Ruiz, and Manuel Coronel. Popoca was wearing shoes with soles consistent with the "hyphen shoe" print. Villegas and Ruiz were wearing shoes with bullseye and wishbone patterns on their soles.

¶5 When the police checked the strip mall where Popoca and the three others had been observed, they found a door to a vacant suite had been pried open and that an attempt had been made to break a hole through the bathroom drywall to gain entry to the neighboring check cashing business. A search of the 4Runner turned up pry bars, power saws, multiple hand tools, a large sledgehammer, a studfinder, an extension cord, a drill, bandanas and a breathing mask, and a large number of gloves and flashlights, as well as several items taken in various other strip mall burglaries. Many of the tools in the 4Runner had remnants of dry wall on them. In addition, a utility knife with drywall residue was found on Popoca.

¶6 Both Villegas and Coronel subsequently agreed to become State's witnesses and identified Popoca as the leader of their burglary ring and the owner of both the 4Runner and the tools used in the burglaries. Following the arrest of Popoca and his crew, strip mall burglaries with the distinctive method of operation and shoe prints of the safe drywall burglars ceased occurring.

¶7 Between April 2006 and January 2007, the Maricopa County grand jury handed up nine indictments charging Popoca with a total of forty-nine counts of burglary in the third degree, each a class 4 felony; five counts of theft, each a class 2 felony; one count of criminal damage, a class 5 felony; and one count of possession of burglary tools, a class 6 felony. Over Popoca's objection, the charges alleged in the nine indictments were consolidated for trial.

¶8 Trial on the consolidated charges commenced on March 31, 2006, and concluded on April 30, 2006, with the jury finding Popoca guilty on twenty-four counts of burglary, twenty-two counts of the lesser included offense of criminal trespass in the second degree, six counts of theft, one count of criminal damage, and one count of possession of burglary tools. On August 4, 2006, the trial court sentenced Popoca on these fifty-four convictions to concurrent and consecutive terms of imprisonment totaling thirty-eight years.

¶9 On March 20, 2008, eleven days prior to commencement of trial on the charges in the nine consolidated indictments, the Maricopa County grand jury handed up another indictment charging Popoca with an additional eleven counts of burglary in the third degree, each a class 4 felony; three counts of theft, one class 2 felony and two class 3 felonies; one count of participation in a criminal syndicate, a class 2 felony; and one count of assisting a criminal syndicate, a class 4 felony. Upon trial to a jury on these charges in August 2008, Popoca was convicted of five counts of burglary, three counts of the lesser included offense criminal trespass in the second degree, one count of theft, and one count of participation in a criminal syndicate. On January 12, 2009, the trial court sentenced Popoca on these convictions as a repetitive offender to concurrent and consecutive terms of imprisonment totaling forty-six years.

¶10 Popoca timely appealed from his convictions and sentences resulting from the second trial and was granted leave to file delayed notices of appeal from his convictions and sentences resulting from the first trial. The ten appeals were consolidated for appellate disposition.

DISCUSSION

A. Motion to Consolidate

¶11 Popoca argues that the trial court erred in granting the state's motion to consolidate the charges in the first nine indictments for trial. Popoca maintains that consolidation of the fifty-plus offenses included in the nine indictments denied him the right to a fair trial guaranteed by the Sixth Amendment of the United States Constitution and Article 2, Sections 23 and 24 of the Arizona Constitution. U.S. Const. amend. VI; Ariz. Const. art. II, §§ 23, 24. Specifically, he claims that the jury would be improperly influenced by the large number of same or similar acts. We will not disturb a trial court's ruling regarding joinder or severance absent a clear abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003).

¶12 Arizona Rule of Criminal Procedure 13.3(a) permits the joinder of offenses in one proceeding "if they: (1) are of the same or similar character; or (2) are based on the same conduct or otherwise connected together in their commission; or (3) are alleged to have been part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a). In addition, if such offenses "are charged in separate proceedings, they may be joined in whole or in part by the court or upon motion of either party, provided that the ends of justice will not be defeated thereby." Ariz. R. Crim. P.

13.3(c). However, the rules governing joinder and severance must be read together. *State v. Curiel*, 130 Ariz. 176, 183, 634 P.2d 988, 995 (App. 1981). Thus, when offenses are joined only by virtue of Rule 13.3(a)(1), a defendant is entitled to have the offenses severed as a matter of right "unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b).

¶13 The state argues that the trial court's consolidation of the nine indictments for trial can be upheld under Rule 13.3 because all the offenses were part of a common scheme or plan and/or involve the same or similar conduct. For an offense to be part of a "common scheme or plan" for purposes of joinder or consolidation, there must be a "particular plan of which the charged crime is a part." *State v. Lee*, 189 Ariz. 590, 598, 944 P.2d 1204, 1212 (1997) (quoting *State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996)). "[T]he inquiry should . . . focus on whether the acts are part of an over-arching criminal plan, and not on whether the acts are merely similar." *Id.* (quoting *Ives*, 187 Ariz. at 109, 927 P.2d at 769); *see also State v. Ramirez Enriquez*, 153 Ariz. 431, 433, 737 P.2d 407, 409 (App. 1987) (holding mere similarity between acts does not, by itself, prove those acts to be part of the same "common scheme or plan").

¶14 In the present case, Popoca and his crew essentially committed the same offense repeatedly and did so in the same manner with a particular type target. Moreover, there was also testimony from a member of Popoca's crew that he and Popoca came up with the idea of burglarizing strip mall businesses in the method they did after watching a television show on burglars and decided the police would assume their burglaries were the work of the burglary crew depicted in the show. Their plan included specifically targeting businesses located next to vacant suites and breaking through bathroom walls to avoid alarm sensors. Each member of the crew was assigned a particular role: Coronel being the driver, Ruiz carrying the tools, Villegas assisting in gaining entry into the buildings and safes, and Popoca leading the crew and disabling the alarms. Furthermore, the members also planned that if they were ever stopped by the police, they would say the 4Runner they were using belonged to someone named Victorino, which is exactly what Popoca told the police the night they were apprehended. In short, contrary to Popoca's contention, the multiple burglaries were not simply separate occurrences of criminal conduct, but rather the result of his engagement in a calculated and continuous business of burglary in accordance with an over-arching business plan. Under these circumstances, the trial court could reasonably find that all the charged offenses were subject to consolidation as part of a

common scheme or plan. Because consolidation was not based solely on the offenses being the same or similar, Popoca was not entitled to severance as a matter of right pursuant to Rule 13.4(b).

¶15 We further find no merit to Popoca's argument that the danger of unfair prejudice from having all the charged offenses tried together outweighed the State's interest in consolidating the indictments. *See* Ariz. R. Crim. P. 13.4(a) (providing for severance when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense"). In deciding whether separate trials are required, the trial court must balance possible prejudice to the defendant against the interests of judicial economy. *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). To successfully challenge the denial of severance, a "defendant must demonstrate compelling prejudice against which the trial court is unable to protect." *Id.* Denial of a motion to sever offenses is reversible error only if evidence of the other offenses would not have been admissible for evidentiary purpose. *Ives*, 187 Ariz. at 106, 927 P.2d at 766.

¶16 Evidence of other offenses is admissible if relevant and admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Van Adams*, 194 Ariz.

408, 415, ¶ 20, 984 P.2d 16, 23 (1999); Ariz. R. Evid. 404(b). In the specific context of identity, evidence of other offenses may be admitted pursuant to Rule 404(b) to establish identity if the defendant's actions at the time of the charged offense and at the time of the other offense are sufficiently distinctive. *State v. Stuard*, 176 Ariz. 589, 597, 863 P.2d 881, 889 (1993). "While identity in every particular is not required, there must be similarities between the offenses in those important aspects 'when normally there could be expected to be found differences.'" *State v. Roscoe*, 145 Ariz. 212, 216, 700 P.2d 1312, 1317 (1984) (quoting *State v. Jackson*, 124 Ariz. 202, 204, 603 P.2d 94, 96 (1979)). However, not only is identity in every detail not required, "[a]bsolute identity in every detail cannot be expected. Where an overwhelming number of significant similarities exist, the evidence of the [other offense] may be admitted." *Roscoe*, 145 Ariz. at 218, 700 P.2d at 1318.

¶17 As the trial court noted at the hearing on the motion to consolidate, most of the evidence presented at trial would be the same for all the charged offenses. For example, all the tools, shoes and other property found in possession of Popoca and his crew when they were arrested would be relevant to proving his involvement in each of the charged offenses. In addition, there was DNA evidence recovered from tools and items left at several of the businesses that were matched to Popoca

and other members of his crew. In light of the obvious signature nature of the burglaries, this DNA evidence would be relevant to establishing Popoca's criminal responsibility for all of the offenses and therefore would be cross-admissible. *See State v. Williams*, 209 Ariz. 228, 233, ¶ 19, 99 P.3d 43, 48 (App. 2004). Further, the fact the "safe drywall burglaries" ceased following the arrest of Popoca and his crew would likewise have probative value to proving their identity as the perpetrators of the offenses. Consequently, evidence of all the burglaries would be admissible on the issue of identity if separate trials were held for each offense. When evidence "is probative on the crucial issue of identification[,] any slight prejudicial element is clearly outweighed by [the] probative value." *State v. Johnson*, 212 Ariz. 425, 430, ¶ 11, 133 P.3d 735, 740 (2006) (quoting *United States v. Buck*, 548 F.2d 871, 876 (9th Cir. 1977)).

¶18 Moreover, the jury instructions mitigated the risk of any prejudice that might have resulted from consolidation. Our supreme court has held "a defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *Prince*, 204 Ariz. at 160, ¶ 17, 61 P.3d at 454. Here, the jury was instructed that each count is a separate and distinct offense, that they must decide each count

separately, and that they must do so based on the law and the evidence applicable to that count, "uninfluenced by [their] decision on any other count." There was no abuse of discretion by the trial court in consolidating the charges in the nine indictments for trial. *See Johnson*, 212 Ariz. at 430, ¶ 14, 133 P.3d at 740.

B. Motion for Mistrial

¶19 Popoca next contends the trial court erred in denying his motion for mistrial for juror misconduct. The motion was made by defense counsel during Popoca's first trial based on a report that two jury members were observed "making comments to each other" and "motioning to each other and making facial expressions, laughing [and] snickering" while he was questioning a witness. Defense counsel informed the trial court he was concerned that his client was being deprived of a fair trial because there were members of the jury who "have already made a determination of guilt before deliberations, before hearing all the evidence." In support of the motion, defense counsel also referred to a note submitted to the court by a jury member that read:

> Can you ask Mr. Popoca's lawyer to please quit wasting our time with the repeated duplicate questions [and] incomplete thought process?
>
> Thank you.

> Also sending text messages from his phone during his own questioning.
>
> Again, thank you!

The trial court denied the motion, finding no juror misconduct.

¶20 "A declaration of mistrial is the most dramatic remedy for trial error and is appropriate only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Nordstrom*, 200 Ariz. 229, 250, ¶ 68, 25 P.3d 717, 738 (2001). The trial judge is in the best position to determine whether a particular incident calls for a mistrial because the trial judge is aware of the atmosphere of the trial, the circumstances surrounding the incident, and the possible effect on the trial. *Williams*, 209 Ariz. at 239, ¶ 47, 99 P.3d at 54. Accordingly, we will not overturn a trial court's decision granting or denying a motion for mistrial because of alleged irregularity involving juror conduct absent a clear abuse of discretion. *See State v. Lang*, 176 Ariz. 475, 482, 862 P.2d 235, 242 (App. 1993).

¶21 In denying the motion for mistrial, the trial court explained:

> I will tell you, [defense counsel], that I was observing the jury last week also during your presentation. And, quite frankly, they were not pleased. I would say, overall the jury was not pleased with how the evidence was being presented.

> It did seem – and it even seemed to me, at one point in time, I told you it appeared like you were stalling. I think everybody in this courtroom who observed your presentation last week would put that into the stall mode and would ascribe to you that kind of behavior.
>
> And whether or not that was your intent or not, it was certainly – that's the way it came across. And I think the jurors, watching their body language the last couple of days last week, that's certainly the way it appeared to me, is they were pretty disconnected. But that's your problem, not theirs.

Having observed the circumstances on which the motion for mistrial was predicated, the trial court could reasonably conclude that there had not been any misconduct on the part of the jurors, but rather merely a natural reaction to the manner in which defense counsel conducted himself during trial.[1]

¶22 Further, juror misconduct warrants a new trial only if there is actual prejudice or if prejudice may be fairly presumed from the facts. *State v. Dann*, 220 Ariz. 351, 371, ¶ 115, 207 P.3d 604, 624 (2009). In requesting the mistrial, the sole claim of prejudice by defense counsel was his concern that Popoca was being denied a fair trial because some of the jurors had already decided the issue of guilt before hearing all the evidence. Even though there may have been some expressions of

[1] We note that defendant's appellate counsel was not his trial counsel.

frustration by jurors regarding the actions of defense counsel during trial, we find no indication in the record that any juror made a final decision on guilt prior to deliberations. To the contrary, the record reflects that at the commencement of trial the jurors were specifically instructed to keep an open mind and not to form a final opinion until after hearing and considering all the evidence, the arguments of counsel, and the final instructions. Jurors are presumed to follow their instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). On this record, defense counsel's concern about the possibility of jurors prematurely deciding the issue of guilt was mere speculation. Accordingly, there was no abuse of discretion by the trial court in denying the motion for mistrial. *See State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993) (holding speculation that juror has closed mind not sufficient to support finding of denial of fair trial).

C. Motion to Dismiss

¶23 Finally, Popoca contends that the trial court should have granted his motion to dismiss the charges against him in the tenth indictment for prosecutorial vindictiveness. Popoca claims the prosecutor's decision to indict him on the additional charges was made in retaliation for his refusal to plead guilty and his motion to enforce his speedy trial rights. Popoca argues that the circumstances surrounding the timing and manner

of the tenth indictment are sufficient to raise a presumption of vindictiveness and that the state failed to sufficiently rebut the presumption. The state responds that the motion to dismiss was properly denied both because it was untimely and because the facts do not support a finding of vindictiveness. We review a trial court's ruling on a claim of prosecutorial vindictiveness for abuse of discretion. *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. 1997).

¶24 Popoca filed his motion to dismiss the charges in the tenth indictment on July 21, 2008, fourteen days before the scheduled trial date of August 4, 2008, and sixteen days before trial actually commenced on August 6, 2008. The trial court offered no reasons in denying the motion at the trial management conference held the day before trial.

¶25 Pursuant to Rule 16, all motions must be made no later than twenty days prior to the date set for trial. Ariz. R. Crim. P. 16.1(b). Motions that are not timely made "shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it." Ariz. R. Crim. P. 16.1(c). No claim is made by Popoca that he was unable to file his motion to dismiss in compliance with the time requirement of Rule 16.1(b). Accordingly, the trial court

could properly deny the motion as untimely. *See State v. Montano*, 204 Ariz. 413, 419, ¶ 18, 65 P.3d 61, 67 (2003).

¶26 Even absent preclusion, the trial court would not have abused its discretion in denying Popoca's motion. As a general rule, the determination of whether to file criminal charges and which charges to file is within the sound discretion of the prosecutor. *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992). Moreover, the prosecutor may revise and tailor the case against a defendant prior to trial. *See, e.g., State v. Jahns*, 133 Ariz. 562, 568, 653 P.2d 19, 25 (App. 1982). A defendant, however, may establish prosecutorial vindictiveness by proving that a prosecutor's charging decisions were motivated by a desire to punish the defendant for doing something the law plainly permits him to do. *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702; *see also Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'") (citations omitted).

¶27 "[B]ecause the courts have recognized that a showing of actual vindictiveness is 'exceedingly difficult to make,' a defendant in some circumstances may rely on a presumption of

vindictiveness." *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702 (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). In determining whether a presumption of vindictiveness exists, the critical question is whether the defendant has shown that "all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption." *Id.* at 687, 832 P.2d at 704. Only if the defendant meets this initial burden of showing an appearance of vindictiveness does the burden shift to the State to rebut the presumption. *Id.* at 685, 832 P.2d at 702.

¶28 Proof that the prosecutor increased the charges after a defendant exercised a legal right "does not alone give rise to a presumption [of prosecutorial vindictiveness]." *Brun*, 190 Ariz. at 507, 950 P.2d at 166 (quoting *Meyer*, 810 F.2d at 1246). This is particularly true where the prosecutor's action occurs in a pretrial setting like the situation in the instant case. In *United States v. Goodwin*, the United States Supreme Court explained that

> a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions. . . . It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

United States v. Goodwin, 457 U.S. 368, 381 (1982). The Court went on to hold, citing *Bordenkircher*, 434 U.S. at 363-65, that "[t]he mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." 457 U.S. at 382.

¶29 In seeking dismissal for prosecutorial vindictiveness, Popoca relied entirely on a presumption of vindictiveness. Popoca's claim of vindictiveness was predicated solely on the timing of the new indictment after his refusal to plead guilty and the filing of his motion for a speedy trial. However, the record shows that at the time of the plea discussions the relevant police investigation was ongoing and upon the conclusion of the investigation, new charges were presented. Because "this sequence of events, taken by itself, does not present a 'realistic likelihood of vindictiveness,'" Popoca's motion to dismiss for vindictiveness would have been subject to denial even if it had been filed timely. *Brun*, 190 Ariz. at 507, 950 P.2d at 166 (quoting *Meyer*, 810 F.2d at 1246)).

CONCLUSION

¶30 There being no reversible error, we affirm Popoca's

convictions and sentences.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

DANIEL A. BARKER, Judge