DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ISAAC VICERA POPOCA, Appellant.	)	1 CA-CR 09-0370 DEPARTMENT D **MEMORANDUM DECISION** Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-006829-001 DT

The Honorable Joseph C. Welty, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Louise Stark, Deputy Public Defender
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Isaac Vicera Popoca ("Defendant") was convicted by a jury on two counts of third-degree burglary, each a class 4 felony; one count of theft, a class 2 felony; one count of theft, a class 5 felony; and one count of attempted third-degree burglary, a class 5 felony. The trial court found that Defendant had multiple prior historical felony convictions and sentenced him as a repetitive offender to five concurrent prison terms, the longest of which was twenty years, with credit for 339 days of presentence incarceration.

DISCUSSION

¶2 On appeal, Defendant contends that: (1) the trial court erred in denying his request to represent himself; (2) the prosecutor engaged in misconduct; and (3) the trial court miscalculated the credit for presentence incarceration. For reasons that follow, we affirm Defendant’s convictions, but modify his sentences to increase the credit for presentence incarceration to 346 days.

Self-Representation

¶3 At his initial appearance on the charges, counsel was appointed to represent Defendant. Prior to trial, Defendant submitted two pro per motions raising claims of a speedy trial violation and ineffective assistance of counsel. During a subsequent pretrial hearing, the prosecutor requested that the

trial court advise Defendant that the State was obligated to respond only to motions from counsel, resulting in the following exchange:

> THE COURT: I understand that Commissioner Lynch had taken some motions that would be – I can't remember the case, Mr. Popoca, but you're not entitled to hybrid representation. So if you have an attorney, the attorney has to be the one filing the motions.
>
> THE DEFENDANT: I filed motions pursuant to *State v. Cornell*. I am waiving counsel.
>
> THE COURT: It is not an on/off switch. You're either representing yourself or you're not. So if there's any motions, they have to be filed by Mr. Wallin and if there is any response obligations, they're only going to be for motions filed for (sic) Mr. Wallin.
>
> MR. WALLIN (defense counsel): Perhaps the Court would like to ask him does he want to represent himself.
>
> THE COURT: He has to raise that on his own. I am not going to raise that for him.
>
> MR. WALLIN: He said he was waiving counsel for the purpose of the motion.
>
> THE COURT: No such thing.

¶4 Defendant contends the trial court erred in refusing to honor his request to waive counsel. The standard of review for evaluating a trial court's handling of a request to waive counsel has not been settled by our supreme court. *State v. Djerf*, 191 Ariz. 583, 592 n.2, 959 P.2d 1274, 1283 n.2 (1998).

As a general rule, however, this court reviews a Sixth Amendment waiver of the right to counsel claim *de novo*, while deferring to the trial court's factual findings unless clearly erroneous. *State v. Rasul*, 216 Ariz. 491, 493, ¶ 4, 167 P.3d 1286, 1288 (App. 2007).

¶5 A criminal defendant has a constitutional right to self-representation. *Faretta v. California*, 422 U.S. 806, 819 (1975); *Djerf*, 191 Ariz. at 591, ¶ 21, 959 P.2d at 1282. To invoke the right of self-representation, the defendant must make an unequivocal request. *State v. Henry*, 189 Ariz. 542, 548, 944 P.2d 57, 63 (1997). Absent an unequivocal request to proceed *pro se*, there is no error by the trial court in refusing the request. *Id.*

¶6 Defendant maintains that his statement about "waiving counsel" was an unambiguous request for self-representation. We disagree. This statement was reasonably construed by the trial court as indicating that Defendant wanted to waive counsel only with respect to pro per motions as opposed to an unequivocal request for self-representation for the entire case. Although a defendant has the right to self-representation, there is no right to hybrid representation, which involves concurrent or alternate representation by both defendant and counsel. *State v. Murray*, 184 Ariz. 9, 27, 906 P.2d 542, 560 (1995). Indeed,

even Defendant's counsel understood the remark about waiving counsel as indicating that Defendant wanted to waive counsel only “for the purpose of the motion” rather than an unequivocal demand for complete self-representation.

¶7 To the extent Defendant desired to represent himself for the entire case, the trial court made it clear that such a request would be entertained, but that Defendant, not the trial court, would have to raise the issue. If Defendant believed the trial court had misunderstood the nature of his request, he could have easily clarified the situation by stating that he did want to undertake full self-representation. The absence of such a request by Defendant in response to the trial court’s comment supports the conclusion that Defendant did not intend to invoke his right to self-representation. Under these circumstances, there was no error by the trial court in denying the request.

Prosecutorial Misconduct

¶8 Defendant next argues that he was denied a fair trial due to prosecutorial misconduct. Specifically, he asserts that the prosecutor minimized and misrepresented the benefits of a witness’s plea agreements during examination of the witness and during closing argument, thereby improperly bolstering the credibility of the witness.

¶9 Because Defendant failed to object during trial to the alleged prosecutorial misconduct, our review is limited to fundamental error. *State v. Phillips*, 202 Ariz. 427, 437, ¶ 48, 46 P.3d 1048, 1058 (2002). Under this standard of review, the defendant bears the burden of establishing both that fundamental error occurred and actual prejudice resulted. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* at ¶ 19 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). In determining whether error is fundamental in the context of prosecutorial misconduct, we consider the entire record and the totality of the circumstances. *State v. Hughes*, 193 Ariz. 72, 86, ¶ 62, 969 P.2d 1184, 1198 (1998).

¶10 To prevail on a claim of prosecutorial misconduct "a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 79, ¶ 26, 969 P.2d at 1191 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Further, in determining whether a prosecutor's remarks during closing argument constitute misconduct, we consider "(1)

whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (quoting *State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1998)).

¶11 Defendant complains that, during the direct and re-direct examination of a co-defendant who testified as a witness for the State, the prosecutor improperly sought to minimize the number of offenses to which the witness had pled guilty under his plea agreements and the extent of his original criminal liability on the charges. Defendant asserts that the prosecutor's conduct left the jury with the false impression that this witness had been convicted of only six offenses when in actuality he pled guilty to twenty-five separate convictions in nine separate cases and had thirty-four other counts dismissed. As Defendant acknowledges, however, the details of the witness's convictions and the extent of his potential criminal liability on the charges against him were fully explored by defense counsel during cross-examination. Consequently, even if we were to assume, without deciding, that the prosecutor acted improperly in seeking to minimize the

benefit to the co-defendant from agreeing to cooperate with the State, Defendant cannot establish that he was prejudiced by the prosecutor's conduct because all of the facts and circumstances attendant to this witness's plea agreements were ultimately presented to the jury.

¶12 Defendant further complains that the prosecutor continued to misrepresent the benefit the co-defendant received from his plea agreements during closing argument. In rebuttal to an argument by defense counsel that the jury should have reasonable doubt about the truthfulness of testimony from a witness who testifies to avoid life in prison, the prosecutor stated:

> The defendant keeps arguing also, that [the co-defendant] testified because he was facing lifetime in prison. That is not true. You heard [the co-defendant] testify, that his original plea offer was 12-and-one-half years. That was before any plea agreement. He was never facing life in prison. According to what his testimony was, it was 12-and-one-half years.

¶13 Defendant characterizes the statement that the co-defendant "was never facing life in prison" as a deliberate lie in light of the possible consecutive prison terms he could have received. When considered in context, however, it appears the prosecutor was not deliberately misstating the evidence. Rather he was merely commenting on the availability of an earlier plea

deal that did not require cooperation with the State in arguing the "relative" benefit of the subsequent agreement entered into by the co-defendant in which he received no more than concurrent six-year prison terms in return for his testimony. As such, the prosecutor's argument is within the scope of fair rebuttal based on the evidence. *See State v. Rosas-Hernandez*, 202 Ariz. 212, 219, ¶ 24, 42 P.3d 1177, 1184 (App. 2002) (noting counsel are given "wide latitude" during closing arguments and permitted to argue all reasonable inferences from the evidence).

¶14 Furthermore, to the extent the prosecutor's argument could be considered misleading, it does not rise to the level of fundamental error given that the jury was instructed that counsel's arguments are not evidence and that the facts are to be determined from the evidence produced in court. *State v. Duzan*, 176 Ariz. 463, 467, 862 P.2d 223, 227 (App. 1993); *see also State v. Newell*, 212 Ariz. 389, 403, ¶67, 132 P.3d 833, 847 (2006) (holding improper comments by prosecutor will not require reversal "unless it is shown that there is a 'reasonable likelihood' that the "misconduct could have affected the jury's verdict'") (quoting *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992)). Jurors are presumed to follow the trial court's instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924

P.2d 441, 443 (1996). There was no fundamental erro based on alleged prosecutorial misconduct.

Presentence Incarceration Credit

¶15 Finally, Defendant argues that the trial court failed to credit him for the appropriate number of days spent in custody prior to sentencing. Defendant contends he is entitled to credit for 347 days of presentence incarceration rather than the 339 days awarded by the trial court. The State concedes the trial court's calculation was incorrect, but asserts that the correct amount of credit for presentence incarceration should be 346 days.

¶16 A defendant is entitled to presentence incarceration credit for "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment." A.R.S. § 13-712(B) (2010). Defendant did not object at sentencing to the trial court's calculation of the credit for presentence incarceration; however, a trial court's failure to award the correct amount of credit for presentence incarceration towards a defendant's sentence constitutes fundamental error. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). Our review of the record finds Defendant was subject to presentence custody in the present case from June 2, 2008, through May 14, 2009, a total of 346 days. Accordingly,

pursuant to A.R.S. § 13-4037(A) (2010), we order that his sentences be modified to include credit for 346 days of presentence incarceration.

CONCLUSION

¶17 For the foregoing reasons, we affirm the convictions, but modify the sentences to increase the credit for presentence incarceration to 346 days.

/S/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Presiding Judge

/S/_____
JON W. THOMPSON, Judge