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
FILED: 11/27/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0912
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DOUGLAS E ROSS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-121395-002 SE

The Honorable Kristin C. Hoffman, Judge

AFFIRMED; RESTITUTION ORDER REMANDED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Douglas Ross appeals his first-degree burglary and misconduct involving weapons convictions and

sentences. He argues the burglary jury instruction was duplicitous, resulting in the possibility of a nonunanimous verdict, and that he was improperly denied his right to be present at the restitution hearing. For the reasons that follow, we affirm his convictions and sentences, but remand for an evidentiary hearing regarding restitution.

BACKGROUND

¶2 Ross and two compatriots had entered the house of Ronald Z. with the intent to commit a theft while one of them was armed. Ross was indicted, and the indictment was read to the jury at the outset of the trial. After the indictment was read, the prosecutor gave her opening statement and stated that the evidence would show that Ross and his two accomplices had unlawfully entered the residence intending to steal marijuana.

¶3 At the conclusion of the trial, the judge instructed the jury that the offense of first-degree burglary required proof that the defendant or an accomplice unlawfully entered, while armed, and with the intent to commit a theft or felony, "a residential or non-residential structure or a fenced commercial or residential yard." He was convicted.

DISCUSSION

I

¶4 Ross argues that the first-degree burglary instruction as read deprived him of a unanimous verdict because it allowed

the jury to convict him by finding that he had unlawfully entered the backyard, the shed, or the residence of the named victim with burglarious intent. He argues that some jury members could have convicted him for the first-degree burglary when he leapt the fence into the backyard, others could have convicted him for breaking into a backyard shed, and yet others could have convicted him for entering the residence. Because he failed to object to the improper instruction at trial, he bears the burden of establishing that the court erred, that the error was fundamental, "and that the error caused him prejudice." *See State v. Henderson,* 210 Ariz. 561, 568, ¶¶ 21-22, 115 P.3d 601, 608 (2005).

¶5 A criminal defendant has the constitutional right to a unanimous jury verdict. Ariz. Const. art. 2, § 23. The possibility of a nonunanimous verdict may be presented when the indictment charges an offense based on one act, but the prosecution offers evidence of different criminal acts, each of which satisfy the definition of the charged crime, a circumstance sometimes referred to as a duplicitous charge. *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12, 196 P.3d 844, 847 (App. 2008). Under such circumstances, the trial court ordinarily is obliged to "either require the state to elect the act which it alleges constitutes the crime, or instruct the jury that they must agree unanimously on a specific act that

constitutes the crime before the defendant can be found guilty." *Id*. at 244, ¶ 14, 196 P.3d at 847 (internal quotation marks omitted). It is not error, however, for the court to fail to take such curative measures when all of the separate acts introduced are part of a single transaction; that is, the events are "part of a larger criminal episode," and the defendant does not "offer[] different defenses to each act," or there is no other "reasonable basis for distinguishing between them." *Id*. at 248, ¶ 32, 196 P.3d at 851.

¶6 Here, the full burglary jury instruction that was read to the jury could have created potential error by allowing the jurors to convict Ross based on any of three different acts with the same intent: entering the backyard, entering the shed, or entering the house. Moreover, a conviction based on the first two acts would only constitute a class three felony; a conviction for entering the residence with intent to steal constitutes a class two felony. *See* Ariz. Rev. Stat. ("A.R.S.") § 13-1508(B) (West 2012). We will not, however, reverse any conviction for an error in jury instructions "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (internal quotation marks omitted). "Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions."

State v. Bruggeman, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989).

¶7 Despite the hypothetical possibility of a nonunanimous verdict, we find there was no real possibility here. Ross's two accomplices testified that he armed himself with a loaded gun, they drove to Ronald's residence with the intent to steal drugs from the house, and they managed to break into the house before being surprised by the homeowner. The victim identified Ross as the person who first entered his house in front of the two accomplices, and as the one who pointed the gun at him. The accomplices only briefly mentioned that before they broke into the residence they broke into the backyard shed, took a double-sided pickax out, but left it after concluding it was of no use.

¶8 The prosecutor, in both her opening statement and in her closing argument, simply argued that Ross, armed with a gun, broke into the residence with the intent to steal drugs and money. She specifically argued in closing that the first element of burglary had been met "because you know that the Defendant had entered the victim's *home* unlawfully without his permission with a loaded gun ready to fire." (Emphasis added.) For his part, Ross denied being at the residence, claimed that he was misidentified by the homeowner, and that his compatriots were lying, as was the witness who he thought could offer him an alibi. Because Ross's defense was "all or nothing," there was

no real possibility that some members of the jury could have found Ross guilty of burglary by jumping over the fence or breaking into the shed, but not guilty of burglary of the residence. Moreover, the verdict form directed the jury to designate whether it found Ross guilty of first-degree burglary "as set forth in Count 1 of the Indictment," which the jury had been informed at the outset of trial was the victim's residence.

¶9 The fact that the State did not ask the jury to convict Ross on the basis that he entered into the backyard or the shed with the operative intent, and his failure to try to defend the entry of the backyard or shed, distinguishes this case from *Davis*, where our supreme court found fundamental, reversible error solely on the basis of a possibility that the jury was not unanimous. *See, e.g., State v. Davis,* 206 Ariz. 377, 390-91, ¶¶ 54-66, 79 P.3d 64, 77-78 (2003). On this record, we find no fundamental error or prejudice warranting reversing the first-degree burglary conviction.

II

¶10 Ross next argues that the court denied his right to represent himself, "unilaterally revok[ing] Mr. Ross' pro per status without proper basis," and violated his due process rights, by conducting a post-sentencing restitution hearing in his absence.

¶11 At the sentencing hearing, the judge announced that the victim was seeking $100 in restitution for a broken lock. After Ross advised the court that he wanted to be present, the restitution hearing was set for December 2, 2010, at 8:30 a.m. Ross, who was in jail, failed to appear by 9:30 a.m., and the court elected to proceed in his absence. Specifically, the court stated:

> THE COURT: And the record will reflect that the victim has been present since about 8:15 this morning.
>
> Mr. Ross is representing himself. He's refused transport to this hearing, although he had notice of it at the time of his sentencing. The Court finds that he's waived his presence.

¶12 Ross's advisory counsel was also absent.[1] The judge then proceeded to take testimony from the victim that he had lost $2,820 as a result of the crime and the subsequent trial, including $2,520 in lost wages based on forty-two hours at a rate of $60 an hour; $175 in gasoline for driving to and from court; $25 in parking fees; and $100 to repair the lock. The judge found the amounts reasonable, and awarded the victim the entire amount.

[1] We note that although advisory counsel was at the sentencing hearing which set the restitution hearing, the minute entry setting the evidentiary hearing omitted advisory counsel.

¶13 As an initial matter, the court did not "unilaterally revoke Mr. Ross' pro per status" by proceeding in his absence. The court expressly acknowledged that Ross was representing himself, but refused to appear.

¶14 There may be merit, however, in Ross's argument that his due process rights were violated when the court proceeded with the hearing in his absence especially because he had no notice that the victim was going to be seeking more than the repair of the lock. A defendant has a right to be present at his restitution hearing. *See State v. Guadagni*, 218 Ariz. 1, 7, ¶ 21, 178 P.3d 473, 479 (App. 2008) (holding that restitution hearing is part of sentencing); *State v. Lewus*, 170 Ariz. 412, 414, 825 P.2d 471, 473 (App. 1992) (holding that defendant's right to be present at sentencing includes right to be present at restitution hearing) (citing Ariz. R. Crim. P. 26.9 ("defendant shall be present at sentencing")). Ordinarily, a defendant "may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it." Ariz. R. Crim. P. 9.1; *see State v. Goldsmith,* 112 Ariz. 399, 400, 542 P.2d 1098, 1099 (1975). Absent extraordinary circumstances, however, a judge must postpone imposition of sentence until the defendant can be present, and to inform him "of the essential warnings and information" regarding appeal. *See State v.*

Fettis, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983) (quoting Ariz. R. Crim. P. 26.9 cmt).

¶15 Assuming for the sake of argument that a judge may proceed with a restitution hearing in the absence of a defendant who has voluntarily waived his right to be present, *cf. State v. Forte*, 222 Ariz. 389, 393, ¶ 13, 214 P.3d 1030, 1034 (App. 2009), the record before us does not allow us to conclude that Ross knowingly, voluntarily and intelligently waived his right to appear at the hearing. *See id*. at 393, ¶¶ 11-13, 214 P.3d at 1034 (holding that minute entry showing defendant refused transport did not provide sufficient evidence to show that defendant personally waived his right to be physically present at sentencing hearing). The record does not explain why Ross was not present other than to say that he did not want to be transported, why his advisory counsel was not present, or whether he or his counsel had notice that the victim was seeking restitution beyond the $100 lock. On this record, we cannot say that Ross knowingly and intelligently waived his right to appear at the hearing to contest the restitution claim by simply refusing transport. *Cf. id*.

¶16 Moreover, a defendant's constitutional due process right includes the right to notice of the amount and nature of the restitution being sought, to allow a defendant the opportunity to challenge the award. *See Guadagni*, 218 Ariz. at

7-8, ¶¶ 22-24, 178 P.3d at 479-80; *Lewus*, 170 Ariz. at 414-15, 825 P.2d at 473-74. Because the award in this case was in an amount nearly thirty times greater than the judge had informed Ross that the victim was seeking, the restitution award in Ross's absence deprived him of the opportunity to challenge the award, violating his due process rights and causing him prejudice. *See Guadagni*, 218 Ariz. at 7-8, ¶¶ 22-24, 178 P.3d at 479-80; *Lewus,* 170 Ariz. at 414-15, 825 P.2d at 473-74.

¶17 The most appropriate way to resolve the issue is to remand it for an evidentiary hearing. The trial court can determine whether Ross and/or counsel were aware that the victim was going to seek restitution in excess of $100 and whether Ross knowingly and voluntarily absented himself from the restitution hearing. If Ross, either directly or through advisory counsel, had information that the restitution request was going to be in excess of $100, and he decided not to participate, then he knowingly, intelligently and voluntarily absented himself. If, on the other hand, Ross was not aware of the increased restitution request, the award should be set aside and another restitution hearing set where he can contest the request.

CONCLUSION

¶18 For the foregoing reasons, we affirm Ross's convictions and sentences, but remand the restitution award for an evidentiary hearing consistent with this decision.

/S/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/S/
_____
PATRICIA A. OROZCO, Judge

/S/
_____
RANDALL M. HOWE, Judge