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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: 07/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0437
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
ERICH PREVOST,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006979-001DT

The Honorable Barbara L. Spencer, Commissioner

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Erich Prevost timely appeals from his convictions and sentences for three counts of burglary in the third degree, class 4 felonies, and one count of possession of burglary tools, a class 6 felony. After searching the record on appeal and

finding no arguable question of law that was not frivolous, Prevost's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Prevost to file a supplemental brief *in propria persona*, but Prevost did not do so. Through counsel, however, Prevost argues the superior court should have stricken the testimony of two police detectives and he was not tried by a jury of his peers. After reviewing the record, we reject both arguments and find no fundamental error. Therefore, we affirm Prevost's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 Early in the morning on July 2, 2010, Prevost and another passenger were riding in a car driven by J.T. A Scottsdale patrol officer pulled the car over because it had a broken taillight, and discovered J.T. had an outstanding arrest warrant and a suspended license. While inventorying the car as part of J.T.'s arrest, a second patrol officer noticed items in the car including "gloves, flashlights, walkie-talkies, . . . screwdrivers, [and] wire crimpers," which the first patrol

¹We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Prevost. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

officer testified "led [him] to believe that they might have been used for some type of . . . burglary." The first patrol officer also found a purse containing a wallet in the car's trunk and another wallet inside the car, and both wallets contained identification cards that did not belong to any of the car's occupants.

¶13 While patrol officers investigated the stop, other officers contacted the owners of the identification cards and one victim reported her car had been broken into, while another reported his car and his son's car had been broken into. All three victims reported they were missing items they had left in their cars; at trial, they identified those items as the same items found in the car with Prevost.

¶14 After explaining to Prevost his *Miranda* rights, a third patrol officer asked him about the items found in the car. Prevost asserted he had stayed inside the car while J.T. had stopped twice and "broken into" three separate cars, and returned with items taken from each car. Although Prevost testified at trial he did "[a]bsolutely nothing" to assist J.T., he also testified that as they drove with J.T., he "had a real strong feeling what [J.T.] was going to be up to . . . [and knew] that's what his MO kind of was, was breaking into

vehicles.”² He also testified that as J.T. got out of the car at the second stop he asked Prevost “to keep point Just watch his back, make sure nobody comes up.” Further, although he insisted he did not actually act as a lookout (or “keep point”), because he was uncomfortable doing so, in a police interview the morning of the stop, he admitted he stood outside the car near the trunk both times J.T. stopped to break into vehicles, and saw everything he did.

DISCUSSION

I. Prevost’s Arguments

¶15 Prevost first argues the superior court should have stricken the testimony of two detectives “after they falsely testified that they did not tell [him] his interrogation was not being recorded.” We disagree. At trial, the State, pursuant to the parties’ stipulation, played a tape of an interview two Scottsdale detectives conducted with Prevost the morning of July 2, 2010. The detectives both testified at trial regarding statements Prevost made during the interview. Prevost later testified the detectives told him they were not recording his statements. In response, the State recalled one of the detectives, and she testified they never denied to Prevost they were recording the interview. The court then permitted Prevost

²The State made it clear it was “proceeding under the accomplice liability statute.”

to impeach this testimony by playing a previously-unplayed portion of the interview in which one detective, in response to Prevost's questions about recording, apparently asked "[w]ho said it was being recorded?" Finally, during the State's redirect examination, the detective admitted she remembered the other detective making that statement, but testified he did so after she had specifically "mentioned to Mr. Prevost" that they were recording the interview "so that [they] wouldn't have to feverishly take notes."

¶6 Prevost did not, however, object to the detectives' testimony or ask the court to strike it. *See State v. Hudson*, 87 Ariz. 162, 163-64, 348 P.2d 928, 929 (1960) ("Having failed to object to the testimony complained of, defendant thereby waived his right to challenge the matter."). Nor has he cited any authority requiring the superior court to sua sponte strike testimony on the basis a witness has "falsely testified." Further, the court allowed Prevost to impeach the detectives' statements, and the inferences to be drawn regarding the detectives' credibility were the jury's to make. *State v. Rivera*, 210 Ariz. 188, 194, ¶ 28, 109 P.3d 83, 89 (2005) (citation omitted) ("Absent a showing that the prosecution was aware of any false testimony, the credibility of witnesses is for the jury to determine."). Thus, the court did not commit error, much less fundamental prejudicial error, *see State v.*

Henderson, 210 Ariz. 561, 567-68, ¶¶ 19-21, 115 P.3d 601, 607-08 (2005) (citations omitted), by allowing the jury to consider the detectives' testimony.

¶7 Second, Prevost argues he was "not tried by a jury of his peers as the jury was all female after the only two men on the jury were chosen as alternates." See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89 (1994) (applying *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender"). Prevost did not, however, object to the composition of the jury at trial, and has waived this argument on appeal. *State v. Garza*, 216 Ariz. 56, 65, ¶ 31, 163 P.3d 1006, 1015 (2007) (citations omitted) (defendant waives *Batson* challenges by failing to object at trial).

II. Anders Review

¶8 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Prevost received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages.

¶9 The evidence presented at trial was substantial and supports the verdicts. The jury was properly comprised of eight members and the court properly instructed the jury on the

elements of the charges, Prevost's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Prevost spoke at sentencing, and his sentences were within the range of acceptable sentences for his offenses. See Ariz. Rev. Stat. § 13-703(B)(2), (I) (2009).

CONCLUSION

¶10 We decline to order briefing and affirm Prevost's convictions and sentences.

¶11 After the filing of this decision, defense counsel's obligations pertaining to Prevost's representation in this appeal have ended. Defense counsel need do no more than inform Prevost of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶12 Prevost has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Prevost 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
LAWRENCE F. WINTHROP, Judge