DIVISION ONE
FILED: 11/23/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 12-0044
	)	DEPARTMENT S
v.	)	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
APOLONIO ALVAREZ, JR., Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-118391-002

The Honorable Cynthia J. Bailey, Judge

AFFIRMED AS MODIFIED

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

Marty Lieberman, Office of the Legal Defender — Phoenix
By Cynthia Dawn Beck, Deputy Legal Defender
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Apolonio Alvarez, Jr. ("Appellant") appeals his conviction and sentence for burglary in the second degree. Appellant's counsel has filed a brief in accordance with *Smith*

v. Robbins, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). Although this court granted Appellant the opportunity to file a supplemental brief *in propria persona*, he has not done so.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),[1] 13-4031, and 13-4033(A). Finding no reversible error, we affirm as modified.

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On April 19, 2011, a grand jury issued an indictment, charging Appellant and Donna Marie Mares each with Count I, burglary in the second degree, a class three felony, in violation of A.R.S. § 13-1507, and Count II, possession of

[1] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

[2] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

burglary tools, a class six felony, in violation of A.R.S. § 13-1505.[3] The State later alleged that Appellant had two non-dangerous historical prior felony convictions. The State also filed an allegation of aggravating circumstances, alleging at least four aggravating circumstances.

¶4 At Appellant's trial, the State presented the following evidence: Sometime between 3:00 a.m. and 4:30 a.m. on April 12, 2011, barking dogs awoke R.R., who looked out of her bedroom window to a vacant house across the street ("the house"). R.R. observed a male (Appellant) standing on the roof of the house near the air conditioning unit and a female (Mares) standing on the ground near the corner of the house. Each individual was wearing a white T-shirt.

¶5 Appellant appeared to be tearing apart the air conditioning unit and throwing its panels toward the ground behind the house, while Mares appeared to be watching to see if anyone was coming. Shortly before 4:30 a.m., R.R. called the police.

¶6 A few minutes later, Avondale police officers began to arrive. Appellant first tried to hide by lying on the roof, but as more policemen arrived and approached the house, he rolled off the roof, jumped a fence, and started to run. Mares also tried to climb over the fence to run, but she could not do so

[3] Mares pled guilty to both counts as charged.

and ultimately became caught on the fence. Both suspects then stopped, obeyed the officers' verbal commands, and were apprehended. Appellant had fresh black grease on his hands.

¶7 After Appellant and Mares were in custody, R.R. identified them as the persons she had seen tearing apart the air conditioning unit at the house. A police officer walked back to the house, where he observed from the ground that the air conditioning unit on the roof appeared to have been taken apart and "was in disarray." The wall panels of the unit were on the porch in the back yard. Additionally, the house's breaker box was open, and the wires had been cut. The officer climbed onto the roof, where he saw more closely that the air conditioning unit had been dismantled and copper piping had been cut and removed. He also noticed a black, grease-like substance on the air conditioner's wires and tubing. In the area around the air conditioner, the officer found a cell phone, a watch cap, a screwdriver, and a pair of pliers.

¶8 Police officers subsequently determined that the cell phone found on the roof belonged to Mares. They also determined that neither Appellant nor Mares owned the house.

¶9 C.S. testified that on April 12, 2011, she owned the house, and although the house was vacant on that date, tenants had lived there previously. C.S. and her husband checked the property regularly, and had done so on the weekend before April

12, 2011. At that time, the air conditioner was still intact, had no parts on the back porch of the house, and was in perfect running condition. C.S. had not given anyone permission to be on her property or to tear apart her air conditioning unit, and she valued the air conditioner at $6,000.00, based on the price she previously paid for it. C.S. also testified she had never seen Appellant before and had not given him or Mares permission to be on her property on April 12, 2011.

¶10 Appellant did not testify. The jury found him guilty of Count I, but reached an impasse as to Count II.[4] At sentencing, the trial court found Appellant had two historical prior felony convictions for enhancement purposes and sentenced him to a presumptive term of 11.25 years' imprisonment in the Arizona Department of Corrections, with credit for sixty-two days of pre-sentence incarceration.[5] Appellant filed a timely notice of appeal.

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[4] The trial court later granted the State's motion to dismiss Count II.

[5] We note the trial court's January 10, 2012 sentencing minute entry indicates the court sentenced Appellant to an aggravated term of imprisonment. Both the length of the sentence and the transcript of the sentencing proceedings make clear, however, that Appellant was sentenced to the presumptive term. Pursuant to A.R.S. § 13-4036, we modify the trial court's January 10, 2012 minute entry to reflect that Appellant was sentenced to the presumptive term of imprisonment. *See State v. Ochoa*, 189 Ariz. 454, 462, 943 P.2d 814, 822 (App. 1997).

II. ANALYSIS

¶11 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdict, and the sentence was within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

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

III. CONCLUSION

¶13 Appellant's conviction and sentence are affirmed. The trial court's January 10, 2012 sentencing minute entry is

modified to reflect that Appellant was sentenced to the presumptive term of imprisonment.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
SAMUEL A. THUMMA, Judge

_____/S/_____
ANN A. SCOTT TIMMER, Judge