DIVISION ONE
FILED: 10/31/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0267
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
BRADLEY JON KING,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-159617-003

The Honorable Daniel G. Martin, Judge

AFFIRMED IN PART; REVERSED IN PART

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Attorney for Appellant

T H O M P S O N, Judge

¶1 Bradley Jon King (defendant) appeals his convictions and sentences for burglary, theft, and possession of burglary

tools. For the reasons set forth below, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Victim parked his van in a Fry's Electronics parking lot while he went into the store. The van had a bicycle rack "bolted in" and "permanently affixed" to the back with two bicycles secured to the rack with a heavy duty cable and locks. Victim covered the bikes with a barbecue cover secured with bungee cords to keep the bicycles clean and dry. A loss-prevention employee of Fry's electronics saw a red pickup truck leave a parking space, drive "by a van that had two racing bikes on it," and then park in another spot. He saw two men exit the truck, walk over to the van, take the bikes off the rack, and put them in the back of their truck and drive away.

¶3 When Police Officer Brian Sergeant arrived, a security officer pointed to the red truck and said, "That's the truck that was involved." After Officer Sergeant pulled defendant over and placed him in investigative detention, defendant stated "the passenger of the truck had nothing to do with the stealing of the bicycles." When Officer Sergeant asked him why he took the bicycles, defendant responded that he "wanted them." Officer Sergeant found a "pair of bolt cutters and some cables" inside the truck. At the back of the van police officers found

"cut locks" and a cable identical to that found in defendant's truck.

¶4 The state charged defendant with one count of burglary in the third degree, a class 4 felony (count 1), one count of theft of property valued at $4000 or more, a class 3 felony (count 2), and one count of possession of burglary tools, a class 6 felony (count 3). The jury found defendant guilty on all three counts. The trial court sentenced defendant to concurrent terms of 10 years imprisonment for count 1, 11.25 years for count 2, and 3.75 years for count 3. He received 241 days of presentence-incarceration credit for each count.

¶5 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033(A) (2010).

DISCUSSION

¶6 Defendant contends that fundamental error occurred when the prosecutor made improper prejudicial references in opening and closing argument that implied defendant was a "career criminal," which he argues alluded to defendant's "criminal history" and are "facts not in evidence." Under fundamental error review, defendant must first prove that an error occurred, and second that the error was fundamental and caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶

20, 115 P.3d 601, 607 (2005). An error is considered fundamental when it 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 (citation omitted).

¶7 Although wide latitude is afforded counsel in closing arguments, counsel may not describe or comment on evidence that has not previously been presented to the jury. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). We will reverse a conviction for prosecutorial misconduct only if "(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004) (citation omitted); *see State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) ("[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." (internal quotation marks omitted)). Our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

¶8 In his opening statement, the prosecutor stated:

> On September [sic] 9, 2010, this man went out to do his job. And like any person going to work, he had to gather his tools of trade. But on that day, the defendant wasn't a mechanic or a cable repairman or working on some construction site. No, on that day, the defendant gathered up his bolt cutters, the tools of his trade that day, and went out to steal from [defendant].
>
> . . . .
>
> [A]t the end of this trial, I am going to ask that you hold this man responsible for using his tools of trade; namely, the bolt cutters, by stealing from [defendant] . . . .

In closing argument, the prosecutor made the following statements: "[defendant] gathered up his bolt cutters and went out to do his job"; "[w]hen you watch that video, you can see him doing his job"; "[i]f you want a motive as to why the defendant had a job that day as a thief, just look to that sentence, 'I wanted them'"; "defendant's job that day was to be a thief"; and "coming from somebody whose job it is to steal, bolt cutters are burglary tools."

¶9 Defendant fails to show that prosecutorial misconduct occurred. The statements made by the prosecutor do not imply that defendant was a career criminal or that he had a criminal history. The comments refer to defendant's intent and actions on "that day," a phrase reiterated by the prosecutor multiple times. The prosecutor also did not mention or allude to facts not in evidence. In any event, the statements were not unduly

prejudicial and did not contribute to the jury's verdict because the trial court advised the jury that opening statements and closing arguments are not evidence. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (as part of the standard jury instructions, the trial court instructed the jury that statements made during closing arguments are not evidence). We presume that jurors follow the court's instructions. *Id.* Therefore, defendant fails to prove that any error, let alone fundamental error, occurred.

¶10 Defendant also argues the trial court erred in denying his motion for a judgment of acquittal on the burglary charge, asserting that he did not enter the van with the intent to commit a theft because the bicycles were attached to the outside of the van. Claims of insufficient evidence are reviewed de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). We do not reweigh the evidence. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

¶11 On a motion for a judgment of acquittal "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." *State v. Parker*, 231 Ariz. 391, ¶ 70, 296 P.3d 54, 70 (2013) (emphasis omitted) (citation omitted). If the record contains substantial evidence establishing the elements of the offense then the motion for judgment of acquittal must be denied. *See id.* Substantial evidence is "such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *West*, 226 Ariz. at 568, ¶ 16, 250 P.3d at 1191 (citation omitted).

¶12 The state charged defendant with committing burglary by "[e]ntering or remaining unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or felony therein." A.R.S. § 13-1506(A)(1) (2010). "'Structure' means any vending machine or any building, object, vehicle, railroad car or place with sides and a floor that is separately securable from any other structure attached to it and that is used for lodging, business, transportation, recreation or storage." A.R.S. § 13-1501(12) (2010). "'Entry' means the intrusion of any part of any instrument or any part of a person's body inside the external boundaries of a structure." A.R.S. § 13-1501(3).

¶13 The state asserts that the external boundaries of the van were extended to include the bike rack because it was "bolted in" and "permanently affixed" to the van. We disagree.

A structure under the statute must have "sides and a floor that is separately securable from any other structure attached to it." A.R.S. § 13-1501(12). The van is a vehicle with sides, a floor, a ceiling, and is separately securable. The bike rack does not extend those boundaries. Any "external boundaries" of the bike rack are imaginary and make it difficult to determine exactly how one could intrude into those imaginary boundaries, whether or not it could be considered part of the vehicle. The bike rack itself does not have a floor or sides, and is not securable. We fail to see how the barbeque cover creates any of those qualities. In order to steal the bikes, defendant did not enter or remain in or on the van, he simply cut the cable and removed the bikes. This was possible without ever touching the bike rack or the vehicle. This is more akin to stealing a bike locked to a lamppost on the sidewalk or on a bike rack at the side of the building. Consequently, we cannot hold that the state presented sufficient evidence establishing the elements of the offense of burglary in the third degree.

¶14 Because we hold that the theft of the bicycles in this situation does not constitute a burglary, we also reverse defendant's conviction for possession of burglary tools. A person commits possession of burglary tools by possessing the tool and "intending to use or permit the use of such an item in the commission of a burglary." A.R.S. § 13-1505(A)(1) (2010).

Defendant used the bolt cutters in the commission of a theft, not a burglary. Apart from the state's argument that defendant committed a burglary, the state does not cite to anything in the record to contend that defendant possessed burglary tools even if it was not a burglary. In our review of the record, we have been unable to find sufficient evidence. Therefore, the elements of the offense of possession of burglary tools have not been established.

CONCLUSION

¶15 For the foregoing reasons, we reverse defendant's convictions and sentences for counts one and three and affirm his conviction and sentence for count two.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge