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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: 6/13/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 12-0331  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
WESLEY JEROME DODSON, III, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-163172-001

The Honorable Carolyn K. Passamonte, Judge *Pro Tem*

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Joseph T. Maziarz, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
William Knight, Rule 38(d) Student  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Charles R. Krull, Deputy Public Defender  
Attorneys for Appellant

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**D O W N I E**, Judge

¶1 Wesley Jerome Dodson, III, appeals his conviction and

sentence for possession of burglary tools.<sup>1</sup> For the following reasons, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 I.M. saw Dodson riding a bike around the fenced compound where I.M.'s employer, Salt River Project ("SRP"), kept spools of copper wire. When Dodson disappeared for a few minutes, I.M. assumed he was using the on-site bathroom but decided to keep an eye on him. A few minutes later, he saw Dodson hurrying off the site with a piece of "number six green stranded" copper wire hanging out of his bag. This was the same type of wire SRP used at the site. I.M. grabbed the wire and found "it wasn't just a piece" of wire, but an entire spool. Dodson told I.M. he found the wire and rode away.

¶3 I.M. got in a truck and searched the surrounding area for Dodson. He found him about 30 minutes later, hiding behind a dumpster and using wire cutters to remove wire from the spool and load it into his bag. When Dodson rode away, I.M. followed, relaying his location to police via telephone. Although I.M.

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<sup>1</sup> Although the notice of appeal states that Dodson is also appealing his burglary conviction, the opening brief addresses only the possession of burglary tools conviction. We therefore do not address the burglary charge. *See, e.g., Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived."); *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 304 n.7, ¶ 19, 197 P.3d 758, 765 n.7 (App. 2008) (arguments not developed on appeal are deemed waived).

lost sight of Dodson several times, officers apprehended him, and I.M. definitively identified him as the man he followed from the construction site. Inside Dodson's bag, officers found green copper wire, which I.M. identified as belonging to SRP.

¶14 Dodson was indicted for burglary in the third degree, a class 4 felony, and possession of burglary tools, a class 6 felony. At the ensuing jury trial, Officer Murphy testified she did not impound, photograph, or refer to wire cutters in her report, and that to her knowledge, no wire cutters were taken into evidence. She further testified that scrap yards will not "take whole reels of wire," instead requiring that the wire be cut.

¶15 Dodson denied taking wire from the SRP site. He testified that he collected scraps of green wire from a dumpster as part of his usual "rounds" salvaging scrap metal and that the scraps were already in his bag when he stopped to use the bathroom at the SRP site. He denied using wire cutters at the dumpster, where he reportedly went to collect a bag he had left earlier, or cutting the wire found in his bag.

¶16 Dodson moved for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure, arguing, *inter alia*, that the State failed to present substantial evidence that he possessed the wire cutters. The court denied the motion. The jury found Dodson guilty of both counts, and he was

sentenced to a term of imprisonment. Dodson timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21, 13-4031, and -4033.

### **DISCUSSION**

¶17 Dodson challenges only his conviction for possession of burglary tools. He claims the State failed to prove that he possessed wire cutters with the intent to use them in committing the SRP burglary and that the prosecutor improperly argued that the State need not prove he "acted intentionally." We consider each argument in turn.

#### **I. Possession of Burglary Tools**

¶18 A person commits the offense of possession of burglary tools by possessing any tool or instrument commonly used for committing burglary and intending to use the tool or instrument in the commission of a burglary. A.R.S. § 13-1505(A)(1). A person commits burglary by entering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial yard "with the intent to commit any theft." A.R.S. § 13-1506(A)(1).

¶19 We review *de novo* a challenge to the sufficiency of evidence. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted). "[T]he 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." *Id.* at ¶ 16 (internal quotation marks omitted); see also *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) ("Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.").

¶10 Dodson testified that he derived income from salvaging scrap materials, including copper wire, which he sold to scrap metal buyers. Officer Murphy testified that scrap metal buyers would not accept whole spools of wire because they knew that wire could still be used and thus was not "scrap." I.M. testified that Dodson had a spool of copper wire in his bag and that he was "100 percent" certain he saw Dodson using wire cutters to cut the wire from the spool. Officers collected strands of green wire, but no spool, from Dodson's bag.

¶11 As the State correctly notes, it was not required to prove that Dodson intended to use, or did in fact use, the wire cutters in committing the SRP burglary. The statute merely required the State to prove that Dodson possessed a tool commonly used for burglary and that he intended to use that tool in committing "a" burglary. A.R.S. § 13-1505(A)(1).

¶12 Based on I.M.'s direct testimony, jurors could have concluded that Dodson possessed wire cutters on the date in question. Dodson does not dispute that wire cutters are tools "adapted or commonly used" for committing a burglary. Jurors

could also reasonably infer from the evidence that Dodson possessed the wire cutters with the intent of using them to commit "a" burglary, notwithstanding the lack of direct evidence on that point. See, e.g., *State v. Rood*, 11 Ariz. App. 102, 104, 462 P.2d 399, 401 (1969) ("[C]riminal intent is usually proven by circumstantial evidence . . . ."); *State v. Murray*, 184 Ariz. 9, 31, 906 P.2d 542, 564 (1995) ("The probative value of evidence is not reduced because it is circumstantial."). Jurors could conclude from the trial testimony that Dodson derived income from selling scrap metal, at least some of which he stole during burglaries, and that the wire cutters he possessed were a tool he intentionally used in stealing wire from commercial yards such as SRP's.

## **II. Closing Argument**

¶13 Dodson next contends the prosecutor improperly argued in closing that the State need not prove he acted intentionally. Because Dodson did not object to the State's closing argument below, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under this standard, Dodson must show both that error occurred and that he was prejudiced by it. *Id.* at ¶ 20 (citations omitted).

¶14 Even assuming *arguendo* that the prosecutor misstated the law in closing, Dodson has not demonstrated the requisite

