IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

AMANDA JEANNE TRISTAN, *Appellant*.

No. 1 CA-CR-12-0449
FILED 12-10-2013

Appeal from the Superior Court in Maricopa County
No. CR-2011-122778-003
The Honorable William L. Brotherton, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry J. Reid

Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the Court, in which Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

S W A N N, Judge:

¶1 Defendant Amanda Jeanne Tristan appeals her convictions and sentences for burglary in the second degree, a class 3 felony, and theft, a class 1 misdemeanor. This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defendant's appellate counsel has searched the record on appeal and found no arguable, nonfrivolous question of law, and asks us to review the record for fundamental error. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona* but did not do so.

¶2 We have searched the record for fundamental error and find none. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 A realtor, M.E., and her significant other, B.L., went to check on one of M.E.'s listings because a pool-service employee had reportedly seen someone in the house a couple of days earlier. B.L. searched every room of the vacant house while M.E. waited outside and downstairs. When B.L. opened a walk-in closet in an upstairs bedroom, he found Defendant and Keith Bouquot sitting on the ground behind the door. Both Defendant and Bouquot were fully clothed and neither appeared to be holding anything. B.L. yelled at them to leave and escorted them outside without resistance. Defendant told B.L. that she had been in the house with Bouquot because they "just wanted to find a place to be alone for a while." Defendant and Bouquot left on foot after B.L. once again yelled at them to leave.

¶4 B.L. and M.E. thereafter took a closer look at a truck parked in front of the house. The loaded truck bed contained, among other things, a hacksaw, pool-cleaning equipment, and documents M.E. recognized as belonging to another realtor. B.L. noticed that the keys

were left in the ignition, and the couple called 9-1-1. Police arrived within minutes and arrested Defendant and Bouquot a few blocks away, whom B.L. and M.E. soon identified during show-ups.

¶5 Police found a purse with Defendant's identification in the truck. The truck search also revealed a makeshift lock-pick, heavy-duty bolt cutters and a handwritten list of addresses spanning several pages and ending with M.E.'s listing. Police confirmed that the pool-cleaning equipment and other items found in the truck bed, valued between $150 and $1,000, had been stolen from another residence that had been vacant for the preceding six months. Notably, the address of the other residence was written immediately above the address of M.E.'s listing on the list found in the truck.

¶6 Defendant admitted that she had made the address list found in the truck. She knew that the homes on the list were either foreclosed or pre-foreclosed and therefore likely to be vacant. However, she denied intending to take or actually taking anything from the homes and instead claimed that she would visit them during the day "to get away." Defendant insisted that she and Bouquot had entered the house to have sex, and denied taking the pool-cleaning equipment from the other residence. But her demeanor during the ensuing police interrogation changed from "smug" to "flustered" when confronted with the fact that the equipment was stolen from an address on the list she had made. Defendant also admitted to having used the bathroom in the house at one point.

¶7 M.E. testified that Defendant and Bouquot did not have permission to enter the house she had listed for sale. Defendant claimed that they had entered through an unlocked backdoor, but a detective testified that the lock on a bedroom balcony door bore pry marks and that a window in the same bedroom was broken with a partly removed screen. Moreover, B.L. testified that all exterior doors were locked when he and M.E. arrived. A former property-crimes detective testified that from 2005 to 2011 there was an "epidemic" of people breaking into foreclosed homes in the area.

¶8 Defendant was indicted and tried for one count of burglary in the second degree and one count of theft. As the state rested at the end of a three-day trial, Defendant moved to dismiss the burglary charge on grounds that the state had failed to present any evidence that she had entered the house with intent to commit theft. The court denied the motion, agreeing with the state that Defendant's intent could be inferred

from her preparation of the list of vacant homes and her possession of stolen items from one of those homes.

¶9 A unanimous jury found Defendant guilty of both burglary in the second degree and theft. Defendant and the state stipulated to the presence of an accomplice as an aggravating factor in exchange for the state's agreement not to pursue another aggravating factor. Defendant further stipulated to one prior felony conviction. The court conducted a mitigation hearing and allowed Defendant to allocute. The court weighed the aggravating and mitigating circumstances, and sentenced Defendant to a minimum 4.5-year prison term on the burglary charge and a 65-day term on the theft charge. The court granted Defendant 65 days of presentence incarceration credit on both charges.

¶10 Defendant timely appeals.

DISCUSSION

¶11 The record reveals no fundamental error. Defendant was present and represented by counsel at all critical stages. The record before us shows no evidence of jury misconduct and the jury was properly comprised of eight jurors. *See* A.R.S. § 21-102(B); Ariz. R. Crim. P. 18.1(a).

¶12 The evidence that the state presented at trial was properly admissible and was sufficient to support Defendant's convictions. A person commits the crime of burglary in the second degree when she "enter[s] or remain[s] unlawfully in or on a residential structure with the intent to commit any theft or any felony therein," A.R.S. § 13-1507(A), and commits theft when she knowingly and without lawful authority "[c]ontrols property of another with the intent to deprive the other person of such property," A.R.S. § 13-1802(A)(1). Moreover, a person can be guilty of either offense as an accomplice if she aids another in committing it or provides another with the means or opportunity to commit it. A.R.S. §§ 13-301 to -303. Here, the state presented evidence that Defendant had (1) made a list of homes in foreclosure or pre-foreclosure that she knew were likely to be vacant; (2) arrived at one of those homes with Bouquot in his truck, which contained items stolen from the address immediately preceding the residence on the list; (3) entered that home without permission and used the bathroom; and (4) hid in a walk-in closet when the owner's agent arrived. This evidence was sufficient to allow the jury to find Defendant guilty on both counts.

¶13 We note that the court did not commit error by granting defense counsel's motion to omit a standard jury instruction regarding

Defendant's right not to testify. Defendant agreed and waived any issue of appeal, and the state did not object. In *State v. Sanderson*, 182 Ariz. 534, 542, 898 P.2d 483, 491 (App. 1995), counsel "stated that he did not want such an instruction given to the jury because it would call attention to the defendant's absence." There, we held that "[w]hen counsel specifically declines an instruction, no fundamental error is present because the court's failure to instruct does not interfere with the defendant's theory of the case nor does it deny [her] a right essential to [her] defense." *Id.* at 543, 898 P.2d at 492.

¶14 The court ordered and considered a presentence report, and found that Defendant knowingly, voluntarily and intelligently stipulated to both the presence of an accomplice as an aggravating factor and to one prior historical felony conviction. Accordingly, the court properly sentenced Defendant as a category two repetitive offender under A.R.S. § 13-703(B)(2), and properly found one aggravating factor, *see* A.R.S. § 13-701(D)(4); *State v. Lamar*, 210 Ariz. 571, 577, ¶ 26, 115 P.3d 611, 617 (2005); *State v. Aleman*, 210 Ariz. 232, 240, ¶ 25, 109 P.3d 571, 579 (App. 2005). Defendant was given the opportunity to speak at the sentencing hearing and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The court acted within its discretion to determine that the aggravating factor and the mitigating factors, weighed together, warranted the imposition of a minimum sentence for the conviction of burglary in the second degree and a sentence equal to the number of days of presentence incarceration credit for the conviction of theft.

¶15 The court imposed lawful sentences. *See* A.R.S. §§ 13-703(I), -707(A)(1), -1507(B), -1802(G). However, it granted Defendant 65 days of presentence incarceration credit when in fact it should have granted only 63 days. Any defective sentence that favors a defendant cannot be corrected unless the state has filed a timely cross-appeal. *State v. Dawson,* 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990). Here, no such cross-appeal was filed.

CONCLUSION

¶16 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We therefore affirm Defendant's convictions and sentences.

¶17 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154,

156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and Defendant's future options. *Id.* Defendant has 30 days from the date of this decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.