DIVISION ONE
FILED: 8/20/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0459
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DONALD VINEYARD,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-008284-001

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Marty Lieberman, Maricopa County Legal Defender — Phoenix
By Cynthia D. Beck, Deputy Legal Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Donald Vineyard (Defendant) appeals his convictions and sentences for burglary in the third degree, a class four felony, and possession of burglary tools, a class six felony.

Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after a search of the entire appellate record, she found no arguable question of law that was not frivolous. *See State v. Clark*, 196 Ariz. 530, 537-38, ¶¶ 30-33, 2 P.3d 89, 96-97 (App. 1999). Defendant was given the opportunity to file a supplemental brief in propria persona, but he did not do so.

¶2 Our obligation in this appeal is to review "the entire record for reversible error." *Id.* at 537, ¶ 30, 2 P.3d at 96. Finding no reversible error, we affirm Defendant's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶3 At approximately 2:30 a.m. on July 16, 2011, Gilbert Police Officer J. Barnett (Officer Barnett) was driving home after the end of his shift and noticed that a home in his Gilbert neighborhood (the Property) had its garage door open. Officer Barnett could see that the passenger side doors on both cars in the Property's driveway were slightly ajar. Officer Barnett then noticed Defendant sitting on the curb in front of a vacant house, approximately 100 feet east of the Property.

¶4 Officer Barnett testified that, as he approached Defendant, Defendant removed black latex gloves from his hands. Defendant testified that he was not wearing gloves when

Officer Barnett contacted him and claimed that he had been carrying the gloves in his pocket.

¶5 Defendant was breathing heavily and sweating profusely, and his hands were trembling. Officer Barnett identified himself as a police officer and asked Defendant what he was doing out on the street in the middle of the night. Defendant avoided making eye contact and was unresponsive.

¶6 Officer Barnett conducted a pat-down search for weapons and removed a loaded .38 caliber revolver and a large pocket knife from Defendant. In response to further questioning, Defendant told Officer Barnett that he had just finished a bike ride. When Officer Barnett pointed out that Defendant did not have a bike with him, Defendant claimed he had returned his bike to his home and had been walking around to cool down. Defendant then explained that he wore the black latex gloves while riding his bike, in order to keep his hands from becoming sweaty and cold. Officer Barnett pointed out that Defendant's explanation seemed strange because latex gloves tend to make one's hands sweat.

¶7 Once backup arrived, Officer Barnett woke the owners of the Property, T.P. and S.P. (collectively, the Victims). The Victims told Officer Barnett that the Property's garage door had been closed before they went to bed. The Victims inspected the cars and determined that a garage door opener, a

car cell phone charger and a pair of binoculars were missing from the cars. Officer Barnett looked for fingerprints on Victim's cars but did not find any, although the dust had been visibly disturbed. Defendant did not have permission to take anything from the Victims' cars.

¶8 Officer Barnett informed Defendant that there had been a burglary and specifically mentioned the missing garage door opener. However, Defendant denied any knowledge of, or involvement in, a car burglary. Soon thereafter, Officer Barnett heard a thump as a man (Pishotta) fell out from underneath the subframe of a Jeep that was parked across the street. Defendant put his head down and had an exasperated look on his face. The officers searched Pishotta and found "shave keys" and other burglary tools.[1] Defendant admitted Pishotta was currently living with him, but claimed he did not know Pishotta was hiding under the Jeep.

¶9 Officer Barnett placed Defendant under arrest. During the search incident to arrest, Officer Barnett found a garage door opener in Defendant's left front pocket. The garage door opener operated the Victims' garage door. Defendant claimed he found the garage door opener on the sidewalk up the

[1] Pishotta was also carrying a key fob that belonged to H.J. H.J. testified that the key fob had been taken out of his unlocked car without his permission on the same night Defendant was arrested. Defendant was acquitted of the burglary count involving H.J.'s vehicle.

street from the Property. Officer Barnett also searched the backpack Defendant was wearing at the time Officer Barnett contacted him. The backpack contained additional pairs of black latex gloves, a first aid kit, a multi-tool pocket knife, a pair of binoculars and some flashlights. Officer Barnett testified that, based on his training and experience, these items could be used as burglary tools. Defendant claimed that the items in the backpack were part of an emergency kit and testified that he did not use any of the items as burglary tools.

¶10 The State charged Defendant with two counts of burglary in the third degree and one count of possession of burglary tools. The jury acquitted Defendant of one count of burglary but returned guilty verdicts on the other counts. The court suspended Defendant's sentence and placed him on three years' probation for each count, to be served concurrently. Defendant was sentenced to three months in jail as a condition of his probation.

¶11 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 (2010), and -4033.A.1 (2010).

DISCUSSION

¶12 When reviewing a claim of insufficient evidence, we view the evidence "in the light most favorable to sustaining the conviction." *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). We do not reweigh the evidence and will affirm if substantial evidence supports the jury's verdict. *Id.* "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

Burglary in the Third Degree

¶13 To convict Defendant of burglary in the third degree, the State was required to prove beyond a reasonable doubt that (1) Defendant entered or remained unlawfully in or on a nonresidential structure, (2) with the intent to commit any theft therein. *See* A.R.S. § 13-1506.A.1 (2010).

¶14 With respect to the first element, the Victims' cars qualify as nonresidential structures. *See* A.R.S. § 13-1501.10, .12 (Supp. 2012)[2]; *State v. Hamblin*, 217 Ariz. 481, 484, ¶¶ 9–12, 176 P.3d 49, 52 (App. 2008). Any entry into the Victims' cars by Defendant was unlawful because the Victims did not license,

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

authorize or otherwise grant Defendant permission to enter their cars. *See* A.R.S. § 13-1501.2.

¶15 Also, the passenger doors of both of the Victims' cars were opened without the Victims' permission, and multiple items were missing from inside the cars, including the Victims' garage door opener. Defendant was contacted by Officer Barnett 100 feet away from the Victims' cars. The missing garage door opener was found in Defendant's pocket. Thus, there was sufficient evidence that Defendant unlawfully entered the Victims' cars.

¶16 With respect to the second element, Defendant's objective must have been to engage in theft as he entered the Victims' cars. *See* A.R.S. § 13-105.10(a) (Supp. 2012) ("'[W]ith the intent to' means . . . that a person's objective is to cause that result or to engage in that conduct.") As applied to this case, "theft" occurs when a person knowingly controls the property of another without lawful authority and with the intent to deprive the other person of the property. *See* A.R.S. § 13-1802.A.1 (Supp. 2012). "[P]roof of a requisite intent to commit theft or any felony can be shown by circumstantial evidence . . . ." *State v. Dusch*, 17 Ariz. App. 286, 287, 497 P.2d 402, 403 (1972); *see also State v. Edgar*, 126 Ariz. 206, 209, 613 P.2d 1262, 1265 (1980) ("It is well settled that criminal intent may be proved by circumstantial evidence . . . .")

¶17 In this case, Defendant was found in close proximity to the Victims' cars at 2:30 a.m. Defendant was wearing a pair of black gloves and carrying multiple weapons. Defendant's backpack contained items that could be used as burglary tools. Defendant's roommate, Pishotta, was hiding under a Jeep across the street, and Defendant was visibly dismayed when Pishotta was discovered. Pishotta was in possession of a stolen key fob and burglary tools. Defendant acted nervous while speaking with Officer Barnett and denied having any knowledge of the burglary or the missing garage door opener. However, Officer Barnett subsequently found the missing garage door opener in Defendant's pocket. Under the circumstances, there was sufficient evidence to support an inference that Defendant intended to commit theft.

¶18 We therefore find that substantial evidence supports the jury's verdict that Defendant was guilty of burglary in the third degree.

Possession of Burglary Tools

¶19 To convict Defendant of possession of burglary tools, the State was required to prove beyond a reasonable doubt that Defendant (1) possessed any explosive, tool, instrument or other article adapted or commonly used for committing any form of burglary, and (2) intended to use or permit the use of such an item in the commission of a burglary. *See* A.R.S. § 13-1505.A.1 (2010). To "possess" means "knowingly to have physical

possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105.34.

¶20 With respect to the first element, the record indicates Defendant was found in possession of items commonly used for committing burglary. Defendant was wearing a backpack containing, among other things, several pairs of black latex gloves, a multi-tool pocket knife, some flashlights and a pair of binoculars. Officer Barnett testified that, based on his training and experience, these items could be used as burglary tools. For example, he testified that the gloves could be used to prevent leaving fingerprints or DNA, the flashlights could be used to illuminate a lock or security device, and the binoculars could be used to "case a place" or to look out for police officers.

¶21 With respect to the second element, there is sufficient evidence that Defendant used or intended to use items in his possession to commit burglary. There were signs that dust had been disturbed on the Victims' vehicles, but no fingerprints were found. Defendant was found at 2:30 a.m. The Victims' garage door was open, and the garage door opener was found in Defendant's pocket. Thus, the record supports the inference that Defendant had used, or intended to use, items in his possession to commit burglary.

¶22 We find that substantial evidence supports the jury's verdict that Defendant was guilty of possession of burglary tools.

CONCLUSION

¶23 We have carefully searched the entire appellate record for reversible error and have found none. *See Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and substantial evidence supported the jury's verdicts of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak, and the court imposed a legal sentence.

¶24 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. *See State v. Shattuck*, 140 Ariz. 582, 584, 684 P.2d 154, 156 (1984). Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *Id.* at 585, 684 P.2d at 157. Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration or petition for review.

¶25 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
_____
ANDREW W. GOULD, Presiding Judge

/S/
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MARGARET H. DOWNIE, Judge