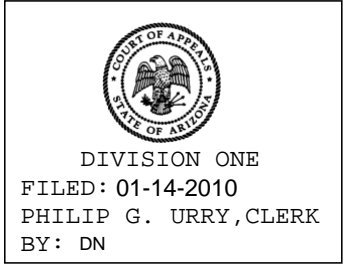


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0981
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ELBERT ROY HORACE BRUTON,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-120117-002 DT

The Honorable Raymond P. Lee, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Elbert Roy Horace Bruton (Defendant) appeals his
sentence and conviction for one count of attempted theft, a
class 3 felony.

¶2 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. Defendant was afforded an opportunity to file a supplemental brief in propria persona, but he did not do so.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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 (2001), and -4033.A.1 (Supp. 2009).¹ Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶4 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996).

¶5 In the early morning hours of March 30, 2008, the victim woke to the sound of an idling truck and a clunking

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

noise. He walked outside to investigate and observed a maroon truck backing up to his trailer-mounted backhoe parked in front of his house. The backhoe and trailer were purchased by the victim in October 2006 for approximately \$56,000. The victim observed the driver of the maroon truck and two other men on foot near the backhoe. Based on his observations, the victim believed that the men were attempting to steal his backhoe and trailer.

¶6 The victim confronted the group by yelling and running towards them. Startled, the driver put the truck in reverse, collided with the trailer and began driving away. The individuals on foot ran towards the truck. The victim chased the suspects, grabbing one man by the nape of his neck. Though it was dark, the area was illuminated by two streetlamps and moonlight. The victim saw the individual he grabbed well enough to later identify him as Defendant. Ultimately, Defendant broke free of the victim's hold, ran to and jumped into the truck as it drove away. The victim returned to his home and contacted the Phoenix Police Department.

¶7 Between approximately 2:00 and 3:00 a.m., police officers located Defendant at a convenience store. The victim was taken to Defendant's location where he identified Defendant as the man he grabbed by the nape of the neck and observed attempting to steal his backhoe and trailer.

¶8 Defendant was transported to the police station, given his *Miranda*² warnings and questioned by Officer L. Defendant informed Officer L. that he had been riding a BMX bike in the desert, had become hungry and thirsty, and decided to walk to the convenience store. Officer L. testified that this statement was unusual because Defendant walked from a corner where two convenience stores were located and walked approximately one mile to the convenience store where he was found. Defendant did not offer an explanation to Officer L. for his decision.

¶9 Defendant testified at trial that: he had been biking in the desert during the attempted theft of the backhoe; Officer L. misstated his explanation of events; he had a prominent tattoo on the back of his neck that the victim had not noticed; and denied involvement in the attempted theft.

¶10 During closing arguments, the prosecutor stated his personal opinion about Defendant's alibi. In the first comment, he stated "I believe he was trying to assist in the theft." Defense counsel objected and the court gave a curative instruction that a lawyer's comments are not to be considered as evidence by the jury. A few minutes later, the prosecutor commented on Defendant's alibi a second time, stating "I don't

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

think people have that bad of luck. I think it's he got caught." Defense counsel did not object.

¶11 At the conclusion of the two-day trial, a jury found Defendant guilty. The court suspended imposition of the sentence, placed Defendant on three years supervised probation and ordered him to serve two months in jail. The court also ordered Defendant to pay restitution to the victim in the amount of \$1080. Defendant received seven days of presentence incarceration credit. Defendant timely appealed.

DISCUSSION

¶12 We review the record for reversible error. *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. Additionally, we will not disturb the fact finder's decision if there is sufficient evidence to support its verdict. See *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶13 Defendant was charged with attempted theft. To prove attempted theft, the State was required to prove that Defendant intentionally acted in a manner that if successful, would result in the control of the property of another. A.R.S. §§ 13-1001.A.2 (2001), -1802.A.1 (Supp. 2009). "Theft of property . . . with a value of twenty-five thousand dollars or more is a class 2 felony." A.R.S. § 13-1802.G. The attempted theft of property over twenty-five thousand dollars is a class 3 felony. A.R.S. § 13-1001.C.2.

¶14 The State presented sufficient evidence to support the verdict. The victim identified Defendant and testified that he observed Defendant attempting to steal property valued over twenty-five thousand dollars. Because the jury had sufficient evidence to support a conviction under Arizona's attempted theft statute, we affirm Defendant's conviction.

CONCLUSION

¶15 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none.³ *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 finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. Defendant was allowed to present evidence and to call witnesses on his behalf. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

³ We note that the prosecutor inappropriately expressed his personal belief regarding Defendant's alibi. While not rising to the level of reversible error, given the court's prior curative instruction, prosecutors should refrain from offering their personal belief as to a defendant's guilt. See *State v. Van Den Berg*, 164 Ariz. 192, 196, 791 P.2d 1075, 1079 (App. 1990).

¶16 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration⁴ or petition for review.

¶17 For the foregoing reasons, Defendant's conviction and sentence are affirmed.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PHILIP HALL, Presiding Judge

/S/

DONN KESSLER, Judge

⁴ Pursuant to Arizona Rule of Criminal Procedure 31.18.b, Defendant or his counsel has fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days.