DIVISION ONE
FILED: 04-20-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-1055
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule
JUSTIN MENENDEZ,	)	111, Rules of the Arizona
	)	Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-170717-002 SE

The Honorable David King Udall, 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 Edith M. Lucero, Deputy Public Defender	
Attorneys for Appellant	
Justin Menendez, Appellant	Buckeye

N O R R I S, Judge

¶1 Justin Menendez timely appeals from his convictions and sentences for attempted burglary in the second degree and possession of burglary tools. After searching the record on

appeal and finding no arguable question of law that was not frivolous, Menendez'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), asking this court to search the record for fundamental error and presenting Menendez's arguments on appeal. This court granted counsel's motion to allow Menendez to file a supplemental brief *in propria persona*, and Menendez chose to do so. We reject the arguments raised through counsel and in Menendez's supplemental brief and, after reviewing the entire record, find no fundamental error. Therefore, we affirm Menendez's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On November 15, 2006, detectives placed Menendez under surveillance. Detectives observed him pick up Thomas Burns in a white PT Cruiser at 9:56 p.m. and return to his house in Phoenix. Surveillance continued into the night, and detectives observed Menendez and Burns drive to and enter/exit the backyard of a nearby unoccupied residence ("residence") five times between approximately 1:00 a.m. and 5:00 a.m. on November 16, 2006. Menendez was wearing dark clothing and dark gloves, and at different times while Menendez and Burns were at the

[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Menendez. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

residence, detectives heard a drill-like noise, several "loud bangs," and then "smaller banging." Each time after Menendez and Burns left the residence and returned to Menendez's home, detectives inspected their points of entry and assessed progressive damage at the residence.[2] After Menendez's fifth visit to the residence, police found a portion of the side garage door, the area near the dead bolt, had been broken off and was lying on the concrete; they also discovered "pry marks on the lower hinge of the door."

¶3 Eventually police conducted a traffic stop and arrested Menendez. Searching his vehicle, detectives "found [] a pair of black gloves [] in the driver's door," and "a flathead screwdriver that was laying on the passenger side seat, as well

[2]Menendez and Burns first parked between the residence and the residence next door ("property next door"), and at first detectives thought they had also entered the property next door. Detectives inspected the property next door but never discovered any sign of damage.

On their first inspection checking doors and windows at the residence, detectives observed an arcadia door partially opened, blocked by a wooden dowel. They also saw a locked wooden door with a doorknob covered with dust. On their second inspection, detectives observed the dust was "gone from the top of the doorknob" as if "somebody had checked" it; they also saw "a bunch of fresh scratches" at the dead bolt of a door leading to the garage. On their third inspection, after hearing a drill-like sound and "a loud bang," detectives observed "yellow oily foamy stuff running from the [garage door] dead bolt . . . to the key entry part of it, and it was running down the door." On their fourth inspection, after hearing "two really, really loud bangs . . . [and then] some smaller banging," detectives observed "pry damage between the [garage] door and the door frame right where the dead bolt is at."

as a green flashlight that was in the back compartment of the vehicle."

¶4 A jury found Menendez guilty of attempted burglary in the second degree and possession of burglary tools. Pursuant to Menendez's admission, the superior court found Menendez had four historical prior felony convictions. On December 3, 2008, the superior court sentenced Menendez to exceptionally aggravated sentences: 15 years for attempted burglary and 5.75 years for possession of burglary tools. The court ordered these sentences to run concurrently and awarded Menendez 730 days of presentence incarceration credit.

¶5 We have jurisdiction over this appeal 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)(1) (2010).

DISCUSSION

¶6 In his supplemental brief and through counsel, Menendez argues (1) the evidence was insufficient to sustain his convictions and the superior court should have granted his Arizona Rule of Criminal Procedure 20 motion, (2) the State withheld exculpatory evidence the residence and the property next door were for sale, (3) the court should have granted defense counsel's request for a jury instruction, and (4) he received ineffective assistance of counsel.

I. Sufficiency of the Evidence

¶7 In support of his insufficiency of the evidence/Rule 20 argument, Menendez argues (1) the progressive damage to the side garage door was not documented; (2) the State failed to perform forensic analysis to determine the screwdriver caused the damage; (3) the State's photographic exhibits showed only two doors, while the State alleged three doors had been "broken into"; (4) the State failed to prove Menendez had sold stolen property to a construction company; and (5) detectives never saw Menendez steal property, hold a flashlight, or use a screwdriver.

¶8 A judgment of acquittal is only appropriate when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of [the] defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).[3]

[3]Burglary in the second degree requires proof the defendant "enter[ed] or remain[ed] unlawfully in or on a

¶9 Here, the State presented substantial evidence of Menendez's guilt. Detectives testified they saw Menendez drive to the residence and enter/exit the backyard five times, heard noises coming from the unoccupied property, and described the progressive damage they observed each time Menendez and Burns left the property. *See supra* note 2. The victim testified she never gave Menendez or Burns permission to be on her property and detectives found black gloves, a screwdriver, and a flashlight in the white PT Cruiser Menendez and Burns used to drive to and from the property. This circumstantial evidence was sufficient to convict Menendez of attempted burglary in the second degree and possession of burglary tools. *See Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 53-54 n.3, ¶¶ 20-21, 213 P.3d 197, 202-03 n.3 (App. 2009) (circumstantial evidence has the same probative value as direct evidence and need not exclude every other reasonable hypothesis).

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residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507 (2010). The crime of attempt requires proof the defendant intentionally engaged "in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be," or engaged "in conduct intended to aid another to commit an offense." A.R.S. § 13-1001(A)(1), (3) (2010). (Although the statutes in this decision were amended after the date of Menendez's offenses, the revisions are immaterial. Thus, we cite to the current version of these statutes.)

Possession of burglary tools requires possession of "any explosive, tool, instrument or other article adapted or commonly used for committing any form of burglary . . . and inten[t] to use or permit the use of such an item in the commission of a burglary." A.R.S. § 13-1505(A)(1) (2010).

II. Withholding of Exculpatory Information

¶10 Menendez argues the State withheld information from the "judge and jury . . . that both [the residence and the property next door] were for sale," and that presentation of this information "could have produced a different out-come [sic]." Menendez's argument is contradicted by the record and is not well taken. In its case-in-chief, the State clarified "there [were] for sale signs" on both properties, the victim testified she was "in the process of selling the house," and in closing argument defense counsel noted "there was a for sale sign" in front of the property next door. Even if the properties' for-sale status constituted exculpatory evidence, there is no improper prosecutorial nondisclosure when the information "is revealed at the trial and presented to the jury." *State v. Bracy*, 145 Ariz. 520, 528, 703 P.2d 464, 472 (1985) (referencing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)).

III. Jury Instruction

¶11 Menendez next argues the superior court should have granted defense counsel's request for a clarifying instruction he had not been charged with trespassing at the property next door. We review a superior court's denial of a requested jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, 126 P.3d 148, 150 (2006).

¶12 The court instructed the jury the crime of attempt to commit burglary in the second degree included the lesser included offense of criminal trespass. Addressing this lesser included offense in closing, defense counsel implied a person would have the "right" to enter an unlocked gate to examine a house that was for sale and would not be trespassing in so doing ("Are you trespassing in that yard if you walk in there to take a look at the house, irrespective of what time of the day or night it is? Can you go up to the house and take a look at it if there's a for sale sign there?").

¶13 In rebuttal, the prosecutor rejected the inference Menendez "was not even trespassing," and stated Menendez and Burns had "trespass[ed] at the neighbor's house." Although the prosecutor's statement regarding a trespass at the property next door was not supported by the evidence (there is minimal evidence in the record Menendez or Burns entered the property next door and no evidence they lacked permission to do so), the prosecutor was attempting to distinguish between "some little simple mere trespass," as he characterized defense counsel's argument, and "what happened at [the victim's] home [which] was clearly an attempted burglary." Because the prosecutor's argument was focused on this distinction, under the circumstances, the prosecutor's statement was harmless and the superior court did not abuse its discretion in refusing to

instruct the jury Menendez had not been charged with trespass at the property next door.[4]

IV. Ineffective Assistance of Counsel

¶14 Finally, Menendez argues defense counsel was ineffective because he did not object to (or move to strike) (1) hearsay testimony of police officers, (2) the lack of forensic analysis connecting the screwdriver to the damage, or (3) misleading statements or the fabrication of evidence by police. He also argues counsel was ineffective by failing to point out to the jury the residence and the property next door were for sale and he had been under surveillance for 28 days without stealing anything or breaking into any homes. Inconsistently, Menendez also argues defense counsel should have objected to detectives' testimony they were "involved in an investigation" of him and he had been under surveillance.

¶15 Menendez's ineffective assistance of counsel arguments are not properly before us. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) ("defendant may bring ineffective assistance of counsel claims *only* in a Rule 32

[4]Burglary in the second degree includes the lesser included offense of criminal trespass, *see State v. Engram*, 171 Ariz. 363, 364, 831 P.2d 362, 363 (App. 1991), and here the jury was instructed on and given a verdict form for criminal trespass as a lesser included offense. The State, however, never charged Menendez with criminal trespass, and stated a trespass had occurred at the property next door solely for the purpose of comparing this act with the more severe acts that occurred at the residence.

post-conviction proceeding -- not before trial, at trial, or on direct review").

¶16 In addition to reviewing those portions of the record necessary to address Menendez's concerns, we have reviewed the entire record for reversible error and have found none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Menendez received a fair trial. He was represented by counsel at all stages of the proceedings and was personally present at all critical stages.

¶17 The jury was comprised of eight members, the court properly instructed the jury on the elements of the crimes, Menendez's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Menendez was given an opportunity to speak at sentencing, and his sentences were within the range of acceptable sentences for his offenses.

CONCLUSION

¶18 We decline to order briefing and affirm Menendez's convictions and sentences.

¶19 After the filing of this decision, defense counsel's obligations pertaining to Menendez's representation in this appeal have ended. Defense counsel need do no more than inform Menendez of the outcome of this appeal and his future options, unless, upon review, counsel finds 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).

¶20 Menendez has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Menendez 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
_____
DANIEL A. BARKER, Judge

/s/
_____
PETER B. SWANN, Judge