DIVISION ONE
FILED: 12/22/2009
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**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,	)	No. 1 CA-CR 08-1069
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
GRANT JAMES BROWN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
_____	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-115771-001 DT

The Honorable Richard J. Trujillo, Judge

AFFIRMED

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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   Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

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S W A N N, Judge

¶1   Grant James Brown ("Appellant") appeals his conviction of one count of Burglary in the Second Degree, a class three felony and a violation of A.R.S. § 13-1507(A) (2001).   His appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

¶2   Counsel for Appellant has searched the record and can find no arguable question of law that is not frivolous. Appellant was given an opportunity to file a supplemental brief *in propria persona* and has not done so. Counsel requests that we search the record for fundamental error. After reviewing the record, we affirm Appellant's conviction and sentence.

FACTS AND PROCEDURAL HISTORY[1]

¶3   On May 24, 2005, members of the Phoenix Police Department had Appellant under surveillance.   While under surveillance, the police observed Appellant pushing an empty shopping cart into an alleyway. An officer watched as Appellant climbed over a fence into a residential yard.   Appellant returned to the alley carrying a load of personal property and placing it on the side of the alleyway; he repeated this process five times.   After his fifth trip, he put the items in the

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[1] "We view the evidence in the light most favorable to sustaining the verdict[] and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997) (citation omitted).

shopping cart and pulled the cart down the alley with a red strap. Soon thereafter Appellant was stopped, arrested, placed in handcuffs and searched.[2]

¶4   The personal property was returned to the victims unharmed, but during the course of the burglary, a windowpane was broken. The victims identified the items recovered from the officers, which included DVDs, a VCR, Nintendo games, a Super Nintendo, box sets of music discs, a nineteen-inch color television, a second television, a watch, a wedding band and adult videos. One of the victims valued the merchandise at approximately $4000, and both victims testified that they did not give Appellant permission to enter their home.

¶5   On June 2, Appellant was charged by indictment with one count of Burglary in the Second Degree. The State alleged that Appellant had five prior convictions and two aggravating factors: (1) the offense involved the taking of or damage to property, having a sufficient value to be an aggravating factor and (2) the offense was committed for pecuniary gain.

¶6   On July 20, Appellant signed a Trial Date Acknowledgement, acknowledging that a trial management conference was set for September 28 and a firm trial date was set for October 5. On September 23, bond was posted for

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[2] Necklaces and rings were found in Appellant's pockets.

Appellant, but five days later he failed to appear for his trial management conference. At the scheduled September 28 conference, the court granted Appellant's written motion to continue trial from October 5 to October 17. Additionally, the court informed Appellant's counsel that if Appellant failed to appear for his October 13 final trial management conference, a bench warrant would issue for his arrest.

¶7 When Appellant failed to appear for the October 13 final trial management conference, a bench warrant was issued for his arrest. A three day trial commenced on October 17 and was conducted in absentia. Appellant was present for the hearing on aggravators and sentencing.

¶8 On October 19, a jury found Appellant guilty of Burglary in the Second Degree. After a hearing on the aggravators, the jury found that the offense involved the taking of property, the value of which was sufficient to constitute an aggravating factor. Further, the jury found that Appellant had five prior convictions. But it did not find that the offense was committed for pecuniary gain. Appellant was sentenced to a presumptive term of 11.25 years.

¶9   Appellant timely appeals.[3]   We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and 13-4033(A)(1) (Supp. 2008).

DISCUSSION

I. Trial In Absentia

¶10   Pursuant to Ariz. R. Crim. P. 9.1, a defendant may waive his right to be present if he voluntarily absents himself from the proceedings. A court may presume the absence is voluntary if the defendant had personal notice of the time of the proceedings, the right to be present, and a warning that the proceedings would go forward in his absence. Ariz. R. Crim. P. 9.1. Notice of the original trial date and a warning that trial could be held in absentia if the defendant fails to appear is sufficient to presume that the defendant knowingly waived his right to appear at trial. *State ex rel. Romley v. Superior Court (Ochoa)*, 183 Ariz. 139, 144-45, 901 P.2d 1169, 1174-75 (App. 1995).

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[3] The superior court filed the judgment and sentence on February 27, 2006. Appellant filed a Petition for Post Conviction Relief pursuant to Rule 32, alleging ineffective assistance of counsel because his attorney failed to file a timely notice of appeal. Without objection from the State, the trial court granted Appellant's request to file a delayed Notice of Appeal.

¶11   Appellant was aware of the original trial date of October 5, 2005 and he was repeatedly warned that trial would proceed in his absence if he failed to appear. Therefore, the trial court properly inferred that Appellant knowingly waived his right to be present at his trial. Accordingly, the trial was properly conducted in absentia.

II. Aggravators

¶12   After the trial, the court held a hearing on aggravators. The jury found that the value of the property was sufficient to constitute an aggravating factor, but this is not among the circumstances specifically enumerated by the Legislature as aggravators.[4]

¶13   Generally an element of an offense can be used as proof of the underlying offense and as an aggravator to increase a sentence beyond the presumptive term. *See, e.g., State v. Bly*, 127 Ariz. 370, 621 P.2d 279 (1980). But as we explained in *State v. Alvarez*, "a trial court must point to conduct that somehow exceeds the elements or aggravates the circumstances of the offense." 205 Ariz. 110, 115, ¶ 16, 67 P.3d 706, 711 (App. 2003) (citation omitted). *Alvarez* interpreted the catch-all provision of the aggravating circumstances statute "as

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[4] At the relevant time, the applicable statute was A.R.S. § 13-702(C); that statute has since been renumbered as A.R.S. § 13-701(D) but no revisions material to this decision have been made. *Compare* A.R.S. § 13-702(C) (Supp. 2004) *with* A.R.S. § 13-701(D) (Supp. 2009).

authorizing a trial court to factor into the sentencing equation any *additional* fact or circumstance not elsewhere specifically provided for or incorporated into our 'carefully structured statutory scheme.'" *Id.* at ¶ 17 (emphasis in original) (citation omitted). But the *Alvarez* court did not view the catch-all provision "as permission for a court to simply cite again in aggravation a fact or circumstance that has already been reckoned into the statutory scheme elsewhere, *either as an element of the offense* or a basis for enhancing the range of sentence." *Id.* (emphasis added).

¶14   Though we conclude that the value of the property was not properly treated as an aggravator, we also hold that the error was harmless. *A fortiori*, it cannot constitute fundamental error.

III. Remaining Issues

¶15   Although a voluntariness hearing was not held, Appellant did not request such a hearing until January 3, 2006, more than two months after the verdict was rendered. Neither the prosecutor nor the court had any obligation to raise the issue. *State v. Alvarado*, 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979).

¶16   The record of voir dire does not demonstrate the empanelment of any biased jurors, and the jury was properly comprised of eight jurors and one alternate. *See* A.R.S. § 21-

102(B) (2002).   At trial, the State presented properly admissible evidence sufficient to allow the jury to find Appellant guilty of Burglary in the Second Degree.

¶17   After the jury returned its verdict, the court received and considered a presentence report.   At sentencing, Appellant was given the opportunity to speak and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence.   The court then imposed a legal sentence, with correct credit given for 250 days of presentence incarceration.

CONCLUSION

¶18   We have reviewed the record for fundamental error and find none.   *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, Appellant's conviction and sentence is affirmed. 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 Appellant of the status of this appeal and his future options.   *Id.*   Appellant has thirty days from the date of this decision to file a petition for review *in propria persona*.   Ariz. R. Crim. P. 31.19(a).   Upon the court's own motion, Appellant has thirty

days from the date of this decision in which to file a motion
for reconsideration.

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PETER B. SWANN, Presiding Judge

CONCURRING:

/S/
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LAWRENCE F. WINTHROP, Judge

/S/
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MICHAEL J.BROWN, Judge