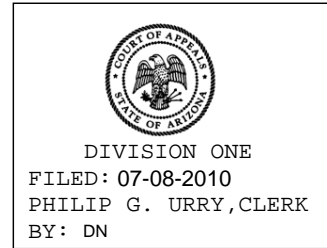


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.S  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA,	)	
	)	1 CA-CR 09-0029
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	
	)	<b>MEMORANDUM DECISION</b>
RUSSELL LEE WIEDEMEYER,	)	(Not for Publication -
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-142095-002 DT

The Honorable Carolyn K. Passamonte, Judge Pro Tempore

**AFFIRMED**

	Phoenix
<hr/>	
Terry Goddard, Arizona Attorney General By Kent E. Cattani, Chief Counsel Criminal Appeals/Capital Litigation Section Attorneys for Appellee	
Bruce Peterson, Office of the Legal Advocate By Thomas J. Dennis, Deputy Legal Advocate Attorney for Appellant	Phoenix

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**K E S S L E R**, Judge

¶1 This 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), following Russell Lee Wiedemeyer's ("Wiedemeyer") conviction of one count of third degree burglary. Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. Wiedemeyer was given the opportunity to file a supplemental brief, but did not do so. After reviewing the entire record, we conclude the evidence is sufficient to support the verdict and there is no reversible error. Therefore, we affirm Wiedemeyer's conviction and sentence.

#### FACTUAL AND PROCEDURAL HISTORY

¶12 We view the facts in the light most favorable to affirming the conviction. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶13 In July 2008, D.C. ("D.C.") worked for the Rush Truck Center ("Center"), an industrial truck facility, in Phoenix. Next to the Center was an ARCO AM/PM ("AM/PM" or "station") that was closed for renovations.<sup>1</sup> During its first week of renovations, D.C. noticed copper had been stripped from one of the station's air conditioning units. He reported the burglary to the station's owner who later asked D.C. to help with security.

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<sup>1</sup> The station was surrounded by a seven-foot-high chain linked fence with an opening that was held closed by a removable pole, which workers used to access the site.

¶14 Before his shift on July 5, 2008, D.C. inspected the station's air conditioning unit and fence for damage and cuts, but did not notice anything unusual. He set up a "watch" location at the Center and hid behind boxes along the fence line. Between 11:30 and 11:45 pm, two men wearing backpacks rode their bikes past the AM/PM while looking around suspiciously. D.C. saw the men turn around and stop at the accessible part of the fence. Once he heard the metal pole scrape as the men lifted it from its coupler, he called 911 to report the incident. D.C. watched the men walk onto the station's property and saw one of the men jump on top of an electrical box and onto the station's roof. The man tried opening an air conditioning panel located on the south side of the building, but was unsuccessful because D.C. put screws in the panel beforehand. Thus, the man later moved over to the unit's small electrical box.<sup>2</sup>

¶15 After a police helicopter approached the station, D.C. saw one of the men jump from the roof onto the ground and then witnessed both men speeding off on their bikes. After police caught one of the men, D.C. identified him as the one who was on

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<sup>2</sup> After the incident, D.C. inspected the unit and noticed a fresh ten-inch piece of copper had been removed from it.

the station's roof.<sup>3</sup> That same night, both suspects were already in custody when Phoenix Police Officer C.M. arrived on the scene after responding to D.C.'s burglary call. Officer C.M. inspected the station's roof and noticed one side of the air conditioning unit had been opened and its electrical wires were cut. The arresting officers gave Officer C.M. property confiscated from the two men, which included tools, flashlights, electrical equipment, lighters, scissors, a screwdriver, lock, and box cutter. Officer C.M. also impounded two rolls of copper wire, gloves, pieces of metal, a knife sheath, and pliers.

¶16 Wiedemeyer was taken into custody and interviewed by Phoenix Police Detective G.S. who asked what he was doing at the AM/PM on the night of the incident.<sup>4</sup> Wiedemeyer indicated he went to the station to use its restroom. When asked about the tools found in his backpack, Wiedemeyer acknowledged they were his and that he used them to fix his bike and make a living. He also indicated that he recycled abandoned electrical items found in alleyways.

¶17 Wiedemeyer was charged by indictment with one count of burglary in the third degree, a Class 4 felony. The State alleged Wiedemeyer had four prior felony convictions warranting

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<sup>3</sup> At trial, D.C. could not identify this man in the courtroom.

<sup>4</sup> At trial, Detective G.S. successfully identified Wiedemeyer as the suspect he interviewed on July 6, 2008.

an enhanced sentence. The State also indicated that any sentence received by Wiedemeyer should be aggravated under Arizona Revised Statutes ("A.R.S.") section 13-702 (2010)<sup>5</sup> because the incident involved an accomplice and was committed in consideration for the receipt of anything of pecuniary value.

¶18 A jury trial began on December 1, 2008. At the end of the State's case, Wiedemeyer moved for an acquittal arguing that nobody could identify him as one of the men who entered the AM/PM on the night of the incident. Wiedemeyer asserted that Detective G.S. identified him in the courtroom merely because Wiedemeyer was brought to the police station after being taken into custody. The State pointed to evidence showing the event occurred, and that during his police interview, Wiedemeyer admitted he was at the AM/PM on the night of the incident. The court denied Wiedemeyer's motion indicating the jury would weigh the facts in the case.

¶19 A jury found Wiedemeyer guilty of burglary in the third degree. At the January 8, 2009 sentencing, Wiedemeyer admitted to four prior felony convictions,<sup>6</sup> but the superior

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<sup>5</sup> We cite to the most current version of the statute when it has not been substantively revised since the date of the offense.

<sup>6</sup> The superior court conducted a colloquy on Wiedemeyer's admissions of his prior felony convictions. During the colloquy, the court addressed Wiedemeyer personally on the record to determine whether he understood that he had the right

court only applied two of the convictions. The State recommended a mitigated sentence of eight years in arguing Wiedemeyer was less culpable than the other suspect and the offense was "fueled . . . by [his] drug use." The superior court sentenced Wiedemeyer to a mitigated term of eight years with 187 days of presentence incarceration credit.

¶10 Wiedemeyer timely filed his notice of appeal. See Ariz. R. Crim. P. 31.3. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, as well as A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1)-(3) (2010).

#### DISCUSSION

¶11 This Court has reviewed the entire record for fundamental error. *State v. Barraza*, 209 Ariz. 441, 447, ¶ 21, 104 P.3d 172, 178 (App. 2005). Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude

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to have the State put on evidence of his prior felony convictions. Wiedemeyer indicated that he understood this right, he wished to waive it, and admit to the prior felony convictions. The court found Wiedemeyer made a "knowing, intelligent and voluntary waiver of the presentation of evidence regarding [his] priors." Our review of the record shows the court's colloquy on the admissions of Wiedemeyer's priors was sufficient pursuant to Arizona Rules of Criminal Procedure ("Ariz. R. Crim. P.") 17.3. Further, there is no evidence indicating Wiedemeyer was incompetent or that he was on drugs when he made the admission.

that the defendant could not possibly have had a fair trial. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Moreover, to prevail a defendant must establish that the error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607.

¶12 Under A.R.S. § 13-1506 (2010), burglary occurs when a person enters or remains unlawfully in or on a nonresidential structure or fenced commercial or residential yard, and that person does so with the intent to commit any theft or any felony therein. At trial, the State presented evidence that D.C. saw Wiedemeyer on the inside of the AM/PM's seven-foot-high fence. Additionally, D.C. testified that he inspected the air conditioning unit and fence prior to the incident and did not notice any damage. After the incident, Officer C.M. stated that he noticed the air conditioning unit had been opened and its electrical wires were cut. The evidence was sufficient because the jury could have found Wiedemeyer entered the fenced commercial property to commit a theft.

#### **CONCLUSION**

¶13 After careful review of the record, we find no meritorious grounds for reversal of Wiedemeyer's conviction or modification of the sentence imposed. The sentence was imposed within the sentencing limits, the court correctly awarded Wiedemeyer 187 days of presentence incarceration credit, and he

was represented at all stages of the proceedings. Additionally, Wiedemeyer was present and he was permitted to speak at sentencing. Accordingly, we affirm Wiedemeyer's conviction and sentence.

¶14 Upon the filing of this decision, counsel shall inform Wiedemeyer of the status of the appeal and his options. Defense counsel has no further obligations, unless upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Wiedemeyer shall have thirty days from the date of this decision to proceed, if he so desires, with a pro per motion for reconsideration or petition for review.

/s/

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DONN KESSLER, Judge

CONCURRING:

/s/

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PATRICK IRVINE, Presiding Judge

/s/

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MICHAEL J. BROWN, Judge