DIVISION ONE
FILED: 01/21/2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0279
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JAMES PHILLIP HALE, JR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-006781-002 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

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

Michael S. Reeves, Esq. — Phoenix
By Michael S. Reeves
Attorneys for Appellant

James Phillip Hale, Jr. — Florence
Appellant *in propria persona*

S W A N N, Judge

¶1 James Phillip Hale, Jr. ("Defendant") appeals his convictions of one count of Burglary in the Third Degree, a class four felony and a violation of A.R.S. § 13-1506, and one count of Possession of Burglary Tools, a class six felony and a violation of A.R.S. § 13-1505. His appeal was timely 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 Defendant's counsel has searched the record and can find no arguable question of law that is not frivolous. At Defendant's request, however, Defendant's counsel asks this court to search the record for fundamental error with respect to whether the trial court erred when it purportedly allowed the State to elicit unqualified expert testimony. Defendant also filed a supplemental brief raising two issues: (1) ineffective assistance of counsel and (2) sufficiency of the evidence. After reviewing the entire record, we find no fundamental error and affirm Defendant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶3 On April 19, 2008, police officers were dispatched to the Wells Fargo building on Washington Street in Phoenix, Arizona in response to a silent alarm. Officer Wheeler was the first to arrive. Three additional officers also responded to the alarm. The officers set up at different locations around

the building and began investigating the cause of the alarm. Officer Brown apprehended a man attempting to leave the scene on a bicycle by shouting commands and ordering him to stop.

¶4 Upon hearing Officer Brown issue commands, Officer Wheeler went to assist him. After the first suspect was apprehended, Officer Wheeler began to walk back to his original location when he noticed Defendant hiding behind a dumpster. Defendant was searched and a large metal Wells Fargo belt buckle was found in his pants pocket.[1] After Officer Wheeler placed Defendant in custody, he joined the other officers to search the building.

¶5 During the search the officers noticed that (1) the break room window of the Wells Fargo building had been broken; (2) there was drywall on the ground with jagged edges as if someone had used force to break through the wall; (3) the soda machine in the break room had scratch marks on it as if someone had pried open the part where the money was inserted; (4) there were two bicycles at the scene; and (5) there was a tire iron beneath the window.

[1] A Wells Fargo employee testified that he owned a Wells Fargo belt buckle; before the burglary it was sitting in his office on a shelf. Another employee also testified that he noticed property, including broken computer equipment that was traditionally stored in the equipment room, had been moved to the break room. He also noticed that several items were missing from his office: a computer monitor, a Zip drive, some items from his refrigerator, and twenty-six dollars.

¶6 Defendant was indicted and charged with one count of Burglary in the Third Degree and one count of Possession of Burglary Tools.

¶7 A jury trial commenced on February 17, 2009. During the trial, two officers testified as to the method of operations of burglars during the commission of the crime and how they may try and sell the stolen property afterward. At the conclusion of the State's case, Defendant made a motion pursuant to Rule 20, which was denied. On February 20, 2009, Defendant was found guilty on both counts. Defendant filed a Motion for New Trial, which was denied.

¶8 At sentencing, Defendant stipulated to a prior felony and to the fact that he was on probation when these offenses occurred. At Defendant's request, the court revoked his probation and sentenced him to a mitigated term of imprisonment of four months for the probation violation, to be served consecutively to the sentence imposed for the Burglary in the Third Degree and Possession of Burglary Tools convictions. The court also sentenced Defendant to a presumptive term of 4.5 years imprisonment for the conviction of Burglary in the Third Degree, to be served concurrently with a presumptive term of 1.75 years imprisonment for the conviction of Possession of Burglary Tools. The court credited Defendant with 363 days of presentence incarceration.

¶9 Defendant timely appeals. 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 (2001), and -4033(A)(1) (Supp. 2009).

DISCUSSION

A. Expert Testimony

¶10 In his Opening Brief, counsel for Defendant contends the trial court erred when it allowed the State to elicit expert testimony from witnesses who were not qualified as experts and who were not properly noticed to defense.[2] We disagree.

¶11 Pursuant to Ariz. R. Crim. P. ("Rule") 15.1(b)(4) the State is required to disclose "[t]he names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons that have been completed." As a sanction for failing to comply with Rule 15.1, the court may declare a mistrial or preclude the expert from testifying. Ariz. R. Crim. P. 15.7. The imposition of such sanctions is discretionary. *State v. Kevil*, 111 Ariz. 240, 247, 527 P.2d 285, 292 (1974).

¶12 In *State v. Kevil* our supreme court held that the trial court did not abuse its discretion when it permitted a

[2] Counsel asserts that the standard of review is an abuse of discretion. But because there were no objections made to this testimony at trial, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

police officer who had not been disclosed as an expert witness to testify about "an objectively discernable pattern in certain robberies which are well known throughout the law enforcement community." *Id.* at 248, 527 P.2d at 293. Much like the officer in *Kevil*, the officers in this case testified about patterns of criminal behavior based on their experiences and observations as police officers. Accordingly, we conclude there was no error, much less fundamental error.

B. Sufficiency of the Evidence[3]

¶13 In his Supplemental Brief, Defendant contends that the evidence presented at trial did not support the verdict. Defendant lists, without elaboration, his reasons for his contention: (1) the lack of fingerprints at the scene; (2) the time line of events; and (3) the quantity of items that had been moved into the break room could not be hauled away readily.

¶14 When reviewing a denial of a motion for judgment of acquittal pursuant to Rule 20, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction. Substantial evidence . . . is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of [a] defendant's guilt beyond a reasonable doubt." *State v. Pena*,

[3] Because Defendant made a Rule 20 motion below, which was denied, and raises this issue on appeal, we review for an abuse of discretion. *See State v. Paris-Sheldon*, 214 Ariz. 500, 510, ¶ 32, 154 P.3d 1046, 1056 (App. 2007).

209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005) (internal quotation marks omitted) (omission in original) (citations omitted).

¶15 In determining whether there is substantial evidence to warrant a conviction, the superior court must "giv[e] full credence to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inference[s] therefrom." *State v. Clifton*, 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982). Whether Defendant entered the Wells Fargo building with the intent to commit a theft, or whether he used a tire iron to commit the crime, are factual determinations for the jury. *See State v. Garcia*, 138 Ariz. 211, 214, 673 P.2d 955, 958 (App. 1983) (whether appellants took victim's money was factual determination for the jury). "Where the evidence discloses facts from which the jury could legitimately deduce either of two conclusions, it is sufficient to overcome a motion for acquittal." *Id.* at 214-15, 673 P.2d at 958-59 (citation omitted).

1. *Burglary in the Third Degree*

¶16 A.R.S. § 13-1506 (Supp. 2009)[4] provides in relevant part:

> A. A person commits burglary in the third degree by:

[4] We cite to the current versions of statutes when no revisions material to our decision have occurred since the relevant time.

> 1. Entering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or any felony therein.

¶17 The evidence and testimony presented at trial were sufficient to establish that Defendant unlawfully entered the Wells Fargo building with the intent to commit theft. When Officer Brown searched Defendant he found a large metal Wells Fargo belt buckle in his pants pocket. An employee of Wells Fargo testified that he was the owner of the belt buckle and that he kept the item on his office shelf. Additionally, witnesses testified that various items had been moved from their original positions, either from individual offices or a store room, to the break room.[5] A window of the break room had been broken and the soda machine had been tampered with, as if a tool had been used to pry open the money dispenser.[6] We therefore conclude that there was sufficient evidence to support the conviction of Burglary in the Third Degree.

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[5] One of the "getaway" vehicles, a bicycle with a wagon-like attachment, was sitting just outside the broken break room window.

[6] A.R.S. § 13-1501(12) (Supp. 2009) defines the term "structure" as "any *vending machine* or any building, object, vehicle, railroad car or place with sides and a floor that is separately securable from any other structure attached to it and that is used for lodging, business, transportation, recreation or storage." (Emphasis added.)

2. *Possession of Burglary Tools*

¶18 A.R.S. § 13-1505 (Supp. 2009) provides in relevant part:

> A. A person commits possession of burglary tools by:
>
> 1. Possessing any explosive, tool, instrument or other article adapted or commonly used for committing any form of burglary as defined in §§ 13-1506, 13-1507 and 13-1508 and by intending to use or permit the use of such an item in the commission of a burglary.

¶19 Although there was no direct evidence that Defendant possessed the tire iron found at the scene, Officer Wheeler testified that the soda machine in the break room had scratch marks on it that were consistent with someone attempting to pry open the money dispenser with a tire iron. This evidence in conjunction with the direct evidence presented permitted the jury to infer that Defendant had used the tire iron to break through the drywall and window and, upon gaining entry to the Wells Fargo building, attempted to use the tire iron to break into the vending machine in the break room. That a jury would infer that Defendant possessed the tire iron to use it to commit burglary is reasonable, not speculative. *Cf. Anderson v. Nissei ASB Mach. Co.*, 197 Ariz. 168, 175, ¶ 22, 3 P.3d 1088, 1095 (App. 1999) (concluding jury drew reasonable inferences, rather than merely speculated, as to why a business modified its product). Accordingly, we conclude that there was sufficient evidence to

support a guilty verdict on the charge of Possession of Burglary Tools.

C. Ineffective Assistance of Counsel

¶20 In his Supplemental Brief, Defendant contends that his trial counsel was ineffective. Ineffective assistance of counsel claims are properly brought under Rule 32. "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

D. Remaining Issues

¶21 The record reflects Defendant received a fair trial. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was represented at all stages of the proceedings and was present at all critical stages. The court properly instructed the jury on the elements of Burglary in the Third Degree and Possession of Burglary Tools. Further, the court properly instructed the jury on the State's burden of proof and the necessity of a unanimous verdict. The court received and considered a presentence report and imposed a legal sentence.

CONCLUSION

¶22 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. After the filing of this decision, defense counsel's

obligations in this appeal have come to an end. Defense counsel need do no more than inform Defendant 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. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant has thirty days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review. Ariz. R. Crim. P. 31.19(a). Upon the Court's own motion, Defendant has thirty days in which to file a motion for reconsideration.

/S/

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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