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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0456
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
CLAYTON GARY WARE,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-007879-001 DT

The Honorable Barbara L. Spencer, Judge Pro Tempore

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 Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Clayton Gary Ware appeals from his convictions and sentences for burglary, theft, and possession of burglary tools. After searching the record on appeal and finding no arguable question of law that was not frivolous, Ware'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. This court granted counsel's motion to allow Ware to file a supplemental brief *in propria persona*, but Ware chose not to do so. After reviewing the entire record, we find no fundamental error and therefore affirm Ware's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND¹

¶12 A used restaurant equipment business owner suspected people had been stealing items from his property, and at around 8:00 p.m. on August 8, 2008, he parked 300 to 400 feet away from his business to observe the property after-hours. At about 9:00 p.m., he saw a white pickup truck parked in front of his padlocked gate and saw "two larger African-American" men "working at the gate." The owner then saw the gate open, the truck back into the property, and the men load two "stainless steel exhaust hoods" into the back of the truck. The men then drove away. The owner called 9-1-1 and followed the truck "from about a block away" with the intent "to follow them wherever they were going with the hoods." Throughout his pursuit, the owner never lost sight of the truck and the exhaust hoods.

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

¶13 Police eventually "initiated a felony traffic stop" and took Ware, the passenger, and Kenneth Whitmore, the driver, into custody. The owner identified Whitmore and Ware as the men who had taken the hoods; at trial, Officer P. testified the owner's description of the suspects matched Whitmore's and Ware's physiques.²

¶14 The truck belonged to Whitmore's employer, and Whitmore was driving after-hours without employer authorization. At trial, Whitmore's employer testified nothing was in the truck when he left the worksite on the night of August 8. At the scene of the traffic stop, however, police found a cut padlock and bolt cutters in the truck. Police verified the owner's key unlocked the padlock.

¶15 Ware was charged with burglary in the third degree, a class four felony; theft, a class six felony; and possession of burglary tools, a class six felony; subsequently, a grand jury indicted Ware for unlawful use of means of transportation. The jury found Ware not guilty of unlawful use of means of transportation and guilty of burglary, theft, and possession of burglary tools. Ware admitted to one prior felony and on June

²Although Whitmore testified he loaded the hoods into the truck with a Caucasian man, and not Ware, "it is the trier of fact's role, and not this court's, to 'resolve conflicting testimony and to weigh the credibility of witnesses.'" *State v. Lee*, 217 Ariz. 514, 516, ¶ 10, 176 P.3d 712, 714 (App. 2008) (quoting *State v. Alvarado*, 158 Ariz. 89, 92, 761 P.2d 163, 166 (App. 1988)).

5, 2009, the superior court sentenced him to concurrent mitigated sentences of 2.25 years for burglary and 9 months each on the theft and possession counts, with 141 days of presentence incarceration credit on each count.

¶16 Ware timely appealed. 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).³

DISCUSSION

¶17 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Ware was represented by counsel at all stages of the proceedings and was personally present at all critical stages. The jury was properly comprised of eight members. The court properly instructed the jury on the elements of the crimes, the State's burden of proof, and the necessity of a unanimous verdict. Ware was given an opportunity to speak at sentencing and the superior court imposed the minimum sentences permissible for third degree burglary, theft, and possession of burglary tools. See A.R.S. §§ 13-1506, -1802, -1505, -703(B)(2), (I)

³Although certain statutes cited in this decision were amended after the date of Ware's offenses, the revisions are immaterial. Thus, we cite to the current versions of these statutes.

(Supp. 2009) (prior to January 1, 2009, A.R.S. § 13-703(B)(2), (I) was A.R.S. § 13-604(A)).

CONCLUSION

¶18 For the foregoing reasons, we decline to order briefing and affirm Ware's convictions and sentences.

¶19 After the filing of this decision, defense counsel's obligations pertaining to Ware's representation in this appeal have ended. Defense counsel need do no more than inform Ware 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).

¶10 Ware 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 Ware 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/

SHELDON H. WEISBERG, Judge

/s/

MARGARET H. DOWNIE, Judge