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

STATE OF ARIZONA,	)	1 CA-CR 09-0722
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
ANTHONY DAVID LEON,	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-131163-003 DT

The Honorable Barbara L. Spencer, Judge Pro Tem

AFFIRMED

Terry Goddard, Attorney General By Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation Section Attorneys for Appellee	Phoenix
James J. Haas, Maricopa County Public Defender by Stephen R. Collins, Deputy Public Defender Attorneys for Appellant	Phoenix
Anthony David Leon Appellant	Douglas

W I N T H R O P, Judge

¶1 Anthony David Leon ("Appellant") appeals his convictions and sentences for two counts of burglary in the

third degree, class four felonies. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record on appeal and found no arguable question of law. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). This court afforded Appellant the opportunity to file a supplemental brief *in propria persona*, and he has done so.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010). Finding no reversible error, we affirm Appellant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY[1]

¶3 This case arises out of two vehicle break-ins in Surprise, Arizona. In the early hours of May 15, 2007, R.P.'s wife woke to noises coming from the front of their home. R.P. investigated, and saw two men "[g]oing into" his next door

[1] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

neighbor's red Kia automobile, removing items, and putting them in a dark-colored Dodge Stratus that was parked in the street. R.P. reported the burglary to police, describing the men as Hispanic and in their twenties.

¶4 Sergeant Kading received a call over the police department's mobile data computer, alerting him to a possible burglary. He "proceeded to the area and began to look for the Dodge Stratus that was mentioned in the call." A few blocks away from the reported burglary, the sergeant discovered the Dodge Stratus "parked in the middle of the street, lights were off, both doors were just closing and the vehicle drove off." He initiated a stop of the vehicle – Appellant was the passenger – and R.P. identified both men as the men he had observed removing items from his neighbor's vehicle.[2]

¶5 In the meantime, a police backup unit returned to where Sergeant Kading initially observed the Dodge Stratus. There, they discovered a sport utility vehicle with a broken window and missing stereo equipment. The owners of both vehicles eventually identified stereo equipment and electronics that police removed from the Dodge Stratus. The police dusted for fingerprints on both vehicles, and matched prints lifted from the first car to Appellant.

[2] The driver was Appellant's cousin.

¶6 Appellant was charged by direct complaint and indicted on two counts of third degree burglary, class four felonies. The State alleged prior felony convictions and that Appellant committed the offenses while on parole. Appellant's first trial took place in April 2009, and resulted in a hung jury. Appellant was tried again, and the twelve member jury found him guilty on both counts. The trial court found that Appellant admitted two prior felony convictions when he testified at trial and that Appellant was on parole at the time of the burglaries. The court sentenced Appellant to the presumptive term of ten years on both counts, to be served concurrently. Appellant received 316 days of preincarceration credit, and the court ordered $234.68 in restitution. This timely appeal followed.

ANALYSIS

¶7 Appellant filed a supplemental brief raising several issues, which we address in turn. Further, through his attorney, he raises the issue of ineffective assistance of counsel. We review questions of law and whether a jury instruction properly states the law *de novo*, *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997) (jury instructions); *Arizona Water Co. v. Arizona Corp. Comm'n*, 217 Ariz. 652, 655-56, ¶ 10, 177 P.3d 1224, 1227-28 (App. 2008) (questions of law), and we review evidentiary issues for an

abuse of discretion. *State v. Blakley*, 204 Ariz. 429, 437, ¶ 34, 65 P.3d 77, 85 (2003).

A. Accomplice Liability Instruction

¶8 Appellant argues that the jury instruction on accomplice liability, which is modeled after A.R.S. § 13-301.2 (2010),[3] was ambiguous and misleading to the jury. Appellant takes issue specifically with subsection two of the accomplice instruction: "'Accomplice' means a person, who, with the intent to promote or facilitate the commission of an offense . . . [a]ids, counsels, agrees to aid, or attempts to aid another person in planning or committing the offense," and argues that the jury may have confused Appellant's presence at the scene of the burglaries with an "attempt to aid" in the commission of the burglary offense.

¶9 At trial, Appellant's defense counsel did not object to the accomplice liability instruction. Failure to object to a proposed jury instruction at trial constitutes a waiver of the argument, unless the error is fundamental. Ariz. R. Crim. P. 21.3(c); *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). Fundamental error goes "to the foundation of the case . . . takes from the defendant a right essential to his defense, and [is an] error of such magnitude that the defendant could not

[3] We cite the current version of statutes in which no revisions material to this decision have since occurred.

possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). As the accomplice liability instruction was a correct statement of the law, we find that the trial court did not commit fundamental error by providing the jury with instructions on accomplice liability.

B. "Entry" Requirement and Sufficiency of the Evidence

¶10 Next, Appellant argues that the State failed to show that Appellant actually entered either of the automobiles at issue in this case, and therefore one of the required elements of burglary remains unproven.[4] We disagree, and address this argument together with Appellant's argument that the evidence was insufficient to support the jury's verdict.

¶11 R.P., the eyewitness who initially reported the crimes, testified to seeing "two gentlemen going into [his neighbor's] red Kia." He described the men as "Hispanics, probably [in their] early 20s." When police stopped the Dodge Stratus, two men matching that description were in the car. The State also presented latent fingerprint cards to show that police were able to lift one of Appellant's fingerprints off the driver's side rear passenger door handle of the red Kia.

[4] A person commits third degree burglary by "[e]ntering or remaining unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein." A.R.S. § 13-1506 (2010).

Finally, police recovered stereo equipment and electronics belonging to the two victims from the Dodge Stratus in which Appellant was riding.

¶12 Although the defense presented conflicting testimony and arguments, ultimately, the jury is the trier of fact and is responsible for assessing the credibility of witnesses and weighing the evidence presented. Barring fundamental error, we defer to the jury's credibility determination because of its presence in the courtroom and proximity to the witnesses. *State v. Uriarte*, 194 Ariz. 275, 283, ¶¶ 41-44, 981 P.2d 575, 583 (App. 1998). We therefore find that the evidence was sufficient to support Appellant's convictions.

¶13 Further, as noted above, the trial court gave an accomplice liability instruction that tracked the language of the accomplice liability statute. *See* A.R.S. § 13-301.2. "By statute, one who engages in any of the conduct outlined in the accomplice liability statutes, with the requisite mental state, is considered as liable as if he had personally committed the offense." *State v. Rios*, 217 Ariz. 249, 251, ¶ 10, 172 P.3d 844, 846 (App. 2007). As an accomplice, then, Appellant need not have personally committed the underlying burglary offense, and therefore need not have actually entered the victims' vehicles, so long as the jury determined he qualified as an accomplice.

C. Court's Failure to Declare a Mistrial

¶14 Next, Appellant argues the trial court abused its discretion when it failed to declare a mistrial after Appellant, while testifying in his own defense, stated in response to the prosecutor's questioning, "This is the second trial, you know, a lot of things were said that wasn't said the first time." Until that point, both parties had been careful to avoid mention of the trial being Appellant's second, instead referring to "another hearing."

¶15 We review the denial of a motion for mistrial for an abuse of discretion. *State v. Mills*, 196 Ariz. 269, 271, ¶ 6, 995 P.2d 705, 707 (App. 1999). "[B]ecause the trial judge is in the best position to assess the impact of . . . statements on the jury, we defer to the trial judge's discretionary determination." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003). Further, "[w]e will not reverse a conviction based on the erroneous admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been admitted." *State v. Hoskins*, 199 Ariz. 127, 142-43, ¶ 57, 14 P.3d 997, 1012-13 (2000).

¶16 Immediately following Appellant's statement, the trial court paused the proceedings and called a bench conference. Defense counsel moved for a mistrial on the grounds that "[t]he

State did open the door, causing [Appellant] to answer" in an unanticipated manner. The court disagreed with defense counsel's characterization, noting that the defense "asked every witness so far about a prior hearing, so that's been pretty clearly out on the table." Ultimately, the trial court struck Appellant's answer and the trial resumed. Our review of the record leads us to conclude that the trial court's assessment of the situation was correct, and the court did not abuse its discretion when it denied defense counsel's motion for a mistrial.

E. Mention of Appellant's Invocation of *Miranda* Rights

¶17 During cross-examination, when asked whether his officers had "enough time to do the interviews they needed to do," Sergeant Kading responded, "Yes, I believe both subjects invoked their Miranda Rights." Appellant argues, "This was plain error and an adverse and unwarranted comment on Appellant's right to remain silent." In response, the court promptly called a bench conference, struck the sergeant's statement, and gave the jury a limiting instruction.

¶18 Generally, "[a] defendant's [right to] due process is violated when a witness introduces a statement at trial that the defendant asserted his right to remain silent." *State v. Gilfillan*, 196 Ariz. 396, 406, ¶ 36, 998 P.2d 1069, 1079 (App. 2000). The error may be harmless, however, depending on the

prejudicial nature of the improper comment. *See State v. Guerra*, 161 Ariz. 289, 297, 778 P.2d 1185, 1193 (1989). "A comment [on a defendant's invocation of constitutional rights] does not constitute reversible error unless the prosecution draws the jury's attention to the defendant's exercise of the right to remain silent and uses it to infer guilt." *State v. Guerrero*, 173 Ariz. 169, 172, 840 P.2d 1034, 1037 (App. 1992). Harmless error, by definition, cannot also be fundamental error. *See State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993).

¶19 As the sergeant's comment was inadvertent, in response to defense counsel's line of questioning, promptly addressed by the court, and never mentioned or used by the prosecution to infer guilt, we find Sergeant Kading's mention of Appellant's invocation of his *Miranda* rights to be harmless error.

D. Fingerprint Card Chain of Custody

¶20 Appellant next argues that "the prosecution failed to produce a chain of custody from the gathering of fingerprints by Officer Johnson to the receipt of two fingerprints by [the latent print examiner] two years later."

¶21 "In setting up a chain of custody, the prosecution need not call every person who had an opportunity to come in contact with the evidence sought to be admitted." *State v. Hurles*, 185 Ariz. 199, 206, 914 P.2d 1291, 1298 (1996)

(citations omitted). An exhibit may be admitted "when there is evidence which strongly suggests the exact whereabouts of the exhibit at all times, and which suggests no possibility of substitution or tampering." *State v. Hardy*, 112 Ariz. 205, 207, 540 P.2d 677, 679 (1975); *see also Hurles*, 185 Ariz. at 206, 914 P.2d at 1298.

¶22 Here, one of the backup officers on the scene, Officer Johnson, testified that he dusted for fingerprints on the outside of the doors of the red Kia. He was able to detect the presence of fingerprints, which he secured on fingerprint cards and stored in his pocket before handing them to the lead officer on the case, Officer Washburn. Officer Washburn testified to receiving the fingerprint cards from Officer Johnson, and then impounding them. Finally, Rosanna Caswell, the fingerprint examiner, testified to receiving the fingerprint cards, analyzing the fingerprints, and repackaging the cards. The testimony presented at trial "strongly suggests that the . . . whereabouts of the fingerprint card[s] was known at all times[,]" and we therefore find no reversible error in the State's handling of the fingerprints. *Hurles*, 185 Ariz. at 206-07, 914 P.2d at 1298-99 (where one officer in the chain of custody did not testify at trial).

E. Exhibit 16.002

¶23 The court admitted two fingerprint cards, but only one, Exhibit 16.001, contained a print belonging to Appellant. Appellant argues that admission of the second print was prejudicial to his case.

¶24 At trial, defense counsel did not object to the admission of Exhibit 16.002. Again, barring fundamental error, a party's failure to object to the admission of a piece of evidence constitutes waiver. *See State v. Spencer*, 109 Ariz. 500, 501, 513 P.2d 140, 141 (1973). Ultimately, the fingerprint examiner's testimony was clear – Exhibit 16.001 was the only card that contained Appellant's fingerprint, and that fingerprint was gathered from the red Kia. Admission of Exhibit 16.002, which was used for purposes of discussing fingerprint analysis and technique, was not an abuse of discretion, nor was it fundamental error.

F. Ineffective Assistance of Counsel Claim

¶25 Finally, through counsel, Appellant argues ineffective assistance of trial counsel. Because ineffective assistance of counsel claims are properly raised in Rule 32 proceedings, "[a]ny 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).

We therefore will not address Appellant's ineffective assistance of counsel claim.

G. Remaining Analysis

¶26 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶27 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

CONCLUSION

¶28 We affirm Appellant's convictions and sentences.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
DANIEL A. BARKER, Judge