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

STATE OF ARIZONA, Appellee, v. BOBBY LEE BANTA, Appellant.	)	1 CA-CR 09-0744 DEPARTMENT D MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2008-180237-002 DT

The Honorable Lisa M. Roberts, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Attorney General
by Kent E. Cattani, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee — Phoenix

The Law Office of Gail Gianasi Natale
by Gail Gianasi Natale
Attorneys for Appellant — Phoenix

W E I S B E R G, Judge

¶1 Bobby Lee Banta ("Defendant") appeals from the conviction and sentence imposed after a jury trial. Defendant's counsel has filed a brief in accordance with *Anders v. California*, 386 U.S.

738, 744 (1967), and *State v. Leon,* 104 Ariz. 297, 299, 451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, she finds no arguable ground for reversal. This court granted Defendant an opportunity to file a supplemental brief, which he did. Counsel now requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). Finding no reversible error, we affirm.

¶2 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033 (A) (2010).

FACTS

¶3 We review the facts in the light most favorable to sustaining the verdict. *See State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). Defendant was charged with burglary in the second degree. The State filed allegations of an historical prior felony conviction and that Defendant committed the instant offense while on release from confinement. The following facts were presented at trial.

¶4 On December 24, 2008, B., a superintendent for a DR Horton Homes subdivision, was locking up a house under construction. He noticed a truck parked outside a completed house next door. Not recognizing the truck, he walked around the house

to check on the situation. From the back patio window, B. saw two men inside attempting to carry a washing machine through the family room to the garage. When the men saw B., they dropped the washing machine onto its side, ran through the garage, exited from a side entry door in the garage and ran to the truck. [TR /2/09 at 25, 27-30.] B. chased them and called 9-1-1. As they were leaving the subdivision, a Peoria police department vehicle stopped the truck. An officer took B. to the truck where he identified the occupants as the men he saw at the house. B. identified Defendant in court as the driver.

¶5 B. testified that although the house was completed, it had not been sold and belonged to DR Horton Homes. B. stated that he did not know Defendant and that Defendant did not have permission to be in the house. B. also testified that a rear window lock in the house had been broken, but the parties stipulated that the police reports did not reflect a forced entry.

¶6 Defendant testified that he has a tile business and employed Mario. He said that Mario had asked him for help with a tile job on December 24, 2008 at the DR Horton Homes house. Mario claimed the house belonged to a friend of Mario's mother. According to Defendant, the owner wanted to upgrade the flooring in the house and Mario needed Defendant's assistance in moving the appliances to the garage in order to do the tile work. He said Mario had a key and that they entered through the front door.

¶7 Defendant testified that after he and Mario moved the washing machine, he went out to his truck to get a tape measure. Mario came out of the house with B. behind him and told Defendant that B. said they had to leave. Defendant said he wanted Mario to call the homeowner to let B. know they had permission to be there, but Mario refused because B. said he would call the police. Defendant testified he believed he had permission to be in the house and that he did not believe he did anything wrong.

¶8 Defendant admitted he had a prior felony conviction for possession of marijuana. He also admitted that he returned to the house on December 26, 2008, but claimed he went there to retrieve Mario's cellphone. In rebuttal, B. testified that on December 24, 2008, he saw the washing machine in the house lying on its side, and that on December 26, 2008, he saw that the washing machine had been moved and was standing upright.

¶9 The jury found Defendant guilty. The court found that the State had proved the historical prior felony conviction and Defendant's release status. At sentencing, however, in order to allow the court to impose concurrent sentences on the burglary conviction and the probation matter, the State dismissed the allegation of release status. The court found as aggravating factors that Defendant was on probation when he committed the offense, that the crime was committed for pecuniary gain and that there was an accomplice. It found as mitigating factors that

Defendant had support from family and friends and had substantially complied with probation. The court determined that the presumptive sentence was appropriate. The court sentenced Defendant to a prison term of 6.5 years with 188 days of presentence incarceration credit. Defendant timely appealed.

DISCUSSION

¶10 Defendant raises six issues in his supplemental opening brief, one of which is also raised on Defendant's behalf in counsel's brief. Defendant first claims that because he was allegedly charged with criminal trespass, a Class 1 misdemeanor, for entering the house on December 26, 2008, the jury should have been instructed on criminal trespass as a lesser-included offense of the December 24, 2008 burglary. Defendant did not request such instruction and has therefore waived the error absent fundamental error. Ariz. R. Crim. P. 21.3(c). There was no error because "Arizona courts have consistently held that criminal trespass is not a lesser-included offense of burglary." *State v. Kozan,* 146 Ariz. 427, 429, 706 P.2d 753, 755 (App. 1985)(citations omitted).

¶11 Defendant next complains that there was too much evidence introduced at trial about his entry in the house on December 26, 2008. Because Defendant failed to object to admission of the evidence, we review for fundamental error only. *State v. Libberton,* 141 Ariz. 132, 138, 685 P.2d 1284, 1288 (1984). The evidence was relevant to show Defendant's guilty mind; a reasonable

inference from the evidence is that Defendant entered the house two days after the burglary to move the washing machine and make it appear as if he and Mario were not attempting to steal it. Further, there was no reference to the fact that Defendant had been charged with criminal trespass for this act, and therefore any prejudice to Defendant was minimal. There was no error.

¶12 Third, Defendant claims that the court committed fundamental error by not settling the jury instructions on the record because defense counsel might have requested instructions on attempt or trespass. Although our courts have consistently disapproved of failing to make records of bench conferences, none of the cases have found that such failure constitutes fundamental error. *State v. Paxton,* 186 Ariz. 580, 588-89, 925 P.2d 721, 729-30 (App. 1996). Further, Defendant has not shown that he was prejudiced in any way by the failure to settle jury instructions on the record. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

¶13 Defendant further claims that neither the State nor his counsel called Mario (co-defendant) as a defense witness. On the first day of trial, the prosecutor said that Mario had turned himself in that day, but indicated that he would not call him as a witness. The judge observed that Mario was not noticed as witness, but stated that "I'll hear argument from both of you later." The issue did not arise again. Questions of trial strategy rest with

counsel, and the decision as to what witnesses to call is a strategic decision made by counsel. *State v. Lee,* 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). Further, Defendant has not shown that Mario could or would have testified on his behalf and/or that his alleged testimony would tend to exculpate Defendant.

¶14 Fifth, Defendant asks this court to listen to a portion of an audiotape of the proceedings held on July 1, 2009, which was not transcribed, in which his attorney allegedly stated that the co-defendant would not be testifying because he had been charged with the same crime and did not yet have representation. Defendant alleges that he never would have gone to trial without having this witness to testify that he was merely helping him lay tile in the house. This court does not have access to the audiotapes of the proceedings; only the transcribed portions of those tapes. In any event, Mario was unavailable until after Defendant's trial commenced, defense counsel did not request a trial continuance and nothing in the record suggests that Mario could or would be a defense witness.

¶15 Finally, Defendant claims that his sentence was improper because the State withdrew the allegation of release status and thus the court was no longer required to impose the presumptive sentence under former A.R.S. 13-604.02. The record shows that the court found three aggravating factors and two mitigating factors and in balancing them, found the presumptive sentence to be

appropriate. As long as a sentence is within the permissible statutory limits, we will not modify or reduce it unless it is clearly excessive. *State v. Gillies,* 142 Ariz. 564, 573, 691 P.2d 655, 664 (1984). The sentence was not excessive, and the trial court did not abuse its discretion in imposing the presumptive sentence.

CONCLUSION

¶16 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Defendant was represented by counsel at all stages of the proceedings, there was sufficient evidence for the jury to find that Defendant committed the offense and the sentence imposed was within the statutory limits.

¶17 After the filing of this decision, counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do no more than inform Defendant of the status of the appeal and of Defendant's future options, unless counsel's review reveals 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, Defendant has thirty days from the date of this decision to

proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona.*

¶18 Accordingly, we affirm Defendant's conviction and sentence.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
MICHAEL J. BROWN, Presiding Judge

/s/_____
JON W. THOMPSON, Judge