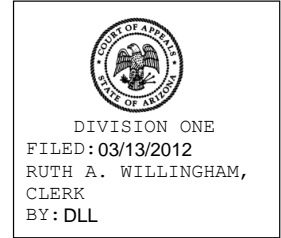


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 10-0962  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ADRIAN SOTO, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-110222-001DT

The Honorable Cari A. Harrison, Judge

**AFFIRMED**

---

Thomas C. Horne, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Division  
And Suzanne M. Nicholls, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Terry Reid, Deputy Public Defender  
Attorneys for Appellant

---

**G O U L D**, Judge

¶1 Defendant Adrian Soto appeals from his convictions and sentences for burglary in the third degree and possession of burglary tools. He argues the trial court erred in not

precluding a surveillance video and by denying his motion for judgment of acquittal as to the possession of burglary tools charge. For the reasons that follow, we affirm.

***Factual and Procedural Background***<sup>1</sup>

¶12 The evidence at trial revealed the following. A.B. was at home around 10 o'clock in the morning on February 23, 2010, when he heard his vehicle alarm activate. Looking outside, A.B. observed a black Taurus stopped with its passenger doors open near his family van. A.B. saw a Hispanic male wearing a black hood, blue jeans, and blue shirt get into the passenger side of the Taurus carrying a DVD monitor from the van. As he was doing so, the suspect yelled something over his shoulder in the direction of the van. A.B. proceeded outside, and the Taurus left. A.B. reported the incident to 911.

¶13 The Taurus was apprehended later that morning and an officer then accompanied A.B. to the Taurus. A.B. identified the vehicle and remarked that Defendant and another suspect, Trevino, were both wearing clothing similar to that worn by the man he observed carrying the DVD monitor.<sup>2</sup> A.B. initially

---

<sup>1</sup> We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

<sup>2</sup> One suspect was wearing a black jacket and black hat; the other was not wearing a jacket. Both were wearing blue shirts.

identified Trevino as the man he observed during the burglary, but subsequently A.B. recognized Defendant's face. Items from A.B.'s van - specifically, a DVD player and monitors and approximately 100 of his CDs - were found in the Taurus. Police also discovered in the Taurus's passenger compartment a crowbar and screwdrivers and an open backpack containing a flashlight and a hammer.

¶4 During the ensuing investigation, law enforcement learned that Defendant and Trevino had been at a local store earlier in the morning before the burglary. Police retrieved the security video from the store. The recordings showed two men wearing the same clothes described by A.B. The men tried to pay for merchandise with a credit or debit card at approximately 6:35 a.m., but then abandoned the goods at the register and left the store together.

¶5 The State charged Defendant under an accomplice liability theory with one count each of burglary in the third degree, a class four felony, and possession of burglary tools, a class six felony.<sup>3</sup> Among other defenses, Defendant disclosed mere presence, mistaken identity, and third-party presence. Just before voir dire commenced, Defendant moved to preclude the surveillance video, arguing it was irrelevant and improper Rule

---

<sup>3</sup> The State also charged Defendant with one count of resisting arrest. This charge was dismissed before trial.

404(b) evidence<sup>4</sup> because it showed Defendant and Trevino attempting to purchase items by "fraudulent use of a card[,]" a crime that was uncharged in this case. In response, the State asserted Defendant's motion was untimely and that the purpose of the video was to establish the relationship between Defendant and Trevino,<sup>5</sup> not to show that Defendant fraudulently used a credit card earlier in the day. Indeed, in oral argument, the State pointed out that the recording did not include audio and did not show that the transaction constituted a crime; instead, the tape "just shows two guys wearing the same clothes, going up conducting a transaction together and leaving the store." The court denied the motion, stating it was untimely as "a 404(b) issue," and "looking at it as a motion in limine, I do not find that the videotape itself represents any prior bad act, so the Court will allow it to come in for the limited purposes to show if the jury finds it to be relevant on the issue of whether the defendant and co-defendant had prior contact with each other . . . ."

¶16 Trial proceeded, and the court denied Defendant's motion for judgment of acquittal pursuant to Arizona Rule of

---

<sup>4</sup> Arizona Rule of Evidence 404(b) provides, in relevant part: "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

<sup>5</sup> The State believed that A.B. only identified Trevino, not Defendant.

Criminal Procedure 20. The jury found Defendant guilty as charged, and it additionally found two aggravating factors relating to each conviction as alleged by the State. The court found prior felony convictions for sentencing purposes. After Defendant unsuccessfully moved for a new trial and renewed his Rule 20 motions, the court sentenced Defendant to concurrent mitigated terms of 6 years for the burglary conviction and 2.25 years for the possession conviction. Defendant appealed, and 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), 13-4031 and -4033(A)(1) (West 2012).<sup>6</sup>

#### ***Discussion***

¶17 Defendant first argues that the trial court erred in not precluding the surveillance video. Specifically, he contends the evidence was irrelevant and unduly prejudicial. He also claims the court committed reversible error by failing to make findings normally required before admitting Rule 404(b) evidence. See *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997) ("[B]efore admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act."). We review for abuse of

---

<sup>6</sup> We cite a statute's current Westlaw version when it has remained materially unchanged since the date of the offense.

discretion. *State v. Beasley*, 205 Ariz. 334, 337, ¶ 14, 70 P.3d 463, 466 (App. 2003).

¶18 We find no abuse of discretion. First, Defendant's motion to preclude was untimely, and the court therefore acted within its discretion in denying the motion. See Ariz. R. Crim. P. 16.1(b), (c). Moreover, regarding Defendant's argument that the video be precluded because it was evidence of a prior bad act, the video depicts Defendant with a man who uses some kind of card when checking out, but then leaving the items with the cashier before exiting the store with Defendant. Numerous innocent explanations exist for this scenario; Defendant's speculation that the jury necessarily determined the transaction to be evidence of an illicit act is insufficient to find error.

¶19 Second, the evidence was relevant because it established a connection between Defendant and his accomplice, whom A.B. identified as the burglary suspect. This connection increased the probability that Defendant was more than merely present when the burglary was being committed. The video also shows Defendant wearing clothing matching A.B.'s description of the clothes worn by the suspect he observed committing the burglary, thereby rebutting Defendant's mistaken identity defense. And because, as noted, the recording did not depict a bad act, it was not unduly prejudicial under Rule of Evidence 403.

¶10 The court acted within its discretion in denying Defendant's motion to preclude because the surveillance tape was relevant, not unduly prejudicial, Defendant did not timely object to it on 404(b) grounds, and the tape did not depict a bad act.

¶11 Defendant next argues the court erred in denying his Rule 20 motion with respect to the charged offense of possession of burglary tools. Defendant contends the State failed to present substantial evidence that he knowingly possessed the tools found in the Taurus. Defendant claims his mere presence in the vehicle was insufficient to show possession.

¶12 We review de novo a trial court's denial of a Rule 20 motion. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). We "will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001). Substantial evidence is evidence that a reasonable jury can accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999). If reasonable minds could differ on the inferences to be drawn from the evidence, whether direct or circumstantial, the case must be submitted to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶13 The trial court did not err when it denied Defendant's Rule 20 motion. The State presented substantial evidence from which the jury could conclude that Defendant either constructively and jointly possessed the tools with Trevino, or that he actually had physical possession of the tools. See *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 365, ¶ 18, 965 P.2d 94, 99 (App. 1998) (noting possession need not be exclusive or personal to establish constructive possession) (quoting *State v. Carroll*, 111 Ariz. 216, 218, 526 P.2d 1238, 1240 (1974)). Specifically, the court heard the testimony of officer Bigler who opined that the tools found in the Taurus are commonly used to gain entry to vehicles. A.B. testified that, as a result of the burglary, his van's driver-side window was "broken . . . like [it] had been pushed down into the actual door." Based on this evidence, and the evidence underlying Defendant's conviction on the burglary offense, one could reasonably infer that Defendant or Trevino actually used the tools to gain entry to A.B.'s van.

¶14 Accordingly, the State presented substantial evidence that Defendant possessed burglary tools, and the court therefore correctly denied Defendant's Rule 20 motion. See A.R.S. §§ 13-1505(A) ("A person commits possession of burglary tools by: 1. Possessing any . . . tool . . . commonly used for committing any form of burglary . . . and intending to use or permit the use of



such an item in the commission of a burglary."), -303(A)(3) (defining accomplice liability); see also *State v. Marchesano*, 162 Ariz. 308, 314, 783 P.2d 247, 253 (App. 1989) ("Arizona courts have long acknowledged that joint participation in a general felonious plan is enough to hold an accomplice liable as principal for any crime committed in execution of the plan."), *overruled on other grounds by State v. Phillips*, 202 Ariz. 427, 437 n.4, 46 P.3d 1048, 1058 n.4 (2002).

**Conclusion**

¶15 Defendant's convictions and resulting sentences are affirmed.

/S/

\_\_\_\_\_  
ANDREW W. GOULD, Judge

CONCURRING:

/S/

\_\_\_\_\_  
DIANE M. JOHNSEN, Presiding Judge

/S/

\_\_\_\_\_  
DONN KESSLER, Judge