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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.34



DIVISION ONE  
FILED: 04/26/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0325  
 ) 1 CA-CR 11-0327  
 Appellee, ) (Consolidated)  
 )  
 v. ) DEPARTMENT A  
 )  
 FREDERICK DAVID RODRIGUEZ, ) **MEMORANDUM DECISION**  
 )  
 Appellant. ) (Not for Publication -  
 ) Rule 111, Rules of the  
 ) Arizona Supreme Court)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2005-013256-001 DT and CR2010-0148889-001 DT  
(Consolidated)

The Honorable Julie P. Newell, Judge *Pro Tempore*

**AFFIRMED**

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

James J. Haas, Maricopa County Public Defender Phoenix  
By Kathryn L. Petroff, Deputy Public Defender  
Attorneys for Appellant

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**T I M M E R**, Judge

¶1 Frederick David Rodriguez appeals his convictions and sentences after a jury convicted him of one count of possession of burglary tools and the trial court found that, in so doing, he violated the terms of his probation. Rodriguez'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), advising this court that after a search of the entire record on appeal, he found no arguable question of law that is not frivolous. This court granted Rodriguez an opportunity to file a supplemental brief in propria persona, but he has not done so. Through his counsel, however, Rodriguez presents two issues: (1) whether sufficient evidence exists he possessed burglary tools, and (2) whether sufficient evidence exists proving his prior convictions. For the following reasons, we affirm.

#### **BACKGROUND**

¶2 In the early morning hours of September 10, 2010, K.S. looked out her living-room window and observed three young men in her neighborhood. After seeing one man attempt to open the doors on several cars parked at her neighbor's house, she called the police.

¶3 Two police officers arrived in the neighborhood shortly thereafter. One of the officer's vehicle headlights

shined on Rodriguez, who immediately ran from the scene. After a short while, Rodriguez stopped, pulled gloves off his hands, threw them on the ground, and sat down on a curb. The officers detained Rodriguez and, with his permission, searched him. In his pockets, they found a screwdriver, a mallet with a flashlight on one end and a window punch on the other end, and a plastic bag containing several earrings. The officers also discovered one of the nearby cars had a shattered driver's door window. G.T., the owner of the vehicle, had left several earrings in the car, which the officers determined were the same earrings they found in Rodriguez's possession.

¶4 The State charged Rodriguez with burglary in the third degree and possession of burglary tools in CR2010-148889-001. It also petitioned to revoke Rodriguez's probation imposed in CR2005-013256-001.

¶5 A jury found Rodriguez not guilty of burglary but guilty of possession of burglary tools. The court found Rodriguez had at least two prior historical felonies and used his criminal history as an aggravating factor. The court further found Rodriguez was on probation at the time of the incident for a previous assault conviction. The court sentenced Rodriguez to four years' imprisonment with 215 days of presentence incarceration credit for the possession of burglary tools conviction. The court also found Rodriguez had violated

the terms of his probation, revoked probation, and sentenced him to one-and-a-half years' imprisonment with 373 days of presentence incarceration credit, to be served consecutively to the first sentence.<sup>1</sup> Rodriguez appealed in both cases, and we consolidated the appeals.

#### DISCUSSION

¶6 In reviewing the sufficiency of evidence, we review the facts in the light most favorable to upholding the verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Evidence is sufficient when it is more than a mere scintilla and is such proof as could convince reasonable persons of the defendant's guilt beyond a reasonable doubt. *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186,

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<sup>1</sup> To avoid duplication, the trial court should apply presentence incarceration credits to only one of a defendant's sentences if it imposes consecutive sentences. *State v. Jackson*, 170 Ariz. 89, 94, 821 P.2d 1374, 1379 (App. 1991). Rodriguez served 158 days in jail in connection with his assault conviction, and then served 215 days after his burglary-tools arrest. The trial court erred by effectively awarding Rodriguez the 215 days of presentence incarceration credit for his burglary-tools offense twice. The presentence incarceration credit for the assault conviction should have been 158 days, not 373 days. We do not correct this error, however, because it is in Rodriguez's favor and the State did not cross appeal. *State v. Dawson*, 164 Ariz. 278, 285-86, 792 P.2d 741, 748-49 (1990).

200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

### I. Possession of burglary tools

¶7 An individual commits possession of burglary tools by "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 intending to use or permit the use of such an item in the commission of a burglary." Ariz. Rev. Stat. ("A.R.S.") § 13-1505(A)(1) (West 2012).<sup>2</sup> An individual commits burglary by entering or remaining unlawfully in a residential or nonresidential structure with the intent to commit theft or any felony. A.R.S. §§ 13-1506, -1507, -1508 (West 2012) (defining various degrees of burglary). A motor vehicle qualifies as a structure for purposes of the burglary statutes. *State v. Hamblin*, 217 Ariz. 481, 484, ¶¶ 10-12, 176 P.3d 49, 52 (App. 2008).

¶8 Sufficient evidence permitted the jury to find Rodriguez possessed burglary tools. Officers testified Rodriguez possessed gloves, a screw driver, and an apparent window punch, which are commonly used to enter a structure.

¶9 There was also sufficient evidence for the jury to find that Rodriguez intended to use the tools in the commission

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<sup>2</sup> Absent material revision after the date of an alleged offense, we cite a statute's current version.

of a burglary. Rodriguez had G.T.'s missing earrings. One of the officers testified the damage to the window was consistent with a window punch. K.S. described the person attempting to open the car doors as "tall[] and on the heavier side" and estimated his age as "15 up to 20s." An officer testified that, at the time of the incident, Rodriguez was six feet tall, weighed 235 pounds, and was twenty-three years old. It was a warm September morning, inferring Rodriguez was unlikely to be wearing the gloves for protection from the elements but perhaps to avoid leaving fingerprints on any burglarized vehicles. No other explanation was provided for Rodriguez's possession of the tools in a residential area so early in the morning. Furthermore, Rodriguez initially fled from the police officers allowing the jury to infer he was among the men spotted by K.S.

## **II. Prior convictions**

¶10 Rodriguez next argues there was insufficient evidence to support the trial court's finding he had prior convictions for purposes of sentence enhancement.

¶11 To prove a prior conviction, the State is required to submit evidence of a conviction and evidence demonstrating the defendant is the same person who committed the previous crime. *State v. Cons*, 208 Ariz. 409, 415, ¶ 16, 94 P.3d 609, 615 (App. 2004). "The proper procedure to establish the prior conviction is for the state to offer in evidence a certified copy of the

conviction . . . and establish the defendant as the person to whom the document refers." *State v. Lee*, 114 Ariz. 101, 105-06, 559 P.2d 657, 661-62 (1976).

¶12 At the sentencing hearing, the State introduced a right thumbprint taken from Rodriguez, an Arizona Department of Corrections "pen pack" containing evidence of three prior historical felony convictions, and a 2005 judgment for one of those felony convictions, which contained a right index fingerprint. Kimberly Leske, a forensic investigator from the Glendale Police Department, testified she fingerprinted Rodriguez on March 16, 2011 and made the comparisons. Rodriguez's thumbprint matched the thumbprint from the pen pack, and the pen pack's right index fingerprint matched the right index fingerprint from the 2005 judgment. The court also found the picture in the pen pack matched Rodriguez. In light of this evidence, the trial court did not err by ruling that the State had proven the historical prior felony convictions.

#### CONCLUSION

¶13 After the filing of this decision, counsel's obligations pertaining to Rodriguez's representation in this appeal have ended. Counsel need do no more than inform Rodriguez of the status of the appeal and his future options, unless counsel's review reveals 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). Rodriguez shall have thirty days from the date of this decision to proceed, if he desires, with an in propria persona motion for reconsideration or petition for review.

/s/  
Ann A. Scott Timmer, Judge

CONCURRING:

/s/  
Maurice Portley, Presiding Judge

/s/  
Andrew W. Gould, Judge