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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

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 03/06/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

STATE OF ARIZONA, ) No. 1 CA-CR 11-0392  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JAMES RONTEA SHEPARD, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-141986-001 DT

The Honorable Maria del Mar Verdin, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona 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 Paul J. Prato, Deputy Public Defender  
Attorneys for Appellant

James Rontea Shepard Yuma  
Appellant

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**B R O W N**, Judge

¶1 James Shepard appeals his conviction and sentence for one count of burglary in the second degree. Counsel for Shepard 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 that after searching the record on appeal, he was unable to find any arguable grounds for reversal. Shepard was granted the opportunity to file a supplemental brief *in propria persona*, and he has done so.

¶2 Our obligation is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Shepard. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

¶3 Shepard was charged by direct complaint with one count of burglary in the second degree, a class 3 felony, pursuant to Arizona Revised Statutes ("A.R.S.") section 13-1507 (2010).<sup>1</sup> The following evidence was presented at trial.<sup>2</sup>

¶4 In August 2010, R.L. was working as a security guard in a new housing development in Avondale. At approximately 8:00

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<sup>1</sup> Absent material revision after the date of the alleged offense, we cite the statute's current version.

<sup>2</sup> Shepard voluntarily absented himself from the trial proceedings.

p.m., he heard a residential alarm and immediately called 9-1-1. Looking in the direction of the sound of the alarm, R.L. saw two men scaling a fence. He approached in his vehicle and saw the men putting things into the bed of an older model truck. He began to follow the men as they were leaving the development. As he was talking to the 9-1-1 dispatcher, he was advised to stop his pursuit. When he returned to the development, he gave a statement to one of the police officers who had just arrived on the scene.

¶15 Officer Villaverde testified that she responded to a residential burglary call. After securing the area, she and her partner looked through the home that appeared to have been ransacked. A television was found face-down on the living room floor and several drawers had been opened. The victim arrived and walked through with the police to list the items that were missing. Villaverde then obtained a statement from R.L. and assisted in the one-on-one identification. R.L. positively identified Shepard as one of the men he had seen jump over the wall and get into the truck. Villaverde accompanied the victim to the same location, where he identified many of the items in the truck as his.

¶16 A jury found Shepard guilty of the charged offense, and it further determined that the State had proven two aggravators: the presence of an accomplice and pecuniary gain.

Prior to sentencing, Shepard admitted to having three prior felony convictions. Shepard was sentenced to twelve and one-half years incarceration, with ninety-five days of presentence incarceration credit. This timely appeal followed.

¶7 In his supplemental brief, Shepard first challenges the credibility of R.L. and Villaverde. We construe this as a challenge to the sufficiency of the evidence. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation and internal quotations omitted). In determining whether substantial evidence exists, we view the facts in the light most favorable to sustaining the jury verdict and resolve all inferences against Shepard. *State v. Stroud*, 209 Ariz. 410, 412, 103 P.3d 912, 914 (2005). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). "The substantial evidence required for conviction may be either circumstantial or direct." *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005).

¶18 Here, the State presented evidence from which the jury could reasonably have concluded Shepard committed burglary.<sup>3</sup> R.L. identified Shepard in a one-on-one identification<sup>4</sup> within one hour of seeing him at the victim's residence. Although he admittedly reported the color of the vehicle as either "white and blue" or "white and green," he also testified that the crime was happening at dusk, and he is color-blind. See *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995) (noting the determination of the credibility of witnesses and the weight to be given any item of evidence is a matter for the jury). Based on our review of the record, these misstatements are inconsequential.

¶19 As to Villaverde, Shepard's only argument is that she testified she could not remember if Shepard was at the bed of the truck for the one-on-one identification or if he was near a

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<sup>3</sup> The burglary statute provides in pertinent part: "A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A).

<sup>4</sup> Shepard suggests that the identification was unfair. We acknowledge that single person identifications "are inherently suggestive." *State v. Canez*, 202 Ariz. 133, 150, ¶ 47, 42 P.3d 564, 581 (2002). Even if an identification is "unduly suggestive," it is nonetheless admissible if found to be reliable. *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002). Here, the trial court conducted an evidentiary hearing, heard the arguments of counsel, and impliedly considered the *Biggers* factors. See *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). The record supports the court's decision to admit the pretrial identification evidence and thus we find no abuse of discretion.

patrol car. Again, we find this inconsistency in her testimony trivial and conclude the remaining evidence presented was sufficient to permit a jury to find beyond a reasonable doubt that Shepard was guilty of burglary in the second degree. See *Mathers*, 165 Ariz. at 66-67, 796 P.2d at 868-69 (requiring the factfinder to rationally apply the reasonable doubt standard to the facts in evidence).

¶10 Shepard also asserts that Juror 36 (who was re-numbered as Juror 10) was allowed to sit on the panel after a lengthy discussion during voir dire about Shepard's absence from the courtroom.<sup>5</sup> Because Shepard failed to object at trial, we review for fundamental error only. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.2d 601, 607 (2005). To prevail, Shepard must establish both the existence of fundamental error and that the error caused him prejudice. *Id.* at ¶ 20. Defense counsel led the discussion during voir dire on this topic. At least five potential jurors said Shepard's absence would trouble them for various reasons. The trial judge interrupted the questioning and instructed the jurors, "you cannot make your finding of guilt based on whether the defendant testifies or does not testify, is present or is not present." At the end of the discussion, when the judge asked if Shepard's absence would

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<sup>5</sup> Ultimately, Juror 10 was chosen as an alternate and was not a part of the jury that deliberated and found Shepard guilty.

affect their ability to be impartial or to follow her instructions, none of the jurors raised their hands. We therefore find no error, much less fundamental error.

¶11 We have searched the entire record for reversible error and find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows Shepard was represented by counsel at all pertinent stages of the proceedings, he was afforded the opportunity to speak before sentencing, and the sentence imposed was within statutory limits. Accordingly, we affirm Shepard's conviction and sentence.

¶12 Upon the filing of this decision, counsel shall inform Shepard of the status of the appeal and his options. Defense counsel has no further obligations unless, upon review, counsel finds 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). Shepard shall have

thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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PATRICIA K. NORRIS, Judge

/s/

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PHILIP HALL, Judge