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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TONY CRUZ, SR., Appellant.	)	2 CA-CR 2012-0084 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20110461

Honorable Robert Duber II, Judge

AFFIRMED

Emily Danies — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Tony Cruz, Sr. was convicted after a jury trial of third-degree burglary and sentenced to an enhanced, maximum twelve-year prison term. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she has reviewed the record but found "[n]o arguable question of law" to raise on appeal. Cruz has filed a supplemental brief arguing that the evidence was insufficient to sustain his conviction, that a witness committed

perjury, and that he was convicted of a crime "not brought by the Grand Jury." Finding no error, we affirm.

¶2 We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Cruz's conviction stems from the theft of a weed trimmer from a locked storage closet in a mobile home park. An employee saw Cruz, who had previously resided in the park, enter the park during the early morning of August 2, 2011. The following day, the owner discovered the hasp of the latch to the closet had been cut and the weed trimmer was missing. That trimmer was found at Cruz's mobile home in another park, and bolt cutters were found in his truck. This evidence is sufficient to support Cruz's conviction for third-degree burglary. *See* A.R.S. § 13-1506(A)(1).

¶3 Cruz first argues the evidence was nonetheless insufficient because the employee testified that he had cut the lock to the storage closet. Thus, he asserts, it was the employee, and not him, who had "broke[n] into the shed." Cruz misapprehends the evidence. The employee and owner testified the hasp of the latch to the storage closet had been cut—not the lock. The employee stated that he later cut the lock and/or part of the latch in order to detach the lock from the latch.

¶4 Cruz also contends that he could not be guilty of burglary because that same employee stated he had used the weed trimmer on August 2 or August 3, and Cruz claims he had been arrested on August 2 on unrelated charges. There was no evidence in the record that Cruz had been arrested. And, although Cruz claimed he had been "denied the right to present this exculpatory alibi evidence" at a pretrial hearing, he cites to no

such hearing nor do we find any indication in the record that Cruz sought to introduce evidence of his arrest.

¶5 And, in any event, the employee's testimony on that point was inconsistent. When asked if he had used the trimmer "prior to seeing the defendant that night," he responded that he thought he had "used it the next day" but was "not for sure." But he later stated that, the morning after seeing Cruz in the park, the hasp had been cut and the weed trimmer was missing. It was for the jury to resolve that inconsistency. *See State v. Money*, 110 Ariz. 18, 25, 514 P.2d 1014, 1021 (1973). It does not render the evidence insufficient as a matter of law. *See State v. Donahoe*, 118 Ariz. 37, 42, 574 P.2d 830, 835 (App. 1977) ("Evidence is not insufficient simply because testimony is conflicting.") And we reject Cruz's related argument that the employee committed perjury. His perjury claim is, in essence, a challenge to the employee's testimony based on several inconsistencies in his testimony. Any contradictions in the employee's testimony went to the weight to be afforded that testimony. *See State v. Moore*, 222 Ariz. 1, ¶ 29, 213 P.3d 150, 158 (2009). And, despite Cruz's contrary argument, nothing in the record suggests the state presented false evidence.

¶6 Cruz next argues that, because the indictment stated he had committed burglary between August 1 and August 2 and the employee testified he had used the weed trimmer on August 2, his conviction was "outside the scope of the charging indictment." This argument fails. As we have explained, the employee's testimony was inconsistent, but the jury readily could conclude the weed trimmer had been stolen on August 2. *See Money*, 110 Ariz. at 25, 514 P.2d at 1021. And the verdict form was

consistent with the indictment, requiring the jury to find Cruz had committed burglary between August 1 and August 2.

¶7 Cruz's sentence was within the prescribed statutory range and was imposed lawfully. *See* A.R.S. §§ 13-703(J), 13-1506(B). We have rejected the claims Cruz raised in his supplemental brief and, pursuant to our obligation under *Anders*, searched the record for fundamental, reversible error and found none. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error). Accordingly, Cruz's conviction and sentence are affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge