

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



DIVISION ONE  
FILED: 1/29/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

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

STATE OF ARIZONA, ) 1 CA-CR 11-0213  
) 1 CA-CR 11-0242  
Appellee, ) (consolidated)  
)  
v. ) DEPARTMENT B  
)  
WYBRA CHRISTOPHER HOLDEN, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
Appellant. ) Rule 111, Rules of the  
) Arizona Supreme Court)

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Appeal from the Superior Court in Maricopa County

Cause Nos. CR2010-006387-002 DT;  
CR2010-005973-003 DT

The Honorable John R. Hannah, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
by Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Division  
and Myles A. Braccio, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
by Eleanor S. Terpstra, Deputy Public Defender  
Attorneys for Appellant

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**H O W E**, Judge

¶1 Wybra Christopher Holden appeals his convictions and sentences for two counts of burglary. He argues that his right to a fair trial was violated when the court consolidated counts one and two into a single trial. We find that Holden has waived this claim on appeal by not renewing his objection to the joinder of the charges at the close of evidence and by not arguing on appeal that the alleged error constitutes fundamental error.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 At 11:23 p.m. on December 30, 2009, Holden and an accomplice entered a Circle K, walked behind the counter, and took cartons of cigarettes worth \$2,500 and placed them into plastic bags that they had brought with them. The store clerk followed company policy and did not intervene. Holden and the accomplice then left the store, and the clerk called the police. The store's surveillance camera had captured the burglary.

¶3 Because of the burglary, Phoenix police officers began patrolling the area around the Circle K. At 11:47 p.m. on January 5, 2010, two officers saw three individuals dressed in dark clothing standing near the store. Holden was later identified as one of the individuals. The officers became suspicious of the men and positioned their patrol car so that they could view the front of the store. They observed the men enter the store and go behind the counter. Holden and the same

individual who accompanied him during the December 30 burglary went behind the counter and tried to open the case where the cigarettes were kept, but the case was locked. Holden again brought a plastic bag with him. The same clerk who worked on December 30 was working that night.

¶14 When Holden and his accomplice realized they could not open the cigarette case, they left the store. The officers immediately stopped the two accomplices, but Holden fled. The officers searched the area and eventually found Holden. The store clerk identified Holden as one of the burglars. The store's surveillance cameras once again captured Holden committing the burglary.

¶15 Holden was indicted on April 14, 2010, with burglary in the third degree, a class four felony, for stealing cigarettes from the Circle K on December 30, 2009. He was indicted separately on August 10, 2010, with burglary in the third degree, a class four felony, for attempting to steal cigarettes from the same store on January 5, 2010.

¶16 The State moved to join the two counts for trial, arguing that the offenses were connected because they occurred at the same store six days apart and involved the same eye-witness, defendants, and modus operandi. Holden objected, but the court granted the State's request because "based upon Rule 13.3, Arizona Rules of Criminal procedure, . . . the two

offenses are of the same or similar character based upon substantial and identical conduct." The court also held that evidence of one offense would be admissible for the other, and that the burglaries were "inextricably intertwined from both an intent and identity standpoint."

¶7 Holden was tried by a jury on the joined charges, and he failed to renew his objection to the joinder at the close of the evidence. The jury found Holden guilty of both counts of burglary, and the court sentenced him to a concurrent presumptive term of ten years' imprisonment for each count. The court also ordered Holden to pay \$2,453.10 in restitution. Holden timely appealed, and we have jurisdiction under Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and -4033(A) (West 2012).<sup>1</sup>

#### DISCUSSION

¶8 Although Holden argues on appeal that the trial court erred in consolidating the separate burglary charges for trial, he has waived this issue because, while he objected to the joinder before trial, he did not renew his objection at the close of evidence. Under Arizona Rule of Criminal Procedure 13.4(c), a party must move to sever joined charges before trial,

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<sup>1</sup> We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

and if the motion is denied, the party must renew the motion "during trial at or before the close of evidence." Failure to timely renew the motion waives any claim to severance. *Id.*

¶9 Because Holden has waived this claim, we may review it only for fundamental error. *State v. Flythe*, 219 Ariz. 117, 119, ¶¶ 4-5, 193 P.3d 811, 813 (App. 2008). To establish fundamental error, Holden must demonstrate that error occurred, that the error was fundamental, and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). He cannot meet this burden because he does not argue that fundamental error occurred. He says nothing about fundamental error in his opening brief, and he has elected not to file a reply brief. See *State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996) (the appellate court is not obligated to search the record for fundamental error).

¶10 Regardless of Holden's failure to ask this Court to review for fundamental error, we find none. The trial court found that the offenses were properly joined because they are of the same or similar character. Further, evidence from both burglaries would have been cross-admissible at separate trials for non-character reasons, such as to establish identity, intent, preparation, modus operandi or a common scheme or plan. Evidence from the first burglary could show Holden's intent to steal the cigarettes when he entered the Circle K on January 5.

The evidence from both offenses could establish identity, because Holden claims that he was not present at the first burglary. The evidence could also show Holden's modus operandi as both offenses occurred at night, against the same Circle K store and store clerk, in the same manner and in an attempt to steal the same items. We find no error in the joinder of the two offenses. See *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980) (No error found where trial court consolidated two offenses where defendant robbed two bowling allies a month apart in an identical manner).

**CONCLUSION**

¶11 For the reasons set forth above, the convictions and sentences are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
RANDALL M. HOWE, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Presiding Judge

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