DIVISION ONE
FILED: 7/23/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0188
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DANIEL WILLIAM ALMARAZ,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-125677-001

The Honorable Carolyn Passamonte, Judge *Pro Tempore*

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James Haas, Maricopa County Public Defender — Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

Daniel William Almaraz — Tucson
Appellant

B R O W N, Judge

¶1 Daniel William Almaraz appeals his conviction and sentence for burglary. Counsel for Almaraz 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, she was unable to find any arguable grounds for reversal. Almaraz was granted the opportunity to file a supplemental brief in *propria persona*, and he has done so.

¶2 We 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 Almaraz. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶3 In June 2011, the State charged Almaraz with burglary in the third degree, a class 4 felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-1506. The following evidence was presented at trial.

¶4 Barlow Distribution, a business that delivers and installs appliances to new homes, has a fenced yard at its facility in Tolleson. At 12:43 a.m. on May 20, 2011, security cameras recorded two individuals jumping into Barlow's fenced yard. Employees at Iveda Solutions, the company which monitors the security cameras, called the police and several minutes

later two individuals throwing items over a wall were recorded by the security cameras. A Barlow employee who was familiar with the items kept in the yard testified that three of the items being thrown over the wall in the security footage appeared to be a radiator, a box of cords containing copper, and a small cooler. He further testified that on the day after the security footage was taken, he discovered that a radiator and box of cords were missing from Barlow's yard. The employee also testified that no one had permission to be in Barlow's yard that night.

¶5 At 12:47 a.m., Officer Lopez was dispatched to the area for a reported burglary in progress. When Lopez arrived and approached the fenced yard, he spotted Almaraz walking inside the yard. Almaraz began running and then jumped over a wall to exit the yard. Officer Lopez ran after Almaraz, who surrendered after a brief chase. After searching and handcuffing Almaraz, Officer Lopez asked him what he was doing, and Almaraz responded that he was trying to get some water. Lopez later identified Almaraz as one of the individuals throwing items over the wall in the photos taken from the security footage.

¶6 A jury found Almaraz guilty of burglary in the third degree and the lesser-included offense criminal trespass. The court sentenced Almaraz to the presumptive prison term of ten

years' imprisonment for the burglary conviction,[1] and was credited with 59 days of presentence incarceration. Almaraz filed a timely notice of appeal and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033.

¶7 In his supplemental brief, Almaraz argues that (1) he was improperly convicted of both burglary and the lesser-included offense of criminal trespass; (2) several jurors were improperly removed because of their race; (3) one of the State's witnesses should not have been allowed to testify; and (4) his motion for a judgment of acquittal should have been granted.

¶8 The jury found Almaraz guilty of both burglary in the third degree and the lesser-included offense of criminal trespass. After the verdict was read, the trial court suggested that the lesser offense could be dismissed at the time of sentencing. At the sentencing hearing, although the criminal trespass issue was not addressed, Almaraz was sentenced only for the burglary charge. Because a defendant cannot be convicted "on two counts based on a single, definite act, the remedy is to remove the lesser sentence." *See State v. Jones*, 185 Ariz. 403, 407-08, 916 P.2d 1119, 1123-24 (App. 1995) (internal quotation

[1] Prior to sentencing in the instant case, Almaraz pled guilty in cause number CR2012-102181-001. As part of the plea agreement in that case, he admitted to two prior felony convictions. Almaraz is serving a concurrent eleven-year term of imprisonment in that case.

omitted). Therefore, we vacate the conviction for criminal trespass.

¶9 Almaraz next alleges that several prospective jurors were excused as part of a "'subterfuge' used by the State to get rid of 'non-whites' from the panel." The Equal Protection Clause prohibits discrimination in jury selection on the basis of race. *Batson v. Kentucky*, 476 U.S. 79 (1986). Defense counsel did not object to the removal of any of the prospective jurors who Almaraz now claims were excused inappropriately. By failing to timely object to the composition of the jury in the trial court, Almaraz has waived any error. *See State v. Garza*, 216 Ariz. 56, 65, ¶ 31, 163 P.3d 1006, 1015 (2007). Almaraz also suggests that his counsel should have objected to the removal of these jurors. A claim of ineffective assistance of counsel will not be considered on direct appeal regardless of its merit. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

¶10 Almaraz next challenges the court's decision to allow Iveda Solutions' employee Jim Berglund to testify regarding the security footage. Almaraz filed a motion in limine to preclude the State from introducing the surveillance video, arguing Berglund was unable to lay sufficient foundation. On the morning of trial, the court conducted a hearing on the motion. Berglund testified that his company used monitoring software to

determine whether each camera was working correctly, that a video time-stamp was automatically updated by computer at midnight every night for the Barlow security cameras, and that he served as the custodian of records for the video footage collected by Iveda. The court denied the motion, reasoning that the objection raised by Almaraz went to the weight of the evidence rather than its admissibility.

¶11 At trial, Berglund identified the disk containing the footage from Barlow Distribution on May 20, testified he had viewed the video on May 21 and again on the morning of the trial, and the video he viewed that morning fairly and accurately depicted the same video that he viewed on May 21. When the State moved to admit the video as Exhibit 7 after Berglund laid the foundation, defense counsel did not object.

¶12 A trial court's ruling on the admissibility of evidence will not be disturbed on appeal absent a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). A foundation for the introduction of evidence may be laid either through identification testimony or by establishing a chain of custody. *State v. Macumber*, 119 Ariz. 516, 521, 582 P.2d 162, 167 (1978). Berglund identified the security footage introduced at trial as being the same video recorded by his company's security cameras on May 21.

Therefore, the trial court did not abuse its discretion by allowing his testimony or admitting the footage into evidence.

¶13 Finally, Almaraz argues that the trial court erred by denying defense counsel's Rule 20 motion for judgment of acquittal. We review the sufficiency of the evidence de novo, *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011), and view the evidence at trial in the light most favorable to sustaining the jury's verdict. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "Substantial evidence, Rule 20's lynchpin phrase, is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *West*, 226 Ariz. at 562, ¶ 16, 250 P.3d at 1191 (internal quotations and citations omitted).

¶14 A person commits burglary in the third degree by: "[e]ntering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or any felony therein." A.R.S. § 13-1506(A)(1). Lopez testified that he saw Almaraz in Barlow's fenced yard, and he identified Almaraz as one of the two men who were recorded on video inside the yard throwing objects over the wall. When Lopez arrested Almaraz, he was wearing work gloves and claimed he was in the yard trying to get some water, despite the fact that a well-lit convenience store was located less than

half a mile away. The Barlow employee testified that no one had permission to be in the yard on the night in question and that two of the items which were seen being thrown over the fence in the security footage appeared to be the same items that were discovered as missing from the yard the following day. We find that there was substantial evidence to support a conclusion of Almaraz's guilt, and that the court did not err by denying the Rule 20 motion.

¶15 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 Almaraz was present and represented by counsel at all pertinent stages of the proceedings, was afforded the opportunity to speak before sentencing, and the sentence imposed was within statutory limits. The court did not conduct a voluntariness hearing; however, the record does not suggest a question about the voluntariness of Almaraz's statements to police. *See State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974). Accordingly, we affirm Almaraz's conviction and sentence for burglary in the third degree. We vacate, however, his conviction for criminal trespass.

¶16 Upon the filing of this decision, counsel shall inform Almaraz 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). Almaraz 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/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

_____/s/_____
JOHN C. GEMMILL, Judge