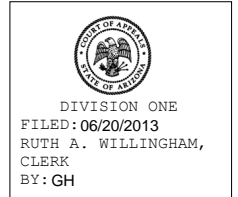


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

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



STATE OF ARIZONA,) 1 CA-CR 12-0281
) 1 CA-CR 12-0288
Appellee,) (Consolidated)
)
v.) DEPARTMENT D
)
OTIS BERRY BRASCOM,)
) **MEMORANDUM DECISION**
Appellant.) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2010-160471-001 and CR2010-117584-001

The Honorable Cynthia J. Bailey, Judge

AFFIRMED

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

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

K E S S L E R, Judge

¶1 Otis Berry Brascom ("Brascom") was tried and convicted of Count 1: burglary in the third degree, a class 4 felony, and Count 2: possession of burglary tools, a class 6 felony.

Counsel for Brascom 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). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Brascom has submitted a supplemental brief *in propria persona*, raising two issues. For the reasons that follow, we affirm Brascom's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 "M.P." observed Brascom attempting to steal copper wire from Cavco, a business that sells manufactured homes. M.P.'s business is located adjacent to Cavco and separated only by a chain link fence. When M.P. first saw Brascom on Cavco property, Cavco's business hours had ended for the day and there were no Cavco employees on the premises. Brascom was crouched down using bolt cutters to cut copper wires inside a circuit breaker box located on the external frame of a manufactured home.

¶3 M.P. yelled at Brascom and, receiving no response, began throwing small rocks at him. At this point, Brascom stood up and M.P. was able to get a good look at Brascom's face. Brascom began walking quickly toward the Cavco property exit. While M.P.'s co-worker called Cavco supervisor "L.G.," M.P. jumped into his car and drove until he located Brascom walking away from the Cavco exit. M.P. passed Brascom and found Officer

"G." working nearby. M.P. explained what he had observed, described Brascom, and informed Officer G. of Brascom's current location.

¶4 Officer G. drove to intercept Brascom while M.P. waited in his car. Officer G. testified that Brascom matched M.P.'s description, and that Brascom was the only pedestrian on the sidewalk at that time. Officer G. pulled over, handcuffed Brascom, and called for back-up. Officers "R." and "W." arrived within minutes. Officer G. left Brascom with the officers and drove back to bring M.P. to the scene of the arrest. Upon arrival, M.P. immediately identified Brascom as the same person he had observed cutting wires on the Cavco property.

¶5 Officer R. then read Brascom his *Miranda* rights,¹ which Brascom said that he understood. During the subsequent interview, Brascom admitted to being on Cavco property and confessed that he had been attempting to steal copper wiring for food and money. Brascom further admitted to owning the bolt cutters that M.P. had seen, and volunteered to take the officers to them. At Brascom's direction, the police found and impounded a duffel bag filled with tools underneath the Cavco manufactured home. M.P. testified that the bolt cutters found in the duffel bag were the same color as the bolt cutters he had seen Brascom

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

using earlier that day. Brascom did not have any copper wires on his person when the police found him and, so far as the police know, Brascom did not take any wires from the Cavco property that day. However, the officers took pictures of the circuit box that showed where Brascom had been able to cut several copper wires.

¶6 The jury found Brascom guilty of burglary in the third degree and possession of burglary tools. At sentencing, the court dealt with the present case (CR2010-160471-001) and the previous case for which Brascom had violated probation (CR2010-117584-001). For the present case, the court imposed a mitigated sentence of six years for burglary in the third degree and a mitigated sentence of 2.25 years for possession of burglary tools, with 518 days of presentence incarceration credit for both counts. As to the previous case, the court revoked Brascom's probation, designated the offense a class six felony, and sentenced him to a presumptive term of one year, with 365 days of presentence incarceration credit. The court ordered all of the sentences to run concurrently. For both cases, the court ordered a term of community supervision. Brascom was ordered to pay a \$2208 fine and a \$375 probation service fee, both of which were reduced to criminal restitution orders.

¶7 Brascom filed a timely appeal. We have jurisdiction

under Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).²

STANDARD OF REVIEW

¶8 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at ¶ 20. On review, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

DISCUSSION

¶9 After careful review of the record, we find no meritorious grounds for reversal of Brascom's convictions or modification of the sentences imposed. The record reflects that

² We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

Brascom was present and represented at all critical stages of trial, the proceedings were held consistent with the Arizona Rules of Criminal Procedure, Brascom was given the opportunity to speak at sentencing, and the sentences imposed were within the ranges for Brascom's offenses. We will address the issues Brascom raised in his supplemental brief and review the evidence to confirm that it was sufficient to support the convictions.

I. APPELLANT'S ISSUES ON APPEAL

¶10 Brascom filed an *in propria persona* supplemental brief raising whether: (1) burglary is a felony; (2) evidence that a defendant was "going to" or "trying to" commit a felony is sufficient to qualify as having intent for the purposes of the burglary statutes.

¶11 Regarding the first issue, the Arizona statute clearly designates burglary in the third degree as "a class 4 felony." A.R.S. § 13-1506(B) (2010). Regarding the second issue, "intent [to commit burglary] may be inferred from all the facts and circumstances disclosed by the evidence, and need not be established by direct proof." *State v. Quatsling*, 24 Ariz. App. 105, 108, 536 P.2d 226, 229 (1975) (internal citation omitted). In other words, evidence that a defendant was "going to" or "trying to" commit a felony can support a jury's inferential finding of intent under the burglary statutes. As discussed below, there is evidence in this record to support a jury

finding that Brascom had the requisite intent to commit burglary in the third degree and possession of burglary tools.

II. SUFFICIENCY OF THE EVIDENCE

¶12 In reviewing the sufficiency of evidence at trial, “[r]eversible 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, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶13 There is evidence in the record to support Brascom’s convictions. A person commits burglary in the third degree by “[e]ntering or remaining unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein.” A.R.S. § 13-1506(A)(1). A person commits possession of burglary tools by “[p]ossessing any . . . instrument . . . intending to use . . . such an item in the commission of a burglary.” A.R.S. § 13-1505(A)(1) (2010).

¶14 The following definitions apply specifically to the burglary statutes:

2. “Enter or remain unlawfully” means an act of a person who enters or remains on premises when the person’s intent for so entering or remaining is not licensed . . . except when the entry is to commit theft of merchandise displayed for sale during normal business hours

3. “Entry” means the intrusion of any part

of any instrument or any part of a person's body inside the external boundaries of a structure

. . . .

10. "Nonresidential structure" means any structure other than a residential structure and includes a retail establishment.

11. "Residential structure" means any structure . . . that is adapted for both human residence and lodging whether occupied or not.

12. "Structure" means any vending machine or any building . . . or place with sides and a floor that is separately securable from any other structure attached to it and that is used for lodging, business . . . or storage.

A.R.S. § 13-1501 (Supp. 2012).

¶15 First, Cavco supervisor L.G. testified that Brascom was on Cavco property after normal business hours and that L.G. had never met Brascom nor given him permission to be anywhere on Cavco property. Thus, there was evidence Brascom was on Cavco property unlawfully. Second, Brascom admitted that the bolt cutters were his and that he had been trying, or intending, to use them to obtain copper wires from Cavco. Third, the record shows that Brascom in fact used his bolt cutters to unlawfully enter Cavco's circuit box, supporting any inference that Brascom had brought his bolt cutters with that intent. Fourth, the circuit box is a separately securable structure on a manufactured home that is used for commercial purposes on a

commercial lot; as such, it is "presumptively a non-residential structure." *State v. Gardella*, 156 Ariz. 340, 342, 751 P.2d 1000, 1002 (1988) (quotation marks omitted) (stating that a structure not used for residence and located within a commercial building is a nonresidential structure); see also *State v. Bass*, 184 Ariz. 543, 546, 911 P.2d 549, 552 (App. 1995) (stating that an unfinished log cabin was properly classified as a "non-residential structure" where the State "fail[ed] to offer substantial evidence that the structure was residential"). This would be consistent with the statutory definition of a structure as a "place with sides and a floor" attached to another structure and used for business or storage. See A.R.S. § 13-1501(12).

¶16 Thus, there is sufficient evidence on the record to support the jury's finding that Brascom committed both possession of burglary tools and burglary in the third degree under A.R.S. §§ 13-1505 and -1506.

CONCLUSION

¶17 For the foregoing reasons, we affirm Brascom's convictions and sentences. Upon the filing of this decision, counsel shall inform Brascom of the status of the appeal and his future appellate options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by

