

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



DIVISION ONE
FILED: 05/07/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 12-0512
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOSEPH ROBERT MIKULEWICZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-008014-001

The Honorable Lisa Daniel Flores, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Joseph Robert Mikulewicz timely appeals his conviction for burglary in the third degree, a class four felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1506. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record, found no arguable question of law, and asked that we review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Despite being given the opportunity to do so, Mikulewicz did not file a supplemental brief *in propria persona*. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied*, 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

¶2 In August 2011, A.G., the director of the Arizona Radiation Regulatory Agency ("Agency"), noticed that one of the Agency's rooftop surveillance cameras was not working. Staff reviewed the camera's footage and saw that its last recorded images were from May 1, 2011, at 4:44 a.m.; they showed a man holding a flashlight in his mouth "reach over and do something to the camera." Staff advised that the camera was damaged and had broken connections. A.G. called the police.

¶3 A Phoenix police officer responded to a dispatch call for a commercial burglary. At the scene, the officer saw the

20- to 30-foot ladder covered by a security panel that led up to the camera, but he did not inspect the camera. Because the building was in a "high-crime area," the officer gave the surveillance video to the burglary reduction program. Officers recognized Mikulewicz in the video.

¶4 Mikulewicz was charged with burglary in the third degree. A jury trial ensued. Detective Barrios testified that he questioned Mikulewicz, who admitted being near the building on May 1 around 2:00 a.m. The detective further testified that Mikulewicz said he climbed the ladder to get a view of the city and "grabbed the camera" but could "not take it" because he could not shake the camera casing loose. The surveillance video was played for the jury.

¶5 A.G. testified that he positioned the camera to "capture someone as they climbed that ladder" because there had been thefts from adjacent buildings. A Phoenix police officer and Detective Barrios also testified that criminal activity was prevalent in the area around the time the surveillance camera was damaged.

¶6 After the State rested, Mikulewicz moved for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"), arguing the State had failed to prove the camera was stolen or that he intended to steal it. The court denied the motion.

¶17 Mikulewicz testified that he rode his bike in the area on May 1 around 4:00 a.m. and saw a ladder, covered by an unlocked security panel, leading to the roof. Mikulewicz said he climbed the ladder to "see the view from on top," but the surveillance camera "spooked" him because it was "pointing directly at [his] face." He covered his face and the camera to "protect [his] face" before climbing back down the ladder. Mikulewicz denied telling Detective Barrios that he tried to take the camera or shake it loose.

¶18 The jury found Mikulewicz guilty as charged. He was sentenced to an eight-year term of incarceration, with 251 days' pre-sentence incarceration credit. This timely appeal followed.

DISCUSSION

¶19 Although Mikulewicz did not file a supplemental brief, through counsel, he has suggested four areas for our review.¹ We

¹ Mikulewicz suggests:

- The jury included persons who were victims of burglaries. See *State v. Rose*, 121 Ariz. 131, 139, 589 P.2d 5, 13 (1978) (dismissal not required simply because prospective juror was victim of crime similar to that with which defendant is charged).
- The State failed to present evidence that anything was stolen. However, that is not an element of the charged offense. See A.R.S. § 13-1506(A)(1) (burglary in the third degree is committed by entering or remaining unlawfully in or on a nonresidential structure with the intent to commit any theft or felony therein).
- The jury was not instructed regarding criminal trespass. See *State v. Kozan*, 146 Ariz. 427, 429, 706 P.2d 753, 755

have considered those issues, read the brief submitted by counsel, and reviewed the entire record. *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and was represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offense charged. The record reflects no irregularity in the deliberation process.

¶10 Viewing the evidence in the light most favorable to sustaining the verdict and resolving all reasonable inferences against the defendant, *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984), the jury had a factual and legal basis for its verdict. A person commits burglary in the third degree by entering or remaining unlawfully in or on a nonresidential structure with the intent to commit theft or any felony. A.R.S. § 13-1506(A)(1); see also *State v. Rood*, 11 Ariz. App. 102, 103, 462 P.2d 399, 400 (1969) (State must prove both entry and

(App. 1985) (criminal trespass is not a lesser-included offense of burglary in the third degree).

- The State's closing argument included facts not in evidence, i.e., that a rash of burglaries or thefts of copper pipe occurred around the same time. However, the record reveals that A.G. and police officers testified about this subject.

intent). Intent may be proven by circumstantial evidence. *Rood*, 11 Ariz. App. at 103, 462 P.2d at 400 (citations omitted).

¶11 Mikulewicz admitted climbing the ladder on the Agency building in the early morning hours of May 1 with a flashlight in his mouth. The police detective testified that Mikulewicz stated he could not take the camera because he could not shake it loose. The jury viewed the surveillance video, which depicted Mikulewicz covering his face and the camera. Based on the trial evidence, jurors could infer Mikulewicz' intent to commit a theft or other felony. To the extent Mikulewicz testified he had a different purpose in mind and never tried to take the camera, "the credibility of a witness is for the trier-of-fact, not an appellate court." *State v. Gallagher*, 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991).

CONCLUSION

¶12 We affirm Mikulewicz's conviction and sentence. Counsel's obligations pertaining to Mikulewicz's representation in this appeal have ended. Counsel need do nothing more than inform Mikulewicz of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Mikulewicz shall have 30 days from the date of this decision to proceed, if he

