

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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STATE OF ARIZONA, *Appellee*,

*v.*

JOSEPH MICHAEL BAY, *Appellant*.

No. 1 CA-CR 16-0648  
FILED 7-6-2017

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Appeal from the Superior Court in Maricopa County  
No. CR2015-155983-001  
The Honorable Mark H. Brain, Judge

**AFFIRMED AS CORRECTED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Joseph T. Maziarz  
*Counsel for Appellee*

The Law Office of Kyle T. Green, P.L.L.C., Tempe  
By Kyle Green  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jennifer B. Campbell joined.

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**NORRIS**, Judge:

¶1 Joseph M. Bay timely appeals from his conviction and sentence for burglary, a class four felony under Arizona Revised Statutes (“A.R.S.”) section 13-1506 (2010). After searching the record on appeal and finding no arguable question of law that was not frivolous, Bay’s counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel’s motion to allow Bay to file a supplemental brief *in propria persona*, but Bay did not do so. After reviewing the entire record, we find no fundamental error and, therefore, affirm Bay’s conviction and sentence as corrected.

**FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>**

¶2 On the evening of December 8, 2015, a man wearing a black hooded sweatshirt and a backpack walked into a Chandler, Arizona drugstore. C.Z., the store’s manager, was working a register opposite a cashier who was working on another register. C.Z. saw the man grab an empty shopping basket and go behind the cashier’s register into an area where the drugstore stored excess cartons of cigarettes. The man walked from behind the register with the basket, holding cigarette cartons, and headed toward the back of the store, out of the view of C.Z. and of the store’s surveillance cameras, before turning around and heading toward the exit. C.Z. noticed the man no longer had the basket when he left the store and the cashier alerted C.Z. that the man was walking out with cartons of cigarettes.

¶3 C.Z. followed the man out the door into the parking lot to see if he could get the man’s license plate or direction of travel. C.Z. saw the man outside and said, “bring the cigarettes back and we won’t call the

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<sup>1</sup>We view the facts in the light most favorable to sustaining the jury’s verdict and resolve all reasonable inferences against Bay. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

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police.” The man turned to look at him before hurrying across the road towards a park. C.Z. called 911 and described the incident, the man, and told the 911 operator where the man was heading until he lost sight of the man.

¶4 Officers S.F., A.H., and R.A. were dispatched toward the park in response to the call. Officer S.F. positioned himself at the north end of a pedestrian path running along a canal adjacent to the park. Officer S.F. saw the man heading north along the path being pursued by Officer A.H. The man attempted to escape the officers by running up an embankment toward the park, but officer A.H. cut off his escape. When the man saw he “had nowhere else to go” he turned around, ran back down the embankment, and jumped into the canal. As soon as the man hit the water, Officer A.H. saw three cartons of cigarettes float out of the man’s backpack.

¶5 Officer A.H. recovered the cigarettes while Officer S.F., joined by Officer R.A., chased Bay. They eventually caught up to him and handcuffed him.

¶6 At trial, C.Z. and Officers S.F., A.H., and R.A. testified to the foregoing facts. Each identified Bay as the man they had seen that night. The jury found Bay guilty of burglary. *See supra* ¶ 1.

¶7 During the aggravation phase of the trial, Bay’s probation officer, M.H., testified Bay was on probation for three separate felony case convictions on December 8, 2015. Based on the evidence, the jury found Bay was on probation for a felony offense at the time he committed the burglary. *See generally*, A.R.S. § 13-708 (Supp. 2016).<sup>2</sup>

¶8 At the sentencing hearing, the superior court found Bay had three historical prior felony convictions.<sup>3</sup> As a category three repetitive

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<sup>2</sup>The Legislature has not materially amended the statutes cited in this decision after the date of Bay’s offense. Thus, we cite to the current version of the statutes.

<sup>3</sup>The court found Bay had prior felony convictions for: the offense of burglary, a class 4 felony committed on October 24, 2010 and convicted on December 14, 2012; the offense of burglary, a class 4 felony committed on February 8, 2012 and convicted on December 14, 2012; and the offense of robbery, a class 4 felony committed on March 22, 2012 and March 29, 2012, and convicted on December 14, 2012. *See generally* A.R.S. § 13-105(22)(a)(i) (Supp. 2016).

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offender, the court sentenced Bay to the presumptive term of 10 years' imprisonment with 279 days of presentence incarceration credit.

**DISCUSSION**

¶9 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Bay received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages or, when not present, waived his right to be present through counsel.

¶10 The evidence presented at trial was substantial and supports the verdicts. The jury was properly comprised of eight members and the court properly instructed the jury on the elements of the charge, Bay's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Bay was given an opportunity to speak at sentencing and did so, and his sentence was within the range of acceptable sentences for his offense.

¶11 The sentencing minute entry contains one error concerning the sentence imposed by the court. The sentencing minute entry states the superior court sentenced Bay pursuant to A.R.S. § 13-702 (2010). The superior court sentenced Bay pursuant to A.R.S. § 13-703(C), (J) (Supp. 2016), however. We therefore correct the sentencing minute entry by deleting the reference to A.R.S. § 13-702 and adding a reference to A.R.S. § 13-703(C), (J).

**CONCLUSION**

¶12 We decline to order briefing and affirm Bay's conviction and sentence as corrected.

¶13 After the filing of this decision, defense counsel's obligations pertaining to Bay's representation in this appeal have ended. Defense counsel need do no more than inform Bay of the outcome of this appeal and his future options, unless, upon review, counsel finds 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).

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¶14 Bay has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Bay 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.



AMY M. WOOD • Clerk of the Court  
FILED: AA