

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

STATE OF ARIZONA, *Appellee*,

v.

DANIEL ORLANDO ESCALANTE, *Appellant*.

No. 1 CA-CR 18-0161
FILED 11-15-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-112986-001
The Honorable Erin Otis, Judge

AFFIRMED, IN PART; VACATED, IN PART

COUNSEL

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

Maricopa County Public Defender's Office, Phoenix
By Mark E. Dwyer
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Peter B. Swann joined.

P E R K I N S, Judge:

¶1 Daniel Escalante appeals his conviction and sentence for burglary in the third degree, a class four felony. After searching the entire record, Escalante's counsel identified no arguable, non-frivolous questions of law and requested this Court search the record for fundamental error. *See Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297 (1969). Escalante was given the opportunity to file a supplemental brief *in propria persona* but chose not to. We have reviewed the record and briefs and found an erroneous order requiring Escalante to pay the costs of DNA testing but no other error. Accordingly, Escalante's conviction and resulting sentence are affirmed. However, we vacate the portion of the sentencing order requiring Escalante to pay for DNA testing.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Early one morning in the spring of 2016, Escalante and an unknown second person used a car jack handle to break into a convenience store in Phoenix. A witness, N.M., arrived in his car before Escalante and the other person left the store. N.M. later testified that one of the men, subsequently identified as Escalante, cut himself on the glass door as he exited the store. N.M. phoned the police and Escalante left the area. The unknown individual left in a vehicle. Police officers arrived at the store, spoke to N.M., and began searching for an individual matching N.M.'s description of Escalante. Police located Escalante on foot approximately three blocks from the store wearing the clothing described by N.M. Police then detained, searched, and eventually showed Escalante to N.M., from a distance, for a one on one identification. N.M. positively identified Escalante as the individual he had seen leaving the store.

¶3 A police officer at the store observed a glass front door with a large hole in it, blood on the floor of the store, and blood on a box of cigarettes. At trial, the officer described seeing beer and cigarette containers littering the store. Officers contacted the store's owner, who provided them with surveillance footage from the store that showed Escalante and another

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man forcing their way inside before taking beer and cigarettes from the store. Based on the evidence at the scene, N.M.'s identification of Escalante, cuts on Escalante's face, and the presence of unexplained glass in the back of the patrol car Escalante was placed in, officers arrested Escalante and booked him into custody.

¶4 The State charged Escalante with third degree burglary and he was released on bond. Escalante did not appear at his trial. During Escalante's trial, N.M. testified to happening upon the burglary, calling the police, and identifying Escalante. The store's owner, S., testified that he had sixteen working cameras at the store and that at least four of them had footage of the burglary. S. provided the State with surveillance footage, which he explained to the jury during Escalante's trial. The officers testified that they had responded to the store and located Escalante.

¶5 The jury found Escalante guilty as charged, in absentia. The State alleged multiple aggravating factors, but never held a separate sentencing trial once Escalante was in custody. Instead, Escalante voluntarily admitted to two prior felonies, one of the aggravating factors the State initially alleged. The State did not allege any additional aggravating factors at sentencing. The court sentenced Escalante to a slightly mitigated sentence of 8 years for burglary in the third degree, to be served concurrently with the sentence imposed in a plea deal on unrelated charges not at issue in this appeal. The court further ordered restitution including a requirement that Escalante pay for DNA testing costs.

DISCUSSION

¶6 On appeal, we view the facts, as reflected in the record, in the light most favorable to sustaining the convictions. *State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 3 (App. 2015). Our review reveals no reversible error, however, the court erred in its orders imposing fines, as discussed below. *See Leon*, 104 Ariz. at 300–01 (describing our *Anders* review process). An individual is guilty of burglary in the third degree if, as relevant here, the individual: (1) enters a nonresidential structure (2) with intent to commit any theft therein. *See Ariz. Rev. Stat. ("A.R.S.") § 13-1506(A)(1)* (2018). The record reveals sufficient evidence upon which the jury could determine, beyond a reasonable doubt, that Escalante is guilty of the charged offense. The record further reflects that all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, that Escalante was represented by counsel at all stages of the proceedings, and that Escalante was either present at, or had voluntarily absented himself from, all critical stages, including the entire trial and verdict. *See State v. Conner*,

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163 Ariz. 97, 104 (1990) (right to counsel); *State v. Bohn*, 116 Ariz. 500, 503 (1977) (right to be present at critical stages). Though Escalante had voluntarily absented himself from trial, he was present for sentencing. The jury was properly composed of eight jurors and the record shows no evidence of jury misconduct. *See A.R.S. § 21-102(B)* (2018); Ariz. R. Crim. P. 18.1(a). The court properly instructed the jury on the elements of the charged offense, the State's burden of proof, and Escalante's presumption of innocence. At sentencing, Escalante had the opportunity to speak and the court stated, on the record, the factors it considered in imposing the sentence. Ariz. R. Crim. P. 26.9, 26.10. The sentence imposed was within the statutory limits. *See A.R.S. §§ 13-701 to -709*.

¶7 Nevertheless, the trial court erred in imposing certain fines as part of Escalante's sentence. Specifically, the trial court ordered Escalante to pay "for any DNA testing costs." This was error. *See State v. Reyes*, 232 Ariz. 468, 472, ¶¶ 13–14 (App. 2013) (explaining that a DNA testing fee is not a fine under A.R.S. § 13-801 or otherwise authorized under A.R.S. § 13-610 and thus in excess of the trial court's sentencing authority). Consequently, we vacate those portions of Escalante's sentence pertaining to any order requiring him to pay for his DNA testing. *Id.* at ¶ 14.

CONCLUSION

¶8 This Court has read and considered counsel's brief, searched the record provided for reversible error, and has found no arguable issue. *State v. Clark*, 196 Ariz. 530, 538, ¶ 36 (App. 1999) (in an *Anders* appeal, "the court itself reviews the record for reversible error"). Accordingly, Escalante's conviction and resulting sentence is affirmed, but, we vacate the portion of the sentencing order requiring Escalante to pay for his DNA testing.

¶9 Upon filing of this decision, defense counsel is directed to inform Escalante of the status of the appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584–85 (1984). Escalante shall have 30 days from the date of this decision to

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proceed, if he desires, with an *in propria persona* motion for reconsideration or petition for review.



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