DIVISION ONE
FILED: 01-05-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0072
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
MELVIN MILES, JR.,	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-146295-001 DT

The Honorable Rosa Mroz, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

Melvin Miles, Jr. — Walsenburg, CO
Appellant

W I N T H R O P, Judge

¶1 Melvin Miles, Jr. ("Appellant") appeals his convictions and sentences for attempted robbery and burglary in

the third degree. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record on appeal and found no arguable question of law. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). This court afforded Appellant the opportunity to file a supplemental brief *in propia persona*, and he has done so.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 12-4033(A) (Supp. 2008). Finding no reversible error, we affirm Appellant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY[1]

¶3 On July 23, 2008, around 7:30 p.m., police officers patrolling the area of 19th Street and Van Buren, in Phoenix, noticed an illegally parked car. The officers drove up behind the car and watched as a woman emerged from the car, pulling a

[1] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

rolling suitcase. The driver of the car sat alone in the front seat, and a person in the back seat was moving his head back and forth violently, as if "head-banging, to rock music."

¶4 The car slowly began moving, and the officers followed as it turned onto Van Buren and then into a convenience store parking lot. Officer Ayala, the officer driving the police car, activated his overhead lights, at which point the rear passenger got out of the car and "jogged" into the convenience store.

¶5 Officer Ayala approached the driver of the car, while Officer Hughes went into the store to find the man who left the car. The driver, the victim, appeared nervous and was shaking as he fumbled for his driver's license. Eventually, he acknowledged that he was in the area to pick up a particular prostitute.

¶6 At trial, the victim testified that he had been in the area searching for a prostitute named "Cookie." While driving around with his window open, Appellant approached the car and offered to "take care" of him. Appellant brought Cookie to the victim's car, the victim invited Cookie to sit in the front passenger seat, and Appellant opened the back door and sat, uninvited, behind the driver's seat. The victim asked Appellant to get out of the car, but Appellant refused and demanded money. When the victim refused to comply, Appellant began choking him from the back seat. He stopped choking the victim when the

police drove by, at which point he instructed the victim to drive into the parking lot of the convenience store.

¶7 When questioned, Appellant told police that Cookie had invited him into the car and that the victim was giving him a ride to the convenience store.

¶8 Appellant was indicted and charged with one count of attempted robbery, a class five felony, in violation of A.R.S. §§ 13-1001 (2001) and 13-1902 (2001), and one count of burglary, a class four felony, in violation of A.R.S. § 13-1506 (Supp. 2008).[2] The State alleged aggravating factors and prior felony convictions. An eight-member jury found Appellant guilty as charged, and the State withdrew the allegation of aggravating factors. Before sentencing, Appellant admitted to six prior felony convictions and the court sentenced him to concurrent sentences of six years for the attempted robbery conviction and eleven years for the burglary conviction. Appellant filed a timely notice of appeal.

ANALYSIS

¶9 Appellant filed a supplemental brief raising five issues, which we address in turn. We review questions of law and whether a jury instruction properly states the law *de novo*, *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997)

[2] We cite the current version of statutes in which no revisions material to this decision have since occurred.

(jury instructions); *Arizona Water Co. v. Arizona Corp. Comm'n*, 217 Ariz. 652, 655-56, ¶ 10, 177 P.3d 1224, 1227-28 (App. 2008) (questions of law), and we review evidentiary issues for an abuse of discretion. St*ate v. Blakley*, 204 Ariz. 429, 437, ¶ 34, 65 P.3d 77, 85 (2003).

A. Denial of Motion for Acquittal

¶10 Appellant argues that the trial court erred in denying his motion for judgment of acquittal, since "the state produced no evidence of intent" as required on the burglary charge. *See* Ariz. R. Crim. P. 20. A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." *Id.* "Substantial evidence" is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted).

¶11 The crime of burglary in the third degree requires proof of two elements: (1) the Appellant entered or remained unlawfully in or on a nonresidential structure; and (2) the Appellant did so with the intent to commit any theft therein. A.R.S. § 13-1506. Failure to prove either element negates a conviction, and the existence of intent is a question of fact for the jury. *See State v. Salcido*, 12 Ariz. App. 275, 276, 469 P.2d 841, 842 (1970).

¶12 In this case, the victim testified that Appellant entered the victim's vehicle,[3] demanded money from him, and began choking him when he did not comply. This testimony and the testimony of the police officers who were on the scene constitute substantial evidence from which a jury could infer that Appellant entered the victim's car with an intent to steal. We therefore find no reversible error with regard to the trial court's denial of Appellant's Motion for Judgment of Acquittal.

B. Jury Instruction on "Intent" Element of Burglary

¶13 Appellant further argues that the jury instructions failed to impress upon the jury that, for Appellant to be found guilty of attempted burglary, he had to have formed the requisite intent prior to or simultaneous to entering the nonresidential structure in question, and were therefore vague and improper.

¶14 The jury instructions defined "with the intent to" as meaning that "a person's objective is to cause that result or to engage in that conduct." This definition corresponds with the definition of "intentionally" or "with intent to" in the Revised Arizona Jury Instructions ("RAJI") Standard Criminal 3. Although the fact that this is a RAJI definition is not determinative, it is persuasive.

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[3] A vehicle qualifies as a "nonresidential structure" under Arizona law. *See State v. Harris*, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App. 1982).

¶15 More important, though, read together, the definition of "with intent to" and A.R.S. § 13-1506,[4] lead to the logical conclusion that, for a burglary to occur, the Appellant had to have been in the process or already formed the intent to commit a theft within the structure. *See Bentley v. Building Our Future*, 217 Ariz. 265, 270, ¶ 13, 172 P.3d 860, 865 (App. 2007) (when statutory language is unambiguous, we apply the plain language without resorting to other methods of statutory interpretation). Stated differently, the instructions required the jury to find that Appellant entered the victim's car with the intent to commit a theft. The clear implication of this language is that the Appellant had already formed his intent to steal or was simultaneously forming his intent. As discussed above, whether intent existed, then, is a jury determination.

¶16 We find no reversible error with respect to the "intent" definition of the jury instructions and its application to the burglary charge.

C. Court's Response to Juror Question

¶17 Next, Appellant argues that the trial court erred when it instructed the jury to continue deliberations after the jury submitted a question asking, "What do we do if we cannot agree?"

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[4] The jury instruction for burglary in the third degree corresponds with A.R.S. § 13-1506 and required the jury to find two things: (1) the Appellant entered or remained unlawfully in or on a nonresidential structure; and (2) the Appellant did so **with the intent** to commit any theft therein.

Appellant asserts that the jury's question was an indication that "they had made their own decisions, and they did not know how to apply it on a verdict form that only gave two options[.]" We disagree. The jury's question simply asked what the jury was to do in the event they were unable to unanimously agree. Their question did not indicate that the jury was finished deliberating or that they had failed to reach an agreement. Thus, it was not fundamental error for the court, after conferring with counsel for both parties, to respond with the impasse instruction that it did and to refer them to the instruction regarding how to treat separate counts.

D. Prosecutorial Misconduct

¶18 Appellant argues that prosecutorial misconduct during the State's closing rebuttal denied Appellant a fair trial. We have reviewed the prosecutor's closing statements in their entirety and in context and find no prosecutorial misconduct, let alone fundamental error.

E. Perjured Testimony

¶19 Finally, Appellant argues that inconsistencies in the victim's statements to police and at trial constituted perjured testimony that prejudiced Appellant, denying him a fair trial. Our review of the record reveals no evidence of perjury or that the prosecutor knew of any potential perjury. Any inconsistencies in the victim's testimony presented a

credibility determination for the jury. The jury, as trier of fact, is responsible for assessing the credibility of witnesses, and we defer to the jury's credibility determination because of its presence in the courtroom and proximity to the witnesses. *State v. Uriarte*, 194 Ariz. 275, 283, ¶¶ 41-44, 981 P.2d 575, 583 (App. 1998).

F. Remaining Analysis

¶20 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶21 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

CONCLUSION

¶22 Appellant's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PETER B. SWANN, Presiding Judge

_____/S/_____
MICHAEL J. BROWN, Judge