DIVISION ONE
FILED: 03-16-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. RAYMOND EUGENE BAKER, Appellant.	)	1 CA-CR 09-0222 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-109158-001 SE

The Honorable Silvia R. Arellano, Judge

AFFIRMED AS MODIFIED

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

James J. Haas, Maricopa County Public Defender — Phoenix
by Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Raymond Eugene Baker ("Defendant") appeals from his conviction for burglary in the second degree and the sentence imposed. For reasons that follow, we affirm as modified.

FACTS AND PROCEDURAL HISTORY

¶2 The State charged Defendant with burglary in the second degree, a class 3 felony. The State alleged that Defendant had four historical prior felony convictions and committed the instant offense while on probation. It further alleged aggravating circumstances other than prior convictions. The following evidence was presented at trial.

¶3 On December 14, 2007, a house in Mesa in which three young women resided was burglarized. After one victim came home from work and found the garage door open, the door into the house unlocked, a window screen in the living room, and the house in disarray, she called the police. Numerous items were missing, including a laptop computer, camera, Ipod and dock, jackets, pearl necklaces, purses, liquor, tools and a large scrapbooking case. Another victim testified that they made "extensive lists" of missing things and that "volume-wise," the number of items couldn’t be carried out at one time by one person.

¶4 A Mesa police officer responded to the call. He observed the screen off the right front window and determined that the burglar might have entered through it. He called a

crime scene technician to process the scene. The technician collected ten latent fingerprints, four from the front living room window where the screen was removed and six from the metal frame of the window screen. He submitted them to a latent print examiner.

¶5 The police developed information through the latent prints taken at the scene connecting Defendant to the crime. An officer contacted the victims to determine if they knew Defendant. They all indicated they did not. Subsequently, the officer arrested Defendant. She interviewed him and showed him a map of the house and the area. Defendant said he was not familiar with the area, had never been to the house, did not know the occupants and was not involved in the burglary.

¶6 A forensic latent print examiner compared two latent prints lifted from the window screen with known fingerprints from Defendant. One latent print matched a fingerprint of Defendant's right little finger. He also used a computerized system to verify his result. The print examiner testified that he was "one hundred percent sure" that the fingerprint lifted from the window screen was Defendant's fingerprint.

¶7 Defendant presented an alibi defense through his former girlfriend. She testified that on December 14, 2007, they were living together, that both were sick and that she

spent the entire day at home with Defendant. She said Defendant was unemployed, but helped a friend distribute advertising flyer

¶8 The jury found Defendant guilty as charged. The jury also found the State proved four aggravating factors: the offenses involved multiple victims in a single incident; Defendant had prior felony and/or misdemeanor convictions; Defendant was on probation at the time of the offense; and there was a similarity between the current offense and an offense for which Defendant had been imprisoned. At sentencing, the court found that the aggravating factors outweighed the mitigating factors and imposed an aggravated twelve-year sentence, with 188 days of presentence incarceration credit. Defendant timely appealed.

DISCUSSION

¶9 On appeal, Defendant claims the trial court abused its discretion in giving the standard jury instruction on "absence of other participant." He argues there was no evidence to support it because nothing indicated another person was involved in the crime. *See State v. Cannon,* 148 Ariz. 72, 80, 713 P.2d 273, 281 (1985)(this instruction appropriate if the evidence shows another person or persons were involved in commission of a crime other than defendant). He contends the instruction confused and misled the jury, was "tantamount to a comment on the evidence," and was an incorrect statement of the law.

¶10 During cross-examination, defense counsel asked the crime scene technician if he took any prints from the bedrooms, drawers, door handles, garage door or any other flat surfaces and whether he examined the premises for trace evidence such as hair or bodily fluids. The technician testified that he did not. He further testified that he was not specifically looking for that evidence, was told to process the windows and window screen and smooth surfaces only and that as to the garage door, an officer told him he was not required to process it.

¶11 After this witness testified, the prosecutor advised the court that "based on [defense counsel's] questions," he was requesting the standard jury instruction on "absence of other participants."[1] Initially, defense counsel had no objection. Later, however, he objected because there was no evidence that another person or persons might have participated in the burglary. He also argued that it would "serve to confuse the jurors in a sense that it is appropriate for them to guess who these other-–who these other prints may have belonged to, and

[1]The absence of other participant jury instruction reads:

> The only matter for you to determine is whether the State has proved the defendant guilty beyond a reasonable doubt. The defendant's guilt or innocence is not affected by the fact that another person or persons might have participated or cooperated in the crime and is not now on trial. You should not guess about the reason any other person is absent from the courtroom.

that's--that fact that they've not been tested or identified is something appropriate for them to consider."

¶12 The prosecutor responded that he did not anticipate defense counsel's questions and responses indicating "that there could have been more than one, or that there were other people involved in this . . . and that's based on the fact that they're bringing out all these other prints, and that the victim testified . . . that it is more than typically one person can hold in an arm, and I think that is left now in their minds, and this is a question that needs to be answered for them." The judge ruled that the jury could be given this instruction. Defense counsel then requested and the court granted a mere presence instruction.

¶13 Later, defense counsel cross-examined the forensic latent print examiner about why he did not look for matches in the eight other latent fingerprints given to him. Counsel also asked the witness about the other fingerprint that he ran through the computerized system and the witness said he did not know whose fingerprint it was, but "presumably," it was not Defendant's print.

¶14 During closing arguments, defense counsel emphasized that "the crime scene technician, focused only on the screen and a window, and then this print that supposedly came from this screen comes back to [Defendant]." He told the jury that the

forensic latent print examiner determined that one print matched Defendant's print, but did not determine if "there's another print that belongs to somebody else. Well, who does that belong to?" He continued, "[a]nd then, unbelievably, he doesn't even care to run the other eight prints . . . it doesn't matter to him about who else touched this screen . . . it doesn't matter whose prints are in the house . . . it doesn't matter who may of [sic] touched anything . . . what lead might they've gotten? Somebody who might of [sic] admitted that they've done this, whoever did it." He then asked rhetorically, "whose prints were in the house? Who else's prints were on that screen? Whose [sic] were those other eight people on the screen on the window?" At the close of evidence, the jury was given the requested instructed.

¶15 We review the trial court's decision to give a jury instruction for an abuse of discretion. *State v. Bolton,* 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). "The purpose of jury instructions is to inform the jury of the applicable law." *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). Although the instructions "need not be faultless," they must not mislead the jury and must provide an understanding of the issues. *Id.* "It is only when the instructions taken as a whole are such that it is reasonable to suppose the jury would be misled that a case should be reversed for error" in the

instructions. *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986). "Mere speculation that the jury was confused is insufficient to establish actual jury confusion." *State v. Gallegos,* 178 Ariz. 1, 11, 870 P.2d 1097, 1107, (1994). "In evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel." *State v. Johnson*, 205 Ariz. 413, 417, ¶ 11, 72 P.3d 343, 347 (App. 2003).

¶16 Here, the State elicited testimony from one of the victims that many items were missing, some of them large, and that one person could not carry them all out at one time. Defendant cross-examined the crime scene technician extensively about why he did not attempt to take latent prints from other areas in the house or garage to determine whether there were prints belonging to someone other than Defendant. He also cross-examined the forensic latent print examiner about why he did not attempt to match the other eight prints. During closing argument, counsel suggested to the jury that there were fingerprints in the house belonging to someone other than Defendant.

¶17 Defense counsel was advancing a theory that the alleged shoddiness of the State's investigation in failing to obtain other fingerprint evidence raised a reasonable doubt about Defendant's guilt. In doing so, however, he created an

inference that others may have committed or participated in the burglary. This inference, together with evidence that many items were taken from the house; the finding of multiple fingerprints on the window screen and on the window; and the finding of Defendant's fingerprint on the window screen could have led the jury to believe that another person or persons participated in the commission of the offense. Based on this circumstantial evidence, the "absence of other participant" instruction was proper. *See State v. Shumway,* 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983) ("A party is entitled to an instruction any theory of the case reasonably supported by the evidence."). *See also State v. Marlow,* 163 Ariz. 65, 69, 786 P.2d 395, 399 (1989) (when no direct evidence showed that co-defendant murdered victim, but a cigarette package with his fingerprint was inexplicably found near the victim's body, there was inference and jury might believe that he killed the victim with defendant's help and State was entitled to accomplice instruction). Further, our supreme court has held that this instruction "should not be excluded based upon a theory that someone else committed the crime." *State v. Walton,* 159 Ariz. 571, 583, 769 P.2d 1017, 1029 (1989); *See also Cannon,* 148 Ariz. at 80, 713 P.2d at 281 (absence of other participant instruction proper even though defendant claimed he was not present at the crime scene and did not commit the robbery).

¶18 The instruction was a correct statement of the law and did not constitute a comment on the evidence. Further, we fail to see how the instruction was confusing or misleading to the jury on any issue before it. It simply informed the jury that it was only to consider Defendant's guilt or innocence and was not to speculate about whether someone else might have been involved in the crime. The trial court did not abuse its discretion in giving this instruction.

¶19 Although Defendant did not raise this issue on appeal, our review of the record reveals that during the aggravation phase of the trial, the jury found that Defendant had more than two prior felony convictions. At sentencing, the judge stated that the jury found "at least two historical priors." In imposing an aggravated twelve-year sentence, the judge relied on this finding and used the priors to enhance Defendant's sentence. The minute entry, however, incorrectly states that the offense is non-dangerous and "non-repetitive."

¶20 Where there is a discrepancy between the oral pronouncement of sentence and the sentencing minute entry, the oral pronouncement controls; if the discrepancy can be resolved by reference to the record, this court can correct the minute entry without a remand for resentencing. *State v. Bowles,* 173 Ariz. 214, 215-16, 841 P.2d 209, 210-11 (App. 1992); *State v. Hanson,* 138 Ariz. 296, 304, 674 P.2d 850, 858 (App. 1983).

Therefore, we correct the sentencing minute entry dated March 9, 2009, to reflect that Defendant's conviction for burglary in the second degree, a class 3 felony, with two historical prior felony convictions, is non-dangerous, but repetitive pursuant to A.R.S. § 13-604.

CONCLUSION

¶21 For the forgoing reasons, we affirm Defendant's conviction and sentence as modified.

/S/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

_/S/_____
PHILIP HALL, Presiding Judge

_/S/_____
JOHN C. GEMMILL, Judge