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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



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FILED: 02/17/11  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: DLL

STATE OF ARIZONA, ) 1 CA-CR 09-0628  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 111, Rules of the  
DAVID WAYNE TAYLOR, ) Arizona Supreme Court)  
)  
Appellant. )  
\_\_\_\_\_)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-176688-001 DT

The Honorable Robert L. Gottsfield, Judge

**AFFIRMED**

Thomas C. Horne, Attorney General Phoenix  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Jeffrey L. Sparks, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
by Joel M. Glynn, Deputy Public Defender  
Attorneys for Appellant

P O R T L E Y, Judge

¶1 David Wayne Taylor ("Defendant") appeals from his conviction for possession of burglary tools. For the following reasons, we affirm.

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

¶2 While surveilling an East Phoenix apartment complex in an unmarked police vehicle on February 6, 2007, Officer Brill noticed Defendant driving a gray Dodge truck. Officer Brill ran the license plate and learned that the vehicle was recently stolen. He radioed for support and pursued Defendant with the assistance of other officers, who were driving both unmarked and marked police vehicles.

¶3 Defendant began driving aggressively, and stopped the vehicle in the parking lot of an apartment complex. He and his passenger ran away from the truck. Both were quickly apprehended.

¶4 Officer Brill found a "black nylon zippered bag" that contained crack cocaine inside the truck. He also noticed that the truck's ignition was damaged, and a non-factory key, which in his opinion resembled a "manipulation key," was in the vehicle's ignition. When Officer Tennyson asked about the key,

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<sup>1</sup> "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

Defendant replied "when you're high on dope, you don't pay attention to things like that."

¶15 Defendant was charged with theft of means of transportation, possession of burglary tools, and possession of a narcotic drug. At trial, Defendant testified that he was unaware the truck was stolen and that he did not notice the damaged ignition. He believed that both the truck and the cocaine belonged to his passenger, who had allowed him to drive. He also testified that he fled because his passenger was a prostitute and had drugs.

¶16 The jury found Defendant guilty on all three counts. He then admitted to being on release at the time of the incident and having two prior historical felonies. He received concurrent sentences of 11.25 years for the theft of means of transportation, ten years for the possession of narcotics, and 3.75 years for possession of burglary tools. Defendant only challenges his conviction and sentence for possession of burglary tools. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(4) (2010).<sup>2</sup>

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<sup>2</sup> We cite the current version of a statute unless there has been a material revision.

## DISCUSSION

¶7 Defendant argues that the instruction on possession of burglary tools was improper. Specifically, he argues that the instruction misstated the law because it did not define the elements of burglary. We disagree.

¶8 Because he did not object to the instruction, we will only review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Defendant, therefore, bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶9 We review whether jury instructions accurately state the law de novo. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). The instructions, viewed as whole, must provide the jury with an accurate statement of the law. *State v. Rios*, 217 Ariz. 249, 250, ¶ 5, 172 P.3d 844, 845 (App. 2007); *State v. Cox*, 217 Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007); *see State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989).

¶10 Section 13-1505 (2010) defines the offense of "possession of burglary tools" as follows:

- A. A person commits possession of burglary tools by:
  1. Possessing any explosive, tool, instrument or other article

adapted or commonly used for committing any form of burglary as defined in sections 13-1506, 13-1507 and 13-1508 and intending to use or permit the use of such an item in the commission of a burglary.

2. Buying, selling, transferring, possessing or using a motor vehicle manipulation key or master key.

B. Subsection A, paragraph 2 of this section does not apply to a person who either:

. . . .

2. Transfers, possesses or uses no more than one manipulation key, unless the manipulation key is transferred, possessed or used with the intent to commit any theft or felony.<sup>3</sup>

¶11 Expressed differently, § 13-1505 creates a single offense – “possession of burglary tools” – with multiple means to satisfy the *actus reus* requirement. See *State v. Manzandeo*, 210 Ariz. 292, 294, ¶¶ 7-9, 110 P.3d 1026, 1028 (App. 2005) (discussing the difference between separate offenses and a single offense that may be violated through various actions). A person, therefore, commits the offense of “possession of burglary tools” by either: (1) possessing any “article adapted

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<sup>3</sup> A “manipulation key” is “a key, device or instrument, other than a key that is designed to operate a specific lock, that can be variably positioned and manipulated in a vehicle keyway to operate a lock or cylinder, including a wiggle key, jiggle key or rocker key.” A.R.S. § 13-1501(8) (2010).

or commonly used for committing any form of burglary . . . and intending to use . . . such item in the commission of a burglary," or (2) "buying, selling, transferring, possessing or using a motor vehicle manipulation key or master key." A.R.S. § 13-1505(A)(1)-(2).

¶12 Here, the Defendant was indicted for violating § 13-1505(A)(2) – "possessing or using a motor vehicle manipulation key" – and the evidence introduced at trial concerned that definition.<sup>4</sup> Prior to closing arguments, the trial court read the final instructions to the jury. The court's oral instruction accurately described "possession of burglary tools" as defined by § 13-1505(A)(2).<sup>5</sup> Because § 13-1505(A)(1) was not implicated, the trial court was not required to instruct the jury on the definition of burglary. The court's oral

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<sup>4</sup> The State concedes that the evidence introduced at trial established that Defendant possessed only one manipulation key. The State, therefore, was required to prove that Defendant possessed the manipulation key with the intent to commit any theft or felony. A.R.S. § 13-1505(A)(2), (B)(2).

<sup>5</sup> The oral instruction provided:

The crime of burglary tools requires proof of the following: One, Possessing or using a motor vehicle manipulation key; two, with the intent to commit any theft. Manipulation Key means a key, device or instrument other than a key that is designed to operate a specific lock that can be variably positioned and manipulated in a vehicle key way to operate a lock or cylinder, including a wiggle key, jiggle key or rocker key.

instruction, therefore, correctly stated the law and did not constitute an error.

¶13 The written instruction that was provided to the jury, however, read:

The crime of possession of burglary tools requires proof of the following:

1. Possessing any tool, instrument or other article adapted or commonly used for committing a burglary, such as a motor vehicle manipulation key; and
2. Intending to use or permit the use of such an item in the commission of a burglary.

¶14 During deliberation, the jury requested a written instruction on the definition of burglary. The trial court then realized that its written instruction for possession of burglary tools was incorrect and provided the jury with a corrected instruction that matched the prior oral instruction.<sup>6</sup>

¶15 Although the trial court's original written instruction misstated the law, the court corrected its error by providing the jury with an accurate instruction prior to the verdict. *State v. Ramirez*, 178 Ariz. 116, 126, 871 P.2d 237,

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<sup>6</sup> Although the trial court's oral or revised written instruction did not define theft, the jury was instructed on theft of means of transportation pursuant to A.R.S. § 13-1814 (2010), and the State, during closing arguments, indicated that if the jury found defendant guilty of using the manipulation key to steal the vehicle, then it satisfied the theft requirement of possession of burglary tools. See *Bruggeman*, 161 Ariz. at 510, 779 P.2d at 825 ("Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions.").

247 (1994) (holding that the trial court has a duty to clarify jury confusion when the earlier instructions are inadequate); *State v. Govan*, 154 Ariz. 611, 613, 744 P.2d 712, 714 (App. 1987) (“[I]f it appears that a mistake or oversight needs to be corrected, the court may send the jury back for further deliberations with additional instructions before receiving its determination as a verdict.”). Additionally, the jury indicated, upon questioning from the trial court and before the verdict was read, that it understood the revised instruction. We presume that the jury followed the corrected instruction. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). Defendant, therefore, has failed to prove fundamental error.

**CONCLUSION**

¶16 Based on the foregoing, we affirm Defendant’s conviction and sentence.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

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PETER B. SWANN, Presiding Judge

/s/

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PATRICK IRVINE, Judge