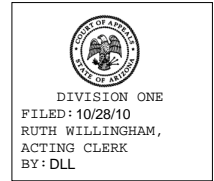


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 09-0979
)
Appellee,) DEPARTMENT A
)
v.) MEMORANDUM DECISION
)
JOSE AUDELO,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-468211-001 SE

The Honorable Emmet J. Ronan, Judge

AFFIRMED AS MODIFIED

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

Stephen R. Collins, Deputy Public Defender Phoenix
Attorney for Appellant

B A R K E R, Judge

¶1 Jose Audelo appeals from his convictions and sentences for third degree burglary, a class four felony, and criminal damage, a class two misdemeanor. Audelo was sentenced on December 15, 2009, and timely filed a notice of appeal on December 23, 2009. Audelo's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after searching the entire record on appeal, he finds no arguable ground for reversal. Audelo was granted leave to file a supplemental brief *in propria persona* on or before September 20, 2010 and did not do so.

¶2 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 (2010), and 13-4033(A) (2010). We are required to search the record for reversible error. Finding no such error, we affirm.

Facts and Procedural Background¹

¶3 Victim S.M.'s car had broken down, and he left it in a parking lot away from his residence. He locked the doors, and the windows were closed. At approximately 3:30 a.m. on September 6, 2008, S.M. drove to the parking lot to inspect the

¹ We review the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Audelo. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

car. He noticed someone in the vehicle, who turned and fled once S.M. yelled at him. S.M. described the person as having a shaved head, approximately 5'10" to 6'2", skinny, and with spiky hair. The suspect fled in his vehicle, and S.M. followed. S.M. noticed that the vehicle was gray, and he noted the license plate number.

¶14 When S.M. returned to his vehicle, the face plate to his stereo and a small flashlight were missing. His speakers and amplifier were sitting next to his car. The metal around the stereo in the car was bent. Fresh blood was on the stereo mount.

¶15 Police traced the license plate number of the car that the victim followed to a gray vehicle owned by Audelo's girlfriend. The girlfriend testified that Audelo had borrowed the car on the night in question. The blood in the car was analyzed, and the DNA profile matched Audelo's.

¶16 On November 18, 2008, Audelo was charged with third-degree burglary and criminal damage. Audelo's case proceeded to trial where he and his counsel were present for all critical stages. The court also conducted a voluntariness hearing and decided to bar Audelo's statements to police officers.

¶17 At the conclusion of the trial, an eight-person jury found Audelo guilty on both counts. The judge held a hearing and found that Audelo had committed four prior felony offenses,

two of which qualified as historical prior felony convictions. Applying this sentencing scheme and weighing the nature of the crime, the length of time passed since his last offense, and Audelo's family situation, the judge sentenced Audelo to a mitigated term of 8.5 years in prison for the burglary charge. The judge imposed a 180-day sentence for the criminal damage charge. Both charges were to run concurrently, and Audelo received 204 days of credit for time served.

Discussion

¶8 At Audelo's request, defense counsel raised two issues in his opening brief. We address those issues, as well as Audelo's sentencing, below.

1. Insufficiency of the Evidence

¶9 Audelo contends that insufficient evidence in the record exists to uphold his convictions. We disagree. "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). "The credibility of witnesses is an issue to be resolved by the jury; as long as there is substantial supporting evidence, we will not disturb their determination." *Id.* at 425, 555 P.2d at 1119.

¶10 Here, sufficient probative facts were present in the record to affirm Audelo's convictions of third-degree burglary

and criminal damage. Third-degree burglary requires the defendant to "enter[] or remain[] unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein." A.R.S. § 13-1506(A)(1) (2008). The victim testified that he had locked his car and he had returned to find another person inside it. When he examined the car, the victim found that a faceplate and a flashlight were missing and that other property from the car had been taken out of the car and left by the side of the vehicle. This is sufficient evidence to show that the perpetrator entered the non-residential structure unlawfully, and intended to commit theft by carrying away the victim's property.

¶11 Sufficient evidence also existed to prove that Audelo was the person who committed the crime. Fresh blood was found in the victim's vehicle, and the DNA profile from the blood matched Audelo's. Police traced the license plate number of the vehicle that was at the scene of the crime back to Audelo's girlfriend, who testified that she lent her car to Audelo for the evening. This was sufficient evidence by which the jury could have found that Audelo was the person who committed the burglary.

¶12 Criminal damage requires that the State prove that a defendant has recklessly defaced or damaged the property of another. A.R.S. § 13-1602(A)(1). The victim testified that

after Audelo had occupied his vehicle there were scratches on the dashboard near the stereo. The face plate to his stereo was also missing. This was sufficient evidence by which the jury could have found that Audelo committed criminal damage.

2. Ineffective Assistance of Counsel

¶13 At his sentencing hearing, Audelo requested new counsel, stating that his counsel was an "idiot" who had "screwed him" by withholding evidence that the state had produced against him during plea negotiations. Audelo stated that, had he been aware of the evidence presented against him, he may have taken the State's plea offer.

¶14 Allegations of counsel's incompetence are properly determined under a Rule 32 ineffective assistance of counsel claim, and we do not address these claims on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

3. Sentencing

¶15 The trial judge sentenced Audelo to the slightly mitigated term of 8.5 years for third-degree burglary after finding four prior felony convictions, two of which qualified as historical priors. The court also sentenced Audelo to 180 days for the criminal damage conviction to be served concurrently with the third-degree burglary sentence. Audelo received 204 days of pre-sentence incarceration credit for time served.

¶16 Criminal damage under the facts of this case is a class 2 misdemeanor. A.R.S. § 13-1602(B)(4). The maximum permissible sentence for a class 2 misdemeanor is four months. A.R.S. § 13-707(A)(2) (2008). We therefore modify Audelo's sentence to 120 days, noting that in either case the sentence was satisfied by time served.

Conclusion

¶17 We have reviewed the record and have found no meritorious grounds for reversal of Audelo's conviction. See *Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Audelo was present at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Accordingly, we affirm and modify the sentence for the criminal damage charge imposed to 120 days pursuant to A.R.S. § 13-707(A)(2).

¶18 After the filing of this decision, counsel's obligations in this appeal have ended subject to the following. Counsel need do no more than inform Audelo of the status of the appeal and Audelo's future options, unless counsel's review reveals 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). Audelo 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.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

JON W. THOMPSON, Judge