DIVISION ONE
FILED: 02/03/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0066
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RICO BARNES,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-126804-001SE

The Honorable Julie P. Newell, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona 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 Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Rico Barnes ("Defendant") timely appeals his conviction for burglary in the second degree in violation of A.R.S. § 13-1507. Pursuant to *Anders v. California,* 386 U.S.

738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has advised us that a thorough search of the record has revealed no arguable question of law, and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* but did not.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On the afternoon of April 17, 2009, C.S. returned to the Mesa apartment she shared with her fiancée to quickly grab a resume for an impending job interview. While in the apartment, she heard "rustling" in a back room. When she walked towards that room, an unknown man came out into the hallway and asked her, "Where is your safe?" The man reached into his pocket, and C.S. ran out the front door and called the police. The man ran out the back door.

¶3 The Mesa police responded to the call and an officer and C.S. inspected the apartment. They found furniture pushed away from the wall, cushions removed from the couches and items strewn about. C.S. told officers that the suspect was wearing blue jeans with either long socks or paint all over them, and a dark-colored jersey with white writing. That evening, police

[1] On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

detained two individuals and asked C.S. to determine whether either was involved in the crime at her apartment. An officer slowly drove C.S. past the two suspects who stood on the street; the officer shined the patrol car light on the suspects as the patrol vehicle passed them. C.S. identified Defendant.

¶4 Defendant was arrested and taken to the police station, where an officer issued *Miranda* warnings. Defendant agreed to answer questions and told the officer he had lived in the neighborhood for two days, did not know anyone there, and had never been inside anybody else's apartment. His fingerprints, however, were found on a doorknob inside C.S.'s apartment.

¶5 Defendant was indicted on burglary in the second degree. Defendant waived his right to jury trial and withdrew his previous request for a voluntariness hearing. The court granted the state's motion to impeach Defendant with two prior felony convictions if he testified, but agreed to sanitize them.

¶6 A one-day bench trial was held. At the conclusion of the state's case, Defendant moved for a judgment of acquittal pursuant to Ariz. R. Crim. P. 20. The motion was denied. Defendant testified and admitted to two prior felony convictions. Defendant also admitted going into the apartment, but testified that he had seen the back door open and entered to protect the belongings inside. When he saw C.S., he inquired,

"Are you safe?" Defendant also testified that he had known C.S.'s fiancée for about two months and had been in the apartment twice before, and that he lied to the investigating officer about those facts because he was "scared . . . nervous."

¶7 The trial court found Defendant guilty. During sentencing, Defendant stipulated that he was on probation when the offense occurred. The court sentenced him to a presumptive term of 11.25 years. He was given 266 days presentence incarceration credit.

¶8 Defendant timely appeals.

DISCUSSION

¶9 We have read and considered the briefs submitted by Defendant's counsel and have reviewed the entire record. *Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and represented by counsel.

I. RULE 20 MOTION

¶10 A judgment of acquittal is appropriate only when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. 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). "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. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶11 The State presented substantial evidence of guilt. "A person commits burglary in the second degree by entering or remaining unlawfully in . . . a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507. Here, Defendant admitted that he entered the apartment without permission. C.S. testified that she had given a safe to her fiancée months earlier, and that because her fiancée carried the safe from the apartment to his place of business every day, it was possible that other people had seen the safe. C.S. testified that when she saw Defendant in the apartment, he asked her, "Where is your safe?" An officer testified that the apartment had been "ransacked." Although Defendant presented a different version of the events, the credibility of witnesses and the weight and value to give to their testimony are questions exclusively for the trier of fact. *State v. Clemons,* 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). *See also State v. Brown,* 125 Ariz. 160, 162, 608 P.2d 299, 301 (1980) (explaining that it is an appellate court's duty to review the

entire record on appeal in a criminal proceeding, but not to sit as the trier of fact and once again balance the evidence adduced at trial).

¶12 On this record, a reasonable trier of fact could have concluded that Defendant intended to commit theft or another felony when he entered the apartment.

II. WAIVER OF JURY TRIAL

¶13 The trial court also appropriately accepted Defendant's waiver of a jury trial.

¶14 Before accepting such a waiver, "the court shall address the defendant personally, advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent." Ariz. R. Crim. P. 18.1(b)(1), (2). Whether a waiver is made knowingly will depend on the unique circumstances of each case. *State v. Butrick,* 113 Ariz. 563, 566, 558 P.2d 908, 911 (1976). The pivotal consideration "is the requirement that the defendant understand that the facts of the case will be determined by a judge and not a jury." *State v. Conroy,* 168 Ariz. 373, 376, 814 P.2d 330, 333 (1991). To ensure that a defendant understands the right being waived, the court must address the defendant personally and receive an affirmative response. *Butrick,* 113 Ariz. at 566, 558 P.2d at 911.

¶15 Here, Defendant signed a written waiver. The trial court also directly questioned Defendant to determine whether he had discussed this issue with his attorney, and explained that Defendant had a right "to have a jury of your peers decide whether you're guilty or not guilty." The court additionally ascertained that Defendant had not been forced into his decision or received any promises for making it. Defendant answered each question posed. Defendant's attorney stated on the record that he told Defendant it would "be best to try to a jury," but Defendant insisted on waiving the jury trial. The trial court accepted the waiver, but did not make a specific finding on the record that the waiver was knowingly, voluntarily, and intelligently made. Although "the better practice would be for the trial judge to make specific findings regarding defendant's waiver, the absence of such findings does not amount to reversible error if the record adequately shows that defendant's waiver was knowing, intelligent, and voluntary." *State v. Russell,* 175 Ariz. 529, 532, 858 P.2d 674, 677 (App. 1993).

CONCLUSION

¶16 We affirm Defendant's conviction and sentence. Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his 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). On the court's own motion, Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge