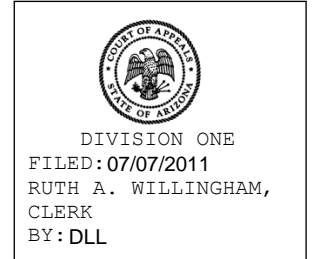


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0960
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
MICHAEL EARL STEWART, JR.,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-180081-001 SE

The Honorable Randall H. Warner, Judge

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 Thomas Baird, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Michael Earl Stewart, Jr., timely appeals from his conviction and sentence for third-degree burglary, a class four felony. Ariz. Rev. Stat. ("A.R.S.") § 13-1506(A)(1), (B) (Supp. 2009). After searching the record on appeal and finding no

arguable question of law that was not frivolous, Stewart's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Stewart to file a supplemental brief *in propria persona*, but Stewart chose not to do so. After reviewing the entire record, we find no fundamental error and, therefore, affirm Stewart's conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND¹

¶12 On October 2, 2009, around 5:15 a.m., a resident in an apartment complex saw two people squatting behind a blue PT Cruiser. One of the individuals had his hand on a big box behind the car. The resident yelled, asked what they were doing, and they immediately turned around and hopped the block wall behind the car. The resident called the police, and after arriving at the scene, police observed the back window of the PT Cruiser had been smashed out and three items were on the ground behind the car -- one large black carpeted speaker box with subwoofers, one empty Pyle View stereo box, and a legal box with miscellaneous papers and items. A crime scene specialist dusted

¹We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Stewart. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

the interior and exterior of the car for fingerprints, as well as the boxes outside the car, and lifted the only viable fingerprints from the Pyle View stereo box. A forensic latent print examiner matched the three viable fingerprints to Stewart's prints.

¶13 After receiving the print examiner's report, a detective spoke with Stewart. Stewart stated he spent the night of October 1, 2009, with his girlfriend at the apartment complex. He denied touching or being near the PT Cruiser but when the detective showed him the print examiner's report, "he became upset." At trial, Stewart's girlfriend testified he stayed with her that entire night along with Stewart's friend and brother, but conceded she was a deep sleeper and would not know if Stewart had left the apartment during the night. The victim testified her car's back window was intact and the speaker box with subwoofers was in the car when she parked it around 8 p.m. on October 1, 2009. She denied knowing Stewart, but stated she had seen him around the apartment complex with his girlfriend.

¶14 A jury unanimously found Stewart guilty of third-degree burglary. After a hearing at which the State presented, over defense counsel's objection, a Department of Corrections "pen pack," the superior court found Stewart had one historical prior felony conviction. Finding no aggravating or mitigating

factors, the superior court sentenced Stewart to the presumptive 4.5-year term for a class four non-dangerous felony with one historical prior felony conviction and awarded Stewart 79 days of presentence incarceration credit. A.R.S. § 13-703(I) (Supp. 2009).

DISCUSSION

¶15 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Stewart received a fair trial.² He was represented by counsel at all stages of the proceedings and was present at all critical stages.

¶16 The evidence presented at trial was substantial and supports the verdict. The jury was properly comprised of eight members and the court properly instructed the jury on the elements of the charge, Stewart's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Stewart was given an opportunity to speak at

²During rebuttal closing argument, the prosecutor improperly expressed his personal belief in Stewart's guilt by stating, "I submit to you the defendant is guilty. I'm asking you to go back and review all the evidence, review all of the evidence, look at all of it, then I want you to come back with a -- a verdict of guilty on this count." Defense counsel, however, did not object, and on this record, these statements were not unduly prejudicial and did not deprive Stewart of a fair trial. See *State v. Duzan*, 176 Ariz. 463, 467, 862 P.2d 223, 227 (App. 1993).

sentencing, and his sentence was within the range of acceptable sentences for his offense.

CONCLUSION

¶7 We decline to order briefing and affirm Stewart's conviction and sentence.

¶8 After the filing of this decision, defense counsel's obligations pertaining to Stewart's representation in this appeal have ended. Defense counsel need do no more than inform Stewart of the outcome of this appeal and his future options, unless, upon review, counsel finds 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).

¶19 Stewart has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Stewart 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

_____/s/_____
PATRICIA K. NORRIS, Judge

CONCURRING:

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

_____/s/_____
DANIEL A. BARKER, Judge