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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0008
) No. 1 CA-CR 11-0009
Appellee,) (Consolidated)
)
) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JULIAN LEE WYNNE,) Rule 111, Rules of the
) Arizona Supreme Court)
)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County
Cause No. CR2008-150180-001SE/CR2009-174658-001SE
The Honorable Shellie F. Smith, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Julian Lee Wynne ("Defendant") timely appeals from his conviction on third degree burglary and theft and from the trial court's order revoking his probation and sentencing to the Department of Corrections. 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. Finding no fundamental error after a thorough review of the record, we affirm.

*FACTS AND PROCEDURAL HISTORY*¹

¶2 In the early morning hours of July 30, 2009, Clarence D. interrupted three people ransacking his disabled Palm Aire trailer in a deserted Mervyn's parking lot in Mesa.

¶3 Around midnight, after repairing the damage of an earlier break-in and with a desire to prevent another, Clarence sat in his truck watching the Palm Aire and saw a white van park alongside the trailer and the shadowy figures of three people

¹ "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

exit. Clarence watched for a while, then called the police, but before they arrived, he approached the Palm Aire. When he got near he saw that the air-conditioning unit had been torn off the back and his belongings strewn about the lot. Through the hole that was left where the air-conditioner had been, he saw "flashlights going off" inside.

¶14 Clarence walked around to the front of the Palm Aire and shouted "you're busted" to the people inside. After a minute or so, the front door opened and a woman and two men came out; they ran away from the Palm Aire and the mini-van toward the adjoining Food City parking lot. The Mervyn's parking lot was well-lit and he was within a short distance of the exiting thieves, so Clarence was able to "get a good look" at the people running from his trailer.

¶15 When the police arrived, Clarence spoke to Mesa Police Officer Dewitt about what he had seen, and together they took a look inside the trailer. When they looked inside, they saw that the trailer was "a disaster" and Clarence's belongings which had been neatly packed were "everywhere scattered on the floor from the front to the back." The other officers who came to the scene searched for, but were unable to find, the people that ran from the trailer.

¶16 Dewitt turned his attention to the white Ford Windstar mini-van, parked next to the trailer and by running the license-

plate number, he discovered that the mini-van was registered to Defendant. After failed attempts to contact Defendant, he shined his flashlight inside and saw keys in the ignition and a variety of items, containers and bags not "neatly" packed in the cabin. Clarence also looked into the mini-van with the aid of Dewitt's flashlight and identified several items that belonged to him. Because of the disarray in the trailer, Clarence later prepared an itemized list of his stolen belongings and mailed it to the Mesa Police Department.²

¶17 A few days later, Detective Standage of the Mesa Police Department conducted a photo lineup with Clarence. Standage generated the lineup using Defendant's photograph, because it matched Clarence's description and Defendant's vehicle was at the scene. Standage used a computer program to select the other photos for the lineup and their positions. Standage read Clarence the standard admonition that the suspect may or may not be depicted in the lineup. Clarence identified

² Defendant insinuated at trial that Clarence "shopped" in Defendant's van with the aid of Dewitt's flashlight before other officers arrived, thus dishonestly forming the list of "stolen" items and viewing Defendant's driver's license to form the basis of his later identification. We find no merit in this argument. Dewitt testified that on-scene it was "tough to see exactly what was in the van . . . you can see the top items, but you can't see what's underneath." Another detective testified that some of the identified items, including the fishing reels, were found in locations not visible from outside the vehicle because they were not "on top" and that some of the items he photographed, possibly including the license, had to be moved to be photographed.

the person depicted in position two as one of the two men he saw exiting his trailer on July 30, 2009, and signed his name below the picture of Defendant on the lineup card to confirm his identification. Defendant's photograph was in position two on the lineup card.

¶18 Standage also obtained a search warrant for and conducted a search of Defendant's van. Using Clarence's itemized list, he identified and removed Clarence's belongings including: a blue waste bin, ink cartridges, fishing reels, a bag of silverware, a lion-print blanket, and a clipboard with a piece of paper bearing the victim's name. Defendant's driver's license was also found in the mini-van. Additional items matching the descriptions in Clarence's list were found in the van, but not removed, including two computer towers, mixer beaters, a lantern, tools, a pendant, and crates and containers containing miscellaneous items. Clarence estimated the value of the stolen items to be approximately \$2,000.

¶19 Defendant was indicted on one count of third degree burglary, a class 4 felony, and theft of property of more than \$2,000 but less than \$3,000, a class 5 felony. For sentencing purposes, the state alleged aggravating circumstances including the presence of an accomplice, a previous felony conviction, prior misdemeanor convictions, historical priors, and the facts

that Defendant left the scene of the crime and was on probation at the time of the offense.

¶10 The case was tried to a jury. Before testimony began, the court conducted a Rule 609 hearing. After argument, the court found that the probative value of admitting Defendant's prior felony conviction outweighed the prejudicial effect, but prohibited the state from disclosing the nature of the felony.

¶11 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.

¶12 Defendant presented one witness and testified on his own behalf. Defendant's witness, David Flannagan, an investigator for the Maricopa County Public Defender's Office, testified about the distances between where Clarence said he was located while watching the trailer and the approximate location of the trailer.

¶13 Defendant testified that his white Ford Windstar mini-van was in the Mervyn's lot in the early morning of July 30, 2009, because after he left a friend's house around 10:00 p.m. the night before, the van had broken down in the Food City parking lot, and he had pushed it from there to the Mervyn's parking lot, right next to Clarence's trailer. He further testified that after pushing the van alongside the trailer he returned to "Gus's" house nearby and was there at 2:00 a.m. on

July 30, 2009, when the three people were exiting Clarence's trailer. Defendant also testified that he regularly left a set of keys to the mini-van in it along with his driver's license, just in case he got "pulled over or anything."

¶14 After deliberations, the jury found Defendant guilty of both Count 1, burglary in the third degree, a class 4 felony, and Count 2, theft of property with value between \$1,000 and \$1,999, a class 6 felony.

¶15 The court held a trial on priors and probationary status. Following testimony from a forensic latent-print examiner who compared the fingerprints taken from Defendant on October 13, 2010, and the fingerprints in the "priors packet" bearing Defendant's name, the court found that Defendant had a prior historical felony conviction for forgery, a class four felony.³

¶16 Defendant's probation officer then testified that he was on probation on the date of the offense in the case before the court.

¶17 On December 15, 2010, Defendant was sentenced to concurrent presumptive terms in the Department of Corrections, 4.5 years for Count 1 and 2.25 years for Count 2, with 59 days of presentence incarceration credit for each count. His

³ Additionally, Defendant admitted his prior felony conviction while testifying at trial.

probation was revoked in CR 2008-150180 and he was sentenced to 2.5 years consecutive to the prison terms in the present case.

DISCUSSION

¶18 We have read and considered the briefs submitted by 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 pre- and post-trial proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure -- including the Rule 609 hearing and the trial on priors. Defendant was present at all critical phases of the proceedings and represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process. The sentence imposed was within the statutory range, and credit for presentence incarceration was properly calculated.

I. RULE 20 MOTION

¶19 A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). 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) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). "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) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

A. Third Degree Burglary

¶20 A person commits third degree burglary by unlawfully entering or remaining in a nonresidential structure with the intent to commit a theft therein. A.R.S. § 13-1506(A)(1).⁴

¶21 Here, substantial evidence was presented for a reasonable jury to find Defendant guilty of third degree burglary of Clarence's Palm Aire trailer.

1. Unlawfully entered or remained

¶22 Clarence saw the Defendant's white mini-van pull alongside his trailer, saw shadowy figures near the back of his trailer, saw that the air-conditioning unit had been ripped from the back, saw the resulting hole through which Defendant entered, saw flashlights in use in the trailer, and saw Defendant exit the trailer. And Clarence had not given Defendant permission to be in his trailer.

⁴ We cite to the versions of statutes in effect at the time of the offense (July 30, 2009).

2. Nonresidential structure

¶123 The Palm Aire trailer was a nonresidential structure as it is an object consisting of sides and a floor and was being used for storage.

3. Intent to commit a theft therein

¶124 The air-conditioning unit was ripped from the back allowing Defendant to gain entry into the trailer. The formerly neatly packed trailer was ransacked and Defendant's vehicle, found within a few feet of the front door, was laden with Clarence's belongings, including paperwork with Clarence's name on it.

B. Theft

¶125 A person commits theft if, without lawful authority, the person knowingly controls the property of another with the intent to deprive the other of the property. A.R.S. § 13-1802(A)(1).

¶126 Here, substantial evidence was presented for a reasonable jury to find Defendant guilty of theft. Clarence did not give permission to Defendant to enter or remove items from his trailer. Clarence's belongings were found inside Defendant's mini-van, which Defendant had parked alongside the trailer. There is no satisfactory explanation, through other circumstances or other evidence, for the presence of Clarence's belongings in Defendant's mini-van.

II. PROBATION VIOLATION AND REVOCATION

¶27 The record reveals no fundamental error. Because Defendant was found guilty of a subsequent criminal offense, pursuant to Ariz. R. Crim. P. 27.8(e), the court was not required to hold an additional violation hearing to establish a probation violation. Additionally, the Defendant was present and represented by counsel at all related revocation proceedings and consented to the terms of probation, including the term requiring him to obey all laws, as part of a plea agreement. Further, through the testimony of his probation officer, the state presented sufficient evidence to support the court's finding that Defendant was on probation at the time the present crime was committed.

CONCLUSION

¶128 We affirm the superior court's finding of probation violation and revocation and imposition of sentence, as well as Defendant's conviction and sentence in the subsequent case. Counsel's obligations pertaining to Defendant's representation in this appeal have ended and 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 has thirty days from the date of this decision in which to file an *in propria persona* motion for reconsideration or petition for review, if he so desires.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PATRICIA K. NORRIS, Judge