IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 12/22/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 10-0087
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOE MERANDA LOPEZ,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-121325-002 DT

The Honorable Teresa A. Sanders, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Myles Braccio, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Joe Meranda Lopez appeals his convictions for burglary, unlawful flight from a law enforcement vehicle, and

first degree felony murder. He argues: (1) the evidence was insufficient to support the burglary conviction; (2) the trial court improperly precluded expert testimony; and (3) the court did not properly apportion credit for presentence incarceration. For the reasons that follow, we affirm Lopez's convictions and sentences, but modify the credit for presentence incarceration.

FACTS AND PROCEDURAL HISTORY

¶2 Lopez took a lawn "renovator," a power washer, and various hand tools from a storage building and placed them into his vehicle. A witness reported Lopez's suspicious activity, and police arrived as Lopez drove away from the scene. Lopez fled when officers tried to stop him. He eventually ran a red light and hit another vehicle at over 60 miles per hour, killing both occupants of that vehicle.

¶3 The State charged Lopez with burglary in the third degree, unlawful flight from a law enforcement vehicle, aggravated assault, and two counts of first degree felony murder. A jury acquitted Lopez of aggravated assault, but found him guilty of the other charges.

¶4 The trial court sentenced Lopez to life imprisonment with a possibility of parole after 25 years for each count of first degree murder, 2.5 years' imprisonment for burglary, and 1.5 years for unlawful flight. The court ordered the sentences for murder and unlawful flight to be served concurrently with

each other but consecutive to the burglary sentence. Lopez timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A), 13-4031, and -4033.

I. Sufficiency of the Evidence for the Burglary Conviction[1]

¶5 Under A.R.S. § 13-1506(A)(1), a person commits burglary in the third degree if he enters or remains unlawfully in or on a nonresidential structure with the intent to commit any theft or felony therein. Ariz. Rev. Stat. ("A.R.S.") § 13-1506(A)(1). A "nonresidential structure" is any structure other than a "residential structure." § 13-1501(10). A "residential structure" is generally any structure "adapted for both human residence and lodging[.]" § 13-1501(11). A "structure" is "any vending machine or any building, object, vehicle, railroad car or place with sides and a floor that is separately securable from any other structure attached to it and that is used for lodging, business, transportation, recreation or storage." § 13-1501(12). "Securable" is not statutorily defined.

¶6 Lopez took the items from what the victim described as a "building" used for storage. The building was approximately

[1] Lopez does not contest the sufficiency of the evidence to support his convictions for first degree murder or unlawful flight.

100 feet from the street in a residential area and was a permanent structure that had been in place approximately 35 years. The building was essentially a rectangle that ran north and south. The southern portion of the building was fully enclosed and consisted of four block or brick walls, several windows, and an entry door in the south wall. The northern portion of the building was also used for storage and was open on the north and west sides, with three steel poles on the west side to support the roof. The entire building was on a concrete slab and was under a continuous peaked roof that ran the full length of the building.

¶7 Two walls were common to the southern and northern portions of the building. The entire east side of the building consisted of a block wall with a brick veneer that ran the length of the building and supported the roof on the east side. The northern wall of the enclosed southern portion of the building was also the southern wall for the northern portion of the building. Lopez stole the items from the open northern portion of the building.

¶8 Lopez asserts the evidence was insufficient to support his burglary conviction because there was no proof that the portion of the building from which he took the property was a "structure," as defined in A.R.S. § 13-1501(12). He argues there was no evidence the northern portion of the building had

"sides and a floor that is separately securable from any other structure attached to it[.]" Lopez further contends the area must also have sides that connect to each other to be a "structure." Lopez does not challenge the sufficiency of the evidence to support any other element of the offense.

¶9 Lopez never argued below that there was insufficient evidence to support a burglary conviction. In fact, in his opening statement, defense counsel told the jury there *was* a burglary and that he could not really argue that point. In closing argument, defense counsel stated, "Now let me simplify things from the outset, so you know where we're going. First, there's no question that the burglary was committed. We don't have to fight about that." "You've got a burglary. Simplify your voting process." "[Lopez is] fairly guilty of burglary." "You must find [Lopez] not guilty of everything but the burglary." Even though Lopez never challenged the sufficiency of the evidence until this appeal, and repeatedly told the jury it should convict him of burglary, we nevertheless review the sufficiency of the evidence to support his conviction. *See State v. Jones*, 188 Ariz. 534, 538, 937 P.2d 1182, 1186 (App. 1996) (describing insufficiency of the evidence as fundamental error).

¶10 The evidence was sufficient to find beyond a reasonable doubt that the building at issue was a "structure,"

as defined by A.R.S. § 13-1501(12). First, regardless of whether the building is considered as a whole or dissected into northern and southern halves, it was a "building," "object" and/or "place" as commonly understood, and it had "sides and a floor," as required by the statute. The statute does not mandate a specific number of "sides." Nor does it require, as Lopez argues, sides "that connect to each other." It is indisputable that all portions of this building had "sides and a floor."

¶11 Regarding the requirement that the building be "separately securable *from any other structure attached to it*[,]" the enclosed southern portion of the building was not simply "any other structure attached to" the northern portion from which Lopez took the property. *See* A.R.S. § 13-1501(12) (emphasis added). Whether considered a "building," "object" and/or "place," this was a single, unified structure. The northern and southern portions were on a concrete slab, shared two walls, and were under a single roof that extended the full length of the building. The open northern portion of the building was an integral part of the structure, interconnected with the whole both structurally and functionally and designed to provide storage -- the single purpose for which the building existed. The fact that part of the building offered storage in an area with four walls and a door does not make that portion of

the building a separate and distinct structure that is simply attached to a separate and distinct northern portion of the building.

¶12 Our legislature did not define "securable" when it stated that a structure is something "separately securable from any other structure attached to it[.]" Among other things, "secure" means free from danger; free from risk of loss; affording safety; strong, stable or firm enough to ensure safety; to relieve from exposure to danger; to shield or make secure; to put beyond hazard of losing; to seize and confine; to make fast; to safeguard against. *Webster's Third New International Dictionary* 2053 (1969). "Securable" is not limited to meaning, as Lopez suggests, capable of being locked, shut and/or otherwise closed by some means to prevent entry. Not only is there nothing in the statute to indicate legislative intent for such a restrictive reading, but doing so would necessarily imply that some form of "breaking" is an element of burglary, that a defendant must take steps to overcome measures taken to secure the structure, such as defeat a lock or latch, break a window, kick open a door, or simply open an unlocked door or a window. This would be inconsistent with the elimination of the common law element of "breaking" when the legislature defined the offense of burglary. Only "entering" or "remaining" in or on the structure is required. *See State v.*

Miller, 108 Ariz. 441, 445, 501 P.2d 383, 387 (1972) ("breaking" was a common law element of burglary not contained in the Arizona burglary statutes).

¶13 The evidence was sufficient to find that the area from which Lopez took the property was a "structure," as defined by A.R.S. § 13-1501(12). The evidence was sufficient to support his burglary conviction.

II. Preclusion of Expert Testimony

¶14 Lopez argues the trial court erred in precluding certain testimony by his expert, "Ryon," on non-disclosure grounds.[2] We review the exclusion of evidence due to untimely disclosure for an abuse of discretion. *State v. Rienhardt*, 190 Ariz. 579, 586, 951 P.2d 454, 461 (1997).

¶15 Lopez formally disclosed Ryon as an expert 14 days before trial. The prosecutor, though, had interviewed Ryon four months earlier. Lopez disclosed Ryon as "an expert in accident reconstruction and police procedure." In his interview with the prosecutor, Ryon stated he would testify as "an expert witness regarding police tactics[,]" "specifically pursuits[.]" Ryon stated Lopez asked him to render an opinion about whether the pursuit in this case complied with either the pursuit policy of the Tempe Police Department or a model policy regarding police

[2] This individual's name is spelled "Ryon" and "Ryan" in different parts of the record. We use the spelling utilized in the trial transcript.

pursuits. It was Ryon's opinion that the pursuit was dangerous and non-compliant with either policy. At no time in the interview did Ryon claim to be an expert regarding acoustics, police sirens, acoustical characteristics of sirens, acoustical factors in police pursuits, or whether a person could have heard the siren of a pursuing vehicle under the circumstances of this case. Nor did he indicate he had performed any work or formed any opinions in these areas.

¶16 Trial began on August 24, 2009. On September 3, the last day on which the State presented evidence, defense counsel advised the prosecutor that he would now call Ryon not only as an expert about the pursuit's propriety, but as an expert regarding how, at certain speeds and distances, the sound of a police siren fades and is inaudible to the person being pursued. The State objected and moved to preclude this testimony. Lopez conceded that none of the materials previously prepared by Ryon addressed these areas or opinions. The trial court noted that Lopez had placed the State in the position of having to rebut the opinions of an expert whose area of expertise and opinions were not disclosed until mid-trial. The court further noted that Lopez could not have an expert offer an opinion on any subject desired simply because the person had previously been disclosed as an expert. Nevertheless, the court withheld ruling until the State could interview Ryon.

¶17 The State interviewed Ryon the next day and later renewed its motion to preclude. In the interview, Ryon expressed the opinion that, under the circumstances presented in this case, a person being pursued could not have heard the police sirens from more than 48 feet away. The trial court granted the State's motion and ruled that Ryon could not offer expert opinions not disclosed prior to trial.

¶18 A defendant must timely disclose experts he intends to call at trial, along with the results of any physical examinations and scientific tests, experiments or comparisons. Ariz. R. Crim. P. 15.2(c)(2). "The underlying principal of Rule 15 is adequate notification to the opposition of one's case-in-chief in return for reciprocal discovery so that undue delay and surprise may be avoided at trial by both sides." *State v. Lawrence*, 112 Ariz. 20, 22, 536 P.2d 1038, 1040 (1975). If a defendant fails to disclose a witness in a timely fashion, preclusion is appropriate. *State v. Thompson*, 190 Ariz. 555, 558, 950 P.2d 1176, 1179 (App. 1997); Ariz. R. Crim. P. 15.7(a)(1).

¶19 The trial court did not abuse its discretion by precluding Ryon's late-disclosed testimony. The precluded area of "expertise" and the associated opinions were completely new

and unrelated to any opinions previously disclosed.[3] They were not disclosed until the last day of the State's case-in-chief. Although Lopez argues a "small delay" would have allowed the State to interview Ryon and prepare for his testimony, Lopez never suggested a delay below, has never explained how the State could have rebutted the new testimony without its own expert, or how a "small delay" would have allowed the State to locate and retain an expert who could perform work necessary to formulate relevant opinions. The trial court did not err by precluding Ryon's testimony.

III. Credit for Presentence Incarceration

¶20 The trial court awarded Lopez 1033 days of credit for presentence incarceration. It applied the credit only to the 2.5 year sentence for burglary because that was the sentence Lopez would serve first; no credit was apportioned to any other sentence. The award of this much credit meant Lopez had already completed his sentence for burglary by the time he was sentenced. A 2.5 year sentence is, however, only 912.5 days long –- 120.5 days less than 1033 days. The trial court recognized the problem, but believed it could not apportion any part of the credit to the consecutive sentences because a

[3] The record suggests Ryon's "expertise" in this area was based on articles he found on the internet. We note that in his initial interview, Ryon stated there was "no doubt whatsoever" Lopez knew the police were behind him and wanted him to stop.

defendant is generally not entitled to presentence incarceration credit on more than one consecutive sentence, even if the defendant was in custody for all of the underlying charges. *See State v. McClure*, 189 Ariz. 55, 57, 938 P.2d 104, 106 (App. 1997). Lopez argues he is entitled to full credit for all time served and that 121 days' credit should be apportioned to the subsequent concurrent sentences for first degree murder and unlawful flight.[4]

¶21 The State concedes that the trial court erred by failing to apportion 121 days of presentence incarceration credit to the consecutive sentences. The court "shall" credit a defendant for "all" time spent in custody. A.R.S. § 13-709(B) (renumbered as § 13-712 by Laws 2008, Ch. 301, § 27). Although a defendant is generally not entitled to presentence incarceration credit on a consecutive sentence, the purpose for not awarding credit on a consecutive sentence is to prevent an impermissible "double credit windfall." *State v. Cuen*, 158 Ariz. 86, 87, 761 P.2d 160, 161 (App. 1988); *McClure*, 189 Ariz. at 57, 938 P.2d at 106. There is no danger of a "double credit windfall" here, but there is a risk that Lopez will not receive

[4] In his opening brief, Lopez sought an additional 123 days of credit based on what appears to be a mathematical error. In his reply brief, Lopez agrees with the State that he is entitled to an additional 121 days of credit.

credit for all time spent in pretrial custody, as mandated by A.R.S. § 13-709(B).

¶22 Pursuant to A.R.S. § 13-4037, we modify the award of presentence incarceration credit to apportion 121 days of Lopez's 1033 days of credit to the sentences for first degree felony murder and unlawful flight from a law enforcement vehicle. Because those sentences are to be served concurrently, we apply the credit to all three sentences. *See State v. Caldera*, 141 Ariz. 634, 638, 688 P.2d 642, 646 (1984) (when concurrent sentences are imposed, a defendant must be given full credit for presentence incarceration on each concurrent count).

CONCLUSION

¶23 We affirm Lopez's convictions and sentences, but modify the credit for presentence incarceration to apportion 121 days of credit to the concurrent sentences for first degree felony murder and unlawful flight from a law enforcement vehicle in the manner indicated above.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PETER B. SWANN, Judge

/s/
DONN KESSLER, Judge