DIVISION ONE
FILED: 12/06/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JAMES EDWARD QUINN, Appellant.	)	1 CA-CR 10-0847 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR-2009-171893-001 DT

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

Bruce Peterson, Office of the Legal Advocate — Phoenix
by Frances J. Gray, Deputy Legal Advocate
Attorneys for Appellant

H A L L, Judge

¶1 Defendant appeals from his convictions and the sentences imposed. For the reasons set forth below, we affirm.

¶2 Defendant's appellate 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 that, after a diligent search of the record, counsel was unable to find any arguable grounds for reversal. This court granted defendant an opportunity to file a supplemental brief, which he has done. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶3 We review for fundamental error, error that goes to the foundation of a case or takes from the defendant a right essential to his defense. *See State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988). We view the evidence presented in a light most favorable to sustaining the verdict. *State v. Cropper,* 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003). Finding no reversible error, we affirm.

¶4 Defendant was charged by indictment with one count of attempted burglary in the second degree, a class 4 felony, and one count of possession of burglary tools, a class 6 felony.

¶5 The following evidence was presented at trial.[1] Hugo Franco[2] testified that he was employed as a maintenance worker at a local hotel, and on the night of November 13, 2009, he saw a tall, white man wearing jeans, a sweatshirt, and white tennis shoes, trying to pry open a hotel room door with a screwdriver. Franco informed hotel personnel that someone was trying to break into a hotel room. After calling the hotel front desk, he went back to the hotel room and the suspect was no longer there. Franco noted that the lock to the hotel room had been damaged and the door no longer closed. Approximately five to ten minutes later, an employee from the hotel front desk, Shannon Tracy, and Franco saw the same man attempting to open a second hotel room door with a screwdriver. Tracy called out to the man and he stopped what he was doing, turned around, walked down the stairs, and into the parking lot. The second hotel room door lock was damaged but the man had failed to open it. Franco and Tracy followed the man and saw him get into an older white Honda. Franco threw a rock at the vehicle and broke the driver's window as the vehicle exited the parking lot.

---

[1] "[W]e view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant." *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009) (quoting *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984)).

[2] He is also referred to as Victor Franco Martinez.

¶6 Approximately four seconds after the vehicle left, Phoenix Police Officer Jeremiah Joncas arrived and Franco described the suspect's car to the police officer. Later that evening, a police officer asked Franco to view a suspect the police had apprehended to determine whether he was the same man who had attempted to break into the two hotel rooms. Franco responded that he was "100 percent sure" it was the same man and that the man was wearing the same articles of clothing. Phoenix Police Officer Stuart Babcock subsequently testified that the suspect Franco identified was defendant.

¶7 Tracy testified that on the night of November 13, 2009, she had been working at the hotel front desk and received a call about a suspicious person attempting to break into a hotel room. Tracy stated that she left the front desk, and several minutes later, she and Franco saw a man attempt to open a hotel room door with a "device." After he failed to open the door, she saw the man walk to an older white vehicle and exit the property. He was wearing a sweatshirt and dark pants. Tracy said she was "one hundred percent sure" that the man who attempted to open the hotel room door was the same man that drove off in the vehicle. She testified that Franco threw a rock and broke the window of the vehicle. Later that same evening, police had apprehended a man and asked her whether it was the same man she saw attempting to open a hotel room door.

She responded she was “100 percent sure” it was the same man and he was wearing the same clothing. Officer Babcock also testified that the man she identified was defendant.

¶8 Officer Joncas testified that he had been working the evening of November 13, 2009, and responded to a call that someone had attempted to break into a hotel room. Franco informed him that the suspect had just left the property and was driving an older white car with a broken window. Seconds later, Officer Joncas saw a vehicle matching that description being driven by defendant and activated his emergency lights. The defendant continued driving to an apartment complex and then “jumped out of his moving car.” After detaining him, Officer Joncas noted that defendant had injuries on his face consistent with being injured from broken glass.

¶9 Police Officer Peter Kucenski testified that he impounded a screwdriver he found approximately forty-five feet away from defendant’s vehicle.

¶10 The jury found defendant guilty of both counts. Defendant admitted to six prior felony convictions. The court sentenced him to concurrent sentences of 10 years incarceration for attempted burglary in the second degree, a class 4 felony, and 3.5 years for possession of burglary tools, a class 6 felony, with 340 days of presentence incarceration credit.

¶11 Defendant presents four issues in his supplemental brief, which we address in turn.

Admissibility of pretrial identification

¶12 Before trial, the attorney then representing defendant filed a motion pursuant to *State v. Dessureault*,[3] requesting the court suppress the witnesses' pretrial identification of defendant. Subsequently, another attorney was appointed to represent defendant, and that attorney withdrew the request for a hearing on the motion, stating he would not have made the motion based on the facts. He did not, however, withdraw the motion and requested that the trial court make a ruling based exclusively on the pleadings. The trial court denied the motion.

¶13 Although defendant's argument is less than clear, we perceive that he is asserting that the court should have suppressed the witnesses' pretrial identification of defendant.[4] A trial court must determine whether the circumstances surrounding the pretrial identifications were "unduly suggestive so as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Smith*, 123 Ariz. 243, 248, 599 P.2d 199, 204 (1979). Although we review the trial

[3] 104 Ariz. 380, 453 P.2d 951 (1969).

[4] Defendant's appearance had changed by the time of trial and neither witness made in-court identifications.

court's ruling regarding challenged identifications for an abuse of discretion, *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002), because defendant presents this argument for the first time on appeal, we review for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Defendant thus bears the burden of proving error, that the error was fundamental, and that he was prejudiced thereby. *Id.*

¶14 We assess the reliability of the witnesses' identifications using the following factors from *Neil v. Biggers*: (1) a witness's opportunity to observe a criminal at the time of a crime, (2) a witness's level of certainty at the identification procedure, (3) a witness's degree of attention, (4) a witness's level of accuracy in the prior description of the criminal, and (5) the amount of time between the crime and the identification procedure. 409 U.S. 188, 199-200 (1972). The witnesses both observed defendant attempt to break into a hotel room; they were separately asked to identify the suspect, and each one stated he or she was one hundred percent positive the suspect was the man who attempted to open the hotel room door; both witnesses accurately described what the suspect was wearing; and the amount of time between the attempted burglary and the identification was minimal. Additionally, witness credibility is a matter solely for the trier of fact and based

on the guilty verdicts, and the jury determined the witnesses were credible and reliable. *State v. Jeffers*, 135 Ariz. 404, 420, 661 P.2d 1105, 1121 (1983). Under these circumstances, we conclude that the trial court did not commit fundamental error when it denied defendant's motion.

Rule 20 motion

¶15 Defendant also claims that the trial court erred by denying his Rule 20 motion for judgment of acquittal. We review the denial of a Rule 20 motion "for an abuse of discretion and will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001). We review the sufficiency of the evidence underlying a conviction only to determine "whether substantial evidence supports the verdict." *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007). 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) (quotation omitted).

Attempted burglary in the second degree

¶16 "A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony

therein." Ariz. Rev. Stat. § 13-1507(A) (2010). "A person commits attempt if . . . such person: [i]ntentionally does . . . anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense." Ariz. Rev. Stat. § 13-1001(A)(2) (2010).

¶17 The state presented substantial evidence of defendant's attempted burglary in the second degree. Two witnesses testified they observed a man attempt to break into a hotel room. Franco specifically testified that he saw a screwdriver in the suspect's hand. Franco shattered the suspect's window with a rock. Both witnesses later positively identified the suspect in separate pretrial identifications. Officer Kucenski found a screwdriver approximately forty-five feet from defendant's vehicle and the vehicle matched Franco's description, including the broken window. Defendant also had injuries consistent with being injured from broken glass. Accordingly, the trial court did not err in denying defendant's motion for judgment of acquittal on the charge of attempted burglary in the second degree.

Possession of burglary tools

¶18 "A person commits possession of burglary tools by: [] possessing any . . . tool . . . used for committing any form of burglary . . . and intending to use or permit the use of such an

item in the commission of a burglary." Ariz. Rev. Stat. § 13-1505(A)(1) (2010).

¶19 As mentioned in ¶ 17, *supra*, Franco and Tracy both saw defendant attempt to break into a hotel room. Although Tracy was unsure of the "device" she saw defendant use, Franco stated it was a screwdriver. Officer Kucenski testified that he impounded a screwdriver he found approximately forty-five feet from defendant's vehicle. Thus, the state presented substantial evidence of defendant's guilt and the trial court did not err in denying defendant's Rule 20 motion.

Trial court's refusal to modify defendant's release conditions

¶20 The trial court set a secured appearance bond of $7800.00. Defendant subsequently requested that the court modify the release conditions to allow defendant to be released on his own recognizance. The trial court held a hearing, found the current bond was appropriate, and denied the request. Issues involving release conditions and bail are moot once a trial has been conducted and an appeal has been filed. *Costa v. Mackey*, 227 Ariz. 565, 569, ¶ 6, 261 P.3d 449, 453 (App. 2011). We therefore decline to address this issue.

Ineffective assistance of counsel

¶21 Finally, defendant argues ineffective assistance of counsel. This court will not consider claims of ineffective assistance of counsel on direct appeal regardless of merit. *See*

State v. Spreitz, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). We therefore decline to address this argument. If defendant wishes to pursue a claim for ineffective assistance of counsel, he should file a claim for post-conviction relief pursuant to Arizona Rule of Criminal Procedure 32.[5]

CONCLUSION

¶22 We have read and considered counsel's brief and defendant's supplemental brief and we have searched the entire record for reversible error. *See Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was given an opportunity to speak before sentencing, and the sentence imposed was within statutory limits.

¶23 After the filing of this decision, counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do no 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. *See State v. Shattuck,* 140 Ariz. 582, 584-85, 684 P.2d 154, 156-

[5] To the extent that defendant is concerned that his trial counsel should have requested oral argument on the *Dessureault* motion, that is an issue that he would need to address as part of any claim that his counsel was ineffective.

57 (1984). Defendant 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. Accordingly, defendant's convictions and sentences are affirmed.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICK IRVINE, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge