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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID A. BECKLEIMER, Appellant.	2 CA-CR 2012-0236 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR201100944

Honorable Joseph R. Georgini, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, David Beckleimer was convicted of third-degree burglary and sentenced to serve a mitigated prison term of 1.1 years and pay $222 in restitution. On appeal, he argues the trial court erroneously admitted evidence he had been carrying a knife the night of the burglary, his conviction was not supported by sufficient evidence, and the restitution order was erroneous. We affirm.

Factual Background and Procedural History

¶2 "We view the evidence in the light most favorable to sustaining [the] conviction." *State v. Hinden*, 224 Ariz. 508, ¶ 2, 233 P.3d 621, 622 (App. 2010). Between nine and ten o'clock the night before Easter 2011, Sherry Tomerlin and her twelve-year-old daughter arrived at the church Tomerlin attended in Superior to prepare for a breakfast the church would be hosting the following morning. After noticing some lights were on inside the church, Tomerlin looked through a window and saw a man inside whom she did not recognize. She observed him only briefly but noticed he was wearing a knife on his belt; she returned to her van and called police.

¶3 Kenneth Burnside, a K-9 officer with the Superior Police Department, responded to the call. As he entered the church, he noticed the basement light, which had been on when he arrived, had been turned off while he was speaking with Tomerlin. Using Tomerlin's key, Burnside unlocked the basement door and entered the church. Once inside, he unholstered his service weapon and loosed his police dog after twice calling out a warning to anyone inside that the dog would search the building "and he will bite you when he finds you." After giving a third warning, Burnside heard a man's voice call out from upstairs, "Do not send the dog." The man, who was later identified as

Beckleimer, emerged wearing a "long knife" sheathed on his belt. After complying with Burnside's order to place the knife on the ground, he was taken into custody. Burnside and Tomerlin then inspected the church and Tomerlin discovered that one of the window screens had a hole in it that had not been there previously. Inside, among Beckleimer's personal effects, they also found empty snack wrappers, mail addressed to the church, and envelopes for donations. After waiving his *Miranda*[1] rights, Beckleimer admitted having eaten some snack cakes he had found inside the church. He was convicted and sentenced as described above, and we have jurisdiction over his appeal pursuant to A.R.S. § 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Admissibility of the Knife

¶4 Beckleimer first argues the trial court erred in denying his motion to preclude evidence he had possessed a knife the night of the burglary. He contends, as he did at trial, that the knife was irrelevant to the offense charged and any probative value it might have had was substantially outweighed by the danger of unfair prejudice. *See* Ariz. R. Evid. 401, 403. We review the ruling for an abuse of discretion. *See State v. Hargrave*, 225 Ariz. 1, ¶ 21, 234 P.3d 569, 577 (2010).

¶5 Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401. The state contends the knife was relevant

[1]*Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

because it supported the inference Beckleimer had entered the church by cutting the window screen, explained why Burnside had drawn his weapon when he entered the church to confront Beckleimer, and helped the officer identify Beckleimer as the same man Tomerlin had seen inside the church before calling the police. We agree with the state that the knife was relevant to Beckleimer's likely method of entering the locked building and therefore his intent.

¶6 One of the elements the state was required to prove was that Beckleimer intended to commit a theft or felony inside the church. *See* A.R.S. § 13-1506(A)(1). A person's manner of entry into a structure can be circumstantial evidence of intent. *See State v. Rodriguez*, 114 Ariz. 331, 334, 560 P.2d 1238, 1241 (1977) (entry by manipulation of door lock supported inference of intent required for burglary); *see also State v. Hopkins*, 108 Ariz. 210, 211, 495 P.2d 440, 441 (1972) (no error where trial court instructed jury intent to commit theft or other felony inferable if entry was through building's window rather than unlocked door).

¶7 Here, the church's pastor testified the building was supposed to be kept locked when no one was there. Although the pastor also testified that occasionally the church was inadvertently left unlocked, Burnside testified he had used Tomerlin's key to enter the church to apprehend Beckleimer, and both the pastor and Tomerlin testified there had not been a hole in the window screen before that night. That Beckleimer was found inside with a knife on the same night that a hole first appeared in the window screen is circumstantial evidence that he had used the knife to make the hole in order to gain entry. This stealthy manner of entry, in turn, is evidence of the requisite intent for

burglary. *See Hopkins*, 108 Ariz. at 211, 495 P.2d at 441 (no error where jury was instructed "criminal intent could be implied from stealth or secretiveness"). The knife therefore was relevant to demonstrate Beckleimer's intent under the low "any tendency" requirement of Rule 401, Ariz. R. Evid. Because "[w]e are required to affirm a trial court's ruling if legally correct for any reason," *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012), we need not examine whether it was relevant under the state's other theories.

¶8 Beckleimer argues in the alternative that even if the knife was relevant, it nevertheless should have been excluded from evidence because it was unfairly prejudicial. Rule 403, Ariz. R. Evid., allows a court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Relying on *State v. Steele*, 120 Ariz. 462, 586 P.2d 1274 (1978), and *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982), Beckleimer suggests that because the knife is a weapon, it may have "arous[ed] and inflame[ed] the emotions of the jury" and therefore should not have been admitted.

¶9 In *Steele*, our supreme court determined that the trial court committed reversible error in admitting a homicide victim's bloodstained shirt because the point on which it was probative—the victim's entrance and exit wounds—had already been established more accurately by photographs of the victim's body. 120 Ariz. at 466, 586 P.2d at 1278. In vacating the defendant's conviction, the court explained, "Although we have stated that cumulative evidence is permissible, when, as here, the [evidence] adds nothing to the evidence to be considered by the jury but tended, and we believe from the

record was intended, only to arouse and inflame the emotions of the jury, it is reversible error." *Id.* (citation omitted).

¶10 Similarly, in *Poland*, our supreme court concluded the trial court had abused its discretion in admitting into evidence a taser gun that police had seized from one of the defendants' homes. *Id.* at 274, 281, 645 P.2d at 789, 796. The court found that the weapon was not relevant to a determination of the facts of the case because "the State [had] not connect[ed] [it] to the crime." *Id.* at 281, 645 P.2d at 796.

¶11 Those cases are distinguishable. Unlike the weapons in *Steele* and *Poland*, Beckleimer's knife was relevant to at least one trial issue, as discussed above, and for that reason we agree with the state that it "was not a gruesome object introduced solely to prejudice [him]." Furthermore, the knife was not unfairly prejudicial because it did not "ha[ve] an undue tendency to suggest [a] decision on an improper basis, such as emotion, sympathy, or horror." *See State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). We accordingly find no abuse of discretion in its admission.

Sufficiency of Evidence

¶12 Beckleimer next argues the evidence presented at trial was insufficient to support his burglary conviction. A conviction must be based on substantial evidence, Ariz. R. Crim. P. 20(a), which "'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. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). Whether the evidence presented at

trial was sufficient to support a defendant's conviction is a legal question we review de novo. *Id.* ¶ 15.

¶13 As noted earlier, to sustain Beckleimer's conviction for third-degree burglary, the record must reflect substantial evidence that he "[e]nter[ed] or remain[ed] unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein." § 13-1506(A)(1). Beckleimer concedes he entered and remained inside the church, and he does not dispute that it was a nonresidential structure. Nor does he specifically dispute that his presence in the church was unlawful, which is supported by the pastor's testimony that she never had given him permission to be inside and Tomerlin's testimony that it never had been "customary to permit those in need to take shelter or provisions from the building without specific permission or prior arrangements." Instead, Beckleimer argues, as he did in his motion for a judgment of acquittal below, that there was no evidence he had intended to commit a theft or felony inside. We disagree.

¶14 First, the state presented evidence that Beckleimer actually committed a theft inside the church. "Evidence that an individual was found in the possession of property from the building may support an inference that he had the requisite intent to commit a crime at the time he entered the premises." *State v. Talley*, 112 Ariz. 268, 269, 540 P.2d 1249, 1250 (1975). The method of committing theft most applicable to the facts of this case is by controlling, without lawful authority, the "property of another with the intent to deprive the other person of such property." A.R.S. § 13-1802(A)(1). Tomerlin testified that the church kept snack cakes in its kitchen area, and Burnside testified that

after being arrested, Beckleimer admitted he had eaten some of them.[2] Although the parties agreed for purposes of restitution that the value of the snack cakes taken was only $2, this does not benefit Beckleimer because "[t]he essence of the crime of burglary is not *value*," but rather intent. *State v. Taylor*, 25 Ariz. App. 497, 499, 544 P.2d 714, 716 (1976).

¶15 Second, the manner of Beckleimer's entry provided additional circumstantial evidence that he had possessed the required intent for burglary. *See West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191 ("Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction."). As we noted above in discussing the admissibility of Beckleimer's knife, evidence that a hole in one of the church kitchen's window screens had appeared around the time of Beckleimer's entry into the church allowed the jury to infer he had entered the building by force, which in turn supports the conclusion he had the intent required for burglary. *See State v. Malloy*, 131 Ariz. 125, 130, 639 P.2d 315, 320 (1981) (noting jury could have found intent to commit burglary from fact defendant broke window); *State v. Belyeu*, 164 Ariz. 586, 591, 795 P.2d 229, 234 (App. 1990) (jury can infer felonious intent from fact defendant entered by breaking window); *Taylor*, 25 Ariz. App. at 499, 544 P.2d at 716 ("An inference of the intent necessary for conviction of burglary may be drawn when unauthorized entry into the premises is gained by force.").

[2]Although Beckleimer was also found in possession of unused donation envelopes and mail addressed to the church, there was testimony that these items lacked value: the mail had been discarded and the church provided the donation envelopes freely.

¶16 Quoting extensively from the Bible, Beckleimer postulates that the historical role of religious institutions in providing assistance to the poor requires the conclusion that "any reasonable person would believe that a church was there to provide food for the hungry." Based on this theory, he suggests he reasonably believed the snack cakes were available to be eaten by those in need, including himself. This argument does not provide grounds for reversal, however, because it does not negate the state's proof but rather asks us to reweigh the trial evidence, and inferences to be drawn therefrom, in his favor. But appellate courts do not reweigh evidence. *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). Instead, the question that guides our review is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, *quoting Mathers*, 165 Ariz. at 66, 796 P.2d at 868. So viewed, the evidence was sufficient to allow the jury to conclude Beckleimer had committed burglary. We accordingly find no error in the trial court's denial of his motion for a judgment of acquittal.

Restitution

¶17 Beckleimer next argues the trial court erred in awarding $202 restitution to the pastor because the indictment named the church as the victim, not her.[3] As Beckleimer acknowledges, however, he stipulated to the order. A defendant who contributes to an alleged error may not assign the same as error on appeal. *State v.*

[3]The total restitution ordered was $222, which included a $20 time-payment fee.

Pandeli, 215 Ariz. 514, ¶ 50, 161 P.3d 557, 571 (2007). Accordingly, we need not consider the argument. And, in any event, the pastor could appropriately be awarded restitution for her economic losses. *See State v. Merrill*, 136 Ariz. 300, 301-02, 665 P.2d 1022, 1023-24 (App. 1983) (affirming restitution to insurance company that suffered economic loss, even though insurance company not direct victim of burglary).

Disposition

¶18 For the foregoing reasons, Beckleimer's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge