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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. ARMONTE ASKAREE LARUE-FRANKLIN, Appellant.	)	2 CA-CR 2012-0481 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20122560002

Honorable Richard S. Fields, Judge

AFFIRMED

John William Lovell — Tucson
Attorney for Appellant

K E L L Y, Presiding Judge.

¶1 Following a jury trial, appellant Armonte Larue-Franklin was convicted of second-degree burglary and possession of burglary tools. The trial court found that Larue-Franklin had a prior felony conviction and was on probation when he committed the charged offenses, and sentenced him to presumptive, concurrent terms of imprisonment, the longer of which is 6.5 years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), avowing he was unable to find any "arguable question of law" to raise on appeal. He asks us to search the record for fundamental error. In compliance with *State v. Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d 89, 97 (App. 1999), counsel also has provided "a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." Larue-Franklin has filed a supplemental brief asking that we vacate his convictions and sentences. For the reasons set forth below, we affirm.

¶2 Viewed in the light most favorable to sustaining the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), there was substantial evidence to support finding the elements necessary for Larue-Franklin's convictions, *see* A.R.S. §§ 13-1507, 13-1505(A)(1), and his sentences are within the authorized range, *see* A.R.S. § 13-703(B), (I).[1] The evidence presented at trial established that at approximately 10:30 p.m. on June 19, 2012, L., a leasing consultant at a Tucson apartment complex who "know[s] a lot of the residents," saw two men who did not look

[1]Although § 13-703 has been amended since Larue-Franklin committed the underlying offenses, those changes are not material to his case. *See* 2012 Ariz. Sess. Laws, ch. 96, § 2 and ch. 190, § 2.

familiar "kind of lingering around." L. testified that she saw one of the men, who was wearing a white shirt, "unscrewing" the bulb from the light in front of one of the vacant, unfurnished apartments. L. saw one of the men "fidgeting" with the apartment's doorknob and "fiddling" with the door. Although the blinds to the apartment were open, "you can't see . . . inside. . . . [Y]ou can't tell whether there's furniture or anything else in there." One of the men then tried "to get in the door" by using a crowbar[2] while the other man "was laying down or sitting."

¶3 The police arrived and "they were caught right in the act, and one guy [later identified as co-defendant, Tynerial Kindred] tried to jump off the front [porch]." Deputies found the crowbar "past the front barrier," or exterior of the door, "about a quarter of the way into the door by the master lock," with the deadbolt intact and the door closed. Deputies discovered Larue-Franklin, who was wearing a white shirt,[3] "at the top of the steps [lying] down, a crowbar in the door, and the light . . . off." Larue-Franklin's head was "[r]oughly" under the crowbar facing toward the door to the apartment. When deputies ordered him to show them his hands, "he began pulling gloves off of his hands."

¶4 Over defense counsels' objection, Deputy Jeffrey Ten Elshof testified that based on his training and experience investigating burglaries, it is common for people to knock on a door to see if anyone is home before they attempt to enter, and that he had

[2]L. testified initially that she saw the man using the crowbar when she first observed him trying to open the door to the apartment, but later clarified that she saw the crowbar "in the door" after the police had arrived and the "lights were on."

[3]Both Larue-Franklin and his co-defendant were wearing white shirts.

seen a pry bar (crowbar) used to make entry in other burglaries. In response to the prosecutor's questions, the deputy also acknowledged that in his experience, people may break into vacant apartments to sleep, "to party," to use drugs, or "to have liaisons." There were no drugs, beer or alcohol found on Larue-Franklin or Kindred. During closing argument, the prosecutor repeatedly asserted that, because Larue-Franklin and Kindred did not know the apartment was vacant, they had intended to "break in" so they could "take stuff out" of the apartment.

¶5 Larue-Franklin raises four issues in his supplemental brief, none of which has merit. He first contends the testimony by Deputies Ten Elshof and Michael Barnett regarding their observations on the night in question and general observations they had made in other burglaries constituted hearsay and violated his Sixth Amendment right to confront an adverse witness. He asserts "[t]he trial court correctly recognized in hindsight that deputy testimony involved inadmissible hearsay, however, despite it striking the latter testimony, the initial testimony was not struck when the court erroneously overruled Appellant's objection." He also asserts, "The jury obviously from [its] verdict on count 1 had difficulty with Deputy Ten Elshof[']s credibility and this inadmissible ev[i]dence was therefore prejudicial as it was the only evidence indicating Appellant obtained the [sic]."

¶6 We find no merit to Larue-Franklin's argument. First, he has failed to cite to any portion of the record where he raised hearsay objections regarding the deputies' testimony or where such testimony was admitted over his hearsay objection, and he thus

has waived and abandoned this argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellate brief shall include, inter alia, citation to record in support of argument). Nor are we aware of any portion of the record supporting this argument or, more importantly, how the challenged testimony constitutes hearsay.[4]

¶7 Moreover, we do not understand Larue-Franklin's claim that his right to confront an adverse witness was violated. He maintains, "The observations and statements of the PANT deputies who did not testif[y] was obviously 'testimonial' under the court's criteria. Accordingly, admission of this evidence was both prejudicial and constitutional error and now requires a new trial." Larue-Franklin does not identify "the PANT deputies who did not testify." However, to the extent Larue-Franklin argues the testimony of Ten Elshof and Barnett violated his right to confront an adverse witness, those witnesses testified at trial and were cross-examined by defense counsel, and Larue-Franklin's confrontation argument therefore does not apply to them. "[T]he Confrontation Clause prohibits the admission of testimonial evidence from a declarant who does not appear at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *State v. King*, 213 Ariz. 632, ¶ 17, 146 P.3d 1274, 1279 (App. 2006), *citing Crawford v. Washington*, 541 U.S. 36, 68 (2004); *see also* U.S. Const. amends. VI, XIV.

[4]We note that, in a portion of the record not cited by Larue-Franklin, defense counsel objected to Ten Elshof's testimony regarding his experience in other burglary investigations. However, that objection, which the trial court overruled, was based on relevance.

¶8 Larue-Franklin next argues the admission of testimony by one of the deputies that Larue-Franklin "had red watery bloodshot eyes and he smelled of intoxicating beverages" constituted prejudicial error under Rule 404(b), Ariz. R. Evid. (evidence of other crimes, wrongs, or acts not admissible to prove character of person in order to show action in conformity therewith). He asserts that the admission of testimony of "other bad act evidence," to wit, that he was intoxicated, permitted the state to "ask[] the jury to draw the impermissible inference that because Appellant might have been intoxicated after the charged offenses he was guilty of knowingly committing the said crime."

¶9 Although Larue-Franklin asserts evidence of his intoxication was admitted over his objection, he has not directed us to any portion of the record showing such an objection. Accordingly, he has forfeited the right to seek relief on this ground absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006) ("A defendant generally waives his objection to testimony if he fails either to ask that it be stricken, with limiting instructions given, or to request a mistrial."). Moreover, to the extent Larue-Franklin is arguing the admission of this testimony was fundamental and prejudicial by asserting it is "of constitutional magnitude," we find no support for this proposition. Nor does it appear the state asserted he committed the charged offense because he was intoxicated, as Larue-Franklin contends it did.

¶10 Larue-Franklin next argues the trial court improperly denied his motion for a judgment of acquittal, *see* Ariz. R. Crim. P. 20, specifically asserting that other than Ten Elshof's testimony, there was no evidence he possessed burglary tools.[5] We review de novo the denial of a motion for a judgment of acquittal. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). Such a motion should be granted only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *see also State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "Substantial evidence is more than a mere scintilla and 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). "If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury." *State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006).

¶11 A person commits second-degree burglary by, inter alia, "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein," *see* § 13-1507, and commits possession of burglary tools by

[5]Notably, the sole basis for Larue-Franklin's Rule 20 motion was the state's failure to establish the element of "entry or remaining unlawfully" in the burglary charge, rather than its failure to provide sufficient evidence to prove possession of burglary tools. In our discretion, we nonetheless address Larue-Franklin's argument.

"[p]ossessing any . . . tool, instrument or other article adapted or commonly used for committing any form of burglary . . . and intending to use . . . such an item in the commission of a burglary," *see* § 13-1505(A)(1). "'Entry' means the intrusion of any part of any instrument or any part of a person's body inside the external boundaries of a structure or unit of real property." *See* A.R.S. § 13-1501(3). "'Possession' means a voluntary act if the defendant knowingly exercised dominion or control over property." *See* A.R.S. § 13-105(35).

¶12 Notably, Larue-Franklin has offered no reason why Ten Elshof's testimony was insufficient to support his conviction of possession of burglary tools, even assuming it was the only evidence presented to support that charge. In any event, as previously noted, responding deputies testified they discovered Larue-Franklin at the top of the steps lying down, with a crowbar in the door above him. When deputies ordered him to show them his hands, "he began pulling gloves off of his hands." Based on this evidence, the jury reasonably could infer not only that a crowbar and gloves are burglary tools, but that Larue-Franklin possessed these items. That different inferences could be drawn from the trial testimony does not assist Larue-Franklin. *See State v. Walker*, 181 Ariz. 475, 479, 891 P.2d 942, 946 (App. 1995) (evidence not insufficient solely because contradicted).

¶13 Although Larue-Franklin generally challenges the trial court's denial of his motion for judgment of acquittal, he makes no specific challenge to the sufficiency of the evidence supporting his conviction for second-degree burglary. As we noted above, there

was ample evidence from which the jury could conclude that Larue-Franklin entered the apartment with the intent to commit a theft or felony therein.

¶14 Finally, Larue-Franklin argues that during the rebuttal portion of her closing argument, the prosecutor improperly vouched for the testimony of the state's witnesses. Larue-Franklin asserts "[t]he credibility of the witnesses in this case was obviously critical to the jury's resolution of the charges [and the jury] clearly had doubts about the three cooperating witnesses' truthfulness given its resolution of the charges." As we understand his argument, Larue-Franklin apparently is suggesting the prosecutor's vouching improperly persuaded the jury to believe the state's witnesses. Notably, the portions of the transcripts in which Larue-Franklin asserts the improper vouching occurred do not contain the language he quotes. Accordingly, he has waived and abandoned this unsupported claim of prosecutorial misconduct, and we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review). We additionally note that the record does not support his claim that the jury "clearly" had doubts about the credibility of the state's witnesses.

¶15 Larue-Franklin also claims the jury could not have found L. was telling the truth "judged against Appellant's girlfriend['s] testimony."[6] To the extent Larue-Franklin

[6]Larue-Franklin attached his girlfriend's affidavit to his supplemental brief, and asks us to consider it on appeal. Because this document, dated May 17, 2013, well after the trial concluded, was not presented to the trial court and thus is not part of the record on appeal, we do not consider it. *See* Ariz. R. Crim. P. 31.9 (describing contents of record on appeal).

asks us to reweigh the evidence, we will not do so. *See State v. Gulbrandson*, 184 Ariz. 46, 65, 906 P.2d 579, 598 (1995) (reviewing court does not reweigh the evidence, but rather views it in light most favorable to sustaining the conviction). Credibility of witnesses is a matter for the jury. *State v. Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002); *State v. Roberts*, 139 Ariz. 117, 121, 677 P.2d 280, 284 (App. 1983).

¶16 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and have found none. And we have rejected the arguments raised in Larue-Franklin's supplemental brief. Accordingly, Larue-Franklin's convictions and sentences are affirmed.

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

CONCURRING:

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

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge