IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE J.M.

No. 2 CA-JV 2013-0138
Filed March 6, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Civ. App. P. 28(c); Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JV18542701
The Honorable Michael Butler, Judge

AFFIRMED

COUNSEL

Barbara LaWall, Pima County Attorney
By Paul Lauritzen, Deputy County Attorney, Tucson
Counsel for State

Arizona Children's Law, LLC, Tucson
By Patrick P. Lacroix
Counsel for Minor

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Presiding Judge Vásquez concurred.

M I L L E R, Judge:

¶1 The juvenile court adjudicated J.M. delinquent of third-degree burglary and theft. J.M. also admitted responsibility for criminal damage, false reporting to law enforcement, and shoplifting. The court placed J.M. on juvenile intensive probation supervision for one year, and ordered him to pay $73.96 in restitution. On appeal, J.M. argues insufficient evidence supported his burglary adjudication and asks that it be reversed. For the reasons set forth below, we affirm.

¶2 "In reviewing the juvenile court's adjudication of delinquency, we review the evidence and resolve all reasonable inferences in the light most favorable to upholding its judgment." *In re Jessi W.*, 214 Ariz. 334, ¶ 11, 152 P.3d 1217, 1219 (App. 2007). The undisputed facts show that in October 2012, J.M. and his sister asked the victim, V., if they could "touch" her dog, who was in V.'s fenced yard. Later that evening, V. discovered that the dog was missing, and a hole "about a foot" in size had been cut in the chain link fence of the yard where she had left the dog. V. reported the incident to the police. The following day, V. found the dog at J.M.'s house.

¶3 Officer Colin Hyde testified that when he questioned J.M. the day after the dog had been stolen, J.M. provided three different versions of what had occurred. He first told Officer Hyde "he got the dog from a friend and brought it home." But after J.M.'s father told him "he needed to tell the truth," J.M. stated he had taken the dog from V.'s house, but he "denied cutting the fence." Finally, when J.M.'s mother "yelled at him to tell the truth and to stop lying," and reminded him that his sister had told her that "he cut the fence with pliers and stole the dog," J.M. admitted that "he did cut the fence . . . and then returned after dark and finished

cutting the fence and took the dog." J.M. also told Officer Hyde he had used "orange-handled pliers" that belonged to his father to cut the fence.

¶4 On appeal, J.M. argues the evidence is insufficient to support his conviction for third-degree burglary.[1] A person commits third-degree burglary by "[e]ntering or remaining unlawfully . . . in a fenced . . . residential yard with the intent to commit any theft or any felony therein."[2] A.R.S. § 13-1506(A)(1). "Th[e] question of sufficiency of the evidence is one of law, subject to de novo review on appeal." *State v. West,* 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). "'[T]he relevant question 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.'" *Id.* ¶ 16, *quoting State v. Mathers,* 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). So viewed, the evidence was sufficient to conclude J.M. had committed burglary.

¶5 J.M. asserts that § 13-1506(A)(1) requires the proof of three distinct elements: (1) intent to enter the victim's yard, (2) intent to commit theft, and (3) intent that "the theft . . . occur within" the victim's yard. J.M. does not dispute that the state proved that he entered V.'s yard when "the tips of his pliers passed the boundary," *see State v. Kindred,* 232 Ariz. 611, ¶ 9, 307 P.3d 1038, 1041 (App. 2013)

---

[1]To the extent J.M. also contends, apparently for the first time on appeal, that the state's argument below was based on the pre-1978 version of the burglary statute, we decline to address this argument. "[O]rdinarily appellate courts do not consider issues that were not timely presented to the lower court unless it is plain or fundamental error," which J.M. does not allege. *In re Pima Cnty. Juv. Action No. J-47735-1,* 26 Ariz. App. 46, 47, 546 P.2d 23, 24 (1976).

[2]Section 13-1802(A)(1), A.R.S., provides a person commits theft if the person knowingly "[c]ontrols property of another with the intent to deprive the other person of such property," while A.R.S. § 13-1801(A)(2) states "control" means "to act so as to exclude others from using their property except on the defendant's own terms."

(evidence defendant inserted pry bar into door jamb of apartment sufficient to support finding of entry[3] to support second-degree burglary conviction), and that he intended to steal V.'s dog. He argues, however, that because he "intended for the theft of the dog to take place *outside* of the residential yard, and that the theft did, indeed, occur *outside* of the fence" (emphasis in original), the state did not prove he intended for the theft to occur "therein" (within the fenced yard), as the statute requires. J.M. maintains that, by having cut a hole too small to permit him to enter the yard, he "had no intent for the theft to occur . . . within the residential yard," and thus did not commit burglary.

¶6 At the adjudication hearing, the state relied on *Kindred* to argue that J.M.'s pliers necessarily intruded into the yard, thereby satisfying the entry element of § 13-1506(A)(1). J.M. did not "contest . . . the theft of the animal" and agreed that under Arizona law intrusion by an instrument qualifies as "entry," but nonetheless argued that the state's case was based on circumstantial evidence that the pliers actually entered V.'s property, an argument he seems to have abandoned on appeal. Acknowledging that § 13-1506(A)(1) "does not specifically" require both "intent to enter" and "intent to enter with the intent to commit theft . . . therein," J.M. nonetheless argued both of these elements are in fact required, and that, without being present in the yard when he took the dog, he did not commit burglary.

¶7 Citing *Kindred,* the juvenile court reasoned "whether it is to cut [the fence] or to put your hand through to pull [the fence] back, there has been an intrusion into the space that, under the statute, is . . . protected." *See Kindred*, 232 Ariz. 611, ¶ 9, 307 P.3d at 1041. Noting it was more concerned with the question whether J.M. had intended to enter the yard to commit the theft "therein," the court found the state had "not been able to prove beyond a

[3] Section 13-1501(3), A.R.S., states "'[e]ntry' 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."

reasonable doubt that [J.M.] had any intent of actually going into the yard." However, the court also concluded, "you don't necessarily have to intend to go within the yard therein, so long as what you're intending [to steal] is within the yard," and because "what [J.M.] wanted to take was able to come to him instead," obviating the need for J.M. to "put an arm in [the yard]," the statute was satisfied. *See State v. Hamblin,* 217 Ariz. 481, ¶ 10, 176 P.3d 49, 52 (App. 2008) (A.R.S. § 13-1506(A)(1) does not specify particular method of entry that must be proven to support conviction); *see also State v. Williams,* 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993) (courts look to statute's language as "'the best and most reliable index'" of its meaning), *quoting Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

¶8 In a similar case, we found evidence that the defendant's accomplices had entered the victim's car with the intent to steal it sufficient to sustain a conviction for third-degree burglary of the car. *State v. Aro,* 188 Ariz. 521, 524, 937 P.2d 711, 714 (App. 1997). We noted that even though § 13-1506(A)(1) requires the theft occur "'therein,'" because the accomplices entered the car with the intent to "'control'" it, it was not necessary to demonstrate the theft of something else inside the car, rather, theft of the car itself satisfied the "therein" element of the burglary statute. *Id.* Similarly, by cutting a hole in V.'s fence, J.M. entered V.'s yard, and by subsequently controlling her dog intentionally, J.M. committed theft of something "therein," as the burglary statute requires. "[T]he crime of burglary is complete when entrance to the structure is made with the requisite criminal intent." *State v. Bottoni,* 131 Ariz. 574, 575, 643 P.2d 19, 20 (App. 1982).

¶9 Additionally, J.M. admitted to Officer Hyde that he had cut V.'s fence, had returned a second time to cut some more, and then "took the dog," supporting the inference that he intended to and did in fact commit 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.").

¶10 Finally, as the juvenile court noted, and the state argued, "the whole purpose of the burglary statute[]" is to impose more severe consequences "because the spirit [of the statute] is people . . . should feel secure within their own yards, within fenced-off areas, and within buildings." *See* 12A C.J.S. *Burglary* § 1 (2013) (historical purpose of sanctioning burglary at common law was "to punish the forcible invasion of a habitation and violation of the heightened expectation of privacy and possessory rights of individuals in structures and conveyances."); *see also State v. Mitchell,* 138 Ariz. 478, 480, 675 P.2d 738, 740 (App. 1983) ("[T]he crime of burglary necessarily involves an infringement of the victim's right to privacy . . . ."); A.R.S. § 13-104 (construe statutes "according to the fair meaning of their terms to promote justice and effect the objects of the law").

¶11 Therefore, we affirm the juvenile court's adjudications of delinquency and disposition.