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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. CESAR TAPIA HERNANDEZ, Appellant.	)	2 CA-CR 2007-0288 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063089

Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Cesar Hernandez was convicted of second-degree burglary and theft of property with a value of at least $3,000. The trial court suspended the imposition of sentence and imposed a four-year term of probation. On appeal, Hernandez claims the trial court abused its discretion in failing to strike a juror for cause. He also claims the state presented insufficient evidence to prove the value of the stolen property and requests that we reduce his conviction for theft from a class three felony to a class one misdemeanor. Hernandez has not shown prejudice with respect to the failure to remove a juror. But because we agree the state failed to present sufficient evidence of the value of the stolen property, we vacate his felony conviction for theft and modify the judgment to reflect a class one misdemeanor conviction for theft. We remand to the trial court with instructions to resentence Hernandez accordingly.

Jury Selection

¶2 Hernandez first argues that the court erred in refusing to strike a juror who Hernandez had challenged for cause. We review the trial court's decision for an abuse of discretion. *State v. Cruz*, 218 Ariz. 149, ¶ 28, 181 P.3d 196, 158 (2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 900 (2009). Even if the court does err in refusing to remove a juror for cause and the defendant is forced to use a peremptory strike, we will not reverse unless the defendant shows prejudice. *State v. Hickman*, 205 Ariz. 192, ¶¶ 20-21, 68 P.3d 418, 422 (2003). If the defendant does not challenge a purportedly impartial juror and fails to remove

that juror with an available peremptory strike, then the defendant has waived any error on appeal. *See State v. Rubio*, 219 Ariz. 177, ¶ 12, 195 P.3d 214, 218 (App. 2008).

¶3 Here, Hernandez argues the court erred in refusing to remove juror O. after that juror expressed certain biases and said he would act on those biases in his decision-making during deliberations. Hernandez asserts that he had to use a peremptory strike to remove O. and that he would have used that strike to remove a different juror, M., who ultimately did serve on the panel. He argues he was prejudiced because M. was an objectionable juror who was forced upon him.

¶4 Hernandez did not challenge M. during jury selection and did not raise an objection regarding his impartiality at any time during trial. And Hernandez does not claim that he used all of his other peremptory strikes to remove other objectionable jurors who should have been struck for cause. Thus, Hernandez could have cured any alleged error with respect to M. by removing him with one of his other peremptory strikes. Having failed to do so, Hernandez has waived any error on appeal regarding M. *See Rubio*, 219 Ariz. 177, ¶ 12, 195 P.3d at 218. Accordingly, even if the court erred in failing to remove juror O. for cause, Hernandez has failed to show prejudice. *See Hickman*, 205 Ariz. 192, ¶¶ 20-21, 68 P.3d at 422.

Sufficiency of the Evidence

¶5 Hernandez next argues the state presented insufficient evidence to prove the value of the stolen property. Because he did not make a timely motion pursuant to Rule 20,

Ariz. R. Crim. P., this claim is forfeited absent fundamental error.[1] *See State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005). However, a conviction that is not supported by sufficient evidence does constitute fundamental error. *Id.*

¶6 The version of A.R.S. § 13-1802(E) in effect at the time of the offense provided as follows:

> Theft of property or services with a value of three thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony. Theft of property or services with a value of two thousand dollars or more but less than three thousand dollars is a class 4 felony. Theft of property or services with a value of one thousand dollars or more but less than two thousand dollars is a class 5 felony. Theft of property or services with a value of two hundred fifty dollars or more but less than one thousand dollars is a class 6 felony. Theft of any property or services valued at less than two hundred fifty dollars is a class 1 misdemeanor . . . .

2004 Ariz. Sess. Laws, ch. 181, § 1.[2]

¶7 When considering claims of insufficient evidence, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence

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[1]At trial, Hernandez did not move for a judgment of acquittal on the theft charge pursuant to Rule 20, but he did raise the issue in a post-trial motion. The trial court found the motion untimely and also noted it would have been denied on the merits even if timely made.

[2]The state asserts that the most recently amended version of the statute, 2006 Ariz. Sess. Laws, ch. 195, § 2, applies. But that amendment did not become effective until September 20, 2006, and Hernandez committed the offenses on August 11, 2006. *See* Ariz. Const. art. IV, pt. 1, § 1(3) (laws effective ninety days after close of legislative session); *Garcia v. Browning*, 214 Ariz. 250, ¶ 7, 151 P.3d 533, 535 (2007) (amendments to statutes apply only prospectively unless otherwise expressly provided).

supports the conviction." *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). With respect to a theft conviction, the record must contain substantial evidence to show the fair market value of the property stolen or fundamental error results. *State v. Rushing*, 156 Ariz. 1, 4, 749 P.2d 910, 913 (1988); *see also* A.R.S. § 13-1801(A)(15) (value means fair market value). "Ordinarily, the owner of property is competent to give an opinion of its value." *Rushing*, 156 Ariz. at 4, 749 P.2d at 913. And specific testimony of value may not be "necessary if value may be inferred from other evidence." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996); *see also* § 13-1801(A)(15) ("When property has an undeterminable value the trier of fact shall determine its value and, in reaching its decision, may consider all relevant evidence, including evidence of the property's value to its owner."). The jury may use common sense, but will "not be permitted to speculate as to value." *State v. Grijalva*, 8 Ariz. App. 205, 207, 445 P.2d 88, 90 (1968).

¶8 If this court determines the evidence is insufficient to establish the value of the property at the amount found by the trier of fact, but it is also apparent that the "stolen items had some value," we will modify the classification of the offense to conform to the evidence. *State v. Corrales*, 131 Ariz. 471, 472-73, 641 P.2d 1315, 1316-17 (App. 1982) (class four felony theft conviction reduced to class one misdemeanor); *see also State v. Blankinship*, 127 Ariz. 507, 512, 622 P.2d 66, 71 (App. 1980) (conviction for theft of property worth more than $1,000 modified to conviction for theft of property worth more than $100).

¶9 Hernandez was convicted of theft of property having a value of $3,000 or more, but less than $25,000, which was a class three felony under § 13-1802.[3] *See* 2004 Ariz. Sess. Laws, ch. 181, § 1. At trial, the victim, William K., testified that his home had been burglarized and that various items had been taken. An entertainment center had been emptied, his wife's computer equipment was gone, three large pictures they had recently purchased were missing, a jewelry box had been "cleaned out," rolls of coins and "different things" that had been in the bedroom were gone, and a hunting knife was missing. William also identified property in photographs of items that had been subsequently recovered by authorities. The photographs depicted a television set, a surround sound system, some compact discs, a wall hanging, and a rock that had been on the mantel of their fireplace. William also testified that "some watches and things" out of the jewelry box had been returned to him including "an imitation Rolex . . . that was no longer working." He stated that he did not get back "[t]he more valuable watches" or his "wedding rings." He also noted that "a few other items that were more valuable, [he] did get back." William further testified that his wife had kept detailed records about their equipment, including a record of serial numbers, and that she had prepared a list of everything that was stolen from the house. This list was turned over to the police, but it was not presented at trial. The state did not present any evidence, through William's testimony or otherwise, as to any monetary value of the

[3]The verdict form listed the category as "$3,000.00 but less than $4,000.00."

stolen property. The state also did not provide any information regarding the age of any items or whether the computer and electronic equipment were operable.

¶10 During deliberations, the jury submitted three questions to the court. In the first question, the jury sought guidance on how it was supposed to determine the fair market value of the stolen items. In the second question, the jury asked if it could presume the minimum value of the property was $3,000 because that is what the state had charged in the indictment and "the [d]efense did not challenge that valuation." And in the third question, the jury asked if it could have the list of stolen property that the victims had prepared. The court responded to the first two questions with a reminder that the state had the burden to prove the value of the stolen property. The court also informed the jury that the indictment was not evidence and that the list of property had not been admitted. When the jury returned its verdicts, it found the value of the stolen property to be at least $3,000 but not more than $4,000.

¶11 The circumstances in *State v. Corrales*, 131 Ariz. at 472, 641 P.2d at 1316, were quite similar to those in the present case. The stolen items in *Corrales* included "two television sets, a radio, a vacuum cleaner, a violin, an electric shaver, a clock, and some jewelry." *Id.* The state had not presented any evidence regarding the value or condition of these items. *Id.* The court observed that even though photographs of some of the items did not depict any "great amount of exterior damage," the photographs were nonetheless of little help in determining value or operability. *Id*. The trial court had "opined that the jury could

infer that a reasonable person would not keep all of these items inside a house unless some of them worked." *Id.* But this court concluded that "[c]ommon experience informs us . . . that such an inference is suspect, at best, and far too tenuous to support a conviction where the value of the property was required to be proven beyond a reasonable doubt." *Id*. The court observed that, although the evidence was insufficient to establish the value of the property, it was apparent the property was worth something. *Id.* at 472-73, 641 P.2d at 1316-17. Accordingly, the court modified the conviction from a felony to a misdemeanor. *Id.*

¶12 The reasoning in *Corrales* is applicable here. The state submitted photographs of some of the stolen property, but it is impossible to determine whether the items depicted were in working order. The owner of the property, William K., testified to what had been stolen but did not provide information as to monetary worth, age, or condition. In the absence of any other testimony or evidence from which fair market value could be determined, we conclude the state did not present sufficient evidence to show the value of the property. As in *Corrales*, the evidence here establishes the stolen items must have had some value, but there is no evidence that shows, beyond a reasonable doubt, what that value was. *See id.* The jury's verdict was the product of improper speculation. *See Grijalva*, 8 Ariz. App. at 207, 445 P.2d at 90. Because a conviction based on insufficient evidence is fundamental error, *see Stroud*, 209 Ariz. 410, n.2, 103 P.3d at 914 n.2, we must modify the

judgment to reflect a conviction for theft as a class one misdemeanor.[4] *See Blankinship*, 127 Ariz. at 512, 622 P.2d at 71 (theft conviction will be modified to conform to the evidence).

Conclusion

¶13 In light of the foregoing, we affirm the conviction for second-degree burglary, vacate the conviction for theft as a class three felony, and amend the judgment to reflect a conviction for theft as a class one misdemeanor pursuant to A.R.S. § 13-1802(E). We remand for resentencing in accordance with this decision.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
PHILIP G. ESPINOSA, Judge

[4]The state could have presented the necessary evidence by simply eliciting additional testimony from William and the record contains no justification for the state's failure to do so. *See Rushing*, 156 Ariz. at 4, 749 P.2d at 913 (owner may provide competent opinion evidence as to value).