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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. DYLAN CARTER, Appellant.	)	2 CA-CR 2008-0013 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR 2007-0107

Honorable Peter J. Cahill, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
Attorneys for Appellee

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V Á S Q U E Z, Judge.

¶1 After a jury trial, Dylan Carter was convicted of theft and possession of burglary tools. The trial court sentenced him to an enhanced, aggravated, ten-year prison term for theft and a consecutive, enhanced, maximum term of 2.25 years for possession of burglary tools. On appeal, Carter contends the court erred in denying his motions to reconsider joinder of this case with another cause, to suppress evidence due to lack of reasonable suspicion to stop the vehicle in which he had been a passenger, and for a directed verdict of acquittal on the charge of possessing burglary tools. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 During the evening of January 12, 2006, Gila County sheriff's deputies Kerszykowski and Garrett were patrolling the area near "the Portals," a residential subdivision near Pine, due to a recent surge in "burglary activity" in the area. Between ten and eleven o'clock that night, while the deputies were parked near the entrance to the Portals, they saw a red Ford Mustang and a blue Dodge Neon turn into a nearby mobile home park. About forty-five minutes later, the same cars passed the officers' location at a high rate of speed. Kerszykowski and Garrett pursued the cars but were ultimately unable to find them. They then radioed their dispatcher with a general description of the vehicles so other officers could help locate them.

¶3 About ten minutes later, Payson police sergeant Faust stopped the Mustang and detained its two occupants—the driver, Tiffany T., and Carter, her passenger. When Kerszykowski arrived there, he noticed a claw hammer, a large-screen television, and a

computer tower in the backseat of the Mustang. After speaking with Tiffany, Kerszykowski arrested her for driving on a suspended license. He then spoke with Carter, who first stated the items in the backseat were his and then said he had gotten some of them from a friend. Based on information Faust obtained from Tiffany that Carter had burglarized a house in the Portals neighborhood, Kerszykowski arrested Carter and informed him of his *Miranda* rights.[1]

¶4 While in custody, Carter made incriminating statements concerning the burglary in the Portals neighborhood (Portals burglary) and another burglary that had occurred around January 6, 2006, near Whispering Pines (Whispering Pines burglary). In connection with the Portals burglary, the state charged Carter with second-degree burglary, theft of property worth more than $2,000 but less than $3,000,[2] criminal damage, and possession of burglary tools. He was also separately indicted for the Whispering Pines burglary on charges of second-degree burglary, trafficking in stolen property, and theft. Over Carter's objection, the trial court joined the cases for trial.

¶5 At trial, the court permitted Carter to represent himself on the Whispering Pines charges while being represented by counsel on the Portals charges. At the conclusion of the evidence, the trial court granted Carter's motion for a directed verdict on the Whispering Pines second-degree burglary charge, but it denied the motion on the trafficking charge in

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

[2]This count was later amended to conform to the evidence, which demonstrated the value of the property taken was greater than $3,000 but less than $25,000.

that indictment and on the count charging possession of burglary tools in the Portals indictment. The jury acquitted Carter of all remaining charges relating to the Whispering Pines burglary, as well as on the second-degree burglary and criminal damage charges arising from the Portals burglary. It found him guilty of theft and possession of burglary tools in connection with the Portals burglary, and the court sentenced him as noted above. This appeal followed.

Discussion

I. Joinder

¶6 Carter first contends the trial court erred by joining the charges from the Whispering Pines and Portals burglaries for trial pursuant to Rule 13.3(A)(3), Ariz. R. Crim. P., because there was no evidence of a common scheme or plan.[3] Preliminarily, we note that both parties and the trial court have analyzed this issue exclusively under Rule 13.3(A), which provides for the joinder of two or more offenses in a single indictment, information, or complaint under certain circumstances. However, these were not multiple offenses joined in a single indictment; the trial court consolidated two separate indictments for purposes of

[3]The state argues Carter waived this argument below by failing to raise it more than twenty days prior to trial. *See* Ariz. R. Crim. P. 16.1 (objections made twenty days or less before trial precluded unless previously unknown or otherwise directed by court). Despite noting that "the State does have a point with regard to waiver," the trial court nonetheless addressed the merits of Carter's argument not once, but three times. Therefore, even assuming the argument was untimely raised below, because the trial court considered the issue on its merits, we will in our discretion do so as well. *See State v. Ferreira*, 128 Ariz. 530, 535, 627 P.2d 681, 686 (1981) (considering merits of motion in limine where trial court considered motion despite untimely filing).

trial.[4] Thus, we must determine whether a joint trial was appropriate under Rule 13.3(C), which applies to consolidated indictments.[5]

¶7 The trial court has broad discretion in determining whether to join offenses under Rule 13.3. *State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (2003). "Its decision will not be disturbed absent a clear abuse of such discretion." *Id.*; *State v. Williams*, 183 Ariz. 368, 377, 904 P.2d 437, 446 (1995). To prove such an abuse of discretion and obtain reversal, a defendant must show "that, at the time he [objected to consolidation], he had proved that his defense would be prejudiced absent severance" and "'demonstrate compelling prejudice against which the trial court was unable to protect.'" *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995), *quoting State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983).

¶8 Before trial, the state filed a motion to join the Portals and Whispering Pines indictments for trial. After receiving no objection from Carter, the trial court granted the

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[4]The court stated, "[W]e have a unique case, not consolidated but joined, with the issues raised by [defense counsel]." In practice, however, there is little difference between analyzing whether joinder or consolidation is appropriate in a given case; the factors listed in Rule 13.3(A) are determinative in both analyses. *State v. Martinez-Villareal*, 145 Ariz. 441, 445, 702 P.2d 670, 674 (1985) (noting "offenses can be joined or consolidated only if they" satisfy one of the three criteria in Rule 13.3(A)). Nonetheless, because the indictments were not formally consolidated below, we have not received the record pertaining to the Whispering Pines burglary. Although appellate counsel has not separately requested it be made part of this record, we find the Whispering Pines record unnecessary to our resolution of the issues on appeal.

[5]Carter also argues the joint trial was inappropriate under Rule 13.3(A)(1), which permits joinder of offenses that "are of the same or similar character." However, because we conclude a joint trial was permissible under Rule 13.3(C), we need not reach this issue.

motion. However, Carter's counsel later moved for reconsideration, stating he had never received the state's motion and objecting to the joinder. The court held a hearing on the first day of trial and denied Carter's motion, finding there had been a "sufficient showing that would justify a joinder under [Rule] 13.3(A)(3) through the admissions of [Carter] of, indeed, a common scheme or plan, thereby justifying the . . . order joining the two [indictments]." Carter twice reurged his motion. Although acknowledging that it may have had reservations initially, the court ultimately concluded that, after hearing all of the evidence, it was "actually very, very clear . . . [that] joinder [wa]s appropriate, most especially the evidence[,] which the jury may or may not believe[,] that . . . the result of the first crime [the burglary tools] were used in the second crime." We agree.

¶9 Rule 13.3(C) permits consolidation of "offenses . . . charged in separate proceedings." If the nature of the offenses in the indictments fits into one or more of the categories for joinder listed in Rule 13.3(A), the indictments may be consolidated, "'provided that the ends of justice will not be defeated thereby.'" *Williams*, 183 Ariz. at 375, 904 P.2d at 444, *quoting* Rule 13.3(C). Rule 13.3(A)(3) provides that multiple offenses may be joined if they are part of a common scheme or plan. Under this rule, a "common scheme or plan" is composed of acts that are "sufficiently related to be considered a single criminal offense." *State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996). "'The distinction is between proving a specific plan embracing the charged crime and proving a general commitment to criminality which might well have involved the charged crime.'" *Id.* at 106, 927 P.2d at 766, *quoting State v. Ramirez Enriquez*, 153 Ariz. 431, 433, 737 P.2d 407, 409 (App. 1987).

¶10 Here, Carter admitted to police officers he had been involved in two separate burglaries that were part of a plan to raise the bail money necessary to "get a couple of other burglars out of jail." He also stated his vehicles had been used to transport the stolen property in both burglaries, and he offered to provide the locations of drop houses in Phoenix where the stolen property had been stored. In addition, Tiffany testified at trial that, on the night of the Portals burglary, Carter had shown her "a couple of [additional] houses" that he and another man "had picked out . . . [t]o break into." Thus, contrary to Carter's argument, the evidence demonstrated these crimes were more than a "concurrence of events" or general commitment to criminality. The evidence supported the trial court's conclusion that the crimes were part of a specific plan to raise bail money by committing burglaries and selling the stolen property.[6] *Compare State v. Grainge*, 186 Ariz. 55, 58, 918 P.2d 1073, 1076 (App. 1996) (evidence defendant supplied victim with marijuana admissible in prosecution for sexual crimes to show defendant's plan to seduce victim), *with Ramirez Enriquez*, 153 Ariz. at 433, 737 P.2d at 409 (at trial for sale of marijuana, other instances of defendant's selling marijuana not admissible as part of common scheme or plan). Because the offenses charged

[6]Even assuming the trial court erred in consolidating the indictments, Carter has failed to establish any prejudice occurred. *See Murray*, 184 Ariz. at 25, 906 P.2d at 558. The jury was properly instructed that the state was required to prove each element of every offense beyond a reasonable doubt and that it should consider each offense separately. *State v. Comer*, 165 Ariz. 413, 419, 799 P.2d 333, 339 (1990). Further, Carter was acquitted on all charges relating to the Whispering Pines burglary and on two of the Portals charges. *See United States v. Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987) ("The best evidence of the jury's ability to compartmentalize the evidence is its failure to convict a[] defendant[] on all counts."). Consequently, there is no basis on which we could conclude the jury's consideration of evidence related to the Whispering Pines burglary improperly influenced its verdicts on the Portals burglary.

in both indictments here were part of a common scheme or plan, consolidation did not defeat "the ends of justice," and the trial court did not abuse its discretion. Ariz. R. Crim. P. 13.3(C).

II. Motion to Suppress Evidence

¶11 Carter next argues the trial court erred by denying his motion to suppress evidence seized as the result of an unlawful stop of the Mustang. He contends Kerszykowski lacked reasonable suspicion to stop the vehicle when he put out the "attempt to locate" and Faust had never developed independent reasonable suspicion for stopping the car. We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *State v. Nelson*, 208 Ariz. 5, ¶ 4, 90 P.3d 206, 207 (App. 2004). We consider only the evidence presented at the suppression hearing, viewing the facts in the light most favorable to sustaining the court's ruling, but we review its legal conclusions de novo. *Id.*

¶12 Kerszykowski testified at the suppression hearing that, on the night in question, he was patrolling an area where there had been a rash of burglaries. He observed the Neon and the Mustang enter a nearby mobile home park and then "spe[e]d away" from the area forty-five minutes later. And, he estimated both vehicles' speed at thirty-five to forty miles per hour, noting the speed limit in that area was twenty-five miles per hour. Kerszykowski also testified he had successfully completed a radar certification class in which he had been trained to visually estimate the speed of moving vehicles and that, to pass the class, he had been required to accurately estimate the speed within five miles per hour ninety percent of the time.

¶13 Additionally, Kerszykowski stated that, although the two vehicles had not appeared unusual when they entered the mobile home park, he noticed they appeared significantly "weighed down" as they later drove past him. He had been unable to catch the cars, despite pursuing them at more than twice the posted speed limit. Based on the information in Kerszykowski's "attempt to locate," however, Faust was able to locate both vehicles while they were still traveling in tandem and to stop the Mustang.

¶14 After hearing the testimony and the arguments of counsel, the trial court denied the motion to suppress, finding there were "a number of different facts . . . in support of the stop, and it does appear that there has been credible testimony that the red Mustang, up in Pine . . . , was indeed going over the speed limit." The court also noted "the [sound associated with] acceleration that [Kerszykowski] could hear" as the vehicle sped away and Kerszykowski's testimony about the added weight in the vehicles.

¶15 On appeal, Carter contends Kerszykowski had "no reasonable articulable suspicion of criminal activity other than a hunch." But he does not challenge the trial court's conclusion that the Mustang was speeding as it passed Kerszykowski. Apparently conceding that Kerszykowski's visual estimate of the Mustang's speed was accurate to within five miles per hour, Carter acknowledges in his opening brief that, "the car[] could have been traveling around 30 miles per hour" as it left the Portals area. And he does not dispute that the speed limit was twenty-five miles per hour.

¶16 A police officer may stop a vehicle when the officer has reasonable suspicion to believe a traffic violation has occurred. *State v. Richcreek*, 187 Ariz. 501, 505 n.2, 930

P.2d 1304, 1308 n.2 (1997); *State v. Gonzales-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). And, traveling at a speed greater than the posted speed limit is a violation of Arizona law. *See* A.R.S. § 28-701; *State v. Box*, 205 Ariz. 492, n.2, 73 P.3d 623, 626 n.2 (App. 2003). Even assuming the Mustang was traveling at thirty miles per hour, it was still exceeding the posted speed limit, giving Kerszykowski reasonable suspicion to stop it.

¶17 That Faust, not Kerszykowski, actually stopped the Mustang does not alter that conclusion. *Box*, 205 Ariz. 492, ¶ 12, 73 P.3d at 627 (officer may stop vehicle for traffic violation committed outside of officer's presence). The circumstances supporting reasonable suspicion "may be established by the collective knowledge of all law enforcement personnel involved." *State v. Peterson*, 171 Ariz. 333, 335, 830 P.2d 854, 856 (App. 1991). Therefore, Faust had reasonable suspicion to stop the Mustang, and the trial court did not err in denying Carter's motion to suppress evidence.[7]

III. Sufficiency of Evidence for Possession of Burglary Tools

¶18 Finally, Carter argues the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on the Portals charge of possessing burglary tools. We review a court's ruling on a Rule 20 motion for an abuse of discretion. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). We view the evidence in the light most favorable to upholding the court's ruling, *State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003), and will reverse only if it appears that "upon no

[7]Because we have concluded the traffic stop was supported by reasonable suspicion to believe a traffic violation had been committed, we need not address whether Kerszykowski also had reasonable suspicion to believe a burglary had occurred.

hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury," *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶19 Carter contends there was no evidence he had "used or was going to use the bolt cutter or hammer in any burglary," therefore the state could not prove these particular items were burglary tools. He also seems to suggest the trial court should have granted his motion on this charge because it granted the motion in relation to the Whispering Pines burglary at which the bolt cutters and hammer had been stolen.

¶20 "A judgment of acquittal under Rule 20 is appropriate only where there is 'no substantial evidence to warrant a conviction.'" *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "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.'" *Mathers*, 165 Ariz. at 67, 796 P.2d at 869, *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). When reasonable minds could differ as to the inferences that may be drawn from the evidence, the evidence is substantial, and the case must be submitted to the jury. *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004); *Landrigan*, 176 Ariz. at 4, 859 P.2d at 114.

¶21 The crime of possession of burglary tools is committed by "[p]ossessing any explosive, tool, instrument or other article adapted or commonly 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." A.R.S. § 13-1505(A)(1). The state was thus required to prove Carter had

possessed the burglary tools and had either intended or permitted their use in furtherance of a burglary. At trial, the state presented evidence that the bolt cutters and hammer were found in the vehicle Carter had rented, that he was aware the tools had been stolen and used in the Whispering Pines burglary, and that he knew they had remained in the Mustang after that burglary. This is sufficient evidence from which the jury could have concluded he possessed the tools. *See State v. Cox*, 217 Ariz. 353, ¶¶ 26-27, 174 P.3d 265, 269 (2007) (defendant's ownership of vehicle and actual knowledge of gun's presence in vehicle sufficient to establish possession). Furthermore, the jury heard evidence that Carter had admitted participating in a broader burglary scheme and had told Tiffany that he intended to burglarize additional houses in the future. And Tiffany testified that Carter had broken a window in order to enter the Portals house. From this, the jury reasonably could have inferred Carter had either used the tools to break the window or had kept them in his car to aid in the commission of future burglaries.

¶22 Moreover, Carter's acquittal on charges related to the Whispering Pines burglary did not necessarily require his acquittal on the Portals charge of possessing burglary tools. Whether he had participated in the Whispering Pines burglary at which the tools had been stolen and used is not the determining factor. The only relevant question is whether there was sufficient evidence from which the jury could conclude that, at the time of the Portals burglary, Carter was in possession of tools commonly used to commit burglaries and either intended or permitted the tools to be used for that purpose. *See* § 13-1505(A)(1). We have already answered this question affirmatively. Therefore, because there was substantial

evidence supporting the jury's verdict, the trial court did not abuse its discretion in denying Carter's Rule 20 motion.

Disposition

¶23 For the reasons stated above, we affirm Carter's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge