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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. RUBEN GERARDO GARRIDO, Appellant.	)	2 CA-CR 2008-0064 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CR-07-124

Honorable Anna M. Montoya-Paez, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 A jury found appellant Ruben Gerardo Garrido guilty of second-degree burglary and possession of burglary tools. On appeal from his convictions and sentences, he argues the trial court abused its discretion in refusing to sanction the state for an alleged discovery violation, the evidence was insufficient to support his convictions, and the imposition of consecutive sentences violated A.R.S. § 13-116. Finding no error, we affirm.

Background

¶2 We view the evidence in the light most favorable to upholding the convictions. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In April 2007, Nogales police officers found Garrido hiding behind a shower curtain in the home of his neighbor, S. The home's front door had been damaged extensively in a manner that suggested a recent forced entry. Items inside the home, including sofas, dressers, and clothes, were out of place, and a digital video disc (DVD) player was lying on the floor. Upon searching Garrido, the officers found a gold cufflink, a watch, and a screwdriver in his possession. At trial, the victim, S., testified he owned the watch.

Discussion

I. Disclosure sanction

¶3 Garrido first contends "[t]he trial court abused its discretion in allowing the state to present evidence at trial which had not been timely disclosed," specifically, testimony by the victim regarding his ownership of the watch found in Garrido's possession. He suggests that testimony should have been precluded as a sanction pursuant to Rule 15.7(a),

Ariz. R. Crim. P. "The trial court has great discretion in deciding whether to sanction a party and how severe a sanction to impose. We review such a decision for an abuse of discretion and grant considerable deference to the trial court's perspective and judgment." *State v. Meza*, 203 Ariz. 50, ¶ 19, 50 P.3d 407, 412 (App. 2002) (citation omitted).

¶4 We first note that, contrary to Garrido's assertion that "none of the formal disclosures submitted by the State disclosed the victim as a witness at trial," the state's initial disclosure listed S. as a witness. But the state did not disclose before trial that S. would testify he owned the watch found in Garrido's pocket when he was arrested. S. identified the watch as his on the first day of trial, before opening statements, when he saw it in evidence. The prosecutor then immediately informed defense counsel of that identification. Garrido's ensuing request to preclude this new "piece of evidence" was denied.

¶5 Rules 15.1 and 15.6, Ariz. R. Crim. P., require the state to make certain disclosures to a defendant and impose a "[c]ontinuing duty" to disclose as "new or different information subject to disclosure is discovered." "Rule 15.1(a)(1) requires the state to disclose the names of all witnesses together with their relevant written or recorded statements." *State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995). But, as Garrido acknowledges "[t]he criminal discovery rules do not require the state to provide a word-by-word preview to defense counsel of the testimony of the state's witnesses." *State v. Wallen*, 114 Ariz. 355, 361, 560 P.2d 1262, 1268 (App. 1977). Garrido does not contend

the state withheld any written or recorded statements or that S.'s testimony "tend[ed] to mitigate or negate [his] guilt or reduce his punishment." *Id.*

¶6 Likewise, Garrido cites no authority to support his broad assertion that, "because of the victim's invocation of his rights [under Arizona's Victims' Bill of Rights], the State should have affirmatively ascertained all information it could regarding the victim's anticipated testimony and timely disclosed the same." *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also State v. O'Neil*, 172 Ariz. 180, 181, 836 P.2d 393, 394 (App. 1991) ("[N]othing in the criminal discovery rules authorizes the trial court to require the state to create or produce evidence, specifically statements, which it must then disclose."). And nothing in the record suggests the state knew or should have known before trial that the victim owned the watch or would so testify. Therefore, we cannot say the state failed to meet its disclosure obligations, much less that the trial court abused its discretion in declining to impose sanctions. *See Wallen*, 114 Ariz. at 361, 560 P.2d at 1268; *see also State v. Jessen*, 130 Ariz. 1, 3-4, 633 P.2d 410, 412-13 (1981) (finding no disclosure violation when defendant "not informed prior to trial that the police report did not reflect with exactness [witness's] understanding of what had occurred").[1]

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[1]In a related argument, Garrido maintains the trial court "fail[ed] to consider and rule on [his] motion for new trial," in which he also challenged the trial court's ruling on this disclosure issue. But the trial court did rule on the motion, albeit after Garrido filed his notice of appeal. Although he cites authority to support his assertion that "the trial court lost jurisdiction to consider any motions except those in furtherance of the appeal," he does not develop that argument, nor does he argue the trial court erred in denying the motion. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). In view of that failure and our disposition above of the

II. Sufficiency of the evidence

¶7 Garrido next argues "the evidence presented at trial [wa]s insufficient to support [the] guilty verdicts" against him. He states "there [wa]s a conflict between the testimony of the state's witnesses and a rational trier of fact would not find him guilty beyond a reasonable doubt" because of that conflict. We review only to determine if substantial evidence supports the verdicts. *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007). "Substantial evidence is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "'Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.'" *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996), *quoting State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976).

¶8 To prove Garrido committed second-degree burglary, the state had to show he had "enter[ed] or remain[ed] unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A); *see also* A.R.S. § 13-1802(A)(1) (theft). Officers found Garrido in the victim's home with the victim's watch in

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argument made again in the motion for new trial, we do not separately address the court's denial of that motion. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

his possession and evidence of a forced entry into the home. Thus, there was evidence to show he had entered the structure unlawfully and had intended to commit a theft while there. *See State v. Garza*, 196 Ariz. 210, ¶ 3, 994 P.2d 1025, 1026 (App. 1999) ("We will uphold a trial court's finding of guilt if it is supported by substantial evidence, which may be either circumstantial or direct.").

¶9 Garrido argues, however, that he had only "entered the residence to investigate" and that, based on his father's trial testimony, he owned the watch found in his possession and had not possessed stolen property. But "[e]vidence is not insufficient simply because testimony is conflicting." *State v. Donahoe*, 118 Ariz. 37, 42, 574 P.2d 830, 835 (App. 1977); *see also State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007) ("'No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.'"), *quoting State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). Thus, we cannot say there was insufficient evidence to support Garrido's burglary conviction.

¶10 Likewise, we reject Garrido's argument that insufficient evidence supported his conviction for possession of burglary tools. One commits that offense by "[p]ossessing any explosive, 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." A.R.S. § 13-1505(A)(1). The investigating officers testified that Garrido had been found with a screwdriver in his possession and that screwdrivers are commonly used to commit

burglaries. They also testified a screwdriver could have caused some of the damage to the victim's front door.

¶11 As Garrido argues, one officer's testimony about whether the screwdriver actually caused the damage was "inconsistent," and the other officer admitted there was "no . . . scientific way[] to determine whether [the particular] tool actually had an effect on th[e] door." But, again, conflicting testimony does not make the evidence insufficient. *Donahoe*, 118 Ariz. at 42, 574 P.2d at 835. And, the evidence necessary to support a conviction may be either direct or circumstantial. *Garza*, 196 Ariz. 210, ¶ 3, 994 P.2d at 1026. In sum, the state produced sufficient evidence for the jury to infer Garrido had possessed a tool commonly used to commit burglary and had intended to use the tool to commit the burglary. *See* § 13-1505(A)(1).

III. Consecutive sentences

¶12 Last, Garrido challenges as "illegal" the trial court's imposition of presumptive, consecutive sentences totaling fifteen years' imprisonment. He argues § 13-116 prohibited the court from imposing consecutive sentences on his burglary and possession-of-burglary-tools convictions. Because Garrido did not object to the sentences below, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error analysis applied when defendant fails to object below). The defendant has the "burden of persuasion in fundamental error review." *Id.* "To prevail under

this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶13 Garrido does not argue any error here was fundamental and, therefore, has not sustained his burden of establishing any fundamental error. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not asserted); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). He does argue, however, the consecutive sentences are illegal, and an illegal sentence constitutes fundamental error. *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002). In any event, Garrido has failed to show any error, fundamental or otherwise, occurred here. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608 ("To obtain relief under the fundamental error standard of review, [defendant] must first prove error.").

¶14 Section 13-116 precludes consecutive sentences for "[a]n act or omission . . . made punishable in different ways by different sections of the laws." This poses an "analytic difficulty" because a crime is not the equivalent of a single act but, instead, "a series of interrelated events and movements—a total transaction with indefinite spatial and temporal boundaries." *State v. Gordon*, 161 Ariz. 308, 313, 778 P.2d 1204, 1209 (1989). Thus, to apply § 13-116, a court must "determine whether a constellation of facts constitutes a single act, which requires concurrent sentences, or multiple acts, which permit consecutive sentences." *Id.* at 312, 778 P.2d at 1208.

¶15 As Garrido correctly asserts, the court in *Gordon* established an analytical framework to resolve this difficulty. Specifically,

> [f]irst, we must decide which of the . . . crimes is the "ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." Then, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge." If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." Finally, we consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime."

State v. Urquidez, 213 Ariz. 50, ¶ 7, 138 P.3d 1177, 1179 (App. 2006) (citations omitted), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (alteration in *Urquidez*).

¶16 Garrido argues only that the first part of this test has not been met. He asserts that the ultimate crime in this case was burglary and that "subtracting the elements of burglary . . . would not leave sufficient evidence to satisfy the secondary crime [of] possession of burglary tools." Because second-degree burglary is a class three felony and possessing burglary tools is a class six felony, we agree burglary was the ultimate crime. *See id*. ¶ 7 ("ultimate crime" is most serious charge).

¶17 We disagree, however, with Garrido's assertion that the first prong of the *Gordon* test is not met here. As noted above, the elements of second-degree burglary are entering or remaining in a residential structure with the intent to commit a theft or felony

therein. § 13-1507(A). Subtracting the evidence showing Garrido was in the victim's home intending to commit a theft leaves the evidence that Garrido possessed a screwdriver—the evidence needed to support his conviction for possession of burglary tools. *See* § 13-1505(A)(1).

¶18 Garrido does not address the remaining aspects of the *Gordon* test and, therefore, has not met his burden to show error on those points. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608; *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *see also State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005) (claim that defendant's sentences violated § 13-116 waived "[b]ecause he failed to develop th[e] argument as required by Rule 31.13(c)(1)(vi)"). Accordingly, we do not further address the other *Gordon* factors.

Disposition

¶19 Garrido's convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge