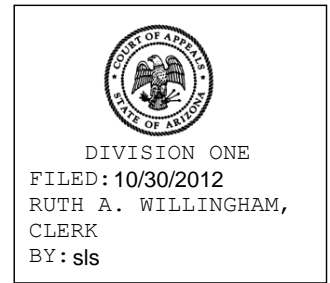


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 11-0290
)
)
) DEPARTMENT A
)
) Appellee,)
)
)
) v.)
) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)
) JOHN ALBERT LEE,)
)
) Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-153059-001DT

The Honorable Colleen L. French, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Defendant-Appellant John Albert Lee ("Lee") was tried and convicted of shoplifting with an artifice or device (Count 1) and organized retail theft (Count 2), and sentenced to ten

years on each count to be served concurrently. Counsel for Lee filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. In addition, counsel requests that this Court review the following issues which were raised by Lee: (1) failure of the superior court to give a lesser included instruction with respect to the charge of organized retail theft, (2) abuse of discretion by the superior court for denying Lee's motion to suppress, (3) erroneous use of a penitentiary pack ("pen pack")¹ to prove prior felonies, (4) failure of the State to produce the actual items Lee was found in possession of, (5) lack of a preliminary hearing, (6) use of old prior convictions to enhance the sentences, (7) violation of Lee's constitutional rights by the State and by the superior court, and (8) insufficiency of the evidence. For the reasons that follow, we affirm Lee's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 Lee's charges arose out of his arrest for shoplifting

¹ A "pen pack" refers to certain prison records kept in compliance with state law. Ariz. Rev. Stat. ("A.R.S.") § 31-221(A) (2002); see *State v. Thompson*, 166 Ariz. 526, 527, 803 P.2d 937, 938 (App. 1990) (referring to the contents of a record from the Department of Corrections as a "pen pack").

from a Safeway. On September 30, 2010, E.V., a loss prevention officer, working for Advance Security, a security company hired by Safeway to prevent theft, was informed by his partner R.B. that he needed to watch Lee, who was in the Safeway. E.V. and R.B. observed Lee picked up several shampoo bottles and placed them into a reusable shopping bag in Lee's cart. E.V. thought that this was odd because he remembered Lee being bald and the items were "kind of high-priced." R.B. testified that Lee was "just grabbing bottles . . . not looking at prices . . . whatever he could get his hands on."

¶3 E.V. then watched Lee select detergent, put it in a bag and then go to the restroom. Before reaching the restroom, R.B. saw Lee go to the deli area and conceal other items. After Lee left the restroom, he picked up the shopping bags, with the detergent and shampoo in them, and proceeded to walk out of Safeway. E.V. testified that Lee could not push the cart out of the door with the items in it because if someone tries to take the cart through the doors without going through a register, the carts lock up and an alarm goes off.

¶4 Once Lee was outside with the items, E.V. testified he approached Lee and identified himself as store security. He further testified that Lee was cooperative and that Lee was taken to the employee break room where E.V. questioned him. E.V. testified that during the questioning he asked Lee why he

took the items, and Lee responded that he took them to trade them for marijuana and that he had done an exchange like this previously. During the interview, Phoenix Police Officer B.Y. arrived at the Safeway in response to the shoplifting call.

¶5 B.Y. read Lee his *Miranda*² rights and Lee agreed to speak with the officer. Lee told B.Y. that he was detained because he took some things from the store and that he would trade items like detergent and shampoo for marijuana. Lee believed he would get thirty dollars (\$30) worth of marijuana for the items he took and also stated that he took some food items to eat.

¶6 After a two-day trial Lee was found guilty of Counts 1 and 2. Lee received two ten (10) year sentences to be served concurrently with a credit of 88 days of presentence incarceration. Lee was also ordered to pay restitution to Safeway in the amount of twelve dollars and sixty-six cents (\$12.66) and a one-time fee payment of twenty dollars (\$20).

DISCUSSION

¶7 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going to the foundation of the case, error that takes

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at ¶ 20, 115 P.3d at 607. On review, we view the facts in the light most favorable to sustaining the jury’s verdict and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

I. SUFFICIENCY OF THE EVIDENCE

¶8 In reviewing the sufficiency of evidence at trial, “[r]eversible 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)).

A. Shoplifting with an Artifice or Device

¶9 There is evidence in the record to support the jury’s conviction of Lee for the crime of shoplifting with an artifice or device. A person commits shoplifting with an artifice or device if that person “[u]ses an artifice, instrument, container, device or other article to facilitate the

shoplifting." Arizona Revised Statutes ("A.R.S.") section 13-1805(B)(2) (2010).³

A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, the person knowingly obtains such goods of another with the intent to deprive that person of such goods by: (1) Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price. . . .

A.R.S. § 13-1805(A)(1). Shoplifting using an artifice or device is a class 4 felony. A.R.S. § 13-1805(I).

¶10 The testimony of both security officers showed that the merchandise was on display for sale at Safeway and that Lee knowingly obtained the shampoo and detergent with the intention of permanently depriving Safeway of such goods by removing the goods from Safeway without paying the purchase price. Furthermore, Lee admitted that he left the Safeway store with the goods without paying the purchase price and that he intended to trade the goods for marijuana. The evidence supports the finding that Lee committed shoplifting.

¶11 With respect to Lee committing shoplifting with an "artifice, instrument, container, device or other article," the State introduced both testimony and photographs that demonstrated Lee used two reusable shopping bags in which to place the items and then carry them out of the store. Although

³ We cite to the most current version of the applicable statute when no relevant substantive changes have occurred.

the statute does not define "container" we look to the dictionary definition of the word under the direction of A.R.S. § 1-213 (2002), which provides that "[w]ords and phrases shall be construed according to the common and approved use of the language." See *Rigel Corp. v. State*, 225 Ariz. 65, 69, ¶ 19, 234 P.3d 633, 637 (App. 2010) (using common usage and dictionary definitions to define a term at issue). Thus, a container for the purposes of this statute is defined to be "[a] receptacle for holding or carrying material." Webster's II New Riverside University Dictionary 304 (1994). The shopping bags meet this definition.

B. Organized Retail Theft

¶12 There is evidence in the record to support Lee's conviction for organized retail theft, also a class 4 felony. A.R.S. § 13-1819(B) (2010).

A person commits organized retail theft if the person, acting alone or in conjunction with another person does any of the following: (1) Removes merchandise from a retail establishment without paying the purchase price with the intent to resell or trade the merchandise for money or for other value.

A.R.S. § 13-1819(A) (1). The testimony of both security officers was that they observed Lee leave the Safeway store with merchandise that he did not pay for. Lee clearly stated that he intended to trade the items for marijuana and that he had done this previously. To admit a defendant's confession as evidence

of the crime, the State need only introduce a reasonable inference to establish corpus delicti. *State v. Jones ex rel. County of Maricopa*, 198 Ariz. 18, 22, ¶ 12, 6 P.3d 323, 327 (App. 2000). Circumstantial evidence of the quantity of items stolen would allow a reasonable jury to infer Lee's intent to resell or trade the stolen items.⁴ *Id.* at 23 n.7, 6 P.3d at 328; *State v. West*, 226 Ariz. 559, 562, ¶ 16, 250 P.3d 1188, 1191 (2011) ("Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction."); *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (holding that circumstantial evidence was sufficient to uphold defendant's convictions). There is sufficient evidence in the record to support Lee's convictions.

II. FAILURE TO GIVE LESSER INCLUDED INSTRUCTION

¶13 A form of verdict may be given to the jury for a lesser included offense that is "necessarily included in the offense charged, an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense." Ariz. R. Crim. P. 23.3.

¶14 The court agreed that the lesser included offense of shoplifting under A.R.S. § 13-1805 should be included in the jury instructions as to Count 1 because shoplifting was a

⁴ Lee was in possession of ten bottles of shampoo and five large bottles of laundry detergent.

necessary element of the greater charge.

¶15 With respect to Count 2, the language in the A.R.S. § 13-1819 does not include the intent to deprive, which is an element of shoplifting as set forth in A.R.S. § 13-1805. Therefore, shoplifting cannot be a lesser included offense of organized retail theft, as shoplifting requires an additional element. In addition, had the court included shoplifting as a lesser included offense of organized retail theft, Lee could have been found guilty of shoplifting for both Counts 1 and 2, which would have been duplicative.

¶16 Therefore, the trial court was correct in denying the lesser included instruction of shoplifting with respect to organized retail theft.

III. THE MOTION TO SUPPRESS

¶17 "A trial court's denial of a motion to suppress will not be reversed in the absence of a clear abuse of discretion." *State v. Adamson*, 136 Ariz. 250, 254, 665 P.2d 972, 976 (1983). "A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or 'the record fails to provide substantial evidence to support the trial court's finding.'" *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007) (quoting *Grant v. Ariz. Pub.*

Serv. Co., 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982)).

¶18 A motion to suppress goes to the admissibility of evidence.⁵ Evidence is admissible as long as it is relevant, meaning that "it has any tendency to make a fact more or less probable than it would be without the evidence." Ariz. R. Evid. 401(a). Lee's statements were relevant evidence within the meaning of Arizona Rule of Evidence 401, and were not made involuntarily. Furthermore, Lee's statements should not have been excluded for any of the reasons set forth in Arizona Rule of Evidence 403.⁶ Review of the record does not show an abuse of discretion in denying the motion to suppress.

IV. ALLOWING PEN PACKS TO PROVE PRIORS

¶19 Lee asserts the superior court erred in admitting a pen pack to prove his prior convictions. To prove prior convictions, "the state must submit positive identification establishing that the accused is the same person who previously was convicted, as well as evidence of the conviction itself." *State v. Cons*, 208 Ariz. 409, 415, ¶ 16, 94 P.3d 609, 615 (App. 2004). The procedure for establishing a prior conviction is

⁵ There is nothing in the record to support a conclusion that Lee's statements or the products found with him should have been suppressed either because the statements were coerced or because the search was a violation of the Fourth Amendment.

⁶ Rule 403 allows the exclusion of evidence if it is unduly prejudicial, misleading, confusing, unduly delaying, a waste of time or needlessly cumulative.

through the submission of a certified copy of such conviction and the establishment that the defendant is referred to therein. *Id.* This requirement has two exceptions, only one of which applied to Lee: "the documentation requirement will be excused where the state can show that its earnest and diligent attempts to procure the necessary documentation were unsuccessful for reasons beyond its control and that the evidence introduced in its stead is highly reliable." *State v. Hauss*, 140 Ariz. 230, 231, 681 P.2d 382, 383 (1984).

¶20 B.Y. took a latent print from Lee on March 8, 2011, and it was entered into evidence at sentencing as Exhibit 1. The State also moved to introduce Exhibit 2, which contained a certified pen pack, a certified fingerprint, and a certified minute entry which contained Lee's fingerprint and a conviction in 2002. The State asserted that Lee's prior convictions were so old, they were unable to obtain other minute entries and therefore the authentication by a certified pen pack was appropriate. The defense objected to the admission of the pen pack, but the court overruled the objection and allowed the pen pack into evidence. The court heard testimony from a fingerprint analysis expert who stated that she was unable to confirm or deny a match with impression number one (from the certified minute entry) and Lee's latent print, but was able to confirm that impression number two (from the certified pen pack)

was a match with Lee's latent print.

¶21 The court did not commit error by allowing the use of a certified pen pack to prove Lee's prior convictions. See *State v. Thompson*, 166 Ariz. 526, 527, 803 P.2d 937, 938 (App. 1990) (holding that "[t]he trial court could have reasonably concluded" that the pen pack was a record of the defendant's prior conviction).

V. FAILURE TO PRODUCE STOLEN ITEMS

¶22 Lee argues that the State did not produce the actual items that were found in Lee's possession, but rather photographs of those items. The State was under no obligation to produce the actual items that were in Lee's possession at the time of the incident. The State instead introduced photographs of the items that were stolen after the photographs were properly authenticated. The introduction of such photographs is proper. *State v. Bouillon*, 112 Ariz. 238, 241, 540 P.2d 1219, 1222 (1975) (holding that photographs of stolen items were properly introduced into evidence after the proper foundation was laid by witness testimony). Because one of the witnesses testified that the photographs were accurate photos of the items found on Lee, thus laying a proper foundation for the photographs, the superior court did not err in admitting the photographs in lieu of the actual items stolen by Lee. *Id.*

VI. LACK OF PRELIMINARY HEARING

¶23 Lee was indicted by a grand jury in lieu of a complaint followed by a preliminary hearing. The Arizona Constitution provides that “[n]o person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment.” Ariz. Const. art. 2, § 30. Arizona Rule of Criminal Procedure 2.2 provides that “[f]elony actions may be commenced: (a) By indictment, which may or may not be preceded by a complaint; or (b) By the filing of a complaint before a magistrate in a limited jurisdiction court, or in a court of record with permission of the judge of such court.” Arizona Rule of Criminal Procedure 5.1 requires that within ten (10) or twenty (20) days of defendant’s initial appearance, there must be a preliminary hearing, unless the complaint has been dismissed. The comment to Rule 5.1 provides that “if the hearing is waived or the charges dismissed (as upon return of a grand jury indictment), no hearing need be held.” (Citation omitted.) It is constitutional for a person accused of a felony to be brought to trial after *either* a grand jury indictment *or* a complaint followed by a preliminary hearing. *State v. Meeker*, 143 Ariz. 256, 265, 693 P.2d 911, 920 (1984) (holding that there was no violation of the defendant’s constitutional rights when he was indicted by a grand jury and did not have a preliminary hearing). Lee’s lack of a

preliminary hearing did not violate his constitutional rights.

VII. USE OF PRIOR CONVICTIONS TO ENHANCE SENTENCING

¶24 Lee argues the superior court erred in enhancing his sentence through prior historical felony convictions. The presumptive sentence for an adult convicted of a class 4 felony, who has two or more prior historical felony convictions, is a sentence of ten (10) years. A.R.S. § 13-703(C), (J) (Supp. 2012). A historical prior felony conviction is defined as “[a]ny felony conviction that is a third or more prior felony conviction.” A.R.S. § 13-105(22)(d) (Supp. 2012). The court found and the record shows that Lee had ten prior felonies; seven of those were historical prior felonies for the purposes of enhancing sentencing. There was no error of the court in applying the enhanced presumptive sentence for each count.

VIII. VIOLATION OF LEE’S CONSTITUTIONAL RIGHTS

¶25 Although Lee asserts a violation of his constitutional rights by both the State and the superior court, Lee does not indicate when or how his constitutional rights were violated. We have searched the record and find no violation of Lee’s constitutional rights.

CONCLUSION

¶26 After careful review of the record, we find no meritorious grounds for reversal of Lee’s convictions or modification of the sentences imposed. The evidence supports

the verdict, the sentence imposed was within the sentencing limits, and Lee was represented at all stages of the proceedings below. Accordingly, we affirm Lee's conviction and sentence. Upon the filing of this decision, counsel shall inform Lee of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Lee shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

ANN A. SCOTT TIMMER, Presiding Judge

/S/

PATRICIA K. NORRIS, Judge