

NOTE: 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. 31.34



DIVISION ONE
FILED: 06/19/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0453
)
Appellee,) DEPARTMENT B
)
v.) MEMORANDUM DECISION
)
DOUGLAS WAYNE ENGLAND,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006224-002DT

The Honorable Janet E. Barton, Judge

CONVICTION AND SENTENCE AFFIRMED

Thomas C. Horne, 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 Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following Douglas Wayne England's conviction of second-degree trafficking in stolen property, a Class 3 felony. England's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). England was given the opportunity to file a supplemental brief but did not do so. Counsel now asks this court to search the record for fundamental error. At England's request, counsel also raises three issues, which we address below. After reviewing the entire record, we affirm England's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2 Two undercover police officers met with T.H. on England's property one day to purchase a stolen car.¹ Because the car was concealed in a locked garage to which England, but not T.H., had a key, T.H. phoned England to come and open the garage. When England arrived, he unlocked and opened the door to the garage, revealing the car inside. England then advised T.H. how to use the house key that was in the car's ignition to start the car. When an undercover detective asked England "if

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against England. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

that [license] plate's going to be reported or anything," England suggested it might never be reported stolen. Then, in England's presence, the detective paid T.H. only \$200 to purchase the car, a price well below fair market value. The car later was identified as having been stolen the previous day.

¶13 England was arrested and charged with one count of second-degree trafficking in stolen property. At trial, the jury found him guilty as charged. The court found two historical prior felony convictions and sentenced England to a mitigated term of nine years with 148 days' presentence incarceration credit.

¶14 England timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033 (West 2012).²

DISCUSSION

A. Issues Raised by England.

1. Denial of motion for mistrial.

¶15 England first argues the court erred by denying his request for a mistrial after the prosecutor asked a detective who was testifying whether he had contact with England subsequent to the charged offense. Because the detective had

² Absent material revision after the date of an alleged offense, we cite a statute's current version.

testified to working undercover, investigating stolen property for four and one-half years, England argues, the question and the detective's affirmative answer necessarily and impermissibly suggested England was involved in other acts of trafficking or other illegal activity.

¶6 We review the superior court's denial of a motion for mistrial for an abuse of discretion. *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003). Evidence of a defendant's other crimes or other bad acts generally is inadmissible under Arizona Rule of Evidence 404(b), but we will reverse a conviction for a violation of that rule of evidence only if there exists a "'reasonable probability' that the verdict would have been different" if the improper testimony had not been admitted. *State v. Hoskins*, 199 Ariz. 127, 142-43, ¶ 57, 14 P.3d 997, 1012-13 (2000) (quoting *State v. Atwood*, 171 Ariz. 576, 639, 832 P.2d 593, 656 (1992)). "In deciding whether to grant a mistrial based on a witness's testimony, the trial court considers (1) whether the testimony called to the jury's attention matters that it would not have been justified in considering in reaching the verdict, and (2) the probability that the testimony influenced the jury." *State v. Gulbrandson*, 184 Ariz. 46, 62, 906 P.2d 579, 595 (1995).

¶7 Here, the detective's affirmative response to the question, "Did you ever have contact with the Defendant again

after that date?" could have referred to purely innocent contact between England and the detective. Even assuming the answer implied a subsequent illegal act in violation of Rule 404(b), the court effectively avoided potential prejudice by striking the question and answer and instructing the jury to disregard them. Additionally, with the parties' agreement, the court further instructed the jury "that the subsequent encounter between the Detective and [England] here was simply a casual encounter that had absolutely nothing to do with the Detective's undercover work. It just happened to be a happenstance encounter." Under the circumstances, we cannot conclude the prosecutor's question and the detective's one-word answer improperly influenced the jury. *See, e.g., State v. Jones*, 197 Ariz. 290, 305, ¶ 34, 4 P.3d 345, 360 (2000). The court did not err by denying England's motion for mistrial based on this testimony.

2. Ineffective assistance of counsel.

¶18 England next argues his counsel was ineffective because, even though England wanted to testify, his attorney "told [him] it would be in the best of [his] interest not to take the stand." A claim of ineffective assistance of counsel may not be reviewed on direct appeal. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002)

(ineffective assistance of counsel claim must be raised under Arizona Rule of Criminal Procedure 32). We therefore do not address England's argument that his counsel was ineffective.

3. Sufficiency of the evidence.

¶19 Finally, England argues insufficient evidence supported his conviction. At trial, England's counsel moved for a judgment of acquittal, and the superior court denied the motion. A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87, 84 P.3d 456, 477 (2004).

¶10 The evidence recounted above was sufficient to support England's conviction. Although England argues "it was [T.H.] who was trying to sell the car to the detectives," the evidence supported the conclusion that England participated in trafficking the stolen car. To the extent the evidence also tied T.H. to the sale of the stolen car, the jury was instructed on accomplice liability and reasonably could have convicted England on that basis as well. See A.R.S. §§ 13-301 (West 2012) ("accomplice" defined), -303(A)(3) (West 2012) (accomplice criminally liable for principal's conduct).

B. Fundamental Error Review.

¶11 The record reflects England received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings. Pursuant to Arizona Rule of Evidence 609, the court considered and sanitized England's prior felony convictions. The court did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of England's statements to police. See *State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974).

¶12 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of eight members with one alternate. The court properly instructed the jury on the elements of the charge, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report, addressed its contents during the sentencing hearing and imposed a legal sentence for the crime of which England was convicted.

CONCLUSION

¶13 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶14 After the filing of this decision, defense counsel's obligations pertaining to England's representation in this appeal have ended. Defense counsel need do no more than inform England of the outcome of this appeal and his future options, 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). On the court's own motion, England has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. England has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/

DONN KESSLER, Judge

/s/

LAWRENCE F. WINTHROP, Chief Judge