DIVISION ONE
FILED: 09/25/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0653
Appellee,	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
KENNETH K. MARCUM,	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-007668-001

The Honorable Robert E. Miles, Judge

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 Louise Stark, Deputy Public Defender
Attorneys for Appellant

Kenneth K. Marcum — Tucson
In Propria Persona

H A L L, Judge

¶1 Kenneth K. Marcum (defendant) appeals from his convictions and the sentences imposed. For the reasons set forth below, we affirm.

¶2 Defendant's appellate counsel filed a brief in accordance with *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), advising that, after a diligent search of the record, she was unable to find any arguable grounds for reversal. This court granted defendant an opportunity to file a supplemental brief, which he has done. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). Defendant has raised in his supplemental brief and through counsel, three issues: (1) failure to give a *Willits* instruction regarding the loss of the vehicle for further inspection by defense; (2) failure to record the hospital interview; (3) officers' assertions that appellant gave different versions of statement.

¶3 We review for fundamental error, error that goes to the foundation of a case or takes from the defendant a right essential to his defense. *See State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988). We view the evidence presented at trial in a light most favorable to sustaining the verdict. *State v. Cropper,* 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003).

¶4 On October 27, 2010, defendant was charged by indictment with one count of arson of a structure or property, a class four dangerous felony, and one count of attempt to commit fraudulent schemes and artifices, a class three felony.

¶5 The following evidence was presented at trial. On the afternoon of July 7, 2010, Shawn Jewel had been watching television in his apartment when he heard a loud noise outside. Jewel looked out of his window and saw a vehicle "engulfed in flames" and defendant on the ground attempting to get away from the vehicle. Jewel called 9-1-1 and went downstairs to try and help defendant. Jewel testified that defendant was concerned that the vehicle might "explode" because there was gasoline inside it. Jewel stated that defendant told him the vehicle "blew up" after he reached inside to try to start it.

¶6 Officer Shawn Osborn, a fire/arson investigator for the City of Surprise, and Detective John Vance responded to a call to investigate a vehicle fire. They observed a burned antique vehicle in an uncovered parking space. Officer Osborn stated that the safety glass was melted inward, which generally means the fire started on the interior of the vehicle. He observed "two very, very obvious burn patterns on the top of the hood . . . and on the top of the trunk lid." He said that those burn patterns were from a flammable liquid such as gasoline, charcoal lighter fluid, cigarette lighter refiller, or liquid

butane. He found that there was the same amount of fire damage throughout the passenger compartment and "zero" fire damage in the engine compartment and the vehicle's fuel lines.

¶7 In addition to investigating the fire, Officer Osborn interviewed defendant at the hospital after the incident. He testified that defendant told him four different accounts of what happened to the vehicle during the interview. First, defendant explained that he had recently increased the vehicle's insurance coverage to $50,000.00, that he had no money, and he had just relocated to Arizona from Illinois. Defendant continued that while he was working on the car, a fuel leak started in the fuel pump, and the car caught fire. Second, defendant explained that he had a "friend"[1] drive the vehicle from his ex-wife's house in Arizona to the Surprise apartment complex and when defendant attempted to start the car, it "blew up." Third, defendant stated that he removed the air cover from the carburetor, primed the carburetor with gasoline, got into the vehicle, and started it. The vehicle ran for about ten minutes and defendant stated that he smelled gas, looked down, and saw fuel inside the vehicle and turned off the ignition. Defendant said that he started the car again and "the interior burst into flames." Fourth, defendant told Officer Osborn that

[1] Officer Osborn attempted to get the name of the driver but defendant diverted him by saying, "[t]here's no foul play here."

there was a fuel leak under the vehicle that originated in the fuel pump. Defendant continued that when he turned on the vehicle by reaching into it with his right arm, it "burst into flames."

¶8 Officer Osborn testified that defendant contacted him on July 21 and was "extremely agitated." Defendant blamed Officer Osborn for holding up the investigation for his claim. Defendant further stated that "the only way he was going to break even on the vehicle is to either have the vehicle lost in fire or have the vehicle totaled in a car wreck."

¶9 Detective Vance testified that he had extensive specialized training in arson. Detective Vance concluded that defendant's versions of the event were inconsistent with the fire patterns as well as his findings, and therefore not possible. Detective Vance believed that fumes inside of a passenger compartment were ignited and resulted in an interior compartment fire. He further explained that the vehicle was not immediately impounded because it had been on private property, there had to be probable cause in order to impound it, and there was not probable cause at that point in the case.

¶10 Darren Cross, an employee for Philadelphia Insurance Companies, testified that he handled defendant's claim. Cross stated that in June 2010, defendant increased the vehicle's insurance coverage by $15,000.00, for a total of $55,000.00.

Cross further testified that the fire damage did not result in a total loss of the vehicle, or $55,000.00. Cross said that in order to constitute a total loss and for defendant to obtain the full amount of $55,000.00, the damage to the vehicle would have to amount to seventy-five percent or greater of its stated value, or the vehicle would have to be stolen. On July 26, 2010, Philadelphia Insurance Companies paid defendant for the amount of damage to the car, which was estimated to be $15,213.97. On July 31, defendant reported the car stolen.

¶11 After a four-day trial, the jury found defendant guilty as charged. The trial court sentenced defendant to a mitigated term of four years on Count one and a mitigated term of two and one-half years on Count two, to be served concurrently. Defendant was given 102 days of presentence incarceration credit.

¶12 On appeal, defendant first argues that the trial court erred by failing to issue a *Willits* instruction.[2] A *Willits* instruction allows the jury to draw an unfavorable inference against the State when the State destroyed or lost material evidence. *State v. Fulminante,* 193 Ariz. 485, 503, ¶ 62, 975

[2] In defendant's supplemental brief, he cites to several pages of a document as support for his claim that the police conducted a "bad" investigation. Although defendant does not state what document he is citing to, we believe it is the transcript from May 26, 2011. However, our review of this transcript does not lead us to conclude that there was fundamental error.

P.2d 75, 93 (1999). A defendant is entitled to a *Willits* instruction upon proving that (1) the State failed to preserve accessible, material evidence that "might tend to exonerate him" and (2) there was "resulting prejudice." *Id.* The exonerating potential of the evidence must have been apparent at the time the State lost or destroyed it in order to warrant such an instruction. *State v. Davis*, 205 Ariz. 174, 180, ¶ 37, 68 P.3d 127, 133 (App. 2002). We decline to hold that the court erred in failing to give such an instruction, in light of the absence of any apparent exonerating potential of the evidence at the time police failed to preserve it. Further, as the trial court noted, defendant failed to show actual prejudice. We therefore conclude that the trial court did not err.

¶13 Defendant next argues that Officer Osborn erred in failing to record his interview with defendant during defendant's hospital stay. Officer Osborn, however, took notes during the interview, wrote a report afterwards, and testified at trial about the content of the interview. Officer Osborn stated that he did not tape record the interview because the batteries to the tape recorder were "dead" and he did not realize that until after the interview started. Defendant has not presented us with any legal basis, and we are not aware of such a basis, to overturn convictions based on a police officer issuing a written report of an interview instead of tape

recording it. We therefore discern no fundamental error on this issue.

¶14 Finally, defendant maintains that Officer Osborn incorrectly asserted defendant gave different versions of the incident. Witness credibility is a matter solely for the jurors, as triers of fact, and based on the guilty verdicts, the jury determined Officer Osborn and the other witnesses were credible and reliable. *See State v. Jeffers*, 135 Ariz. 404, 420, 661 P.2d 1105, 1121 (1983). Officer Osborn submitted a detailed report after he interviewed defendant. He testified in court and gave a thorough account of the interview, which was consistent with the report. The guilty verdicts were supported by the record and we decline to find reversible, fundamental error on this basis.

¶15 We have read and considered counsel's brief and defendant’s supplemental brief and have searched the entire record for reversible error. *See Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was given an opportunity to speak before sentencing, and the sentences imposed were within statutory limits. Furthermore, based on our review of the record, there was sufficient evidence for the jury to find that defendant committed the offenses for which he was convicted.

¶16 After the filing of this decision, counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do no more than inform defendant of the status of the appeal and his future options, unless counsel's review reveals 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). Defendant has thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review. Accordingly, defendant's convictions and sentences are affirmed.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MAURICE PORTLEY, Presiding Judge

_/s/_____
DIANE M. JOHNSEN, Judge