DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 08-0458
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RAYMOND MEROLLE, JR., Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-009428-001 DT

The Honorable James T. Blomo, Judge Pro Tempore

AFFIRMED AS MODIFIED

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S W A N N, Judge

¶1 Raymond Merolle ("Defendant") appeals from his convictions and sentences for two counts of Theft pursuant to A.R.S. § 13-1802, class two felonies, and one count of Arson of a Structure pursuant to A.R.S. § 13-1703, a class four felony. For the reasons set forth below, we affirm the conviction and sentence, and modify the minute entry to reflect accurately the charge of which defendant was convicted.

FACTS AND PROCEDURAL HISTORY

I. Overview

¶2 On September 13, 2006, Defendant was indicted for three counts of Theft pursuant to A.R.S. § 13-1802 and one count of Arson of an Occupied Structure pursuant to A.R.S. § 13-1704.[1] Trial by jury commenced on January 14, 2008. During trial, the State moved to amend the indictment to allege Arson of a Structure instead of Arson of an Occupied Structure; the superior court granted that motion. The jury found Defendant guilty of two of the three Theft charges, both class two felonies based on the value of the stolen property, and the Arson of a Structure charge, a class four felony. Defendant was found not guilty of the third Theft charge.

[1] Defendant was also indicted for one count of Perjury and one count of Forgery. Those counts, however, were dismissed without prejudice before trial.

¶3 Judgment was entered on the jury's verdicts and Defendant was sentenced to concurrent presumptive 5-year terms of imprisonment for the Theft offenses and a consecutive, exceptionally mitigated 2.25-year term of imprisonment for Arson of a Structure.[2] Defendant timely appealed, and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A) (Supp. 2009).

II. Trial Evidence

¶4 The following summary of the evidence is unusually detailed. We engage in the exercise because this appeal challenges sufficiency of the evidence. The record reveals that the evidence against defendant was not only abundant, but meticulously gathered and carefully presented. A detailed recitation of the evidence presented at trial is therefore warranted.[3]

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[2] In its answering brief, the State observes that the sentencing minute entry incorrectly orders that Defendant is guilty of Arson of an Occupied Structure, a violation of A.R.S. § 13-1704. We correct the error and modify the minute entry to reflect that Defendant was convicted of Arson of a Structure, a violation of A.R.S. § 13-1703.

[3] We view the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

A. Count 1: Theft of Box Trailer, Sandrail, and Quad Recreational Vehicles

¶5 In 2005, Amy R.[4] met Defendant and began a relationship with him. Amy lived with Defendant in his house in Cave Creek, Arizona for about eight or nine months until they broke up in July or August of 2006. Shortly thereafter, Amy began dating Rick P. and moved in with him at his house in Chandler, Arizona.

¶6 On November 22, 2005, Rick's box trailer, which contained a sandrail and two quad recreational vehicles, was stolen from his driveway.[5] The theft occurred three days after Amy saw Defendant driving in a circle around the cul de sac in Rick's neighborhood.

1. Box Trailer

¶7 Rick's box trailer, which he purchased from Performance Trailer for $11,500, was a 30-foot enclosed Haulmark trailer with a ramp in the back. The trailer had a large scrape on the side, some loose trim on the passenger side door, and a dimple in the rear door. A black "Glamis" sticker had been affixed to the upper right corner of the rear door and a rear marker taillight had been secured with silicone. In the

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[4] To protect the identities of victims and witnesses, we do not use their last names.

[5] A sandrail is an off-road vehicle that consists of a metal frame, four wheels, two to four seats, and an engine. A quad recreational vehicle is a four-wheel all-terrain vehicle that generally seats one rider.

interior, the trailer had custom ramps and custom checkered flooring, as well as rails on which cabinets were mounted and a paper towel rack capable of holding fluids. The trailer floor had four or five tie-downs and the roof had two air vents. When the trailer was stolen, the rear door was locked with dual padlocks and the side door was locked with the factory lock. Rick had the key to the side door and no spare key was hidden on the trailer.

¶8 Two months after Rick's trailer was stolen, Defendant purchased an enclosed Haulmark box trailer from Jackssons Trailers. Unlike Rick's trailer, Defendant's trailer had one roof vent and six D-rings, had a "Jackssons Trailers" sticker affixed to the exterior, and did not have a side door.

¶9 On February 2, 2006, after receiving information that Rick's trailer was parked at a Phoenix residence, police obtained a search warrant and recovered a trailer from that residence. The owners of the residence were friends of Defendant and had given him permission to park the trailer on their property.

¶10 The recovered trailer had a temporary license plate registered to Defendant and the metal Vehicle Identification Number ("VIN") plate riveted to the front of the trailer matched the VIN on the registration. At the time it was recovered, the VIN plate was bowed out – the VIN plate on Rick's trailer had

sat flat. The last five numbers of the VIN for Defendant's trailer were stamped near the hitch of the recovered trailer and also marked with grease pencil across one of the trailer's cross members. Two "Jackssons Trailers" stickers were affixed to the recovered trailer's side.

¶11 The area where Rick had affixed the "Glamis" sticker on his trailer had been scratched and dulled on the recovered trailer, as if adhesive had been buffed off. Like Rick's trailer, the recovered trailer had a scrape on the side and a dimple in the rear door. Unlike Defendant's trailer, but like Rick's trailer, the recovered trailer had a side door, and a key that Rick later provided to law enforcement fit the lock to one of the trailer's interior doors. The interior of the trailer contained a paper towel rack, two rails that could accommodate cabinets, and a rack used to hold tie-downs. The flooring was checkered plastic. Rick testified that he had no doubt in his mind that the recovered trailer was his.

2. Sandrail

¶12 Rick's sandrail was custom-built by Darren Riley, the owner of an Arizona sandrail and dune buggy manufacturing company. Affordable Powder Coating, a Phoenix company, had powder-coated the frame of Rick's sandrail black with metallic silver flakes. Rick's sandrail was one of only two sandrails of that particular color built by Mr. Riley – the other was owned

by Mr. Riley. Rick's sandrail was "extreme" and had "all the options" and a Corvette engine. The sandrail cost Rick $45,500.

¶13 On March 3, 2006, law enforcement went to Affordable Powder Coating and seized a sandrail frame. Mr. Riley had contacted the police after seeing the disassembled frame of Rick's sandrail there. He recognized the frame because of its color and because of the unique, rare options he had built into it: a specialized steering system, a hole in the dashboard designed to accommodate a helicopter aviation headset system, and a light bar. Although some other minor, unpainted modifications had been added to the frame since Mr. Riley's manufacture, Mr. Riley testified that he was absolutely sure that the frame belonged to Rick's sandrail.

¶14 Affordable Powder Coating's owner testified that in his business, work orders are filled out by customers who leave items to be powder coated. The items are then photographed and tagged by an Affordable Powder Coating employee. An invoice is not prepared until the job is completed. The Affordable Powder Coating work order pertaining to the seized frame was admitted into evidence. The customer, requesting that the frame be re-coated blue, signed his or her name as "Regi Acca" and provided a contact phone number identical to the phone number that Defendant provided police when he was taken into custody.

B. Count 2: Arson of Acura

¶15 After Rick's trailer and its contents were stolen, he and Amy left Arizona. Amy left her car, an Acura, at a girlfriend's apartment complex. Amy learned that the Acura had been taken from the complex around January 4, 2006. The Acura was not paid off and Amy was behind in a payment, so she initially thought that it had been repossessed. But when the finance company informed her that it had not repossessed the Acura, Amy contacted the police and reported the car stolen.

¶16 On or about the evening of February 22, 2006, Ernest C. was rollerblading on a bike trail along the side of a river bottom near Union Hills and 51st Avenue in Phoenix. He saw a man in a green-hooded jersey in the middle of the river wash, standing outside of a car and making motions. The car then caught on fire.

¶17 The man ran from the burning car, carrying an object that looked like a gas can. He passed Ernest on the bike path, exclaiming "oh, shit" when he saw that someone was there. Ernest could not see the man's face because it was concealed by clothing. After the man had passed him, Ernest heard the sound of a vehicle being turned on. As he rollerbladed home, a pickup truck drove down the road, pacing him. When Ernest reached his home ten or fifteen minutes later, he called the police.

¶18 The fire department responded to the scene and extinguished the fire. Police found no people in the area but did find three latex gloves about twenty yards north of the burned car, between it and the bike path. DNA testing of the inside of the gloves revealed two DNA contributors, one a high-quantity contributor. Comparison of the DNA from the gloves to a sample of Defendant's DNA revealed that Defendant was the high-quantity contributor.

¶19 The burned vehicle, recognizable as a blue Acura, was eventually identified as Amy's car. Detective Mark Hoerrmann was able to locate a partial identification number stamped at a confidential location on the engine. That was one of only two locations where Detective Hoerrmann was able to find any identifying information – at all of the other locations he examined, the information had been destroyed or removed. At the other of the preserved confidential locations, he found a date code indicating that the vehicle was built in 1997. Detective Hoerrmann was able to cross-reference the information he found with the public VIN and identify the Acura as Amy's. Records revealed that Amy was the only person in five years in Arizona who had reported stolen an Acura of that specific make, color, and year.

¶20 After Defendant became a suspect in the theft of Rick's trailer and its contents, police had affixed a GPS

tracking device to his pickup truck. Records from the device placed Defendant's truck in the vicinity of Amy's Acura at the date and time when it was burned.

C. Count 4: Theft of Cigarette Boat and Trailer

1. Theft

¶21 On August 15, 2004, a 38-foot Myco trailer and a 38-foot 2001 Cigarette Top Gun boat were stolen from a marina in Brick Township, New Jersey.

¶22 The trailer, owned by Mehl Electric Company, was white with red and blue stripes. It was customized with "drive protectors," a toolbox, and a spare tire carrier. Mehl Electric Company's manager testified that the company received approximately $6,000 from its insurance company for the stolen trailer but paid $20,600 for a replacement trailer.

¶23 The boat, owned by Tiffany E., was a custom Phil Lip-Ship Edition. Custom-designed by Philip Lipschutz, the boat, originally named "Rice Hauler" and later registered with the Coast Guard as "Frenzy," was one-of-a-kind. "Frenzy" had a two-step hull, unique engines with custom exhaust pipes, a unique dual water temperature thermostat, unique propellers, a unique steering wheel, and a unique speedometer. The paint job on "Frenzy" was unique and, in Mr. Lipschutz's opinion, would have been very difficult to replicate. Tiffany bought "Frenzy" for $217,500 but did not recover the full purchase price from her

insurance company. The boat's insured value was reported as $215,000.

2. "In Awe"

¶24 Approximately a year after Mehl Electric Company's trailer and Tiffany's boat were stolen, another incident involving a different 38-foot Cigarette Top Gun boat, "In Awe," occurred in Brick Township, New Jersey. Like "Frenzy," "In Awe," originally called "The Banana Boat," was built by Philip Lipschutz. At the time of the incident, "In Awe," on consignment to a boatyard called ProRoc Marine, was being stored at the boatyard and advertised for sale on the Internet.

¶25 On July 16, 2005, "In Awe" caught on fire. Police Chief Kevin Valentine testified that he was driving by, saw the fire, and pulled his car off the road to call 911. He then turned his car around and encountered a vehicle that he described as a royal blue Camaro with white racing stripes. The vehicle had its lights off and was parked with a clear view of the boatyard. The vehicle's license plate read "NYPD." As he drove to the boatyard, Chief Valentine noticed that someone was in the driver's seat of the vehicle. When leaving the boatyard a short time later, Chief Valentine again noticed the vehicle driving away. He followed the vehicle to a lifted drawbridge and watched as it turned around and drove back toward the boatyard.

¶26 At some point, a police officer who was directing traffic around the scene of the fire stopped what he described as a royal blue Corvette with red decals to inform the occupants, a male driver and a female passenger, to wait to cross until the fire hoses had been moved. As the officer spoke, the driver, whom the officer described as a man in his mid-thirties, stared forward and did not respond. Defendant was forty at the time of the incident. A 1998 Corvette with a personalized "NYPD" license plate was registered with the Arizona Department of Motor Vehicles to a person with Defendant's name born on December 22, 1939. Defendant and his father share the same name.

¶27 Within a month after the fire, Defendant contacted ProRoc Marine and inquired whether the hull of "In Awe" was for sale. ProRoc had not advertised the hull for sale because the fire had damaged its structural integrity so that it was no longer seaworthy. ProRoc sold the "In Awe" hull to Defendant for "salvage only." Defendant told ProRoc that he intended to use the hull as a display in a theme restaurant.

3. Investigation and Recovery

¶28 Efforts by an investigator hired by Tiffany's insurance company and Randall Fricke, who at the time was working as a Marine Theft Investigator for the Arizona Game and Fish Department, led to the eventual location of a boat that

Fricke believed to be "Frenzy." On February 5, 2006, Fricke took photographs of a boat located on a cattle ranch in Pinal County, Arizona. The ranch owner's stepson had obtained his stepfather's permission for a friend named "Ray" (a shortened version of Defendant's first name) to temporarily store the boat there. Three days after Fricke observed the boat at the ranch, and before he could obtain a search warrant, the boat was moved.

¶29 About a month and a half later, Fricke again located the boat that he believed to be "Frenzy," and this time he was able to seize it. The boat was at an RV storage lot center in Florence, Arizona. On February 8, 2006, an individual with Defendant's name had paid for six months' storage for the boat. The renter had provided Defendant's father's phone number as a contact number.

¶30 An inspection of the recovered boat revealed no usable fingerprints. Various parts and equipment on the recovered boat matched with "Frenzy." The recovered boat's hose clamp, wire ties, dashboard, and the hydraulic rams on its steering mechanism were all consistent with "Frenzy." The recovered boat's paint job was consistent with "Frenzy" and there were no signs that the boat had been repainted. The name on the hull of the recovered boat, however, was not "Frenzy" but "In Awe," written in stick-on letters.

¶31 But despite the name on the hull, the shape of the hull was consistent with "Frenzy" and not with "In Awe." Mr. Lipschutz, who designed both boats, testified that "Frenzy," a newer model, had a two-step hull whereas "In Awe" had a non-stepped, straight-bottomed hull. Mr. Lipschutz testified that to change a non-stepped hull into a two-step hull like that of the recovered boat, a person would have to have access to the mold. He said that he believed that such a modification would be "impossible to do." Mr. Lipschutz further testified that based on the customizations he had made to "Frenzy" and the differences between the speedometers, dashboards, and speed capabilities of "Frenzy" and "In Awe," he was "a hundred percent positive" that the recovered boat was "Frenzy." Tiffany, the owner of "Frenzy," also identified the recovered boat as "Frenzy." Additionally, after looking at a picture of "Frenzy," a friend of Defendant identified "Frenzy" as a boat that Defendant had taken to a lake in October 2005.

¶32 Black spray paint on the interior cabin panels of the recovered boat appeared to cover up manufacturer identification numbers. At both the public and the confidential locations, the Hull Identification Number ("HIN") of the recovered boat matched "In Awe," as did another identifying number found on the inside of the boat. But all of the identifying numbers appeared to have been added after original numbers were removed. At one of

the locations, the stamped digits of the HIN were not straight and were not of uniform depth, as though they had been punched in individually instead of imprinted with one stamp. The other HIN was not permanently affixed at the Coast Guard-approved location but rather was placed with stick-on tape at an unusual spot.

¶33 When the boat was recovered from the storage center, it was sitting on a Myco trailer with a tool box. The trailer had color pinstriping and a New York trailer plate. The plate did not match the trailer, but instead matched a 1987 Yacht Club trailer of a different color with a different VIN. Inspection of the recovered trailer revealed only a partial VIN in one confidential location. The partial VIN was consistent with the VIN of the Myco trailer belonging to Mehl Electric Company.

¶34 Defendant's motion for judgment of acquittal on all counts pursuant to Ariz. R. Crim. P. 20 ("Rule 20"), made at the close of the State's case in chief, was denied.

DISCUSSION

¶35 Defendant raises two arguments on appeal. First, he argues that the superior court abused its discretion in granting the State's motion to amend the indictment to allege Arson of a Structure instead of Arson of an Occupied Structure when it appeared that there was insufficient evidence to prove that the Acura had been occupied. Second, he argues that there was

insufficient evidence to support his convictions, and the superior court therefore erred in denying his Rule 20 motion.

I. Amendment of Indictment

¶36 Ariz. R. Crim. P. 13.5(b) provides, in relevant part:

> The . . . grand jury indictment limits the trial to the specific charge or charges stated in the . . . grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment.

"A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980) (citations omitted). We review the superior court's ruling granting a motion to amend for an abuse of discretion. *State v. Johnson*, 198 Ariz. 245, 247, ¶ 4, 8 P.3d 1159, 1161 (App. 2000). We agree with the State that the amendment in this case neither changed the nature of the offense charged nor prejudiced Defendant, and therefore conclude that the superior court did not abuse its discretion.

A. The amendment of the indictment did not change the nature of the offense charged.

¶37 Pursuant to Ariz. R. Crim. P. 13.2(c), the "[s]pecification of an offense in an indictment . . . shall constitute a charge of that offense and of all offenses

necessarily included therein."[6] For purposes of Ariz. R. Crim. P. 23.3, which requires that the jury be instructed on all offenses "necessarily included" in the charged offense, a "necessarily included" offense is a lesser-included offense of the charged offense that is supported by the evidence. *State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980). Logically, the same definition of "necessarily included" applies to Ariz. R. Crim. P. 13.2(c).[7]

¶38 A lesser-included offense is an offense that is composed solely of some but not all of the elements of the greater offense, so that it is impossible to have committed the greater offense without having committed the lesser offense. *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). Under this test, Arson of a Structure is a lesser-included offense of Arson of an Occupied Structure. "A person commits arson of an occupied structure by knowingly and unlawfully damaging an occupied structure by knowingly causing a fire or explosion." A.R.S. § 13-1704(A). "A person commits arson of a

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[6] The Comment to this provision explains that it is "intended as a solution to the ambiguities caused by 'open' charges – *i.e.,* charges which do not specify the degree of a crime charged – by requiring the prosecutor to specify only the most serious degree, and automatically including all necessarily included offenses within the charge." Ariz. R. Crim. P. 13.2(c) cmt.

[7] Indeed, as the Comment to Ariz. R. Crim. P. 13.2(c) notes, Ariz. R. Crim. P. 13.2(c) serves to clarify Ariz. R. Crim. P. 23.3.

structure . . . by knowingly and unlawfully damaging a structure . . . by knowingly causing a fire or explosion." A.R.S. § 13-1703(A). An "occupied structure" is defined as a "structure" with the additional element of "occupation." *See* A.R.S. § 13-1701(2), (4). It is impossible for a person to have committed Arson of an Occupied Structure without also having committed Arson of a Structure.

¶39 Arson of a Structure was therefore a "necessarily included" offense of the expressly charged Arson of an Occupied Structure and, pursuant to Ariz. R. Crim. P. 13.2(c), was included as a matter of law in the original indictment. The State's motion to amend the indictment is therefore more accurately described as a motion to dismiss the greater offense only, leaving in place the necessarily included lesser offense. The "amendment" did not change the nature of the offense charged, because Arson of a Structure had been charged and that charge was left unchanged. In effect, the motion merely decreased the severity of Defendant's potential punishment by eliminating the most serious of the charged offenses and changing the classification of the offense from a class two to a class four felony. See A.R.S. § 13-1704(B) & -1703(B).

¶40 The State's "amendment" of the indictment is distinguishable from the amendments in *State v. Sanders*, 205 Ariz. 208, 68 P.3d 434 (App. 2003), and *State v. Freeney*, 223

Ariz. 110, 219 P.3d 1039 (2009). Both *Sanders* and *Freeney* involved amendments that supplanted an element in the originally charged offense with a different element. *See Sanders,* 205 Ariz. at 212, ¶ 9, 68 P.3d at 438; *Freeney*, 223 Ariz. at 113, ¶¶ 16-17, 219 P.3d 1042. By contrast, the "amendment" in the instant case did no more than express the State's intention to proceed on a necessarily included, already-charged offense.

B. The amendment of the indictment did not prejudice Defendant.

¶41 In determining whether a defendant is prejudiced by an amendment to an indictment, we consider two important rights held by all defendants: (1) the right to notice of the charges and ample opportunity to prepare to defend against them, and (2) "the right to double jeopardy protection from subsequent prosecution on the original charge." *Johnson*, 198 Ariz. at 248, ¶ 8, 8 P.3d at 1162 (citation omitted). It is the defendant's burden to demonstrate that he has suffered actual prejudice. *Id.* Defendant has not satisfied that burden here.

¶42 First, Defendant was on notice of the charge of Arson of a Structure well before trial because that offense was included in the original indictment pursuant to Ariz. R. Crim. P. 13.2(c). He therefore had ample opportunity to prepare to defend himself against the charge. Additionally, before trial, the prosecutor notified defense counsel that she believed that the indictment should have expressly charged Defendant with

Arson of a Structure instead of Arson of an Occupied Structure. According to the prosecutor, defense counsel was not amenable to an amendment of the indictment at that time. But on the first day of trial, before voir dire commenced, the prosecutor informed the court and defense counsel that she would later move to amend if she felt that the evidence at trial warranted an amendment.

¶43 Second, Defendant's conviction for Arson of a Structure provides him double jeopardy protection from prosecution for the Arson of an Occupied Structure. "The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9, 206 P.3d 769, 772 (App. 2008) (citations omitted). For purposes of double jeopardy, an offense and its lesser-included offense are considered the same offense. *Id.* Therefore, Defendant's conviction for Arson of a Structure, a lesser-included offense of Arson of an Occupied Structure, protects him from subsequent prosecution for either offense. And the record, taken as a whole, would support the double jeopardy protection were the State subsequently to prosecute Defendant for the act of burning the Acura. *Bruce*, 125 Ariz. at 424, 610 P.2d at 58.

¶44 Because the amendment of the indictment in this case did not change the nature of the charged offense, and because Defendant did not demonstrate that he was prejudiced by the amendment, we conclude that the superior court did not abuse its discretion in allowing the amendment.

II. Sufficiency of the Evidence

¶45 We review the denial of a Rule 20 motion for an abuse of discretion. *State v. McCurdy*, 216 Ariz. 567, 573, ¶ 14, 169 P.3d 931, 937 (App. 2007). We will reverse if there is a complete absence of probative facts to support a conviction. *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

¶46 Rule 20(a) provides that a court "shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction." "Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt. 'If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'" *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87, 84 P.3d 456, 477 (2004) (citations omitted). Substantial evidence may be either direct or circumstantial. *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App.

2005). In determining whether there is substantial evidence to warrant a conviction, the superior court must "giv[e] full credence to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inference[s] therefrom." *State v. Clifton*, 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982).

¶47 The sufficiency of the evidence is tested against the statutorily required elements of the offense. *Pena*, 209 Ariz. at 505, ¶ 8, 104 P.3d at 875. When a Rule 20 motion is made at the close of the State's case, as it was here, the sufficiency of the evidence is tested at that point. *Mathers*, 165 Ariz. at 66, 796 P.2d at 868. We conclude that the evidence presented at trial was easily sufficient to support Defendant's convictions on both Theft charges and on the Arson of a Structure charge, and that the court therefore did not abuse its discretion in denying Defendant's Rule 20 motion.

A. Theft

¶48 A.R.S. § 13-1802 provides:

> (A) A person commits theft if, without lawful authority, the person knowingly:
>
> 1. Controls property of another with the intent to deprive the other person of such property.

The statute further provides that the offense will constitute a class two felony when the stolen property is valued at $25,000 or more. A.R.S. § 13-1802(E).[8]

1. Count 1: Theft of Box Trailer, Sandrail, and Quad Recreational Vehicles

¶49 Substantial evidence was presented at trial to show that Defendant, without lawful authority, knowingly controlled Rick's box trailer and its contents with the intent to deprive him of those items, thereby committing Theft pursuant to A.R.S. § 13-1802.

¶50 The State presented evidence showing that Rick was living with Defendant's ex-girlfriend and that Defendant was seen driving around Rick's neighborhood shortly before the trailer was stolen from his residence. The evidence also showed that a trailer recovered by police from a Phoenix residence had been stored there by Defendant. The recovered trailer had several characteristics unique to Rick's trailer, such as a scrape on the side, a dimple in the rear door, a paper towel rack, rails for cabinets, and a checkered floor. The exterior of the recovered trailer also appeared to have been buffed in an area where Rick had affixed a sticker to his trailer. A key

[8] We cite to the version of the statute in effect at the time the offense was committed. This statute has since been amended and this provision is currently included in subsection G. 2009 Ariz. Sess. Laws, ch. 119, § 2 (1st Reg. Sess.).

supplied by Rick to police fit the side door of the recovered trailer.

¶51 Evidence was also presented showing that Defendant committed Theft of the sandrail contained in Rick's trailer. Circumstantial evidence, in the form of the phone number provided on the work order provided to Affordable Powder Coating, tied Defendant to a sandrail frame with the same unique color and customizations as Rick's sandrail.

¶52 From the sum of the evidence, reasonable persons could have found Defendant guilty beyond a reasonable doubt of Theft of the trailer and the sandrail. The fact that other persons might have drawn a different conclusion from the evidence does not alter the fact that the evidence of Defendant's guilt was substantial. *See Davolt*, 207 Ariz. at 212, ¶ 87, 84 P.3d at 477; *see also State v. Garcia*, 138 Ariz. 211, 214-15, 673 P.2d 955, 958-59 (App. 1983). The superior court did not abuse its discretion in denying Defendant's Rule 20 motion regarding the Theft charge alleged in Count 1 of the indictment. Additionally, evidence at trial showed that Rick had purchased the trailer and sandrail for a combined amount that exceeded $25,000. There was therefore substantial evidence supporting Defendant's conviction for Theft as a class two felony.

2. Count 4: Theft of Cigarette Boat and Trailer

¶53 Substantial evidence was presented at trial to show that Defendant committed Theft pursuant to A.R.S. § 13-1802 by, without lawful authority, knowingly controlling Tiffany's Cigarette boat, "Frenzy," and Mehl Electric Company's Myco trailer with the intent to deprive the owners of their property.

¶54 A boat was recovered by police from a storage facility rented by an individual with the name shared by Defendant and his father and with a contact phone number matching that of Defendant's father. The recovered boat had many characteristics consistent with "Frenzy," such as unique equipment and customizations, and its paint job matched the unique paint job of "Frenzy." And although the name on the recovered boat's hull, "In Awe," matched the name of a hull that Defendant had purchased for salvage, the shape of the hull was consistent with the design of "Frenzy" but not "In Awe." Circumstantial evidence suggested that Defendant was involved in the burning of "In Awe" that preceded his purchase of its hull. The public and confidential HIN numbers on the recovered boat matched "In Awe" but it appeared that the original HIN numbers had been removed and replaced, and other identifying information had been obliterated with spray paint.

¶55 The recovered boat was found on a Myco trailer with characteristics consistent with Mehl Electric Company's stolen

trailer. Like the stolen trailer, the recovered trailer had a tool box. Only one partial VIN was found on the recovered trailer, but it was consistent with the VIN of the stolen trailer.

¶56 Based on the evidence, reasonable persons could have found Defendant guilty beyond a reasonable doubt of Theft of "Frenzy" and Mehl Electric Company's trailer. The superior court did not abuse its discretion in denying Defendant's Rule 20 motion regarding the Theft charge set forth in Count 4 of the indictment. Additionally, there was substantial evidence from which the jury could reasonably find that the value of the stolen items exceeded $25,000. There was therefore substantial evidence supporting Defendant's conviction for Theft as a class two felony.

B. Arson of a Structure

¶57 A.R.S. § 13-1703 provides that "[a] person commits arson of a structure . . . by knowingly and unlawfully damaging a structure . . . by knowingly causing a fire or explosion." Substantial evidence was presented at trial to show that Defendant knowingly and unlawfully damaged a structure, Amy's Acura, by knowingly causing a fire.[9]

[9] A.R.S. § 13-1701 defines "structure" as "any building, object, vehicle, watercraft, aircraft or place with sides and a floor, used for lodging, business, transportation, recreation or

¶58 A witness observed a man set fire to a car and run away. The man passed him on foot and the witness heard a vehicle turn on. As the witness returned home, a pickup truck paced him down the street. Information obtained from a GPS tracking device affixed to Defendant's pickup truck placed the truck near the scene of the fire around the time the fire was set, and Defendant's DNA was present in latex gloves found near the fire.

¶59 The burned car was an Acura of the type reported stolen by Amy; no other Acura of that type had been reported stolen in Arizona for five years. Partial identifying information found on the burned Acura was consistent with Amy's car.

¶60 Based on the evidence, reasonable persons could have found Defendant guilty beyond a reasonable doubt of Arson of a Structure. The superior court did not abuse its discretion in denying Defendant's Rule 20 motion with regard to the Arson of a Structure charge.

CONCLUSION

¶61 We conclude that the superior court did not abuse its discretion in granting the State's motion to amend the indictment to allege Arson of a Structure when the indictment

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storage." A car clearly qualifies as a structure under this definition.

originally referred to Arson of an Occupied Structure. The amendment did not change the nature of the offense and did not prejudice Defendant. We also conclude that because there was sufficient evidence to support Defendant's convictions, the superior court did not abuse its discretion in denying Defendant's Rule 20 motion. We therefore affirm Defendant's convictions and sentences as modified in footnote 2, *supra*.

/S/

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PETER B. SWANN, Presiding Judge

CONCURRING:

/S/

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LAWRENCE F. WINTHROP, Judge

/S/

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MICHAEL J. BROWN, Judge