DIVISION ONE
FILED: 12/08/09
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 08-0842
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
MARK ANTHONY ESCOBAR, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-145812-001 DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Kessler Law Offices — Mesa
By Eric W. Kessler
Attorneys for Appellant

D O W N I E, Judge

¶1 Mark Anthony Escobar ("defendant") timely appeals his conviction and sentence for theft of a means of transportation.

Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has advised that he has thoroughly searched the record and found no arguable question of law. Counsel now requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but he did not do so. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied,* 459 U.S. 882 (1982).

FACTS AND PROCEDURAL BACKGROUND

¶2 On July 15, 2007, at 2:30 a.m., the victim left his hotel room at 33rd Avenue and Buckeye to drive his girlfriend home. Forty-five minutes later, he went back to the hotel to return the key. A man whom the victim had never met approached the victim's car and asked for a ride. The victim refused. As the victim looked away, the man walked around the back of the car, opened the passenger door, and got in. He grabbed the victim's cell phone. Holding a knife with a nine-inch blade, he ordered the victim to turn right and park on Buckeye. There, the man ordered the victim out of the car, yelling to hand over everything he had. He grabbed the victim's left hand and demanded his wallet, threatening: "I'm going to stab you."

After the victim handed over his wallet, the man told him to run or he would get stabbed. The victim ran across the street to a gas station, and the man drove away in the victim's 2002 Saturn. The victim called 9-1-1 from a pay phone.

¶3 Officer L. arrived at the scene. He observed that the victim "seemed very excited and very upset," and "his actions were consistent with what I've seen people who have been victims of a crime would be." The victim did not appear to be under the influence of drugs or alcohol. Officer L. interviewed the victim with the help of a Spanish-speaking officer and dispatched the license plate number and descriptions of the car and suspect.

¶4 Within minutes, Officer M. responded that he had located the Saturn approximately one mile away. It was backed into a driveway with the engine running and the driver-side door open. Defendant was talking with another male at the rear of the Saturn. As Officer M. drove by in his marked police vehicle, the men walked briskly into the house and shut the door. Officer M. verified the license plate on the Saturn and notified dispatch. When back-up units arrived, Officer M. asked the owner of the house to bring everyone outside. Three men, including defendant, came outside.

¶5 Officer L. drove the victim to the home, where he was shown three different males one-by-one and asked if he

recognized anyone. The victim identified defendant as the man who had taken his car. The victim was then asked to check the Saturn and report any missing items.

¶6 Defendant lived at the home in question, and the owner permitted a search of her house. Because defendant had private access to his bedroom, the officers also obtained defendant's written consent to search his bedroom. On defendant's bedroom floor was a pair of his jeans, the pockets of which contained a key and small silver coins that had "markings of, for example . . . an Indian." [Internal quotations omitted.] These items matched descriptions of the key and coins the victim reported missing from his vehicle.[1] Officers found other items in defendant's bedroom that the victim reported missing from his car, including speakers, an amplifier with cut wires, and CDs.

¶7 Defendant was charged with armed robbery, a class 2 dangerous felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1904 (2001) (count 1); and theft of a means of transportation, a class 3 felony, in violation of A.R.S. § 13-1814 (Supp. 2008)[2] (count 2). The indictment was amended to reflect count 1 was a dangerous offense. The State

---

[1] Police later confirmed that the key belonged to the hotel.

[2] We cite to the current version of the applicable statute because no revisions material to this decision have since occurred.

alleged historical priors and requested a hearing. Ariz. R. Evid. 609. However, no hearing was necessary because defendant stipulated, and later testified, to sanitized versions of four prior felony convictions.[3]

¶8 During trial, defendant challenged the admissibility of recordings of several phone calls he made from jail two days after the offense, describing how he got upset at a man who intervened in a fight between him and his girlfriend, so he jumped into "[the man's] car and took his [stuff]." Defendant argued, *inter alia*, the evidence was prejudicial because it referred to a separate, unrelated incident. However, the trial court determined the relevance outweighed any prejudice and admitted it to permit the jury to "parse it out."

¶9 After the State rested, the trial court denied defendant's motion for judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure. Defendant took the stand and related a completely different version of the events.

¶10 Defendant testified he regularly sells cocaine from the hotel and knew the victim as "Flaco," a customer who had purchased from him previously. He testified that, on the date in question, the victim came to look for a prostitute and to buy

[3] Defendant was convicted in CR 2001-097894, CR 2005-006096-002, and CR 2001-017082 (all armed robberies, class 2 felonies) and CR 2001-016275 (unlawful flight from a law enforcement vehicle, a class 5 felony).

cocaine. Defendant testified he traded cocaine for the victim's speakers and paid $20 for his amplifier. Defendant testified he also traded cocaine for the CDs. According to defendant, they ended up "snorting coke and drinking" in his hotel room. As a result, he said, the victim got "stuck" and did not want to leave. When they ran out of cocaine, defendant claims the victim lent him his Saturn so he could retrieve more from his house. When he got home, however, defendant ate and fell asleep. He claimed he had no intention of keeping the Saturn and "told one of [his] little homeys to go drop [the Saturn] off," undressed, and "crashed out."

¶11 A twelve-person jury found defendant not guilty of armed robbery and guilty of theft of a means of transportation.[4] Defendant was sentenced to an aggravated prison term of thirteen years and was ordered to pay restitution.

DISCUSSION

¶12 We have read and considered defense counsel's brief and reviewed the entire record. *See Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the disposition was within the trial

[4] A clerical error was made in the original sentencing minute entry dated September 19, 2008, which mislabeled the "Theft of Means of Transportation" conviction as "Count 1" instead of "Count 2." This error was corrected in a minute entry dated October 14, 2008.

court's authority. Defendant was represented by counsel and was present at all critical stages of the proceedings.[5]

¶13 A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. 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." *State v. Mathers,* 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted). "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) (citation omitted).

¶14 The State presented substantial evidence of guilt as to count 2. The victim testified he did not give defendant, whom he did not know, permission to drive or possess his car. Defendant admitted driving the Saturn, but claimed he had permission to do so. The jury considered the conflicting testimony and found defendant guilty. "No rule is better established than that the credibility of the witnesses and the

[5] Defendant was not present during a brief recess on the second day of trial when the State advised the court of two technical changes to the indictment to reflect that count 1 was a dangerous offense, and the stolen vehicle was a 2002 Saturn, not a 1992 model. Defense counsel did not object to either change. Defendant was present for the remainder of trial.

weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons,* 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). *See also State v. Lehr,* 201 Ariz. 509, 517, 38 P.3d 1172, 1180 (2002). A reasonable jury could have found from the evidence presented that defendant was guilty of stealing the victim's Saturn.

¶15 During closing arguments, the prosecutor argued that the tape recordings, in which defendant essentially admitted to a robbery, related directly to this offense. Defendant, however, testified "that was a totally separate incident," and his counsel argued this position in his closing argument. To rebut this and show there was no discrepancy between the tape and the victim's testimony, the prosecutor offered two possible theories: (1) the victim told defendant he was tired from dropping his girlfriend off, which reminded defendant of the fight he had with his own girlfriend, so he got upset and robbed the victim, or (2) defendant fabricated the fight to show he took the car to defend his girlfriend's honor. The prosecutor then stated:

> *I feel the first version is correct*. But either way, it is up to you whether this pertains. But it's two days later, he's in custody only over this event, and the facts all match as far as jumping into the car and taking his stuff.

[Emphasis added.]

¶16 Defendant did not object to this argument. And although the statement improperly expresses the prosecutor's personal opinion about the evidence, it does not constitute fundamental error. For a prosecutor's remarks to constitute misconduct warranting a new trial, the remarks must call to the jury's attention a matter it is not entitled to consider, and it must be probable that the remarks influenced the jury's verdict. *See State v. Williams*, 169 Ariz. 376, 380, 819 P.2d 962, 966 (App. 1991) (citation omitted).

¶17 Prejudice does not necessarily follow from improper argument. *State v. Roscoe,* 184 Ariz. 484, 496-97, 910 P.2d 635, 647-48 (1996). Here, the prosecutor was attempting to rebut defendant's contention that the recording described a separate incident. We cannot find that this isolated remark likely influenced the verdict. Moreover, the prosecutor immediately mitigated the effect of his personal opinion by telling the jury, "But either way, it is up to you whether this pertains." The jury was also instructed that the lawyers' arguments were not evidence.

CONCLUSION

¶18 We affirm defendant's conviction and sentence. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
SHELDON W. WEISBERG, Judge