

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



DIVISION ONE  
FILED: 04-13-2010  
PHILIP G. URRY, CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 08-1114  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
)  
LUCIO CRUZ, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2007-158825-002 SE

The Honorable James T. Blomo, Judge *Pro Tempore*

**AFFIRMED**

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

Yvette Gray Attorney At Law Phoenix  
By Yvette C. Gray  
Attorney for Appellant

Lucio Cruz Florence  
Appellant *In Propria Persona*

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**B R O W N**, Judge

¶1 Lucio Cruz appeals his conviction and sentence for one count of theft of means of transportation. Counsel for Cruz 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 searching the record on appeal, she was unable to find any arguable grounds for reversal. Cruz was granted the opportunity to file a supplemental brief *in propria persona*, and has done so.

¶2 Our obligation is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Cruz. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

¶3 In November 2007, Cruz was indicted for theft of means of transportation, a class 4 felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1814 (Supp. 2009).<sup>1</sup> The following evidence was presented at trial. In August 2007, a man leaving a place of business in Phoenix discovered that his 2007 Ford Focus was missing. He immediately contacted the police and reported the vehicle stolen. Several days later,

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<sup>1</sup> We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

Tempe Police officer Wallace pulled Cruz over for driving suspiciously. He ran the plates on the 2007 Ford Focus Cruz was driving and discovered the vehicle had been reported stolen. Wallace also noticed that the driver's side window was broken and there was glass on the inside of the vehicle. After Wallace read Cruz his *Miranda*<sup>2</sup> rights, Cruz gave several different scenarios as to how he came to be driving the vehicle, including: (1) that he and Vanessa Vacaneri<sup>3</sup> picked the car up together; (2) that Vanessa picked it up the day before; and (3) that he had seen Vanessa in the car three days before.

¶14 Vanessa testified on behalf of Cruz. She told the jury that she had borrowed the car from a friend to go get something to eat, although she could not recall where her friend lived. She saw Cruz at a convenience store and asked him to drive because she "can't see at night and [] didn't have . . . glasses or contacts on." Vanessa further admitted that she was high on methamphetamine on the night of the incident and she did not "really remember every second" very clearly.

¶15 The jury found Cruz guilty as charged. It also found that the State proved one aggravating circumstance, the presence

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> Vanessa Vacaneri is a co-defendant in this case, but is not a party to the appeal. She entered a plea of guilty to attempted unlawful use of means of transportation and possession or use of dangerous drugs.

of an accomplice. Cruz was sentenced to a mitigated term of ten years imprisonment with 348 days of presentence incarceration credit. He timely appealed.

¶6 In his supplemental brief, Cruz raises several issues, including improper admission of photographs and ineffective assistance of counsel.<sup>4</sup> We consider alleged trial error under the harmless error standard when a defendant objects at trial and thereby preserves an issue for appeal. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) (citation omitted). Fundamental error review, in contrast, applies when a defendant fails to object to alleged trial error. *Id.* at ¶ 19 (citing *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993)). Fundamental error is "error going to the foundation of the case, error that takes 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." *Id.* (citation and internal quotations omitted). None of the arguments in Cruz's supplemental brief were raised in the trial court, therefore we review only for fundamental error.

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<sup>4</sup> This court will not consider claims of ineffective assistance of counsel on direct appeal, regardless of merit. See *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must be first presented to the trial court in a petition for post-conviction relief. *Id.*

¶17 Cruz argues that the State withheld "crucial evidence" by not disclosing certain photographs that were used at trial. We disagree.

¶18 "The underlying principle of our disclosure rules is the avoidance of undue delay or surprise." *State v. Reinhardt*, 190 Ariz. 579, 586, 951 P.2d 454, 461 (1997) (citation omitted). A trial court's ruling on admissibility of evidence will not be disturbed absent a clear abuse of discretion. *State v. Emery*, 141 Ariz. 549, 551, 688 P.2d 175, 177 (1984) (citation omitted). During the examination of Wallace, defense counsel asked for a sidebar conference in which he indicated he had not previously seen two photographs. The State reminded the court that the pictures had been disclosed long ago and "[defense counsel] had plenty of time to come to [the State's] office and make sure [his] file [was] complete."<sup>5</sup> Defense counsel did not raise any further objection or otherwise dispute the State's position that the pictures had been timely disclosed. Thus, we find no error, much less fundamental error.

¶19 Next, Cruz claims the court erred by not declaring a mistrial during closing arguments, or in the alternative, by not striking defense counsel's statement that Cruz had prior felony convictions. We find nothing in the record that indicates

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<sup>5</sup> "Pictures" were listed on the State's notice of disclosure statement filed January 19, 2008.

defense counsel brought up Cruz's prior felony convictions during closing arguments. The record indicates that the only mention of prior felony convictions occurred just before sentencing, after the jury had found him guilty. We find no error.

¶10 Finally, Cruz alleges that the jurors were biased against Vanessa because they asked her irrelevant questions and thus the court erred in not striking her testimony from the record. Specifically, Cruz points to the jury's questioning of Vanessa as to whether she was under the influence of drugs during her testimony. Although the jury's question may have been repetitive, it was within the trial court's discretion to allow it. See Ariz. R. Crim. P. 18.6(e), cmt. to 1995 amendment ("If the court determines that the juror's question calls for admissible evidence, the question should be asked by court or counsel in the court's discretion."). Prior to the jury's question about her drug use, in response to questioning from defense counsel, Vanessa admitted she had been using methamphetamine on the date of the crime, and later pled guilty to possession of methamphetamine. She also denied she was "high" but admitted she was currently taking prescribed medications for a mental illness. Again, we find no error.

¶11 We have read and considered counsel's brief and Cruz's brief, and we have reviewed the entire record for fundamental

error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. As far as the record reveals, Cruz was represented by counsel at all stages of the proceedings,<sup>6</sup> Cruz was given the opportunity to speak before sentencing, and the sentence imposed was within statutory limits.

¶12 Upon the filing of this decision, counsel shall inform Cruz 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). Cruz 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.

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<sup>6</sup> Due to a family emergency, Cruz's counsel was not present in the courtroom during the reading of the verdict on the aggravating factors; however, the court polled the jury in his absence.

¶13 Accordingly, we affirm Cruz's conviction and sentence.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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PETER B. SWANN, Presiding Judge

/s/

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LAWRENCE F. WINTHROP, Judge