IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 10/28/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 09-0136
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
WILLIAM BOROVIAK, JR.,	)	
	)	(Not for Publication –
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-121537-001 DT

The Honorable Julie P. Newell, Judge *Pro Tempore*

AFFIRMED AS MODIFIED

Terry Goddard, 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 Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

William Richard Boroviak, Jr., Appellant — Safford

B A R K E R, Judge

¶1 William Boroviak ("Defendant") appeals from his conviction and sentence for one count of theft of a means of transportation, a class three felony. Defendant's 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 this court that after searching the entire record on appeal, he finds no arguable ground for reversal. We granted Defendant leave to file a supplemental brief *in propria persona* on or before September 7, 2010. Defendant's counsel advised this court that his office received Defendant's supplemental brief on September 10, 2010. Counsel then filed Defendant's supplemental brief with this court on September 28, 2010. In our discretion, we have accepted the late-filed supplemental brief and discuss the issues it raises below.

Facts and Procedural Background[1]

¶2 On February 17, 2008, at approximately 10:30 p.m., the victim in this case ("D.B.") took his motorcycle for a test ride. The motorcycle was a custom 1983 Harley Davidson worth $10,000 to $12,000, which D.B. never considered selling.

[1] We view the facts in the light most favorable to sustaining the court's judgment and resolve all inferences against Defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998); *State v. Moore*, 183 Ariz. 183, 186, 901 P.2d 1213, 1216 (App. 1995).

¶3 At approximately 11:30 p.m., while traveling on Arizona State Route 202, the motorcycle stopped working. D.B. pulled over, removed the key, secured the bike with a lock, and started walking down the freeway. D.B. accepted a ride from two men in a pickup truck. Upon D.B.'s request, the two men dropped him off at a nearby bar where he called for a taxi and went home. When D.B. returned at approximately 7:00 a.m. the following morning, the motorcycle was gone. D.B. filed a police report on that same day.

¶4 On April 2, 2008, officers received information that D.B.'s motorcycle was at Defendant's house. Upon arrival, officers looked into Defendant's backyard and saw the handlebar of what they later confirmed was D.B.'s motorcycle. Defendant had covered the motorcycle with a tarp, placed tires in front of it, positioned it between two sheds, and placed a lock on the back tire. On April 5, 2008, officers returned to Defendant's house, found Defendant crouched down behind a shed, and took him into custody.

¶5 After waiving his *Miranda* rights, Defendant told police that two acquaintances, Ron and Mark, had dropped the motorcycle off in a pickup truck, asked Defendant to "get the motorcycle running," and that Defendant was holding the motorcycle until they returned. Defendant was unable to provide the last names, telephone numbers, or addresses of either Ron or

Mark. Defendant admitted that he had replaced the ignition system of the motorcycle with an on/off toggle switch because he received the motorcycle without the ignition key.

¶6 Defendant was charged with theft of a means of transportation, a class three felony. The State alleged that without lawful authority Defendant knowingly controlled D.B.'s motorcycle, knowing or having reason to know that the property was stolen.

¶7 Seven days before trial, the State filed a motion in limine to exclude at trial Defendant's exculpatory testimony. The court granted the motion in part. Over Defendant's objection, the court precluded Defendant from testifying that Ron and Mark told him the motorcycle was abandoned ("proposed testimony"). The court found that the proposed testimony was inadmissible hearsay. Defendant was limited to testifying that based on discussions with Ron and Mark, it was his impression the motorcycle was abandoned.

¶8 A jury ultimately found Defendant guilty, and the court sentenced Defendant to four and a half years in prison and ordered him to pay $6,731.80 in total restitution. Defendant motioned the court for a new trial on the grounds that he was substantially prejudiced when the court excluded the proposed testimony as hearsay. Defendant timely filed a notice of appeal.

¶9 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) (2003), 13-4031 (2001), and 13-4033(A) (2001). We are required to search the record for reversible error. Finding no such error, we affirm as modified.

Discussion

¶10 In addition to those issues raised by Defendant in his supplemental brief, defense counsel raised issues at the request of Defendant in the opening brief. We will address all issues raised in both briefs, treating together those issues that overlap.

(1) Insufficiency of the Evidence

¶11 Defendant contends that there was insufficient evidence to convict him at trial. We will reverse a conviction for insufficiency of evidence only if "there is a complete absence of probative facts to support the conviction[s]." *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976).

¶12 To prove that Defendant had committed theft of a means of transportation, the State had to show that Defendant "without lawful authority . . . knowingly . . . control[ed] another person's means of transportation knowing or having reason to know that the property [was] stolen." A.R.S. § 13-1814(A)(5) (2008). "'Control' . . . means to act so as to exclude others from using their property except on the defendant's own terms."

A.R.S. § 13-1801(A)(2). "'Means of transportation' means any vehicle." A.R.S. § 13-1801(A)(9).

¶13 The main dispute at trial was whether Defendant knew or had reason to know that the motorcycle was stolen. At trial, the jury heard evidence that two men, whose last names, telephone numbers and addresses the Defendant did not know, delivered to Defendant a custom Harley Davidson motorcycle that Defendant recognized was probably worth $10,000 to $12,000. Defendant admitted that if he had seen the motorcycle on the side of the road, he would not have thought it was abandoned. The motorcycle had no key and no license plate. Defendant replaced the keyed ignition with an on/off toggle switch. Although Defendant claims he gave permission for the police to take the motorcycle, he admitted that he remained inside the house the entire time the police were processing the motorcycle outside. He did so even though he had the key to the lock he placed on the back tire, which the police had to use bolt cutters to remove. Police returned days later and found Defendant crouched down behind a shed in the backyard. Based on this evidence, the jury could have reasonably concluded that Defendant knew or had reason to know that the motorcycle was stolen.

¶14 The remaining elements were satisfied by D.B.'s testimony that he used his motorcycle as a means of

transportation, that he did not give permission for the motorcycle to be taken, that the motorcycle the police recovered from Defendant was his, and Defendant's admissions that he controlled the motorcycle by making repairs and keeping the motorcycle at his house until he was paid. Thus, there was sufficient evidence to find Defendant guilty of theft of a means of transportation.

(2) Exclusion of Defendant's Proposed Testimony

¶15 Defendant argues that it was reversible error for the trial court to exclude as hearsay Defendant's proposed testimony.[2] We review issues raised in an *Anders* appeal for fundamental error. *See Anders*, 386 U.S. at 738; *Leon*, 104 Ariz. 297, 451 P.2d 878; *State v. Banicki*, 188 Ariz. 114, 117, 933 P.2d 571, 574 (App. 1997).

¶16 Under fundamental error review, the "defendant must establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. Smith*, 219 Ariz. 132, 136, ¶ 21, 194 P.3d 399, 403 (2008) (citing *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005)). To be fundamental, an error must go "to the foundation of the

[2] We conclude that Defendant has made this argument in the following places: (1) Defendant's supplemental brief, (2) issue nine in defense counsel's opening brief; and (3) the language of issue four of defense counsel's opening brief as follows: "Violation of Appellant's 5th and 14th Amendment rights by trial court's restrictions on his testimony."

case, . . . take[ ] from the defendant a right essential to his defense," or be so significant "that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

¶17 Here, Defendant succeeds in establishing that there was error. As Defendant's counsel correctly argued at trial, Defendant's proposed testimony should have been allowed under the non-hearsay use of showing the effect of the statement on the hearer. *See State v. Rivera*, 139 Ariz. 409, 414, 678 P.2d 1373, 1378 (1984) ("Words or writings offered to prove the effect on the hearer or reader are admissible where offered to show their effect on one whose conduct is in issue."). In *State v. Hernandez*, we approved the admissions of statements that a witness "had heard an unknown person say" because the statements were "offered to prove the effect on the hearer [and] are admissible when they are offered to show their effect on one whose conduct is at issue." 170 Ariz. 301, 306, 823 P.2d 1309, 1314 (App. 1991). Defendant did not offer the statement for the truth of the matter - to prove that the motorcycle was truly abandoned. He offered the statement to establish that he assumed the motorcycle was abandoned only because Ron and Mark told him it was. Thus, the statement was offered for a non-hearsay use. If the court was concerned that the jury might

rely on the statement to establish the truth of the matter asserted, it should have nevertheless admitted the statement, leaving the burden on the State to request a limiting instruction if it so desired. *See Readenour v. Marion Power Shovel*, 149 Ariz. 442, 449, 719 P.2d 1058, 1065 (1986) ("The danger that the jury may improperly consider the evidence or apply it in an improper manner does not in itself provide a reason for exclusion."); *see also* Ariz. R. Evid. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

¶18 Although the court committed error, the error did not rise to the level of fundamental given the other evidence presented to the jury. As discussed in more detail above, this included evidence that Ron and Mark dropped off a "$10,000 to $12,000" motorcycle that Defendant admitted he would not have thought was abandoned had he found it, the vehicle had no license plate, and those delivering it asked him to make the motorcycle run without having a key. Against this backdrop of evidence, Defendant was permitted by the court to testify that based on the conversations he had with Ron and Mark, he was under the impression that the motorcycle was abandoned. Defendant was not permitted to testify specifically that Ron and

Mark *told him* the motorcycle was abandoned. Although we recognize the probative difference between the two statements, the difference is not significant given the other evidence at trial. This is especially true when other than the testimony of Defendant, a convicted felon, there was no corroborating evidence that Ron or Mark truly made the statement in the first place or that they even existed. Thus, we cannot say that the trial court's error was fundamental - that it went "to the foundation of the case," or that it took from Defendant "a right essential to his defense," or that it was so significant that Defendant "could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (quoting *Hunter*, 142 Ariz. at 90, 688 P.2d 980 at 982).

¶19 Even if we shifted the burden, applying a harmless error standard, the result is the same. Based upon the foregoing and particularly the insignificant difference between what was actually admitted and what was precluded, beyond a reasonable doubt the result at trial would have been the same. For these same reasons, there was no error in the denial of Defendant's motion for new trial that was also based upon the failing to admit the proposed testimony. Unsupported claims of a motorcycle admittedly worth $10,000 to $12,000 being abandoned did not create reasonable doubt. Under either scenario, the jury was free to consider that a reasonable person would have

inquired of the police department to ensure that such a valuable vehicle was not stolen rather than accepting the view that it had been abandoned.

(3) Untimely Motion in Limine

¶20 Defendant contends that the State's motion in limine was untimely. In *State ex rel. Collins v. Superior Court*, the Arizona Supreme Court stated that a motion in limine "is treated as a motion to suppress by this Court and must comply with the time constraints of Rule 16.1" of the Arizona Rules of Criminal Procedure. 132 Ariz. 180, 182, 644 P.2d 1266, 1268 (1982). Rule 16.1 requires that motions be filed twenty days prior to trial. Because the State filed its motion seven days prior to trial, we agree that the motion was untimely.

¶21 However, although the motion was untimely, we have previously held that it is within a trial court's discretion to hear late motions, including motions in limine. *State v. Vincent*, 147 Ariz. 6, 8-9, 708 P.2d 97, 99-100 (App. 1985) ("The preclusion sanction in Rule 16.1(c) . . . . is a judicial remedy designed to protect judicial interests. Its invocation, therefore, rests in the discretion of the trial court . . . ."). Thus, the trial court did not err in hearing the State's motion.

(4) Settlement Discussion

¶22 Defendant argues that there were two reversible errors committed in connection with the parties' settlement discussion. First, Defendant argues that the court committed reversible error by not granting him a settlement conference. In the pretrial conference, the court ordered that counsel "set up and participate in a settlement conference," and "pursuant to Rule 17.4(a) that counsel with authority to settle the case shall participate in a good faith discussion with the settlement court regarding a non-jury or no-trial resolution which conforms to the interests of justice." Although there was no settlement conference held in this case, both sides did engage in a discussion of a no-trial offer, and Defendant was presented with the opportunity to understand and accept that offer.

¶23 At the trial management conference, the judge presented Defendant with the terms of a potential plea offer as well as the sentencing range he would face if he was found guilty at trial. The State then explained in detail Defendant's exposure at trial. Finally, the court took a break to give defense counsel time to discuss the offer with Defendant. After the break, Defendant stated that he was not interested in the offer. Had a settlement conference been held, Defendant would not have received a greater opportunity to understand and accept the State's offer than that which he received. Accordingly,

Defendant cannot establish that he was prejudiced by not receiving a settlement conference.

¶24 Second, Defendant argues that the court erred by misrepresenting the sentencing range that Defendant would be exposed to if he rejected the plea offer and was later found guilty. Based on the State's allegations, the court told Defendant that if he was found guilty at trial, he would be sentenced using the range for defendants with one historical prior. Ultimately, Defendant was sentenced under the range used for defendants with two priors under A.R.S. § 13-702.02. However, because the sentencing range for defendants with one historical prior under § 13-604 and the range for defendants with two priors under A.R.S. § 13-702.02 are identical, Defendant cannot establish that he was prejudiced in any manner.

(5) Unconstitutionally Vague Statute

¶25 Defendant asserts that the statute under which he was convicted - A.R.S. § 13-1814 - is unconstitutionally vague. We review de novo whether a statute is constitutional. *State v. Mutschler*, 204 Ariz. 520, 522, ¶ 4, 65 P.3d 469, 471 (App. 2003). A party challenging a statute's constitutionality must overcome a "strong presumption" that the statute is constitutional. *State v. Kaiser*, 204 Ariz. 514, 517, ¶ 8, 65 P.3d 463, 466 (App. 2003). A statute is unconstitutionally vague if it fails to give persons of average intelligence

reasonable notice of what conduct is prohibited or if it allows for arbitrary and discriminatory enforcement. *In re Dayvid S.*, 199 Ariz. 169, 172, ¶ 11, 15 P.3d 771, 774 (App. 2000).

¶26 Section 13-1814(A) states in pertinent part:

> A person commits theft of means of transportation if, without lawful authority, the person knowingly . . . [c]ontrols another person's means of transportation knowing or having reason to know that the property is stolen.

This statute is to be read in conjunction with A.R.S. § 13-1801, which defines *means of transportation* as "any vehicle" and *control* as meaning "to act so as to exclude others from using their property except on the defendant's own terms."

¶27 Defendant's claim that the statute under which he was convicted is unconstitutionally vague is without merit. The language contained in A.R.S. §§ 13-1814 and 13-1801 is unambiguous. We conclude that a person of ordinary intelligence would understand the prohibited conduct as identified in the instant statutes, and the language is sufficiently clear to avoid any real potential for arbitrary or discriminatory enforcement.

(6) Prosecutor's Arguments

¶28 Defendant contends that his fifth and fourteenth amendment rights were violated by the prosecutor's frivolous arguments. For a prosecutor's improper argument to warrant

reversal, the defendant must demonstrate that it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes,* 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); *see* U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 4.

¶29 Defendant does not direct us to any specific prosecutorial arguments and, having reviewed the record, we cannot find any arguments that are so frivolous that they can be said to have violated Defendant's constitutional rights to due process.

(7) Ineffective Assistance of Counsel

¶30 Defendant makes various arguments regarding errors made by defense counsel. We construe these arguments as a claim for ineffective assistance of counsel and note that "ineffective assistance of counsel claims are to be brought in Rule 32 proceedings." *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *Id.* We decline, therefore, to address Defendant's arguments for ineffective assistance on direct appeal.

(8) Fraudulently Obtained Indictment

¶31 One of the issues raised by defense counsel on behalf of Defendant states, "Fraudulently obtained indictment." After reviewing the record, we conclude that there is no evidence of any fraud in connection with the State's indictment and therefore no grounds for reversal.

(9) State's Pretrial Motions

¶32 Defendant contends that the trial court erred in granting State's pretrial motions. The only State motion that the court granted and that we have not already discussed was the State's motion to continue the trial. The court granted the motion because the prosecutor had been assigned to a case with overlapping trial dates. We find no error in the court's ruling.

Conclusion

¶33 We have reviewed the record and have found no meritorious grounds for reversal of Defendant's convictions. *See Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Defendant was present at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure.

¶34 Although we affirm Defendant's conviction, we modify his sentence to grant him fifty-eight days of presentence

incarceration credit. A.R.S. § 13-4037(A) (2010). After the filing of this decision, counsel's obligations in this appeal have ended subject to the following. Counsel need do no more than inform Defendant of the status of the appeal and Defendant's 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). 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.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge