IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 01/05/2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0254
	)	DEPARTMENT C
v.	)	
	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
VERNON EARL WOODS, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-157571-001 SE

The Honorable Silvia R. Arellano, Judge

AFFIRMED

Terry Goddard, 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

W I N T H R O P, Judge

¶1 Vernon Earl Woods ("Appellant") appeals his conviction and sentence for misconduct involving weapons. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record on appeal and found no arguable question of law. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). Although this court granted Appellant the opportunity to file a supplemental brief *in propia persona*, he has not done so.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 12-4033(A) (Supp. 2008). Finding no reversible error, we affirm Appellant's conviction and sentence.

FACTS AND PROCEDURAL HISTORY[1]

¶3 On September 13, 2008, Mesa Police Officer Connolly followed Appellant's car because it was similar in description

[1] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

to a vehicle involved in an armed robbery. The officer followed the silver Dodge truck to an address in Mesa. When the vehicle's five occupants exited the car, the officer asked them to sit on the curb so he could speak with them. While the occupants complied, Officer Connolly looked through the rolled up windows of the vehicle and "saw a handgun on the floorboard partially underneath the driver's seat." He asked the vehicle's occupants who the gun belonged to, and Appellant, who was also the vehicle's driver, claimed the weapon. Appellant further acknowledged that he had previously been arrested and charged with a felony. Appellant gave the officer permission to retrieve the loaded gun, a .38 caliber Bensa handgun.

¶4 When questioned, after Officer Connolly read him his *Miranda* rights, Appellant claimed to be the owner of the gun and to have obtained it "from an unknown person at an unknown location." At that point, the officer arrested Appellant.

¶5 Later, Officer Dunleavy, a detective, questioned Appellant and learned that "he obtained the gun from a guy named Jay[,]" and that the gun was "more than likely" stolen.

¶6 At trial, Appellant's parole officer testified that Appellant was on felony parole on September 13, 2008, and that he was not permitted to possess a firearm at that time. Appellant's father testified that the gun actually belonged to

him; he purchased it for eighty dollars from a man at a gas station who was asking for money to feed his family. Appellant also took the stand and testified that, when officers asked, he claimed the weapon as his own because he thought it belonged to his younger brother, a new father. He did not want his brother to get in trouble.

¶7 Appellant was charged by direct complaint, followed by indictment, with misconduct involving weapons, a class 4 felony, in violation of A.R.S. § 13-3102 (Supp. 2008),[2] and theft, a class 6 felony, in violation of A.R.S. § 13-1802 (Supp. 2008). The State alleged aggravating factors and a prior felony conviction. An eight-member jury convicted Appellant of the weapons charge, but acquitted him of theft. The State proved the prior felony conviction at trial and did not elect to hold a hearing on additional aggravators. The court sentenced Appellant to the presumptive term of 4.5 years, with 141 days of presentence incarceration credit. Appellant filed a timely notice of appeal.

ANALYSIS

¶8 Although Appellant did not file a supplemental brief, he requested that counsel raise three issues on his behalf. We

[2] We cite the current version of statutes in which no revisions material to this decision have since occurred.

review questions of law *de novo*, *Arizona Water Co. v. Arizona Corp. Comm'n*, 217 Ariz. 652, 655-56, ¶ 10, 177 P.3d 1224, 1227-28 (App. 2008), and we review evidentiary issues for an abuse of discretion. *State v. Blakley*, 204 Ariz. 429, 437, ¶ 34, 65 P.3d 77, 85 (2003).

A. Search and Seizure of the Gun

¶9 Appellant questions whether the search of the truck and seizure of the gun was wrongful "once the Mesa officers realized that the truck and none of the occupants were involved in whatever caused the Tempe police alert."

¶10 Officer Connolly testified that once the five occupants of the truck had exited the vehicle, he checked the truck for additional occupants. While looking through the rolled up windows of the truck, he noticed the gun. In the interest of officer safety, it was reasonable for Officer Connolly to peer through the windows of the vehicle to ensure that all of the occupants had exited. *See Terry v. Ohio*, 392 U.S. 1, 23-24 (1968); *State v. Garcia Garcia*, 169 Ariz. 530, 531-32, 821 P.2d 191, 192-93 (App. 1991) ("any reasonable fear for safety is enough to warrant a search under *Terry*"). In peering through the windows of the truck, the officer saw, in "plain view," the weapon at issue in this case. "A police officer is not required to close his eyes to evidence which is

in plain view[,]" so long as the officer has prior justification to be in a position to view the evidence, the discovery of the object was inadvertent, and its evidentiary value is immediately apparent to the officer. *State v. Kelly*, 130 Ariz. 375, 378, 636 P.2d 153, 156 (App. 1981) (citations omitted).

¶11 After viewing the weapon, Officer Connolly questioned the group to determine who the gun belonged to and retrieved it with Appellant's consent.

¶12 We find no reversible error with respect to the search of the truck and seizure of the weapon.

B. Father's Testimony

¶13 Appellant next argues that "there could be no conviction for knowingly possessing the gun because his father . . . testified under oath that he was the one who put and left the gun in the truck, that he did not tell anyone in the family that the gun was there and had forgotten about it."

¶14 While it is true that Appellant's father testified as Appellant asserts, Appellant made statements to police that were at odds with his father's testimony. Appellant told police that the gun belonged to him and that he had acquired the gun himself from a man named "Jay." Inconsistent witness statements present a credibility determination for the jury. The jury, as trier of fact, is responsible for assessing the credibility of witnesses,

and we defer to the jury's credibility determination because of its presence in the courtroom and proximity to the witnesses. *State v. Uriarte*, 194 Ariz. 275, 283, ¶¶ 41-44, 981 P.2d 575, 583 (App. 1998).

C. Appellant's Telephone Call from Jail

¶15 Finally, Appellant expresses concern about "the propriety of [the State] using his telephone call from jail, in which he never affirmatively states, agrees or admits that he carried or possessed a weapon[.]"

¶16 The call at issue was a three-way telephone conversation between Appellant, his brother, and a woman. During the portion of the call that the court admitted as Exhibit 7, Appellant discussed his arrest and the weapon with the woman. She asked "how it happened," to which Appellant said, "[I]t ain't like I called the police and said come over here and check the damn truck, I have a big pistol." She also asked whether he had learned his lesson and was planning to "carry" again, to which Appellant responded, "[H]ell no."

¶17 The telephone call was properly used to impeach Appellant when he took the stand in his own defense. The recording constituted a party admission under Arizona Rule of Evidence 801(d)(2)(A). Party admissions require no external indicia of reliability and we find no abuse of discretion or

reversible error in its admission. *See State v. Garza*, 216 Ariz. 56, 66, ¶ 41, 163 P.3d 1006, 1016 (2007).

D. Remaining Analysis

¶18 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶19 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant 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.

CONCLUSION

¶20 Appellant's conviction and sentence is affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PETER B. SWANN, Presiding Judge

_____/S/_____
MICHAEL J. BROWN, Judge