

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: 02-11-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 09-0442
)
) DEPARTMENT A
 Appellee,)
)
) MEMORANDUM DECISION
 v.)
) (Not for Publication -
) Rule 111, Rules of the
 SAMUEL CRAIG MOONEY,)
) Arizona Supreme Court)
)
 Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-152774-001 DT

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

CONVICTIONS AND SENTENCES 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 Peg Green, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following Samuel Craig Mooney's conviction of one count of theft and 12 forgery counts. Mooney's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Mooney was given the opportunity to file a supplemental brief but did not do so. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Mooney's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Mooney worked as a caregiver for K.P., an elderly man with Alzheimer's disease.¹ Prior to K.P.'s death, Mooney cared for him for approximately 14 months. F.P., K.P.'s wife, considered Mooney "almost like a member of our family." After K.P. died, F.P. continued to pay Mooney to perform "odd jobs" at an agreed-upon rate of ten dollars per hour. Generally, F.P. paid Mooney by check in increments of \$300. After K.P. became ill, F.P. fell behind in monitoring her bank accounts. Several months later, when reviewing her banking records, F.P. discovered numerous checks from her accounts made out to Mooney

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Mooney. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

bearing a signature not her own. F.P. neither had written the checks herself, nor authorized anyone else to do so. The morning after discovering the checks, F.P. told her daughters what she had learned, and they called the police.

¶13 When the police first interviewed Mooney, he told them F.P. had written the checks to pay him for work he performed and that she suffered from Alzheimer's disease and drank alcohol often. When the police interviewed Mooney late, he said F.P. had given him permission to write checks to himself on several occasions. Initially Mooney maintained that F.P. told him to write out the checks but that she always signed them; however, he later told a detective that he signed F.P.'s name on a check at least once. Mooney also told the detective that he had written checks to himself and that F.P. was unaware of them, but he thought it was okay because they were friends and he intended to pay the money back.

¶14 The state charged Mooney with count one, theft of \$4,000 or more but less than \$25,000, a Class 3 felony; and counts two through fourteen, forgery, a Class 4 felony. At trial, the State introduced copies of 12 checks from F.P.'s checking accounts made payable to Mooney; all bore a signature F.P. testified was not hers, had been cashed or deposited by Mooney and were not authorized by F.P. Each check corresponded

to one count of forgery. During the trial, the court entered a judgment of acquittal on count 12 because F.P. testified she was not certain whether she had signed the corresponding check. At the State's request, the court then amended the theft charge from a class 3 to a class 4 felony, because the total amount of money alleged stolen fell below \$4,000. See Arizona Revised Statutes ("A.R.S.") section 13-1802(G) (Supp. 2009).

¶15 The jury found Mooney guilty of all counts remaining after the judgment of acquittal on count 12. The superior court sentenced Mooney to four years of probation on count one, a presumptive 2.5-year prison term on count two and mitigated 3-year prison terms for each of counts 3-11, 13 and 14; the court ordered the prison sentences to run concurrently and the probation term to run consecutively to Mooney's incarceration.

¶16 Mooney timely appealed. 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 -4033 (Supp. 2009).

DISCUSSION

¶17 The record reflects Mooney received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court

held an appropriate pretrial *Donald*² hearing at which Mooney rejected the State's plea offer. The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of 12 members with one alternate.

¶18 The State charged Mooney with committing theft, defined by statute as, "without lawful authority . . . knowingly control[ing] property of another knowing or having reason to know that the property was stolen." See A.R.S. § 13-1802(A)(5). In its final jury instructions, however, the court told the jury that theft requires proof that the defendant "without lawful authority, knowingly controlled another person's property . . . [and] intended to deprive the other person of the property." See A.R.S. § 13-1802(A)(1). Because Mooney did not object at trial, we review this issue for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Under fundamental error review, we will not reverse a conviction unless fundamental error has occurred and it has resulted in prejudice. *Id.*, ¶ 20, 115 P.3d at 607.

¶19 Without addressing whether the theft instruction constituted fundamental error, we conclude Mooney was not prejudiced by the instruction. Mooney's defense was that F.P.

² *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

authorized him to write the checks to himself to pay him for work he performed at her home, not that he did not know the money he controlled was stolen. Therefore, because Mooney can show no prejudice from the instruction on theft, we will not reverse the conviction on that ground.

¶10 The court properly instructed the jury on the elements of the remaining charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report and addressed its contents during the sentencing hearing and imposed a legal sentence on the charges arising out of the crimes of which Mooney was convicted.

CONCLUSION

¶11 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶12 After the filing of this decision, defense counsel's obligations pertaining to Mooney's representation in this appeal have ended. Defense counsel need do no more than inform Mooney of the outcome of this appeal and his future options, 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).

On the court's own motion, Mooney has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for reconsideration. Mooney has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
DANIEL A. BARKER, Judge