DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0800
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
JAMES HERBERT HUGHES, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200801238

The Honorable Mark W. Reeves, Judge

AFFIRMED

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

Michael Breeze, Yuma County Public Defender, — Yuma
By Edward F. McGee, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 James Herbert Hughes ("defendant") appeals his convictions for importation and possession for sale of marijuana. 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; he 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 an opportunity to file a supplemental brief *in propria persona*, but he has not done 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).

FACTS AND PROCEDURAL HISTORY

¶2 On October 3, 2008, defendant drove his vehicle across the San Luis port of entry at the United States border. Customs and Border Protection ("CBP") Officer Suarez asked defendant where he was going and whether he was bringing "any liquor, plants, fruit, medicine, weapons, drugs or $10,000 or more" into the country. Defendant said he was going to San Luis and had nothing to declare. Upon request, defendant opened the rear of the vehicle. Officer Suarez noticed Bondo® beneath the carpet and saw that the color of the cargo area did not match the rest of the car.[1] Defendant was sent to a secondary inspection lane, where he told Officer Zacarias he was traveling from El Golfo to

[1] Bondo® is a filler compound used for vehicle body repairs. It is also used in cargo areas to create hidden compartments.

Walmart but had nothing to declare. A drug-sniffing dog alerted on the vehicle, and an inspection ensued. Officers pulled away loose carpet and found Bondo® in the entire rear cargo area. A measuring device showed higher density in the cargo area than normal, indicating there was "something extra there." Officers removed the floorboard and found fifty-two packages containing a green, leafy substance, which field and lab-tested as marijuana. Defendant was placed in a holding cell, and officers called Immigration and Customs Enforcement ("ICE").

¶3 ICE agent Zazueta arrived and took statements from the CBP officers. When ICE agent Duarte arrived, defendant was taken to an interview room directly across from the evidence-processing room. The storage room was empty; the marijuana had not yet been removed from defendant's car.

¶4 Before any questions were asked, agents read defendant *Miranda* warnings, and he signed a form stating he understood those rights. Defendant did not request an attorney. Defendant told Agent Zazueta he did not know why he was being detained, but "later thought about it and said . . . he knew, but he didn't . . . want to know." Defendant also said he "did not know exactly what was in the vehicle," but admitted he "knew it was something illegal." Defendant claimed he purchased the vehicle for $350 from a man known only as "Gustavo." Gustavo hired defendant to cross the border, pick him up in Quartzsite,

and drive him to Fresno, California. There, Gustavo would leave him at a hotel and take the car, only to return later with a "briefcase full of money." Defendant was paid "five to $600 plus whatever expenses he accrued" during the trips. Defendant said he did this "five or six times."

¶5 Defendant was indicted for knowingly importing marijuana weighing two pounds or more and possession for sale of marijuana weighing four pounds or more, both class 2 felonies in violation of Arizona Revised Statutes ("A.R.S.") sections 13-3405(A)(4), (B)(11) and -3405(A)(2), (B)(6) (2010).[2] A jury trial ensued. After a voluntariness hearing, the trial court found that ICE agents gave proper *Miranda* warnings. After considering additional statutory factors under A.R.S. § 13-3988(B) (2010), the court ruled that defendant's statements to the officers were admissible.

¶6 At the conclusion of the State's case, the trial court denied defendant's motion for judgment of acquittal pursuant to Arizona Rule of Criminal Procedure ("Rule") 20. Defendant took the stand and admitted that he was paid to drive across the border, pick up Gustavo in Quartzsite, and take him to Fresno. He claimed, however, that he only bought the car at the end of August and had made the Fresno trip with Gustavo only twice.

[2] We cite to the current version of applicable statutes as no revisions relevant to this appeal have occurred.

Defendant testified that he admitted knowing about the marijuana only because agents showed it to him before the interview and told him it came from his car. He admitted saying, "I knew there was something wrong," but denied using "the word illegal." Defendant told the jury he refused to answer any more questions after the agents read him *Miranda* rights.

¶7 Defendant re-called Agent Zazueta to the stand to ask about the agent's prior inconsistent testimony that defendant might have seen the marijuana since it had been removed from the car before the interview. Agent Zazueta admitted he was mistaken when he made that statement. He testified that, after reviewing his notes, he realized defendant could not have seen the marijuana because it had not been removed from the car until after the interview. At the close of trial, defendant renewed his Rule 20 motion, which was again denied.

¶8 The jury deliberated and found defendant guilty on both counts. Defendant was sentenced to concurrent five-year presumptive prison terms and a fine.

DISCUSSION

¶9 We have considered the brief submitted by defense counsel and reviewed the entire record. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence

imposed was within the statutory range. There were no irregularities in the deliberation process.

¶10 The trial court properly denied defendant's Rule 20 motion. A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). 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) (citations 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).

¶11 The State presented substantial evidence of guilt, including testimony by officers who inspected defendant's car, the chemist who analyzed the seized evidence, and the agents who interviewed defendant, in addition to incriminating statements by defendant himself. We next briefly address several issues that counsel indicates defendant wishes to raise.

1. Shackles

¶12 Defendant argues he was "accidentally led into court in chains and shackles in the presence of the jury." Defendant does not state when this occurred, and we cannot find

any such incident in the record. With two minor exceptions, the transcripts reflect that defendant was present when the jury entered and remained until the jury exited.[3]

¶13 Even assuming that defendant was brought into the courtroom shackled when the jury was present, "[a]n appellate court will not find error on the ground that the defendant was shackled unless it is shown that the jury saw the shackles." *State v. McMurtrey,* 136 Ariz. 93, 98, 664 P.2d 637, 642 (1983). Defendant has neither established nor argued that the jury actually saw him in shackles. *See State v. Miller*, 186 Ariz. 314, 323-24, 921 P.2d 1151, 1160-61 (1996) (holding claim was "without merit" where defendant "does not claim that the jury ever saw him shackled, and thus fails to show prejudice").

2. False testimony

¶14 Defendant contends the arresting officer falsely testified that he "described the seized drugs without having seen them in police custody, when, in fact, prior to being interviewed, he was led to a room and shown the drugs." Defendant also claims ICE officers fabricated the incriminating statements attributed to him.

[3] There were two recesses where it is unclear the order in which the jury and defendant exited and returned: once during jury selection and another on the third day of trial. Nothing in the record reflects that there were problems on either occasion with the jury seeing defendant shackled.

¶15 "The credibility of a witness and the weight and value to be given a witness' testimony are questions exclusively for the jury." *State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974); *accord State v. Lee,* 217 Ariz. 514, 516, ¶ 10, 176 P.3d 712, 714 (App. 2008) ("[I]t is the trier of fact's role, and not this court's, to 'resolve conflicting testimony and to weigh the credibility of witnesses.'" (citation omitted)). It was for the jury to decide whether defendant's testimony undermined the officers' credibility. We do not reweigh that evidence on appeal. *Tison*, 129 Ariz. at 552, 633 P.2d at 361.

3. Prosecutor's Comments

¶16 Defendant contends that when he "testified that he had been shown the drugs," the prosecutor falsely stated "that [defendant] had seen a photograph of them," though "he had been shown a poor quality Xerox copy of an image of the drugs." Defendant also claims the prosecutor falsely stated that defendant owned the car for two or three months, though he had only owned it for thirty-three days before his arrest.

¶17 Defendant's first claim is not supported by the record. The only reference the prosecutor made to photographs during defendant's testimony was when she asked whether defendant, in preparation for trial, had discussed with his

attorney "the photographs that were taken during the investigation."

¶18 As to the second claim, the prosecutor stated during closing argument that defendant owned the car for two or three months. This statement was a reasonable inference from the evidence presented. Officer Suarez testified that defendant stated he "had [the car] for about three months."

4. Confession

¶19 Defendant argues that the prosecutor mischaracterized his statement: "I know, but I don't want to know," as a confession to willingly crossing the border with drugs. We disagree. The prosecutor's argument was a reasonable inference from the evidence presented.

5. *Miranda* violation

¶20 Defendant contends that officers "questioned him extensively prior to administering Miranda warnings" and continued questioning him even after he asked for an attorney. At the voluntariness hearing, however, the agents testified that defendant was advised of his *Miranda* rights and that he signed a form stating that he understood those rights *before* substantive questioning began. Prior to the *Miranda* warnings, defendant was only asked for "biographical information, name, [and] date of birth." Such "[n]eutral, nonaccusatory questioning in furtherance of a proper preliminary investigation," is permitted

under *Miranda*. *State v. Pettit,* 194 Ariz. 192, 195, ¶ 16, 979 P.2d 5, 8 (App. 1998*).* According to the agents, defendant responded to the questions freely and never asked for an attorney. Because the trial court specifically found that the agents' testimony was credible, we discern no error.

6. Tape-Recording of the Interview

¶21 Defendant contends that his interview was not recorded, notwithstanding the presence of a tape recorder in the room. Both agents testified that the interview was not recorded based on ICE policy. Agent Zazueta took handwritten notes, a copy of which was provided to defendant, and made a written report of the interview. Defendant cites no authority for the proposition that interviews must be recorded, and we are aware of none.

7. Speedy Trial Rights

¶22 Defendant argues his speedy trial rights were violated because it took eleven months to get to trial, though he only waived time twice to allow witnesses to be interviewed. "Neither the United States nor the Arizona Constitution requires that a trial be held within a specified time period." *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997) (citing U.S. Const. amend. VI; Ariz. Const. art. II, § 24). In determining whether there has been a violation of speedy trial rights, we consider four factors: "(1) the length of the delay;

(2) the reason for the delay; (3) whether the defendant has demanded a speedy trial; and (4) the prejudice to the defendant." *Id.* (citation omitted). "In weighing these factors, the length of the delay is the least important, while the prejudice to defendant is the most significant. *Id*. at 139-40, 945 P.2d at 1270-71.

¶23 Defendant has not articulated any prejudice arising from any delay. Moreover, the record reflects that the delays were mostly attributable to the defense or were expressly waived by defendant. On this record, we find no violation of defendant's speedy trial rights.

8. Hearsay Evidence at Sentencing

¶24 Defendant contends that the prosecutor provided the trial court with "slanderous" email statements from his family without allowing him a chance to respond. Hearsay evidence is admissible at sentencing, provided defendant is given an opportunity to refute it and it bears some indicia of reliability. *State v. McGill*, 213 Ariz. 147, 160, ¶¶ 55-56, 140 P.3d 930, 943 (2006).

¶25 The sentencing transcript reflects that the prosecutor provided emails from defendant's brothers that were addressed to the court on the date she received them. The court took a recess to review the messages and gave defense counsel copies. The messages make unflattering claims about defendant's past in

Bolivia, including criminal allegations. Although defendant was present and had an opportunity to refute them, he did not do so. The messages apparently did not affect the sentence because defendant received the presumptive term recommended in the presentence report, which was prepared before the emails were received. In pronouncing sentence, the trial court noted that defendant had no criminal history, and it did not mention the email messages as something it had considered.

9. Ineffective Assistance of Counsel

¶26 Ineffective assistance of counsel claims must be brought in Rule 32 proceedings. "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

CONCLUSION

¶27 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,
Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PETER B. SWANN, Judge