DIVISION ONE
FILED: 02/14/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0088
	)	1 CA-CR 11-0094
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT B
	)	
CHRISTOPHER KIOWA SPARGO,	)	
	)	**MEMORANDUM DECISION**
Appellant.	)	(Not for Publication -
	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-118500-001SE and CR2010-048155-001SE

The Honorable Arthur T. Anderson, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, 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 Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Christopher Kiowa Spargo ("Appellant") filed this appeal in accordance with *Anders v. California*, 386 U.S. 738

(1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following his conviction of theft of means of transportation, a class 3 felony, under Arizona Revised Statutes ("A.R.S.") section 13-1814(A)(5) (2010),[1] and the revocation of his probation.

¶2 Finding no arguable issues to raise, Appellant's counsel requested that this Court search the record for fundamental error. Appellant was given the opportunity to, but did not submit a *pro per* supplemental brief. For the reasons that follow, we affirm Appellant's conviction and modify his sentence to reflect an increase to his presentence incarceration credit.

FACTUAL AND PROCEDURAL HISTORY

¶3 On December 11, 2009, the victim ("L.D.") left his SUV unlocked in his driveway with the keys in the center console. The next morning, he discovered it was missing and reported it to the police. L.D. testified that he did not give anyone permission to take or drive his car.

¶4 On February 20, 2010, Detective S. was called to investigate a small silver SUV parked at the corner of Alma

[1] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

School and 8th Avenue.[2] He parked his unmarked police vehicle in the same lot as the SUV to conduct surveillance. Detective S. observed Appellant quickly enter the SUV, turn on the ignition, and pull out of the parking lot. Detective S. followed behind him.

¶5 At that point, Sergeant V., having arrived to assist Detective S., heard that the SUV had left the parking lot and was headed north. When the SUV passed him, Sergeant V. immediately pulled out behind it in his marked patrol car. Detective S. then instructed Sergeant V. to initiate a traffic stop. Within a few moments, and before Sergeant V. turned on his overhead lights, Appellant drove the SUV into an apartment complex and parked in a covered parking space, hitting a support pylon with the passenger's side as he did so. Appellant then exited the vehicle and fled on foot. Detective S. pursued him, but after Appellant scaled a seven foot wall, he lost track of him. At the base of the wall, Detective S. found Appellant's baseball cap and cell phone, as well as the keys to the SUV. In the meantime, Sergeant V. ran the vehicle identification number in the national crime computer, which confirmed that the vehicle

[2] According to a police report, on February 19, 2010, Appellant was contacted by police regarding a matter in which he was tangentially involved. When he left, police ran the license plate of the SUV he was driving and discovered the vehicle was reported stolen. The next day, at a general briefing, officers of the Mesa Police Department were told to be on the lookout for the vehicle.

was stolen.

¶6 When Appellant fled, additional units were called to the scene. A K-9 unit eventually found Appellant hiding in the bed of a pickup truck under a pile of palm fronds. Appellant, who had injured himself during the pursuit, was transported to a hospital.

¶7 At the hospital, Detective S. conducted an interview with Appellant after reading Appellant his *Miranda* rights.[3] During that interview, Appellant stated he got the car from his friend "Junior," but was unable to provide Junior's full name or any contact information. He then stated he was to return the car to Junior's girlfriend "Tiffany," but again was unable to provide any contact information. Later in the interview, when Detective S. asked Appellant who Tiffany was a second time, Appellant claimed he did not know anyone by that name.

¶8 Appellant testified that he had been planning on purchasing the car from his friend, there was no indication the SUV had been stolen, and that he lied to Detective S. during the interview in an attempt to buy time and figure out what was going on. In addition, he stated that he originally fled from the police because he had a suspended license and was not supposed to be driving.

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶9 In October 2010, a jury found Appellant guilty of theft of means of transportation. After hearing additional evidence, the jury also found Appellant guilty of the following aggravators: (1) the offense involved damage to the property; (2) the victim of the offense was sixty-five or more years of age; and (3) Appellant was on probation at the time of the offense. Appellant received the presumptive term of 11.25 years with 322 days of presentence incarceration credit. Because he violated the conditions of his probation imposed on May 8, 2008, he was sentenced to an additional 2.5 years with 380 days of presentence incarceration credit. The court ordered the sentences to run consecutively. Appellant was also ordered to pay a total of $7,137.47 in restitution.

STANDARD OF REVIEW

¶10 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 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." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain a reversal,

the defendant must also demonstrate that the error caused prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

DISCUSSION

¶11 After careful review of the record, we find no grounds for reversal of Appellant's conviction. The record reflects Appellant had a fair trial and all proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Appellant was present and represented at all critical stages of trial, was given the opportunity to speak at sentencing, and the sentences imposed were within the range for Appellant's offenses.

I. SUFFICIENCY OF THE EVIDENCE

¶12 In reviewing the sufficiency of evidence at trial, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "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) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶13 There is evidence in the record to support the jury's conviction of Appellant for the crime of theft of means of

transportation. To obtain a conviction the State must show that the defendant: (1) without lawful authority; (2) knowingly controlled; (3) another person's means of transportation; (4) knowing or having reason to know the property was stolen. A.R.S. § 13-1814(A)(5).

¶14 First, there is sufficient evidence to support the jury's finding that the vehicle belonged to another person and was taken without lawful authority. L.D. testified that he was the registered owner of the silver SUV, that the vehicle was taken without his permission, and that it was reported stolen on December 12, 2009.

¶15 Second, there is evidence that Appellant controlled the vehicle as he testified to driving the SUV on February 20, 2010.

¶16 Finally, there is evidence that Appellant knew or should have known that the vehicle was stolen. It is true that the vehicle did not display any customary indices of illegal possession, such as a damaged steering column or broken windows. However, that does not detract from the evidence presented from which the jury could have inferred that Appellant knew or should have known the SUV was stolen. First, after he was arrested, Appellant claimed he was borrowing the vehicle, but was unable to provide the police with his alleged friend's full name or contact information. Second, although Appellant testified that

he was planning on purchasing the vehicle, the $1,200 he agreed to pay was considerably disproportionate to the $11,000 the SUV was actually worth. Finally, although running or hiding after a crime has been committed does not by itself prove guilt, it can be taken into consideration with all of the other evidence provided. *See State v. Lujan*, 124 Ariz. 365, 371, 604 P.2d 623, 635 (1979). Based on the evidence presented, a reasonable jury could have inferred that Appellant knew or should have known that the SUV was stolen.

II. PRESENTENCE INCARCERATION CREDIT

¶17 Presentence incarceration credit is given for time spent in custody beginning on the day of booking and ending on the day before sentencing. *See State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993); *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987). Appellant was in custody from his arrest on February 20, 2010 until his sentencing on January 18, 2011. While Appellant's total time incarcerated prior to sentencing was 332 days, he only received a credit of 322 days. Appellant was also incarcerated from March 21, 2008 until May 8, 2008 in connection with his 2008 charge (for which he received probation). In calculating the presentence incarceration credit for Appellant's probation violation sentence, the court included this additional 49 days. While Appellant's total time incarcerated prior to sentencing

was 381 days, he only received a credit of 380 days. We, therefore, modify the sentence to reflect this correction.

CONCLUSION

¶18 For the foregoing reasons, we affirm Appellant's conviction but modify his sentence to grant him 332 days of presentence incarceration credit for his conviction of theft of means of transportation, and 381 days for his sentence in connection with his probation violation. Upon the filing of this decision, defense counsel shall inform Appellant of the status of his appeal and his future appellate 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). Upon the Court's own motion, Appellant shall have thirty days from the date of this

decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge