**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

DIVISION ONE
FILED: 02/23/2012
RUTH A. WILLINGHAM, CLERK
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| STATE OF ARIZONA, | ) | No. 1 CA-CR 11-0226 |
| | ) | |
| Appellee, | ) | DEPARTMENT B |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| SHELDON MAURICE JOHNSON, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-106953-002 DT

The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

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**S W A N N**, Judge

**¶1** Sheldon Maurice Johnson ("Defendant") timely appeals his convictions for two counts of organized retail theft and one count of trafficking in stolen property. 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 us that a thorough search of the record has revealed no arguable question of law, and 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* and did so.

*FACTS AND PROCEDURAL HISTORY*[1]

**¶2** Defendant and Andrew Thomas Thieme worked together to steal from two local grocery stores diapers, beer, toilet paper and laundry detergent that they later attempted to sell.

**¶3** On February 4, 2010, plainclothes, undercover officers from Avondale Police Department's and Scottsdale Police Department's HEAT units saw Defendant drive a Chevrolet Cavalier, with Thieme as his passenger, to an Albertson's grocery store and park in the lot. Thieme got out, entered the store while Defendant stood near the Cavalier's trunk, and returned to the Cavalier a short time later with toilet paper, beer, diapers and laundry detergent in his cart. Scottsdale Police Department's Officer Watson saw Thieme bypass the store registers without paying. Defendant unloaded the items from the

[1] We view the facts in the light most favorable to sustaining the convictions and sentences. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

cart into the Cavalier, Thieme got in the passenger seat, and then the "Cavalier went mobile," with Defendant driving.

**¶4** Officers followed the Cavalier as it drove to and parked at a Basha's in Sun City. At the Basha's, Thieme again got out and went in, followed by Scottsdale Police Department's Officer Stewart, who saw Thieme -- with his cart laden with cases of beer, liquid laundry detergent and toilet paper -- skip the registers and leave the store. Defendant again loaded up the Cavalier with the goods, got in the driver's seat and left the lot.

**¶5** Officers followed the Cavalier from Basha's to an apartment complex where Defendant stopped the Cavalier, unloaded and stacked several cases of beer and met with Chester Player, who began handling the beer after Defendant unloaded it. Officers then moved in, arrested and handcuffed Defendant and Thieme.[2]

**¶6** While being transported, and after receiving a *Miranda* warning, Defendant told Watson that Thieme chose the detergent, diapers and toilet paper, because they would fit in the cart and be easy to sell because "everybody washes their clothes, everybody has babies, and everybody uses toilet paper"; as for the beer, he told Watson that Player told him in an earlier

[2] The total value of the items taken from Albertson's was $223.10, and from Basha's was $201.45; the goods that officers confiscated were returned to the stores.

conversation that he wanted to purchase nine cases of beer and the agreed upon price was $100. In a second taped interview, following a second issuance of *Miranda* warnings, Defendant admitted "delivering" the items, and when Watson told him he knew Defendant stole them, Defendant replied with "there's been no complaint, there's been no call to complain."

**¶7** Defendant was charged by direct complaint with two counts of organized retail theft, a class 4 felony, and one count of trafficking in stolen property, a class 2 felony. He waived a preliminary hearing. The state alleged prior convictions and aggravating circumstances and requested a Rule 609 hearing. On the first trial day, the state noted that there were potential Rule 404(b) issues with the video and audio recordings and noted that even though the state did not file a 404(b) motion prior to trial, it disclosed its intent to use 404(b) material in its Rule 15.1 disclosure.[3] Following written motions by the state to use the recordings and motions by defense counsel to preclude the recordings, the court conducted an evidentiary hearing the next day, during which Officer Toschik testified about the investigation and the court listened to the audio recording of Defendant's post-arrest interview. After finding that the tapes and evidence were being admitted

[3] The state further argued that it was not obligated to file a 404(b) motion because the statements were not actually within the scope of Rule 404(b).

for a proper purpose and weighing the probative value against the prejudicial effect, the court permitted the audio tape with redactions of the statements relating to a prior arrest and a specific prior incident.

**¶8** Defendant was convicted on all counts and the jury found the aggravating circumstances of the presence of an accomplice on Counts 2 and 3, and pecuniary motive on Counts 1, 2 and 3, beyond a reasonable doubt. Defendant was sentenced on March 31, 2011, following a trial on priors, to a mitigated seven years imprisonment on Counts 1 and 2 and a mitigated thirteen years imprisonment on Count 3, to be served concurrently, and received 420 days of presentence incarceration credit.

*DISCUSSION*

**¶9** We have read and considered the briefs submitted by Defendant and counsel, and have reviewed the entire record. *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was present at all critical phases of the proceedings or he waived his presence and he was represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process. The state properly

proved Defendant's prior convictions and the sentence imposed was within the statutory range.

**¶10** Defendant requests that we review certain specific issues. He contends: (1) the state engaged in selective prosecution; (2) the state improperly extended the date set for trial; (3) the state improperly withheld and belatedly disclosed an audio tape and redacted it insufficiently, resulting in prejudice; (4) the evidence was insufficient; and (5) the sentence received was more harsh because the Clerk of Court did not properly process Defendant's requests to have his prior convictions set aside. We address each asserted error in turn.

*I. SELECTIVE PROSECUTION*

**¶11** Defendant asserts that the state engaged in selective prosecution in its choice of charges. To prevail on such an argument, Defendant must show that (1) other similarly situated people were not charged with the crime of which he is accused and (2) the decision to charge him with that crime was made based on an impermissible ground, such as race or religion. *State v. Montano*, 204 Ariz. 413, 428, ¶ 78, 65 P.3d 61, 76 (2003). Defendant here makes no such argument, and our review of the record reveals none.

*II. EXTENSION OF THE TRIAL DATES*

**¶12** Defendant asserts that his right to due process was violated when the court extended the last day to start trial

without notice to Defendant or his counsel and without first seeking or obtaining authorization from the presiding judge, as required by Arizona Rule of Criminal Procedure 8.4.

**¶13** Defendant misunderstands the history of his case. Defendant's arraignment occurred March 10, 2010, resulting in a "last day" of August 8, 2010. The first trial setting for July 12, 2010, was continued at *Defendant's* oral request at the June 30 pretrial conference because his codefendant's motion to continue had been granted -- 65 days' time was excluded resulting in a new last day of October 12, 2010, and a new trial date of September 15, 2010. The September 15 trial date was reset to November 17, 2010, following Defendant's motion to continue because of conflicts in defense counsel's schedule; Defendant waived time, and the new last day, with the exclusion of 63 days, was then December 14, 2010. Defendant again moved to continue because defense counsel was in a car accident, resulting in resetting of trial to December 7, 2010. On December 2, 2010, Defendant again moved to continue due to a death in defense counsel's family and trial was reset for January 10, 2011; with Defendant's waiver of time and exclusion of 34 days, the result was a new last day of January 17, 2011. On January 7, 2011, Defendant again moved to continue and agreed to waive time, so a new trial date was set for January 31, 2011,

and the new last day became February 7, 2011, upon the exclusion of 21 days.

**¶14** Rule 8.4 requires that "[d]elays occasioned by or on behalf of the defendant" shall be excluded from speedy trial computations. All continuances were the result of Defendant's motions, and Defendant agreed to waive time upon each of these motions. Neither Defendant's due process right to speedy trial, nor Rule 8.4, were violated by the state when the court extended his "last day" upon Defendant's own motions to continue.

*III. DELAY IN DISCLOSURE AND INSUFFICIENT REDACTION*

**¶15** Defendant argues that the state withheld an audio tape until the day of trial and that it insufficiently redacted that tape as instructed by the court. He argues that the audio recording of his interview with officers after his arrest on February 4, 2010, was not disclosed until the day of trial. The record demonstrates that the prosecution timely disclosed the existence of the recording and provided it to defense counsel, and that defense counsel received and reviewed the tape prior to trial.

**¶16** While the prosecution did not file a Rule 404(b) motion before trial, and defense counsel did not object to the statements at issue prior to the day of trial, the court nonetheless conducted a hearing on the concerns raised by defense counsel and decided to allow the recording with

redactions. The court specifically required that the prosecution redact statements regarding a prior arrest and a specific prior incident. We find no support for Defendant's assertion that the state failed to redact the ordered portions.

*IV. SUFFICIENCY OF THE EVIDENCE*

**¶17** "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)).

**¶18** Here, the state presented an audio recording of Defendant's knowledge of the stolen nature of items Thieme took from the stores and the overall scheme he was participating in, as well as his motivations for participating in the charged crimes. The state presented video recordings of Defendant's coconspirator exiting the stores without paying for items and of Defendant loading the items into the car, and elicited testimony of officers who observed Defendant sell cases of beer to Chester Player. It cannot be said that there is a complete absence of probative facts to support Defendant's convictions.

*V. PRIOR CONVICTIONS AND SENTENCING*

**¶19** Section 13-907 of the Arizona Revised Statutes allows a conviction to be set aside following a defendant's completion of sentence and discharge by the court. The decision to do so

is within the discretion of the trial court. *See* A.R.S. § 13-908. That a prior conviction has been set aside does not preclude the state from proving it as a prior conviction in a subsequent criminal action. *State v. Barr*, 217 Ariz. 445, 449-50, ¶¶ 17-19, 175 P.3d 694, 698-99 (App. 2008) (citations omitted).

**¶20** Defendant argues that his applications to have the prior convictions set aside were not handled properly by the Clerk of Court and that this improper handling resulted in a harsher sentence in this case. Defendant's argument fails because even if his applications had been accepted, timely processed and successful, the state would still have been permitted to use them in the present prosecution for the purposes of sentencing.

*CONCLUSION*

**¶21** We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Defendant's convictions and sentence. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant

has 30 days from the date of this decision to file a petition for review *in propria persona.* *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge