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

STATE OF ARIZONA, Appellee, v. THOMAS PATRICK ANDREWS, JR., Appellant.	)	1 CA-CR 11-0266 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-135084-001SE

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

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 Thomas Patrick Andrews ("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 under Arizona Revised Statutes ("A.R.S.") section 13-1814(A)(5) (2010).[1]

¶2 Finding no arguable issues to raise, Appellant's counsel requested that this Court search the record for fundamental error. In a supplemental brief, Appellant argues: (1) that the pretrial identifications using a photo lineup were improperly admitted; and (2) that the use of fingerprint analysis to establish prior felony convictions was improper.[2]

¶3 After reviewing the entire record, we conclude the evidence is sufficient to support the verdict and there is no reversible error. Therefore, we affirm Appellant's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶4 On July 3, 2010, R.S., manager of the detail department of Berge Volkswagen, observed "a white male with dark hair . . . walking around the lot and taking a peek in the cars." R.S. was cleaning a car at the time. R.S. asked the man if he needed help, but the man walked away.

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[1] We will refer to the current version of the statute if no substantive changes have been made since the underlying events.

[2] Appellant also requests this Court review for ineffective assistance of counsel. This Court does not consider ineffective assistance of counsel claims on direct appeal regardless of merit. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must be raised in a petition for post-conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure. *Id.*

¶5 That evening, around 5:30 p.m., a blue 2002 four-door Volkswagen Jetta, belonging to J.T., was stolen from the dealership's maintenance department. T.G., a repair technician at the dealership, testified that he saw Appellant sitting in the driver's seat of the car while it was parked in the maintenance bay and drive away. The police interviewed T.G. that evening, and T.G. gave them a description of the individual.

¶6 On July 5, Officer A.S. of the Mesa Police Department discovered the car while on patrol. Officer A.S. confirmed on his computer that it was stolen, and then turned around back to the vehicle. He observed three individuals, including Appellant and his girlfriend J.S., walking away "at a pretty fast rate." Officer A.S. approached Appellant, who seemed "very nervous." Appellant was then detained.

¶7 On July 6——three days after the theft——investigating officer C.W. showed a photo lineup to both R.S. and T.G. from which both identified Appellant as the suspect. T.G. had no "doubt in [his] mind" when he made the photo identification; he was "100 percent positive." R.S. was "very confident." R.S. and T.G. both signed the same photo lineup card underneath the picture of Appellant, but they each separately identified the Appellant before either signed. C.W. testified that he gave a

full admonition to both T.G. and R.S., including an instruction that the suspect may not be in the photo lineup.

¶8 A *Dessureault* hearing occurred regarding the pretrial identifications made by T.G. and R.S. using the photo lineup. The trial court ruled that the identifications were admissible. At trial, R.S. testified that there was nothing on the pictures to direct his attention to one particular picture. R.S. testified that C.W. did not tell him that the suspect may not be in the photo lineup. R.S. could not identify the Appellant in court. T.G. also testified that C.W. did not tell him that the suspect may not be in the photo lineup. T.G. testified that, upon identifying the Appellant in the lineup, C.W. confirmed that was the suspect. T.G. was able to identify the Appellant in court. He was also able to remember the Appellant's clothing at the time of the crime, which matched video stills taken of an individual walking around the lot.

¶9 The jury found the Appellant guilty of theft of means of transportation. The State used a latent fingerprint card with inked prints and an automated summary report, or "pen pack," to prove historical priors. The pen pack was testified to by P.D., a witness that had not been disclosed to the defense until the day before the priors trial. Appellant made a motion to exclude the State's fingerprint expert witness, on the grounds that the witness was not timely disclosed. The trial

court decided that the defense could have a month continuance; the defense, however, decided to proceed as scheduled and would just interview P.D. that day. Based on the pen pack and P.D.'s testimony, the trial court found that the Appellant had four allegeable felony convictions, and sentenced him as a Category 3 repeat offender. The judge imposed the presumptive sentence of 11.25 years. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, as well as A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

STANDARD OF REVIEW

¶10 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)).

DISCUSSION

¶11 This Court has reviewed the entire record for fundamental error. After careful review of the record, we find no meritorious grounds for reversal of Appellant's conviction or modification of the sentence imposed. The record reflects

Appellant had a fair trial and was present and represented by counsel, or his presence was appropriately waived, at all critical stages of trial. Appellant was given the opportunity to speak at sentencing, and the trial was conducted in accordance with the Arizona Rules of Criminal Procedure. The evidence is sufficient to sustain the verdict and the trial court imposed a lawful sentence for Appellant's offense.

I. Substantial evidence in the record supports the jury's verdict.

¶12 We review the "evidence presented at trial only to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Substantial evidence is "more than a 'mere scintilla'" and is evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *Id.* at 411-12, ¶ 6, 103 P.3d at 913-14 (quoting *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997)). Reversible error occurs only when "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 To be guilty of theft of means of transportation, a defendant must knowingly control "another person's means of

transportation knowing or having reason to know that the property is stolen." A.R.S. § 13-1814(A)(5).

¶14 There was sufficient evidence for the jury to find that the State proved the elements of the crime. One eyewitness testified that he saw a man at the dealership who matched Appellant's description. A second eyewitness testified that he actually saw Appellant at the car dealership and watched him drive the car away. Officer A.S. testified that he found Appellant in possession, i.e. control, of the car. J.T. testified that he, not Appellant, was the owner the car. The jury could have reasonably inferred that Appellant knew it was stolen because they could infer that he did in fact steal it.

II. Issues raised in the supplemental brief.

A. The pretrial photo identification was properly admitted.

¶15 Appellant challenges the results of the *Dessurealt* hearing, claiming that the pretrial identifications were unduly suggestive and should not have been admitted. "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968).

¶16 The minute entry of the *Dessureault* hearing indicates that the trial court considered the five factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) when deciding that the pretrial identifications were admissible. "[F]actors to be considered in evaluating the likelihood of misidentification include [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation." *Biggers*, 409 U.S. at 199-200. After considering those factors, the trial court found that the pretrial identifications were not unduly suggestive and were therefore admissible. The minute entry, however, does not give much insight into the trial court's analysis.

¶17 The *Biggers* factors are not meant to determine whether a pretrial identification is unduly suggestive. Rather, they determine whether an identification that is already found to be unduly suggestive should still be admitted because the identification has a high degree of reliability. *Id.* at 198-200.

¶18 There was conflicting evidence as to whether T.G. and R.S. were told that the suspect might not be in the photo lineup. In light of that conflict, we construe the evidence in

the light most favorable to affirming the trial court——that C.W. gave the admonition. *See State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). Moreover, T.G. and R.S. both identified Appellant as the suspect before either of them actually signed the photo lineup card, so that C.W.'s alleged statement that Appellant was the suspect did not affect their identification of Appellant. Given that the identification procedure was not unduly suggestive, the trial court unnecessarily applied *Biggers*. *See State v. Taylor*, 27 Ariz. App. 330, 333, 554 P.2d 926, 929 (1976) (determining that because "the photo lineup was not unduly suggestive," there was no "need to examine the requirements of [*Biggers*]").

¶19 Even if the identification procedure is considered unduly suggestive, the *Biggers* factors weigh in favor of admission of both pretrial identifications. First, both R.S. and T.G. had the opportunity to, and did actually view Appellant at the time of the crime (in T.G.'s case), or within approximately a half-hour of the crime (in R.S.'s case).

¶20 The second factor weighs in favor of admission, as both R.S. and T.G. were paying attention to Appellant. Though R.S. was in the process of washing a car, at one point he talked to Appellant to see if he needed help. T.G. testified that he saw Appellant in the driver's seat before Appellant drove the car off the lot.

¶21 The third factor, the accuracy of the witness' prior identification of the criminal, is also in favor of admission. The record indicates that T.G. gave the police a description of Appellant on the day of the theft. At trial, T.G. was able to describe Appellant's clothing, and R.S. was able to describe at least his race and hair color.

¶22 The fourth factor, the level of certainty of the witnesses at the time of the identification, weighs in favor of admission. T.G. used the words "100 percent positive," while R.S. used the words "very confident" when describing their level of certainty.

¶23 Lastly, the fifth factor probably weighs against admission, as three days had passed between the theft and the pretrial identification. This may have decreased the reliability of the identifications to an extent. However, no one factor is dispositive. "Whether a pretrial identification is reliable is based on the 'totality of the circumstances.'" *State v. Moore*, 222 Ariz. 1, 9, ¶ 29, 213 P.3d 150, 158 (2009) (quoting *Biggers*, 409 U.S. at 199).

¶24 In sum, we find that the pretrial identifications were not unduly suggestive. Even if they were, the identifications are still admissible because they are reliable under a *Biggers* analysis.

B. The use of fingerprint analysis to prove prior convictions was not a violation of due process.

¶25 Appellant argues that the use of pen packs was an incorrect method to establish priors. At trial, to support this argument, Appellant relied on *State v. Hauss*, 140 Ariz. 230, 681 P.2d 382 (1984). This case describes the preferred, but not necessarily required, method for finding prior convictions. *See id.* at 231, 681 P.2d at 383.

¶26 In *Hauss*, the appellant claimed that prior convictions were not sufficiently established because there was no written documentation. *Id.* The priors were established by the testimony of a probation officer who was "present in court when the prior judgments of guilt were entered and sentences imposed." *Id.* at 230-31, 681 P.2d at 382-83. Although our supreme court upheld the lower court's finding of prior convictions "[b]ecause . . . the proffered testimony sufficiently established the prior convictions," it made it clear that it did not generally approve of that method "as a substitute for the proof we have generally required in the past." *Id.* at 231, 681 P.2d at 383. The court stated that "[i]n the future . . . we will not, and trial courts must not, consider the reliability and sufficiency of non-documentary evidence offered to establish the fact of a prior conviction absent a showing by the state that its earnest and diligent

efforts to obtain documentary evidence were unsuccessful for reasons beyond its control." *Id.* at 232, 681 P.2d at 384.

¶27 In this case, the State used "documentary evidence" in the form of fingerprint cards and an automated summary report, a certified document, as well as a live witness to explain the documentary evidence. Thus, the requirements of *Hauss* are met.

CONCLUSION

¶28 For the foregoing reasons, we affirm Appellant's conviction and sentence. Upon the filing of this decision, 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). 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