DIVISION ONE
FILED: 04/26/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0343
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
CHRISTOPHER JOHN BENEDETTO,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-144633-001 DT

The Honorable Susanna C. Pineda, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Matthew Binford, Assistant Attorney General
Attorneys for Appellee

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

P O R T L E Y, Judge

¶1 Christopher John Benedetto was convicted and sentenced for theft of a motor vehicle. He argues that the trial court

erred by: (1) denying his Arizona Rule of Criminal Procedure ("Rule") 20 motion; (2) denying his motion for change of judge; and (3) denying his request for the exclusion of witnesses. For the reasons set forth below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 While his brother, David, was in the hospital, Kevin kept an eye on his brother's apartment and 1991 Ford Explorer SUV. Sometime between July 26 and August 9, 2010, Kevin noticed that the SUV was missing. He reported the theft after his brother died on August 14, 2010.

¶3 Defendant ran a red light on August 26, 2010, and was stopped in a Circle K parking lot by a City of Phoenix police officer. The officer discovered that the license plate did not match the SUV, and that the SUV was stolen. In addition to other damage, the officer noticed that Defendant was using a screwdriver to start the vehicle.

¶4 After he was arrested and read his *Miranda*[2] rights, Defendant told the officer that "he had bought [the SUV] from a black male in the area of . . . Fifth Street and Hatcher on July 30 of 2010" for $350. Defendant could not, however, provide the name, contact information, or description of the seller, and the

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, ¶ 2, 119 P.3d 473, 474 n.2 (App. 2005).
[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

officer was unable to locate a bill of sale in the SUV. Defendant also admitted he had been using a screwdriver to start the SUV since the purchase.

¶5 Defendant was charged, tried, and convicted of theft of means of transportation, a class three felony. He was subsequently sentenced to six and a half years in prison. We have jurisdiction over his appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012), 13-4031 (West 2012), and -4033 (West 2012).

DISCUSSION

I. Denial of Change of Judge Request

¶6 The first issue we address is whether we have jurisdiction to review the denial of the notice of change of judge just before the start of the trial. We must independently ascertain our jurisdiction over an appeal or an issue in an appeal. *See State v. Eby*, 226 Ariz. 179, 180, ¶ 3, 244 P.3d 1177, 1178 (App. 2011) (quoting *Grand v. Nacchio*, 214 Ariz. 9, 15, ¶ 12, 147 P.3d 763, 769 (App. 2006)).

¶7 Our supreme court has stated that a special action is the only way to challenge the denial of a motion to change a judge. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223-24, 921 P.2d 21, 23-24 (1996) (citation omitted) ("[I]f we are to have a peremptory challenge to a judge, then we must have a system in

which the opportunity to review a ruling on the propriety of a notice occurs before the judge presides over the case much further. Special action relief . . . is discretionary [but] that is all a party is entitled to . . . .”). And, this court has followed the court’s direction. In *State ex rel. Thomas v. Gordon*, we stated that “[c]hallenges to rulings regarding a party’s peremptory request for a change of judge are appropriately reviewed by special action.” 213 Ariz. 499, 501, ¶ 7, 144 P.3d 513, 515 (App. 2006) (citations omitted).

¶8 On the morning of trial, the case was formally assigned to the case management judge.[3] Defendant then orally requested another judge, but his request was denied as untimely.

¶9 He now challenges the ruling. We cannot review his challenge because the denial of the motion is not a final appealable order. *See* A.R.S. §§ 12-120.21(A)(1), 13-4033(A). As a result, and as we did in *Thomas*, we will follow the direction in *Taliaferro*: the only way to challenge the denial of a change of judge request is by special action. Consequently, we do not have jurisdiction to review the denial of the oral motion for change of judge.

[3] Maricopa County Superior Court Administrative Order No. 2010-089 provides that the case management judge is the “preferred” trial judge, if available.

II. Sufficiency of the Evidence

¶10 Defendant contends that the trial court erred when it denied his Rule 20 motion for directed verdict. He argues that the State "did not present testimony from the true owner of the Explorer regarding whether or not [Defendant] had permission to drive the vehicle." Furthermore, he claims that the jury could not rely on Kevin's testimony as substantial evidence because Kevin had two prior felony convictions. We disagree.

¶11 We review the denial of a Rule 20 motion de novo and examine the evidence in the light most favorable to sustaining the verdict. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (citation omitted). Because Defendant testified at trial, we review the entire record and not just the State's case-in-chief. *See, e.g.*, *State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995) (citations omitted); *State v. Eastlack*, 180 Ariz. 243, 258-59, 883 P.2d 999, 1014-15 (1994) (citation omitted).

¶12 "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 and internal quotation marks omitted). We make "no distinction between the probative value of direct and circumstantial evidence." *Bible*, 175 Ariz. at 560 n.1, 858 P.2d at 1163 n.1

(citations omitted). We will not set aside a jury verdict for insufficient evidence unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted). Furthermore, if conflicts appear in the evidence, we will resolve them in favor of sustaining the verdict. *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994) (citation omitted).

¶13 Moreover, the credibility of witnesses is an issue to be resolved by the jury, and, as long as there is substantial evidence, we will not disturb its determination. *See Soto-Fong*, 187 Ariz. at 200, 928 P.2d at 624. "Evidence is no less substantial simply because the testimony is conflicting or reasonable persons may draw different conclusions therefrom." *State v. Mercer*, 13 Ariz. App. 1, 2, 473 P.2d 803, 804 (1970). "If reasonable minds could differ as to whether the properly admitted evidence, and the inferences therefrom, prove all elements of the offense, a motion for acquittal should not be granted." *Bible*, 175 Ariz. at 595, 858 P.2d at 1198 (citations omitted).

A.

¶14 Defendant argues that the jury did not hear from the owner of the SUV that he did not have permission to use the

vehicle and, as a result, the evidence was insufficient to convict him. The plain language of the statute, however, does not require testimony from the true owner of a vehicle. The statute simply requires proof that, "without lawful authority, [Defendant] knowingly . . . [controlled] another person's means of transportation knowing or having reason to know that the property [wa]s stolen." A.R.S. § 13-1814(A)(5) (West 2012). "The strength or weakness of testimony is not measured by the number of witnesses; one witness, if relevant and credible, is sufficient to support a conviction." *State v. Montano*, 121 Ariz. 147, 149, 589 P.2d 21, 23 (App. 1978) (citation omitted).

¶15 The jury heard from Kevin, who testified extensively. Kevin testified that his brother owned the SUV and that he never knew David to have loaned the SUV to anyone; that he paid the SUV's insurance so that David could use it for work; that David had given him the SUV's keys and registration while he was in the hospital; and that he did not know Defendant and had never given him permission to drive the SUV. Defendant also testified that he did not know either David or Kevin, and implied that he did not have either brother's permission to drive the SUV. Although David could not testify, the jury had to determine whether to believe Kevin, and we will not interfere with its

assessment of a witness's credibility on appeal.[4] *See Soto-Fong*, 187 Ariz. at 200, 928 P.2d at 624. We conclude there was sufficient evidence from which the jury could determine that Defendant did not have permission to use the SUV.

¶16 There was also sufficient evidence from which the jury could find that Defendant knew he possessed a stolen vehicle. Despite Defendant's experience as "an auto salesman" who knew the proper way to buy a vehicle, he conceded that a torn out ignition would "probably" be an indicator to a layperson that a car might be stolen. He also testified that he knew he should not have been driving the SUV without a proper title, but maintained that he "had to move it" before he received the title from the seller or it would have been towed. Defendant also admitted that he did not know the seller, whether he owned the SUV, or whether the seller had any right to sell it. The testimony and evidence of the cracked column, screwdriver for a key, and fictitious license plate constitute substantial evidence to sustain the verdict.

B.

¶17 Defendant also claims that Kevin's testimony could not provide substantial evidence for the jury's consideration because of his two prior felony convictions. The issue of any

[4] Kevin's testimony that his brother had passed away in the hospital was sufficient evidence, if accepted by the jury, to establish that David was dead, even without a death certificate.

witness's credibility, however, is strictly for the jury to resolve. *State v. Cox*, 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007) (citations omitted). "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *Id.* (citations and internal quotation marks omitted). The record demonstrates that the jury was made aware of Kevin's felony convictions for possession of a forgery device, and the jury was free to consider this information to determine whether Kevin was credible. *Id*.

III. Failure to Exclude Witness

¶18 Kevin was listed as the victim, in addition to David. Just before trial, the rule of exclusion of witnesses was invoked and Defendant unsuccessfully sought to exclude Kevin from the courtroom. Defendant did not request a hearing, and had not challenged the indictment. He only argued that the State had not produced any information to demonstrate that Kevin either had lawful authority over the SUV or was his brother's legal representative. Subsequently, after the State's case-in-chief and the Rule 20 motion, the court amended the indictment sua sponte by removing Kevin as a victim.

¶19 Defendant now argues that the court erred by denying his motion to exclude Kevin. He also claims that the error was prejudicial because he was not permitted to interview Kevin

prior to trial because he was listed as a victim, which affected his entire trial preparation and defense strategy.

¶20 To address the argument, we look at whether Kevin was a victim and whether he should have been excluded from the trial proceedings. A victim has "the right to be present at all criminal proceedings where the defendant has the right to be present." *Patterson v. Mahoney*, 219 Ariz. 453, 455, ¶ 6, 199 P.3d 708, 710 (App. 2008) (citation, ellipsis, and internal quotation marks omitted). A victim is statutorily defined and includes any:

> person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person . . . .

A.R.S. § 13-4401(19) (West 2012); *see also* Ariz. Const. art. II, § 2.1(C) (defining a victim, in part, as "a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative").

¶21 Although Kevin was listed as a victim in the indictment, the court eventually determined that he was not a crime victim. We therefore assume, without deciding, that the court erred by denying Defendant's motion to exclude Kevin.

¶22 The issue then becomes whether the error was harmless. We will affirm a conviction despite the error if it is harmless; that is, if the State, "in light of all of the evidence," can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict. *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (quoting *Bible*, 175 Ariz. at 588, 858 P.2d at 1191) (internal quotation marks omitted). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* (quoting *State v. Anthony,* 218 Ariz. 439, 446, ¶ 39, 189 P.3d 366, 373 (2008)) (internal quotation marks omitted).

¶23 We find that the denial of the motion to exclude Kevin was harmless error. After the motion to exclude was denied, Kevin was the first witness after opening statements. Defendant then took full advantage of the opportunity to cross-examine Kevin. Moreover, Kevin left the courtroom after giving his testimony, as the court subsequently indicated.[5]

¶24 Our supreme court has noted that the rule of exclusion is intended "to encourage the discovery of truth, and detection and exposure of falsehood." *State v. Stolze*, 112 Ariz. 124,

[5] After the indictment was amended, Defendant did not ask to interview Kevin or to recall him to testify, nor did he move for a mistrial.

126, 539 P.2d 881, 883 (1975) (citation omitted). The fact that Kevin was the first witness and left the courtroom immediately after his testimony demonstrates that any prejudice that might have been caused by the denial of the motion is non-existent. He did not hear other testimony and there is no suggestion that he tried to tailor his testimony to any other information. Consequently, any error was harmless.

CONCLUSION

¶25 For the foregoing reasons, we affirm Defendant's conviction and sentence.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Judge

/s/
_____
ANDREW W. GOULD, Judge