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. EDWARD JOSEPH BADER, Appellant.	)	1 CA-CR 11-0427 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)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. CR 2010-137017-001

The Honorable Barbara L. Spencer, Commissioner

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 Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Edward Joseph Bader ("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 a credit card or obtaining a credit card by fraudulent means, a class 5 felony under Arizona Revised Statutes ("A.R.S.") section 13-2102 (2010).[1]

¶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 supplemental brief. For the following reasons, we affirm Appellant's conviction and modify his sentence to reflect an increase to his presentence incarceration credit.

FACTUAL AND PROCEDURAL HISTORY

¶3 In April, 2010, J. ("J" or the "victim") entered the emissions testing center at the Department of Motor Vehicles in Phoenix, Arizona. After the inspection was completed by Appellant, J handed him her debit/credit card as a method of payment. After running the card twice, Appellant told J that the card was not going through and the victim wrote him a check instead. Appellant wrote down the victim's credit card information without the victim's knowledge or permission. A few hours later, Appellant's supervisor ("MR") was reviewing security tapes and stumbled across this event. MR immediately called the private investigation firm that is employed by the

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

emissions center and spoke to an internal affairs manager. MR called Appellant to her office and asked him to clean out the content of his pockets, talked to him briefly and asked him to return to his station. Through this search, MR found a yellow Post-it with the victim's credit card information.

¶4 At an interview, the internal affairs manager confronted Appellant about writing the victim's credit card information on a Post-it, and Appellant admitted to doing so. During the interview, Appellant also admitted he had written down credit card information before. At the end of the interview, the internal affairs manager terminated Appellant's employment. At that point, police escorted Appellant off the premises and into the backseat of the police car. Appellant, after being read his *Miranda*[2] rights, elected to continue talking to the officer. The police officer asked Appellant why he had a Post-it in his pocket with the victim's credit card information on it. Appellant responded with "I was stupid" or "I made a mistake." Appellant admitted to writing the information down on the Post-it. The police officer asked Appellant about any other occasion where he might have done the same thing. Appellant responded that he had done this before but in every occasion he thought better of it and threw the information away. The officer released Appellant and took into evidence the Post-it

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

and the check.

¶5 In April 2011, a jury convicted Appellant of theft of a credit card or obtaining a credit card by fraudulent means, a class 5 felony. The court considered that Appellant had prior offenses on record, but considered it a mitigating fact that they were over twenty years old.

¶6 The court sentenced Appellant to a probation term of three years. Appellant was also sentenced to a four-month period in jail, starting November 15, 2011, 100 hours of community restitution and substance abuse treatment.

STANDARD OF REVIEW

¶7 This Court must review the entire record for fundamental error. *See 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)). We will not reverse unless the defendant can show the fundamental error caused prejudice. *Id*. at ¶ 20. On review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all

inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

DISCUSSION

¶8 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. The record reflects Appellant had a fair trial, and was present and represented by counsel 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 lawfully authorized sentence for Appellant's offenses, except for presentence incarceration credit.

I. SUFFICIENCY OF THE EVIDENCE

¶9 Substantial evidence has been described as "more than a mere scintilla and is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997) (internal quotation marks 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) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶10 For the jury to find Appellant guilty of theft of a credit card or obtaining a credit card by fraudulent means, it had to find Appellant: (1) controlled a credit card without the cardholder's or issuer's consent through theft or theft by extortion; (2) sold, transferred or conveyed a credit card with the intent to defraud; or (3) with the intent to defraud, obtained possession, care, custody or control over a credit card as security for debt. A.R.S. § 13-2102.

¶11 Theft of a credit card includes controlling a credit card without the cardholder's consent and converting property of another for an unauthorized use. A.R.S. §§ 13-1802(A)(2)(2010) and -2102(A)(1). While Appellant returned the credit card to the victim, he copied down the identifying information for a use not authorized by the victim. A credit card is defined to include the "number that is assigned to the card . . . even if the physical card . . . is not used or presented." A.R.S. § 13-2101(3)(d)(2010).

¶12 The State presented sufficient evidence to support the jury's verdict. Based on the testimony presented at trial the jury could reasonably have found that Appellant copied down the victim's credit card information onto a Post-it and inserted it into his pocket without the victim's consent.

¶13 The record contains sufficient evidence to support Appellant's conviction for theft of a credit card or obtaining a credit card by fraudulent means.

II. PRESENTENCE INCARCERATION CREDIT

¶14 Presentence incarceration credit given for time spent in custody begins on the day of booking and ends the day before sentencing. *See State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993). Appellant was in custody from the day of his conviction on April 11, 2011 until his sentencing on May 26, 2011. While Appellant's total time incarcerated prior to sentencing was 44 days, he did not receive any presentence incarceration credit. We, therefore, modify the sentence to reflect this correction.

CONCLUSION

¶15 For the foregoing reasons, we affirm Appellant's conviction and sentence but modify his sentence to grant him 44 days of presentence incarceration credit. 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).

¶16 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/
DIANE M. JOHNSEN, Presiding Judge

/S/
LARRY F. WINTHROP, Judge