

NOTE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/24/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0378
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
MARKEISE FERNANDEZ WINSTON,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006318-005 DT

The Honorable Paul J. McMurdie, Judge

CONVICTION AND SENTENCE AFFIRMED

Thomas C. Horne, 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 Eleanor S. Terpstra, Deputy Public Defender
Attorney for Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following Markeise Fernandez Winston's conviction of trafficking in stolen property in the second degree, a Class 3 felony. Winston's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Winston was given the opportunity to file a supplemental brief but did not do so. Counsel now asks this court to search the record for fundamental error. In addition, Winston requested his counsel raise whether there was sufficient evidence to support his conviction. After reviewing the entire record, we affirm Winston's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2 After an undercover police detective received a phone call from a person offering to sell some stolen property, the detective and his partner arranged to meet the person in the parking lot of a local bar.¹ Both detectives wore hidden cameras that recorded the meeting, and the videos were played for the jury at trial while the detectives explained what occurred.

¶3 When the detectives arrived in the parking lot, a 1994 Oldsmobile pulled up and three people got out, including Winston

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Winston. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

and a woman who went by the name "Budget." The detectives negotiated the sale of the car primarily with Budget, who openly admitted to them that the car was stolen. At one point during the meeting, Winston approached and told Budget, "I just want my cut," and she responded that he would get \$50 from the transaction. Winston had the keys to the car and assured detectives that the car would start. After the sale was complete, the detectives left in the car.

¶14 The jury found Winston guilty of trafficking in stolen property in the second degree. At sentencing, Winston stipulated to one historical prior felony conviction and to being on probation at the time of the offense. Because Winston was on probation at the time of the offense, he was ineligible for a term less than the presumptive sentence. Ariz. Rev. Stat. ("A.R.S.") § 13-708(C) (West 2012).² The superior court sentenced him to the presumptive sentence of 6.5 years with 118 days' presentence incarceration credit.

¶15 Winston timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033 (West 2012).

² Absent material revision after the date of the alleged offense, we cite a statute's current version.

DISCUSSION

A. Sufficiency of the Evidence.

¶6 Winston argues that insufficient evidence supported his conviction. At trial, Winston's counsel moved for a judgment of acquittal, and the superior court denied the motion.

¶7 Under Arizona Rule of Criminal Procedure 20, the court may grant a judgment of acquittal before the verdict if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). We review the superior court's denial of a Rule 20 motion for abuse of discretion and will reverse only if "there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001).

¶8 Winston was charged with trafficking in stolen property in the second degree, which requires proof that the defendant recklessly trafficked in the stolen property of another. See A.R.S. § 13-2307(A) (West 2012). In a *pro per* letter to the superior court, Winston argued that he did not know the car was stolen. The statute does not require that a defendant know the property is stolen, only that he consciously disregard that likelihood. A person acts recklessly when, "with respect to a result or to a circumstance described by a statute defining an offense," the person "is aware of and consciously disregards a substantial and unjustifiable risk that the result

will occur or that the circumstance exists." A.R.S. § 13-105(10)(c) (West 2012).

¶19 At trial, the owner of the car identified the stolen car and testified that when the car was stolen, she had the only key to the car's ignition. When the car was returned to her, it was altered so the ignition could be turned on without a key. The detectives testified that the steering column was damaged and that the car had a "punched ignition." Although there was no indication Winston was involved in the theft of the car, Budget acknowledged to detectives that the car was stolen. At the meeting in the parking lot, Winston possessed the keys to the doors and trunk of the car, assured detectives that the car would start, and at one point became involved in the price negotiation. It also was clear Winston was being paid as part of the transaction. Presented with this evidence, the jury reasonably could have found that Winston consciously disregarded a substantial and unjustifiable risk that the car was stolen when he participated in selling the car to the detectives. Sufficient evidence supports his conviction of trafficking in stolen property.

B. Fundamental Error Review.

¶10 The record reflects Winston received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court

held appropriate pretrial hearings. It did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of Winston's statements to police. See *State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974).

¶11 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of eight members with two alternates. The court properly instructed the jury on the elements of the charge, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report, addressed its contents during the sentencing hearing and imposed a legal sentence for the crime of which Winston was convicted.

CONCLUSION

¶12 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶13 After the filing of this decision, defense counsel's obligations pertaining to Winston's representation in this appeal have ended. Defense counsel need do no more than inform Winston of the outcome of this appeal and his future options, 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). On the court's own motion, Winston has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Winston has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PHILIP HALL, Judge