DIVISION ONE
FILED: 08/09/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 11-0425
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
SAMER ABDIN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-122647-001DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

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

Bruce Peterson, Maricopa County Legal Advocate — Phoenix
By Keri L. Chamberlin, Deputy Legal Advocate
Attorneys for Appellant

Samer Abdin — Kingman
Appellant *in propria persona*

O R O Z C O, Judge

¶1 Samer Wahib Abdin (Defendant) appeals his convictions and sentences for one count of theft of means of transportation,

a class 3 felony, and one count of misconduct involving weapons, a class 4 felony.

¶2 Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969) advising this court that after a search of the entire appellate record, counsel found no arguable question of law that was not frivolous. Defendant was afforded the opportunity to file a supplemental brief in propria persona, which he did, raising several issues on appeal.

¶3 In addition to considering the issues raised by Defendant, our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶30, 2 P.3d 89, 96 (App. 1999). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010) and -4033.A.1 (2010). Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶4 On March 20, 2010, a thirty-six-foot 2005 Wells Cargo trailer that had been reported stolen by the victim (M.D.) was found by M.D., who subsequently alerted police. Defendant was

[1] We view the evidence presented at trial in the light most favorable to sustaining the verdicts. *State v. Cropper*, 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003).

the registered owner of the license plate affixed to the trailer. Because the vehicle identification number (VIN) had been etched off, police were initially unable to determine ownership of the trailer.

¶5 When first contacted by police, Defendant initially cooperated by answering questions but eventually ended discussions, stating that further questions should be directed to his attorney, Bob Storrs. Police then communicated with Defendant through Storrs, indicating they suspected the trailer was stolen and requesting it be made available for inspection.

¶6 On April 8, 2010, a police officer followed Defendant's truck to a tow yard. After the truck arrived at the tow yard, the trailer was hitched to Defendant's truck. After leaving the tow yard, the truck and trailer were involved in an accident. Thereafter, the trailer was towed to the Scottsdale Police Department's secure yard, where police identified the trailer as the one reported stolen by M.D. Police then executed a search warrant at a residence owned by Defendant's mother, where they found three knives and an ax in a fifth-wheel camper located in the backyard of the residence.

¶7 At trial, the State presented evidence that Defendant had been in unlawful possession of M.D.'s trailer and that he illegally possessed deadly weapons due to his status as a convicted felon. Specifically, M.D. testified he had never met

Defendant and did not give Defendant permission to control or possess the trailer. Regarding the misconduct involving weapons charge, a police officer testified Defendant's mother told police that Defendant lived in the fifth-wheel camper. Police officers also testified that the knives found in the camper were designed for lethal use and Defendant admitted ownership of the knives during a telephone conversation. A custodian of records relating to the restoration of civil rights testified that Defendant was a convicted felon and was prohibited from possessing deadly weapons. Defendant's prior criminal record was certified through fingerprint analysis.

¶8 Defendant also presented witnesses in his defense. Defendant's mother and brother testified that Defendant lived in the house, not in the fifth-wheel camper, and that the camper was used for storage. A witness for Defendant also testified that Defendant purchased the trailer from a third party seller but was unable to accept delivery of title because he was unable to contact the seller after the initial transaction.

¶9 While preparing jury instructions, the court specifically asked Defendant if he wanted a lesser included offense instruction to be given on the theft of means of transportation charge. Defense counsel shook his head, indicating that he did not want the instruction to be given, and

the court confirmed, stating, "Okay. No, do not want a lesser included."

¶10 The jury returned guilty verdicts on both counts. The court found clear and convincing evidence that Defendant's priors could be used as aggravators and sentenced Defendant to an eight-year mitigated term for theft of means of transportation and an eight-year minimum term for misconduct involving weapons, to be served concurrently, with 259 days of presentence incarceration credit. Defendant timely appealed.

DISCUSSION

¶11 In his supplemental brief, Defendant argues the trial court erred in not giving a lesser included offense instruction and in giving an incomplete instruction on theft of means of transportation. We address each in turn.

Jury Instructions

¶12 Because Defendant did not object to the jury instructions at trial, we review the given instructions only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). 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. Hunter,* 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984) (citation omitted). "To prevail under this standard

of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607 (citation omitted).

¶13 Defendant alleges the trial court erred by not giving a lesser included offense instruction on theft of means of transportation. At trial, however, Defendant specifically informed the court that he did not want a lesser included offense instruction to be given to the jury. The failure to include discretionary instructions specifically rejected by Defendant is not error. *See State v. Logan,* 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632–33 (2001) ("[W]e will not find reversible error when the party complaining of it invited the error."); *see also State v. Vickers*, 129 Ariz. 506, 512-13, 633 P.2d 315, 321-22 (1981) (noting that Arizona Rule of Criminal Procedure 21.3(c) provides that "a party may not assign as error the failure to give an instruction unless he objects before the jury retires").

¶14 Defendant also argues the trial court erred in giving an incomplete instruction on theft of means of transportation. Theft of means of transportation is codified in A.R.S. § 13-1814.A (2010), which defines the crime as any of five separate forms of conduct that are each independently sufficient to support a conviction. In the instant case, the trial court

instructed the jury solely on the relevant definition of theft of means, from A.R.S. § 13-1814.A.5. Defendant argues the court's omissions of A.R.S. § 13-1814.A.1-4 was error.

¶15 In support of his argument, Defendant cites *State v. Gendron*, 168 Ariz. 153, 812 P.2d 626 (1991) for the proposition that "failure to instruct the jury on a disputed element of a charged offense constitutes fundamental error." Defendant misinterprets *Gendron*. In that case, our supreme court held that the trial court had not committed fundamental error in failing to give a jury instruction on a justification defense when the defendant did not request the instruction and specifically disclaimed reliance on a justification defense. *Id.* at 154-55, 812 P.2d at 627-28. Accordingly, *Gendron* does not support Defendant's position.

¶16 It was not error for the trial court to instruct the jury solely on A.R.S. § 13-1814.A.5 and not on any of the four alternative courses of conduct that constitute theft of means of transportation. Furthermore, Defendant cannot establish prejudice as any possible error regarding this issue redounded to his benefit. Accordingly, Defendant has failed to prove fundamental error. *See Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

Sufficiency of the Evidence

¶17 Defendant also challenges the sufficiency of the evidence to support his convictions. "When reviewing the sufficiency of the evidence, an appellate court does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact." *State v. Barger*, 167 Ariz. 563, 568, 810 P.2d 191, 196 (App. 1990) (citation omitted). Rather, we "will affirm the conviction if there is 'substantial evidence' to support the guilty verdict." *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (quoting *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981)). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). "In determining whether substantial evidence exists, we view the facts in the light most favorable to sustaining the jury verdict and resolve all inferences against [the defendant]." *State v. Stroud*, 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005) (citation omitted).

¶18 To support a conviction for theft of means of transportation, the State must prove the defendant controlled another person's means of transportation without lawful

authority and knowing or having reason to know that the property was stolen. A.R.S. § 13-1814.A.5. Here, M.D. testified that his trailer was stolen and that he had never met Defendant nor given him permission to control the trailer. The State also presented evidence that Defendant's truck was used to pick up the trailer from a tow yard and that Defendant told police he paid $735 to retrieve the trailer from the tow yard. In addition, Storrs testified on behalf of Defendant and stated that he communicated to Defendant that police suspected the trailer was stolen property.[2] The State therefore presented substantial evidence to support a conviction for theft of means of transportation.

¶19 To support a conviction for misconduct involving weapons, the State must prove the defendant knowingly possessed a deadly weapon and that the defendant was a prohibited possessor at the time of possession. A.R.S. § 13-3102.A.4 (Supp. 2011). In this case, the State presented evidence that, as a result of Defendant's felony criminal record, he was

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[2] Assuming Storrs's testimony might come within the purview of statements protected by the attorney-client privilege, Defendant waived the right to assert the privilege because Storrs testified on Defendant's behalf and made the relevant statements during direct examination. *See* A.R.S. § 13-4062.2 (2010); *State v. Sucharew,* 205 Ariz. 16, 21, ¶ 10, 66 P.3d 59, 64 (App. 2003) (the attorney-client privilege "belongs to the client"); *Ulibarri v. Superior Court,* 184 Ariz. 382, 385, 909 P.2d 449, 452 (App. 1995) (client may waive the attorney-client privilege).

prohibited from possessing deadly weapons. Officers also testified that deadly weapons were seized from Defendant's residence and Defendant admitted ownership of the weapons. Accordingly, the State presented substantial evidence at trial to support a conviction for misconduct involving weapons.

CONCLUSION

¶20 We have read and considered the briefs submitted by counsel and Defendant, and carefully searched the entire record for reversible error and found none. *See Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and substantial evidence supported the jury's verdicts. Defendant was present and represented by counsel at all critical stages of the proceedings. Defendant and his attorney were given an opportunity to speak and present witnesses at sentencing, and the court imposed legal sentences.

¶21 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires,

with an in propria persona motion for reconsideration or petition for review.

¶22 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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JON W. THOMPSON, Judge

/S/
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SAMUEL A. THUMMA, Judge