DIVISION ONE
FILED: 3/26/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | No. 1 CA-CR 12-0196 |
| | ) | |
| Appellee, | ) | DEPARTMENT D |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| ANTHONY JOSEPH RODRIGUEZ, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-119058-001

The Honorable William L. Brotherton, Jr., Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Mikel Steinfeld, Deputy Public Defender
Attorneys for Appellant

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G E M M I L L, Presiding Judge

**¶1** Anthony Joseph Rodriguez appeals his conviction and sentence for trafficking in stolen property in the second degree. For the reasons that follow, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

**¶2** On appeal, we view the facts "in the light most favorable to sustaining the verdict." *State v. Moody*, 208 Ariz. 424, 435 n. 1, ¶ 1, 94 P.3d 1119, 1130 n.1 (2004) (citation omitted).

**¶3** In April 2011, a manager of a local PGA Tour Superstore learned of a Craigslist advertisement offering a brand new set of recently released Ping golf clubs. The advertisement stated: "$1,000 in the store, save on these; $750 firm." The manager checked the SKU tag on the box of clubs pictured in the advertisement and discovered that the factory had shipped the set to his store eight days earlier. The set was still listed in his inventory as unsold. He concluded that the clubs advertised on Craigslist had been stolen from the store.

**¶4** The store manager called police, and an undercover officer called the number in the advertisement and offered to buy the clubs. Rodriguez answered the phone call and explained that he had purchased the clubs a week earlier for $1,000, but he agreed to sell the clubs for $650 because he needed the money immediately.

**¶5** Rodriguez arranged to meet the "buyer" at a local convenience store. When the plainclothes officer arrived at the store, he observed two individuals who appeared to be watching

him. Rodriguez called the officer and changed the meeting place to a store farther east.

**¶6** When the officer drove west to allow his backup team to deploy to the new location, Rodriguez called the officer and told him he was going in the wrong direction. When the officer arrived at the new meeting place, Rodriguez introduced himself and showed the officer the set. After verifying that the serial numbers on the clubs matched those missing from the PGA Tour Superstore, the officer arrested Rodriguez. Rodriguez told the officer that his grandmother had given the set of golf clubs to him, and because he had another set, he did not need this one. The Craigslist ad was pulled by an unknown person within twenty minutes of Rodriguez's arrest. Police returned the Ping golf clubs to the PGA Tour Superstore, and the manager confirmed from the serial numbers that they were the clubs missing from the inventory.

**¶7** The jury convicted Rodriguez of the charged offense and the judge suspended sentence and imposed three years of probation with sixty days in jail as one of the conditions. Rodriguez filed a timely appeal.

**DISCUSSION**

**¶8** Rodriquez argues on appeal the trial court erred by a) improperly instructing the jury on permissive inferences, b)

denying his request for new counsel, and c) denying his motion for judgment of acquittal.

**A. Instruction on Inferences**

**¶9** Rodriguez argues that the jury instruction on the permissive inferences that may arise from the possession of recently stolen property violated his due process rights. He argues specifically the phrase "unless satisfactorily explained" impermissibly shifted the burden of proof. At trial, Rodriguez acknowledged the existing case law on permissive inferences, but argued that the instruction constitutes an impermissible comment on the evidence and violates the doctrine of separation of powers by allowing the legislature to dictate to the judiciary, and ultimately the jury, the interpretation of evidence. He informed the trial court that these were "the only two objections I have" to the instruction.

**¶10** The judge overruled the objections after hearing the State's argument that an instruction on permissive inferences was permitted under *State v. Mohr*, 150 Ariz. 564, 724 P.2d 1233 (App. 1986) and *State v. Cole,* 153 Ariz. 86, 734 P.2d 1042 (App. 1987). The judge gave the following standard jury instruction, the first part of which is based on A.R.S. § 13-2305(1) and (2) (2010)[1]:

[1] We cite the current version of the statute, which has not been amended since 1987.

> Permissible inferences relating to theft:
>
> The defendant has been accused of Trafficking in Stolen Property in the Second Degree.
>
> > 1. Proof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the defendant was aware of the risk that such property had been stolen.
> >
> > 2. Proof of the purchase or sale of stolen property at a price substantially below its market value, unless satisfactorily explained, may give rise to an inference the defendant was aware of the risk that it had been stolen.
>
> You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.
>
> In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, a defendant need not testify. Possession may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.

*See* A.R.S. § 13-2305(1) and (2); RAJI (Criminal) 23.05 (3d ed. 2012).

**¶11** Rodriguez did not object to the instruction on grounds the instruction shifted the burden of proof, and did not single out the phrase "unless satisfactorily explained" as objectionable. "The purpose of an objection is to permit the trial court to rectify possible error, and to enable the

opposition to obviate the objection if possible." *State v. Romero,* 85 Ariz. 263, 265, 336 P.2d 366, 367 (1959) (citation omitted). We find that Rodriguez's objection failed to adequately raise the claim that the phrase "unless satisfactorily explained" shifted the burden of proof. We accordingly review this claim for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Rodriguez thus bears the burden of establishing that there was error, that the error was fundamental, and that the error caused him prejudice. *Henderson,* 210 Ariz. at 568, ¶¶ 23, 26, 115 P.3d at 608.

**¶12** "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Mandatory presumptions "violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense." *Francis v. Franklin*, 471 U.S. 307, 314 (1985). "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Francis*, 471 U.S. at 314. "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense

justify in light of the proven facts before the jury." *Id.* at 314-15. We evaluate jury instructions on inferences from the perspective of what a reasonable jury could have understood. *Id.* at 315.

**¶13** We review the legal adequacy of an instruction de novo. *State v. Martinez*, 218 Ariz. 421, 432, ¶ 49, 189 P.3d 348, 359 (2008). We review the adequacy of jury instructions in their entirety to determine if they accurately reflect the law. *State v. Hoskins,* 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). Only when the instructions taken as a whole may have misled the jury will we find reversible error. *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003).

**¶14** We find no error, much less fundamental error that prejudiced Rodriguez. The offense of trafficking in stolen property in the second degree requires proof that a person "recklessly traffic[ed] in the property of another that has been stolen." A.R.S. § 13-2307(A) (2010). The instruction at issue allowed the jury to infer from the possession of recently stolen property, or the sale of stolen property at substantially below market price, that defendant was aware of the risk that it was stolen. This instruction, however, advised the jury that it could reject these inferences if they were not warranted under the facts. Furthermore, the instruction reaffirmed that even if

the jury did accept either inference, the State still had the burden of proof.

**¶15** The United States Supreme Court and this court have held that similar instructions comport with due process. *See Barnes v. United States,* 412 U.S. 837, 843-847 (1973) (holding that the instruction satisfied due process because it was permissive, and there was a rational connection between the facts proved and the facts presumed); *Mohr*, 150 Ariz. at 567-68 and n.2, 724 P.2d at 1236-37 and n.2 (App. 1986) (reasoning that a similar permissive instruction would not impermissibly shift the burden and accordingly would be constitutional). The court did not directly address, in either case, the specific argument that the isolated phrase "unless [or "if not"] satisfactorily explained" improperly shifted the burden of proof. The Supreme Court's opinion, however, effectively defeats this argument.

**¶16** The Supreme Court held that it was permissible under the circumstances to shift the burden of *production* to the defendant because the burden of *proof or persuasion* remained with the government, reasoning:

> It is true that the practical effect of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant. If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant introduces evidence, since ordinarily the Government's evidence will not provide an explanation of his possession consistent with

> innocence. In *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), the Court stated that the burden of going forward may not be freely shifted to the defendant. *See also Leary v. United States*, 395 U.S. 6, 44-45, 89 S.Ct. 1532, 1552, 23 L.Ed.2d 57 (1969). *Tot* held, however, that where there is a 'rational connection' between the facts proved and the fact presumed or inferred, it is permissible to shift the burden of going forward to the defendant. Where an inference satisfies the reasonable-doubt standard, as in the present case, there will certainly be a rational connection between the fact presumed or inferred (in this case, knowledge) and the facts the Government must prove in order to shift the burden of going forward (possession of recently stolen property).

*Barnes,* 412 U.S. at 846 n.11. An inference satisfies the reasonable doubt standard when the evidence is "sufficient for a rational juror to find the inferred fact beyond a reasonable doubt." *Id.* at 843.

**¶17** In this case, the evidence offered by the State to support the inferences was sufficient to prove beyond a reasonable doubt that Rodriguez was aware of the risk that the golf clubs were stolen. Because there was a rational connection between the facts proved and the fact inferred, the concerns of due process are satisfied with respect to shifting the burden of production to defendant.

**¶18** We are not persuaded by Rodriguez's argument that a reasonable jury could have been misled by this instruction into thinking the inferences were mandatory, or that the defendant had the burden of proving that he was unaware of the risk the

property was stolen. Rodriguez misplaces his reliance on older federal cases that criticized as potentially burden-shifting an instruction providing that "[s]o unless the contrary appears from the evidence," the jury might infer that a defendant intended the consequences of his voluntary acts. *See United States v. Silva,* 745 F.2d 840, 850-51 (4th Cir. 1984) (and cases cited therein). This instruction, although often faulted as confusing and potentially misleading, has rarely resulted in reversal of the conviction, because of the curative effect of other instructions on the burden of proof. *See e.g., Silva*, 745 F.2d at 852 (holding that any prejudice from this portion of the charge was "ameliorated entirely by the remainder of the instructions" on the burden of proof)[2]; *but see Mann v. United States*, 319 F.2d 404, 410 (5th Cir. 1963) (reversing in part on basis of faulty instruction); *United States v. Barash,* 365 F.2d 395, 402-03 (2d Cir. 1966) (same).

**¶19** Rodriguez also misplaces his reliance on a case from the Washington Supreme Court which disapproves an even more confusing instruction that states: "[i]n any prosecution for

[2] *See also United States v. Garrett*, 574 F.2d 778, 782 (10th Cir. 1978)(holding that potentially harmful effect of instruction was vitiated by other instructions on burden of proof); *United States v. Reeves,* 594 F.2d 536, 541 (6th Cir. 1979) (holding challenged phrase was harmless in context of the entire case); *Cohen v. United States,* 378 F.2d 751, 755-56 (9th Cir. 1967) (finding jury was not misled by challenged instruction in context of other instructions on burden of proof).

burglary, any person who enters or remains unlawfully in a building *may* be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent." *See Washington v. Cantu*, 132 P.3d 725, 729-30 (Wash. 2006) (reversing on ground the court improperly applied a mandatory presumption of criminal intent).

**¶20** In contrast to the confusing and potentially misleading instructions in the cases relied upon by Rodriguez, the instruction in this case makes clear that, even absent a satisfactory explanation of his possession of recently stolen property or his sale of the property at substantially below market price, the jury was not required to infer guilt. *Cf. Cnty Court of Ulster Cnty, N.Y. v. Allen*, 442 U.S. 140, 161 (1979) (inference permissible when "it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal"). Moreover, the remainder of the instructions, including the separate instructions on the burden of proof, the jury's duty to determine the facts based on the evidence, and the defendant's right not to produce any evidence, also served to emphasize that the State had the burden of proving every element of the offense. For the foregoing

reasons, we find no error or due process violation in the instruction on the permissive inferences provided here.

**B. Denial of New Counsel**

**¶21** Rodriguez also argues that the trial court violated his right to the assistance of counsel when the court "forced [him] to go to trial with an attorney who was questionably prepared and with whom Rodriguez had a conflict." Rodriguez orally moved for new counsel the day before trial, explaining that he did not feel he was being "quite represented right" because his attorney was not properly considering the photo of the Craigslist advertisement. Rodriguez indicated that he had had the same problem with his previous attorney. His attorney informed the court that he had found that the SKU numbers on a receipt for an "actual purchase made at the PGA Superstore" did not match the SKU numbers in the advertisement. He admitted that his client had been angry with his previous counsel as well, but avowed that he was prepared for trial and ready to represent his client's best interests. The assignment judge denied Rodriguez's request for a new attorney on the ground no legal basis existed. Rodriguez renewed his request for new counsel later that same day, and the trial judge denied it, reasoning that the attorney, in the judge's experience, was "a very good counsel," and Rodriguez's complaint did not meet the standard for requiring new counsel.

**¶22** We review the court's decision to deny a request for new counsel for abuse of discretion. *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 27, 119 P.3d 448, 453 (2005). We find none in this case. The Sixth Amendment guarantees a criminal defendant the right to be represented by competent counsel. U.S. Const. amend. VI; *State v. Moody,* 192 Ariz. 505, 507, ¶ 11, 968 P.2d 578, 580 (1998). An indigent defendant, however, is not "entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *Moody,* 192 Ariz. at 507, ¶ 11, 968 P.2d at 580 (citation omitted).

**¶23** A trial court is required to appoint new counsel only if there exists "an irreconcilable conflict or a completely fractured relationship between counsel and the accused." *Cromwell,* 211 Ariz. at 186, ¶ 29, 119 P.3d at 453. "A single allegation of lost confidence in counsel does not require the appointment of new counsel, and disagreements over defense strategies do not constitute an irreconcilable conflict." *Id.* In determining whether to grant a defendant's request for new counsel, the trial court considers factors "designed specifically to balance the rights and interests of the defendant against the public interest in judicial economy, efficiency and fairness," including the following:

> [W]hether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of

> the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and the quality of counsel.

*Cromwell,* 211 Ariz. at 187, ¶ 31, 119 P.3d at 454 (citations omitted). The defendant must "put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible." *State v. Paris-Sheldon,* 214 Ariz. 500, 505, ¶ 12, 154 P.3d 1046, 1051 (App. 2007) (citation omitted).

**¶24** This is an archetypical case of disagreement between client and counsel over defense strategy, which does not rise to the level of irreconcilable conflict. *See Cromwell,* 211 Ariz. at 185-88, ¶¶ 22-37, 119 P.3d at 452-55 (holding that disagreement over the evidence against defendant, examination of DNA expert, and subpoena of records did not create irreconcilable conflict); *cf. Moody,* 192 Ariz. at 507, ¶ 13, 968 P.2d at 580 (finding record "replete with examples of a deep and irreconcilable conflict"). Moreover, in light of Rodriguez's complaint that his attorney was not prepared to go to trial the next day, we do not find that his attorney's relatively circumspect clarification for the court on the nature of their disagreement created any such irreconcilable conflict. *Paris-Sheldon,* 214 Ariz. at 506-07, ¶ 17, 154 P.3d at 1052-53

(finding that inquiry into the nature of the conflict cannot by itself create need for new counsel, unless inquiry itself is "particularly acrimonious").

**¶25** Other factors also support the court's denial of Rodriguez's request for a new attorney. Because by his own admission, the same disagreement arose with his prior counsel, it is likely new counsel would have been confronted with the same conflict. The timing of the request for new counsel –- the day before trial was set to begin, more than nine months after indictment, and five months after this attorney was appointed to represent Rodriguez -– also supports the court's denial. Finally, the trial judge commented that, in his experience, Rodriguez's attorney had been "a very good counsel." Rodriguez's attorney, for his part, avowed that he was prepared for trial and pledged to represent Rodriguez's best interests. On this record, we find that the court did not abuse its discretion in denying Rodriguez's request for a new attorney.

**¶26** Rodriguez's claim that his former attorney was unprepared for trial and failed to adequately represent him is at bottom a claim of ineffective assistance, which is not cognizable on direct appeal. *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *Id.* Such claims must

rather be brought in a Rule 32 petition for post-conviction relief. *Id.* We find no abuse of discretion in the judge's denial of Rodriguez's motion for appointment of new counsel.

**C. Sufficiency of Evidence**

**¶27** Rodriguez also argues that the evidence was insufficient to prove that the golf clubs had been stolen from the PGA Tour Superstore, and that the trial court erred in denying his motion for judgment of acquittal on this basis. The offense of trafficking in stolen property requires proof in pertinent part that the property was stolen. A.R.S. § 13-2307.

**¶28** We review de novo the denial of a motion for judgment of acquittal and the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Evidence is sufficient if it is evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Stroud*, 209 Ariz. 410, 411-12, ¶ 6, 103 P.3d 912, 913-14 (2005).

**¶29** The manager of the PGA Tour Superstore testified that he believed the golf clubs were stolen, although he could not say for sure how they got out of the store. He testified,

however, that the SKU tag in the Craigslist advertisement matched the SKU tag assigned to the set of clubs that was missing from the store. The SKU tag had been removed from the box before Rodriguez handed it to the police officer, but the manager confirmed, from the serial numbers on the clubs, that it was the set he believed had been stolen from his store.

**¶30** The jury could also reasonably infer from the circumstances surrounding Rodriguez's sale of the clubs that they had been stolen from the store. The officer who set up the buy testified that it appeared that two people were watching him at the convenience store where he was originally scheduled to meet Rodriguez. The evidence suggests that one of the onlookers subsequently called Rodriguez to report that the officer initially drove in the wrong direction. The officer also testified that Rodriguez told him two different stories on how he had obtained the golf clubs, and dropped the price to $650 from his "firm offer" of $750, a deep discount from the $1,000 he claimed to have paid a week before. Rodriguez also claimed to have a receipt for the clubs but explained that he did not want to return them because he wanted the money immediately. Finally, the Craigslist advertisement mysteriously disappeared from the site shortly after police arrested Rodriguez. In light of the store manager's testimony and the suspicious

circumstances surrounding Rodriguez's offer to sell the clubs, a reasonable jury could have found that the clubs had been stolen.

**Conclusion**

**¶31** For the foregoing reasons we affirm Rodriguez's conviction and imposition of probation for trafficking in stolen property in the second degree.

/s/
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/
JON W. THOMPSON, Judge

/s/
DONN KESSLER, Judge