

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOSEPH ALBERT ENCINAS, *Appellant*.

No. 1 CA-CR 17-0063
FILED 12-21-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-150793-001
The Honorable Christine E. Mulleneaux, Judge *Pro Tempore*

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade
Counsel for Appellant

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MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Chief Judge Samuel A. Thumma joined.

J O N E S, Judge:

¶1 Joseph Encinas appeals his convictions and sentences for one count each of trafficking in stolen property and theft. After searching the entire record, Encinas's defense counsel identified no arguable question of law that is not frivolous. Therefore, in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), defense counsel asks this Court to search the record for fundamental error. Encinas was granted the opportunity to file a supplemental brief *in propria persona* but did not do so. Finding no reversible error, we affirm as modified.

FACTS¹ AND PROCEDURAL HISTORY

¶2 In May 2014, Cactus Bikes, a retail shop in Tempe specializing in high-end bicycles, was burglarized; two bicycles were reported stolen, including a 2014 Kona Process 134 demo bicycle worth over \$2,000. In October, 2014, a manager at Cactus Bikes saw a craigslist ad for a Kona Process 134 that looked identical to the stolen Kona including the specific seatpost added to each of Cactus Bikes' demo bicycles. The manager noted the low sale price of \$1,000 and incorrect description of the bicycle and reported the ad to the police.

¶3 Thereafter, an officer with the Phoenix Police Department called "Joe," the ad's publisher, and posed as an interested buyer. Wearing plain clothes, the officer met a man later identified as Encinas at Encinas's workplace the next day. The officer noted the serial number was identical to that of Cactus Bike's missing Kona. When informed the bicycle was stolen, Encinas stated he recently purchased the bicycle online for \$1,200. After being advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S.

¹ "We view the facts in the light most favorable to sustaining the convictions with all reasonable inferences resolved against the defendant." *State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 2 (App. 2015) (quoting *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

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436, 444-45 (1966), and transported to the police station, Encinas admitted he bought the Kona from a friend of a friend roughly five months prior for a “couple hundred dollars.” At the time of the purchase, he did not inquire as to how the Kona had been acquired; at the time of his arrest, he told the officer he believed it may have been stolen from Tempe. Encinas admitted he was hoping to “make a fast stupid dollar” and “screwed up.”

¶4 Encinas was indicted on one count each of trafficking in stolen property in the second degree and theft. At trial, the officer identified Encinas as the man who attempted to sell him the Kona bicycle, and Cactus Bikes employees testified it was worth more than \$2,000. At the conclusion of the State’s case, Encinas unsuccessfully moved for judgment of acquittal.

¶5 Encinas testified in his defense. Encinas explained he lied about buying the Kona online because he was worried a potential buyer would question why he asked \$1,000 for it when he had only paid \$200. He also asserted for the first time that, when he initially told police he believed the bicycle had been stolen from Tempe, he was only trying to help them find the thief. Encinas denied knowing the bicycle was stolen.

¶6 The jury convicted Encinas as charged. During the aggravation phase of trial, the jury found Encinas committed the offense of trafficking in stolen property in “consideration for the receipt, or in the expectation of the receipt of . . . pecuniary value.” The trial court found beyond a reasonable doubt that Encinas had four prior historical felony convictions and sentenced him as a non-dangerous, repetitive offender to concurrent presumptive terms of: (1) 11.25 years’ imprisonment, with credit for 91 days of presentence incarceration, for trafficking in stolen property, and (2) 5 years’ imprisonment for theft. Encinas timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1),² 13-4031, and -4033(A)(1).

DISCUSSION

¶7 A person is guilty of trafficking in stolen property in the second degree if he “recklessly traffics in the property of another that has been stolen.” A.R.S. § 13-2307(A). As applicable here, “traffic” means “to buy, receive, possess or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person.” A.R.S. § 13-2301(B)(3). And, a person acts recklessly if he

² Absent material changes from the relevant date, we cite a statute’s current version.

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acts with “awareness and conscious disregard of a substantial risk, which disregard constitutes a gross deviation from the applicable standard of conduct.” *In re William G.*, 192 Ariz. 208, 213 (App. 1997); *accord* A.R.S. § 13-105(10)(c). A person commits theft when, “without lawful authority, the person knowingly . . . [c]ontrols property of another with the intent to deprive the other person of such property.” A.R.S. § 13-1802(A)(1). A person acts knowingly if, “with respect to conduct or to a circumstance described by a statute defining an offense, that . . . person is aware or believes that the person’s conduct is of that nature or that the circumstance exists.” A.R.S. § 13-105(10)(b). A knowing mental state “does not require any knowledge of the unlawfulness of the act or omission.” *Id.* The record here contains sufficient evidence upon which the jury could determine beyond a reasonable doubt: (1) the Kona that Encinas offered for sale had been stolen from Cactus Bikes in May 2014; (2) Encinas knew the bicycle was stolen; and (3) Encinas consciously disregarded the circumstances when he chose to proceed with its sale.

¶8 The record reflects Encinas served 91 days of presentence incarceration. But, he was given credit for this time only as to his conviction for trafficking in stolen property. “In the case of concurrent sentences[,] it is required to fully credit defendants with the total time spent awaiting trial in each separate count.” *State v. Caldera*, 141 Ariz. 634, 638 (1984) (citing *State v. Cruz-Mata*, 138 Ariz. 370, 375-76 (1983)). Failure to award full presentence incarceration credit is fundamental error. *State v. Ritch*, 160 Ariz. 495, 498 (App. 1989). Accordingly, we modify Encinas’s sentences to reflect 91 days of presentence incarceration credit against each count. *See* A.R.S. § 13-4037(A).

¶9 Our review reveals no other fundamental error. *See Leon*, 104 Ariz. at 300 (“An exhaustive search of the record has failed to produce any prejudicial error.”). The proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Encinas was represented by counsel at all stages of the proceedings and was present at all critical stages including the entire trial and the verdict. *See State v. Conner*, 163 Ariz. 97, 104 (1990) (right to counsel at critical stages) (citations omitted); *State v. Bohn*, 116 Ariz. 500, 503 (1977) (right to be present at critical stages). The jury was properly comprised of eight jurors, and the record shows no evidence of juror misconduct. *See* A.R.S. § 21-102(B); Ariz. R. Crim. P. 18.1(a). The trial court properly instructed the jury on the elements of the charged offenses, the State’s burden of proof, and Encinas’s presumption of innocence. At sentencing, Encinas was given an opportunity to speak, and the court stated on the record the evidence and materials it considered and the factors it found in imposing the sentences.

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See Ariz. R. Crim. P. 26.9, 26.10. Additionally, the sentences imposed were within the statutory limits. *See* A.R.S. § 13-703(J).

CONCLUSION

¶10 Encinas's convictions are affirmed and his sentences are affirmed as modified. Defense counsel's obligations pertaining to Encinas's representation in this appeal have ended. Defense counsel need do no more than inform Encinas of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for submission to our supreme court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85 (1984).

¶11 Encinas has thirty days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. *See* Ariz. R. Crim. P. 31.19(a). Upon the Court's own motion, we also grant Encinas thirty days from the date of this decision to file an *in propria persona* motion for reconsideration.



AMY M. WOOD • Clerk of the Court
FILED: AA