

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

KEITH ERIC KOSKELLA, *Appellant*.

Nos. 1 CA-CR 15-0824 and 1 CA-CR 16-0649
(Consolidated)
FILED 1-30-2018

Appeal from the Superior Court in Maricopa County
Nos. CR2011-112122-002 and CR2015-117079-001
The Honorable John Christian Rea, Judge

AFFIRMED

COUNSEL

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

The Hopkins Law Office, P.C., Tucson
By Cedric Martin Hopkins
Counsel for Appellant

STATE v. KOSKELLA
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

CATTANI, Judge:

¶1 Keith Eric Koskella appeals his convictions and sentences for trafficking in stolen property and misdemeanor theft, as well as the revocation of his probation and the resulting sentence for an earlier conviction of attempted fraudulent schemes and artifices. Koskella's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), certifying that, after a diligent search of the record, he found no arguable question of law that was not frivolous and asking this court to search the record for reversible error. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999). Koskella filed a supplemental brief asserting three issues. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2011, Koskella pleaded guilty to attempted fraudulent schemes and artifices as part of a broader plea agreement. In accordance with that agreement, the superior court imposed a two-year probation term to begin on Koskella's release after serving a prison term for a related offense.

¶3 While on probation in 2015, Koskella was living with his elderly parents. His mother, a gemologist who designed and created jewelry, stored jewelry items in a safe in the garage. After Koskella's father was hospitalized for two days in April 2015, several items were taken from the jewelry safe. Koskella's parents called the police.

¶4 Investigators discovered that Koskella had pawned a microscope in mid-March and a gold necklace just days before. Further investigation revealed that Koskella had also pawned several rings, a watch, and a pendant around the time his father was hospitalized. Koskella's mother identified the microscope and all the jewelry as hers. She denied giving anyone permission to sell these items.

STATE v. KOSKELLA
Decision of the Court

¶5 Koskella was arrested and charged with trafficking in stolen property (one count related to the microscope and two counts related to the jewelry) and theft of property worth over \$25,000. At trial, he testified that his parents (who he claimed had memory issues) had given him permission to borrow the items and pawn them for a short-term loan, and that he planned to redeem and return the items the next month. The jury acquitted him of the jewelry-related offenses, but found him guilty of trafficking the microscope and theft of property worth less than \$1,000. The jury also found multiple aggravating circumstances as to each offense.

¶6 The superior court found Koskella had two historical prior felony convictions and sentenced him as a repetitive offender to a presumptive term of 11.25 years' imprisonment for trafficking and 6 months for misdemeanor theft. The court found Koskella had violated his probation in the 2011 matter due to his convictions on the new charges, then revoked probation and sentenced him to a mitigated term of 2 years' imprisonment. The court ordered that the sentences for theft and the 2011 conviction run concurrently, with credit for 284 days of presentence incarceration, to be followed by a consecutive term for trafficking.

¶7 Koskella timely appealed the 2015 convictions and, after the superior court granted him leave to file a delayed appeal, appealed the probation revocation as well.

DISCUSSION

I. Koskella's Supplemental Brief.

¶8 Koskella argues that (1) the superior court erred by failing to dismiss the indictment for a rule-based speedy trial violation, (2) the proceedings were marred by prosecutorial misconduct warranting reversal, and (3) that the State failed to present sufficient evidence to support the 2015 convictions. Each of these arguments fails.

A. Speedy Trial.

¶9 Koskella asserts that the jury was impaneled one day after expiration of the speedy trial deadline under Rule 8 of the Arizona Rules of Criminal Procedure, and that the superior court thus erred by denying his motion to dismiss for violation of his rule-based right to a speedy trial. We review the court's denial of his motion to dismiss for an abuse of discretion and resulting prejudice. *See State v. Spreitz*, 190 Ariz. 129, 136 (1997).

STATE v. KOSKELLA
Decision of the Court

¶10 Under Rule 8.2(a)(1), an in-custody defendant must be tried within 150 days after arraignment. Koskella agrees that jury selection began within the Rule 8 timeframe, but argues that his Rule 8 speedy trial right was nevertheless violated because the jury was not picked and impaneled until the next day. Although *jeopardy* does not attach until the jury is impaneled, *see, e.g., Klinefelter v. Superior Court*, 108 Ariz. 494, 495 (1972), Koskella's trial began with jury selection on his Rule 8 last day (and the court proceeded promptly to impanel the jury and continue with trial the next day). *Cf. Ariz. R. Crim. P. 19.2* (noting the defendant's right to be present "at every stage of trial, including, if applicable, the impaneling of the jury"); *United States v. Gonzalez*, 671 F.2d 441, 443-44 (11th Cir. 1982) (holding that trial commences for purposes of the federal Speedy Trial Act when jury selection begins, not when the jury is sworn and jeopardy attaches). Because Koskella concedes that jury selection began within the Rule 8 time limit, the superior court did not err by denying his motion to dismiss on speedy trial grounds.

¶11 Moreover, Koskella failed to show resulting prejudice. *See Spreitz*, 190 Ariz. at 136. Although he posits that the victims (his parents) would have declined to testify against him if the court had dismissed the case and the State later refiled charges, he offers nothing more than speculation to support his position. Thus, even if the one-day delay to impanel the jury violated Rule 8, Koskella's claim fails.

B. Prosecutorial Misconduct.

¶12 Koskella argues that several instances of alleged prosecutorial misconduct warrant reversal. Prosecutorial misconduct warrants reversal only if "(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145 (2004) (citation omitted). A defendant is not entitled to relief based on an assertion of prosecutorial misconduct unless the misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial," rendering "the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007) (citations omitted).

¶13 Koskella claims that the State prohibited access to the room at his parent's house in which he had been living, and thus improperly denied him access to information located in that room that was necessary to his defense. But Koskella does not explain what information was there or how it would have undermined his convictions. And the record does not reflect that Koskella used the discovery tools available to him to attempt to access

STATE v. KOSKELLA
Decision of the Court

any such information, much less that the State would have opposed or prevented such attempts. Under these circumstances, Koskella has not shown misconduct.

¶14 Koskella further asserts that the prosecutor presented false or misleading testimony by asking his mother about whether she had given permission to “sell” the microscope when in fact it was pawned. But the record does not suggest that this testimony was false or that the jury received any incorrect impression about the disposition of the microscope. Moreover, the defense was free to—and in fact did—argue, based on Koskella’s testimony, that he had permission to pawn the microscope temporarily. Koskella thus has not shown misconduct in this regard.

¶15 Koskella argues that the prosecutor improperly shifted the burden of proof by questioning him on cross-examination about (and discussing in closing argument) his failure to present corroborating testimony from potential defense witnesses. But a prosecutor’s comments about a defendant’s failure to present evidence in support of his theory of the case (provided the comments do not direct the jury to consider the defendant’s own silence) are not improper and do not shift the burden of proof. *State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24 (App. 2008). And in any event, the potential defense witnesses were relevant primarily to the charges of which Koskella was acquitted, which suggests that he was not prejudiced by the questioning or argument. Accordingly, Koskella has not shown misconduct, much less pervasive misconduct warranting relief.

C. Sufficiency of the Evidence.

¶16 Koskella challenges the sufficiency of the evidence to support his 2015 convictions, arguing that although the State presented evidence that he did not have permission to *sell* the microscope, it failed to present evidence that he lacked permission to pawn it. He contends that his mother’s testimony that he could “take [the microscope] and use it whenever he wanted” (although he did not have permission to “sell” it) supports his theory that he had permission to temporarily “take” the microscope to pawn it. But the jury could reasonably conclude that the scope of permission to “take it and use it” did not encompass transferring the microscope to another. *See State v. West*, 226 Ariz. 559, 562, ¶ 16 (2011) (noting that evidence sufficient to support a conviction may be direct or circumstantial, 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”) (citations omitted).

STATE v. KOSKELLA
Decision of the Court

II. Fundamental Error Review.

¶17 We have read and considered counsel's brief and have reviewed the record for reversible error. *See Leon*, 104 Ariz. at 300. We find none.

¶18 Koskella was present and represented by counsel at all stages of the proceedings against him, except for brief periods for which counsel waived his presence. The record reflects that the superior court afforded Koskella all his constitutional and statutory rights, and that the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The court conducted appropriate pretrial hearings, and the evidence presented at trial was sufficient to support the jury's verdicts. Koskella's sentences fall within the range prescribed by law, with sufficient credit given for presentence incarceration.

CONCLUSION

¶19 We affirm Koskella's convictions and sentences, as well as his probation revocation and the resulting sentence. After the filing of this decision, defense counsel's obligations pertaining to Koskella's representation in this appeal will end after informing him of the outcome of this appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). On the court's own motion, Koskella has 30 days from the date of this decision to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.



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