

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

JOSHUA LEE SPITERI, *Appellant*.

No. 1 CA-CR 21-0075

FILED 5-10-2022

---

Appeal from the Superior Court in Yavapai County  
No. V1300CR202080116  
The Honorable Thomas K. Kelly, Judge *Pro Tempore*

**AFFIRMED**

---

COUNSEL

Arizona Attorney General's Office, Phoenix  
By Linley Wilson  
*Counsel for Appellee*

Stephen L. Duncan, Scottsdale  
*Counsel for Appellant*

Joshua Lee Spiteri, Eloy  
*Appellant*

STATE v. SPITERI  
Decision of the Court

---

**MEMORANDUM DECISION**

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge Michael J. Brown joined.

---

**T H U M M A**, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). Counsel for defendant Joshua Lee Spiteri advised this court that he has found no arguable question of law after searching the entire record and asks this court to conduct an *Anders* review. Spiteri was given the opportunity to file a supplemental self-represented brief and has done so. This court has reviewed the record, including those issues presented in Spiteri’s supplemental brief and the authority in his supplemental citations of authority, and has found no reversible error. As a result, Spiteri’s convictions and resulting sentences are affirmed.

**FACTS AND PROCEDURAL HISTORY**

¶2 In February 2020, Spiteri entered a Walmart in Cottonwood, Arizona. A Walmart asset protection associate, who pieced together receipts and video footage of Spiteri, testified at trial that Spiteri was carrying a youth bow when he entered the store. Spiteri walked through the aisles and placed various items in his shopping cart, including two fishing rods and a 32-gallon Action Packer tote. Spiteri put a different youth bow in his cart and removed the youth bow he brought into the store. The asset protection associate testified that “I can see that he starts concealing all of the previously larger items into the Action Packer and puts the Action Packer into the cart itself,” then replaces the lid.

¶3 Spiteri then placed two jackets, two pairs of shoes and a memory card reader and adaptor in the tote. After placing a coat in the cart, Spiteri left the cart near a fitting room. Spiteri then tried to return the new youth bow and two fishing rods at the customer service desk using a receipt. Although refusing one of the fishing rods, the store accepted the other fishing rod and youth bow and paid Spiteri a cash refund.

STATE v. SPITERI  
Decision of the Court

¶4 After buying some cigarettes, Spiteri then went back to his shopping cart. The asset protection associate testified that “it looked like he had a UPC” [Universal Product Code] sticker “on his finger.” Spiteri took his cart to the self-checkout area, scanned the UPC he had on his hand for a smaller tote and scanned various other items, including a heater. Spiteri asked an employee to void the heater, which she did, but Spiteri kept the heater in his cart. He then pushed his cart filled with these items past the exit security system and, after smoking a cigarette, left the store with the items. Spiteri paid \$45.99 for merchandise Walmart estimated was worth \$528.76.<sup>1</sup>

¶5 Later in February 2020, Spiteri made a second visit to the same Walmart. During that visit, the asset protection associate noticed a suspect, later identified as Joshua Allen Baker, who appeared to be transferring UPCs from cheaper items to more expensive items. Spiteri joined Baker and they spoke “as if they knew each other.” While the pair walked down an aisle with printer ink, the asset protection associate testified that Spiteri appeared to put a box of printer ink into a reusable bag he was carrying.

¶6 The asset protection associate identified Spiteri from his earlier visit and called law enforcement. Meanwhile, Spiteri and Baker placed dozens of sheets of felt, known for the ease of UPC swapping, into their shopping cart. Law enforcement arrived and watched the pair from the store’s asset protection office. They saw Spiteri transfer felt UPCs to a tie-down ratchet set and other items. Baker then handed Spiteri car keys and Spiteri left the store, where he was taken into custody by law enforcement. Baker continued to place UPCs on other items when he was intercepted by law enforcement. Baker’s shopping cart contained several items with improper UPCs.

---

<sup>1</sup> As requested by Spiteri, this court takes judicial notice of the superior court’s February 3, 2022 minute entry denying his Rule 24.4 motion, and affirming a restitution order of \$358.78. Ariz. R. Evid. 201(c). Contrary to Spiteri’s claim, that order does not show “that the State failed to reach its burden as to” organized retail theft (first visit) because that count did not turn on the value of the items taken. Nor has Spiteri shown that the superior court, in denying his Rule 24.4 motion and affirming the restitution order, found that the trial evidence was insufficient to support that conviction. Among other things, the trial evidence showed that he swapped the tote UPC for a cheaper item.

STATE v. SPITERI  
Decision of the Court

¶7 Spiteri was indicted on: (1) trafficking in stolen property in the second degree, a Class 3 felony; (2) organized retail theft (first visit), a Class 4 felony; (3) organized retail theft (second visit), a Class 4 felony; (4) shoplifting with an artifice or device, a Class 4 felony and (5) resisting arrest, a Class 1 misdemeanor. After significant motion practice, Spiteri was present for all four days of his jury trial held in January 2021. After the close of the State’s case in chief, the court granted Spiteri’s motion for judgment of acquittal on count 4. After the close of evidence, the court found Spiteri not guilty of count 5.

¶8 The jury found Spiteri guilty on the remaining three counts. Given his prior criminal history, the court sentenced Spiteri as a category three repetitive offender for the three nondangerous felonies. The court imposed the following prison terms, each of which was less than presumptive: 11 years for count 1; 9 years for count 2 and 9 years for count 3, with counts 1 and 2 imposed concurrently and count 3 consecutive to counts 1 and 2. Spiteri was properly given 361 days of presentence credit. This court has jurisdiction over his timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033(A) (2022).<sup>2</sup>

**DISCUSSION**

¶9 The record shows that Spiteri was represented by counsel at all stages of the proceedings and that counsel was present at all critical stages. The record contains substantial evidence supporting the verdicts. The sentences imposed were within statutory limits. The award of presentence incarceration credit was accurate. In all other respects, from the record presented, all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. In his 60-page supplemental self-represented brief, Spiteri raises several issues, addressed below.

**I. Grand Jury Proceedings.**

¶10 Spiteri’s attempt to challenge the grand jury proceedings is waived. *See* Ariz. R. Crim. P. 12.9(b) (motions challenging grand jury proceedings must be filed “no later than 45 days after the certified transcript and minutes of the grand jury proceedings are filed or no later than 45 days after the defendant’s arraignment, whichever is later”). Spiteri has not shown that any exception applies to this deadline.

---

<sup>2</sup> Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated

STATE v. SPITERI  
Decision of the Court

**II. Jury Instructions.**

¶11 Spiteri argues that the court erred by not giving jury instructions “correcting the relevant misrepresentations of fact [and] law” and that “[t]he jury was tricked into falsely believing that items were concealed by the prosecutor.” Although a witness used the term “conceal” several times while testifying, the court took corrective action with counsel at sidebar during trial. Moreover, concealment was an element of shoplifting with an artifice or device (count 4), A.R.S. § 13-1805, and the court granted Spiteri’s motion for judgment of acquittal of that count at the close of the State’s case. Thus, no curative instruction was required.

**III. Claimed Perjury.**

¶12 Spiteri argues that “the number of perjurious statements suborned by the prosecution was overwhelming,” which constitute “good and sufficient cause to dismiss all charges against” him. Spiteri argues that trial witnesses and the State “acted in concert to commit fraud on the court and the Grand Jury, then continued their conspiracy throughout trial by altering and/or embellishing facts to trick the jury into believing ‘facts’ that the prosecutor and witnesses knew were not actual facts, but in fact, were just their contrivances.”

¶13 Perjury is a “false sworn statement in regard to a material issue,” made by a person “believing it to be false.” A.R.S. § 13-2702(A). “Knowing use of perjured or false testimony by the prosecution is a denial of due process and is reversible error without the necessity of a showing of prejudice to the defendant.” *State v. Ferrari*, 112 Ariz. 324, 334 (1975). But Spiteri’s allegations are based on inconsistencies in testimony. Inconsistencies in testimony are not perjury, but may be considered in assessing credibility. *See id.* Spiteri’s counsel cross-examined the witnesses and highlighted the inconsistencies for the jury.

¶14 On the record presented, Spiteri has not shown the State offered perjured testimony. The purported inconsistencies Spiteri references were adequately addressed during cross-examination, allowing the jury to weigh credibility of the witnesses. *State v. Clemons*, 110 Ariz. 555, 556-57 (1974) (“No rule is better established than the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.”). Nor has Spiteri factually supported his related claims. For these reasons, Spiteri’s claimed perjury arguments fail.

STATE v. SPITERI  
Decision of the Court

**IV. Preclusion of Witnesses/Admission of Hearsay Evidence.**

¶15 Spiteri argues the superior court allowed the State to violate the rule against hearsay and the State “violated the judge’s own order and over Appellant’s sustained objection by Motion For Preclusion.” Spiteri’s October 2020 motion for preclusion sought to preclude testimony from three of the State’s witnesses for lack of timely disclosure at a time when trial would start days later. The court denied that motion, finding preclusion was not an appropriate remedy. Moreover, trial was then continued to January 2021, disclosures were updated and the court precluded testimony from witnesses that were not timely disclosed. Spiteri has shown no error. Nor has Spiteri shown how the court improperly allowed inadmissible hearsay evidence at trial. As a result, he has not shown resulting prejudice, or a denial of his Confrontation Clause rights. Merely mentioning an argument on appeal is insufficient; an undeveloped argument is waived. *See State v. Sanchez*, 200 Ariz. 163, 166 ¶ 8 (App. 2001).

**V. Denial of Defense Motions.**

¶16 Spiteri argues “the judge denied numerous defense motions without hearings and without a finding of facts and conclusion of law because the denials were baseless and prejudicial.” Spiteri cites no authority that the court had to hold a hearing on his motions or to make findings of fact and conclusions of law. Nor has he shown the court erred in ruling on the motions he references.

¶17 Spiteri’s October 2020 motion to dismiss claimed no evidence supported the charges. After briefing and argument, the court denied the motion, finding the indictment was sufficient. Spiteri has not shown that the indictment was “insufficient as a matter of law,” Ariz. R. Crim. P. 16.4(b), and the jury’s verdicts negate any argument that no evidence supported the charges on which he was convicted.

¶18 Along with his October 2020 motion for preclusion addressed above, Spiteri’s November 2020 motion to dismiss also raised disclosure issues. After briefing and argument, the court denied it without prejudice. Spiteri has not shown that the issue was preserved by being reasserted later or how the court’s denial without prejudice was error.

¶19 Spiteri’s December 2020 pretrial motion to determine corpus delicti sought dismissal “for the State’s failure to establish the authenticity of the evidence namely the allegedly stolen printer cart[r]idges/or to present sufficient independent evidence to allow the jury to consider the Defendant’s statements made to the police under the rule of corpus delicti.”

STATE v. SPITERI  
Decision of the Court

The State's response argued, among other things, that the motion was premature until the close of the State's case in chief at trial. After briefing and argument, the court denied the motion without prejudice. Spiteri has not shown that the issue was preserved by being reasserted later or how the court's denial without prejudice was error.

¶20 Spiteri's first February 2021 motion for mistrial was based on his allegation that, after being taken into custody following the guilty verdicts, the jury saw him in handcuffs before deliberating on aggravating circumstances. After briefing and argument, the court granted the motion in part, such that "the pecuniary gain Aggravating Factor is not being considered" for sentencing purposes. Spiteri has not shown how he was harmed by the court granting his motion.

¶21 Spiteri's second February 2021 motion for mistrial claimed information that "Scott" had texted the asset protection associate "to investigate" was improperly admitted because "Scott" did not testify at trial. The State responded that the motion was untimely, that Spiteri failed to timely object at trial and that the text from "Scott" was not hearsay or testimonial under the Confrontation Clause. After briefing and argument, the court found the motion was timely but denied it. Spiteri has shown no error in that ruling.

**VI. Purported Prosecutorial Misconduct.**

¶22 Spiteri next claims the State committed prosecutorial misconduct by offering perjured testimony before the grand jury and at trial; presenting testimony contrary to the rule against hearsay; overcharging Spiteri; misstating facts and evidence; providing video evidence to the jury that was not received in evidence and committing invited error. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79 ¶ 26 (1998) (citations omitted).

¶23 The perjury and hearsay arguments are discussed above. Absent illegal acts or abuse (not present here), this court will not interfere with the State's broad discretion in charging decisions. *State v. Murphy*, 113 Ariz. 416, 418 (1976). Spiteri's argument that the State intentionally misstated facts and evidence is unsupported. Spiteri again focuses on testimony about items being "concealed," which is addressed above. Spiteri has provided no evidence of prosecutorial misconduct. *See Hughes*, 193

STATE v. SPITERI  
Decision of the Court

Ariz. at 79 ¶ 26. Nor has Spiteri identified in the transcripts where “the prosecutor misstated Arizona law to the jurors.”

¶24 Spiteri’s argument that the State improperly showed the jury video evidence also fails. Counsel and the court conferred on the record about how videos received in evidence could be best shown to the jury. The trial confirms the video evidence was received in evidence and shown to the jury during trial. Spiteri has shown no error.

¶25 Spiteri argues that the State invited error. Invited error is designed to prevent a party from injecting trial error in the record and then seeking to profit from it in an appeal. *State v. Logan*, 200 Ariz. 564, 566 ¶ 11 (2001). The doctrine applies when “the source of the error” at trial is the same “party urging the error” on appeal. *Id.* Spiteri has not shown any invited error by the State.

**VII. Sentencing.**

¶26 Spiteri asks this court “to review for error the use of priors for sentencing, as it appears that the judge abused his discretion and used priors that do not apply.” Spiteri’s presentence report lists more than a dozen prior misdemeanor convictions, four violent in nature; six prior felony convictions, four involving theft or property crimes and three prior prison sentences. Spiteri has not identified which prior felony convictions he claims are improper. Defense counsel admitted Spiteri was a category three repetitive offender at sentencing, although noting Spiteri believed he was a category two offender. On the record presented, however, the superior court did not err in sentencing Spiteri as a category three repetitive offender.

¶27 To the extent Spiteri argues *State v. Veloz*, 236 Ariz. 532 (App. 2015) and *State v. Cope*, 241 Ariz. 323 (App. 2016) show his sentence is unlawful, neither case applies. Both address whether convictions for organized retail theft, as a greater offense, and the lesser-included offenses of shoplifting or theft, violated double jeopardy. *Veloz*, 236 Ariz. 532; *Cope*, 241 Ariz. 323. Here, by contrast, Spiteri was convicted of two counts of organized retail theft and one count of trafficking in stolen property; neither is a lesser-included offense of the other. Nor does Spiteri argue that he requested a lesser-included offense jury instruction, and the record does not reflect such a request.



STATE v. SPITERI  
Decision of the Court

¶28 Spiteri argues his conviction conflicts with *Veloz*, which stated that “[a] person who leaves a store carrying an item in plain view could not be charged with organized retail theft under 13-1819(A)(2).” 236 Ariz. at 537 ¶ 14. *Veloz* also stated, however, that “someone using an artifice arguably could be charged with shoplifting or organized retail theft.” 236 Ariz. at 537 ¶ 14. The State alleged and trial evidence showed that, during the first visit, Spiteri used the tote as a device to remove the items from Walmart, which were not in plain view. The State alleged and trial evidence showed that, during the second visit, Spiteri and Baker used an artifice (the swapped UPCs) to facilitate the removal of merchandise from Walmart. After considering the trial evidence, the jury found Spiteri guilty of both organized retail theft charges. *Veloz* does not prohibit those verdicts.

**VIII. Other Arguments.**

¶29 Although claiming ineffective assistance of trial counsel, any such claim must “be brought in Rule 32 proceedings,” not in this appeal. *State v. Spreitz*, 202 Ariz. 1, 3 ¶ 9 (2002). Spiteri also argues that “[t]he trial court simply cannot possess the requisite subject-matter jurisdiction when the whole of the case is itself a crime, perpetrated by the prosecutor, et al.” The superior court, under both Arizona’s Constitution and Title 13 of the Arizona Revised Statutes, has subject matter jurisdiction over criminal matters. *See* Ariz. Const. Art. 6 Sec. 9. Spiteri offers no authority to the contrary.

¶30 After filing his supplemental brief, Spiteri has made other filings, several of which have been addressed in prior orders. On March 7, 2022, however, Spiteri filed a “Notice of State’s/Appellee’s ‘Confession of Error’ -&- Evidence of State’s ‘Untimeliness,’” arguing the State conceded error by failing to file an answering brief. This court’s August 2021 order, however, directed that no answering brief was required by the State unless ordered by the court. Thus, Spiteri’s concession of error argument fails. To the extent that his March 7, 2022 filing seeks other relief, that relief is denied, including for the reasons addressed above.

STATE v. SPITERI  
Decision of the Court

CONCLUSION

¶31 This court has read and considered counsel's brief and Spiteri's supplemental brief and has searched the record provided for reversible error and has found none. *Leon*, 104 Ariz. at 300; *State v. Clark*, 196 Ariz. 530, 537 ¶ 30 (App. 1999). As a result, Spiteri's convictions and resulting sentences are affirmed.

¶32 Upon the filing of this decision, counsel is directed to inform Spiteri of the status of the appeal and of his future options. Defense counsel has no further obligation unless, upon review, counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Spiteri 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