DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0172
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
DOMINIQUE ALMOS, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-150932-001 DT

The Honorable F. Pendleton Gaines, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Bruce Peterson, Legal Advocate — Phoenix
by Francis Gray, Deputy Legal Advocate
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Dominique Almos ("Defendant") appeals from his conviction on one count of theft of a means of transportation, a Class 3 felony. He contends that the trial court abused its discretion by (1) denying his motion for judgment of acquittal and (2) admitting evidence of his tattoos and gang affiliation and making improper comments about that affiliation in front of the jury. Defendant also maintains that the court committed fundamental error when it permitted the prosecutor to comment on his exercise of the constitutional right not to testify or present evidence. For reasons set forth below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Defendant was indicated for theft of a means of transportation, a Class 3 felony. The evidence at trial was the following. At the end of the work day on August 12, 2008, Karen C.[2] drove to her home in the vicinity of Baseline and Rural Road in Tempe and parked her dark blue, 2006 Honda Civic in the driveway at approximately 4:30 p.m. Later that evening, her husband moved the Honda into their carport.

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[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Defendant. *State v. Vendever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

[2]We use the first initial of the victim's last name to protect her privacy as a victim. *State v. Maldonado*, 206 Ariz. 339, 341 n.1 ¶2, 78 P.3d 1060, 1062 n.1 (App. 2003).

¶3 The following morning, August 13, Karen's husband realized that the car was missing from their carport. When the vehicle was taken, the title, registration and proof of insurance, as well the husband's driver's license, were all in the glove compartment of the Honda. There was also "[m]iscellaneous paperwork" and "junk mail" in the side compartments of the doors. The couple reported the vehicle stolen to Tempe Police.

¶4 At approximately 7:00 a.m. on the morning of August 14, Phoenix Police Officer E.B., assigned to the auto theft liaison team, was patrolling in the area of 1130 East Durango Street in Phoenix. He noticed a dark blue Honda Civic parked in the parking lot of an apartment complex at that address. His suspicions were aroused because "Hondas or Civics are one of the most commonly stolen vehicles, not only in the State, but the country" and because "it just didn't fit the apartment complex." The car appeared to be "out of place" to E.B. because he knew it was "a $15,000 to $20,000 vehicle," and, in his experience, the occupants of the apartment complex could ill afford such an expensive vehicle. When the officer ran the Honda's license plate on his computer, he found that it had been reported as stolen.

¶5 Officer E.B. called an undercover Phoenix police unit to undertake surveillance of the vehicle. Within twenty minutes

of the unit's setting up, Officer R.B. saw Defendant walking up a driveway towards the Honda. Defendant walked toward the vehicle, turned and went back toward the apartment complex, and then re-emerged with a woman following him. The woman remained in the driveway area while Defendant walked to the Honda, opened the trunk with a key, and removed a bag. Defendant then walked to the driver's side door and opened it with the key. To avoid the necessity of instigating a vehicle pursuit, the officers moved in at that point and arrested Defendant before he actually entered the automobile.

¶6 The Honda had no visible damage to it and exhibited none of the usual signs of a forced entry. Police found sunglasses and four CDs inside the Honda. The bag that Defendant had retrieved from the trunk was on the ground outside of the driver's side door and contained clothing. At trial, Defendant stipulated that all of the items recovered from the car by the police were Defendant's property.

¶7 Officer E.B. contacted the woman who was at the scene with Defendant and interviewed her. She lived in Apartment #2 in the complex, the apartment behind which the Honda was parked. She denied any knowledge of the Honda. After speaking with her, E.B. concluded that she should not be arrested for theft of the Honda.

¶8 After the arrest, Officer E.B. contacted the victim to return the car key that Defendant had in his possession to her. The victim had recently moved to Tempe, and the key Defendant had used was a missing master key to the vehicle that had apparently been lost during the move.

¶9 Defendant did not testify at trial or present any witnesses. Defendant simply argued that, based on the evidence presented, the State had failed to prove beyond a reasonable doubt that he knew that the vehicle was stolen. The jury found Defendant guilty of the offense as charged.

¶10 At sentencing on February 25, 2009, the trial court found that the State had proven that Defendant had two prior felony convictions for sentence enhancement purposes. The court then sentenced Defendant to an enhanced, presumptive terms of imprisonment of 11.25 years. Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1)(2003), 13-4031 and 13-4033 (2001).

DISCUSSION

Denial of Rule 20 Motion/Sufficiency of the Evidence

¶11 The State charged Defendant with theft of a means of transportation, alleging that Defendant controlled the victim's Honda without lawful authority "while knowing or having reason to know that the property was stolen." *See* A.R.S. § 13-

1814(A)(5) (Supp. 2009). At the close of the State's evidence, Defendant moved for a judgment of acquittal, arguing that there was "no testimony regarding [defendant] knowing that the vehicle was stolen, nor was there sufficient evidence to show that he should have known." The trial court denied the motion. Although the court acknowledged that this was "an unusual case," it concluded that there was "enough substantial evidence to support a jury verdict."

¶12 On appeal, Defendant argues that the trial court abused its discretion when it denied his motion because the State "failed to produce any evidence to show that Defendant knew or should have known the Honda was stolen." We find no abuse of discretion.

¶13 Rule 20 requires a trial court to enter a judgment of acquittal before a verdict is rendered "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. We review a trial court's denial of a Rule 20 motion for judgment of acquittal for an abuse of discretion and will reverse only if no substantial evidence supports the conviction. *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003)(citation omitted). If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court must submit a case to the jury. *Id.*

¶14 Substantial evidence may be either circumstantial or direct, and is evidence that a reasonable jury may accept as sufficient to infer guilt beyond a reasonable doubt. *Id*. Furthermore, it is well established that a conviction may be sustained on circumstantial evidence alone. *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981).

¶15 Defendant maintains that there was no evidence from which the jury could have legitimately deduced that he knew or should have known that the Honda was stolen. Defendant bases his argument on the fact that the evidence showed that the Honda was undamaged and that he had a master key, as well as the lack of any evidence that he tampered with or altered the title or other documents in the glove compartment or that he or the woman with him at the apartment complex lacked the means to purchase the vehicle.

¶16 It is true that this case is "unusual," as the trial judge remarked. As defense counsel brought out at trial, it does not have any of the customary indices of illegal possession often associated with vehicle theft cases, such as cracked steering columns and/or broken windows or a Defendant in possession of "Slim Jims" or other devices frequently used to gain unlawful access to a vehicle. However, that does not detract from the evidence that the jury did have in this case from which, even if circumstantial, the jury could have inferred

beyond a reasonable doubt that Defendant knew or should have known the car was stolen.

¶17 First, we note that the State requested an instruction that "[p]roof of possession of recently stolen property, unless satisfactorily explained, may give rise to an inference that the person in possession . . . was aware of a risk that it had been stolen or in some way participated in its theft." *See* A.R.S. § 13-2305(1) (2001). The trial court refused to give the instruction because it considered the time between the theft and Defendant's arrest to be "too far away" in this case. We, however, believe the State was entitled to such an instruction.

¶18 Although the precise time the car was stolen was not known, the evidence at trial established that the theft occurred *after* the car was placed in the carport on the "night of August 12" and *before* the victim's husband noted its absence in the "early" morning of August 13. While the police only observed Defendant exercising control over the vehicle at approximately 7:00 a.m. on the morning of August 14, the evidence permitted an inference that Defendant had controlled the vehicle *prior* to that time, as indicated by his clothing stored in the trunk and his other personal belongings located in its interior, including the CD located inside the car radio.

¶19 Nevertheless, even if we were to calculate the timing as the court did--from the night of the 12th to the morning of

the 14th--that time lapse did not preclude giving the instruction. The instruction is permissive in nature and simply provides that the evidence "*may* give rise to an inference" and permits the jury to exercise its common sense. Although the court did not instruct the jury accordingly, the State, without objection, argued the inference to the jury in its closing arguments. The evidence supports the State's arguments and the jury could have properly considered this inference in its deliberations.

¶20 Furthermore, the evidence established that Defendant had access to the interior of the vehicle and that the vehicle contained legal documents in the glove compartment as well as papers and "junk mail" in the side door areas that would have borne the victims' names and addresses. The evidence, while circumstantial, was sufficient evidence from which the jury could have inferred Defendant knew or should have known that the Honda was stolen. *Blevins*, 128 Ariz. at 67, 623 P.2d at 856. The trial court did not abuse its discretion in denying Defendant's Rule 20 motion.

Admission of "Eastside"

¶21 The CD that was located inside the car's radio had "the insignia of a marijuana leaf" on it as well as the word "Eastside" written on it in black permanent marker. Prior to trial, Defendant moved to preclude evidence of the word

"Eastside" at trial, arguing that it was irrelevant to proving the charge and unduly prejudicial because it suggested his involvement in gang activity. Defendant pointed out he was stipulating to the fact that the CDs belonged to him. The State simply argued that it planned to elicit testimony about the word "Eastside" written on the CD, but that it did not "intend to elicit testimony as to what that might mean, if anything."

¶22 The trial court precluded any evidence regarding possession of a pipe found in the car and about gang activity. The court viewed testimony regarding the word "Eastside, if that's all it is, with no reference to gang, gang activity" to be "innocuous." It therefore ruled that the State could have its witness "say just Eastside and leave it at that." It also informed defense counsel that she could have a limiting instruction if she requested one.

¶23 At trial, the State elicited testimony from Officer E.B. that the CD he found in the car radio had the word "Eastside" written on it in permanent marker. Over Defendant's "403" objection, the court also permitted the State to elicit the testimony that E.B. observed that Defendant "had the insignia of E.S." on his right bicep. When the State next asked E.B. "for the record, what are the initials of Eastside," Defendant objected; and the trial court sustained the objection, stating: "I think the jury can figure it out for itself."

¶24 On appeal, Defendant contends that the trial court abused its discretion, not only by permitting the State to elicit evidence about the word "Eastside," but also by allowing the State to elicit testimony that his tattoo was the "insignia of E.S." on his bicep. According to Defendant the sole reason for introducing this evidence was to allow the State to argue that Defendant "acted in conformity with his purported gang affiliation by stealing or possessing a car he knew was stolen."

¶25 We view a trial court's rulings on the admission or exclusion of evidence for an abuse of discretion. *State v. Tankersley,* 191 Ariz. 359, 369, 956 P.2d 486, 496 (1998). We will not reverse a trial court's rulings concerning issues of relevance and admissibility absent a clear abuse of discretion. *State v. Alatorre*, 191 Ariz. 208, 211, 953 P.2d 1261, 1264 (App. 1998).

¶26 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Ariz. R. Evid. 401. Relevant evidence, while generally admissible, may be excluded if its probative value is "substantially outweighed" by the danger of unfair prejudice. *State v. Connor*, 215 Ariz. 553, 564 ¶ 39, 161 P.3d 596, 607 (App. 2007); Ariz. R. Evid. 402, 403. "Evidence is unfairly prejudicial only when it has an undue tendency to

suggest a decision on an improper basis such as emotion, sympathy, or horror." *Connor,* 215 Ariz. at 553, ¶ 39, 161 P.3d at 607. A trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice, and thus has broad discretion in making its decisions. *Id.* We find no abuse of discretion here.

¶27 Our review of the record shows that the State merely used the evidence of the word and of Defendant's tattoo to argue in its rebuttal closing that those pieces of evidence "puts him to the CDs inside that car . . . [t]hat's his stuff in there . . . [h]e didn't just come across that car." The State never used the information to allege any gang affiliation or even to hint that "Eastside" may have been a gang and Defendant a member of it, let alone that Defendant "acted in conformity with"[3] gang membership to steal the vehicle.

¶28 It is true that Defendant stipulated that the CDs in the car were his and that the State could simply have used that stipulation to argue that he controlled the car without authority. However, it is also true that there was no evidence of driving in this case; Defendant was only seen removing his

[3]Defendant raises his Rule 404(a) character evidence objection for the first time on appeal. In the absence of any showing of fundamental error, he has forfeited this argument on appeal by his failure to raise it below. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). For the reasons stated above, we find no error, let alone fundamental error, and need not address this further.

property from the car. Therefore, tying Defendant through his tattoo to the CD tended to show Defendant may have actually played the CD at some point during the use of the vehicle. This evidence countered any suggestion that Defendant might not have "controlled" the vehicle and/or "controlled" it long enough to have become aware that it was stolen. It also reinforced the State's argument concerning inferences to be drawn from possession of recently stolen property because it obviously put Defendant's use of the car at some time earlier than that morning. The trial court did not abuse its discretion in permitting the testimony in this case and no improper use of the evidence by the State. *Tankersley,* 191 Ariz. at 369, 956 P.2d at 496.

¶29 Defendant also argues for the first time on appeal that the trial court's statement that "the jury can figure it out for itself" was an improper comment on the evidence that encouraged the jury to "speculate that the letters 'E.S.' 'are the initials of Eastside' [and that] therefore Defendant was a member of the Eastside gang." The trial court's statement only indicated to the jury that it could decide for itself whether the "E.S." on Defendant's bicep correlated to "Eastside" written on the CD, thereby identifying it as his property. Because there was absolutely no evidence of any gang membership or affiliation or any indication in the record that any of the

jurors even identified "Eastside" as a gang, we find no merit to this argument.

Comment on Defendant's Fifth Amendment Rights

¶30 Defendant argues that the State improperly commented on his constitutional rights not to testify or present evidence and thereby shifted the burden of proof to him when it argued in rebuttal closing that, "[t]here is not a shred of evidence that [Defendant] did not know or have reason to know the car was stolen. Defendant acknowledges that he failed to raise this objection below. That means that, in order to prevail, he must establish that fundamental error occurred and that it caused him prejudice in his case. *Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d at 607. Before we engage in fundamental error analysis, we must first find that some error occurred. *Id.* at 568, ¶ 22, 115 P.3d at 608. Our review reveals that no error occurred, let alone fundamental error.

¶31 The prosecutor made the statement to which Defendant objects during the following portion of his argument in rebuttal closing:

> *There is not a shred of evidence that [Defendant] did not know or have reason to know the car was stolen.* The evidence, the testimony, the testimony in itself is evidence. That's what people see. If you have surveillance, if you had audio/video recording of an incident, then maybe you get a conviction? Not even then do you get a conviction. You might need somebody to

> actually look inside the mind of somebody to tell you what they were thinking; did they [know] something, did they intend to do something; did they mean it. Even then we don't know. You would need a mind reader to get inside to know what a person is thinking.
>
> Also in your instruction, is the intent inference [sic]. In order to prove knowingly, if you can infer a person's intent, that will also prove knowingly; and how do you get to their intent? From the surrounding circumstances; that's part of your instructions. How do you know he controlled the vehicle, knowingly controlled the vehicle? It's not just know or have reason to know that the car was stolen; it's knowingly controlled that vehicle.
>
> How did he know? You look at the surrounding circumstances. . . .

Taken in context, it is clear that the prosecutor was not commenting on Defendant's failure to testify or present witnesses, nor attempting to impermissibly shift the burden of proof. Instead, the prosecutor was countering defense counsel's arguments that the State had produced no evidence that Defendant controlled the car or knew that it was stolen and her statement that the "first person who approaches that vehicle is the person who gets arrested and stands before you today as the accused in this case . . . [a]nd that's all we know." By its comment, the State was clearly addressing the problems it faced with the circumstantial nature of the evidence in this case.

¶32 Prosecutors are given wide latitude in presenting arguments to a jury. *State v. Velazquez*, 216 Ariz. 300, 311, ¶ 48, 166 P.3d 91, 102 (2007). The statement Defendant objects to on appeal was well within the ambit of argument at trial.

CONCLUSION

¶33 For reasons stated above, we affirm Defendant's conviction and sentence.

/S/_____
SHELDON H. WEISBERG, Presiding Judge

CONCURRING:

_/S/_____
PHILIP HALL, Judge

/S/_____
JOHN C. GEMMILL, Judge