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

STATE OF ARIZONA, Appellee, v. MYKEL RAY ASHMORE Appellant.	)	1 CA-CR 09-0290 DEPARTMENT B MEMORANDUM DECISION Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2008-006668-001 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Terry Goddard, Attorney General
by Kent E. Cattani, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee — Phoenix

James Haas, Maricopa County Public Defender
by Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant — Phoenix

W E I S B E R G, Judge

¶1 Mykel Ray Ashmore ("Defendant") appeals from his conviction and sentence imposed after a jury trial. His counsel has filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 744 (1967), and *State v. Leon,* 104 Ariz. 297, 299, 451 P.2d

878, 880 (1969), advising this court that after a search of the entire record on appeal, she finds no arguable ground for reversal. Counsel thus requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We granted Defendant an opportunity to file a supplemental brief, and he has done so.

¶2 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001).

FACTUAL AND PROCEDURAL BACKGROUND

¶3 We review the facts in the light most favorable to sustaining the verdict and resolve all inferences against Defendant. *See State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). In April 2008, Defendant was indicted and charged with having committed second-degree trafficking in stolen property, a Class 3 felony, on May 30, 2007. The State also alleged that on May 7, 2007, Defendant had committed facilitation of trafficking in stolen property and had been convicted of that offense, a class 6 undesignated felony, on March 4, 2008; that the instant crime had been committed while Defendant was on release pursuant to A.R.S. § 13-604.02(B) (Supp. 2008); and, as an aggravating factor, that Defendant had committed the instant offense with the expectation of receipt of pecuniary value.

¶4 A jury trial took place on March 3 and 4, 2009. Detective E.F. testified that while working undercover on property crimes in 2007, she had met Defendant at a Circle K. She mentioned to Defendant that she was looking for a laptop computer and gave him her telephone number. Defendant later called her to say that he had a laptop. E.F. arranged to meet Defendant on May 30, 2007 and was accompanied by Officer J.M. At the agreed location, the officers met Defendant and two others, Brian and Tony.

¶5 Officer J.M. negotiated primarily with Tony. Tony wanted $200 for the computer, but they agreed upon a purchase price of $150. Because they could not turn on the computer, J.M. said if it worked, he would return with an additional $50. The officers gave Tony $150. E.F. later paid Tony $50. Detective E.F. testified that she thought the laptop was stolen because Defendant said that it had come from a house in the area, not that it was his, and because of its low price. Officer J.M. said that he thought the laptop was stolen because of the price and the fact that it was missing part of the power cord.

¶6 Officer J.M identified Defendant as the person to whom he was introduced by E.F. He said that Defendant stood next to Tony while the parties negotiated a price for the laptop. Detective M.H. testified that she determined that the laptop belonged to E.M. and returned it to her. E.M testified that her home had been burglarized recently and the laptop taken. She also stated that

she did not know Defendant and had not given him permission to borrow or to sell her computer.

¶7 Defendant testified that on May 30, 2007, his friend Tony said that he had a laptop he needed to sell in order to pay rent. Defendant called Officer E.F. and was at Tony's apartment when the officers arrived to examine the laptop. Defendant said that Tony did all the talking while Defendant was on the phone during most of the discussion and that no one told him that the computer was stolen. On cross-examination, Defendant admitted that he had a prior conviction on March 4, 2008 and stated that he did not receive any of the $200.

¶8 The jury found Defendant guilty as charged. At sentencing, defense counsel argued that this offense and the prior were committed close in time, normally would have been charged together, and that Defendant likely would have received probation on both offenses. The court noted that probation now was not possible and that Defendant had been offered a plea to probation in this case. The court agreed with defense counsel that "if these two charges had been brought together, I am sure that a probation plea would have been offered since he had no prior felony convictions." The court also observed that if the two cases had been tried together and resulted in a conviction, the presumptive sentence would have been 3.5 years for this offense. For those reasons, the court imposed a mitigated term of imprisonment of 3.5 years with 57 days of presentence incarceration. The court revoked

Defendant's probation in the prior offense, designated it a class 6 felony, and imposed a one-year term of imprisonment, the sentences to run concurrently.

¶9 In his supplemental brief, Defendant argues that if the two offenses had been tried together, he likely would have received probation. He suggests that if he had fully understood the implications of a second separate conviction, he would have "considered fully" the plea offer to probation in this case. He asks for a hearing so that the superior court can consider resentencing. To the extent Defendant asserts a claim for ineffective assistance of trial counsel because counsel allegedly failed to fully explain the impact of a prior conviction on the possible sentencing in this case, it cannot be considered on direct appeal, but must be brought in a post-conviction relief proceeding under Rule 32, Arizona Rules of Criminal Procedure. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

¶10 As to Defendant's claim that the two offenses charged in separate actions could or should have been tried together in one proceeding, we note that neither party moved for consolidation. *See* Ariz. R. Crim. P. 13.3(c). Further, the decision to consolidate cases is within the discretion of the trial court. *State v. Befford*, 157 Ariz. 37, 41, 754 P.2d 1141, 1145 (1988). Finally, even assuming the cases were consolidated, notwithstanding the judge's comments, we cannot speculate on a possible probation plea offer by the State, acceptance of such offer by Defendant

and/or acceptance of the plea by the court. Nor can we speculate as to whether, in the absence of a plea, Defendant would have received probation if convicted of this offense at a consolidated trial.

¶11 Finally, a trial court has substantial discretion in determining an appropriate sentence within the legal sentencing range. *State v. Blanton*, 173 Ariz. 517, 519, 844 P.2d 1167, 1169 (App. 1992). The court also has discretion in weighing aggravating and mitigating factors. *State v. Harvey*, 193 Ariz. 472, 477, ¶ 24, 974 P.2d 451, 456 (App. 1998). If a sentence is neither unlawful nor imposed in an unlawful manner, the court has no authority to modify or change the sentence. *State v. Thomas,* 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984); Ariz. R. Crim. P. 24.3. Here, the court imposed a lawful sentence in a lawful manner and Defendant is not entitled to be resentenced.

CONCLUSION

¶12 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Defendant was represented by counsel at all stages of the proceedings, the sentences imposed were within the statutory limits, and sufficient

evidence existed for the jury to find that Defendant committed the charged offense.

¶13 After the filing of this decision, counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do no more than inform Defendant of the status of the appeal and of 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, 684 P.2d 154, 156-57 (1984). Defendant has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona.*

¶14 We affirm Defendant's conviction and sentence.

/S/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
MARGARET H. DOWNIE, Judge