DIVISION ONE
FILED: 08/12/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0519
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
LEONARD WAYNE THOMAS, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-175694-002 DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Pamela J. Eaton, Attorney at Law — Phoenix
By Pamela J. Eaton
Attorney for Appellant

Leonard Wayne Thomas — Florence
Appellant

B R O W N, Judge

¶1 Leonard Wayne Thomas appeals his conviction and sentence for one count of theft of means of transportation. Counsel for Thomas filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that after searching the record on appeal, she was unable to find any arguable grounds for reversal. Thomas was granted the opportunity to file a supplemental brief *in propria persona*, and has done so.

¶2 Our obligation is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Thomas. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

BACKGROUND

¶3 In July, 2008, Thomas was charged with one count of theft of means of transportation, a class 3 felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1814 (2010). The following evidence was presented at trial.

¶4 Police officer S.W. testified that in November 2007, he was conducting a prostitution sting operation at a motel in Phoenix. Thomas was seen driving a Chevrolet Malibu through the motel's parking lot with the driver's window rolled down. S.W.

testified that Thomas drove very slowly, looked directly at him, and smiled, showing prominent gold teeth. He further testified that all vehicles entering the motel parking lot during the sting operation had their license plates checked by the police. A search of the license plate of the vehicle Thomas was driving indicated that the vehicle had been stolen.

¶5 Police officer M.M. made contact with Thomas in a motel room. Before officer M.M. informed Thomas the vehicle was reported as stolen, he briefly questioned Thomas and his guest. They initially told the officers they had arrived at the motel via taxi, but when asked what Thomas knew about the Chevy Malibu, he stated "I did not steal the vehicle[,]" and "I did not know it was stolen." Thomas then came onto the balcony of the motel, where S.W. identified him as the man who he had seen drive through the parking lot earlier. Thomas was arrested and subsequently charged with theft of means of transportation.

¶6 At trial, Thomas testified on his own behalf. He admitted he was driving the vehicle, but he maintained that a man named "Joe," had allowed Thomas' "Aunt" to use the vehicle in exchange for forty dollars and some crack cocaine. He claimed that he used the car to go get some clothes. He then picked up a prostitute and took her to the motel. Thomas admitted he had the keys to the car hidden under the nightstand in his motel room, but maintained that he did not steal it.

¶7 The jury found Thomas guilty as charged. He was sentenced to a mitigated term of ten years in prison, with 58 days of presentence incarceration credit. He timely appealed.

DISCUSSION

¶8 In his supplemental brief, Thomas argues that the trial court abused its discretion and violated his constitutional rights in denying his motion for judgment of acquittal. He also alleges prosecutorial misconduct, asserting that (1) the State acted vindictively by delaying its filing of the charge against him, (2) the State committed a *Brady*[1] violation, and (3) the State failed to properly investigate the crime. We address these issues in turn.[2]

¶9 We review the denial of a motion for a judgment of acquittal for an abuse of discretion. *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003). We will reverse

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] Thomas suggests that the State's delay in filing the charge against him violated his constitutional rights. When evaluating pre-indictment delay, the due process clause plays only a limited role; the primary guarantee against outdated prosecution is the relevant statute of limitations. *State v. Broughton,* 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988). Consequently, a prosecutor has broad discretion in determining when to file charges, providing he does not act illegally in doing so. *State v. Frey*, 141 Ariz. 321, 325, 686 P.2d 1291, 1294 (App. 1984) (recognizing that prosecutor has broad discretion in charging crimes and courts will not interfere with that discretion unless the prosecutor acts illegally or in excess of his powers). Nothing in this record remotely suggests that the prosecutor acted illegally or in excess of his authority.

only if there is "a complete absence of probative facts to support a conviction." *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990) (citation omitted). "[A] trial court must submit a case to the jury if reasonable minds can differ on the inferences to be drawn from the evidence." *Henry*, 205 Ariz. at 232, ¶ 11, 68 P.3d at 458.

¶10 To convict Thomas of theft of means of transportation, the State was required to prove that Thomas, without willful authority, controlled the victim's means of transportation, knowing or having reason to know the vehicle was stolen. A.R.S. § 13-1814(5). The victim testified that Thomas did not have permission to drive her vehicle. Additionally, Thomas was in possession of the key to the vehicle, he was seen driving the vehicle by a police officer, and Thomas admitted to driving the vehicle. Although Thomas adamantly denied knowing the vehicle was stolen, he testified that he had spent time at the crack house earlier that day when "Joe" appeared and let the occupants of the house use the car in exchange for some crack cocaine. He also testified that he was given permission to use the car by his "Aunt" who paid "Joe" forty dollars to use the vehicle for a limited time. In addition, officer M.M. testified that Thomas stated he did not know the vehicle was stolen even before he had informed Thomas it had been reported stolen. Moreover, Thomas hid the keys to the vehicle under the nightstand in the motel

room and initially denied having driven the vehicle when police questioned him, claiming instead he had arrived at the motel in a taxi. A reasonable juror could conclude on these facts that Thomas knew or had reason to know the vehicle was stolen. We find no abuse of discretion.

¶11 Thomas next asks us to review for prosecutorial misconduct, based on the failure of the State to preserve allegedly exculpatory evidence and to properly investigate the crime. Under *Brady*, the prosecution may not suppress evidence favorable to a criminal defendant. 373 U.S. at 87. A *Brady* violation occurs, however, only if the prosecution suppresses evidence favorable to the defendant that "would have created a reasonable doubt had it been presented to the jury." *State v. Montano*, 204 Ariz. 413, 424, ¶ 52, 65 P.3d 61, 72 (2003) (citation omitted).

¶12 Thomas claims the State committed a *Brady* violation by not taking possession of the clothes he placed in the vehicle, which he contends would have supported his claim that he used the vehicle for a limited purpose only and had no intention of depriving the owner of it permanently. Thomas, however, fails to show how preserving the clothes would have created reasonable doubt for the jury, particularly since the presence of the clothes in the vehicle was undisputed. Furthermore, even if the clothes tended to show that Thomas had no intention of keeping

the car permanently, such a conclusion is immaterial because intent to deprive the owner of the car permanently is not a required element of the crime charged. As such, we reject Thomas' claim that a *Brady* violation occurred here.

¶13 Thomas nonetheless asserts that the trial court acknowledged the merit of his *Brady* violation claim when it decided to give a *Willits*[3] instruction to the jury based on the theory that Thomas told the police "he was using the vehicle to go get his clothes," and that "the police never followed up on . . . the evidence; they never tagged it." We disagree that a trial court's decision to allow a *Willits* instruction equates to an acknowledgment that a *Brady* violation necessarily occurred; but even if this were the case, the *Willits* instruction was all that was necessary to cure a violation here.

¶14 A *Willits* instruction permits the jury to infer facts against the State and is given in instances where the state has failed to preserve evidence that is potentially exculpatory. *See State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987) (finding that in "instances where the evidence is no longer available because the State has destroyed the evidence or failed in its duty to preserve the evidence, the defendant's due process right may nonetheless be protected by the court giving a

[3] *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964); Rev. Ariz. Jury Instr. Stand. Crim. 10.

Willits instruction to the jury"). Unless there is bad faith on the part of the State or great prejudice to the defendant would result, the instruction is all that is necessary to cure an alleged *Brady* violation. *Id*. Thomas does not argue the State acted in bad faith when it failed to collect and preserve his clothing. Likewise, there is no evidence that the State's decision not to do so resulted in significant prejudice to Thomas. Therefore, even if a *Brady* violation did occur, we find that the *Willits* instruction sufficiently protected Thomas' due process rights.

¶15 Thomas further argues the State engaged in misconduct by failing to conduct a proper investigation. Specifically, he contends the prosecution never contacted his "Aunt" to verify that "Joe" provided the car in exchange for forty dollars. Based on the record before us, we find no misconduct.

¶16 Although the State may not suppress potentially exculpatory evidence, it has no duty to seek out and obtain evidence merely to corroborate information for the defense. *See Rivera*, 152 Ariz. at 511-12, 733 P.2d at 1094-95 (finding the State has no duty to gather evidence for the defense to use in corroborating the defense's own evidence). In addition, any constitutional duty to preserve evidence is limited to that evidence which possesses exculpatory value that is apparent before its destruction and is of such a nature that the

defendant would not be able to obtain comparable evidence by other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 488-89 (1984).

¶17 Here, even assuming Thomas' "Aunt" would have confirmed the existence of "Joe" and testified that he provided the car as Thomas claimed, the only utility in this evidence would have been to corroborate Thomas' own testimony. Moreover, Thomas did not claim the State's failure to contact his "Aunt" resulted in his inability to later obtain corroborating testimony from her had he chosen to call her as a witness.[4] Consequently, we find no misconduct by the State in this regard.

CONCLUSION

¶18 We have read and considered counsel's brief, and we have reviewed the entire record for fundamental error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. As far as the record reveals, Thomas was represented by counsel at all stages of the proceedings, he was given the opportunity to speak before sentencing, and the sentence imposed was within statutory limits. Accordingly, we affirm Thomas' conviction and sentence.

[4] Thomas testified that his aunt was incarcerated at the time of trial, but did not claim he was unable to secure any testimony from her due to this fact. Nor did he offer any explanation as to why he did not call her as a witness.

¶19 Upon the filing of this decision, counsel shall inform Thomas of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds 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). Thomas has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

/s/
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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
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JON W. THOMPSON, Judge

/s/
_____
SHELDON H. WEISBERG, Judge