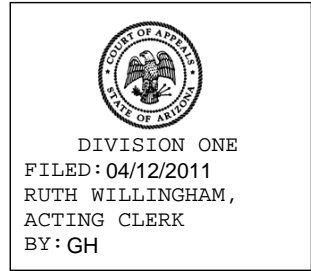


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 09-0935  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
)  
LANCE T. COUCH, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-125086-001 DT

The Honorable Robert L. Gottsfield, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
Attorneys for Appellee

Maricopa County Public Defender's Office Phoenix  
By Joel M. Glynn, Deputy Public Defender  
Attorneys for Appellant

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G E M M I L L, Judge

¶1 Lance T. Couch appeals from his convictions and sentences for two counts of theft of means of transportation. Counsel filed a brief in compliance with *Anders v. California*,

386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Couch was afforded the opportunity to file a supplemental brief *in propria persona* and he raises several issues. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). Finding no reversible error, we affirm Couch's convictions and the imposition of probation.

#### FACTS AND PROCEDURAL HISTORY

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶3 Richard Brunk and Brian Honaker work for Auction Ron Brunk, Inc. (hereinafter "Auction"), a company in the business of auctioning off estate furniture and vehicles to the public. On April 18, 2007, Brunk and Honaker were picking up items they bought in an estate sale at 4771 West Paltaire Avenue in Glendale. Included among the items were two motorcycles found in a backyard shed.<sup>1</sup> The two motorcycles "weren't in the greatest condition." They were very dusty, had flat tires, and

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<sup>1</sup> The motorcycles were a 1960 Harley Davidson, and a 1970 A.J.S. 250.

had rusting or missing parts. At the very end of the clean out, the two bikes were dragged into an easement, or alley, behind the home. Brunk and Honaker finished locking up the house and drove their unmarked truck to pick up the motorcycles in the alley. Brunk testified that this took approximately ten to fifteen minutes. When they returned to the alley, the bikes were gone.

¶4 Honaker noticed that drag marks were left in the gravel leading to another townhouse. Honaker knocked on the back gate of the townhome and engaged in conversation with a woman and a man, later identified as Couch. Honaker, who was wearing a company shirt, asked them if they had seen anyone take the vehicles. They denied knowing anything about the motorcycles, but Honaker responded that he could see the motorcycles through the gate. Couch claimed they were his and that he had found them. Couch asked Honaker if he had paperwork to prove Auction owned them. At one point in the conversation, Couch offered to buy the motorcycles for a hundred and fifty dollars. Honaker said that they did have paperwork, but Couch did not ask to see it.<sup>2</sup>

¶5 Within ten minutes from the start of the conversation,

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<sup>2</sup> Brunk testified they keep paperwork with them in the truck if someone asks what they are doing.

Brunk called the Glendale Police Department. Officer B<sup>3</sup> met Brunk in the front yard, and at some point Brunk provided him with a letterhead from attorney Peter Van Camp confirming the estate sale at that address.<sup>4</sup> Officer B spoke to Brunk, Honaker, and several of Couch's roommates before speaking to Couch. After Officer B read Couch his *Miranda* rights, Couch said he understood his rights and spoke with Officer B about the motorcycles. Couch told Officer B that he took the motorcycles believing they were abandoned.<sup>5</sup> Officer B arrested Couch and released the motorcycles to Brunk.

¶16 After the state rested its case-in-chief, the court denied a directed verdict, finding there was "sufficient evidence to show . . . [and] no evidence rebutting Mr. Brunk and Mr. Honaker's testimony on ownership . . . ." Couch then testified at trial that he called out "three or four times" in the alley, and waited five to ten minutes before deciding the motorcycles were abandoned. He looked into the house behind the fence and saw that there wasn't any furniture inside. Couch admits covering one motorcycle with a white sheet to protect it

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<sup>3</sup> Because the full names of the officers are not relevant, we will use the first initials of their last names.

<sup>4</sup> Officer B testified to recording the name of the law firm and the date of the purchase in his police report, but there was no mention of paperwork made in the police report.

<sup>5</sup> Officer B thought he had recorded the conversation but he was told the tape did not pick up anything but "a lot of noise."

from the sun, but denies covering both of them. Couch testified that when he engaged Honaker in conversation, the police had already been called. Couch said he was relieved, believing that the police would clear up who owned the motorcycles.

¶17 The jury found Couch guilty of both offenses as charged. The trial court suspended imposition of sentences and imposed supervised probation for 18 months for each conviction, including a 60 day jail term as a condition of probation. Couch timely appeals.

#### **DISCUSSION**

¶18 Having considered defense counsel's brief and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. We will briefly address the arguments Couch has presented in his supplemental brief and explain why we have found no reversible error on the bases argued by Couch.

#### **Sufficiency of the Evidence**

¶19 First, Couch asserts various issues regarding the insufficiency of the evidence. "When reviewing the sufficiency of the evidence, an appellate court does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact." *State v. Barger*, 167 Ariz. 563, 568, 810 P.2d 191, 196 (App. 1990). We will reverse a conviction for insufficiency of evidence only if "there is a complete absence

of probative facts to support the conviction." *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976).

¶10 There is sufficient evidence to support the jury's decision in this case. "A person commits theft of means of transportation if, without lawful authority, the person knowingly . . . controls another person's means of transportation knowing or having reason to know that the property is stolen." Arizona Revised Statutes ("A.R.S.") section 13-1814(A)(5) (2010).<sup>6</sup> The record shows that Couch took and controlled motorcycles that belonged to Auction Ron Brunk, Inc. There was testimony from Honaker and Brunk that Couch initially denied knowing about the motorcycles and then refused to release them. Honaker and Brunk testified that they had only left the motorcycles in the alley for a short period of time. There is also evidence that both of the motorcycles in Couch's backyard had been covered. A reasonable jury was permitted to draw the inference that Couch knew or had reason to know the motorcycles did not belong to him. It is for the jury to weigh witness testimony, assess credibility, and draw reasonable inferences from the evidence, and we generally do not substitute our judgment for that of the jury. *See State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004). There was

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<sup>6</sup> We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

substantial evidence in support of the jury's verdicts of guilt.

### **Inconsistent Testimony**

¶11 Couch similarly contends that there were several incidents of inconsistent or false testimony. He cites inconsistent testimony from Honaker and Brunk regarding the amount of time it took them to pick up the motorcycles. Couch also questions Officer B's testimony that he was shown paperwork confirming the ownership of the motorcycles. Couch contradicts Honaker's testimony by reiterating that the police were already called by the time he talked to Honaker. The presence of conflicting or inconsistent testimony, however, is not cause for reversal of convictions in the absence of trial court error and unfair prejudice to the defendant. "The credibility of a witness and the weight and value to be given a witness' testimony are questions exclusively for the jury." *State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974); accord *State v. Lee*, 217 Ariz. 514, 516, ¶ 10, 176 P.3d 712, 714 (App. 2008) ("[I]t is the trier of fact's role, and not this court's, to 'resolve conflicting testimony and to weigh the credibility of witnesses.'" (citation omitted). It was up to the jury to weigh the testimony of the state's witnesses against Couch's testimony, and we do not reweigh that evidence on appeal. See *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

## Concealment

¶12 Couch further raises the issue of concealment. He argues that there was no concealment because he left one motorcycle uncovered, he did not hide the drag marks, and the motorcycle tires were left showing. We construe this argument as a challenge to the court's instruction to the jury on concealment, which was as follows:

In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence, together with any evidence of the defendant's allegedly hiding or concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reasons for allegedly hiding or concealing evidence.

The evidence supported the giving of a concealment instruction. "A party is entitled to a jury instruction on any theory reasonably supported by the evidence." *State v. Tschilar*, 200 Ariz. 427, 436 ¶ 36, 27 P.3d 331, 340 (App. 2001). Police photographs and witness testimony indicated that both motorcycles were covered. In arguing for the instruction, the State pointed out that the only evidence that Couch covered only one motorcycle was his own testimony. The judge tailored the instruction by adding that the jury should consider that Couch was *allegedly* hiding or concealing evidence. The concealment instruction was justified by the evidence, a correct statement of the law, and not unduly prejudicial.



### **Police Bias**

¶13 Couch argues that Officer B was biased because he believed the men from Auction immediately and assumed that Couch was guilty. Couch argues that Officer B interviewed everyone else before hearing his side of the story. "A police officer is not per se interested merely by virtue of his involvement in the criminal investigation, absent evidence of some personal connection with the participants or personal stake in the outcome of the case." *State v. Nevarez*, 178 Ariz. 525, 527, 875 P.2d 184, 186 (App. 1993). Officer B cannot be considered biased against Couch simply because he interviewed the Auction people first and testified he remembered seeing Auction paperwork. Officer B testified that he questioned Couch in detail and understood Couch's side of the story. Moreover, Couch availed himself of the opportunity to cross-examine Officer B regarding his testimony. We perceive no particular evidence of police bias and, more importantly, it is the jury that decides whether and to what extent any witness is biased or otherwise unreliable.

### **Police Misconduct**

¶14 Couch also argues that Officer B intentionally destroyed the tape recording of their interview conducted before his arrest. He claims this recording would have supported his case. To obtain relief because of police failure to preserve

evidence, the defendant must show that the evidence is material exculpatory evidence, as opposed to potentially useful evidence, and that the police acted in bad faith by failing to preserve it. *State v. Speer*, 221 Ariz. 449, 457 ¶37, 212 P.3d 787, 795 (2009).

¶15 Couch has not established that the recording would produce material exculpatory evidence. Its likely relevance would be, at best, the potential to substantiate Couch's testimony. More importantly, Couch does not point to any evidence suggesting that the police acted in bad faith or that the tape was intentionally destroyed. Officer B testified that it was windy that day, and he was told that the tape simply did not pick up anything but a lot of noise. Additionally, Couch cites no authority for the proposition that police interviews must be recorded and produced for the sake of the defendant.

¶16 Moreover, any potential unfairness was rectified by the judge's inclusion of a jury instruction regarding the failure to produce this evidence. The defense argued for, and received, a "Willits" instruction. The transcript of the trial records this instruction as follows:

If you find that the State has lost, destroyed or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. You should -- if you find that any such

explanation is inadequate, then you may draw an inference unfavorable to the State, which, in itself, may create a reasonable doubt as to the defendant's guilt.

The jury was given the opportunity to weigh the police testimony regarding the tapes. There has been no denial of a fair trial on this basis.

#### **Ineffective Assistance of Counsel**

¶17 Finally, Couch argues that his attorney failed to adequately cross-examine Honaker regarding the initial conversation in the backyard. He contends that counsel should have placed one of his roommates on the stand to contradict Honaker's testimony that Couch was initially present in the backyard. We construe these arguments as claims of ineffective assistance of counsel. We do not, however, consider claims of ineffective assistance of counsel on direct appeal regardless of merit. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must be first presented to the trial court in a petition for post-conviction relief, not on direct appeal. *Id.* Therefore, we do not address these claims.

¶18 In accordance with *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Couch of the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for

submission to the Arizona Supreme Court by petition for review. Couch has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

**CONCLUSION**

¶19 The convictions and imposition of probation are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSON, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Judge