DIVISION ONE
FILED: 02/24/2011
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0051
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
DANIEL ALLEN KAADY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-159990-001 DT

The Honorable Edward O. Burke, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Presiding Judge

¶1 Daniel Allen Kaady ("Appellant") appeals his convictions and sentences for two counts of trafficking in stolen property. Appellant's counsel has filed a brief in

accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *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 on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). In addition, this court granted Appellant the opportunity to file a supplemental brief *in propria persona*, and although he has not filed a supplemental brief, he has raised issues through his counsel's brief.

¶2 We have appellate 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 (2010), and 13-4033(A) (2010). Finding no reversible error, we affirm Appellant's convictions and sentences.

I. FACTS AND PROCEDURAL HISTORY

¶3 We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

¶4 On February 23, 2009, a grand jury issued an indictment, charging Appellant with two counts of trafficking in

stolen property, each a class three felony. *See* A.R.S. § 13-2307 (2010).[1]

¶5 At trial, the State presented the following evidence: On December 15, 2007, three undercover Phoenix police detectives began a long-term sting operation to purchase stolen laptops. Detective Kincannon came into contact with a man named "Short Dog" and informed him that he was looking to purchase stolen laptops. Later that day, Short Dog called Detective Kincannon and told him he knew of someone who was selling laptops. This person was Appellant. Detective Kincannon arranged to meet with Short Dog and Appellant at a nearby strip mall. Detectives Hester and Ballentine accompanied Detective Kincannon to this meeting.

¶6 The three detectives arrived at the location in an unmarked vehicle. Appellant pulled up in a white truck. Short Dog approached the unmarked vehicle and led Detectives Hester and Kincannon to Appellant's truck. Detective Hester began to examine the two laptops Appellant brought. One was an HP, and one was an IBM. The laptops had no cases, the wires were loose, and the IBM had a docking port connected to it, indicating that it had been attached to something else at another time. Appellant informed Detective Kincannon that the laptops were

[1] We cite the current version of the applicable statute because no revisions material to our decision have since occurred.

his, the files on them had been "cleared," and Appellant had traded dope for them. The detectives and Appellant negotiated a price of $350 for both laptops. After he paid Appellant, Detective Kincannon paid Short Dog $20 for setting up the deal.[2] After detectives purchased the laptops, the laptops were impounded and subsequently taken to Detectives Baranowski and Oldenburg for forensic examination and to determine ownership.

¶7 Detective Baranowski searched the unallocated space on the HP and found information pertaining to a business ("D.V.P."). Detective Oldenburg searched through the unallocated space on the IBM and found information pertaining to another business ("F.C.I.").

¶8 At trial, the vice president of F.C.I. testified that on December 8, 2007, an IBM computer was stolen from F.C.I. The executive director from D.V.P. testified that on approximately December 14, 2007, an HP laptop was stolen from D.V.P. Each witness identified one of the computers purchased by Detective Kincannon as the computer stolen from his respective business.

¶9 On November 17, 2009, a jury found Appellant guilty as charged. The jury also found the presence of an accomplice and pecuniary gain as aggravating factors. The court sentenced

[2] Detective Kincannon testified he paid Short Dog $20 because it is common on the streets to pay the person who set up the deal. By acknowledging Short Dog's contribution, Detective Kincannon avoided a potential confrontation with Short Dog.

Appellant to slightly aggravated concurrent terms of five years' incarceration in the Arizona Department of Corrections for each trafficking in stolen property count. The court credited Appellant for thirty-four days of pre-sentence incarceration. Appellant filed a timely notice of appeal.

II. ANALYSIS

¶10 Through his counsel, Appellant has raised four issues. We have reviewed the record and find no error, much less reversible error.

A. The Trial Court's Refusal to Grant a Continuance

¶11 Appellant argues the trial court erred by refusing to grant a continuance to allow counsel he purportedly retained from Chicago ("Chicago counsel") to replace his appointed counsel and represent him at trial. Appellant was first granted a trial continuance on August 27, 2009. Appellant again requested a continuance at a status conference hearing on August 31, 2009, the day before trial was to begin. At that hearing, Appellant argued he had retained Chicago counsel, who would need sixty days to adequately prepare for trial.[3] The next day, the court granted Appellant's motion, and trial was set to begin November 2, 2009. On November 2, Appellant filed a motion to continue, and the court reset the trial date to November 9,

[3] At no time did Appellant's purported Chicago counsel actually file a notice of change of counsel or otherwise file an appearance.

2009. Due to scheduling conflicts and a recusal by one judge, the trial did not begin until November 16, 2009. Thus, Appellant's Chicago counsel had over two months to appear and prepare.

¶12 On the first day of trial, after voir dire, Appellant personally asked for another continuance to allow his Chicago counsel more time to prepare. The court denied this request, stating, "[I]t's a little late [to be] asking for a continuance." The court advised Appellant, however, that if his Chicago counsel appeared, the court would allow Chicago counsel to assist his appointed counsel throughout the trial proceedings.

¶13 We find no error, much less fundamental error, in the court's ruling denying a continuance after trial had begun. *See generally State v. Dixon,* 126 Ariz. 613, 616, 617 P.2d 779, 782 (App. 1980) ("The right to assistance of counsel, while fundamental, may not be employed as a means of delaying or trifling with the court." (citation omitted)). Appellant was granted several continuances to allow adequate time for his Chicago counsel to appear and prepare for trial. Additionally, Appellant was represented by appointed counsel, who assisted him throughout trial and all stages of the proceedings. Moreover, without addressing the adequacy of appointed counsel, we note that the record suggests that even "an attorney with unlimited

time for preparation and the highest degree of professional skills could not have affected the overwhelming nature of the evidence in this case." *Id.* The court's decision to deny Appellant another continuance after voir dire had already been conducted does not constitute error, much less fundamental error.

B. Appellant's Allegation of a Biased Jury

¶14 Appellant argues responses given by prospective jurors during jury selection demonstrated bias and resulted in a jury that could not be fair and impartial. Appellant's unsupported assertion does not specify which juror, question, or response resulted in a biased jury. Unless there are objective indications of jurors' prejudice, we will not presume its existence. *State v. Tison,* 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981). We have reviewed the jury selection transcript and find no evidence that a biased juror was permitted to sit.

C. Denial of Appellant's Request for a Mistrial

¶15 Appellant contends the trial court erred by denying his request for a mistrial after Detective Kincannon allegedly testified about Appellant's prior criminal record. On direct examination of Detective Kincannon, the following exchange took place:

> [THE PROSECUTER]: And how do you still remember that that individual is -- was [Appellant]?

> DETECTIVE KINCANNON: His size. He was very tall. Probably about six –- I'm estimating at this point probably anywhere between 6'3, 6'5. And at the time I believe his record that we had seen it was high two hundreds, high two hundreds in weight, his face is – hair is basically the same.

Following direct examination of Detective Kincannon, defense counsel moved for a mistrial, arguing that when the detective referred to Appellant's record, he was referring to Appellant's criminal record, and that reference was an indication Appellant had a criminal history. Defense counsel further asserted that "it's inappropriate for the jury to hear anything about my client having any kind of criminal record unless he decides to take the stand and that decision has not been [made]." In response, the prosecutor argued that the word "'record' is a vague term," and the detective did not mention prior crimes or use the words "felony," "misdemeanor," or "crime" when mentioning Appellant's "record." The prosecutor further argued that a mistrial would be premature and suggested a curative instruction might be appropriate. Defense counsel, however, did not request a curative instruction at that time, when the motion for a mistrial was later denied, or when final jury instructions were discussed, and the court did not provide the jury with a curative instruction.

¶16 In general, we review a trial court's ruling on a motion for a mistrial for an abuse of discretion. *State v.*

Moody, 208 Ariz. 424, 456, ¶ 124, 94 P.3d 1119, 1151 (2004); *State v. Dann,* 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003). A mistrial "is 'the most dramatic remedy for trial error and should [therefore] be granted only when it appears that justice will be thwarted unless . . . a new trial [is] granted.'" *Moody,* 208 Ariz. at 456, ¶ 126, 94 P.3d at 1151 (citing *Dann,* 205 Ariz. at 570, ¶ 43, 74 P.3d at 244 (quoting *State v. Adamson,* 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983))).

¶17 Although the record on appeal does not conclusively show that Detective Kincannon's reference to Appellant's "record" was a reference to a criminal record, we nonetheless do not approve of the detective's reference. However, we note that although prompted by the prosecutor, defense counsel made no attempt to seek the less drastic remedy of a curative instruction. Further, even assuming that the detective's reference was clearly improper, we generally defer to the trial court's judgment on the remedy for improper testimony because the trial judge is in the best position to assess the impact of a witness's statements on the jury. *Dann,* 205 Ariz. at 570, ¶ 43, 74 P.3d at 244 (citing *State v. Jones,* 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000)). Given the State's overwhelming evidence against Appellant, we find that the trial's atmosphere was not so tainted by the transitory error as to result in

injustice. *See State v. Hughes,* 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998); *United States v. Yarbrough,* 852 F.2d 1522, 1539 (9th Cir. 1988). Therefore, the trial court did not abuse its discretion, much less commit fundamental error, in denying Appellant's motion for a mistrial.

D. Ineffective Assistance of Counsel

¶18 Appellant argues his counsel did not adequately argue his motion for judgment of acquittal, *see* Ariz. R. Crim. P. 20, at the close of the State's case. This is an argument for ineffective assistance of counsel, which we do not address on direct appeal. *See State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (precluding the review of ineffective assistance of counsel claims on direct appeal). Instead, Appellant's claim regarding the adequacy of his counsel's argument must be raised in a petition for post-conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. *See id.*

¶19 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The

proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶20 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant 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.

III. CONCLUSION

¶21 Appellant's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Judge

_____/S/_____
PATRICK IRVINE, Judge