IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 02/17/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0076
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
HARRY MARK MARTIN,	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. No. CR2007-109756-001SE

The Honorable Lisa Ann VandenBerg, Judge *Pro Tem*

AFFIRMED

Thomas Horne, Arizona 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 Tennie B. Martin, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 Harry Mark Martin appeals his conviction for theft. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record, found no arguable question of law, and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but has not done so. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

FACTS AND PROCEDURAL HISTORY

¶2 In 2006, Sorenson Construction discovered that a John Deere backhoe was missing from its inventory and reported it stolen. The police report incorrectly stated that the backhoe was a 1985 model; it was actually a 1997 model.

¶3 In February 2007, Detective Sparman saw Martin driving a backhoe. He observed two young children riding unsecured in the cab and initiated a stop. After obtaining Martin's name and the backhoe's VIN, the detective ran the information through a police database and learned the backhoe had been reported stolen. Martin told the detective he had purchased the backhoe from a person named Jeff from Queen Creek. Detective Sparman offered to release Martin so he could obtain ownership

documentation, but Martin declined. Martin initially said the paperwork was in a filing cabinet at his home, but later stated it was in a friend's storage shed and would be difficult to locate. Martin was arrested. In the cab of the backhoe, the detective found a screwdriver that had apparently been used in lieu of a key. The ignition module "had been damaged with what was consistent with a screwdriver." Detective Sparman testified that a screwdriver can be "jammed in" the ignition to act as a key.

¶4 Martin was indicted on one count of theft, a class 2 felony, and one count of possession of burglary tools (the screwdriver), a class 6 felony. The original indictment alleged, *inter alia*, that Martin "without lawful authority, knowingly controlled SORENSON CONSTRUCTION's 1985 John Deere backhoe, of a value of $25,000 or more, but less than $100,000, knowing or having reason to know that the property was stolen." At some point, handwritten interlineations were made on the face of the original indictment, reflecting the following changes: (1) the theft charge was reduced to a class 3 felony; and (2) the backhoe's value was decreased to a range of $4,000 to $25,000.[1]

[1] These changes were made before trial. During voir dire, the trial court advised prospective jurors that the backhoe (still referred to as a 1985 model) had a value "of $4,000 or more, but less than $25,000."

¶5 A jury trial commenced. On the second day of trial, Sorenson employee Jeremy Bowles testified. He told the jury that Sorenson had never rented out this particular backhoe. Mr. Bowles testified that the model year for the stolen backhoe was 1997, and he provided the VIN. He estimated that, at the time of trial, the backhoe was worth $22,500, though it would have been worth more in 2006.

¶6 After Mr. Bowles was excused from the witness stand, the State moved to amend the indictment to allege the correct model year for the backhoe. Defense counsel objected, arguing he was not given notice of the different model year, which prejudiced defendant. The court ordered the parties to submit written briefs regarding the proposed amendment. Defense counsel did not do so. Instead, he again argued Martin would be prejudiced because the amendment would place the burden on the defense to prove the value of the backhoe. The court granted the State's motion, ordering the indictment amended "to reflect in Count 1, the John Deere backhoe shall be listed as 1997 and not 1985."

¶7 At the close of the State's case-in-chief, Martin moved for a directed verdict pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"). The court denied the motion.

¶8 The jury acquitted Martin of possession of burglary tools but found him guilty of theft, with the property having a

value of "$4,000.00 or More, But Less than $25,000.00." At sentencing, Martin was placed on probation for one year. This timely appeal followed.

DISCUSSION

¶9 We have read and considered the brief submitted by defense counsel and have reviewed the entire record. *Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Martin was represented by counsel at all critical phases of the proceedings. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

¶10 Defense counsel states, without elaboration, four "issues" that Martin wishes to raise: (1) insufficiency of the evidence; (2) actual innocence; (3) error in allowing amendment to the indictment; and (4) burden shifting.

A. Sufficiency of the Evidence[2]

¶11 In reviewing the sufficiency of the evidence, an appellate court does not re-weigh that evidence to determine

[2] We construe Martin's claim of actual innocence as one challenging the sufficiency of the evidence. *See* Ariz. R. Crim. P. 32.1(h).

whether it would reach the same conclusion as the original trier of fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Instead, it considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Montano*, 204 Ariz. 413, 423, ¶ 43, 65 P.3d 61, 71 (2003); *see also State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). All reasonable inferences are resolved against the appellant, and any conflicts in the evidence are resolved in favor of sustaining the judgment. *Guerra*, 161 Ariz. at 293, 778 P.2d at 1189; *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). To set aside a verdict due to insufficient evidence, it must clearly appear that "upon no hypothesis whatever is there sufficient evidence to support the conclusion reached" by the trier of fact. *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶12 Under Arizona Revised Statutes ("A.R.S.") section 13-1802(A)(5), "[a] person commits theft if, without lawful authority, the person knowingly . . . [c]ontrols property of another knowing or having reason to know that the property was stolen." Mr. Bowles testified that Sorenson Construction owned the backhoe. He said the company had not rented out the backhoe and had, in fact, reported it stolen. Detective Sparman

testified that a screwdriver had been used in the backhoe's ignition module, which had been damaged, and that thieves sometimes used screwdrivers in lieu of keys. The State established a prima facie case of guilt.[3] *See State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) ("Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.").[4]

B. Amended Indictment

¶13 Pursuant to Rule 13.5(b), a court may amend the charges "only to correct mistakes of fact or remedy formal or technical defects." "[T]he test to determine what amendments are constitutionally permitted is whether the amendment changes the nature of the offense charged or prejudices the defendant in any way." *State v. Sanders*, 205 Ariz. 208, 214, ¶ 19, 68 P.3d 434, 440 (App. 2003). An amendment changes the offense if it "propos[es] a change in factual allegations or a change in the legal description of the elements of the offense." *Id.* at 215, ¶ 25, 68 P.3d at 441.

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[3] Any arguable error in denying the Rule 20 motion as to the possession of burglary tools charge was harmless, as the jury acquitted Martin of this charge.

[4] During Martin's case-in-chief, the State elicited testimony from Bonnie Brown, Mr. Bowles's assistant, to the effect that Martin did not have permission to use the backhoe.

¶14 The State merely amended the model year of the backhoe. It did not seek to increase the backhoe's value over the range previously alleged. The value of the backhoe was not an element of the theft charge, *see* A.R.S. § 13-1802(A)(5), but merely established the class of felony committed. *See* A.R.S. § 13-1802(G). Defense counsel, in opening argument, told the jury the backhoe was worth $8,000. Similarly, Martin testified that he paid $8,000 for the backhoe--an amount well within the value range alleged by the State. Martin did not demonstrate any prejudice he suffered due to the amendment, and he has not explained how the change in model year improperly shifted the burden of proof to him.

CONCLUSION

¶15 We affirm defendant's conviction and sentence. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform defendant of the status 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, defendant shall have

thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Presiding Judge

/s/
MICHAEL J. BROWN, Judge