DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. DAVID SILVA, Appellant.	)	1 CA-CR 10-0368 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-145410-001DT

The Honorable George H. Foster, Jr., Judge

CONVICTION AFFIRMED, SENTENCING REMANDED

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K E S S L E R, Judge

¶1 David Silva ("Appellant") filed this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and

State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969), following his conviction of theft of means of transportation, a class 3 felony, under Arizona Revised Statutes ("A.R.S.") section 13-1814(A)(5) (2010).[1]

¶2 Finding no arguable issues to raise, Appellant's counsel requested that this Court search the record for fundamental error. Appellant was afforded the opportunity to file a *pro per* supplemental brief and presented the following issues: (1) insufficient evidence at trial; (2) receipt of excessive sentence; and (3) offer of an improper plea bargain.[2] Our review of the record revealed a non-frivolous argument that the trial court fundamentally erred in failing to conduct a colloquy upon defense counsel's stipulation to the existence of Appellant's prior felony convictions. Ariz. R. Crim. P. 17.6; *State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d 479, 480 (2007). For the reasons that follow, we affirm Appellant's conviction and remand for sentencing.

FACTUAL AND PROCEDURAL HISTORY

¶3 On July 11, 2009, Officers M. and H. were patrolling the area around 67th Avenue and Bethany Home Road. At 1:30 a.m., Officer H. observed one male and one female subject

[1] We cite the current versions of the applicable statutes when no revisions material to this decision have since occurred.

[2] Appellant also filed a Motion for Supplemental Briefing of Issues. We deny that motion, but address the issues raised in that motion.

walking northbound. The male subject looked back to a parking lot to the south and shouted "5-0's coming."[3] In response, Officers M. and H. pulled into the south parking lot where the warning was directed.

¶4 Officer H. testified that he observed Appellant exit the driver's side of a black Mercedes-Benz SUV, close the door, and walk briskly to a white sedan parked a few spaces away. Appellant crouched down near the sedan's front driver's side tire, and a female exited the passenger side of the SUV. The officers got out of their car, initiated contact, performed a consensual pat-down search of Appellant, and requested both Appellant and the female to sit on a parking block.

¶5 Officer H. provided the SUV's license plate information to dispatch. A search revealed that the vehicle had been reported stolen by its owner on July 3, 2009. Appellant was subsequently taken into custody.

¶6 During a search of the immediate area the officers located the keys to the SUV on the wheel well of the sedan next to where Appellant had been crouching. Police photographed the scene and dusted the SUV for prints. None of the prints were later matched to Appellant.

¶7 The SUV's registered owner, F.D., arrived at the scene

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[3] The term "5-0" is slang for police. The expression arose from the television show "Hawaii 5-0."

to pick up his vehicle. F.D. testified that when he arrived he saw no visible damage to the exterior or interior of the SUV. The only damage noted was to the key itself and the plastic ring located around the ignition switch.

¶8 Appellant was taken to the Glendale city jail where the officers read him his *Miranda* rights. Appellant denied being inside of the SUV, and claimed that he was crouching next to the sedan in order to dump his "G."[4]

¶9 In January 2010, a jury convicted Appellant of theft of means of transportation, and he was sentenced as a category three repetitive offender to a mitigated term of ten years. Appellant filed a timely appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, as well as A.R.S. sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

ANALYSIS

¶10 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567,

[4] The term "G" is slang for methamphetamine.

¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at ¶ 20. On review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

I. PRIOR CONVICTION STIPULATION

¶11 "When a defendant's sentence is enhanced by a prior conviction, the existence of the conviction must be found by the court." *Morales*, 215 Ariz. at 61, ¶ 6, 157 P.3d at 481. This is typically achieved through a hearing in which the State provides a certified copy of the conviction as well as proof that the defendant is the person identified in the document. *Id.* Such a hearing is not necessary, however, if counsel stipulates to the existence of the conviction. *Id.* at ¶¶ 7, 9. Instead, Arizona Rule of Criminal Procedure 17.6 requires that the court conduct a plea-type colloquy. *Id.* at ¶ 9.

¶12 Although the omission of the Rule 17.6 colloquy is considered fundamental error, it does not always necessitate resentencing. *Id.* at 62, ¶ 11, 157 P.3d at 482. "The colloquy serves to ensure that a defendant voluntarily and intelligently waives the right to a trial on the issue of the prior conviction. Given this purpose, . . . prejudice generally must

be established by showing that the defendant would not have admitted the fact of the prior conviction had the colloquy been given." *Id.* Where conclusive evidence of prior convictions is not in the record, remand for a determination of prejudice is appropriate. *State v. Geeslin*, 221 Ariz. 574, 579, ¶ 19, 212 P.3d 912, 917 (App. 2009), *vacated in part on other grounds*, 223 Ariz. 553, 225 P.3d 1129 (2010).

¶13 In this case, Appellant stipulated to two prior felony convictions in exchange for a dismissal of the aggravation allegation that the crime was committed while on release. Based on the stipulation and possibly two earlier felony convictions mentioned in the presentence investigation report, Appellant was sentenced as a category three repetitive offender.[5] *See* A.R.S. §§ 13-105(22)(d) (2010), -703(C) (Supp. 2010). The State, however, did not prove any of the alleged felony convictions, and the trial court failed to conduct the required colloquy.

[5] The prior convictions read into the record by the State at sentencing were: (1) Cause Number CR 2005-129440-001, criminal trespass in the first degree, a class 6 designated felony; and (2) Cause Number CR 2003-014191-001, criminal trespass in the first degree, a class 6 designated felony. It is possible the 2003 conviction did not qualify as a prior historical felony based on time of occurrence. *See* A.R.S. § 13-105(22)(c). It is unclear whether the trial court relied on any other prior convictions since it referred to only the two stipulated convictions in the sentencing minute entry.

Given the lack of any record disproving prejudice,[6] we remand to the trial court to determine whether Appellant understood the rights he was waiving and the consequences of the stipulation. On remand, the court should also consider whether Appellant qualified as a category three repetitive offender per A.R.S. §§ 13-105(22) and -703(C). If prejudice is shown, or he is not a category three repetitive offender, Appellant's sentence must be vacated and he must be resentenced. The State, however, will be given the opportunity to prove the prior convictions at that time. *State v. Osborn*, 220 Ariz. 174, 179, ¶ 14, 204 P.3d 432, 437 (App. 2009).

II. SUFFICIENCY OF THE EVIDENCE

¶14 Appellant argues there was insufficient evidence to support his conviction of theft of means of transportation. In reviewing a claim of the sufficiency of the evidence, we review the evidence presented at trial "only to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Substantial evidence has been described as more than a "mere scintilla and is that which reasonable persons could accept as

[6] "[R]emand has not been ordered in Rule 17 cases only where, as in *Morales*, the record on appeal was sufficient to *disprove* prejudice." *Carter*, 216 Ariz. at 291, ¶ 22, 165 P.3d at 692 (emphasis added). Here, the record contains the "State's Allegation of Historical Priors," a statement of the stipulated convictions read by the State at sentencing, and the presentence report.

sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997) (internal quotation marks omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶15 There is evidence in the record to support the jury's conviction of Appellant for the crime of theft of means of transportation. To obtain a conviction, the State must show that Appellant: (1) without lawful authority; (2) knowingly controls; (3) "another person's means of transportation"; (4) "knowing or having reason to know that the property is stolen." A.R.S. § 13-1814(A)(5).

¶16 First, there is sufficient evidence to support the jury's finding that the vehicle belonged to another person and was taken without lawful authority. F.D. testified that he was the registered owner of the black Mercedes-Benz SUV, that the vehicle was taken without his permission, and that it was reported stolen on July 3, 2009.

¶17 Second, while there is no direct evidence that Appellant controlled the vehicle, circumstantial evidence is available. The evidence includes testimony that Appellant

exited the driver's seat of the SUV and crouched down near an adjacent sedan's front driver's side tire, and that the keys to the stolen SUV were located on the wheel well of the sedan next to where Appellant had been crouching. Based on this testimony the jury could reasonably conclude that Appellant had been in possession of the keys to the stolen SUV, that he had placed them in the wheel well of the sedan, and that his attempt to hide them was an assertion of control.

¶18 The jury could find the final element, knowing or having reason to know that the property is stolen, based on the permissible inferences relating to theft.[7] "Proof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft." A.R.S. § 13-2305(1) (2010); *State v. Alfaro*, 127 Ariz. 578, 580, 623 P.2d 8, 10 (1980) (invoking the inference requires unexplained possession and recently stolen property). The evidence presented at trial established that the SUV was reported stolen eight days prior to Appellant's arrest. *See State v. Jones*, 125 Ariz. 417, 420, 610 P.2d 51, 54 (1980) (finding two months to be sufficiently recent to "trigger the statutory inference"). In addition, "[t]he

[7] "The inferences set forth in § 13-2305 apply to any prosecution under subsection A, paragraph 5 of this section." A.R.S. § 13-1814(B).

record also discloses no evidence which might constitute an explanation of [A]ppellant's possession of the property." *Alfaro*, 127 Ariz. at 580, 623 P.2d at 10. Based on this information, we find there was sufficient evidence to trigger the statutory inference.

¶19 In comparing the evidence in the record to the elements listed in the statutes, we find there was sufficient evidence to support the jury's conviction of Appellant for theft of means of transportation.

III. RECEIPT OF EXCESSIVE SENTENCE

¶20 Appellant received a mitigated term of ten years.[8] He asserts that his sentence is excessive.

¶21 "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within the statutory limits, as [Appellant's] is, unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003). As the court duly considered the evidence presented at sentencing, we do not believe that it abused its discretion by imposing a mitigated sentence subject

[8] Appellant was sentenced as a category three repetitive offender under A.R.S. § 13-703(J). The mitigated sentence for a class 3 felony for a category three repetitive offender is 7.5 years, the presumptive term is 11.25 years, and the aggravated sentence is 25 years. A.R.S. § 13-703(J).

to a redetermination on remand concerning the stipulation and other alleged prior felonies. *See supra* ¶ 13.

IV. IMPROPER PLEA BARGAIN

¶22 Appellant originally faced two separate trials for CR 2009-145410-001 (theft of means of transportation) and CR 2008-159532-001 (domestic violence).[9] Appellant claims that the prosecution erred in combining the charges for one plea bargain. He argues he should have received a separate plea for bargain the charge of theft of means of transportation.

¶23 "It is well settled that criminal defendants have no constitutional right to a plea agreement and the state is not required to offer one." *State v. McKinney*, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996), *superseded by statute on other grounds as noted in State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000). "No constitutional provision prevents the full prosecution of all criminal law violators, so long as such prosecution is not tainted with invidious discrimination." *Murgia v. Municipal Court*, 540 P.2d 44, 46-47 (Cal. 1975). With no right to a plea bargain, and no indication in the record of prosecutorial misconduct, we find Appellant's allegation to be without merit.

[9] CR 2008-159532-001 was dismissed without prejudice prior to jury selection.

CONCLUSION

¶24 For the foregoing reasons, we affirm Appellant's conviction and remand for further proceedings consistent with this decision.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
MICHAEL J. BROWN, Judge