DIVISION ONE
FILED: 07/14/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0572
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MARK DURAN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-136973-001 DT

The Honorable Barbara L. Spencer, Judge *Pro Tempore*

AFFIRMED

Thomas C. 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 Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

Mark Duran — Buckeye
Appellant

B R O W N, Judge

¶1 Mark Duran appeals his conviction and sentence for one count of theft of means of transportation. Counsel for Duran 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. Duran was granted the opportunity to file a supplemental brief *in propria persona*, and he 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 Duran. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

BACKGROUND

¶3 In June 2010, Duran was indicted for 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).[1] The following evidence was presented at trial.

¶4 In June 2009, the victim's Chevrolet Suburban was stolen from his place of employment. The victim's boss alerted

[1] Absent material revision after the date of the alleged offense, we cite the statute's current version.

the victim to the theft after he saw the vehicle being driven off the business property by a person wearing a light-colored baseball hat. The victim borrowed his boss's truck to chase after his vehicle while his boss called 9-1-1 to report the theft.

¶5 Officer Stockton received an emergency broadcast that a gray Chevrolet Suburban with a lifted suspension had been stolen. He saw a truck matching that description parked at a gas station and confirmed it was the vehicle he was looking for. After waiting a few minutes, Officer Stockton observed a man wearing a white baseball hat approach the vehicle to pump gas into it. At that time, Officer Stockton drew his weapon and, with the help of two undercover officers, arrested Duran. Officer Stockton read Duran his *Miranda*[2] rights and asked Duran if he was driving the truck. Duran responded that he was "stupid" and just wanted to cruise around. When asked if he had permission to borrow the truck on that day, Duran answered in the negative. Stockton asked Duran if he had the keys to the vehicle, and he said "no, I [hot-wired] it."

¶6 Meanwhile, other officers located the victim and took him to the gas station, where he identified the vehicle as his. The victim also found that his ignition and tilt steering had

[2] *Miranda v. Arizona,* 384 U.S. 436. (1966).

been internally broken where previously there had been no damage to these areas. At trial, the victim testified that he did not give Duran permission to borrow his vehicle nor had he ever given him permission.

¶7 The jury found Duran guilty of theft of means of transportation. The trial court found that the State met its burden of proving that Duran had one prior historical felony conviction and the court sentenced Duran to a "slightly mitigated term" of six years' imprisonment with 181 days of presentence incarceration credit. This timely appeal followed.

DISCUSSION

¶8 Through counsel, Duran requested consideration of eight issues. Additionally, Duran filed a one-page supplemental brief. Each of the matters discussed in the supplemental brief fall within one or more of the eight issues raised by counsel; thus, we need not separately address the supplemental brief.

¶9 Duran asserts that his counsel was ineffective by failing: (1) to represent him to the "full extent" at trial; (2) to investigate the claim that he waived a constitutional right; (3) to use the closing statement he submitted; and (4) to inform him when he could testify at trial. However, these issues are not properly before us. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (recognizing that claims of ineffective assistance of counsel are not considered on direct appeal

regardless of merit). Such claims must be first presented to the trial court in a petition for post-conviction relief. *Id*.

¶10 Duran next argues that his Fifth Amendment right against self incrimination was violated because police failed to read him his *Miranda* rights. As a result, Duran asserts that the court should have suppressed all incriminating statements. We review the trial court's ruling admitting a defendant's statements over his objection for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 126, ¶ 25, 140 P.3d 899, 909 (2006).

¶11 At the voluntariness hearing, Officer Stockton testified that he read Duran his *Miranda* rights from a standard card after handcuffing Duran and before questioning him. Based on this testimony, the court concluded that Duran received proper *Miranda* warnings. Although Duran attempted to refute this testimony, we defer to the trial court's credibility determination. *See State v. Gallagher*, 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991) (finding that the credibility of a witness is for the trier of fact).

¶12 Duran further contends that even if he received the *Miranda* warnings, "police only asked if he understood those rights," which he "never waived." "To satisfy *Miranda,* the State must show that [the defendant] understood his rights and intelligently and knowingly relinquished those rights before custodial interrogation began." *State v. Tapia,* 159 Ariz. 284,

286-87, 767 P.2d 5, 7-8 (1988). "A defendant does not even have to expressly state that he will waive his rights, so long as he answers the questions freely and does not attempt to terminate the interrogation." *State v. Stabler,* 162 Ariz. 370, 376, 783 P.2d 816, 822 (App. 1989).

¶13 Here, Officer Stockton testified that after administering the *Miranda* warning, Duran responded to his questions and never invoked his right to remain silent or otherwise requested that the interrogation cease. The officer observed no signs of impairment and testified that Duran appeared to understand his questions. Moreover, there is no indication that Duran was coerced, threatened, or forced to answer any questions. To the extent Duran's testimony contradicted these facts, we defer to the trial court's decision to give more weight to the officer's testimony. *See Gallagher*, 169 Ariz. at 203, 818 P.2d at 188.[3] Based on this record, we find no error in the trial court's finding that Duran was read

[3] Although the trial court excluded one inculpatory statement made by Duran before he received the *Miranda* warning, the trial court determined that the post-*Miranda* statements were admissible because the police did not act deliberately to undermine *Miranda*, the post-*Miranda* statements were uncoerced, and Duran's waiver was valid. *See State v. Zamora*, 220 Ariz. 63, 70, ¶ 18, 202 P.3d 528, 535 (App. 2009) (finding that a trial court must decide deliberateness in undermining *Miranda*, absent any such deliberateness, uncoerced post-*Miranda* statements are admissible).

his *Miranda* warnings, waived his rights, and that his confessions were freely and voluntarily made.

¶14 Duran next argues that the prosecution only proved mere presence at the gas station and never presented direct evidence identifying Duran with the Suburban. We review the sufficiency of the evidence presented at trial only to determine if "substantial evidence" exists to support the verdict. *State v. Stroud,* 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Evidence is sufficient when it is "more than a [mere] scintilla" and is such proof as could convince reasonable persons of a defendant's guilt beyond a reasonable doubt. *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981). The substantial evidence required to warrant a conviction may be either circumstantial or direct. *State v. Mosley,* 119 Ariz. 393, 402, 581 P.2d 238, 247 (1978).

¶15 Here, based on the testimony of the victim and the officers, we find substantial evidence in the record to support the jury's verdict. Duran was at the gas station with a vehicle that had been stolen approximately ten minutes prior and he matched the description of the person who stole the vehicle. Furthermore, Duran admitted that he did not have permission to use the vehicle, and informed Officer Stockton that he had "wired" it. Under these circumstances, a reasonable jury could

conclude that Duran was guilty of theft of means of transportation.

¶16 Duran also challenges the credibility of the victim's testimony. He argues that the victim was "untruthful" when he testified that he saw an officer place Duran's items into a baseball hat. However, "the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). We do not reweigh this evidence on appeal. *Tison*, 129 Ariz. at 552, 633 P.2d at 361.

¶17 Lastly, Duran claims that his fiancée overheard the prosecutor coach a witness on what needed to be said, and his attorney failed to address this issue. Our review of the record reveals no support this assertion. Furthermore, even if there were support in the record for Duran's assertion, it would necessarily implicate whether counsel was ineffective at trial, which we cannot address here. *Spreitz,* 202 Ariz. at 3, ¶ 9, 39 P.3d at 527.

¶18 We have searched the entire record for fundamental error and find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows that Duran was present and represented by counsel at all pertinent stages of the proceedings, was afforded the

opportunity to speak before sentencing, and the sentence imposed was within statutory limits. Accordingly, we affirm Duran's conviction and sentence.

CONCLUSION

¶19 Upon the filing of this decision, counsel shall inform Duran 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). Duran 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/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Presiding Judge

/s/

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DONN KESSLER, Judge