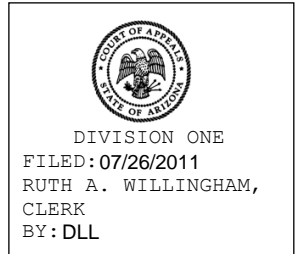


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0691
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
KIRK CHARLES POEPPE,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-155829-001DT

The Honorable Steven P. Lynch, Judge *Pro Tempore*

AFFIRMED IN PART, VACATED IN PART, REMANDED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

Kirk Charles Poeppe Buckeye
Appellant

B A R K E R, Judge

¶1 Kirk Charles Poepppe appeals from his convictions and sentences for shoplifting with two or more predicate convictions, a class 4 felony; and trafficking in stolen property in the first degree, a class 2 felony. Poepppe was sentenced on July 30, 2010, and timely filed a notice of appeal on August 19, 2010. Poepppe's counsel 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 this court that after searching the entire record on appeal, she finds no arguable ground for reversal. Poepppe was granted leave to file a supplemental brief *in propria persona* on or before June 6, 2011. On June 1, 2011, Poepppe filed a supplemental brief raising several points of error. Additionally, as there appeared to be an error in sentencing on the shoplifting count, we ordered briefing on that issue. The State conceded error.

¶2 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010). We are required to search the record for reversible error. We affirm both convictions and affirm the sentence on the trafficking in stolen property conviction. However, as the State concedes, the trial court erred in pronouncing sentence as to the shoplifting conviction.

Therefore, we vacate the sentence on that count and remand for resentencing on the shoplifting conviction.

Facts and Procedural Background¹

¶3 On August 19, 2009, two police officers observed Poeppe entering a Sam's Club. The officers followed Poeppe into the store and observed him enter the area where liquor was displayed for sale. One officer then saw Poeppe carrying two bottles, at least one of which contained an amber-colored liquid. They observed Poeppe move as if he was lifting up his shirt and then adjusting it back down. The officer continued to follow Poeppe, noticing that he was no longer carrying the bottles.

¶4 Poeppe exited the store and entered a vehicle as a passenger. An officer observed Poeppe stop at a residence and exit the vehicle carrying a black bag. Poeppe met with some people standing in front of the house for a few minutes and returned to the car.

¶5 The car then parked at a second address. The officers did not see what transpired there, but later some officers met with a resident of the home and recovered a bottle of tequila. The serial number on the bottle that was recovered was two

¹ We review the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Poeppe. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

numbers off from the serial number of a bottle displayed at the Sam's Club where the officers had observed Poeppe. The Sam's Club had also done an inventory of their merchandise around the time of the incident, which revealed that two bottles of tequila were missing. After Poeppe's arrest, he was read his *Miranda* warnings. About an hour later at the police station, Poeppe admitted to stealing the two bottles of tequila and selling them for \$10 per bottle. Prior to the interview, Poeppe had asked the officer if the officer would be able to offer him a "deal," but the officer told Poeppe that he "didn't make any deals" and that he "didn't have anything to offer him."

¶6 At trial, the State presented evidence that Poeppe had been convicted twice of felony shoplifting in the previous five-year period. The jury found Poeppe guilty of both shoplifting with two or more predicate convictions and trafficking in stolen property in the first degree. After a hearing on priors, the court found that Poeppe had two prior felonies that could be used for sentencing purposes. At the sentencing hearing, the trial judge sentenced Poeppe to a "mitigated" term of twelve years for both offenses to be served concurrently. Poeppe timely appealed.

Discussion

¶7 In his supplemental brief, Poeppe raises several points of error. We discuss each in turn and also consider

whether error was committed during sentencing.

1. Constitutionality of the Crime of Shoplifting with Two or More Predicate Convictions

¶18 Poeppe argues that the crime of shoplifting with two or more predicate convictions is unconstitutional because it is unfairly prejudicial to the defendant to expose the defendant's past crimes to the jury. Poeppe asserts that this exposure lessens the State's burden of proof to less than beyond a reasonable doubt. He also argues that the prejudice caused by exposing the defendant's past crimes should require a bifurcated trial for the past crimes and the current crime.

¶19 Although it is a violation of the Rules of Evidence to present testimony when its probative value is outweighed by unfair prejudice, Ariz. R. Evid. 403, "evidence of defendant's other crimes is admissible if it tends to prove an essential element of the crime charged." *State v. Keith*, 24 Ariz. App. 275, 277, 537 P.2d 1333, 1335 (1975). As to Poeppe's request for a bifurcated trial, when "the issue for which the defendant seeks a separate trial is an element of the crime charged bifurcation to avoid the 'prejudice' caused by proof of one element of the offense is inappropriate." *State ex rel. Romley v. Superior Court*, 171 Ariz. 468, 470, 831 P.2d 844, 846 (App. 1992). Therefore, neither the statute nor the trial court violated Arizona law or Poeppe's right to a fair trial by

permitting evidence of Poeppe's prior crimes to be presented to the jury.

2. Permissibility of Testimony as to Poeppe's Transfer of the Alcohol

¶10 Poeppe next argues that the testimony at trial about the officers' recovery of the alcohol from a third party violated his rights under the corpus delicti doctrine. Under this doctrine, before a defendant's confession of a crime is admitted as evidence, the State must provide independent proof that a crime was committed. *State v. Sarullo*, 219 Ariz. 431, 434, ¶ 7, 199 P.3d 686, 689 (App. 2008). Poeppe argues that the State presented no evidence, aside from his confession, that he actually sold the stolen alcohol. Therefore, his conviction for trafficking in stolen property would be improper.

¶11 While Poeppe is correct that the State did not produce independent evidence that he sold the alcohol in question, the crime of trafficking in stolen property does not require actual sale for conviction. Section 13-2301(B)(3) states that to "traffic" means:

to sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person, or to buy, receive, possess or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person.

(Emphasis added.) Thus, evidence of the transfer was all that was needed to convict Poeppe under the trafficking statute. This evidence was provided by the recovery of a bottle from a third party matching the description of the alcohol stolen by Poeppe after the officers observed Poeppe entering the residence of the party after the theft. Therefore, the trial court did not err on this ground.

3. *Whether Poeppe's Right to Testify Was Violated by His Counsel Threatening to Withdraw if He Testified*

¶12 Poeppe argues that he was denied his Fifth Amendment right to testify at trial because his attorney allegedly threatened to withdraw if Poeppe insisted on testifying at trial. Our review of the record does not reveal any point at which the court denied Poeppe his right to testify. To the extent that Poeppe claims that his attorney acted improperly, these issues are properly brought as an ineffective assistance of counsel claim. Such claims must be raised in a Rule 32 motion and cannot be raised on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

4. *Requirement of Court to Give Requested Defense Instruction*

¶13 Poeppe claims that he was entitled to a defense instruction stating:

An accused may not be convicted on his own uncorroborated confession before a person's incriminating statement can be used as evidence. The State must present proof that

a crime has occurred and that someone is responsible for that crime, or in other words, the State must present proof that one committed the crime with which the defendant is charged.

The trial court denied this instruction, stating that it would be confusing to the jury.

¶14 Although a defendant is entitled to a jury instruction if the defense theory is supported by the evidence, a party is not entitled to an inaccurate, misleading, or confusing instruction. See *State v. Valenzuela*, 114 Ariz. 81, 84, 559 P.2d 201, 204 (App. 1977). In Arizona, “[a]pplication of the corpus delicti rules is for the trial court,” and the court’s ruling is left to its discretion. *State v. Jones*, 198 Ariz. 18, 23, ¶ 13, 6 P.3d 323, 328 (App. 2000). Here, the trial court had already ruled in a prior motion that the corpus delicti doctrine was satisfied. Therefore, the court properly ruled that a jury instruction as to the doctrine, although an accurate statement of the law, could be misleading and confusing to the jury.

5. Whether the Prosecution Knowingly Used False or Perjured Testimony

¶15 Poeppe claims that the State knowingly presented false or perjured testimony because the police testified that they followed Poeppe into the Sam’s Club, but a video surveillance tape of the incident does not show them entering the store. One

of the officers, however, testified that he was in plain clothes during the incident where they were tracking Poeppe. The surveillance video reveals that other people were present in the store where Poeppe took the bottles. Because we view the evidence in the light most favorable to supporting the verdict, *Fontes*, 195 Ariz. at 230, ¶ 2, 986 P.2d at 898, we do not interpret the tape as proving that the officers were not present in the store. Therefore, there is no error on this ground.

6. *Whether the State Could Establish Prior Convictions Without Fingerprint Verification*

¶16 Poeppe claims that the trial court improperly based its finding of his two prior felony offenses on testimonial evidence at the priors hearing. Poeppe argues that, under *State v. Lee*, 114 Ariz. 101, 105-06, 559 P.2d 657, 661-62 (1976), "[t]he proper procedure to establish the prior conviction is for the state to offer in evidence a certified copy of the conviction and establish the defendant as the person to whom the document refers." Poeppe is correct that this is the proper standard, but here the State met that standard. The State introduced into evidence copies of the certified minute entries. Because the fingerprinting expert could not conclusively determine whether the fingerprints on the minute entries matched Poeppe's, the State called as a witness the individual who

served as Poeppe's probation officer for the two prior convictions. There was no error.

7. Sufficiency of the Evidence for Trafficking in Stolen Property

¶17 Poeppe argues that the State presented insufficient evidence to convict him of trafficking in stolen property. We reverse a conviction based on a claim of insufficient evidence "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). The evidence supporting the verdict may be direct or circumstantial in nature. *See State v. Arredondo*, 155 Ariz. 314, 317, 746 P.2d 484, 487 (1987).

¶18 The crime of trafficking in stolen property in the first degree requires the State to prove that the defendant: (1) "knowingly initiates, organizes, plans, finances, directs, manages or supervises," (2) "the theft and trafficking in the property of another," (3) "that has been stolen." A.R.S. § 13-2307(B). "Trafficking" requires that the defendant "sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person, or to buy, receive, possess or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person." A.R.S. § 13-2301(B)(3).

¶19 Here, the State presented evidence that Poeppe stole property. The testimony of the officers was that Poeppe was seen in the store taking alcohol, moving his clothes around, leaving the store, and visiting a house where officers later found a bottle of tequila with a serial number close in number to those in the display where he was seen taking the bottles. This testimony constitutes sufficient evidence to infer that he stole the alcohol. When Poeppe walked into the store to take the bottles, this was sufficient evidence to show that he initiated the theft. Finally, when the officers observed him visiting a household after the theft and later recovered the stolen bottle of alcohol from the household, this was sufficient evidence from which the jury could infer that Poeppe transferred the stolen property to a third party. Therefore, the State presented sufficient evidence from which the jury could convict Poeppe of trafficking in stolen property.

8. *Voluntariness of Confession*

¶20 Finally, Poeppe argues that his confession was involuntary because it was a result of the officers' implied promise that he would receive a lenient sentence and because the officers gave false and misleading statements as to the extent that the surveillance video implicated Poeppe. Poeppe points us to no implied promises and we have found none.

¶121 As to the alleged "deception" that occurred when the police stated that the surveillance video showed Poeppe shoplifting, the video clearly shows Poeppe taking bottles of alcohol from the display. Thus, it is not clear that the officer's statements to Poeppe were deceptive. Even if they were, "A statement induced by fraud or trickery is not made involuntary unless there is additional evidence indicating that the defendant's will was overborne or that the confession was false or unreliable." *State v. Winters*, 27 Ariz. App. 508, 511, 556 P.2d 809, 812 (1976). Poeppe has not shown any such evidence. Therefore, it was not error to admit his confession.

9. Sentencing

¶122 As stated above, Poeppe was convicted of count 1, shoplifting with two or more predicate offenses, a class four felony; and count 2, trafficking in stolen property in the first degree, a class two felony. The court found that Poeppe had two historical prior felony convictions, and therefore Poeppe was categorized as a category three repetitive offender. A.R.S. § 13-703(C) (2009). At sentencing, the court stated:

Based on the totality of the circumstances, I think that the criminal history has to be considered an aggravating factor. But I think that Defense counsel has put on the record a number of mitigating factors. I think that the disparity between the codefendants who had similar type of criminal history is also something the Court needs to consider.

Based on the totality of the circumstance, I'm going to sentence the Defendant to a mitigated term of 12 years in the Department of Corrections with credit for the 345 that he's already been in custody.

The sentencing minute entry read:

AS PUNISHMENT IT IS ORDERED Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

Count 1: 12 year(s) from July 30, 2010
Presentence Incarceration Credit: 345 day(s)
Mitigated
Sentence is concurrent with Count 2.

Count 2: 12 year(s) from July 30, 2010
Presentence Incarceration Credit: 345 day(s)
Mitigated
Sentence is concurrent with Count 1.

¶123 Count 2 was a class 2 felony, which for a category 3 repetitive offender had a mitigated term of 10.5 years, a minimum term of 14 years, and a presumptive term of 15.75 years. A.R.S. § 13-703(J). Count 1 was a class 4 felony, which for a category 3 repetitive offender had a mitigated term of 6 years, a minimum term of 8 years, a presumptive term of 10 years, and a maximum term of 12 years. *Id.* The trial judge stated in both the sentencing transcript and the sentencing minute entry that Poeppe was to receive a mitigated sentence. Despite this, the sentence for the class 4 felony was at the maximum end of the sentencing range. The sentence for the class 2 felony was

between the mitigated term of 10.5 years and the minimum term of 14 years.

¶124 The State concedes that the court erred on this point. We therefore vacate the sentence on the shoplifting count and remand for resentencing.

Conclusion

¶125 We have reviewed the record and have found no meritorious grounds for reversal of Poeppe's convictions on the trafficking sentence. See *Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We vacate and remand for resentencing on the shoplifting count only. Poeppe was present at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure.

¶126 After the filing of this decision, counsel's obligations in this appeal have ended subject to the following. Counsel need do no more than inform Poepppe of the status of the appeal and Poepppe's 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). Poepppe 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.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge