DIVISION ONE
FILED: 09/29/2011
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. CHRISTOPHOER JERRY TWINE, Appellant.	)	1 CA-CR 11-0110 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-106724-002 SE

The Honorable Daniel G. Martin, Judge

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 Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

B A R K E R, Judge

¶1 Christopher Jerry Twine appeals from his conviction and sentence for shoplifting with artifice or device, a class 4 felony. Twine was sentenced on January 20, 2011, and timely filed a notice of appeal on February 8, 2011. In accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), counsel for Twine searched the entire record on appeal and filed a brief advising this court that he found no arguable ground for reversal. He requested this court search the record for fundamental error.

¶2 Although stating no error occurred, counsel noted the absence of a colloquy as to priors between the trial court and Twine at the time of the sentencing. In addition to this issue, counsel for Twine raised two issues on Twine's behalf. First, the issue of whether the verdict was supported by the evidence, given that it was his accomplice, rather than Twine, that placed the items of clothing on the separate clothing racks prior to removing them from the store. Second, the issue of a wrongful conviction because the City of Tempe considers shoplifting a felony when the value of items removed exceeds $1000. Twine argues that anything below $1000 should be considered a misdemeanor, a charge to which he was entitled. Twine was granted leave to file a supplemental brief *in propria persona* on or before August 1, 2011, however, Twine did not do so.

¶3 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 12-4033(A) (2010). We are required to search the record for reversible error. Finding no such error, we affirm.

Facts and Procedural History

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

¶5 On October 3, 2009, just after 5 p.m., George P. and David B. were working the same shift as Neiman Marcus loss prevention officers. George P. was monitoring the cameras from the camera room. Shortly after 5 p.m., he observed two males enter the store and subsequently meet up inside. They selected items of clothing, placed them on a separate rack, and combined the items each had selected with the other's selections. Thereafter, one of the males removed a "black trash bag" from his pocket, placed the bag on the floor, and both males began to place the selected items of clothing into the bag. Twine then picked up the bag with the items in it. Both males left the store through the mall exit. Twine was then observed holding the bag outside the store.

¶6 George P. and David B. went around to the mall exit and confronted the two males. George P. and David B. identified themselves as store security. One of the males immediately surrendered, while Twine dropped the bag and ran. David B. pursued Twine, while George P. took inventory of the items in the discarded bag and observed that the items were Neiman Marcus merchandise.

¶7 Officer Kyle T. was dispatched to Neiman Marcus at 5:20 p.m. on October 3, 2009, in response to a shoplifting call. Upon arriving at the scene, Officer Kyle T. examined the contents of the bag outside the store and aided George P. in inventorying the items, concluding that the value of the items "prior to tax" was $930. Officer Moser J. was dispatched to the same call and, while en route, was advised of a foot pursuit. When Officer Moser J. arrived, he took Twine, who had been detained by David B., into custody. Because he began complaining of chest pain, Twine was transported to Tempe St. Luke's Hospital. At the hospital, Twine was read his rights and arrested. The State charged him with one count of shoplifting with artifice or device, a class 4 felony.

¶8 At trial, the video recording of the entire ordeal, which shows Twine and the other male picking out the items and "exiting the store with the unpaid merchandise," along with the still images taken from the video, were entered into evidence

and published to the jury. When asked about the use of the bag on the witness stand, Officer Moser J. testified that, in his experience, he commonly came across individuals using bags to carry a larger number of items than would otherwise be possible.

¶9 After Officer Moser J. testified, both the State and the defense rested, and the defense made a Rule 20 motion, which the court denied. Twine absconded after the jury read the verdict. The court proceeded to the aggravation phase, which was completed without Twine. Prior to sentencing, Twine was apprehended and charged with an offense arising from his departure from the court. (CR 2010-159968-001 DT, hereafter "968 matter") He entered a plea as to that matter.

¶10 At the sentencing phase, because Twine had admitted two prior felony convictions to the trial court in the 968 matter, the State was of the opinion that clear and convincing evidence of their existence was available in this case. Defense counsel stated that he "discussed it with Mr. Twine" and that "[Mr. Twine] doesn't desire to have a trial on his priors." The court replied that since Twine "admitted to the two prior felony convictions in connection with the [CR 2010-]159968 matter, that priors are established for purposes of the [CR 2010-]106724 matter by clear and convincing evidence." The trial court gave the defense an opportunity to discuss this issue further; however, the defense consented, stating it had no issues.

Disposition

¶11 We examine the two issues raised by Twine through his counsel first, followed by the issue of colloquy at the sentencing phase.

1. Sufficiency of the Evidence and Improper Charge

¶12 Twine claims that the verdict was not supported by the evidence. Evidence is sufficient if "there is substantial evidence to support the guilty verdict." *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984). To satisfy this, a "rational trier of fact" must be able to find guilt beyond a reasonable doubt. *Id.* "In reviewing sufficiency of the evidence, we examine the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Reinhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

¶13 Twine was convicted of shoplifting with artifice or a device under A.R.S. § 13-1805 (2010).[1] The trial judge read the instruction as to this charge as follows:

> The crime of shoplifting with artifice or device requires the State to prove that the defendant: One. Was in an establishment in which merchandise was displayed for sale; and Two. While in the establishment, knowingly obtained goods of another with the intent to deprive the other person of such

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

> goods by: A. Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price, or B. Concealment; and Three. While in the course of shoplifting, used an artifice, instrument, container, device, or other article with the intent to facilitate shoplifting.

The instruction accurately stated the law. The video evidence and related evidence presented by the State established these elements. Twine's claim that it was merely his accomplice who removed the clothing items from the racks is contradicted by the testimony of the loss prevention officer. Accordingly, the jury had sufficient evidence to convict Twine.

¶14 Next, Twine claims that he should have been charged with a misdemeanor. Shoplifting of an amount below $1000 is ordinarily a misdemeanor in Arizona. A.R.S. § 13-1805(H). However, when the act of shoplifting is accompanied by either two or more prior felonies, or by the use of an artifice or device, the shoplifting is elevated to a class 4 felony. A.R.S. § 13-1805(I). Thus, Twine was appropriately charged by the State.

2. Absence of the Colloquy

¶15 With certain exceptions, the Arizona Rules of Criminal Procedure require the court to address the defendant and determine that the decision to forego his constitutional right to trial on the prior convictions is voluntary and intelligent, and to advise the defendant of the consequences of his actions.

Ariz. R. Crim. P. 17.2 and 17.3. This colloquy "serves to ensure that a defendant voluntarily and intelligently waives the right to a trial on the issue of the prior conviction." *State v. Morales*, 215 Ariz. 59, 62, ¶ 11, 157 P.3d 479, 482 (2007). The complete absence of a colloquy is fundamental error. *Id.* at 61, ¶ 10, 157 P.3d at 481. However, the absence of a colloquy does not automatically entitle the defendant to resentencing: "[P]rejudice 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.* at 62, ¶ 11, 157 P.3d at 482.

¶16 In *Morales*, the defendant's prior convictions were stipulated to by the State and the defense attorney. *Id.* at 60-61, ¶ 4, 157 P.3d at 480-81. Despite there being no colloquy at sentencing, the Arizona Supreme Court held that the error was inconsequential as the evidence of the prior convictions was already in the record, and neither party challenged its authenticity. *Id.* at 62, ¶ 13, 157 P.3d at 482. Because the prior convictions of the defendant were already present in the record prior to the sentencing phase, there would have been no reason for an order of resentencing only to have the same convictions admitted into the record once again. *Id.*

¶17 Similar to the prior convictions in *Morales*, there was evidence before the court of the priors here. Twine accepted a

plea offer in the 968 matter in which he expressly admitted the priors. Although not admitted into evidence in this case, the parties and the trial court were aware of it, and the trial court essentially took judicial notice of it. Thus, the lack of a colloquy did not prejudice Twine.

Conclusion

¶18 We have reviewed this matter for fundamental error. *See Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Twine was present and represented by counsel at all critical stages of the proceedings, except those from which he voluntarily absented himself. All proceedings were appropriately conducted in accordance with the Arizona Rules of Criminal Procedure. Accordingly, we affirm.

¶19 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 Twine 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). Twine 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/
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DANIEL A. BARKER, Judge

CONCURRING:

/s/
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PETER B. SWANN, Presiding Judge

/s/
_____
PATRICIA K. NORRIS, Judge