IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALEX ORTEGA,
Appellant.

No. 2 CA-CR 2016-0218
Filed May 10, 2017

Appeal from the Superior Court in Pinal County
No. S1100CR201500467
The Honorable Richard T. Platt, Judge

AFFIRMED AS MODIFIED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

M I L L E R, Judge:

¶1 Appellant Alex Ortega was convicted after a jury trial of theft of a means of transportation and sentenced to the presumptive prison term of 11.25 years.[1] Ortega contends the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20(a), Ariz. R. Crim. P., and argues the conviction is not supported by sufficient evidence. He also contends the court erred by refusing to give the jury an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), relating to DNA[2] evidence. We affirm for the reasons stated below.

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[1]The sentencing minute entry designates the offense a class four rather than a class three felony. The 11.25-year prison term is the presumptive term for a category three, class three felony, which the sentencing transcript reflects is the term the trial court imposed after finding two historical prior felony convictions. Generally, when there is such a conflict, the oral pronouncement controls, *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989), although we will attempt to determine the trial court's intent by referring to the record, *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). Absent a cross-appeal by the state, we do not correct error we discover on appeal that will inure to a defendant's detriment. *See State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990). But because the error here is merely clerical and does not alter the prison term Ortega received, we correct it by modifying the minute entry accordingly. *See State v. Ovante*, 231 Ariz. 180, ¶ 39, 291 P.3d 974, 982 (2013).

[2]Deoxyribonucleic acid.

¶2 Like the trial court's denial of a Rule 20 motion, we review de novo a defendant's challenge to the sufficiency of the evidence. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). We will affirm the conviction if there is "substantial evidence" supporting it. *State v. Ellison*, 213 Ariz. 116, ¶ 65, 140 P.3d 899, 916-17 (2006). Evidence is substantial if reasonable persons could accept it as proving the elements of an offense beyond a reasonable doubt. *See State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009). We do not reweigh the evidence on appeal; that is the province of the trier of fact. *State v. Lewis*, 224 Ariz. 512, ¶ 21, 233 P.3d 625, 629 (App. 2010). Rather, we view the evidence and all inferences therefrom in the light most favorable to sustaining the verdict. *See State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶3 A person commits theft of a means of transportation if the person knowingly and without lawful authority "[c]ontrols another person's means of transportation with the intent to permanently deprive the person of the means of transportation." A.R.S. § 13-1814(A)(1). "Control" is defined as "act[ing] so as to exclude others from using their property except on the defendant's own terms." A.R.S. § 13-1801(A)(2).

¶4 The evidence established that a sergeant with the Casa Grande Police Department found a new Ford F-150 "EcoBoost" truck, with expired or cancelled dealer license plates, parked in front of Ortega's house. The truck was missing from the lot of a car dealership. Ortega, who came out of the home, told another officer who arrived as a backup that a friend of his had left the truck there because he had been too intoxicated to drive. Ortega admitted he had been in the truck on the passenger's side. He offered to go to the friend's house, which he said was down the street, to see if the friend had left a key. Ortega walked to a house, and stopped to talk to a Hispanic woman who was outside the residence. She was later identified as Ortega's grandmother, although he told the officer he did not know her name. Ortega told the officer the friend was not

home but that the woman had given him the key to the truck, which he gave to the officer. The officer questioned the grandmother and then arrested Ortega. She testified at trial that she had not given Ortega a key.

¶5 A water bill for the address of the home where the truck had been parked was found inside the truck. A license plate with two fingerprints matching Ortega's was found in a pouch behind the driver's seat. In addition, after Ortega was arrested, he made a telephone call from jail during which he told a friend he had "a brand new truck," that was "fresh off the lot," with "EcoBoost," and that "cops impounded it," because "[s]omebody was driving it too fast."

¶6 Ortega concedes the truck that officers found parked in front of his home was stolen between January 11 and January 21, 2015, but contends there was insufficient evidence he had controlled it and intended to permanently deprive the owner of it. But the jury reasonably could have rejected Ortega's claim to the officer that his friend had been driving the truck and that Ortega did not have the key but had gotten it from his grandmother at the second house. *See Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d at 269 (jury's role to assess credibility of witnesses, weigh evidence, and resolve conflicts in evidence). The evidence, albeit circumstantial, supported the inference that Ortega had control of the truck. *See State v. Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d 51, 54 (App. 2013) (appellate court does not distinguish circumstantial from direct evidence in determining whether there is sufficient evidence to support verdict).

¶7 Similarly, we reject Ortega's argument there was insufficient evidence he intended to permanently deprive the owner of the truck. The jury reasonably could have drawn that inference from the license plates in the truck on which his fingerprints were found, and, again, his statements from the jail. *See State v. Edgar*, 126 Ariz. 206, 209, 613 P.2d 1262, 1265 (1980) (intent to permanently deprive may be established by circumstantial evidence). The truck had been missing for as long as a week. The trial court did not err in finding the state had presented substantial evidence and denying the Rule 20 motion, and the evidence supports the verdict.

¶8 Ortega next contends the trial court erred in denying his request for a *Willits* instruction. He requested the instruction on the second day of trial after learning one of the investigating police officers had instructed the crime laboratory not to analyze DNA taken from the inside of the truck based on the incorrect information that Ortega had confessed. One of the investigating officers testified items taken from the truck were "swabbed" for DNA—a "Slim Jim" and bolt cutters—but another officer testified that they had not yet received results from the crime laboratory at the Department of Public Safety.

¶9 A *Willits* instruction permits the jury to infer that missing evidence would have been exculpatory and is appropriate "[w]hen police negligently fail to preserve potentially exculpatory evidence." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). The defendant must establish the state failed to preserve material, reasonably accessible evidence "that could have had a tendency to exonerate" him, thereby resulting in prejudice to the defense. *State v. Glissendorf*, 235 Ariz. 147, ¶ 8, 329 P.3d 1049, 1052 (2014). "Failure to preserve" evidence is not limited to destruction or loss of evidence, but also applies "where the state fails to act in a timely manner to ensure the preservation of evidence that is obviously material, and reasonably accessible." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). We review a trial court's ruling on a request for a *Willits* instruction for abuse of discretion. *Glissendorf*, 235 Ariz. 147, ¶ 7, 329 P.3d at 1052.

¶10 The trial court found the state had "not lost, destroyed, or failed to preserve that evidence." Ortega contends, as he did below, that the state failed to preserve evidence by directing the crime laboratory not to analyze it. He argues that although the state did not physically lose the evidence, it effectively lost it because "it was not available for testing by the defense or anyone else" as a result of the police department's negligence, which "made this evidence inaccessible to the defense." Ortega does not explain how or why he believes the evidence was unavailable to him. Additionally, the state had disclosed the existence of evidence of the crime scene pursuant to Rule 15.1(b) and (c), Ariz. R. Crim. P., and Ortega did not file a pre-trial request to examine or test the evidence. Had he done so before

trial, the evidence would have been available for testing requested by him. *Cf. State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) (finding *Willits* instruction not required with respect to additional testing state had failed to conduct on samples of blood, saliva, and filter paper with vaginal smear released to defendant for independent testing where defendant, too, had failed to order such additional testing). Thus, Ortega cannot show he was prejudiced by the state's decision not to test the evidence. A *Willits* instruction is not required "merely because a more exhaustive investigation could have been made." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). Nor does the "[s]tate . . . have an affirmative duty to seek out and gain possession of potentially exculpatory evidence." *State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987).

¶11 Moreover, Ortega did not establish the evidence had a tendency to exonerate him. Evidence has a "tendency to exonerate" when it is material and "potentially helpful" to the defendant. *Glissendorf*, 235 Ariz. 147, ¶ 10, 329 P.3d at 1052, *quoting Murray*, 184 Ariz. at 33, 906 P.2d at 566. The helpfulness cannot be speculative, *id.* ¶ 9, rather, it "must be predicated on a theory supported by the evidence," *State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988). In addition to the fact that DNA testing might have resulted in a positive match to Ortega, potentially inculpatory evidence, a negative match would not have established he had lacked control of the truck. Ortega had admitted he had been inside the truck and other evidence permitted the jury to infer he had controlled the truck. It would have made little difference that his DNA was not found there.[3] The trial court did not abuse its discretion in refusing to give the instruction.

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[3]Because the record does not include a transcript of closing arguments, we cannot determine precisely what Ortega's theory of the defense was. Nor were the opening statements transcribed. *See* Ariz. R. Crim. P. 31.8(b)(2)(ii), (b)(4); *see also State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990) ("It is within the defendant's control as to what the record on appeal will contain, and it is the defendant's duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to be raised in the appeal.").

¶12 We affirm the conviction and the sentence imposed.