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

FILED BY CLERK
NOV -3 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>JACK OWENS,<br><br>Appellant. | 2 CA-CR 2010-0042<br>DEPARTMENT A<br><br><u>MEMORANDUM DECISION</u><br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084919

Honorable Terry L. Chandler, Judge

AFFIRMED

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West, Christoffel & Zickerman, PLLC
By Anne Elsberry — Tucson
Attorneys for Appellant

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H O W A R D, Chief Judge.

**¶1** Following a four-day jury trial, appellant Jack Owens was convicted of theft of a means of transportation and possession of burglary tools. The trial court sentenced him to concurrent, presumptive prison terms of 11.25 years and 3.75 years, respectively. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S.

738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record thoroughly but found no arguable issue for appeal. She asks that we search the record for fundamental error. Owens has filed a supplemental brief raising various issues, none of which requires reversal. We affirm.

**¶2** Viewing the evidence in the light most favorable to sustaining the verdict, we find there was sufficient evidence to support the jury's finding of guilt. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). Owens was arrested after he was found driving a recently stolen vehicle and in possession of modified automobile keys, called "jiggle keys," that are used in automobile thefts. *See* A.R.S. §§ 13-1814(A)(5), 13-1505.

**¶3** As we understand his first argument, Owens asserts the trial court erred in admitting evidence of his prior convictions pursuant to Rule 404(b), Ariz. R. Evid. To the extent Owen asserts the evidence was not admitted properly because it was introduced before he testified, he is incorrect. The evidence was admitted to demonstrate Owens's knowledge of the use of jiggle keys for automobile theft. *See* Ariz. R. Evid. 404(b) (other act evidence admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). Its admission was not conditioned on his testifying at trial. That the state also relied on those convictions in impeaching Owens when he did testify is immaterial. *See State v. Smith*, 146 Ariz. 491, 500, 707 P.2d 289, 298 (1985) ("Once [prior conviction] evidence is before the jury for one purpose, however, we cannot see what substantial further

prejudice will result from its use for the additional purpose of attacking the credibility of defendant after he had taken the stand to testify in his own behalf.").

**¶4** Owens further argues the testimony of police officer Crystal Frei about one of Owen's prior arrests for automobile theft was admitted improperly under Rule 404(b) because that case did not involve the use of a jiggle key. The record does not support Owens's argument. Frei testified that when she had arrested Owens in 2006 after stopping him for driving a stolen vehicle, he had jiggle keys in his possession.

**¶5** We also reject Owens's related contention that his conviction was "bas[ed] . . . solely on [his] prior convictions." As we have noted, ample evidence supported the jury's verdict. And we find no abuse of discretion in the trial court's admission of Owens's prior convictions pursuant to Rule 404(b). *See State v. Jeffrey*, 203 Ariz. 111, ¶ 13, 50 P.3d 861, 864 (App. 2002) ("We will not disturb a trial court's determination on the admissibility and relevance of evidence absent an abuse of discretion.").

**¶6** Owens also asserts the state tampered with evidence by adding a fourth key to a key ring police reports had described as having only three keys. Although a police report states Owens had a key ring with three keys when he was stopped, a photograph of the interior of the stolen vehicle shows a key ring with four keys, with one of the keys inserted in the vehicle's ignition. A police officer who had been at the scene testified the photograph was accurate, and another officer described the four keys at trial. This minor discrepancy between a police report and physical evidence does not suggest the evidence had been altered. "[U]nless a defendant can offer proof of actual change in the evidence,

or show that the evidence has, indeed, been tampered with, such evidence will be admissible." *State v. Ritchey,* 107 Ariz. 552, 557, 490 P.2d 558, 563 (1971).

**¶7** Finally, Owens stipulated that he had three historical prior convictions and that he had committed the instant offenses while on probation. Owens's sentences were within the prescribed statutory range and were imposed lawfully. *See* A.R.S. §§ 13-1505(C); 13-1814(D); 13-604(C), (D).[1] Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and, having found none and having rejected the claims raised in Owens's supplemental brief, we affirm his convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[1]The Arizona criminal sentencing code has been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 31, 2008." *Id.* § 120. We refer in this decision to the statutes as they were worded and numbered at the time of Owens's offenses. *See* 2008 Ariz. Sess. Laws, ch. 24, § 1 (§ 13-604).