

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK  
DEC 20 2007  
COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0399
Appellee,	)	DEPARTMENT B
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
RUSSELL MORRIS BROWN,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061087

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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Terry Goddard, Arizona Attorney General  
By Randall M. Howe and William Scott Simon

Phoenix  
Attorneys for Appellee

Gail Gianasi Natale

Phoenix  
Attorney for Appellant

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E S P I N O S A, Judge.

¶1 After a jury trial, Russell Brown was convicted of one count each of theft of a means of transportation by control, a class three felony; third-degree burglary, a class three felony; and first-degree trafficking in stolen property, a class two felony. The trial court found Brown had one prior felony conviction and sentenced him to concurrent, presumptive

terms of imprisonment, the longest for 9.25 years. On appeal, Brown claims the trial court erred in denying his motion pursuant to Rule 20, Ariz. R. Crim. P., on the charge of first-degree trafficking.<sup>1</sup> Finding no error, we affirm.

### **Factual and Procedural Background**

¶2 We view the facts and any reasonable inferences therefrom in the light most favorable to sustaining the convictions. *See State v. Henry*, 205 Ariz. 229, ¶ 2, 68 P.3d 455, 457 (App. 2003). On a Monday morning in March 2006, the manager of a charity thrift shop arrived at work and discovered a donated maroon Cadillac was missing. The only set of keys and the title for the vehicle, which were kept in an office, were also missing.<sup>2</sup> Brown was an assistant manager of the shop and had been in charge on the previous Saturday. Brown failed to come to work on Monday, and the manager tried unsuccessfully to contact him to inquire about the car's whereabouts. When Brown again failed to appear on Tuesday, the manager called the police.

¶3 On Tuesday morning, a police records check for the Cadillac revealed it had been registered on Monday to a Maria Aguirre. It had been impounded Monday night when the person driving it was discovered to have a suspended driver's license. The car had not sustained any damage consistent with a theft. Aguirre reported she and her son had purchased the car from a man at a convenience store by paying \$1,500 cash and promising

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<sup>1</sup>Brown does not contest his other two convictions.

<sup>2</sup>The title was an "open" title—that is, it had been signed by the seller and notarized, but the buyer's information was blank.

to pay another \$1,500 when she received her income tax refund. She also testified the man had said it was his car and had provided the keys and a title for the car. The custodian of records for the state Motor Vehicle Division (MVD) testified the Cadillac's title showed a transfer from the donor to Aguirre, and the manager testified the shop had never received any proceeds from the sale of the car. At a photographic lineup, Aguirre identified Brown as the seller. Police subsequently located Brown in Tucson and arrested him. He was convicted as noted above and acquitted of one count of fraudulent scheme and artifice, a class two felony.

### **Rule 20 Motion**

¶4 On appeal, Brown argues the trial court erred in denying his motion pursuant to Rule 20, Ariz. R. Crim. P., for a judgment of acquittal on the trafficking charge based on Aguirre's "contradictory and inconsistent testimony." The state responds that sufficient evidence supports his conviction and that Brown is essentially asking this court "to reweigh the evidence and find him not guilty." We review the trial court's ruling on a Rule 20 motion for an abuse of discretion. *See Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458; *State v. Carrasco*, 201 Ariz. 220, ¶ 1, 33 P.3d 791, 792 (App. 2001).

¶5 Pursuant to Rule 20(a), Ariz. R. Crim. P., every conviction must be based on "substantial evidence," that is, evidence "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). If reasonable people could differ about whether the evidence establishes a fact in issue, that evidence is substantial. *State v. Atwood*, 171 Ariz. 576, 597,

832 P.2d 593, 614 (1992). We will reverse a conviction for insufficient evidence “only if ‘there is a complete absence of probative facts to support [the trial court’s] conclusion.’” *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), quoting *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). And, in assessing the sufficiency of the evidence, we view it in the light most favorable to sustaining the verdict. See *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶6 Brown’s primary complaint is that Aguirre’s testimony was inconsistent and thus, insufficient. The inconsistencies in a witness’s testimony, however, bear on the weight to be given that testimony, which is a matter for the jury. *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995) (“The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses.”). This court does not determine the credibility of any witness but instead defers to the jury’s determination. See *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004); *Cid*, 181 Ariz. at 500, 892 P.2d at 220; *State v. Tubbs*, 155 Ariz. 533, 535, 747 P.2d 1232, 1234 (App. 1987). Moreover, if a reasonable jury could differ about whether the evidence establishes any fact that is in issue, the trial court must submit that question to the jury. *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458.

¶7 To prove first-degree trafficking in stolen property, the state was required to establish beyond a reasonable doubt that Brown “knowingly initiate[d], organize[d], plan[ned], finance[d], direct[ed], manage[d] or supervise[d] the theft and trafficking in the property of another that ha[d] been stolen.” A.R.S. § 13-2307(B). “‘Traffic’ means to sell,

transfer . . . 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 . . . or otherwise dispose of the property to another person.” A.R.S. § 13-2301(B)(3). The state was also required to show Brown had committed an act proscribed by § 13-2307(B) with the necessary *mens rea* of knowingly trafficking in stolen property.

¶8 There was sufficient evidence for the jury to conclude Brown was the person who sold the Cadillac to the Aguirres. It included Aguirre’s testimony; the photographic lineup in which she had identified Brown; the fact that the keys and title, which had been secured at the thrift shop separately from the Cadillac, had been provided to the Aguirres; the fact that Brown worked at the thrift shop from where the keys and title had been taken; and testimony by Brown’s sister and niece that he had brought a maroon or dark red Cadillac to each of their homes during the weekend before the car was reported stolen. Brown’s niece also admitted she had used a computer to generate a temporary registration tag for the car in Brown’s name by entering the vehicle identification number. And, because there was circumstantial evidence Brown himself had stolen the vehicle, obviously he would have known it was stolen when he sold it.

¶9 Brown further contends, in a less than clear argument, that the trial court’s refusal to instruct the jury on the lesser-included offense of second-degree trafficking in stolen property and its failure to give an attempt instruction *sua sponte* show that “[t]he state did not present sufficiently substantial evidence” that he had committed first-degree trafficking. He cites *State v. Galan*, 134 Ariz. 590, 591-92, 658 P.2d 243, 244-45 (App.

1982), which held attempted trafficking in stolen property is a cognizable offense, and also cites *State v. DiGiulio*, 172 Ariz. 156, 835 P.2d 488 (App. 1992). The *DiGiulio* court held that “[r]ecovery of property by authorized persons, such as the police, strips it of its stolen character, and precludes conviction based upon its *subsequent* receipt or possession.” 172 Ariz. at 159, 835 P.2d at 491 (emphasis added). *DiGiulio* is inapposite because the evidence here showed Brown did not possess the Cadillac after the police impounded the car.

¶10 Brown has not articulated how the trial court erred in not giving the suggested instructions.<sup>3</sup> Moreover, during trial, both counsel agreed the evidence in the case would not support an instruction on second-degree trafficking, and defense counsel did not object to the court’s decision not to give the instruction. Because Brown raises the issue of attempted trafficking for the first time on appeal, we do not address it. See *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (failure to raise issue at trial, including failure to request jury instruction, forfeits right to raise issue on appeal). Brown has also failed to argue that any resulting error was fundamental, that is, “error [that] goes to the foundation of the case or deprives [him] of an essential right to his defense.” *State v. White*, 160 Ariz. 24, 31, 770 P.2d 328, 335 (1989). He certainly has failed to carry his

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<sup>3</sup>Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., requires the appellant to include in his brief “[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.” See *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004); *State v. Sanchez*, 200 Ariz. 163, ¶ 8, 24 P.3d 610, 613 (App. 2001) (claim forfeited because defendant failed to develop argument in brief).

burden of showing that fundamental error occurred and caused him prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶11 Brown lastly asserts that the jury’s verdict of acquittal on the charge of fraudulent scheme and artifice somehow renders the evidence in support of his trafficking charge insufficient. Brown fails to explain this theory and we do not address it other than to note that, to whatever extent those verdicts are actually inconsistent, Arizona permits inconsistent verdicts. *See State v. Eastlack*, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994); *DiGiulio*, 172 Ariz. at 162, 835 P.2d at 494 (“While the jury’s verdicts were inconsistent, that fact does not entitle defendant to relief. There is no constitutional requirement that verdicts be consistent.”).

### **Disposition**

¶12 Based on the foregoing, we affirm Brown’s convictions and sentences.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge