

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

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COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0127
	)	DEPARTMENT B
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
LOUIS ELVEN WAY SPEAR,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101615001

Honorable Edward B. Acuña, Judge

AFFIRMED IN PART; REVERSED IN PART

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K E L L Y, Judge.

¶1 In this appeal from his convictions for theft by control and theft by controlling stolen property, appellant Louis Spear argues there was insufficient evidence

to support the convictions. We agree as to the conviction for theft by controlling stolen property, and therefore reverse that conviction.

### **Background**

¶2 “We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury’s verdicts.” *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In April 2010, Pima County Sheriff’s deputies responded to a call from a woman who reported she had seen “an expensive model car parked to the rear of her home” and that Spear, whom she identified as her tenant’s son, had gotten in and out of the passenger side of the car. When the deputies approached the tenant’s mobile home, a woman who was visible through the door called out the name “Louis.” Spear came down the hall of the mobile home and outside to talk to the deputies.

¶3 The car the woman had reported seeing was a Lexus that was identified as having been stolen in a burglary earlier in the month. After obtaining a warrant, detectives searched the mobile home and found a cherry silverware box from that burglary as well as various items from a second burglary. The driver’s side headrest of the Lexus was also swabbed for DNA,<sup>1</sup> and tests established the DNA found belonged to Spear.

¶4 The state charged Spear with burglary, theft by control, and theft by controlling stolen property. The trial court granted his motion for a directed verdict, made pursuant to Rule 20, Ariz. R. Crim. P., as to the burglary count, but denied it as to the remaining counts. The jury found Spear guilty of theft by control of property worth

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<sup>1</sup>Deoxyribonucleic acid

“more than \$4,000 but less than \$25,000” and theft by controlling stolen property worth “more than \$25,000.” The trial court imposed enhanced, concurrent, presumptive sentences, the longest of which was 15.75 years’ imprisonment. This appeal followed.

### **Discussion**

¶5 Spear first maintains his “convictions must be vacated” because the state failed to produce sufficient evidence he had “dominion and control over the property.” When considering claims of insufficient evidence, “we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.” *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence is that which “reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005), quoting *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 469 (1997).

¶6 To convict a defendant of theft by control the state must establish that “without lawful authority, the person knowingly . . . [c]ontrols property of another with the intent to deprive the other person of such property.” A.R.S. § 13–1802(A)(1). Section 13–1801(A)(2), A.R.S., defines “[c]ontrol” as acting “to exclude others from using their property except on the defendant’s own terms,” while § 13–1801(A)(4) defines “[d]eprive” as “to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, [or] to withhold with the intent to restore it only on payment of any reward or other compensation.”

¶7 In this case, Spear was seen getting out of the passenger side of the vehicle after it had been taken from the burglary victims' home and his DNA was found on the driver's headrest of the vehicle. From this the jury could draw the reasonable inference that Spear had driven the car as well as ridden in it and had thereby excluded the rightful owners from using it. And, "[t]he wrongful taking of another's property without an apparent purpose to return it and without explanation evidences an intent to permanently deprive." *State v. Ramirez*, 115 Ariz. 70, 75, 563 P.2d 325, 330 (App. 1977). Thus, we cannot say there was a complete lack of evidence to support Spear's conviction for theft by control. *See State v. Johnson*, 215 Ariz. 28, ¶ 2, 156 P.3d 445, 446 (App. 2007) ("We will not reverse a conviction for insufficient evidence unless 'there is a complete absence of probative facts to support [the jury's] conclusion.'"), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988) (alteration in *Johnson*).

¶8 In order to establish Spear also committed theft by controlling stolen property, the state was required to prove that, without lawful authority, Spear knowingly "[c]ontrol[led] the property of another knowing or having reason to know that the property was stolen." § 13-1802(A)(5). The state presented no evidence to suggest Spear knew or had reason to know the property found in the mobile home was stolen. But, "[u]nexplained possession of recently stolen goods is a circumstance from which the jury might infer the guilt of defendants when supported by sufficient corroborating evidence." *State v. Payne*, 7 Ariz. App. 43, 44, 436 P.2d 137, 138 (1968); *see also* A.R.S. § 13-2305(1) ("Proof of possession of property recently stolen, unless satisfactorily explained,

may give rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft.”).

¶9 In this case, however, we agree with Spear that the state failed to present sufficient evidence he had been in possession of the property in the mobile home. Although as noted above Spear was present in the mobile home when deputies arrived to investigate the call about the Lexus, no evidence at trial showed he lived there, regularly visited the home, or was even aware the stolen property was in the home. The only evidence about the owner or occupant of the mobile home was the landlord’s stipulated testimony that Robert Spear, Spear’s father, was her tenant. And, no DNA or fingerprint evidence from inside the home or on the stolen property found inside the home was presented. Thus, the state failed to prove Spear was in possession of the property, and the jury could not infer he had known or had reason to know the property was stolen on that basis. *See State v. Andrade*, 83 Ariz. 356, 358-59, 321 P.2d 1021, 1022-23 (1958) (presence in vehicle with stolen property not sufficient to establish possession). We therefore reverse Spear’s conviction for theft by controlling stolen property.<sup>2</sup>

¶10 Finally, we note that at sentencing, the trial court imposed what it deemed a “presumptive” term of 15.75 years’ imprisonment for Spear’s theft by control conviction. But, because he was convicted only of having committed theft by control of property worth \$4,000 to \$25,000, Spear committed a class three felony, not a class two felony. *See* § 13-1802(G). The presumptive sentence for such a conviction is 11.25 years.

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<sup>2</sup>Because we reverse Spear’s conviction for theft by controlling stolen property for insufficient evidence, we need not address his argument that “the state produced insufficient evidence that the value of the stolen property exceeded \$25,000.”

A.R.S. § 13-703(J). It appears the court simply reversed the class of felony on the two convictions, as had the presentence report, and imposed the class-three-felony sentence on what was actually a class two felony and vice versa. We therefore vacate the sentence imposed and correct it to the appropriate presumptive sentence of 11.25 years' imprisonment. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (“Although we do not search the record for fundamental error, we will not ignore it when we find it.”); *see also State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009) (“[T]he imposition of an illegal sentence constitutes fundamental error.”).

**Disposition**

¶11 Spear’s conviction for theft by control is affirmed. His conviction and sentence for theft by control of stolen property are reversed. The sentence imposed on his theft by control conviction is corrected to reflect the appropriate presumptive term of 11.25 years’ imprisonment.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

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