DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0655
	)	1 CA-CR 10-0170
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT E
	)	
DELANIE BELFIELD ROSS,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-006706-001 DT

The Honorable Glenn M. Davis, Judge and
The Honorable Christopher Whitten, Judge

AFFIRMED IN PART, VACATED IN PART

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
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Delanie Belfield Ross — Buckeye
Appellant

O R O Z C O, Judge

¶1 Delanie Belfield Ross (Appellant) appeals his convictions and sentences on three counts of fraudulent schemes and artifices and one count of theft, each a class two felony. For the reasons that follow, we affirm Appellant's convictions and sentences; however, we vacate the trial court's February 12, 2010 order, modifying Appellant's award of presentence incarceration credit, and we reinstate the July 17, 2009 order, awarding Appellant 1626 days of presentence incarceration credit.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In 2003, Appellant learned that his brother-in-law, Willard Cooper, Jr. (Cooper), had a high credit score. Appellant told Cooper that he "could get [Cooper] a million dollars' worth of property and like a hundred thousand dollars in cash" based on the credit score. Cooper subsequently moved from Mississippi to Arizona to live with Appellant and Appellant's wife, Veronica.

¶3 Appellant formed TempleBloc, Inc. (TempleBloc) under Cooper's name in March 2004, listed Cooper as president, completed the Articles of Incorporation for TempleBloc, and

[1] In reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996).

designated a board of directors consisting of Cooper, Veronica, and Appellant. Veronica applied for a corporate bank account under the name UPSW Dispatching Services (UPSW) and later amended her application to say that UPSW did domestic and international consulting and was owned by TempleBloc. She also added Cooper as a co-signer to the account.

¶4 In 2004, M. Brooks prepared a 2002 corporate tax return for UPSW and a 2003 corporate tax return for TempleBloc based on information provided to him by Appellant, who identified himself by his nickname, Lane Quue. Brooks had no experience preparing corporate tax returns and failed to obtain annual reports, profit and loss statements, or other financial records for the companies. The tax returns listed assets in the amounts of $1,546,660 and $1,031,610 for UPSW and TempleBloc, respectively. However, TempleBloc conducted no form of legitimate business. Cooper testified that he signed the tax returns because he signed anything that Appellant asked him to sign.

¶5 In 2004, Appellant leased four Hummers from Kachina Cadillac (Kachina) for himself, Veronica, Cooper, and Appellant's friend. Appellant, who identified himself as Mr. Quue, negotiated the leases with T. Heiner, one of Kachina's salesmen. Appellant informed Heiner that he ran a very profitable business, was going to put the vehicles in

TempleBloc's name, and was acting at the direction of Cooper. Kachina sent Cooper's credit application and TempleBloc's tax return to its credit agency, GMAC Financial Services (GMAC).

¶6 After GMAC approved the leases, Cooper signed the paperwork. He testified that Appellant told him not to talk to anyone at Kachina, to sign the documents, to write a check for $80,000 even though the money was not in the account at the time, and to leave as quickly as possible. Kachina subsequently provided the four Hummers to TempleBloc.

¶7 In June 2004, M. Lima of Luxury Home Investments, LLC (Luxury Home) was in negotiations to buy a home valued at approximately $4.2 million in Paradise Valley, Arizona (Quartz Mountain Property). Lima met Appellant, who identified himself as Lane Quue, around this same time. Although Appellant informed Lima that he was "the right-hand man" for Cooper and that he wanted to purchase properties on Cooper's behalf, Lima never met Cooper.

¶8 Luxury Home entered into a contract to purchase the Quartz Mountain Property for $2 million and the current owners' personal property for an additional $320,000. After securing the contract, Lima and Appellant negotiated a contract in which Luxury Home would sell the Quartz Mountain Property to TempleBloc for approximately $4.2 million.

¶9 After Appellant informed Lima that he was having

trouble securing conventional financing for the purchase of the Quartz Mountain Property, Lima referred Appellant to J. Janssen of A&A Funding Corporation (A&A Funding). Because A&A Funding did not have the funds necessary for the Quartz Mountain Property loan, Janssen referred the deal to J. Kaplan of Mortgages, Ltd. and asked Mortgages, Ltd. to assist in funding the acquisition of the Quartz Mountain Property. Lima and Janssen gave Mortgages, Ltd. some of the paperwork it needed to complete the loan, including TempleBloc's tax return.

¶10 Mortgages, Ltd. provided TempleBloc with a $2.2 million loan to purchase the Quartz Mountain Property. Kaplan testified that he believed Appellant was Cooper, but Cooper was not involved in the acquisition of the Quartz Mountain Property and when Cooper discovered that Appellant was trying to purchase the house, he "objected to it from the start." However, after Appellant told him that everything was alright, Cooper "went on [Appellant's] word" and signed the closing documents.

¶11 Luxury Home and Appellant negotiated a reduced purchase price of approximately $3.2 million for the Quartz Mountain Property in August 2004. Because TempleBloc still needed $1 million to purchase the Quartz Mountain Property, Lima contacted a private investor, Dr. R. Greenberg, to assist in securing the necessary financing. Dr. Greenberg's company, Quantum Consulting, LLC (Quantum), provided the loan for the

additional $1 million.

¶12 As a result of some confusion over whether certain items of personal property were going to remain in the Quartz Mountain Property after the sale, Luxury Home gave TempleBloc a price concession. Rather than give money to TempleBloc, Luxury Home used approximately $430,000 of the price concession funds to repay a portion of Quantum's loan. While completing the price concession agreement, Lima witnessed Appellant sign Cooper's name, which concerned Lima because this was the first time he had witnessed Appellant sign anything. Because of the price concession, TempleBloc and Cooper owed Quantum $600,000, and a promissory note for this amount was recorded and was secured by the Quartz Mountain Property.[2]

¶13 After TempleBloc secured financing, there was a simultaneous close of escrow with Luxury Home purchasing the Quartz Mountain Property from the owners for $2 million and simultaneously selling it to TempleBloc for $3.2 million. Because the parties used a nominee agreement, the deed indicated the buyer was TempleBloc and the sellers were the original owners. After the closing, Appellant and Veronica lived in the Quartz Mountain Property, but Cooper continued to reside at

[2] The State charged Appellant with one count of fraudulent schemes and artifices for the $600,000 loan from Dr. Greenberg (Count 2); however, the jury acquitted Appellant of this count at trial.

their previous address.

¶14 After purchasing the Quartz Mountain Property, Appellant told Cooper that he was going to release the liens because he wanted to be able to refinance. Appellant used the Internet to learn how to release liens on real property and told Cooper that by doing that, the house becomes "yours outright."

¶15 Appellant contacted A. Flagg-Thomas and asked her if she knew anyone who could notarize documents. She introduced Appellant to her friend S. Emudianughe. Emudianughe notarized two lien releases for Appellant: one in which Appellant signed as Daniel Moore in order to release the $2.2 million Mortgages, Ltd. lien, and the other in which Appellant signed as Dr. Greenberg in order to release Quantum's $600,000 lien. Both lien releases stated that the debts had been fully paid.

¶16 After recording the lien releases, TempleBloc conveyed the Quartz Mountain Property to Horizon Consulting, Inc. (Horizon). TempleBloc registered for the trade name Horizon Consulting Grant Resource (HCGR) several weeks later.

¶17 Appellant subsequently obtained an $850,000 line of credit from a private lender, J. Hancock, after Appellant told Hancock that he owned the Quartz Mountain Property "free and clear." Hancock believed that Appellant was Cooper and that Horizon was Appellant's company, and he agreed to provide draws against the line of credit to Appellant upon Appellant's

request.

¶18 Before receiving any funds from Hancock, Cooper named himself president of Horizon at Appellant's request because Appellant told him that if Cooper was Horizon's president, it would enable them to deposit checks issued to Horizon in one of Veronica's bank accounts.[3] Hancock provided an initial draw of $225,000 to Appellant. Appellant then requested that Hancock give Quantum $250,000 as payment of the $600,000 loan.

¶19 Appellant later requested the remaining $375,000 of the $850,000 line of credit from Hancock. However, Appellant wanted the money quickly, and Hancock denied the request because Hancock was entitled to time to come up with the money under their agreement.

¶20 After learning that the Quartz Mountain Property liens had been fraudulently released, Mortgages, Ltd. filed an affidavit of erroneous recording with the recorder's office and initiated foreclosure proceedings in December 2004.

¶21 In February 2005, the State charged Appellant, Veronica, and Cooper[4] with two counts of fraudulent schemes and

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[3] Although TempleBloc registered for the trade name HCGR, Cooper signed a corporate resolution that made him the president of Horizon. The corporate resolution states that Horizon is a Mississippi corporation.

[4] Cooper pled guilty to one count of theft and is not a party to this appeal.

artifices, one count of theft, and one count of conspiracy, and the grand jury returned an indictment against them (First Indictment). However, the trial court subsequently determined that count one of the First Indictment was duplicitous and requested that the State amend the count.

¶22 The State resubmitted the case to a new grand jury, and the grand jury returned a new indictment (Second Indictment) against Appellant and Veronica in June 2006 under the same cause number as the First Indictment. In the Second Indictment, Appellant and Veronica were indicted with four counts of fraudulent schemes and artifices (count one through count four), one count of theft (count five), and one count of conspiracy (count six).[5] After returning the Second Indictment, the State moved to dismiss the First Indictment, and the trial court granted the motion.

¶23 The trial court later remanded the case to a new grand jury for a redetermination of probable cause. The grand jury again indicted Appellant and Veronica (Third Indictment) in November 2006. In June 2008, the trial court determined that the Third Indictment was based on misinformation and decided again to remand the case to the grand jury. However, this court reversed the trial court's remand order after the State filed a

[5] The State also charged Veronica with one additional count of fraudulent schemes and artifices (count seven).

special action petition.

¶24 Appellant's trial was held in November 2008.[6] A jury convicted Appellant of three counts of fraudulent schemes and artifices and one count of theft.[7] The trial court sentenced Appellant to concurrent sentences of 15.75 years on each count and ordered the sentences to be served consecutively to Appellant's sentence that he received for violating his probation on a prior conviction. The trial court initially awarded Appellant 1626 days of presentence incarceration credit but later reduced the award to 267 days.

¶25 Appellant timely appealed. 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 -4033.A.1 (2010).[8]

¶26 Defendant's counsel originally filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this

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[6] Veronica pled guilty shortly before trial, and she is not a party to this appeal.

[7] Appellant was acquitted of count two, one of the fraudulent schemes and artifices charges. On the first day of trial, the State moved to dismiss count six, the conspiracy charge, and count seven, the fraudulent schemes and artifices charge that pertained only to Veronica. The trial court granted the State's motion.

[8] We cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant filed a supplemental brief raising various issues for review. Due to the complexity of the case and the number of issues raised, we asked the State to file a response to the numerous issues, which it did. After this court began reviewing the issues, we found a sentencing issue that was not raised by either Appellant's counsel or Appellant. We therefore vacated the *Anders* designation and ordered supplemental briefing on the sentencing issue. *See State v. Thompson*, 229 Ariz. 43, 46, ¶ 6, 270 P.3d 870, 873 (App. 2012). In spite of the redesignation, we address below the arguments raised by Appellant in his supplemental brief.

DISCUSSION

I. Indictments

¶27 On appeal, Appellant raises several issues relating to the first two indictments. We discuss these issues in detail below.

A. Amendment of the First Indictment

¶28 First, Appellant contends that the First Indictment limited any future trial to the specific charge or charges stated in that indictment. He further asserts that under Arizona Rule of Criminal Procedure 13.5.b, the First Indictment could only be amended to correct mistakes of fact or to remedy

formal or technical defects, unless he consented to the amendment. Appellant argues that the State violated Rule 13.5.b and his due process rights by altering the nature of the charges and original allegations made against him.

¶29 Based on the record, we find this argument to be without merit. Appellant is correct that Rule 13.5.b limits the amending of an indictment to corrections of "mistakes of fact or [remedies for] formal or technical defects." However, the State can modify an indictment to charge new and different matters with "the concurrence of the grand jury." *State v. O'Haire*, 149 Ariz. 518, 520, 720 P.2d 119, 121 (App. 1986). The State obtained the concurrence of the grand jury in this case when it resubmitted the case to a new grand jury, which returned the Second Indictment against Appellant. Accordingly, we find no violation of Rule 13.5.b and no violation of Appellant's due process rights.

B. Modification of the Entire Indictment

¶30 Appellant also asserts that the State arbitrarily decided to treat the entire First Indictment as a remand, rather than just amending the duplicitous count one. He contends that defects in indictments must be attacked by a Rule 16 motion and the State did not file one. Additionally, Appellant claims that the State violated the Arizona Rules of Criminal Procedure and his due process rights by treating the entire charging

instrument as a remand and resubmitting the case to a new grand jury, adding new statutes, and altering the nature of the original allegations, without the court remanding or dismissing the First Indictment.

¶31 As previously discussed, the State can make substantive modifications to an indictment, but it may not do so without the concurrence of the grand jury. *State v. Kelly*, 123 Ariz. 24, 26, 597 P.2d 177, 179 (1979). Additionally, we find no support for Appellant's argument that the State may only attack defects in an indictment by a Rule 16 motion. The case Appellant cites states that a Rule 16 motion to dismiss the prosecution would be a proper remedy in a situation in which the indictment is challenged as being insufficient. *See State v. Superior Court ex rel. Pima Cnty.*, 121 Ariz. 341, 342, 590 P.2d 457, 458 (App. 1977). Nowhere in the case does it say that "[d]efects in [an] indictment must be attacked by way of Rule 16.6 motion[s]," as Appellant claims.

¶32 Contrary to Appellant's assertion, the State may return a superseding indictment "any time before trial," in the event it needs to make substantive changes to the indictment. *State v. Superior Court ex rel. Pima Cnty.*, 137 Ariz. 534, 536, 672 P.2d 199, 201 (App. 1983). Because the State did not merely amend the First Indictment to charge new and different matters, but rather returned a Second Indictment, we do not find that the

State violated the Arizona Rules of Criminal Procedure or Appellant's due process rights.

C. Two Indictments Under the Same Cause Number

¶33 Appellant next contends that it is impossible for the First and Second Indictments to be valid at the same time. He asserts that only the First Indictment was valid because there cannot be two valid indictments at the same time under the same cause number; therefore, when the First Indictment was dismissed, only a void Second Indictment remained. Alternatively, Appellant asserts that the First and Second Indictments were a single charging instrument and both would have been dismissed when the First Indictment was dismissed by the State, which left no valid charging instrument to hold and try Appellant. Appellant believes that his due process rights were violated because the State submitted the case before a new grand jury and returned a Second Indictment under the same cause number without the trial court granting a remand or dismissal of the First Indictment.

¶34 As stated above, "[a] superseding indictment may be returned any time before trial," and it replaces the prior indictment. *Superior Court ex rel. Pima County*, 137 Ariz. at 536, 672 P.2d at 201. While returning a second indictment under the same cause number as the first indictment is not a common practice, we do not find that this caused the superseding Second

Indictment to be void because we fail to see how this resulted in any prejudice to Appellant. *See, e.g.*, *State v. Steward*, 9 Or. App. 35, 39, 496 P.2d 40, 42-43 (1972) (stating that the fact that "the second indictment retained the same case number as the first cannot invalidate it" because the defect does not prejudice the substantial rights of the defendant); *see also State v. Young*, 149 Ariz. 580, 585, 720 P.2d 965, 970 (App. 1986) ("Absent prejudice, errors in a grand jury proceeding do not constitute reversible error when a conviction is appealed.").

¶35 The State returned the Second Indictment even though the trial court merely requested that it amend the duplicitous count one. However, Appellant did not object to the dismissal of the First Indictment. Further, the trial court found no bad faith in the State's decision to return the Second Indictment against Appellant, and it stated that the request to dismiss the First Indictment was supported by good cause. *See* Arizona Rule of Criminal Procedure 16.6.a ("The court, on motion of the prosecutor showing good cause therefor, may order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8.").

¶36 Based on the fact that the State may return a superseding indictment at any time and the fact that a

superseding indictment is not invalidated merely because it has the same cause number as the first indictment, we find that Appellant has failed to demonstrate how his due process rights have been violated or that the State's decision to obtain the Second Indictment prejudiced him. Further, Appellant has failed to explain how the First and Second Indictments affected the Third Indictment, on which Appellant was subsequently tried. Therefore, we find that the State did not violate Appellant's due process rights and the Second Indictment was a valid charging instrument to hold Appellant until it was superseded by the Third Indictment.

D. Failure to Rule on Two Motions

¶37 Finally, Appellant alleges that the trial court abused its discretion by failing to rule on two of his motions that dealt with the above issues stemming from the first two indictments. Appellant contends that the court's failure to rule on his Motion to Dismiss Indictment Based on Vagueness . . . and his Motion to Quash Indictments violated his due process rights, the Arizona Constitution, and several state statutes and rules.

¶38 We find the arguments in these motions to be moot. Appellant was indicted a third time after he filed these motions challenging the First and Second Indictments, and the trial court, in its October 23, 2007 minute entry, ruled that all pre-

grand jury remand motions were moot. Therefore, we find no abuse of discretion.

II. Motions

¶39 Appellant contends that the trial court failed to rule on many of his motions in a timely manner and also did not rule at all on over thirty of his motions. We address the issues related to Appellant's pretrial motions below.

A. Failure to Rule Within Sixty Days

¶40 Appellant contends that the trial court failed to rule on at least sixty-nine of his motions within sixty days, as is required by Article 6, Section 21, and Article 2, Section 11, of the Arizona Constitution, A.R.S. § 12-128.01 (2003), and Arizona Rule of the Supreme Court 91(e). Article 6, Section 21, of the Arizona Constitution states that "[e]very matter submitted to a judge of the superior court for his decision shall be decided within sixty days from the date of submission thereof. The supreme court shall by rule provide for the speedy disposition of all matters not decided within such period."

¶41 The only action that our supreme court has taken to "provide for the speedy disposition of all matters" is found in Arizona Rule of the Supreme Court 91(e), requiring periodical reports from the clerk of the superior court, but affording no relief to a party should the matter not be ruled upon during the sixty day period. *Klinger v. Conelly*, 2 Ariz. App. 169, 172,

407 P.2d 108, 111 (1965). Even if there has been a failure to rule within sixty days, the remedy is merely a mandate from this court that the superior court enter a ruling on the matter. *See W. Sav. & Loan Ass'n v. Diamond Lazy K Guest Ranch, Inc.*, 18 Ariz. App. 256, 261, 501 P.2d 432, 437 (1972).

¶42 Moreover, Appellant does not explain how any delay in ruling caused him injury or justifies reversal of his convictions, and his argument is not supported by the record. Even if the trial court did not rule on all of Appellant's motions within sixty days, the trial court did an admirable job of managing the motions. Appellant filed hundreds of pretrial motions; however, the trial court repeatedly requested lists of pending motions from the parties, dealt with the motions included in those lists, and denied others that had not been included.

¶43 Further, the trial court, with Appellant's consent, decided to first rule on all dispositive motions, followed by evidentiary hearings and oral arguments on other issues once the dispositive issues had been decided. Because Appellant agreed to the trial court's scheduling order, he cannot now claim that the delay caused by the scheduling order violated his due process rights. *See State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988) ("One may not deliberately inject error in the record and then profit from it on appeal."). We

therefore conclude that any delay in the trial court's disposition of Appellant's pretrial motions does not warrant reversal.

B. Failure to Rule on Motions

¶44 Appellant asserts that the trial court failed to rule on approximately thirty of his motions. He contends that the trial court's failure to rule was an abuse of discretion, prevented him from having a fair trial, and violated his due process rights and Arizona constitutional provisions, statutes, and rules. We disagree that the trial court failed to rule on the motions listed in Appellant's supplemental brief, and we discuss the trial court's disposition of the motions below.

i. Moot Motions

¶45 In its October 19, 2007 minute entry, the trial court discussed several of the motions included in Appellant's supplemental brief. The court stated that all pre-grand jury remand motions were moot and urged Appellant to re-file the motions if he thought they were still relevant. This minute entry mooted five of the motions on Appellant's list in his supplemental brief: Request for Voluntariness Hearing, Motion for Discovery of Brady Material, Motion Requesting Court to Order State to Provide Proof of Cross-Certification of Federal Peace Officer(s) Pursuant to A.R.S. § 13-3875, Notice of Arrest Made in Violation of A.R.S. § 13-3888, and Motion to Request

Court Ordered Disclosure Pursuant to Rule 15.1(G).

ii. Abandoned Motions

¶46 Because of the volume of pretrial motions filed, the trial court requested that the parties file lists of pending motions on several occasions. Although Appellant complied and filed lists of outstanding motions on which he wanted the court to rule, Appellant agreed to the trial court's scheduling order that stated that dispositive motions would be decided first, followed by evidentiary hearings and oral arguments on all other issues. This scheduling order explains why the then presiding trial judge who received the motions delayed in ruling on some of the pending motions.

¶47 In June 2008, a new trial judge took over the case, and the court requested from both the State and Appellant a list of all pending motions in its July 7, 2008 minute entry. Both parties filed a list of pending motions; however, Appellant failed to include in that list numerous motions on which he now claims the trial court failed to rule. Those motions include his (1) Motion Requesting Court to Order State to Provide a List of All Original Documents in State's Possession; (2) Motion for Court to Order Witnesses to Provide Duces Tecum Materials; (3) Motion for Disclosure by Order of the Court; (4) Motion to Preclude "State's Response . . . Motion to Dismiss Indictment Based on Vagueness" and Motion to Supplement; (5) Motion for

Judgment on the Pleadings; (6) Motion to Dismiss Count 1; (7) Motion to Dismiss Pursuant to Violation of Substantial Procedural and Due Process Rights and its Supplement; and (8) Motion in Limine.

¶48 Appellant had the opportunity and ability to ask the new trial judge to rule on his pending motions. However, he failed to raise these motions in his list of pending motions. Therefore, we conclude that Appellant's failure to bring these motions to the new trial judge's attention so the court could issue a ruling on them after deciding the dispositive motions constitutes an intent to abandon those motions.[9] *See State v. McLemore*, 230 Ariz. 571, 581-82, ¶¶ 32, 36, 288 P.3d 775, 785-86 (App. 2012) (stating that defendant abandoned his motion to proceed pro se when he failed to raise the issue again after his case was transferred to a new trial judge, who might not have seen the motion on file).

iii. Denied Motions

¶49 Many of the motions included in Appellant's supplemental brief were denied by the trial court in various minute entries. The trial court denied Appellant's: (1) Motion to Preclude in its September 20, 2006 minute entry; (2) Petition

[9] Although we find that Appellant abandoned these motions, we also note that a motion that is not ruled on is deemed denied by operation of law. *McElwain v. Schuckert*, 13 Ariz. App. 468, 470, 477 P.2d 754, 756 (1970).

for Writ of Habeas Corpus in both its August 25, 2006 and September 20, 2006 minute entries; (3) Motion to Dismiss Based on Court's Rule 15.8 Sanctions Ruling in its October 19, 2007 minute entry; (4) Motion to Dismiss Based on Violation of Procedural and Due Process Rights Related to State's Presentation of Two Supervening Indictments in its October 23, 2007 minute entry because the motion was not included in Appellant's October 2007 list of pending motions; (5) Petition for Writ of Habeas Corpus tacitly in its October 19, 2007 minute entry; (6) Motion to Quash Amended Order Dated April 5, 2007, for Recusal of Judge Granville, and for Attorney Fees and the two Declarations in support of this motion in its October 23, 2007 minute entry because the motion and supplements were not included in Appellant's October 2007 list of pending motions; (7) Motion to Dismiss Pursuant to Constitutional Violations in both its October 23, 2007 and November 27, 2007 minute entries; (8) Motion to Quash Ruling Electronically Filed 11/01/07 in its November 2, 2007 minute entry; (9) Motion for Sanctions and to Compel Re: State's Failure to File Motion to Consolidate in its September 8, 2008 minute entry; (10) Motion for Hearing Re: Court Referral of Prosecutor for Bar Inquiry Pursuant to Ethical Breach(es) during a hearing held on February 8, 2008; (11) Motion for Court to Order Prosecution to Produce a Copy of Federal Agent's Authorization to Make Arrest on State Statutes

and to Make Original Documents Available for Inspection in its July 31, 2008 minute entry; (12) Motion for Court to Order Prosecution to Produce the Personnel Files of Law Enforcement Witnesses in its July 31, 2008 minute entry; (13) Motion for Court Order Re: Discovery in its July 31, 2008 minute entry; and (14) Motion to Reconsider 4/29/08 Rule 16.6(B) Ruling in its May 6, 2008 minute entry.

iv. Granted Motions

¶50 Two of the motions included in Appellant's list of motions on which the trial court failed to rule were granted by the trial court. The court granted both Appellant's Motion for Court to Order Handwriting Exemplar and the State to Retain and Produce Original Evidence for Forensic Examination and his Motion for Court Order Re: Copy of Cloned Hard-Drive to Be Release[d] to Defense Expert in its July 31, 2008 minute entry.

C. Failure to Rule on All Issues in Motions

¶51 Appellant also alleges that the trial court "cherry-picked" his motions by only deciding certain issues in his multi-issue motions. He first cites, as an example, his motion titled Rule 12.9(A), A.R.Cr.P. Challenge to Grand Jury Proceedings. After Appellant filed this motion, the trial court remanded the case to the grand jury for a redetermination of probable cause. Although Appellant contends that the trial court did not rule on all issues in the motion before remanding

the case, Appellant failed to provide this court with transcripts from the evidentiary hearing. Accordingly, "the missing portions of the record will be presumed to support the action of the trial court." *State v. Bojorquez*, 111 Ariz. 549, 553, 535 P.2d 6, 10 (1975). We therefore presume that the trial court properly disposed of Appellant's motion.

¶52 As another example of "cherry-picking," Appellant cites his motion titled Challenge to Grand Jury Proceedings Pursuant to Rules 12.9 and 12.28 (A.R.Cr.P.). After a 12.9 evidentiary hearing, the trial court once again remanded the case to the grand jury. In its June 13, 2008 minute entry, the trial court stated that it had "reviewed the entire matter," it was remanding the case to the grand jury, and "[f]urther oral argument on the Motion for Remand and any remaining motions as well as any further evidentiary hearings [was] unnecessary for the reasons set forth [t]herein and [was] therefore DENIED." Thus, we find that the trial court sufficiently reviewed the remaining issues in Appellant's motion and denied those issues prior to remanding the case to the grand jury.

III. Trial Issues

¶53 Appellant raises numerous issues pertaining to his trial in his supplemental brief. We address those issues below.

A. Insufficient Evidence

¶54 Appellant asserts that the State presented

insufficient evidence to support his convictions. When reviewing a claim of insufficient evidence, we view the evidence "in the light most favorable to sustaining the conviction." *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). We do not reweigh the evidence and will affirm if substantial evidence supports the jury's verdict. *Id.* "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We review Appellant's fraudulent schemes and artifices convictions, as well as his theft conviction, below.

i. Fraudulent Schemes and Artifices

¶55 Fraudulent schemes and artifices is committed when a person, "pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." A.R.S. § 13-2310.A (2010). The term "benefit" means "anything of value or advantage, present or prospective," A.R.S. § 13-105.3 (Supp. 2012), and it is defined broadly to encompass both pecuniary and non-pecuniary gain. *State v. Henry*, 205 Ariz. 229, 233, ¶ 15, 68 P.3d 455, 459 (App. 2003).

a. Count One

¶56 Appellant was convicted of one count of fraudulent

schemes and artifices for making false or fraudulent representations to Lima of Luxury Home, Janssen of A&A Funding, and Kaplan and Ziegler of Mortgages, Ltd., in order to knowingly obtain the benefit of a $2.2 million mortgage from Mortgages, Ltd.

¶57 During the trial, the State introduced sufficient evidence of the false or fraudulent representations made by Appellant. Cooper testified that Appellant posed as Cooper when he was negotiating to buy the Quartz Mountain Property. Although Cooper objected to Appellant buying the Quartz Mountain Property when he first learned of the negotiations, he testified he signed the closing documents after Appellant told him that everything was alright.

¶58 Brooks prepared a 2003 corporate tax return for TempleBloc. Brooks had no experience preparing corporate tax returns and failed to obtain annual reports, profit and loss statements, or other financial records for the company; instead, he completed the tax return based on information provided to him by Appellant. The tax return listed assets in the amount of $1,031,610 for TempleBloc. However, TempleBloc conducted no form of legitimate business.

¶59 Lima testified that Appellant told him that he was the right-hand man for Cooper and that he would be buying the Quartz Mountain Property on Cooper’s behalf. Lima testified that he

witnessed Appellant sign a price concession document as Cooper.

¶60 Appellant also informed Lima that Cooper had an escrow account of approximately $1 million, and Cooper was planning on using that money to purchase properties in Arizona. However, when asked if he had an escrow account from Diversified Title and Escrow in the amount of $800,000, Cooper testified that he had no knowledge of the account.

¶61 After Appellant informed Lima that he was having trouble getting conventional financing, Lima referred Appellant to Janssen of A&A Funding. Janssen identified Appellant in a photo lineup as Cooper. Janssen testified that he packaged a loan for the Quartz Mountain Property and that he considered TempleBloc's 2003 corporate tax return when generating the loan application. Janssen further testified that Appellant signed documents with Cooper's signature.

¶62 Janssen also stated he brokered the loan to Mortgages, Ltd. because his company did not have an in-house funding source for a loan the size required to obtain the Quartz Mountain Property. He testified that he provided the documentation given to him for the loan application to Mortgages, Ltd., including TempleBloc's fraudulent tax return.

¶63 Kaplan and Zeigler of Mortgages, Ltd. testified that Appellant held himself out to be Cooper during the walk through of the Quartz Mountain Property and signed loan commitment

documents with Cooper's name. They both also identified Appellant as the man they believed to be Cooper in a photo lineup. Kaplan said that TempleBloc's tax return was material to his decision to fund the loan.

¶64 In his supplemental brief, Appellant questions who actually received the benefit of the $2.2 million loan. He believes that Kaplan testified falsely when he said that Cooper was the borrower and not TempleBloc. However, TempleBloc was merely a shell corporation that conducted no legitimate form of business. Appellant personally negotiated with the parties and made the false representations necessary to secure the $2.2 million loan, not Cooper. As a result of these fraudulent representations, Appellant obtained the benefit of a $2.2 million loan from Mortgages, Ltd. This loan was used to finance the acquisition of the Quartz Mountain Property, in which Appellant and Veronica lived.

b. Count Three

¶65 Appellant was also convicted of one count of fraudulent schemes and artifices for making false or fraudulent representations in order to knowingly obtain the benefit of an $850,000 loan from Hancock. At trial, the State introduced sufficient evidence of the false or fraudulent representations made by Appellant to Hancock in order to obtain this loan.

¶66 Hancock testified that he entered into negotiations to

provide a loan to Appellant, who he believed to be Cooper, using the nickname Lane Quue. Hancock identified Appellant as Cooper or Lane Quue during a photo lineup. Hancock also testified that he was told that the Quartz Mountain Property was owned free and clear by Cooper, who he identified as Appellant. He stated that if he had known there were other liens against the property, he would never have agreed to lend money to Appellant, especially in light of the size of the other liens.

¶67 Appellant misrepresented to Hancock that the Quartz Mountain Property was owned free and clear when, in reality, he had fraudulently released liens in the amount of $2.2 million and $600,000 against the Quartz Mountain Property. As a result of these misrepresentations, Appellant received a benefit: Hancock extended an $850,000 line of credit to him.

c. Count Four

¶68 Appellant was convicted of one final count of fraudulent schemes and artifices for making false or fraudulent representations in order to knowingly obtain the benefit of leases on four Hummers from Kachina. At trial, the State introduced sufficient evidence of the false or fraudulent representations made by Appellant to Kachina to obtain the leases.

¶69 Appellant first contends that no evidence was presented that Appellant or TempleBloc obtained leases in

Cooper's name. However, Cooper testified that Appellant negotiated the leases for the Hummers. Additionally, Heiner, a salesman for Kachina, identified Appellant in a photo lineup and testified that he worked primarily with Appellant in negotiating the leases for the four Hummers. He further testified that Appellant informed him that he was negotiating on Cooper's behalf and that Cooper wanted to lease the vehicles in TempleBloc's name.

¶70 As described above, Appellant was instrumental in creating a fraudulent tax return for TempleBloc that included $1,031,610 in assets, even though TempleBloc conducted no form of legitimate business. Appellant provided TempleBloc's fraudulent tax return to Kachina in order to obtain the leases. When shown TempleBloc's tax return during trial, Heiner testified that the return would have been required for a GMAC credit application in order to obtain the leases on the four vehicles. He stated that GMAC would have relied on the tax return in order to establish that the lessee had sufficient income to repay the loans and to guarantee return of the vehicles at the end of their lease.

¶71 Appellant contends that TempleBloc obtained the benefit because TempleBloc's name was on the leases. However, as previously stated, TempleBloc was merely a shell corporation that conducted no legitimate business. Appellant negotiated

with the parties and made the false representations necessary to secure the four leases. As a result of Appellant's false or fraudulent representations, he obtained the benefit of leases on four Hummers from Kachina.

ii. Theft

¶72 Appellant also contends that the State introduced insufficient evidence to convict him of count five. Under count five, Appellant was charged with theft because he obtained $475,000 from Hancock using forged lien releases in order to represent the already mortgaged Quartz Mountain Property as good collateral for an $850,000 loan. To convict a defendant of theft, the State must prove that the defendant "[o]btain[ed] services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services." A.R.S. § 13-1802.A.3 (Supp. 2012).

¶73 During Appellant's trial, the State introduced sufficient evidence to convict Appellant of this crime. Cooper testified that Appellant told him that he was going to release the loans from the Quartz Mountain Property because he wanted to refinance. Appellant used the Internet to learn how to release loans from a property and told Cooper that by doing that, the house becomes "yours outright."

¶74 Flagg-Thomas testified that Appellant asked her if she knew anyone who could notarize documents. She introduced

Appellant to her friend Emudianughe. Emudianughe testified that Appellant told her his name was Daniel Moore when she met him, and she identified him in a photo lineup as Daniel Moore. She testified further that after signing one lien release as Daniel Moore, Appellant signed another lien release in the name of Dr. Greenberg, who he claimed was his brother.

¶75 Appellant contends that there was no evidence that material misrepresentations were made to Hancock related to the fraudulent lien releases. However, Hancock testified that Appellant told him that he owned the Quartz Mountain Property free and clear and that statement was material to his decision to loan money to Appellant. Hancock loaned Appellant a total of $475,000, consisting of one draw in the amount of $225,000 and a second draw of $250,000. After securing these funds, Appellant and Veronica moved to Atlanta. There is no indication that Appellant intended to repay the funds received from Hancock. Therefore, we find that sufficient evidence was presented at trial to convict Appellant of theft.

B. *Other Trial Issues*

i. Duplicity of Count One

¶76 Appellant alleges that count one was duplicitous because it stated that misrepresentations were made to several people and that a benefit was obtained by TempleBloc and Cooper. An indictment that does not comply with the mandate of Arizona

Rule of Criminal Procedure 13.3 by charging separate crimes in the same count is duplicitous. *Spencer v. Coconino Cnty. Superior Court*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983). Duplicitous indictments are prohibited because they do not give the defendant notice of exactly what charges he must defend against, they make a pleading of prior jeopardy impossible if the defendant is subject to a later prosecution, and they present a hazard of a non-unanimous jury verdict. *Id.*

¶77 Appellant's contention that count one was duplicitous because it stated that a benefit was obtained in the name of TempleBloc and Cooper is without merit. As discussed above, the jury needed to find that Appellant received the benefit. We found sufficient evidence to prove this element of the fraudulent schemes and artifices count. Whether the loan was in the name of Cooper or TempleBloc is irrelevant to Appellant's conviction.[10]

¶78 Moreover, the fact that Appellant was alleged to have made multiple fraudulent representations to several people in order to obtain the $2.2 million loan does not make the fraudulent schemes and artifices count duplicitous. *See State*

[10] Appellant also alleges that count three was duplicitous; however, he does not elaborate on this claim in his brief, and we therefore do not address it. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007) (stating that the failure to develop and support an argument waives the issue on appeal).

v. Suarez, 137 Ariz. 368, 373, 670 P.2d 1192, 1197 (App. 1983) (holding that a fraudulent schemes and artifices count involving twenty-four separate transactions was not duplicitous); *see also State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985) (holding that counts alleging thefts from banks were not duplicitous because when "numerous transactions are merely parts of a larger scheme, a single count encompassing the entire scheme is proper"). We find that the State alleged a sufficiently close nexus among Appellant's acts so as to fairly characterize the acts as part of one scheme; therefore, count one was not duplicitous.

ii. Other Issues with Count One

¶79 Appellant argues that he should not have been convicted of count one because Kaplan, Cooper, and Lima all testified falsely. Appellant blames the prosecutor for presenting misleading and false evidence. Although a prosecutor may not knowingly encourage false testimony, "the credibility of witnesses is for the jury to determine." *State v. Rivera*, 210 Ariz. 188, 194, ¶ 28, 109 P.3d 83, 89 (2005). We find that Appellant has failed to prove that the witnesses testified falsely, much less that there was false testimony *and* the prosecution was aware of it.

¶80 Appellant asserts that Mortgages, Ltd. is not a true victim because it did not lend the $2.2 million, as alleged in

count one, but it instead brokered the transaction. Article 2, Section 2.1(C), of the Arizona Constitution states that a victim is a person "against whom the criminal offense has been committed." We discussed above that sufficient evidence was introduced to prove that Appellant committed the crime of fraudulent schemes and artifices against Mortgages, Ltd., which enabled him to obtain the benefit of a $2.2 million loan from them. We find the source of the loan that Appellant obtained from Mortgages, Ltd. irrelevant.

¶81 Appellant also claims that in a real estate transaction, the benefit is obtained when the transaction closes. Appellant believes that the testimony from an employee of the title company who said that she thought that the only transaction that closed was the loan between the original owners and Lima is proof that a benefit was not obtained in TempleBloc's name. This argument is without merit. There is ample evidence in the record to prove that the transaction closed in this case, including the warranty deed between the original owners and TempleBloc that was recorded by the title company.

¶82 Finally, Appellant asserts that there was no testimony at trial that the benefit was obtained in the name of TempleBloc and Cooper as was listed in the indictment. The State introduced a copy of Mortgages, Ltd.'s loan guaranty as an

exhibit; the loan was in the name of TempleBloc and guaranteed by Cooper. Additionally, "[t]he charging document shall be deemed amended to conform to the evidence adduced at any court proceeding," Arizona Rule of Criminal Procedure 13.5.b, but the defendant must have been put on notice of the charges against him. *State v. Delgado*, 174 Ariz. 252, 255, 848 P.2d 337, 340 (App. 1993). No formal action or motion is required. *Id.* Even if the evidence introduced at trial only proved that the loan was in the name of TempleBloc or Cooper, we find that Appellant was put on notice of the charge against him.

iii. Other Issues with Count Three

¶83 Appellant argues that the State failed to prove that an $850,000 *loan* was obtained because Hancock only testified that he extended an $850,000 *line of credit*. However, Hancock testified that Appellant wanted $850,000 but that he "treat[ed] it as a line of credit" because he could not come up with the money in a lump sum. Because "[t]he charging document shall be deemed amended to conform to the evidence adduced at any court proceeding," Arizona Rule of Criminal Procedure 13.5.b, whether Appellant obtained an $850,000 loan or an $850,000 line of credit is irrelevant. We find that Appellant was put on notice of the charge against him. *See Delgado*, 174 Ariz. at 255, 848 P.2d at 340.

¶84 Appellant raises a similar argument that the State

failed to prove that the benefit was obtained in the name of Cooper or Horizon. However, Hancock testified that he provided the loan to Appellant under the assumption that Appellant was Cooper and Horizon was Appellant's company. Additionally, the State presented a deed of trust during trial for the $850,000 line of credit with Horizon and Cooper as trustors.

¶85 Appellant also raises questions concerning the identity of the borrower. Although Appellant's name was not listed on the deed of trust and there was testimony that Horizon was the borrower, Hancock was under the assumption that Appellant was Cooper and Horizon was Appellant's company when he extended the line of credit to Appellant.

¶86 Appellant finally contends that no evidence was presented that the loan was obtained from Hancock because Hancock testified that he, his father, and other people agreed to provide a line of credit. However, the deed of trust described above was between Hancock, Cooper, and Horizon. Although Hancock may have borrowed money from other individuals in order to fund the line of credit that he provided Appellant, we find the actual source of the funds to be irrelevant.

iv. Other Issues with Count Four

¶87 Appellant further contends that Kachina was not a true victim because GMAC ultimately approved the vehicle leases. We find that Appellant made misrepresentations to Kachina in the

form of TempleBloc's fraudulent tax return. Further, Heiner testified that he reviewed the tax return and would not have forwarded Appellant's lease application to GMAC if he did not believe that the leases would be approved. Kachina ultimately parted with the benefit in this case: it provided the leases to Appellant and parted with the four Hummers. We therefore find that Kachina was a victim in this case. *See* Ariz. Const. art. 2, § 2.1(C) (stating that a victim is defined as "a person against whom the criminal offense has been committed").

¶88 Appellant questions whether the leases were obtained in the name of Cooper and whether Humvee vehicles were obtained, as stated in the indictment. Because "[t]he charging document shall be deemed amended to conform to the evidence adduced at any court proceeding," Arizona Rule of Criminal Procedure 13.5.b, whether the leases were in the name of TempleBloc, Cooper, or both and whether Humvees or Hummers were obtained is irrelevant. We find that Appellant was put on notice of the charge against him. *See Delgado*, 174 Ariz. at 255, 848 P.2d at 340.[11]

¶89 Appellant also contends that count four is duplicitous because the State failed to specifically identify the four Hummers with vehicle identification numbers and trade names,

[11] The First Indictment correctly stated that four 2004 H-2 Hummer vehicles were obtained, which is further evidence that Appellant was put on notice of the charges against him.

which puts him at risk of double jeopardy. We fail to see how this makes the count duplicitous; the indictment does not charge separate crimes in the same count. *Spencer*, 136 Ariz. at 610, 667 P.2d at 1325. Each lease for each Hummer is merely one transaction in a larger scheme to defraud, making up count four. *See Via*, 146 Ariz. at 116, 704 P.2d at 246 (holding that counts alleging thefts from banks were not duplicitous because when "numerous transactions are merely parts of a larger scheme, a single count encompassing the entire scheme is proper").

¶90 Further, an indictment must only contain "a plain concise statement of facts sufficiently definite to inform the defendant of the offense charged." *State v. Kidd*, 116 Ariz. 479, 481, 569 P.2d 1377, 1379 (App. 1977). We find that the indictment provided Appellant with sufficient facts to inform him of the offense charged in count four.

¶91 Appellant finally asserts that the State failed to establish dates for the transactions or the date of when the vehicles were delivered to Appellant. This argument fails because "exact dates are not required so long as they are within the statute of limitation and no prejudice is shown." *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996) (quoting *United States v. Austin*, 448 F.2d 399, 400 (9th Cir. 1971)), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). Appellant has not alleged or

demonstrated any actual prejudice.

v. Other Issues with Count Five

¶92 Appellant first asserts that the grand jury lacked jurisdiction to investigate and return an indictment for a theft offense under A.R.S. § 21-422 (2013). We disagree. Section 21-422.B states that the grand jury has jurisdiction to return indictments "for only those offenses or violations of law arising out of or in connection with" certain enumerated offenses. While the crime of fraudulent schemes and artifices is one of the enumerated offenses, the type of theft of which Appellant was indicted and convicted is not included in the statute's list. A.R.S. § 21-422.B. In this case, however, the theft charge "arose out of or in connection with" the fraudulent scheme and artifice for which Appellant was charged in count three. We therefore find that the grand jury had jurisdiction to return an indictment against Appellant on count five.

¶93 Appellant argues that the indictment's wording makes it appear that there was one transaction in the amount of $475,000, rather than two draws of $250,000 and $225,000. Appellant fails to elaborate on this argument or prove that this language was insufficient to apprise him of the charges against him. We therefore deem this argument waived on appeal. *See Polanco*, 214 Ariz. at 491 n.2, ¶ 6, 154 P.3d at 393 n.2 (stating that the failure to develop and support an argument waives the

issue on appeal).

¶94 Appellant next contends that the statute cited in the indictment alleges theft by control, but the description of the crime that was included in the indictment conflicted with the statute. Count five stated that Appellant "obtained services or property of another by means of any material misrepresentation."

¶95 "Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) (citation omitted). Therefore, "[a]n indictment's general citation to A.R.S. § 13-1802 is sufficient to charge a violation of the statute's subsections." *State v. Cotten*, 228 Ariz. 105, 108, ¶ 6, 263 P.3d 654, 657 (App. 2011). We therefore find that the language of the statute was sufficient to apprise Appellant of the charge against him.

¶96 Appellant again raises the same assertion that Hancock was not a victim because the money came from Hancock, his father, and various other sources. However, Hancock was the one who negotiated with Appellant and who urged his family members to provide him money so he could fund Appellant's line of credit. The indictment is only required to set forth a sufficient factual statement to give a defendant notice of the

charges against him. *See* Ariz. R. Crim. P. 13.2.a. Although Hancock may have borrowed money from other people in order to fund the line of credit that he provided Appellant, we find the source of the loan to be irrelevant and find that the indictment sufficiently apprised Appellant of the charges against him.

¶97 Appellant also raises the issue that count five was duplicitous because the indictment should have alleged all of the people from whom Hancock obtained funds in order to provide the line of credit. He contends that the count charged two or more separate offenses in the same count. This argument is unintelligible, and we decline to address it.

¶98 Appellant finally contends that the indictment listed 65301 East Quartz Mountain Road, instead of 6301 East Quartz Mountain Road, and there was no evidence that a crime took place at that address. Appellant does not explain how this defect affected him. Because a document is amended to conform to the evidence presented at trial, Arizona Rule of Criminal Procedure 13.5.b, we find that this defect did not result in any prejudice to Appellant, and Appellant was sufficiently apprised of the charges against him.

IV. Sentencing

¶99 Appellant's brief raises a number of sentencing issues, many of which stem from the same course of events. On June 10, 2008, just prior to the trial court granting the Motion

to Remand, the State filed "State's Motion to Amend Indictment to Allege Defendant's Prior Convictions." The motion stated "[t]he State intends to use [Appellant]'s prior felony convictions at trial and at sentencing" and listed three alleged prior convictions: (1) a 1997 federal felony conviction in the Northern District of Texas, Dallas Division for one count of conspiracy to possess unauthorized access devices and one count of counterfeit access devices (aiding and abetting); (2) a 2000 federal felony conviction in the Northern District of Texas, Dallas Division for bank fraud; and (3) a 2003 Arizona felony conviction for fraudulent schemes and artifices. The motion also indicated Appellant's violation of his term of release for the second prior and violation of probation on the third prior. Appellant takes issue with several elements of this motion.

A. Failure to Allege Supervised Release Status

¶100 First, Appellant contends that the State failed to properly allege that he was on probation, parole, or supervised release at the time of his arrest. This argument is without merit. Appellant's enhanced sentence was based on his prior convictions, which moved him from the first-time offender sentencing scheme into the repetitive offender sentencing scheme pursuant to A.R.S. § 13-703.C, J (Supp. 2012). Although the trial court mentioned the fact that Appellant was on probation at the time of the current offenses at Appellant's sentencing,

this also was not the reason the trial court cited for giving Appellant the presumptive sentence within the repetitive offender sentencing scheme. The trial court sentenced Appellant to a presumptive term based on its determination that the aggravating and mitigating factors balanced out.

¶101 Additionally, the fact that Appellant was on probation at the time of his arrest was addressed in two settlement conference memoranda, filed by the State on December 18, 2007 and February 6, 2008. The memoranda cite A.R.S. § 13-604.02.B[12] and state that Appellant "must be sentenced to at least the presumptive term, as these offenses were committed while [Appellant] was on probation." Thus, we find Appellant had prior notice of the State's intent to use the fact that Appellant was on probation at the time he committed the current offenses during Appellant's sentencing.

B. Lack of Adequate Notice of Intent to Use Historical Priors for Sentence Enhancement

¶102 Appellant further contends that the State failed to give him adequate notice of its intent to use his prior convictions for sentence enhancement. Arizona Revised Statutes § 13-703.N requires that notice be given of the State's intent to prove priors any time before the case is actually tried, and at least twenty days before the case is actually tried if there

[12] Section 13-604.02 was renumbered as A.R.S. § 13-708 (Supp. 2012).

is the possibility of prejudice.

¶103 Here, Appellant was put on notice of the possible sentencing implication of his historical priors as early as December 18, 2007, when the State filed a Settlement Conference Memorandum detailing Appellant's three prior convictions and the effects that those convictions could have on Appellant's sentence. Additionally, the State filed a second Settlement Conference Memorandum on February 6, 2008 that outlined the enhancement effect that his historical priors would have on his sentence. The memoranda states, in pertinent part, "[i]f [Appellant] is convicted of Class 2 Fraudulent Schemes in count one with three prior felony convictions, he faces a sentencing range of the presumptive sentence of 15.75 years."

¶104 In addition, the State filed its Motion to Amend Indictment to Allege [Appellant's] Prior Convictions on June 10, 2008. This motion discussed Appellant's prior convictions and stated that "[t]he State intends to use [Appellant's] prior felony convictions at trial and at sentencing."

¶105 Appellant also contends that the State's Motion to Amend "did not amend [the] charging document to allege any statutes to authorize a sentence in the two historical prior range." However, Appellant was put on notice of the increased presumptive sentence that he would receive as a result of his prior felony convictions in the two settlement conference

memoranda filed by the State.

¶106 We therefore find that no prejudice or surprise resulted from the omission of the citation in the indictment. Additionally, because the trial did not commence until November 3, 2008, both provisions of A.R.S. § 13-703.N were satisfied, and Appellant was undoubtedly on notice of the potential punishments for his crimes.

C. Failure to Prove Historical Priors

¶107 Appellant then argues that regardless of the issue of notice, the State failed to prove the prior convictions at the priors hearing. At the hearing, the State introduced certified copies of Appellant's prior convictions, and Appellant's probation officer testified regarding the identity of Appellant. Appellant contends that the only way to prove alleged priors is to submit a certified record of the conviction containing defendant's fingerprints and then call a fingerprint analyst to testify that the fingerprints are in fact those of the defendant. "Although the preferred method of proving prior convictions for sentence-enhancement purposes is submission of certified conviction documents bearing the defendant's fingerprints, courts may consider other kinds of evidence as well." *State v. Robles*, 213 Ariz. 268, 273, ¶ 16, 141 P.3d 748, 753 (App. 2006) (citation omitted).

¶108 In this case, the State submitted both documentary and

testimonial evidence that established that Appellant's prior convictions existed and that Appellant was the party named in those prior convictions. The probation officer testified that even though he had not been present at trial or sentencing for Appellant's federal convictions, Appellant presented himself to the probation officer upon his relocation to Arizona and identified himself as Delanie Ross. In addition, the trial court took proper judicial notice of its own records in verifying Appellant's prior Arizona conviction and probation status. *See* Ariz. R. Evid. 201; *see also In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000). This combination of evidence meets the clear and convincing burden required to prove Appellant's prior convictions for sentence enhancement purposes.

D. Use of Foreign Priors

¶109 Appellant further contends that his foreign priors are unusable because the State did not demonstrate that they would be felonies in Arizona. "Before using a foreign conviction for sentencing enhancement purposes under § 13–604, the superior court must first conclude that the foreign conviction includes 'every element that would be required to prove an enumerated Arizona offense.'" *State v. Crawford*, 214 Ariz. 129, 131, ¶ 7, 149 P.3d 753, 755 (2007) (quoting *State v. Ault*, 157 Ariz. 516, 521, 759 P.2d 1320, 1325 (1988)).

¶110 The record reflects that the trial court found that Appellant's federal conviction for bank fraud required proof of all of the necessary elements of fraudulent schemes and artifices, a class two felony in Arizona. As such, the trial court did not abuse its discretion to use the foreign prior for sentence enhancement.

E. Unlawful Sentence

¶111 Finally, Appellant argues that the sentence given by the trial court was unlawful. Upon review, there are two separate issues concerning the trial court's initial sentence. Appellant only argues the first, but we consider both.

i. Errors in Oral Pronouncement

¶112 The first issue concerns clerical errors made in the oral pronouncement of Appellant's sentence. In the oral pronouncement, the trial court made several errors, such as issuing Appellant a sentence for count two, for which he was not convicted. In the written pronouncement of the sentence, the sentences were attributed to the proper counts, but the dates for Appellant's prior convictions were entered incorrectly. Appellant is correct in asserting that this constitutes an error; however, his argument that the oral pronouncement controls is flawed.

¶113 "[W]hen there is a discrepancy between the oral pronouncement of sentence and the minute entry that cannot be

resolved by reference *to the record*, a remand for clarification of sentence is appropriate." *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992). In *Bowles*, the court referenced other parts of the record that indicated that the trial court intended the defendant's sentence to be consistent with the written pronouncement. *Id.* As such, the court determined that because the trial court's intent was manifest, remand was unnecessary. *Id.*

¶114 Here, the trial court held an additional hearing on February 12, 2010, in which it clarified the record and removed any doubt about its intent. During this hearing, the trial court corrected both the sentences issued for each count and the dates of the prior convictions used for sentence enhancement. As the discrepancy between the oral pronouncement and written pronouncement can be resolved by referencing the record, there is no need for remand on this issue.

ii. Modification of Sentence

¶115 Although Appellant did not raise the issue of the trial court's ability to modify an unlawful sentence, we requested briefing on this issue from both the State and Appellant's counsel. Appellant was initially awarded 1626 days of presentence incarceration credit at his sentencing on July

17, 2009.[13] The State filed a Motion to Correct Unlawful Sentence on August 5, 2009, arguing that an application of A.R.S. § 13-708.C to Appellant's case required the trial court to make his sentence consecutive to the sentence he had served for violating his probation. By awarding Appellant 1626 days of presentence incarceration credit, the trial court had awarded Appellant the same presentence incarceration credit on both the prior sentence and the consecutive sentence. *See State v. Cuen*, 158 Ariz. 86, 88, 761 P.2d 160, 162 (App. 1988) (holding that when a consecutive sentence is imposed, the defendant is not entitled to "double credit" for presentence time served). The trial court also, in effect, made Appellant's sentence concurrent to the sentence he served for violating his probation by awarding him presentence incarceration credit for the period of time that he was serving his sentence for his probation violation.[14] The State requested that the trial court modify Appellant's unlawful sentence and award him 266 days of

[13] Unlike the clerical errors enumerated above, this credit was represented in both the oral pronouncement of the sentence and the written pronouncement.

[14] Appellant was given presentence incarceration credit from his arrest on February 3, 2005 through his sentencing on July 17, 2009. However, Appellant was given a five year sentence for violating the terms of his probation. He was incarcerated for this violation from February 3, 2005 until October 23, 2008, when he was released from the sentence.

presentence incarceration credit.[15]

¶116 The court acknowledged receiving the State's motion in a minute entry filed on August 27, 2009, and the trial court afforded Appellant five days to submit a response. Appellant filed his own Motion to Modify Unlawful Sentence on August 25, 2009, alleging that other errors occurred during sentencing, but the sentence was not corrected until February 12, 2010.

¶117 "An unlawful sentence is one that is outside the statutory range." *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991). "The state has two procedural vehicles to challenge an illegally lenient sentence: an appeal or a timely motion pursuant to Rule 24.3 [of the Arizona Rules of Criminal Procedure]." *State v. Bryant*, 219 Ariz. 514, 516, ¶ 5, 200 P.3d 1011, 1013 (App. 2008). Rule 24.3 affords a trial court sixty days after an entry of judgment to modify an unlawful sentence. After the sixty day period has elapsed, the trial court is divested of its jurisdiction to modify the sentence. *Id.* at 517, ¶¶ 10-11, 200 P.3d at 1014.

¶118 In Appellant's case, the State did not appeal the unlawful sentence, but it did file a Motion to Correct Unlawful Sentence in accordance with Rule 24.3. The State contends that

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[15] Appellant was released from his sentence on October 23, 2008 and was sentenced on July 17, 2009. Although the State requested that the trial court modify the award to 266 days, the trial court awarded Appellant 267 days of presentence incarceration credit.

that by filing its motion within sixty days, it complied with Rule 24.3's requirements. However, the filing of a motion is insufficient for the trial court to retain jurisdiction. "Rule 24.3 requires more than that the state simply notified the court of an unlawful sentence. Under Rule 24.3, the trial court itself must act within sixty days to correct an unlawful sentence, or the sentence will stand." *Id.* at ¶ 11. In *Bryant*, the trial court did not amend the defendant's illegal sentence until 115 days after the judgment was entered, and this court vacated the amended sentence. *Id.* at 517-18, ¶¶ 10, 18, 200 P.3d at 1014-15.

¶119 Appellant's case is similar to *Bryant*. The trial court issued an illegal sentence in violation of A.R.S. § 13-708.C but did not modify it until well after the statutory period had expired. The State contends that we should reconsider the holding in *Bryant*. It contends that if we apply *Bryant*, it would result in an injustice to the State because the State timely filed its motion to amend, yet the trial court failed to act on the motion within the required sixty days. We agree, however, with the determination in *Bryant* that the trial court is divested of jurisdiction to correct the sentence if it fails to act within the sixty day limit prescribed by Rule 24.3. As the State has not appealed the sentence, and the trial court did not have jurisdiction to modify the initial sentence, we

must vacate the modified sentence of February 12, 2010 and reinstate the sentence issued on July 17, 2009, granting Appellant 1626 days of presentence incarceration credit.

CONCLUSION

¶120 For the foregoing reasons, Appellant's convictions and sentences are affirmed. However, we vacate the trial court's February 12, 2010 order, modifying Appellant's award of presentence incarceration credit, and reinstate the July 17, 2009 order, awarding Appellant 1626 days of presentence incarceration credit.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PHILIP HALL, Judge

/S/
_____
JOHN C. GEMMILL, Judge