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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 10/02/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

STATE OF ARIZONA,) 1 CA-CR 11-0338
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
JOSEPH JOHN VIOLA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 1990-010323

The Honorable Daniel G. Martin, Judge
The Honorable Colleen L. French, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

Tyrone Mitchell, PC Phoenix
By Tyrone Mitchell
Attorney for Appellant

B R O W N, Judge

¶1 Joseph John Viola appeals his convictions and sentences for five counts of fraudulent schemes and artifices.

Viola argues the trial court erred when it admitted evidence of his prior felony convictions, denied his motion to set aside the designation of this case as complex, and sentenced him to an aggregate term of thirty-six years' imprisonment. Viola further argues the evidence was insufficient to support his convictions. For the reasons that follow, we affirm.

BACKGROUND

¶2 At various times between 1988 and 1990, five victims¹ provided money to Viola in the belief that he would invest it for them in a "managed account in financial futures." Two of the victims received a modest refund from Viola, but three of the victims ultimately lost all their money. In 1990, the State charged Viola with six counts of fraudulent schemes and artifices,² but Viola absconded for twenty years after the trial court released him on his own recognizance. Authorities eventually apprehended Viola in 2010. A jury convicted Viola as charged and the trial court sentenced him to eighteen years' imprisonment for each count, with Counts 2 through 5 to run concurrent with each other but consecutive to Count 1. Viola timely appealed.

¹ One of the victims died before trial. The executor of his estate, his son, testified at trial.

² The State dismissed Count One prior to trial.

DISCUSSION

I. Admission of Prior Convictions

¶3 Viola argues the trial court erred when it granted the State's motion in limine and admitted evidence of Viola's prior felony convictions for fraudulent schemes and artifices, theft, and sale of unregistered securities. The trial court admitted the evidence as intrinsic to the charged offenses. On appeal, Viola argues the evidence constituted inadmissible character evidence, any probative value was substantially outweighed by the danger of unfair prejudice, and "the jury was not able to compartmentalize and separate the evidence from the respective charges, and thus, the jury unfairly judged and convicted [him] for the instant offense [sic] based upon his past conduct." Viola does not address whether the evidence was intrinsic.

¶4 We review a trial court's evidentiary rulings for a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Evidence is intrinsic "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *State v. Ferrero*, 229 Ariz. 239, ___, ¶ 20, 274 P.3d 509, 513 (2012). Intrinsic evidence may be admitted without any analysis pursuant to Arizona Rule of Evidence 404. *Id.* at ¶ 21, 274 P.3d at 514.

¶15 The trial court did not abuse its discretion when it determined evidence of Viola's five prior felony convictions was intrinsic to the charged offenses. A person commits fraudulent schemes and artifices if, "pursuant to a scheme or artifice to defraud," the person "knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions[.]" Ariz. Rev. Stat. ("A.R.S.") § 13-2310(A) (2012).³ When a person offers investment opportunities, that person's failure to inform potential investors of his or her prior felony convictions is a "material omission" for purposes of A.R.S. § 13-2310(A). *State v. Ritacca*, 169 Ariz. 401, 402, 819 P.2d 987, 988 (App. 1991). Here, Viola failed to inform at least four of the five victims that he had prior felony convictions for various financial crimes. Those four victims testified that had they known of Viola's prior convictions, they would not have given him any money and would not have done business with him. The existence of Viola's prior felony convictions and his failure to inform the victims about those convictions directly provide the material omission element of the charged offense and was therefore intrinsic evidence.

¶16 Further, the trial court instructed the jury it could consider the evidence of Viola's prior convictions only to

³ Because the statute has not changed since the time of the offenses, we cite the current version.

determine whether Viola made a misrepresentation and/or a material omission. The court instructed the jury it could not consider the prior convictions as evidence of Viola's character or as evidence of a character trait. The court further instructed the jury it could not consider that evidence to determine whether Viola acted in conformity with his character and, therefore, committed the charged offenses. "Juries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996). Viola's claim that "the jury was not able to compartmentalize and separate the evidence from the respective charges, and thus, the jury unfairly judged and convicted Appellant for the instant [offenses] based upon his past conduct[]" is mere speculation that is not supported by the record. Accordingly, the trial court did not err in admitting evidence of Viola's prior convictions.

II. Sufficiency of the Evidence

¶7 Viola also argues the evidence presented at trial was insufficient to support his convictions. Viola argues he introduced evidence that the allegedly fraudulent investments were legitimate; and he created reasonable doubt as to whether he was actually the person who defrauded the victims. He also argues that some of the victims benefited from their investments; and that he was simply an agent of a trust. Viola

does not cite any portion of the record to support his factual assertions.

¶18 "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). We draw all reasonable inferences that support the verdict. *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999). Further, we resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not weigh the evidence, however, as that is the function of the jury. *Id.*

¶19 The evidence was more than sufficient to support each of Viola's convictions. To perpetrate his scheme, Viola offered the victims investments in securities. As part of the transaction, Viola had each victim sign identical agreements with "Yuban Trading and Leasing." Among other things, the agreement provided the victim was "acquiring a managed account in financial futures from Yuban Trading, a wholly owned subsidiary of Yuban Family Trust, a federally registered

investment trust organized in the Commonwealth of Pennsylvania." Another portion of the agreement provided, "the management of this account falls under the exemption provisions of the Commodity Exchange Act, 7 USC 1 et. seq., as amended, as relate[d] to trading advice offered by a separate party, which limits such advice to a group of persons not to exceed fifteen in number."

¶10 In spite of what the agreement led the victims to believe they were investing in, a "managed account in financial futures" such as that referenced in the written agreements is actually a pool of money from investors used to invest in the futures market. The Commodity Futures Trading Commission ("CFTC") regulates futures trading as well as the people involved in futures trading. The CFTC acts primarily through the National Futures Association ("NFA"). Despite the language of the agreement, if Viola and Yuban Trading and Leasing sought to have investors invest in a "managed account in financial futures," both were required to register with the CFTC. Further, an investment trust such as the Yuban Family Trust had to be registered with the Securities and Exchange Commission ("SEC"). And, although Viola had been registered with the CFTC prior to February 1986, he was not registered at the time the victims signed the agreements. Moreover, Yuban Trading and Leasing and the Yuban Family Trust were never registered with

the CFTC, the NFA or the SEC. Regarding the representation that the Yuban Family Trust was a "federally registered investment trust organized in the Commonwealth of Pennsylvania," the relevant Pennsylvania agencies had no records or information regarding Yuban Family Trust.

¶11 After the victims signed the agreements with Viola, each victim gave Viola money to invest. The victims eventually began to question the legitimacy of their transactions with Viola and attempted to close their accounts and retrieve their money. After continued periods of Viola evading questions about the money, each victim eventually reached a point where they could no longer contact Viola. With the exceptions of one victim who received \$500 from Viola and another who received \$4000, each victim lost all the money they invested. Viola presented no evidence that the investments he allegedly made on behalf of the victims ever actually existed.

¶12 Beyond the misrepresentations contained in the written agreement and Viola's failure to disclose the absence of any compliance with the applicable federal law, Viola did not tell at least four⁴ of the five victims that he had five prior felony convictions. Each of those four victims testified they would

⁴ Because the victim of count 2 died before trial, it is unknown whether Viola told him about his prior felony convictions.

not have done business with Viola had they known of his convictions.

¶13 Viola also argues that he presented evidence at trial creating reasonable doubt as to the identity of the person who committed the crimes. In particular, Viola references the testimony of Kenneth Moses, a biometrics expert, who testified that Viola's physical appearance was inconsistent with the photograph of the alleged perpetrator. According to Viola, Moses' testimony was sufficient to create reasonable doubt, and therefore, there was insufficient evidence on which to convict him. The testimony of each victim, some of whom had been Viola's friends, identifying him at trial belies Viola's assertion. Further, a search of Viola's home found documents related to the transactions involving all five victims. Finally, as noted above, Viola absconded for twenty years after the trial court released him on his own recognizance. A jury may consider a defendant's flight as evidence of guilt. *State v. Conroy*, 131 Ariz. 528, 532, 642 P.2d 873, 877 (App. 1982). Accordingly, while Viola presented evidence suggesting that his appearance was inconsistent with that of the alleged perpetrator, there was other evidence on which the jury could base a finding that Viola was in fact the person who committed the offenses.

¶14 "[A] 'scheme or artifice' is some 'plan, device, or trick' to perpetrate a fraud. The scheme need not be fraudulent on its face but 'must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.' The term 'defraud' as used in [A.R.S. § 13-2310] is not measured by any technical standard but, rather, by a 'broad view.'" *State v. Henry*, 205 Ariz. 229, 232, ¶ 12, 68 P.3d 455, 458 (App. 2003) (internal citations omitted). The aforementioned evidence was more than sufficient to permit a reasonable jury to find beyond a reasonable doubt that Viola, "pursuant to a scheme or artifice to defraud," knowingly obtained "any benefit by means of false or fraudulent pretenses, representations, promises or material omissions[.]"

III. The Designation of the Case as Complex

¶15 Viola's counsel moved to designate the case as complex. In support of his motion, counsel pointed to the number of counts, the nature of the charges, the potential amount of money involved, the number of victims, the number of potential witnesses, the fact that the police report was approximately 600 pages long, the need for an unknown number of experts by both parties, and the need for additional time to investigate the case and prepare for trial. The judge hearing

the motion ultimately granted it.⁵ Shortly thereafter, Viola's case was transferred to a different judge who accepted Viola's waiver of counsel. Viola then filed a motion to set aside the complex designation, which the trial court denied.

¶16 On appeal, Viola argues the first court erred when it granted defense counsel's motion to designate the case as complex and that the trial court erred when it denied Viola's motion to set aside the designation. The only prejudice Viola claims to have suffered from the designation is, "[u]ltimately, the delay in prosecuting this case denied [Viola] his right to a fair trial, because the State was given additional time to pad its case with extra witnesses and evidence which was unnecessary and unduly prejudicial."

¶17 We review the determination of whether a case is complex for abuse of discretion. *Snyder v. Donato*, 211 Ariz. 117, 119, ¶ 7, 118 P.3d 632, 634 (App. 2005). A case is "complex" if it is "so complicated, by virtue of its nature or because of the evidence required, that the ordinary limits for the time to trial are insufficient and must be extended to afford more time to prepare so that the case can be fairly and fully presented." *Id.* at 120, ¶ 12, 118 P.3d at 635.

⁵ Because Viola did not take the steps necessary to include the transcript of the hearing on the motion in the record on appeal, we will presume the missing transcript supports the decision of the trial court. See *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995).

¶18 We find no abuse of discretion. First, the case was designated as complex because Viola's counsel asked the court to do so. There is no reversible error when the party complaining of the error invited it. *State v. Logan*, 200 Ariz. 564, 565, ¶ 8, 30 P.3d 631, 632 (2001). Second, the trial court did not abuse its discretion when it found there was no need to reconsider the prior ruling. At that time, nearly six months before trial, the court could reasonably determine that the nature and size of the case and the amount of work left to be done by both parties merited that the case remain designated as complex.

¶19 Finally, there is nothing in the record to suggest Viola suffered any prejudice. Viola does not allege the complex designation prejudiced or otherwise affected his ability to defend his case in any way. Further, Viola directs us to nothing to support his claim that "the delay in prosecuting this case denied Appellant his right to a fair trial, because the State was given additional time to pad its case with extra witnesses and evidence which was unnecessary and unduly prejudicial." Viola does not identify any unnecessary and unduly prejudicial extra witnesses and evidence. Accordingly, we find the designation of the case as complex and the subsequent refusal to reconsider the designation were not abuses of discretion.

IV. Sentencing

¶20 The crime of fraudulent schemes and artifices is a class 2 felony. A.R.S. § 13-2310(A). Because Viola had two prior felony convictions for purposes of sentence enhancement, the available sentence for each count ranged from a minimum of fourteen years' imprisonment to a maximum of twenty-eight years. The presumptive term of imprisonment was "three-fourths of the median of the allowable range." A.R.S. § 13-604(D) (1989). At the sentencing hearing, the trial court found the sole aggravating factor was Viola's three other prior felony convictions and the sole mitigating factor was Viola's age. Viola also argued his medical condition and a prior surgery were mitigating factors, but offered nothing to prove their existence. The trial court, however, accepted Viola's avowals as sufficient proof. Nevertheless, while the trial court expressly considered Viola's medical condition and prior surgery, the court ultimately found neither was a mitigating factor for sentencing purposes.

¶21 The trial court found the aggravating factor outweighed the mitigating factor and sentenced Viola to "slightly aggravated" terms of eighteen years' imprisonment for each count—four years more than the minimum sentence available but ten years less than the maximum. The court also determined consecutive sentences were appropriate based on the existence of

multiple victims and ordered Counts 2 through 5 to run concurrent with each other but consecutive to Count 1.

¶22 Viola argues the sentences are “unreasonable and excessive[.]” He also asserts the trial court failed to give adequate consideration to his medical problems as a mitigating factor and that the court rendered its decision based on its “disdain” for Viola.⁶

¶23 It is well established that “a judge [] is to be accorded very wide discretion in determining an appropriate sentence.” *Wasman v. United States*, 468 U.S. 559, 563 (1984). When a trial court imposes a sentence within the statutory range, we will not disturb that sentence absent an abuse of discretion. *State v. Jenkins*, 193 Ariz. 115, 121, ¶ 25, 970 P.2d 947, 953 (App. 1998). Abuse of discretion is “an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons.” *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992).

¶24 The trial court did not abuse its discretion when it imposed sentences of eighteen years for each count, nor when it imposed consecutive sentences. An eighteen-year sentence is well within the available range and is only four years above the minimum sentence available. There is nothing excessive or

⁶ Viola does not argue the sentences constitute cruel and unusual punishment.

unreasonable about an eighteen-year sentence for a class 2 felony committed by a defendant with two historical prior felony convictions for purposes of sentence enhancement and three additional prior felony convictions for purposes of aggravation. This is especially true where, as here, the prior convictions were for similar if not identical offenses and/or conduct. Furthermore, a trial court may impose consecutive sentences where more than one victim is involved. *State v. White*, 160 Ariz. 377, 380, 773 P.2d 482, 485 (App. 1989). Because the evidence demonstrated that there were at least five victims, the trial court was permitted to impose consecutive sentences.

¶25 Regarding the trial court's failure to find Viola's medical condition or prior surgery were mitigating factors, a trial court need not find the existence of a mitigating factor simply because a defendant presents evidence of that factor. The court is only required to consider the evidence of that mitigating factor. *Jenkins*, 193 Ariz. at 121, ¶ 25, 970 P.2d at 953. Here, the trial court expressly noted that it considered the evidence of Viola's medical condition and his surgery. Nothing more was required.

¶26 Finally, there is nothing in the record to even hint that the trial court felt "disdain" for Viola.

CONCLUSION

¶127 Based on the foregoing, we affirm Viola's convictions and sentences.

/S/

MICHAEL J. BROWN, PRESIDING JUDGE

CONCURRING:

/S/

ANDREW W. GOULD, JUDGE

/S/

DONN KESSLER, JUDGE