DIVISION ONE
FILED: 10-19-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0381
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DENNIS PATANE,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200700855

The Honorable Lawrence C. Kenworthy, Judge

AFFIRMED IN PART; REVERSED IN PART

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W I N T H R O P, Presiding Judge

¶1 Dennis Patane ("Appellant") was convicted by a jury on one count of fraudulent schemes and artifices, a class 2 felony,

and one count of forgery, a class 4 felony. The trial court suspended sentencing and placed Appellant on supervised probation for three years with the condition that he pay a $5,000 fine. On appeal, Appellant argues that there was insufficient evidence to support the convictions and that the trial court erred in denying a motion *in limine* seeking preclusion of evidence. For reasons that follow, we affirm the conviction for fraudulent schemes and artifices, but reverse the conviction for forgery.

FACTUAL BACKGROUND

¶2 In reviewing a claim of insufficient evidence, we construe the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against the defendant. *State v. Greene*, 192 Ariz. 431, 436-37, ¶ 12, 967 P.2d 106, 111-12 (1998) (citation omitted). Viewed in this light, the evidence at trial established the following: Appellant conducted a trustee's sale and served as the auctioneer on July 16, 2004, with respect to a deed of trust on a residence owned by Claudia C. ("Victim"). The beneficiary of the deed of trust was Norwest Mortgage, Inc. At the time of the trustee's sale, the property was valued at approximately $250,000.

¶3 Three individuals bid on the property. Larry H. signed the bidder sign-in sheet using his own name. Louis S.

likewise signed his own name, but indicated he was bidding on behalf of his brother. Kevin Pelroy signed the sheet as "Gary Naylor," with the indication that he was bidding on behalf of Adelphia Properties.

¶4 Unbeknownst to the other bidders, Appellant had previously arranged to have Pelroy, who had never been to a trustee's sale, bid for the property on Appellant's behalf. Appellant told Pelroy that he wanted to buy the property and that the person he was planning on having bid for him could not make it that day. Appellant instructed Pelroy to sign the sign-in sheet as "Gary Naylor" and to make sure that he won the property, stating there was "no cap" on the amount he should bid. Appellant further explained to Pelroy that Naylor was going to finance the property for him for about 30 days until Appellant could have the property refinanced in his own name.

¶5 The opening bid submitted to Appellant on behalf of Norwest Mortgage was $102,101.86, the amount of the unpaid debt and costs. Appellant then entertained additional bids on the property. The bidding proceeded with the bids increasing in increments of between $100 and $1000. Larry H. bid up to approximately $135,000. Louis S. bid up to $167,000, the highest amount his brother was willing to pay for the property. Pelroy made the high bid of $167,500 and was declared the winner by Appellant.

¶6 Immediately after the trustee's sale, Appellant prepared a receipt and instruction form stating the following: that Gary Naylor was the winning bidder; that the trustee's deed was to be issued in the name of Naylor's company, Adelphia Properties, LLC; and that the final bid on the property was $105,000. On August 18, 2004, First American Title Insurance Company, as trustee, executed a trustee's deed upon sale in favor of grantee Adelphia Properties, LLC. The trustee's deed was recorded on September 9, 2004 and included declarations that the amount of the unpaid debt together with costs was $102,101.86 and the amount paid by the grantee at the trustee's sale was $105,000.

¶7 Following the trustee's sale, Louis S. learned that the property had been deeded by the trustee for $105,000 and called Appellant to inquire how that was possible. Appellant responded that he did not know and that he just handled the paperwork. Louis S. then called Naylor and asked how he managed to get the property for $105,000. During their conversation, Naylor told Louis S. he had attended the trustee's sale, which Louis S. knew to be false. Louis S. thereafter contacted the police to report his concerns about the trustee's sale, resulting in an investigation being commenced.

¶8 During the investigation, Pelroy eventually contacted the police and admitted to bidding on the property and lying

about it at Appellant's request. Pelroy subsequently entered into a plea agreement on a charge of false reporting to law enforcement and ultimately testified as a witness for the State at Appellant's trial on charges of fraudulent schemes and artifices, theft, and forgery stemming from the trustee's sale.

¶9 At the conclusion of the State's case-in-chief and at the close of all the evidence, the trial court denied Appellant's Rule 20 motion for judgment of acquittal on the charges of fraudulent schemes and artifices and forgery.[1] The trial court additionally rejected the claim of insufficient evidence on these two charges raised by Appellant in his motion for new trial.

DISCUSSION

¶10 Rule 20 of the Arizona Rules of Criminal Procedures requires a trial court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(A). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the

[1] The trial court granted Appellant's motion for judgment of acquittal with respect to the theft charge.

conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)). We review claims of insufficient evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

Fraudulent Schemes and Artifices

¶11 A person is guilty of fraudulent schemes and artifices if, "pursuant to a scheme or artifice to defraud, [he] 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) (2010).[2] Appellant argues that the evidence was insufficient to support his conviction on the charge of fraudulent schemes and artifices, claiming there was no proof of the specific benefit alleged in the indictment.

¶12 Count 1 of the indictment charged, in pertinent part:

> That on or about the **16TH** day of **AUGUST, 2004**, the defendant, **DENNIS PATANE**, pursuant to one scheme or artifice to defraud, did then and there knowingly obtain any benefit from **CLAUDIA [C.]**, to wit: **CONDUCTED A TRUSTEE SALE WHICH LEAD [sic] TO THE LOSS OF FUNDS TO THE VICTIM**, by means of false or fraudulent pretense, representations, promises or material omissions, a class 2 felony . . . .

[2] We apply the substantive law in effect when the offense was committed. *See* A.R.S. § 1-246 (2002); *State v. Newton*, 200 Ariz. 1, 2, ¶ 3, 21 P.3d 387, 388 (2001). Absent material revisions after the date of an offense, we cite the statute's current version.

Appellant's contention on appeal is limited to asserting that there is no evidence that would have permitted the jury to find a "loss of funds to the victim" as alleged in the indictment. Specifically, Appellant contends that the State failed to show that Victim was entitled to any additional proceeds resulting from the trustee's sale. Further, he argues that the evidence presented was inadequate to show that Louis S.'s brother was able to perform on his bid of $167,000 even if he had not been outbid by Pelroy. We disagree with each contention.

¶13 Pursuant to A.R.S. § 33-812(A) (2010), proceeds from a trustee's sale are to be paid to the owner of the property only after payment of various parties, including those who hold junior liens and other encumbrances on the property. As Appellant correctly notes, however, there was no evidence of any junior lien-holders or other individuals or entities having claims secured by the property. Given the absence of such evidence, the jury could reasonably infer that there were no such claimants and that Victim was therefore deprived of obtaining payment of the $62,000 difference between the true high bid and the false $105,000 sale price misrepresented to the trustee by Appellant. *See State v. Sullivan*, 205 Ariz. 285, 287, ¶ 6, 69 P.3d 1006, 1008 (App. 2003) (holding that "if reasonable minds could differ on the inferences to be drawn from the evidence, the motion for judgment of acquittal must be

denied"); *State v. Farley*, 199 Ariz. 542, 544, ¶ 11, 19 P.3d 1258, 1260 (App. 2001) (holding that State was not required to disprove all affirmative defenses offered by defendant). Moreover, even assuming the existence of junior lien-holders or other encumbrances against the property, Victim was entitled to have the proceeds from the trustee's sale of her property applied on her behalf to satisfy those debts and obligations secured by the property. Therefore, Victim would have still suffered "loss of the funds" as a result of Appellant's fraud by the funds from her property not being applied to her benefit. The fact that Victim might not have ultimate possession of the funds does not render the evidence insufficient to support the fraud charge as "injury to or reliance by a victim is not a necessary element of this offense." *State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App. 1983); A.R.S. § 13-2310(B).

¶14 There was also sufficient evidence to permit the jury to find that the second highest bidder had the ability to pay the amount of the bid. Louis S. testified that he had been in the real estate business for twenty-five years, that he bid at the trustee's auction on behalf of his brother, and that he had the requisite deposit to participate as a bidder. He further testified as to the maximum his brother was willing to pay for the property and how he stopped bidding when he reached that figure. In addition, there was testimony from his brother that

he bought and sold multiple houses as investment properties during the time period when the trustee's sale occurred. Finally, upon learning of the discrepancy between the actual bids and the amount the property was sold for by the trustee, Louis S. and his brother pursued the matter with Appellant, Pelroy, Naylor, and ultimately the police to determine why they did not get the property. On this record, the jury could reasonably find that Louis S. and his brother had not only the desire, but also the ability to pay for the property if they had been the successful bidder at the trustee's sale. Accordingly, there was no error by the trial court in denying the motions for judgment of acquittal and new trial based on the claim of insufficient evidence.

¶15 In connection with his challenge to his conviction on the charge of fraudulent schemes and artifices, Appellant contends the trial court erred by denying his motion *in limine* to preclude testimony by Pelroy unless the State first established the foundation that there would have been excess funds available from the auction to which Victim would have been entitled. We review a trial court's rulings on evidentiary issues for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 308, ¶ 47, 4 P.3d 345, 363 (2000).

¶16 As discussed above, the evidence was sufficient to establish that Appellant's fraudulent conduct caused a loss to

Victim in the amount of the funds over the credit bid that would have resulted from the trustee's sale. The testimony by Pelroy was relevant to proving the fraud engaged in by Appellant and therefore there was no error by the trial court in denying his motion *in limine*. *See* Ariz. R. Evid. 402 ("all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of Arizona or by applicable statutes or rules"). Furthermore, to the extent Appellant argues that the trial court erred in allowing testimony by Pelroy regarding other benefits enjoyed by Appellant due to the fraud -– specifically, obtaining the property from Naylor -– this "additional" benefit is merely the flip-side of the allegation that he benefited by the loss of funds to Victim, *i.e.*, he would obtain the property through Naylor at a lower price by misrepresenting the actual bids at the trustee's sale.[3] *See State v. Henry*, 205 Ariz. 229, 232, ¶ 12, 68 P.3d 455, 458 (App. 2003) (holding that a "benefit" obtained via fraudulent schemes and artifice may be prospective only); A.R.S. § 13-105(3) (2010) (defining "benefit" as

[3] Appellant also refers in his argument to testimony by Pelroy regarding evidence that he would benefit by a payment from Naylor if Naylor was the successful bidder. The testimony of a fee to be paid to Appellant by Naylor, however, came from Naylor, not Pelroy, and thus cannot serve as a basis for a claim of error in the denial of Appellant's motion *in limine* to preclude Pelroy's testimony.

"anything of value or advantage, present or prospective"). Thus, there was no abuse of discretion by the trial court in denying Appellant's motion *in limine* to preclude Pelroy's testimony.

Forgery

¶17 Appellant next contends the evidence was insufficient to support his conviction for forgery. The forgery charge was predicated upon the bid sheet prepared by Appellant. The bid sheet consisted of a handwritten list of the bidders and the purported bids at the trustee's sale and shows a total of thirty bids in $100 increments commencing with the beneficiary's bid of $102,101.86 and concluding with a final high bid of $105,000 by "Naylor" on behalf of Adelphia Properties, LLC. There was no evidence of when the bid sheet was prepared or how it came into the possession of the State. The only evidence presented at trial regarding this document was from Victim, who testified that she was present when Appellant subsequently acknowledged he prepared the document.[4]

¶18 The crime of forgery requires proof that the accused, with intent to defraud, (1) falsely made, completed or altered a

[4] The acknowledgement made by Appellant as to preparation of the bid sheet occurred at a deposition in a civil suit. The jury in the criminal trial was not permitted to know the circumstances under which Appellant made the acknowledgement, only that the victim was present and heard Appellant state he prepared the bid sheet.

written instrument; (2) knowingly possessed a forged instrument, or; (3) offered or presented, whether accepted or not, a forged instrument or one that contains false information. A.R.S. § 13-2002(A) (2010). The State maintains that the evidence was sufficient to support Appellant's conviction for forgery under either the first or third subsections of A.R.S. § 13-2002(A).

¶19 The definitions applicable to forgery in violation of the first subsection are as follows:

> "Falsely alters a written instrument" means to change a complete or incomplete written instrument, without the permission of anyone entitled to grant it, by means of counterfeiting, washing, erasure, obliteration, deletion, insertion of new matter, connecting together different parts of the whole of more than one genuine instrument or transposition of matter or in any other manner, so the altered instrument falsely appears or purports to be in all respects an authentic creation of it ostensible maker or authorized by him.

A.R.S. § 13-2001(5).

> "Falsely completes a written instrument" means to transform an incomplete written instrument into a complete one by adding, inserting or changing matter without the permission of anyone entitled to grant it, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

A.R.S. § 13–2001(6).

> "Falsely makes a written instrument" means to make or draw a complete or incomplete written instrument that purports to be an

> authentic creation of its ostensible maker but that is not either because the ostensible maker is fictitious, or because, if real, the ostensible maker did not authorize the making or drawing of the written instrument.

A.R.S. § 13–2001(7) (2010).

¶20 As these three definitions makes clear, the commission of the offense of forgery under the first subsection involves the making, completing or altering of an instrument in such a manner so it falsely appears or purports to be authorized by or the authentic creation of another person or entity. Although the bid sheet contains false information concerning how the bidding occurred at the trustee's sale and the amount of the high bid, there is nothing about the preparation of the document that causes it to falsely appear or purport to either be authorized by or the creation of someone other than Appellant.

¶21 In addition, contrary to the State's contention, the record is devoid of any indication that Appellant had any obligation to prepare the bid sheet in his capacity as the trustee's agent or that it was in fact prepared on the trustee's behalf. *Cf. State v. Thompson*, 194 Ariz. 295, 296-97, ¶¶ 1-11, 981 P.2d 595, 596-97 (App. 1999) (affirming conviction for forgery where MVD employee made, completed and altered instruments issued by MVD). On this record, there is no factual

basis for a finding that Appellant committed forgery in violation of A.R.S. § 13-2002(A)(1).

¶22 The evidence was likewise insufficient to sustain the conviction for forgery under A.R.S. § 13-2002(A)(3). To commit forgery under this subsection, Appellant must have offered or presented the instrument in question with intent to defraud. As previously mentioned, the only evidence submitted by the State at trial regarding the bid sheet was that Appellant acknowledged preparing it. In the absence of evidence as to when the bid sheet was prepared, the State's assertion that the bid sheet could be considered to have been presented to the trustee to document the trustee's sale is pure speculation. While a criminal conviction may rest upon circumstantial proof, *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985) (citations omitted), it may not be based on speculation. *State v. Sanchez*, 181 Ariz. 492, 494-95, 892 P.2d 212, 214-15 (App. 1995); *see also State v. Grijalva*, 8 Ariz. App. 205, 207, 445 P.2d 88, 90 (1968) (noting that jurors are not permitted to speculate as to an essential element of an offense). Given the complete absence of proof that would permit the jury to find beyond a reasonable doubt that Appellant actually offered or presented the bid sheet to someone as part of the fraud, we are compelled to hold that there was insufficient evidence to support the conviction for

forgery and that the trial court therefore erred in denying the motion for acquittal with respect to this count.

CONCLUSION

¶23 For the foregoing reasons, we affirm the conviction for fraudulent schemes and artifices, but reverse the conviction for forgery.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICK IRVINE, Judge

_____/S/_____
RANDALL H. WARNER, Judge*

*Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Randall H. Warner, Judge of the Arizona Superior Court, to sit in this matter.