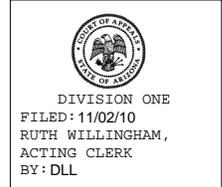


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS
AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 09-0484
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
ANDREW STEPHEN GUTHRIE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-102145-001 DT

The Honorable James T. Blomo, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Karen M. Nobel
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Andrew Stephen Guthrie ("Defendant") appeals from his convictions following a jury trial and from the sentences imposed. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Defendant was indicted for theft of property with a value of \$25,000 or more, but less than \$100,000, a class 2 felony, and fraudulent schemes and artifices, a class 2 felony.

¶3 The following evidence was presented at trial. During 2007, Defendant worked as a salesman for Tire Partners Plus ("TTP"), a tire wholesaler. Around December 2007, TTP's controller informed the general manager, Shawn D., that the company had several accounts that were over the credit limit and that all of the accounts related Defendant's clients. He first discovered that although there were electronic records of sales by TTP to several customers, the original invoices showing customer signatures were missing. When asked about them, Defendant told Shawn that he believed he had turned in the original invoices, but said he would check for them at home. Defendant failed, however, to respond to repeated calls from Shawn. When Defendant returned to work, Shawn confronted him about the missing invoices, but Defendant denied any wrongdoing.

¶4 Shawn also discovered that TTP did not have receipts or other proof of deliveries corresponding to the questionable invoices showing the customers received the merchandise listed on the invoices. Shawn contacted one such customer who denied making the purchases from TTP. Shawn investigated two deliveries made by Defendant personally in December 2007 to an alleged customer. He reviewed a videotape of Defendant leaving the warehouse twice with a loaded truck and returning twice in less than an hour's time. Because of the size of the order, the distances involved, rain, and time of day, Shawn knew that making those deliveries would be "physically impossible." Further, Defendant's daily activity log did not reflect the alleged deliveries made by him that day.

¶5 Shawn noticed discrepancies between the information found on some of the purchase orders and on TTP's corresponding invoices. Three invoices did not have stock numbers on them and six had inaccurate numbers. In all, Defendant created false invoices involving six customers: Freeway Chevy, Tire Pro's, Goins Automotive Group, Jones Auto Outlet, Bell Honda and AZ Elite Wheels. Shawn was unable to locate the merchandise listed on the invoices at the TTP warehouse. He received payment of \$383.08 for a set of tires Defendant had sold to Jason M., which had been incorrectly billed to Freeway Chevy, but estimated that the total value of lost inventory was about \$54,000. Shawn

indicated that Defendant improved his position in the company and received commissions as a result of generating the invalid invoices.

¶6 Shawn notified the Phoenix Police Department and Detective Angel investigated the case. He contacted the customers listed on the subject invoices and all of them denied making the purchases from TTP as reflected on the invoices. The detective arrested Defendant and interviewed him. Defendant admitted creating false invoices to "boost[] his sales numbers" because "he was getting in trouble at work [and] wasn't making enough money for the company." He also told the detective that Goins Automotive had an account with TTP but that it had poor credit, so he created the invoices so Goins could purchase the tires. Defendant said he had sold the missing inventory, worth about \$60,000 to Goins, but that Goins had not yet paid for it. Defendant also told Detective Angel that Jason M. had purchased tires from him and that Jason would pay for them. Although Defendant denied possessing TTP's property, in a search of Defendant's house, police found a set of tires and rims belonging to TTP for which Defendant had not paid.

¶7 Representatives authorized to make purchases for the six companies whose names appeared on the invalid invoices testified at trial. Each of them denied ordering the merchandise from TTP and paying the invoices. Some of them

denied knowing Defendant and/or TTP. The owner of Goins Automotive, in particular, testified that he had never heard of Defendant or TTP and that at the time of the alleged purchase, his company was going out of business. Jason M. testified that he purchased tires from Defendant for \$383.08, but that he did not purchase them through Freeway Chevy as the TTP invoice reflected. Defendant's former employer's also testified that he purchased tires from Defendant, that Defendant personally delivered them and that he paid Defendant \$700 in cash.

¶8 The jury found Defendant guilty as charged. The court suspended Defendant's sentences and placed him on concurrent, seven-year terms of probation. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and, -4033 (A) (2010).

DISCUSSION

¶9 On appeal, Defendant claims the trial court erred in denying his motion for judgment of acquittal on the charge of fraudulent schemes and artifices because there was insufficient evidence to support the conviction. He also argues that the trial court committed fundamental error in instructing the jury on that offense.

Sufficiency of Evidence

¶10 After the State presented its case, Defendant moved for a judgment of acquittal, alleging that the State had failed to present evidence that Defendant had received a benefit from the alleged fraudulent scheme. In denying the motion, the court found that there was substantial evidence that Defendant had received higher commissions and had made money on a "side deal" as a result of the scheme. On appeal, Defendant makes a different argument. Relying on *State v. Johnson*, 179 Ariz. 375, 880 P.2d 132 (1994), Defendant alleges there was no evidence of a false pretense that induced TTP to permit him to remove the inventory and that the fraudulent activity occurred after the theft.

¶11 We review a trial court's denial of a motion for judgment of acquittal for an abuse of discretion. *State v. McCurdy*, 216 Ariz. 567, 573, ¶ 14, 169 P.3d 931, 937 (App. 2007). A judgment of acquittal is only appropriate "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). Substantial evidence is such proof that a reasonable person could find beyond a reasonable doubt that the defendant is guilty of the charged offense. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). When reviewing the sufficiency of the evidence, we resolve all reasonable

inferences and conflicts in the evidence against the defendant. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶12 A person commits the offense of fraudulent schemes and artifices if the person "knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." A.R.S. § 13-2310(A) (2010). "Reliance on the part of any person shall not be a necessary element of the offense." A.R.S. 13-2310(B). A "'scheme or artifice to defraud' includes a scheme or artifice to deprive a person of the intangible right of honest services." A.R.S. § 13-2310(E).

¶13 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.'" *State v. Henry*, 205 Ariz. 229, 232, ¶ 12, 68 P.3d 455, 458 (App. 2003) (internal citations omitted). The statute generally proscribes conduct "lacking in 'fundamental honesty [and] fair play . . . in the general and business life of members of society.'" *State v. Haas*, 138 Ariz. 413, 424, 675 P.2d 673, 684 (1983) (citation omitted). It is broadly construed "to cover all of the varieties made possible by boundless human ingenuity." *Id.* A "benefit" is defined as "anything of value or advantage, present or prospective." A.R.S. § 13-105(3) (2010). It includes more

than just money or property. *Henry*, 205 Ariz. at 233, ¶ 15, 68 P. 3d at 459.

¶14 We find the evidence was sufficient for a reasonable person to find beyond a reasonable doubt that Defendant committed the offense. Defendant knowingly created false invoices reflecting that customers of TTP had purchased merchandise from TTP totaling approximately \$54,000. None of the customers, however, ordered, received or paid for it and TTP was unable to account for the missing merchandise. Defendant obtained a benefit from this scheme by having access to inventory, receiving commissions for each fraudulent invoice he created and \$700 in cash from his former employer. Defendant admitted he falsified the invoices to boost his sales numbers and improve his position with TTP.

¶15 Defendant's reliance on *Johnson* is misplaced. There, the defendant worked for a trucking company that gave him debit-like cards to purchase gasoline for company trucks. Although not authorized to do so, the defendant used the cards to fuel his personal vehicles. He was charged with fraudulent schemes and artifices. 179 Ariz. at 376, 880 P.2d at 133. Finding that the defendant could be guilty of theft, but not of fraudulent schemes, the court vacated the defendant's conviction. *Id.* at 381, 880 P.2d at 138. The court explained that "false pretense, created through words or omissions, is the act that separates

fraud from routine theft [and] that the false pretense must actually cause the victim to rely, and, as a result, give property or money to the defendant." *Id.* at 378, 880 P.2d at 135. The court held that the defendant "created no pretense, made no representation and concealed nothing from his employer when he used the card by inserting it into [the] pump [and] "did nothing other than use the card[] to steal gas, presumably hoping [his employer] would pay for it without noticing." *Id.* at 380-81, 880 P.2d at 137-38.

¶16 In this case, however, Defendant did not merely steal tires or embezzle money from TTP and then cover it up, as Defendant alleges; rather, he created numerous false invoices and submitted them to TTP in order to perpetrate his fraudulent scheme. As a result, Defendant was allowed to remove inventory from the warehouse and also received commissions and cash. In contrast to *Johnson*, Defendant's false pretenses caused TTP to unwittingly provide benefits to him. See also *State v. Fimbres*, 222 Ariz. 293, 297-98, ¶ 9, 213 P.3d 1020, 1024-25 (App. 2009) (holding that unlike *Johnson*, the defendant's use of gift cards that had been altered to correspond to others' accounts was a fraudulent scheme and artifice). Defendant's reliance on federal cases interpreting the federal mail fraud statute as restricted to schemes involving bribes or kickbacks is also misplaced because of the "distinct difference[s]" between the

federal mail fraud statute and the Arizona version of that statute. *Haas*, 138 Ariz. at 419, 675 P.2d at 679. The evidence was sufficient to support the conviction, and the trial court did not err in denying the motion for judgment of acquittal.

Jury Instructions

¶17 Defendant claims the trial court committed fundamental error in instructing the jury on the offense of fraudulent schemes and artifices. In particular, Defendant alleges that the court (1) failed to instruct the jury on specific intent to defraud; (2) improperly instructed the jury that the State need not prove reliance; and (3) "overbroadly instructed" the jury on intangible loss of honest employee service. The State argues that the error was invited because the Defendant's jury instructions on the offense were nearly identical to those given by the trial court.

¶18 Defendant requested and received a jury instruction stating that a scheme or artifice to defraud includes "depriv[ing] a person of the intangible right of honest services." See A.R.S. § 13-2310(E). Under the invited error doctrine, a defendant who expressly requests a jury instruction is precluded from arguing on appeal that the instruction is erroneous. *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001); *State v. Lucero*, 223 Ariz. 129, 136, ¶ 20,

220 P.3d 249, 256 (App. 2009). Thus, we do not consider Defendant's argument as to that instruction.

¶19 Defendant requested a jury instruction stating that the crime of fraudulent schemes and artifices "requires proof that the defendant: 1. [k]nowingly participated in a scheme or artifice to defraud; and 2. [o]btained any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." Defendant did not request nor did the court give an instruction that the State was required to prove that Defendant acted with specific intent to defraud.

¶20 The court instructed the jury that the crime "requires proof that the defendant: participated in a scheme or artifice to defraud; and knowingly obtained any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." A.R.S. § 13-2310(A). It instructed the jury on the statutory definitions of "intentionally" and "knowingly." A.R.S. § 13-105(10(a),(b)(2010). The court also instructed the jury that "reliance on the part of any person is not required to prove this offense." A.R.S. § 23-2310(B).

¶21 Defendant failed to object to the challenged instructions, and we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To establish fundamental error, the defendant must prove that error occurred, that the error "complained of goes to the

foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial," and that such error resulted in prejudice. *Id.*, 210 Ariz. at 568, ¶¶ 23-26, 115 P.3d at 608. "[F]undamental error occurs 'when the trial judge fails to instruct upon matters vital to a proper consideration of the evidence.'" *State v. Edmisten*, 220 Ariz. 517, 522, ¶ 11, 207 P.3d 770, 775 (App. 2009) (citation omitted).

¶22 Here, there was no error. The instructions tracked the language of A.R.S. § 13-2310 and correctly stated the law applicable to the offense, including that reliance is not a statutory element of the crime. *See State v. Bridgeforth*, 156 Ariz. 60, 64-65, 750 P.2d 3, 7-8 (1988) (instructions adequately covered crime of fraudulent schemes and artifices and included definitions of intentionally and knowingly, trial court did not err in failing to give requested instruction that state must prove specific intent to defraud). *See also State v. Fierro*, 220 Ariz. 337, 339-40, ¶¶ 10-11, 206 P.3d 786, 788-89 (App. 2008) (trial court gave instructions that tracked language of statute defining offense and accurately described required mental state, there was no error); *State v. Rios*, 217 Ariz. 249, 251, ¶ 9, 172 P.2d 844, 846 (App. 2007) (no error occurred where trial court gave instructions that tracked express language of governing statutes). Also, if there was any ambiguity in the

instructions about specific intent to defraud, the prosecutor argued in closing that Defendant intended to deceive TTP in order to receive a benefit. *Fierro*, 220 Ariz. at 340, ¶ 14, 206 P.3d at 789 (closing arguments can be considered when assessing adequacy of instructions). He told the jury that Defendant admitted he "falsified invoices" to "raise [his] sales numbers" and urged the jury to consider "all of the people who came in here to tell you about how the defendant did the same thing over and over and over again. That's how you know this was not a mistake. This was not an accident. This was exactly what the defendant intended to do." There was no error.

CONCLUSION

¶23 For the foregoing reasons, we affirm Defendant's convictions and disposition.

/s/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ _____
PHILIP HALL, Presiding Judge

/s/ _____
PETER B. SWANN, Judge