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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/26/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0503
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOHN THOMAS GONZALES,) Rule 111, Rules of the
) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-152987-001 SE

The Honorable David K. Udall, Judge,
The Honorable Emmet J. Ronan, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 John Thomas Gonzales appeals his conviction and

sentence for theft, a class five felony. He contends there was insufficient evidence to support his conviction and the trial court made improper findings of aggravation during sentencing. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 "We view the facts in the light most favorable to sustaining the verdict." *State v. Cropper*, 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003).

¶3 From February 2007 to April 2007, Pyramid Mechanical employed Gonzales as a plumbing installer. When Gonzales was going to be out performing a job on his own, the owner of Pyramid Mechanical usually gave a business check to Gonzales to be used to purchase materials. The owner would sign the check and leave the rest of it blank. Gonzales was supposed to bring the receipts from his purchases back to the owner, but "he'd always come up with the excuse he forgot them at the house and he'd give them to [the owner] later." The owner testified that the checks were not to be used for any purpose other than buying materials unless he explicitly stated otherwise.

¶4 Shortly after Gonzales was fired, the owner discovered that Gonzales had written checks payable to himself without permission. These four checks were drawn on Pyramid Mechanical's business account with Bank of America. The first check discovered by the owner was for the amount of \$1600, and

the check had cleared his business account. Three other unauthorized checks were subsequently found, payable to Gonzales in the amounts of \$200, \$80, and \$800. Copies of these three checks were admitted into evidence. These copies revealed that each check was dated prior to the \$1600 check. Two of these check copies bear the stamp or imprint from apparent check cashing businesses ("Ace Cash Express" and "PLS Check Cashers of Arizona") plus reference to Wells Fargo Bank on the back. The third check copy shows various stamps or imprints on the back.

¶15 Gonzales was charged with theft of \$2000 or more but less than \$3000. After the trial court denied Gonzales' motion for a directed verdict of acquittal, the jury convicted Gonzales of theft as charged. Gonzales was given a sentence of five years, the presumptive term for a class five felony with two prior felony convictions. See Ariz. Rev. Stat. ("A.R.S.") § 13-703(J) (2010).¹ Gonzales timely appeals. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and - 4033(A)(1) (2010).

ANALYSIS

Sufficiency of the Evidence

¶16 Gonzales argues that the trial court should have

¹ Unless otherwise noted, we cite the current version of the applicable statute because no revisions material to this decision have since occurred.

directed a verdict of acquittal because there was insufficient evidence to support the guilty verdict. We review the trial court's denial of a directed verdict for an abuse of discretion and will not reverse unless there is no substantial evidence to support the verdict. *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003). Substantial evidence is evidence upon which reasonable people could base a finding of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999). When challenging the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Montano*, 204 Ariz. 413, 423, ¶ 43, 65 P.3d 61, 71 (2003) (quoting *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981)).

¶17 For Gonzales to be found guilty of theft, the State had to prove that he, without lawful authority, knowingly "[c]onvert[ed] for an unauthorized term or use services or property of another entrusted to the defendant . . . for a limited, authorized term or use." A.R.S. § 13-1802(A)(2) (2010). Consistent with this statute, the trial court instructed the jurors that theft requires proof that the defendant was entrusted with another's property for a limited

use and the defendant knowingly put the property to an unauthorized use.

¶18 The court admitted into evidence the four checks of varying amounts, all made payable to John Gonzales. The owner of Pyramid Mechanical testified that he signed four blank business checks and gave those checks to Gonzales for the limited purpose of buying materials from third-party suppliers. The owner did not give Gonzales permission to write any of those four checks to himself. Despite the lack of permission, all four checks were made out to Gonzales.

¶19 Based on the checks themselves and the owner's testimony, the jury could have reasonably inferred that Gonzales knowingly and without authorization made the four checks payable to himself for his own purposes and then cashed or deposited them. Therefore, substantial evidence supported the jury's guilty verdict.

Improper Consideration of Aggravating Factors

¶10 Gonzales also argues in his opening brief that aggravating factors were improperly considered at his sentencing. However, the State points out that Gonzales was sentenced to a presumptive term of imprisonment, not an aggravated term. In his reply, Gonzales appears to have abandoned his argument and asks that the "improper findings of aggravation be stricken from the court record and corrected in

any subsequent documents at Arizona Department of Corrections.”

¶11 In *State v. Johnson*, 210 Ariz. 438, 442, ¶ 13, 111 P.3d 1038, 1042 (App. 2005), this Court held that the trial court did not err when it considered an aggravating factor not found by the jury in sentencing the defendant, because the trial court did not rely on that factor to increase the sentence beyond the maximum allowed by the jury verdict alone. Similarly, in this case, the trial court mentioned aggravating factors during Gonzales’ sentencing that were not found by the jury, but ultimately sentenced Gonzales to the presumptive term. “[T]he presumptive term is the ‘statutory maximum’ . . . sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant . . . without any additional findings.” *State v. Fell*, 209 Ariz. 77, 87, ¶ 35, 97 P.3d 902, 912 (App. 2004) (quoting *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004)). Because Gonzales received the presumptive sentence, not an aggravated sentence, no reversible error occurred when the trial court considered aggravating factors.

¶12 Regarding Gonzales’ request that we correct the court record and documents at the Arizona Department of Corrections (DOC), we note that he did not ask for this relief in his opening brief, so we ordinarily would not address the request because the State did not have a chance to respond to the reply

brief. *State v. Myers*, 117 Ariz. 79, 87, 570 P.2d 1252, 1260 (1977); see also *State v. Ruggiero*, 211 Ariz. 262, 267 n.2, ¶ 22, 120 P.3d 690, 695 n.2 (App. 2005) (“Generally an issue raised for the first time in a reply brief is waived.”). Even if not waived, because no reversible error occurred when the trial court found and considered aggravating factors but imposed a presumptive sentence, we are not persuaded that any portion of the record before us needs to be corrected, nor has Gonzales identified any particular document in our record that needs correcting. If Gonzales believes the DOC has encoded incorrect information regarding his conviction into its record system, he should seek correction through the appropriate administrative procedures or in superior court.

CONCLUSION

¶13 For the reasons stated above, Gonzales’ conviction and sentence are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge