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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: 03/06/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0305
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
GARY BERNARD LEE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-009355-001SE

The Honorable Lisa M. Roberts, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Adriana M. Zick, Assistant Attorney General
Attorneys for Appellee

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Attorneys for Appellant

S W A N N, Judge

¶1 Defendant Gary Bernard Lee appeals from his sentences,
arguing that the trial court erred in using his four prior New

Jersey convictions to enhance his sentences because none of them constitute historical prior felony convictions in Arizona. For reasons set forth below, we affirm.

*FACTS AND PROCEDURAL HISTORY*¹

¶12 On December 18, 2008, the state charged Defendant with: one count of fraudulent schemes and artifices (Count 1), a class 2 felony; one count of aggravated taking of the identity of another (Count 2), a class 3 felony; one count of taking the identity of another (Count 4), a class 4 felony; and six counts of forgery, a class 4 felony (Count 3 and Counts 5 through 9). The charges arise out of incidents that occurred between April 20 and July 30, 2008, during which time Defendant used a false Social Security number in a series of transactions. A jury found Defendant guilty of all counts, except Count 2, aggravated taking of the identity of another.² The same jury also found that the state had proven two aggravating factors: (1) that Defendant had a lengthy criminal history; and (2) that Defendant had previously spent time in prison.

¹ We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vendeveer*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 (App. 2005).

² Defendant elected to represent himself at trial. Advisory counsel assumed Defendant's defense at sentencing.

¶13 On March 26, 2010, the trial court considered the aggravating factors, Defendant's two prior historical felony convictions, and the fact that Defendant was on probation when he committed the present offenses, when it sentenced him to concurrent aggravated terms of imprisonment totaling 20 years -- 20 years for Count 1 and 11 years for Counts 3 through 9.

¶14 Before trial, the state alleged that Defendant had eight historical, non-dangerous felony convictions: (1) a 1990 New Jersey conviction for theft by deception; (2) a 1992 New Jersey conviction for uttering a forged instrument; (3) a 1992 Pennsylvania conviction for forgery; (4) another 1992 Pennsylvania conviction for forgery; (5) a 2001 New Jersey conviction for resisting arrest; (6) a 2000 New Jersey conviction for theft of services; (7) a 2001 New Jersey conviction for falsifying/tampering with records; and (8) a 2003 New Jersey conviction for theft of services. Defendant responded that his New Jersey and Pennsylvania convictions did not qualify as felonies in Arizona because the out-of-state offenses did not "contain every element that would constitute a felony in Arizona" and thus could not be used to enhance his sentences. In its reply, the state conceded that Defendant's resisting arrest conviction did not meet the elements of a felony in Arizona. It maintained that his seven remaining foreign convictions qualified as felonies because they were

analogous to Arizona's felony offenses of fraudulent schemes and artifices, forgery, theft, and false swearing.

¶15 The trial court determined for purposes of trial that the state had proven the following prior convictions beyond a reasonable doubt: (1) the 2000 New Jersey conviction for theft of services committed on December 21, 1998 (Cause #99-03-00159-I); (2) the 2001 New Jersey conviction for falsifying/tampering with records committed on July 14, 2000 (Cause #I-1396-05-01); and (3) the 2003 New Jersey conviction for theft of services committed on or between January 1, 1999, and March 5, 2001 (Cause #I-4185-12-02). The trial court approved their use for impeachment purposes. Defendant later testified at trial and admitted these three prior "felony" convictions during direct examination.

¶16 After the jury verdicts, Defendant again addressed the issue of his foreign convictions with the court in a "sentencing memorandum" in which he reiterated his earlier arguments that the foreign convictions could not qualify as priors because they did not have the same elements as Arizona felonies. However, in this memorandum Defendant conceded that if his prior New Jersey convictions were proven, he had two that would qualify as prior felonies in Arizona. According to Defendant, these were his 2001 conviction for falsifying/tampering, which fit the Arizona definition of forgery, a class 4 felony, and his 2003 theft of

services conviction, which, depending on the amount involved, would fit the Arizona definition of theft as a class 6 felony.

¶17 Before sentencing, the trial court held a hearing and heard additional argument on the issue. As Defendant agreed, the focus of the proceeding was not whether or not he had committed the alleged priors, but only whether or not the priors qualified as historical prior convictions because they equated to Arizona felonies, thus exposing him to enhanced sentence ranges. The state acknowledged that, because the two priors that it wished to use had not occurred within the requisite four- or five-year time frame, it needed to establish four prior convictions "in order to get to two." A.R.S. § 13-105(22)(b), (d) (third and subsequent felony convictions are historical priors).

¶18 The state then went on to argue that Defendant's 1990 New Jersey conviction for theft by deception committed on September 11, 1989 (CR I-2944-1189) was analogous to the Arizona crime of fraudulent schemes and artifices, a class 2 felony; and that his 2000 New Jersey conviction for theft of services committed on December 21, 1998 (CR 99-03-00159-I) was analogous to *either* the Arizona crime of fraudulent schemes and artifices, a class 2 felony, *or* to the Arizona crime of theft as a class 6

felony.³ The trial court ultimately found that the state had established that Defendant's theft by deception conviction was equivalent to Arizona's fraudulent schemes and artifices offense, a class 2 offense, and that his theft of services conviction equaled an Arizona conviction for theft of a value over \$250, a class 6 felony. The court also found that these two convictions qualified as prior historical felonies for enhancement purposes. Based on these findings, the trial court ruled that Defendant's 2003 New Jersey conviction for theft of services and his 2001 New Jersey conviction for falsifying/tampering with records, being his third and fourth prior convictions, constituted two prior historical felonies for sentence enhancement purposes, and it sentenced defendant accordingly. A.R.S. § 13-105(22).

¶19 Defendant timely appeals. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. § 12-120.21(A)(1) and §§ 13-4031 and -4033.

DISCUSSION

¶10 On appeal, Defendant argues that it was error for the trial court to find that his 2003 and 2001 New Jersey

³ The state also argued that a 1992 New Jersey conviction for uttering a forged instrument (CR I-1814-8-92) was also equivalent to the Arizona crime of fraudulent schemes and artifices, but the trial court found that the state did not prove this beyond a reasonable doubt under the factual circumstances of the case. The trial court therefore did not count it for § 13-105(22) purposes.

convictions were equivalent to Arizona felony convictions because "none of the New Jersey convictions would be felonies in Arizona . . . or met the definition of 'historical prior felony conviction.'" He maintains that the trial court subsequently erred when it imposed enhanced sentences based on his prior convictions. We find that the trial court committed no sentencing error.

¶11 Whether a foreign conviction constitutes a felony in Arizona is an issue of law that we review de novo. *State v. Smith*, 219 Ariz. 132, 134, ¶ 10, 194 P.3d 399, 401 (2008). We will uphold a trial court's ruling if it is correct for any reason. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶12 A.R.S. § 13-604(W)(2)⁴ permits a trial court to sentence a defendant who has historical prior felony convictions to an enhanced sentence. A defendant who has been convicted "in any court outside the jurisdiction of this state" may also be subjected to an enhanced sentence in Arizona if the offense for which he was convicted outside of Arizona is "an offense which if committed within this state would be punishable as a felony." A.R.S. § 13-604(N).

⁴ In 2008, Arizona renumbered portions of its sentencing scheme. A.R.S. § 13-604 was renumbered § 13-702 without substantive changes relevant to this case. For the purposes of this decision, we refer to the relevant statute as it was numbered at the time defendant committed the present Arizona crimes.

¶13 Before using a foreign conviction to enhance an Arizona statute, a trial court must first determine 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)). See also *Smith*, 219 Ariz. at 134, ¶ 10, 194 P.3d at 401. The trial court must make this determination "by comparing the statutory elements of the foreign crime with those in the relevant Arizona statute" and there must be strict conformity between the elements of the foreign crime and the elements of some Arizona felony before enhancement can apply. *Crawford*, 214 Ariz. at 131, ¶ 7, 149 P.3d at 754; *Smith*, 219 Ariz. at 134, ¶ 10, 194 P.3d at 401. The trial court must rely solely on a comparison of the foreign crime to Arizona law, and extraneous information regarding the factual nature of the foreign conviction may be used only to narrow the foreign conviction to the subsection of the statute that served as the basis for the foreign conviction. *Crawford*, 214 Ariz. at 132, ¶¶ 10-11, 149 P.3d at 755.

I. 2000 AND 2003 THEFT OF SERVICES CONVICTIONS

¶14 Defendant first contends that his 2000 (CR 99-03-00159-I) and 2003 (CR I-4185-12-02) convictions for theft of services are not historical prior felony convictions under

Arizona law. He argues that the New Jersey statute for theft of services differs from Arizona's statutes for fraudulent schemes and artifices and theft because: (1) the New Jersey and Arizona statutes have different *mens rea* requirements; (2) the Arizona fraudulent schemes and artifices statute requires multiple acts, whereas the New Jersey statute requires only one single act; and (3) the Arizona fraudulent schemes and artifices statute requires that the act be completed "pursuant to a scheme," whereas the New Jersey statute does not.

¶15 The New Jersey theft of services statute, New Jersey Statutes Annotated (N.J.S.A.) 2C:20-8,⁵ provides that:

(a) A person is guilty of theft if he purposely obtains services which he knows are available only for compensation, by deception or threat, or by false token, slug or other means, including but not limited to mechanical or electronic devices or through fraudulent statements, to avoid payment for the services. "Services" include labor or professional service; transportation, telephone, telecommunications, electronic, water, gas, cable television, or other public service; accommodation in hotels, restaurants or elsewhere; entertainment; admission to exhibitions; use of vehicles or other movable property. Where compensation for service is ordinarily paid immediately upon the rendering of such

⁵ Although the state refers to the language of the statutes that were in effect at the time of Defendant's convictions, the appropriate reference is to the language of the statutes that were in effect at the time defendant committed the offenses. See A.R.S. § 1-246 ("When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed."). We cite the language accordingly.

service, as in the case of hotels and restaurants, absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay.

(b) A person commits theft if, having control over the disposition of services of another, to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto.

¶16 The state argued, and the trial court found, that the statute is equivalent to Arizona's statute for fraudulent schemes and artifices, A.R.S. § 13-2310, which provides:

(A) Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by any means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony.

(B) Reliance on the part of any person shall not be a necessary element of the offense described in subsection A of this section.

(C) A person who is convicted of a violation of this section that involved a benefit with a value of one hundred thousand dollars or more is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except pursuant to § 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted.

(D) The state shall apply the aggregation prescribed by § 13-1801, subsection B to violations of this section in determining the applicable punishment.

(E) As used in this section, "scheme or artifice to defraud" includes a scheme or artifice to deprive a person of the intangible right of honest services.

¶17 Defendant first contends that the statutes differ in their *mens rea* requirements and the requisite levels of culpability. Thus, while the New Jersey statute requires that a defendant acts "purposely," the Arizona statute requires that a defendant act "knowingly," and the statutes do not strictly conform.

¶18 A.R.S. § 13-105(9)(b) provided that:

"Knowingly" means, with respect to conduct or to a circumstance described by statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

As to culpability, New Jersey law provided that:

A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

. . . .

A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

.

(2) Substitutes for kinds of culpability. When the law provides that a particular kind of culpability suffices to establish an element of an offense such element is also established if a person acts with a higher kind of culpability.

N.J.S.A. 2C:2-2(b), (c).

¶19 It is true that New Jersey requires that a defendant who commits theft by deception act "purposely," while Arizona requires that a defendant who commits fraudulent schemes and artifices only act "knowingly." However, it is also true, as the state notes, that New Jersey law provides that a person who acts with a higher level of culpability, i.e., one who acts "purposely," is deemed to have acted with a lower level of culpability, i.e., "knowingly." N.J.S.A. 2C:2-2(c)(2). Furthermore, New Jersey's and Arizona's definitions of "knowingly" are virtually identical. In New Jersey a defendant "acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence"; in Arizona he does so if "with respect to conduct or to a circumstance described by a statute defining an offense, that . . . person is aware or believes his or her conduct is of that nature or that the circumstances exist." N.J.S.A. 2C:2-2(b)(2); A.R.S. § 13-105(9)(b). Thus the *mens rea* requirements conform because the fact that defendant was found to have acted with a higher level

of culpability in New Jersey indicates that he was also deemed to have acted "knowingly."

¶120 Next, Defendant contends that the two statutes do not conform: the New Jersey theft of services offense can be committed by one single act while the Arizona fraud/schemes statute requires multiple acts, because a "'scheme' implies a plan in furtherance of which numerous acts may be committed." Where the language of a statute is plain and unambiguous, we need look no further. *State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1990).

¶121 Nothing in the language of our Arizona statute imposes a requirement that the scheme to defraud must necessarily occur over an extended period of time in order to qualify as an offense. A scheme or artifice is simply defined as "some 'plan, device, or trick' to perpetrate a fraud." *State v. Haas*, 138 Ariz. 413, 423, 675 P.2d 673, 683 (1983) (citation omitted). Thus in *State v. Clough*, we found that the defendant's knowing presentation of a check supported by insufficient funds constituted a fraudulent scheme. 171 Ariz. 217, 222, 829 P.2d 1263, 1268 (App. 1992). Similarly, in *State v. Stewart*, we found that a defendant was guilty of fraudulent schemes and artifices when he obtained money from the victim by making false representations that he would paint her roof. 118 Ariz. 281, 282-83, 576 P.2d 140, 141-42 (App. 1978). While a fraudulent

act may be perpetrated through a series of component steps that occurs over days or hours, it is still a single act. Accordingly, Defendant's argument that Arizona's statute cannot be satisfied with a single act fails.

¶122 Finally, Defendant argues that the two statutes do not conform because the New Jersey theft of services offense can be committed without a "scheme or artifice to defraud." The New Jersey statute states that a person is guilty of the crime if he obtains services "by *deception* or threat," by use of a "false token," or by failing to pay for certain services immediately which give "rise to a presumption that the service was obtained by *deception* as to intention to pay." N.J.S.A. § 2C:20-8(a) (emphasis added). To "defraud" is commonly defined as "to deprive of something by deception," and "deceive" is synonymous with "mislead" or "delude." Merriam-Webster's Collegiate Dictionary, 321, 327 (11th ed. 2003). Therefore, contrary to Defendant's arguments, the New Jersey statute, like the Arizona one, contains the requirement that the defendant act with intent to defraud or swindle. Consequently the trial court did not err in finding that Defendant's 2000 conviction for theft of services (CR 99-03-00159-I) could be used to enhance Defendant's Arizona sentence.

¶123 With regard to his 2003 New Jersey conviction for the same offense, Defendant concedes in his opening brief that based

on the dollar amount involved in the New Jersey conviction for theft of services, that offense is analogous to Arizona's theft offense as a class 6 felony. On appeal, he simply argues that the *mens rea* is different because the New Jersey theft statute requires that a defendant act "purposely," while the Arizona theft statute requires that a defendant act "knowingly."⁶ As discussed above, we reject that argument.

II. 2001 FALSIFYING/TAMPERING WITH A RECORD CONVICTION

¶24 Defendant argues that the trial court improperly used his 2001 New Jersey conviction for falsifying/tampering with records committed on July 14, 2000 (CR I-1396-05-01) to enhance his sentences. Defendant fails to prove that the trial court committed error in its ruling that this offense qualified as a felony under Arizona's forgery statute.

¶25 The 2000 New Jersey statute, N.J.S.A. 2C:21-4(b)(2), states:

A person is guilty of issuing a false financial statement, a crime of the third degree, when, with the purpose to deceive or injure anyone or to conceal any wrongdoing; he by oath or affirmation:

. . . .

⁶ Defendant also argues that this offense could not be counted as an historical prior conviction because it was more than ten years old. A.R.S. § 13-105(22)(c). However, because the trial court properly found that Defendant had four prior historical New Jersey convictions, the trial court properly used two of them to enhance his Arizona sentences. A.R.S. § 13-105(22)(d).

Represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to such person's current financial condition or ability to pay, whereas, he knows it is substantially inaccurate in that respect.

The 2000 Arizona forgery statute, A.R.S. § 13-2002, states:

(A) A person commits forgery if, with the intent to defraud, the person:

- (1) Falsely makes, completes or alters a written instrument; or
- (2) Knowingly possesses a forged instrument; or
- (3) Offers or presents, whether accepted or not, a forged instrument that contains false information.

(B) The possession of five or more forged instruments may give rise to an inference that the instruments are possessed with an intent to defraud.

(C) Forgery is a class 4 felony.

¶126 Both statutes clearly require an intent to defraud or injure, the production of a written instrument, and the knowledge that the information contained in the instrument was false or "substantially inaccurate." Defendant argues that the statutes do not strictly conform because, unlike Arizona, New Jersey requires that the "false financial statement" be one that is made "under oath or affirmation." For this argument, Defendant relies on the New Jersey definition of "financial statement" that is contained in the New Jersey Accountancy Act of 1997. N.J.S.A. 45:2B-44. According to the plain language of

that same statute, however, the provisions and definition therein apply solely to the Accountancy Act.⁷ That definition therefore is not controlling in the context of the New Jersey criminal statutes, and Defendant does not point us to any specific authority that proves otherwise. Moreover, as the state notes, in Arizona the specific definition of a "written instrument" for purposes of the offense of forgery includes "any paper, document or other instrument that contains written or printed matter or its equivalent." A.R.S. § 13-2001(11)(a). Therefore, Arizona's broad definition would encompass any written instrument, including a false financial statement that was made under oath. The trial court committed no error when it used this prior conviction to enhance Defendant's sentences.

III. 1990 THEFT BY DECEPTION CONVICTION

¶127 Defendant argues that his 1990 New Jersey conviction for theft by deception (CR I-2944-1189) committed on September 9, 1989, also does not constitute a felony conviction under Arizona law. As with his prior argument regarding the New

⁷ N.J.S.A. 45:2B-44: "The statements on standards specified herein shall be adopted by regulation by the board and shall be in accordance with standards developed for general application by recognized national accountancy organizations such as the American Institute of Certified Public Accountants." We note, however, that for purposes of the New Jersey forgery statute, a "[w]riting" includes printings or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, access devices, and other symbols of value, right, privilege, or identification." N.J.S.A. 2C:21-1(3).

Jersey theft of services offenses, Defendant argues that the New Jersey statute for this offense does not strictly comport with Arizona's fraudulent schemes and artifices statute because Arizona's statute requires multiple acts over time whereas the New Jersey offense of theft by deception can be completed through one single act alone.⁸

¶128 Under the terms of the 1990 New Jersey statute, a person commits theft by deception if he "purposely obtains property of another by deception" and "[a] person deceives if he purposely":

(a) Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;

(b) Prevents another from acquiring information which would affect his judgment of a transaction; or

(c) Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship.

N.J.S.A. 2C:20-4. In Arizona, the fraudulent schemes and artifices statute, A.R.S. § 13-2310, provided that:

⁸ Defendant also argues on appeal that the New Jersey statute does not comport with the Arizona 1989 theft statute. However, because the trial court found that the New Jersey statute met the requirement of the Arizona fraud/schemes and artifices statute, we need not address that argument on appeal. See *Perez*, 141 Ariz. at 464, 687 P.2d at 1219 (we will uphold trial court's ruling if correct for any reason).

(A) Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony.

(B) Reliance on the part of any person shall not be a necessary element of the offense described in subsection (A).

. . . .

(E) As used in this section, "scheme or artifice to defraud" includes a scheme or artifice to deprive a person of the intangible right of honest services.

¶129 The plain language of both statutes requires the procurement of another's property through "purposeful" or "knowing" deception or falseness. As discussed *supra*, New Jersey's "purposeful" requirement encompasses Arizona's *mens rea* "knowing" requirement, and nothing in the plain language of the Arizona statute requires that the execution of the fraudulent act be committed over a span of time or be committed on a separate occasion from the actual acquisition of the property itself. Arizona law recognizes that the crime of fraudulent schemes or artifices may occur in a single act. *Clough*, 171 Ariz. at 222, 829 P.2d at 1268; *Stewart*, 118 Ariz. at 282-83, 576 P.2d at 141-42.

¶130 Defendant also argues that the fact that the Arizona statute does not require reliance "must mean something," but he neither specifies what that might be nor how that differentiates

the New Jersey statute, which, on its face, also does not contain a "reliance" requirement. This argument also fails.

CONCLUSION

¶31 Because we find that the trial court properly enhanced Defendant's sentences with two prior historical felonies, we affirm Defendant's convictions and sentences.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge