**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

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MAR 16 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,
v.
EDWARD PORTER BOLDING,
Appellant.

2 CA-CR 2010-0088
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061270

Honorable Deborah Bernini, Judge
Honorable Hector E. Campoy, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By David J. Euchner — Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

**¶1** After a jury trial, Edward Bolding was convicted of two counts of fraudulent scheme and artifice and one count of obstructing criminal investigation or

prosecution. The trial court initially sentenced him to concurrent, presumptive prison terms, the longest of which was 9.25 years, and ordered him to pay restitution. However, he ultimately was resentenced to two concurrent, five-year prison terms, placed on probation for a consecutive, three-year term, and ordered to pay restitution. On appeal, Bolding argues there was insufficient evidence to convict him of either count of fraudulent scheme and artifice. He also contends the trial court violated his right to a twelve-person jury and improperly imposed a consecutive probation term for his conviction of obstructing criminal investigation or prosecution. Finding no error, we affirm.

## Factual Background and Procedural History

**¶2** Bolding, a former attorney, was charged with crimes arising out of his representation of two clients in separate matters. On appeal, we view the facts in the light most favorable to upholding the convictions and resolve all reasonable inferences against the defendant. *State v. Haas*, 138 Ariz. 413, 419, 675 P.2d 673, 679 (1983).

### Client M.H.

**¶3** In 1991 M.H. was charged with arson and hired Bolding to defend her. To fund the representation, M.H. executed an "Irrevocable Assignment and Direction" in which she instructed the trustee of a trust of which she was the income beneficiary to pay the trust income to Bolding until he determined that all attorney fees and costs related to the representation, including a $25,000 retainer fee, had been paid. M.H. was convicted and sentenced to prison. In 1995, while incarcerated, she executed a general durable power of attorney to allow Bolding to use trust funds to manage her possessions, buy land

on which she could place a manufactured home, and grow a savings account for her. Between 1992 and 2004, the trustee disbursed $692,494.45 to Bolding.

**¶4** In January 2004, M.H. was released from prison. Although Bolding had rented an apartment for her where she stayed after her release, she discovered that many of her belongings were missing, Bolding had not purchased any property for her, and she had very little money available to her. M.H. contacted the Arizona Attorney General's office and, shortly thereafter, found a handwritten letter from Bolding at her apartment threatening to reveal to authorities M.H.'s alleged confessions to past crimes, including causing the death of her mother and her former husband, if she continued to pursue her "frivolous claim" against Bolding. M.H. reported the letter to the police and the Attorney General's office, and the investigation continued.

**Client W.L.**

**¶5** In 2000, W.L. was involved in an automobile accident and suffered a serious brain injury. Bolding, who had been W.L.'s attorney in previous matters and was at that time representing him on criminal charges, also represented him in his lawsuit following the accident. Although Bolding negotiated a settlement for $800,000, he informed W.L. the case had settled for far less[1] and then spent over $400,000 of the settlement money on expenses unrelated to W.L.

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[1]W.L. testified at trial that Bolding had told him he would receive a lump sum of $50,000 plus $1,500 per month for five years, totaling $140,000.

**Trial and Appeal**

**¶6** Bolding was charged with one count of fraudulent scheme and artifice relating to M.H. (count one), one count of the same offense relating to W.L. (count three), and one count of obstructing criminal investigation or prosecution based on his threatening letter to M.H. (count two). The case was tried to an eight-person jury. Bolding failed to appear in court on the day the jury concluded its deliberations, but proceedings continued in his absence and the jury found him guilty as charged.

**¶7** Bolding was apprehended in June 2009 and, in October, the court sentenced him to concurrent terms of imprisonment: five years on count one, 1.5 years on count two, and 9.25 years on count three. Immediately after imposing sentence, however, the court granted Bolding's pending motion to vacate the judgment and sentence pursuant to Rule 24.2, Ariz. R. Crim. P., and ordered a new trial, finding that the failure to impanel a twelve-person jury constituted both structural and fundamental error. The state appealed, and while the appeal was pending, our supreme court decided *State v. Soliz*, upholding the defendant's trial by an eight-person jury as constitutionally permissible because it effectively eliminated "any risk of his receiving a sentence of thirty years or more." 223 Ariz. 116, ¶ 12, 219 P.3d 1045, 1048 (2009). The parties stipulated to stay the appeal, and this court revested jurisdiction in the trial court for a determination of the effect of *Soliz* on Bolding's case. Finding that *Soliz* controlled the issue, the court vacated its October 2009 decision granting a new trial, concluded the state implicitly had waived allegations of sentence enhancements under former A.R.S. § 13-702.02, and set the matter for resentencing. In March 2010, the court sentenced Bolding to concurrent prison

terms of five years each on counts one and three, ordered him to serve a consecutive, three-year probation term on count two, and ordered him to pay $327,640.52 in restitution to M.H. and $413,124.64 to W.L., as well as the state's extradition costs. Bolding appealed.

**¶8** We denied the state's motion to dismiss the appeal in *State v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011), holding that A.R.S. § 13-4033(C) did not deprive Bolding of the right to appeal because he had not been informed he could forfeit that right by voluntarily delaying sentencing for more than ninety days by absconding. We now address the merits of his appeal.

## Discussion

### Sufficiency of Evidence

**¶9** Bolding first argues that neither count of fraudulent scheme and artifice is supported by sufficient evidence and therefore his convictions as to those two counts should be vacated. We will vacate a conviction for insufficient evidence only if there is a complete absence of substantial evidence to support it. *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). Substantial evidence is such proof that rational persons could accept as adequate and sufficient to support a finding of guilt beyond a reasonable doubt. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). The question of sufficiency of the evidence "is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

False Pretenses

**¶10** Bolding first contends, as he did below, that the state failed to prove he had obtained a benefit from either client by means of false pretenses and that he therefore could not be convicted of either count of fraudulent scheme and artifice. A person is guilty of that offense if he or she, "pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." A.R.S. § 13-2310. The crime includes "frauds in which the perpetrator takes advantage of the victim by inducing the latter to turn over property or money based on a false picture painted by the perpetrator." *State v. Johnson*, 179 Ariz. 375, 378, 880 P.2d 132, 135 (1994). A defendant's actions satisfy the false-pretense element "when that defendant has knowingly led the adverse party to believe a state of facts which is not true and when this has been accomplished either by active misrepresentations, or omitting material facts which [the] defendant knew were being misunderstood, or by stating half-truths, or by any combination of these methods." *Haas*, 138 Ariz. at 423, 675 P.2d at 683.

**¶11** Relying principally on *Johnson*, 179 Ariz. 375, 880 P.2d 132, Bolding claims he "lawfully obtained money from third parties for the benefit of each client[] and made no representations whatsoever to those third parties" and that his actions therefore did not satisfy the false-pretense element. He argues that although the evidence may have been sufficient to support a conviction of theft, *see* A.R.S. § 13-1802, it was not sufficient to support his conviction of fraudulent scheme and artifice. In *Johnson*, our supreme court held that "[f]alse pretense, created through words or omissions, is the act

that separates fraud from routine theft." *Id.* at 378, 880 P.2d at 135. In that case, the victim-employer provided its employees, including the defendant, with fuel cards that allowed them to obtain gasoline for use in company vehicles. *Id.* at 376, 880 P.2d at 133. Recognizing that the employer had no system to track the issuance or use of the cards, the defendant obtained multiple cards and used them to obtain money and drugs. *Id.* The court reversed the defendant's conviction for fraudulent scheme and artifice, explaining that although he may have been guilty of theft, there was no evidence the defendant had used false pretense to obtain either the fuel cards or the gasoline which he converted to his own use. *Id.* at 379-81, 880 P.2d at 136-38.

**¶12** The state distinguishes *Johnson*, arguing that here the victims "allowed [Bolding] to obtain and/or retain and spend their money based on [his] express misrepresentations to them," whereas in *Johnson* the defendant had made no false statement or material admission to gain the benefit. The state specifies that Bolding "falsely told the severely brain-damaged [W.L.] that [his] civil settlement was far less than it actually was," which prevented W.L. from knowing of and demanding the full settlement. Likewise, the state argues, Bolding "falsely told the imprisoned [M.H.] that he would use Trust funds to maintain and expand her estate," inducing her to sign a power of attorney allowing him to obtain and manage the funds.

**¶13** We agree the state presented sufficient evidence from which the jury could reasonably infer Bolding had misled the victims in order to obtain the benefits he received. Attorneys testifying for the state established that Bolding, in his capacity as an attorney, owed his clients a fiduciary duty, and M.H. correspondingly testified that she

had trusted Bolding due to his status as her attorney and because she "had no way of checking on what he was doing" while she was incarcerated. M.H. further testified that Bolding had told her he would manage her possessions and purchase property for her while she was in prison and he needed a power of attorney in order to accomplish this. Based on these statements, M.H. granted the power of attorney, believing that when she was released from prison, she would "have a house and a lot[,] . . . money in [her] savings account[, and] . . . possessions from [her] home." But when she actually was released, "nothing was the way it had been represented to [her]." Although Bolding had maintained a savings account for her, it contained only "about $3,000," far less money than M.H. had expected, and Bolding had not acquired property for her or preserved her possessions, despite having obtained $338,925 in trust income through the power of attorney he persuaded M.H. to grant him.

**¶14** This was more than sufficient evidence from which the jury reasonably could infer that Bolding induced M.H. to grant him access to the trust funds "by misrepresenting or concealing his true intent," *Johnson*, 179 Ariz. at 379, 880 P.2d at 136, in order to appropriate income from the trust for himself by taking advantage of M.H.'s lack of knowledge and incapacity while incarcerated.

**¶15** The evidence similarly established that Bolding was able to appropriate the bulk of W.L.'s settlement funds by his misrepresentations to W.L. and to the insurance company representing the defendants in W.L.'s lawsuit. Richard Potts, the managing attorney for Travelers Insurance Company, testified that when the case settled, Bolding told the insurance company that the settlement funds should be deposited in an account

belonging to Annuity Investment Trust, where they would "be used to purchase an annuity that would provide a monthly income for [W.L.] for the rest of his life." The money was deposited, but Bolding controlled that account and only six payments were made to W.L., totaling $13,066, all in the months of March and April 2002. Contrary to Bolding's assertion on appeal, this constituted a misrepresentation to the insurance company.

**¶16** Bolding also took advantage of W.L.'s incapacity after the automobile accident and affirmatively misrepresented the amount of the settlement to him. W.L. testified he "lost [his] past" as a result of the accident, which caused a skull fracture, serious brain injury, partial paralysis, and memory loss. This was supported by the testimony of Dr. LaWall, a neurologist and psychiatrist who had found that W.L.'s injuries caused him to be incompetent to stand trial in the criminal case then pending against him. W.L. further testified that he had trusted Bolding, stating, "I thought I couldn't find a better friend in the world." The jury heard evidence that Bolding abused this trust, telling W.L. he would receive $140,000 for the accident—a lump sum of $50,000 and $1,500 per month for five years thereafter—when Bolding actually had settled the case for $800,000.[2] Dr. LaWall also opined that W.L. would not have had the ability to read and understand legal documents for some period after his accident, but Bolding executed a fee agreement with W.L. only a few months later. The evidence was

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[2]Travelers Indemnity Company paid $422,531 to Annuity Investment Trust, established by Bolding purportedly for W.L.'s benefit. W.L. testified, however, that he never received even the $140,000 promised by Bolding but rather was paid only "about $50,000."

sufficient to allow the jury to conclude that Bolding had obtained a benefit by means of false pretenses. *See Johnson*, 179 Ariz. at 379, 880 P.2d at 136; *State v. Suarez*, 137 Ariz. 368, 374, 670 P.2d 1192, 1198 (App. 1983).

Named Victim

**¶17** Bolding next argues there was insufficient evidence to support his conviction of fraudulent scheme and artifice with respect to M.H. because the indictment alleged the offense had been committed against the trust rather than against M.H. personally, and the evidence showed that no fraud or theft had been perpetrated against the trust itself. Specifically, Bolding contends that because M.H. had executed an irrevocable assignment of her income—and later a power of attorney—in favor of Bolding there was "no substantial evidence of a scheme to defraud the trust." We disagree.

**¶18** The record contradicts Bolding's suggestion that the assignment and power of attorney were "valid" and that his dealings with the trust were "entirely honest." We agree instead with the state, and ultimately the implicit finding of the jury, that the evidence supported a conclusion that Bolding "did not 'properly' obtain the [power of attorney;] he obtained it via his fraudulent representations to a Trust beneficiary." Thus, Bolding's use of the fraudulently acquired power of attorney to obtain funds from the trust was itself fraudulent and enabled him to obtain a benefit, thus satisfying the elements of § 13-2310. *See State v. Proctor*, 196 Ariz. 557, ¶ 16, 2 P.3d 647, 651-52 (App. 1998) (state need not prove victim's reliance on misrepresentations to establish elements of offense); *cf. Gomez v. Maricopa Cnty.*, 175 Ariz. 469, 474, 857 P.2d 1323,

1328 (App. 1993) (agent binds principal only where power of attorney not obtained by misrepresentation or fraud). That the state could have alleged a separate count for the fraud against M.H. does not render insufficient the evidence that the trust was also defrauded.[3] Because, as discussed above, there was sufficient evidence for the jury to conclude that Bolding had obtained the power of attorney fraudulently, the evidence was likewise sufficient to support a conclusion that he defrauded the trust when he used that document to obtain trust funds—whether or not the trust ultimately bore the economic loss caused by the crime.

**Twelve-Person Jury**

**¶19** Bolding next argues he is entitled to a new trial because he was deprived of his right to be tried before a twelve-person jury. Whether Bolding was entitled to a twelve-person jury is a question of law we review de novo. *See State v. Maldonado*, 206 Ariz. 339, ¶ 10, 78 P.3d 1060, 1063 (App. 2003).[4]

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[3]Nor does the failure to allege M.H. as a victim in the indictment prevent her from receiving restitution if the sentencing court was satisfied by a preponderance of the evidence that she suffered the economic loss alleged. A.R.S. § 13-804(A); *see also State v. Guilliams*, 208 Ariz. 48, ¶¶ 13-14, 90 P.3d 785, 789 (App. 2004) (test for restitution is whether particular criminal conduct directly caused economic loss; restitution statutes do not require that specific victim be named in indictment or verdict form); *State v. Merrill*, 136 Ariz. 300, 301, 665 P.2d 1022, 1023 (App. 1983) (both direct victim of burglary and insurance company that paid direct victim's claims properly considered "victims" for purpose of restitution).

[4]Bolding concedes he "did not demand a twelve-person jury at the time of [i]mpanelment of the jury," but argues the impanelment of an eight-person jury in this case constituted structural error or, in the alternative, fundamental, prejudicial error. Because we find no error, however, we need not address the question of which category of error might apply. *See Soliz*, 223 Ariz. 116, ¶ 12, 219 P.3d at 1048.

**¶20** In a criminal case in which the defendant faces a potential prison term of thirty years or more, the jury "shall consist of twelve persons." Ariz. Const. art. II, § 23; A.R.S. § 21-102(A). However, no error occurs in cases where a defendant is tried by an eight-person jury, so long as the defendant does not actually receive a sentence of thirty years or more. *Soliz*, 223 Ariz. 116, ¶ 16, 219 P.3d at 1049. In such cases, the state is determined to have waived the ability to obtain a sentence of thirty years or more as a matter of law. *Id.*

**¶21** The state argues that no error occurred because, under *Soliz*, the impanelment of an eight-person jury automatically reduced Bolding's sentencing exposure to less than thirty years. Bolding attempts to distinguish *Soliz*, arguing that the prosecutor in that case "declined to prove the defendant's prior convictions and was satisfied with a presumptive sentence of ten years," whereas in Bolding's case "the State was vigilantly seeking aggravated sentences that would be run consecutively." *See id.* ¶ 3. Quoting *Soliz*, Bolding contends the rule established by that case is that "the State must implicitly 'act[] to effectively reduce the defendant's jeopardy *before the jury began deliberations*.'" *See id.* ¶ 16. We disagree with this narrow interpretation of *Soliz*'s effect. Bolding is correct that the *Soliz* court supported its holding with previously decided Arizona cases in which "the prosecutor or judge explicitly acted to effectively reduce the defendant's jeopardy before the jury began deliberations." *Id.* But he ignores the remainder of the same paragraph in which the court states, "We believe that what was explicit in those situations is implicit here. By failing to request a jury of twelve, the State effectively waived its ability to obtain a sentence of thirty years or more." *Id.*

Contrary to Bolding's characterization, *Soliz* holds that when the state fails to request a jury of twelve and the court fails to impanel a jury of that number, this itself constitutes an implicit dismissal of allegations that could make the potential sentence thirty years or more, whether or not the state explicitly dismisses any charges. *See id.*

**¶22** We note, moreover, that Bolding's suggested interpretation would create the same anomalous results our supreme court sought to cure in *Soliz*. 223 Ariz. 116, ¶ 17, 219 P.3d at 1049. Under Bolding's proposed reading, defense counsel would have no incentive to request a twelve-person jury but could "decide to see what verdict an eight-person jury reached, knowing that a retrial would always result" if the state had failed to dismiss a charge and the defendant "faced a potential sentence of thirty years or more." *Id.* Additionally, "because the state would usually be prohibited from seeking a sentence longer than initially imposed after a defendant's successful appeal," under Bolding's interpretation, "a remand after a reversal . . . would be conducted before an eight-person jury." *Id.* Our supreme court specifically disapproved these results as "anomalous." *Id.* Accordingly, we reject Bolding's reading of *Soliz* and find the trial court did not err in denying him a new trial.

**Resentencing**

**¶23** In his final argument, Bolding contends he was improperly resentenced on count two, his conviction for obstructing a criminal investigation or prosecution. Bolding concedes he did not make this argument to the trial court; however, because the "pronouncement of sentence is procedurally unique" and Bolding had "no appropriate opportunity to preserve any objection to errors arising during the court's imposition of

sentence," he did not forfeit appellate review in failing to object to the sentence below. *State v. Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d 1099, 1101 (App. 2011).

**¶24** As noted earlier, Bolding was originally sentenced to presumptive prison terms of five years on count one, 1.5 years on count two, and 9.25 years on count three, all to run concurrently. After *Soliz* was decided, the trial court found the state had implicitly dismissed the enhancement allegation under § 13-702.02, and it resentenced Bolding to concurrent, five-year prison terms on counts one and three, to be followed by a consecutive, three-year probation term on count two. Bolding challenges the consecutive term of probation, arguing it increases his punishment in violation of Rule 26.14, Ariz. R. Crim. P., and *North Carolina v. Pearce*, 295 U.S. 711 (1969).

**¶25** Rule 26.14, which "embodies the standards for resentencing adopted by the Supreme Court" in *Pearce*, Ariz. R. Crim. P. 26.14 cmt., provides:

> Where a judgment or sentence, or both, have been set aside . . . on a post-trial motion, the court may not impose a sentence for the same offense . . . which is more severe than the prior sentence unless (1) it concludes, on the basis of evidence concerning conduct by the defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate, or (2) the original sentence was unlawful and on remand it is corrected and a lawful sentence imposed, or (3) other circumstances exist under which there is no reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge.

We first examine whether Bolding's new sentence is "more severe" than his prior sentence. Probation ordinarily is not a sentence but is rather "a judicial order allowing a criminal defendant a period of time in which to perform certain conditions and thereby avoid imposition of a sentence." *State v. Muldoon*, 159 Ariz. 295, 298, 767 P.2d 16, 19

(1988). For purposes of Rule 26, however, a sentence does include probation. Ariz. R. Crim. P. 26.1 cmt.; *State v. Falco*, 162 Ariz. 319, 321, 783 P.2d 258, 260 (App. 1989). But even so, we find no basis to sustain Bolding's unsupported assertion that the new sentence "increase[s] the punishment in terms of Rule 26.14," particularly in light of his concession that "the new sentence did not increase the amount of time [he] has to serve in prison." Indeed, his new sentence imposes only five years in prison while his prior sentence totaled 9.25 years. And even were we to count his probation term as the fungible equivalent of a prison term for purposes of this argument, the prison and probation terms would total only eight years—still less than his original 9.25-year sentence. We accordingly find that the new sentence is not more severe than the original.

**¶26** Moreover, even if Bolding's new sentence were deemed more severe than his prior sentence, we still would conclude it does not violate Rule 26.14 because the trial court articulated "other circumstances" justifying the sentence, so that there is no "reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge." Ariz. R. Crim. P. 26.14. In resentencing Bolding, the court stated, "I'm not going to punish Mr. Bolding for the fact this has come back on legal issues that have reduced the range of sentence that the Court is permitted to impose." And, as the state points out, objective factors support the court's conclusion about its own disinterest. As noted above, the court imposed a lesser sentence on resentencing. Furthermore, the court initially granted Bolding's motion to vacate the judgment and sentence and it was the state, not Bolding, that appealed from that decision.

**¶27** Finally, the court pointed to other circumstances[5] justifying imposition of the new sentence, stating that the reason for adding a term of consecutive probation was "so that finances can be monitored in an attempt to try to get some restitution payments for [M.H.] and [W.L.]." *See State v. Thomas*, 142 Ariz. 201, 203, 688 P.2d 1093, 1095 (App. 1984) (no due process violation if trial court details non-vindictive rationale for increased sentence and rationale supports increase). Accordingly, we see no reasonable likelihood of vindictiveness by the trial court and consequently find no error in the resentencing on count two. *See id.* (due process forbids only sentence enhancement motivated by actual vindictiveness toward defendant for having exercised guaranteed rights), *citing Wasman v. United States*, 468 U.S. 559, 568 (1984).

**Disposition**

**¶28** For the foregoing reasons, Bolding's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

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[5]We read "other circumstances" to mean circumstances other than those listed in the previous two clauses of Rule 26.14, that is, circumstances other than (1) the defendant's conduct after the original sentencing or (2) an unlawful original sentence. Ariz. R. Crim. P. 26.14.