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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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERT ROSS FUNK, JR., Appellant.	2 CA-CR 2011-0216 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100665001

Honorable Edgar B. Acuña, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Robert Funk, Jr., was convicted of trafficking in stolen property in the second degree, and the trial court sentenced him to a mitigated prison term of ten years. On appeal, Funk argues there was insufficient evidence to support his conviction for trafficking and contends his conviction should be reduced to the lesser-included offense of false representation. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to upholding Funk's conviction. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the morning of January 19, 2010, D.P. discovered his vehicle had been stolen from the driveway of his residence in Tucson. Two days later the vehicle was found in the driveway of Funk's residence. Police officers questioned Funk, who stated he did not know how the vehicle had gotten there. When officers subsequently asked D.P. to determine if any items had been taken from inside the vehicle, he informed them that his global positioning system (GPS) unit was missing.

¶3 D.P. gave the officers the GPS unit's serial number, and the detective assigned to the case discovered that Funk had pawned the unit for $25 on the afternoon of January 19. On January 28, D.P. met the detective at the pawn shop where he identified the unit, furnished proof of ownership, and repurchased it for $25. The detective then

contacted Funk, who admitted pawning the GPS unit,[1] indicating he had received it from an acquaintance as payment for repair work on a car. Funk provided little information about the acquaintance, but admitted he assumed the GPS unit had been stolen.

¶4 Funk was indicted for trafficking in stolen property in the second degree. He was tried in absentia, convicted as charged, and, upon being taken into custody, was sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Discussion

¶5 Funk argues the trial court erred in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. He contends the evidence was insufficient to support his conviction because pawning an item does not meet the statutory definition of "trafficking." We review the denial of a Rule 20 motion de novo, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), and will reverse a conviction only if there is no substantial evidence to support the jury's verdict, *State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). Substantial evidence is evidence that "reasonable

[1]As part of the pawn transaction, Funk signed a document pursuant to A.R.S. § 44-1625, acknowledging:

> All information in this report is complete and accurate. I am the owner of the goods described in this report or I am authorized to enter into this pawn or sales transaction on behalf of the owner of the goods described in this report. I understand that I will be guilty of a class 1 misdemeanor if the information in this report is not complete and accurate, if I am not the owner of the goods pledged or sold or if I am not authorized to enter into the pawn or sale transaction on behalf of the owner of the goods.

persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997).

¶6 To convict a defendant of trafficking in stolen property in the second degree, the state must prove that the defendant recklessly trafficked in the stolen property of another. A.R.S. § 13-2307(A). The term "traffic" is defined as follows:

> [T]o sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person, or to buy, receive, possess or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person.

A.R.S. § 13-2301(B)(3). Here, the state presented substantial evidence that Funk had trafficked in stolen property. The parties stipulated that on January 19, 2010, Funk had taken the stolen GPS unit to a pawn shop in Tucson and pawned it for $25. By doing so, Funk clearly transferred the GPS unit to the pawn shop.

¶7 Funk does not dispute that the GPS unit was "stolen property" or that he exchanged it for money at a pawn shop. Rather, he maintains the item was recovered before the pawn redemption period had expired, "when no property interest was conveyed to the pawn shop."[2] Thus, he contends the item had not been "disposed of" for purposes of the trafficking statute. The interpretation of a statute is a question of law we review de novo. *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007). "When called upon to interpret a statute, we consider its plain language, giving meaning to each word

[2]The pawn shop employee who had conducted the transaction with Funk testified that pursuant to the pawn contract Funk had ninety days, plus a fourteen-day grace period, during which he could redeem the item for $25 plus interest and fees. We refer to this period of time as the "redemption period."

and phrase 'so that no part is rendered void, superfluous, contradictory or insignificant.'" *State v. Windsor*, 224 Ariz. 103, ¶ 6, 227 P.3d 864, 865 (App. 2010), *quoting State v. Larson*, 222 Ariz. 341, ¶ 14, 214 P.3d 429, 432 (App. 2009).

¶8 Funk acknowledges that his argument was rejected in *State v. Johnson*, 165 Ariz. 555, 556, 799 P.2d 896, 897 (App. 1990), on similar facts, but he argues that case is distinguishable and we should reconsider its "conclusory holding." In *Johnson*, this court concluded the defendant had trafficked in stolen property because he "obviously 'dispose[d] of' [it] when he pawned it." *Id.* However, Funk maintains the issue in *Johnson* was the sufficiency of the factual basis for a guilty plea, which "involves a lesser standard of proof" that "does not control the issue presented here." He also notes that it is unclear in *Johnson* whether the redemption period had expired after the property was pawned but before the defendant was charged.

¶9 But in *Johnson*, as in this case, the core issue on appeal was whether the act of pawning a stolen item meets the statutory definition of trafficking. *Id.* It therefore was not relevant to our resolution of the legal issue whether the defendant pled guilty or was convicted following a jury trial. In either instance, had the defendant's conduct not fit the statutory definition of the crime, the conviction would have been vacated. *See State v. Carr*, 112 Ariz. 453, 455, 543 P.2d 441, 443 (1975) (conviction on guilty plea vacated because "no factual basis to support [each] element of the crime"); *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007) (judgment of acquittal appropriate when "no substantial evidence to prove each element of the offense"). Contrary to Funk's

argument, our analysis and holding in *Johnson* was not governed by the manner in which the conviction was achieved. 165 Ariz. at 556, 799 P.2d at 897.

¶10 We also disagree with Funk's suggestion that the result should be different if, as in his case, the redemption period for the pawned item had not yet expired when the item is recovered by police and the defendant is charged. Funk contends that "any common understanding of the term ["dispose of"] includes an element of finality" that was not present here until the redemption period had expired, "giving the pawn shop the legal right to control and dispose of the property." But even assuming the term "dispose of" encompasses an "element of finality,"[3] Funk ignores that trafficking can be committed in other ways. The definition of "traffic" in § 13-2301(B)(3) includes "to sell, transfer, distribute, [or] dispense" stolen property to another. And "transfer" simply means "[t]o convey or remove from one place, person, etc., to another; pass or hand over from one to another; specifically, to change over the possession or control of." *Black's Law Dictionary* 1497 (6th ed. 1990). Funk's interpretation of the statute essentially renders the words "sell, transfer, distribute, [and] dispense" superfluous. We reject any

[3]To "dispose of" means:

> To alienate or direct the ownership of property, as disposition by will. . . . To exercise finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away. Often used in restricted sense of "sale" only, or so restricted by context.

Black's Law Dictionary 471 (6th ed. 1990).

interpretation that does not give meaning to each word and phrase of a statute. *See Windsor*, 224 Ariz. 103, ¶ 6, 227 P.3d at 865. The evidence that Funk had pawned the stolen GPS unit was sufficient to support his conviction for trafficking.

¶11 Funk next argues his conviction should be reduced to false representation pursuant to A.R.S. § 44-1630, a class one misdemeanor, because that statute—the more recent, more specific statute—trumps § 13-2307(A)—the older, more general statute.[4] The applicability of a statute is a question of law we review de novo. *State v. Bolding*, 227 Ariz. 82, ¶ 5, 253 P.3d 279, 282 (App. 2011); *see also Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d at 651; *State v. Eddington*, 226 Ariz. 72, ¶ 7, 244 P.3d 76, 80 (App. 2010).

¶12 After the trial court denied Funk's Rule 20 motion, he requested a jury instruction on false representation, which he claimed is a lesser-included offense of trafficking. The state responded that false representation is not a lesser-included offense of trafficking in stolen property in the second degree because the two offenses require different mental states. The court granted Funk's request for the false representation instruction, but the jury nevertheless convicted him of the trafficking offense. Funk then filed a motion for a new trial, in which he argued the verdict was contrary to the law because he should have been prosecuted for false representation. After hearing argument, the court denied the motion.

[4]In addition, Funk contends his conviction should be reduced to one for false representation because the state failed to prove "traffic[king]" for purposes of § 13-2307(A) given that he pawned the GPS unit rather than selling it. But because Funk's conduct constituted trafficking, we need not address this argument further.

¶13 On appeal, Funk argues that the false representation statute, § 44-1630, adopted in 1994, specifically governs pawnbrokers and the conduct for which he was convicted, while the trafficking statute, § 13-2307(A), added in 1977, is "extremely broad" and encompasses almost any kind of transfer of stolen goods without necessarily involving pawnbrokers. Accordingly, he maintains that § 44-1630 trumps § 13-2307(A) in this case.

¶14 When a recent, more specific statute deals with the same subject as an older, more general statute, the recent, more specific statute normally controls. *See State v. Canez*, 118 Ariz. 187, 190-91, 575 P.2d 817, 820-21 (App. 1977); *State v. Johnson*, 195 Ariz. 553, ¶ 8, 991 P.2d 256, 258 (App. 1999). Consequently, when the acts proscribed by an older, more general statute parallel those of a recent, more specific statute, the state cannot prosecute a defendant for violation of the older one. *See Canez*, 118 Ariz. at 191, 575 P.2d at 821. However, this principle applies only when two statutes actually conflict. *See State v. Weiner*, 126 Ariz. 454, 456, 616 P.2d 914, 916 (App. 1980); *State v. Keener*, 206 Ariz. 29, ¶ 13, 75 P.3d 119, 122 (App. 2003). And a conflict arises only "where the elements of proof essential to conviction under each statute are exactly the same." *Weiner*, 126 Ariz. at 456, 616 P.2d at 916.

¶15 We find no such conflict between § 13-2307(A) and § 44-1630 because trafficking in stolen property in the second degree and false representation are separate

offenses with distinct elements of proof,[5] even though both offenses may arise from one set of facts. *Cf. State v. Mussiah*, 141 Ariz. 212, 214, 685 P.2d 1364, 1366 (App. 1984) (theft and failure to return rental property different offenses that can occur under one factual scenario). A person commits second-degree trafficking in stolen property by "recklessly traffic[king] in the property of another that has been stolen." A.R.S. § 13-2307(A). In contrast, a person commits false representation by:

> Giv[ing] false information or provid[ing] false representation as to the person's true identity or as to the person's ownership interest in property in order to receive monies or other valuable consideration from a pawnbroker, second hand dealer, scrap metal dealer or dealer in precious metals and . . . receiv[ing] monies or other valuable consideration from a pawnbroker, second hand dealer, scrap metal dealer or dealer in precious metals.

A.R.S. § 44-1630. Section 13-2307(A) thus criminalizes the act of exchanging stolen property, whereas § 44-1630 focuses on the exchange of information leading to the exchange of property. As Funk points out, trafficking applies broadly to several types of transactions, but false representation requires the involvement of a pawnbroker or similar dealer. Moreover, the state must prove a reckless mental state pursuant to § 13-2307(A),

[5]Accordingly, we disagree with the trial court's determination that false representation is a lesser-included offense of second-degree trafficking in stolen property. *See State v. Bay*, 150 Ariz. 112, 117, 722 P.2d 280, 285 (1986) ("A requested instruction on a lesser included offense is proper only if the lesser offense is composed of some but not all of the elements of the greater crime so that it is impossible to commit the greater offense without committing the lesser offense."). However, any error resulting from the instruction was harmless and actually benefited Funk. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (error harmless where guilty verdict unattributable to error); *see also State v. Sowards*, 147 Ariz. 156, 159 n.2, 709 P.2d 513, 516 n.2 (1985) (issue erroneously submitted to jury was harmless and benefited defendant).

whereas § 44-1630 defines a strict-liability offense. Because the statutes are not in conflict, we presume the legislature did not preclude the state from prosecuting a defendant under either § 13-2307(A) or § 44-1630. *See Weiner*, 126 Ariz. at 456, 616 P.2d at 916.

¶16 As the state points out, choosing which offense to charge and prosecute is within the sound discretion of the state. *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992). When a defendant can be prosecuted under two or more statutes for the same conduct, the state has the discretion to determine which statute to apply, *State v. Lopez*, 174 Ariz. 131, 143, 847 P.2d 1078, 1090 (1992), as long as it does not discriminate against any class of defendants, *State v. Johnson*, 143 Ariz. 318, 321, 693 P.2d 973, 976 (App. 1984). Funk has presented no such evidence of prosecutorial discrimination or misconduct. We thus find no error in his prosecution for trafficking in stolen property in the second degree.

Disposition

¶17 For the reasons set forth above, the conviction and sentence are affirmed.

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

CONCURRING:

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

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