IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ELLIOTT EDWARD FISHER,
Appellant.

No. 2 CA-CR 2015-0234
Filed March 10, 2016

Appeal from the Superior Court in Pinal County
No. CR201202576
The Honorable Boyd T. Johnson, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Elliott Fisher was convicted of computer tampering. On appeal, he argues the trial court erred by denying his motion to dismiss for lack of jurisdiction. He maintains the federal courts have exclusive jurisdiction over the offense because the computer tampering occurred at a health facility operated within the Gila River Indian Community and the medical record he obtained was for a Native American patient. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Fisher's conviction. *See State v. Almaguer*, 232 Ariz. 190, ¶ 2, 303 P.3d 84, 86 (App. 2013). In January 2011, Desert Visions Youth Wellness Center (Desert Visions), a facility located in Sacaton operated by Indian Health Service under the United States Department of Health and Human Services (HHS), placed Fisher, a licensed practical nurse, on administrative leave and revoked his access to their medical records. The following month, Fisher called M.Z., another nurse at Desert Visions, and told her to fax a particular "nursing note" from a patient's record to his home in Apache Junction. Fisher submitted that record in a pleading he had filed with the Merit Systems Protection Board (MSPB) to dispute his administrative leave. When the chief executive officer of Desert Visions learned that Fisher had obtained a patient record while on leave, she asked her representative in the MSPB dispute to notify the Office of Inspector General for HHS, which launched an investigation and ultimately arrested Fisher.

¶3 A grand jury indicted Fisher for computer tampering. He filed two motions to dismiss for lack of subject matter jurisdiction, arguing "federal jurisdiction is exclusive" when the state "allege[s] that a non-Indian committed a crime against an Indian in Indian Country." After oral argument, the trial court denied the motion. On the eve of trial, Fisher filed a motion to continue, asserting he had filed a notice of removal in the federal court and requesting a continuance of the jury trial pending that court's ruling. On the day of trial, the trial court denied the motion to continue. The jury found Fisher guilty as charged, and the court suspended the imposition of sentence and placed Fisher on probation for eighteen months. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶4 Fisher argues that "[f]ederal law is very specific and preempts state court jurisdiction over a criminal prosecution when an offense involving an Indian occurs on Indian land."[1] We review a trial court's exercise of subject matter jurisdiction de novo. *State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 709 (App. 2008). "[D]efects in subject matter jurisdiction cannot be cured," *State v. Fimbres*, 222 Ariz. 293, ¶ 31, 213 P.3d 1020, 1029 (App. 2009), and therefore are akin to structural error, *see State v. Henderson*, 210 Ariz. 561, ¶ 12, 115 P.3d 601, 605 (2005). *See also Fimbres*, 222 Ariz. 293, ¶ 29, 213 P.3d at 1028 ("'Subject matter jurisdiction is the power of a court to hear and determine a controversy.'"), *quoting State v. Bryant*, 219 Ariz. 514, ¶ 14, 200 P.3d 1011, 1014 (App. 2008). If such error is found,

[1]In his brief, Fisher also refers generally to the principle of federal preemption. However, he does not develop any argument related to this principle beyond asserting without support that "the unauthorized access of the patient's medical record constituted a [Health Insurance Portability and Accountability Act] violation." We therefore do not address the issue further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review).

"reversal is mandated." *State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 236 (2009).

¶5 "Generally, a state has complete jurisdiction over the lands within its exterior boundaries." *State v. Vaughn*, 163 Ariz. 200, 203, 786 P.2d 1051, 1054 (App. 1989); *see* A.R.S. § 13-108(A)(1) (asserting jurisdiction over an offense when "[c]onduct constituting any element of the offense . . . occurs within this state"). The federal courts, however, generally have jurisdiction over crimes that occur in Indian country—that is, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a); *see State v. Moore*, 173 Ariz. 236, 238, 841 P.2d 231, 233 (App. 1992). Specifically, 18 U.S.C. § 1152 provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

¶6 Section 1152 also gives the federal courts "jurisdiction over non-Indians," like Fisher, "who commit crimes against Indians on Indian reservations." *Moore*, 173 Ariz. at 238, 841 P.2d at 233. But federal jurisdiction does not necessarily preempt contemporaneous state jurisdiction. *State v. Robles*, 183 Ariz. 170, 174, 901 P.2d 1200, 1204 (App. 1995). Federal jurisdiction under § 1152 is exclusive

"only when the crime occurs on a federal enclave and when no elements of the crime occur outside that enclave." *Robles*, 183 Ariz. at 170, 172, 174, 901 P.2d at 1200, 1202, 1204 (denying relief from conviction for conspiracy to commit murder because "[e]lements of the crime of conspiracy . . . were committed off the reservation," although actual murder occurred on reservation).

¶7 Applying that reasoning here, we turn to the elements of Fisher's offense. Section 13-2316(A), A.R.S., states in relevant part:

> A person who acts without authority or who exceeds authorization of use commits computer tampering by:
>
> . . . .
>
> 7. Knowingly obtaining any information that is required by law to be kept confidential or any records that are not public records by accessing any computer, computer system or network that is operated by . . . a health care provider as defined in [A.R.S.] § 12-2291 . . . .

See State v. Young, 223 Ariz. 447, ¶ 13, 224 P.3d 944, 947 (App. 2010). In this case, the trial court also instructed the jury on accomplice liability.

> "[A]ccomplice" means a person . . . who with the intent to promote or facilitate the commission of an offense:
>
> 1. Solicits or commands another person to commit the offense; or
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense[; or]

> 3. Provides means or opportunity to another person to commit the offense.

A.R.S. § 13-301. Because an accomplice "is considered as liable as if he had personally committed the offense," *State v. Rios*, 217 Ariz. 249, ¶ 10, 172 P.3d 844, 846 (App. 2007); *see* A.R.S. § 13-303(A)(3), the conduct described in § 13-301 is an "element" of the offense as well, *cf. State v. McNair*, 141 Ariz. 475, 480-81, 687 P.2d 1230, 1235-36 (1984) (discussing "intent" and "act" elements of accomplice liability).

¶8 The evidence established that Fisher had asked M.Z. to fax a patient's medical record to Fisher's home in Apache Junction. When he received that record, Fisher "[k]nowingly obtain[ed] . . . information that is required by law to be kept confidential or . . . records that are not public records." § 13-2316(A)(7). Moreover, by telling M.Z. to send him the medical record, and, by providing the details needed to locate the exact record he wanted, Fisher acted as an accomplice while outside of Indian country. *See* § 13-301. Accordingly, there is sufficient evidence to support the trial court's conclusion that elements of Fisher's offense occurred outside of Indian country. *See Robles*, 183 Ariz. at 172, 901 P.2d at 1202. The court therefore properly denied the motion to dismiss. *See Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d at 709; *Robles*, 183 Ariz. at 174, 901 P.2d at 1204.

Disposition

¶9 For the foregoing reasons, we affirm.