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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THE STATE OF ARIZONA, Appellee, v. EVA MARIE BACINSKI, Appellant.	2 CA-CR 2008-0147 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063193

Honorable Howard Hantman, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Eva Bacinski was convicted of one count of fraudulent scheme or artifice, one count of theft, and four counts of forgery. The trial court imposed enhanced, mitigated, concurrent prison terms, the longest of which was six years. On appeal, Bacinski argues that the trial court erred by precluding evidence of third-party culpability and that prosecutorial misconduct entitles her to a new trial. We agree the court erroneously precluded evidence by applying incorrect legal standards. For the reasons stated below, we therefore affirm the convictions and sentences in part; we reverse the convictions for theft and three counts of forgery, as charged in counts two, three, five, and six of the amended indictment, respectively; and we remand the case to the trial court for resentencing on count one, fraudulent scheme or artifice.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). Bacinski was the granddaughter of the victim, Gladys H. Bacinski and Gladys lived at the same address until June 2005, when Gladys moved to a nursing home.[1] Gladys had an individual checking account that only she was authorized to use. In December 2005, without Gladys's consent, someone placed an order over the internet for personal checks bearing both Gladys's and Bacinski's names to be sent to Gladys's former address, where Bacinski still resided. Police officers found some of these checks there, in Bacinski's bedroom, while executing a search

[1]At the former address, there were both a house and a trailer that shared one mailbox. Bacinski had lived in the trailer and later moved into the house.

warrant. Although Bacinski denied modifying, ordering, or using the checks, she later admitted to Gladys that she had "done wrong" and asked Gladys to "help her out of this scrape."

¶3 Four of the checks that had been ordered over the internet were written, signed, and cashed without Gladys's permission, and copies of these checks served as the basis for the separate forgery counts in the indictment. Three of the checks purportedly bear Bacinski's signature, and one bears Gladys's purported signature with the name misspelled. Bacinski's driver's license number is written on one of the checks with her signature; a different but similar number appears on another check with her signature; and the two other checks have no driver's license or identification numbers on them. In addition to these four checks, numerous other checks were admitted into evidence to show Bacinski had committed theft and to establish how much money she had taken from Gladys.

¶4 At trial, Bacinski maintained that another person had committed the offenses. Although the state's expert witness testified there were some "indicators" suggesting Bacinski could have written and signed various checks, he admitted that other checks could have been written by someone else. He testified further that some checks, such as the check that was the basis for one of the forgery charges, appeared to have been written by two different people. And, several other people lived or spent time in Bacinski's house at the time the various checks were cashed. One of those people was her brother, Stanley.

¶5 On the first day of trial, the state moved to preclude, *inter alia*, evidence that Stanley had previously forged a family member's checks. Bacinski opposed the motion,

arguing it was "a big part of our defense . . . [that] there were other people in that home. Stanley . . . in fact, has been charged and took a plea regarding identity theft, forgery, that type of stuff, and he was living in the home at the time." The court deferred ruling on the admissibility of any other-act evidence, noting, "This is a major evidentiary issue . . . that I'm hearing about with the jury outside for the first time. . . . [I]t has an impact."

¶6 The next day, Bacinski sought to elicit testimony from Sylvia, Stanley's former wife and a witness for the state, that Stanley had stolen checks from Sylvia and forged her name when they were separated. The state moved to preclude the evidence under Rule 404(b), Ariz. R. Crim. P., and Bacinski opposed the motion.

¶7 When the court asked Bacinski if Stanley had been charged with or convicted of the earlier forgeries, she stated she did not believe he had been. The court then precluded the evidence. Later that day, Bacinski made an offer of proof outside the presence of the jury, eliciting testimony from Sylvia that Stanley had "stolen [her] checks and [had] forg[ed her] signature." Sylvia also testified Stanley had pled guilty to stealing her checks and was convicted in 2002 or 2003 in "this court," presumably referring to the Pima County Superior Court. Bacinski provided no records of a felony conviction, however, and the trial court reaffirmed its order precluding the testimony on the grounds that it was "too speculative" and "collateral."

¶8 In the state's rebuttal closing argument, the prosecutor challenged Bacinski's third-party culpability defense with the following remarks: "You can eliminate Stanley. Stanley is a man. If a man is going to make forged checks and take them to Wal-mart, take

them to Fry's, he's not going to put a woman's name on it. He'll put a man's name on them . . . ." After the jury had begun deliberating, Bacinski objected to this argument on the ground that it was "prejudicial," particularly in light of the evidence that had been precluded. The trial court implicitly found the prosecutor's comment was "disingenuous" and, thus, improper but denied Bacinski's motion for a mistrial. The jury found Bacinski guilty of all the charges.

Preclusion of Evidence

¶9 Bacinski argues "[t]he trial court erred by improperly precluding evidence of third-party guilt." She contends the court applied an incorrect legal standard in ruling on the proffered evidence because the court "focused on whether Stanley had been convicted of a felony, even though a conviction is not required in order to admit this evidence." We review a trial court's exclusion of third-party culpability evidence for an abuse of discretion. *State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002). We conclude the trial court erred here for the reason asserted.

¶10 A defendant has a constitutional right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). A defendant may therefore present exculpatory evidence showing a third party committed the charged offense, subject to certain conditions. *See Prion*, 203 Ariz. 157, ¶¶ 21-22, 52 P.3d at 193; *State v. Gibson*, 202 Ariz. 321, ¶ 19, 44 P.3d 1001, 1004 (2002). First, the evidence must be relevant, meaning it must tend to create a reasonable doubt as to the defendant's guilt. *Gibson*, 202 Ariz. 321, ¶ 15, 44 P.3d at 1003. Second, in accordance

with Rule 403, Ariz. R. Evid., the probative value of the evidence must not be substantially outweighed by the risk that it will cause undue prejudice, confusion, or delay. *Gibson*, 202 Ariz. 321, ¶ 13, 44 P.3d at 1003. Finally, if a defendant offers "evidence of other crimes, wrongs, or acts" of the third party, such evidence must be admissible for a proper purpose under Rule 404(b), Ariz. R. Evid. *See State v. Tankersley*, 191 Ariz. 359, ¶ 39, 956 P.2d 486, 496 (1998) (observing Rule 404(b) "applies to other acts of third persons as well as to those of defendants").

¶11 Here, the trial court concluded that the evidence of Stanley's previous act of forgery was "too speculative" and it appeared to base that conclusion on the lack of documentary evidence that Stanley had been convicted of that offense. But, a criminal conviction is not required for evidence of a prior crime, wrong, or act to be admissible. *State v. Miller*, 129 Ariz. 465, 469, 632 P.2d 552, 556 (1981); *see also State v. Terrazas*, 189 Ariz. 580, 584 n.3, 944 P.2d 1194, 1198 n.3 (1997) (observing acquittal on criminal charge would not necessarily preclude evidence of prior act); *State v. Robinson*, 165 Ariz. 51, 56-57, 796 P.2d 853, 858-59 (1990) ("Prior bad act evidence need not necessarily constitute evidence of a particular crime."). Rather, a defendant need only establish, by clear and convincing evidence, that the other act was committed. *Terrazas*, 189 Ariz. at 582, 944 P.2d at 1196.[2]

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[2]Arizona courts have not expressly ruled on the issue of whether "'reverse 404(b)' evidence"—that is, evidence of other acts offered to exonerate a defendant—is subject to a lower standard of admissibility than evidence of other acts offered against a defendant. *United States v. Stevens*, 935 F.2d 1380, 1402 (3d Cir. 1991). Several other jurisdictions have so held. *See id.* at 1404-05; *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984); *State v. Garfole*, 388 A.2d 587, 591 (N.J. 1978). In *Terrazas*, our supreme court required other acts be proven by clear and convincing evidence primarily due to the risk

¶12 Moreover, in-court testimony of the victim of a prior act has been found sufficient to establish the act was committed for purposes of Rule 404(b). *See, e.g.*, *State v. Smyers*, 205 Ariz. 479, ¶ 8, 73 P.3d 610, 612 (App. 2003), *vacated in part on other grounds*, 207 Ariz. 314, 86 P.3d 370 (2004). And, our supreme court has instructed that, when determining the admissibility of third-party culpability evidence, questions concerning the reliability of the evidence and the credibility of witnesses are within the province of a jury, and judges should not "bootstrap [themselves] into the jury box via evidentiary rules." *State v. LaGrand*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987). Here, the trial court found Sylvia's testimony insufficient to establish Stanley had committed a prior act merely because Bacinksi could provide no documentary evidence that he had been convicted of that act. Consequently, the court applied an incorrect legal standard and erred when it precluded the evidence on that basis. *See State v. Robles*, 213 Ariz. 268, ¶ 4, 141 P.3d 748, 750 (App. 2006) (court abuses discretion by committing error of law).

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of unfair prejudice such evidence poses to a criminal defendant. 189 Ariz. at 584, 944 P.2d at 1198. This court has pointed out that this risk does not exist in a reverse Rule 404(b) situation. *See State v. Taylor*, 9 Ariz. App. 290, 293, 451 P.2d 648, 651 (1969). Moreover, our supreme court has emphasized that "[t]he proper standard regarding third party culpability evidence is found in Rules 401, 402, and 403, [Ariz. R. Evid.]" *Prion*, 203 Ariz. 157, ¶ 22, 52 P.3d at 193. And, other jurisdictions have found that Rules 401 and 403, Fed. R. Evid., obviate the need for additional admission requirements. *See, e.g.*, *Stevens*, 935 F.2d at 1404-05. Nevertheless, the cases Bacinski cites in arguing for a lower standard were decided before *Tankersley* and *Terrazas*. We will not exempt defendants from the normal requirements of Rule 404(b) absent explicit direction from our supreme court. *See State v. Bejarano*, 219 Ariz. 518, ¶ 6, 200 P.3d 1015, 1017 (App. 2008) (court of appeals "may not disregard or modify the law as articulated by the Arizona Supreme Court").

¶13 Nor can we affirm the trial court's preclusion of the evidence on the alternate ground that it was "collateral." Other act evidence, subject to the requirements of Rule 404(b), is always collateral because such evidence, by definition, involves acts other than those directly involved in the specific criminal charge in dispute. *See Terrazas*, 189 Ariz. at 584, 944 P.2d at 1198. Thus, the proper inquiry was not whether Stanley's prior act was collateral, but whether (1) the act was relevant for some purpose other than as evidence of Stanley's character; (2) the probative value of the evidence was substantially outweighed by the risk of undue prejudice or delay; and (3) the evidence of the act tended to create reasonable doubt as to Bacinski's guilt. *See* Ariz. R. Evid. 404(b); *Gibson*, 202 Ariz. 321, ¶¶ 16, 19, 44 P.3d at 1004. And if, by using the term collateral, the trial court intended to convey to the parties that the relevance of the evidence was too attenuated to be admissible, the record does not support that assessment.

¶14 Here, the very core of Bacinski's defense was that others with similar access to Gladys's checks committed the offenses for which she had been charged. Therefore evidence that her brother, who had lived at the residence, had the knowledge to forge and pass a woman's check was directly relevant to her defense that he had committed the offenses. In its closing argument, the state itself underscored the importance and relevance of the precluded testimony when it asserted that Stanley could not have committed the offenses because a man could not have forged and passed a check belonging to a woman. In the absence of Sylvia's testimony that Stanley had stolen her checks and forged her name, the jury likely drew the inference suggested by the prosecutor that Stanley did not commit

the forgeries in the present case because he would not present a forged check in a woman's name. Sylvia's testimony would have refuted that suggestion.

¶15 Because the precluded evidence tended to create a reasonable doubt as to Bacinski's guilt, it was relevant and admissible as third-party culpability evidence. Because it showed that the allegedly culpable third party had the knowledge and opportunity necessary to commit the charged offenses, it was offered for a proper purpose under Rule 404(b). Nor has the state articulated how admission of the evidence would have unfairly prejudiced it or caused any undue delay.[3] The trial court therefore erred in precluding it.

Harmless Error Analysis

¶16 An erroneous evidentiary ruling does not entitle a defendant to a new trial unless the error was "'sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed.'" *Prion*, 203 Ariz. 157, ¶ 27, 52 P.3d at 194, *quoting State v. Pandeli*, 200 Ariz. 365, ¶ 18, 26 P.3d 1136, 1143 (2001), *vacated on other grounds*, 536 U.S. 953 (2002). Here, we cannot conclude the jury would have reached the same verdicts on all the charges if the court had permitted Sylvia to testify that Stanley had stolen and forged checks in her name.

¶17 Although Gladys testified that Bacinski had vaguely admitted some wrongdoing, and although the state found a set of Gladys's checks with Bacinski's name on them in Bacinski's bedroom, these facts did not by themselves prove that Bacinski had

[3]Indeed, Bacinski's offer of proof consumed only two pages of transcript and the state made no argument that admission of Sylvia's testimony as to Stanley would have required that it call any additional witnesses.

committed all of the crimes with which she was charged. The state's own handwriting expert testified that different people may have written the various checks. Other testimony established that a variety of people could have had access to the checkbook in question. Moreover, the state was likely motivated to so specifically address Stanley's potential culpability in forging the checks because his potential culpability was a significant issue in the case. Under these circumstances, we cannot assume that the jury would have reached the same verdict as to all counts had it received concrete evidence showing that another person with the opportunity to commit some of the offenses also possessed the knowledge to do so.

¶18 We therefore must reverse Bacinski's convictions of forgery as charged in counts three, five, and six of the indictment amended for trial. We also reverse her conviction for theft as charged in count two of the amended indictment, because classification of this offense as a class three felony required the jury to find the total amount of money taken to be under $25,000 but at least $3,000, and we cannot conclude the jury would have found Bacinski responsible for this amount of theft if it had found that Bacinski had committed some, but not all, of the forgeries.[4]

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[4]Although the threshold amount for designating theft a class three felony was raised from $3,000 to $4,000 before Bacinski's trial, the law contained no retroactivity clause and took effect in September 2006. *See* 2006 Ariz. Sess. Laws, ch. 195, § 2. Hence, the version of A.R.S. § 13-1802 in effect when the crimes were committed applies to the case. *See* A.R.S. § 1-244 ("No statute is retroactive unless expressly declared therein."); A.R.S. § 1-246 (notwithstanding subsequent changes, "offender shall be punished under the law in force when the offense was committed"); *State v. Williams*, 125 Ariz. 438, 440, 610 P.2d 72, 74 (App. 1980) (defendant not entitled to benefit from subsequent statutory changes absent express retroactive provision).

¶19 However, we affirm Bacinski's convictions for fraudulent scheme or artifice and one count of forgery, as listed in counts one and four, respectively, of the amended indictment. For several reasons, we conclude the evidence of Stanley's potential culpability would have had no effect on these two counts. *See State v. Hummert*, 188 Ariz. 119, 126, 933 P.2d 1187, 1194 (1997) (preclusion of third-party evidence harmless error when admissible evidence overwhelmingly establishes defendant's guilt). First, the forged check underlying count four had Bacinski's driver's license number on it, unlike the other checks underlying the forgery counts, and it was signed in her own name. Presumably, then, the person forging the check provided a woman's driver's license—an unlikely modus operandi for a male perpetrator. Moreover, the gravamen of the fraudulent scheme or artifice count was the planning involved in modifying Gladys's checks to suggest that Bacinski was a joint account holder. We find it unlikely any person other than Bacinski would have been motivated to place her name on the checks, and officers found a book of checks so modified in Bacinski's bedroom. Finally, the check indicating that it had been cashed with reference to Bacinski's photographic identification was one of the modified checks. Accordingly, we conclude beyond a reasonable doubt that the precluded testimony did not influence the jury's verdicts on those two counts. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) ("Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.").

Prosecutorial Misconduct

¶20 Bacinski also argues she was entitled to a new trial on all counts because the prosecutor committed misconduct during closing argument. Specifically, she contends the prosecutor engaged in misconduct when, after successfully moving to preclude evidence that Stanley had forged his wife's checks, the prosecutor argued that Stanley could not have committed any of the forgeries on a woman's account because he was a man. Although we agree with the trial court that such argument was improper under those circumstances, any prejudice arising from those remarks was limited to convictions on counts we now reverse. For the reasons discussed above, we conclude the comments did not affect the jury's verdicts on counts one and four, for fraudulent scheme or artifice and forgery, given the other overwhelming evidence of Bacinski's guilt as to these counts and the comparative lack of relevance of Stanley's potential culpability to them. *See State v. Bocharski*, 218 Ariz. 476, ¶ 74, 189 P.3d 403, 418 (2008) ("We will reverse a conviction because of prosecutorial misconduct if misconduct is present and 'a reasonable likelihood exists that [it] could have affected the jury's verdict, thereby denying defendant a fair trial.'"), *quoting State v. Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382 (2005) (alteration in *Bocharski*).

Sentencing

¶21 As a final matter, although we affirm Bacinski's conviction for fraudulent scheme or artifice, our disposition will require the trial court to resentence her on that count. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005) (error not harmless if it affects sentence). Section 13-2310(D) requires the trial court to consider the aggregate

value of the amounts stolen by means of the fraudulent scheme or artifice when determining the appropriate sentence.[5] Insofar as the convictions we have reversed as to counts two, three, five, and six—counts involving numerous checks—may have affected the trial court's determination of the aggregate amount of theft arising from the fraudulent scheme or artifice, we cannot be confident the trial court would have imposed the same sentence in the absence of convictions on these counts.[6]

Disposition

¶22 Due to the court's error in precluding exculpatory other-act evidence, we reverse Bacinski's convictions and sentences for theft and forgery, as charged, respectively,

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[5]Section 13-2310(A), A.R.S., designates fraudulent scheme or artifice a class two felony, whereas § 13-2310(D) provides that "[t]he state shall apply the aggregation prescribed by [A.R.S.] § 13-1801[(B)], to violations of this section in determining the applicable punishment." Section 13-1801(B), which is the definitions section for the chapter of the criminal code relating to theft, states: "In determining the classification of the offense, the state may aggregate in the indictment or information amounts taken in thefts committed pursuant to one scheme or course of conduct, whether the amounts were taken from one or several persons." Although § 13-1801(B) literally concerns *classification* of an offense and § 13-2310(A) designates all fraudulent scheme or artifice convictions class two felonies, we do not interpret provisions of our criminal code to be meaningless. *See Mejak v. Granville*, 212 Ariz. 555, ¶ 9, 136 P.3d 874, 876 (2006). Accordingly, we interpret § 13-2310(D) as directing courts to consider the aggregate value of items taken pursuant to a fraudulent scheme or artifice when determining an appropriate punishment within the prescribed range of sentence for a class two felony.

[6]Because the trial court did not impose an aggravated term, it was entitled to consider any information, including information about forged checks for which Bacinski had not been convicted, in determining an appropriate sentence. *See State v. Johnson*, 210 Ariz. 438, ¶¶ 12-13, 111 P.3d 1038, 1041-42 (App. 2005) (jury findings only required for sentence greater than presumptive to be imposed). We merely conclude here that convictions on the counts we have reversed may have caused the trial court to feel compelled to aggregate the amounts involved in those counts, when it might not have done so otherwise.

in counts two, three, five, and six of the indictment amended for trial and remand for any further appropriate proceedings. We affirm Bacinksi's convictions for fraudulent scheme or artifice and forgery, as charged in counts one and four of the amended indictment, because these convictions were supported by overwhelming evidence and were not affected by the error.

¶23 We affirm Bacinski's three-year sentence on count four for forgery. However, we instruct the court to conduct a resentencing on the fraudulent scheme or artifice conviction set forth in count one of the indictment. *See* § 13-2310(D).

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge