FILED BY CLERK
SEP 22 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARIA JESUS AMAVIZCA, Appellant.	2 CA-CR 2009-0371 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080372

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Maria Amavizca was convicted of two counts of taking the identity of another. The trial court suspended the imposition of sentence and placed

her on probation for one year. On appeal, Amavizca contends there was insufficient evidence to establish that she had: (1) used the personal identifying information of another person on the date alleged in count two, (2) acted with an unlawful purpose, and (3) acted with knowledge that the victim was a real or fictitious person. She also argues the state failed to provide sufficient notice of its intent to introduce evidence at trial of her immigration status and of similar conduct that occurred outside the dates alleged in the indictment. For the reasons stated below, we affirm her conviction as to count one and vacate her conviction as to count two.

Factual and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In the fall of 2007 and again in January 2008, Andrea Wilson applied for a job at a retail store in Anderson, Indiana, where she resided. Both times she was informed that she already worked for the company, and the second time she was told that the store was located in Tucson, Arizona. She apparently contacted authorities, and, on January 15, 2008, Pima County Sheriff's Detective Moreno went to the store, located on Cardinal and Valencia in Tucson and asked to speak with Andrea Wilson. The store manager returned with Amavizca, and, when Moreno asked her if she was Andrea Wilson, she nodded yes. He then placed her under arrest, and while conducting a search incident to that arrest, he found a debit card in her possession bearing the name Maria Amavizca.

¶3 Amavizca was indicted on two counts of taking the identity of another and one count of fraudulent scheme or practice. On the first day of trial, the court dismissed the fraudulent scheme or practice charge. The jury found Amavizca guilty of both counts of taking the identity of another. The trial court denied Amavizca's motion for a new trial. It then suspended the imposition of sentence and placed her on probation as noted above. This timely appeal followed.

Discussion

I. Sufficiency of Evidence

¶4 Amavizca contends the trial court erred in denying her motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. She argues there was insufficient evidence that she had used the victim's personal identifying information on January 15, 2008, as alleged in count two of the indictment; acted with an unlawful purpose; or acted with knowledge that Andrea Wilson was a real or fictitious person. "[W]e review the sufficiency of evidence presented at trial only to determine whether substantial evidence supports the jury's verdict, 'viewing the facts in the light most favorable to sustaining the jury verdict.'" *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007), *quoting State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). "Substantial evidence is evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *Id.*, *quoting State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914-15 (2005). "'We review the denial of a motion for a judgment of acquittal for an abuse of discretion' and will reverse only if there is 'a

complete absence of probative facts to support a conviction.'" *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007), *quoting State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006).

A. Use of personal identifying information

¶5 Amavizca first contends the state did not present sufficient evidence that she had used the personal identifying information of another on January 15, 2008, to support her conviction for count two of the indictment. The term "personal identifying information" is defined in the statute as "any written document or electronic data that does or purports to provide information concerning a name, signature, electronic identifier . . . ." A.R.S. §§ 13-2001(10); 13-2008.[1] Amavizca asserts the state established only that she had nodded her head in response to Detective Moreno's question, "Are you Andrea Wilson?" She argues the state therefore failed to present evidence that she had used any written document or electronic data on the date of the offense alleged in count two of the indictment. In its answering brief, the state concedes error, and we agree.

¶6 "If [a] statute is clear and unambiguous, we apply the plain meaning of the statute." *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 7, 122 P.3d 6, 10 (App. 2005). Read together, §§ 13-2001(10) and 13-2008 explicitly state that the personal identifying

[1]As we discuss in more detail below, this statute was amended in May 2008. *See* 2008 Ariz. Sess. Laws, ch. 152, § 1. Because Amavizca committed these crimes before May 2008, we apply the statute as it existed at the time of her offenses, *State v. Coconino County*, 139 Ariz. 422, 427, 678 P.2d 1386, 1391 (1984) (unless expressly made retroactive, statute in effect when defendant committed crime applies), and refer to that version of the statute unless otherwise noted.

information must be a written document or electronic data. Amavizca's nodding her head acknowledging that she was Andrea Wilson clearly was insufficient under the statutes. Therefore, because the state did not present substantial evidence that on January 15, 2008, Amavizca had used personal identifying information as defined in § 13-2001(10), the trial court erred in denying her motion for a judgment of acquittal as to count two. We therefore must vacate this conviction.

B. Unlawful purpose

¶7 Amavizca next argues the state failed to present sufficient evidence that she had used personal identifying information of Andrea Wilson for "any unlawful purpose."[2] *See* § 13-2008. At the time of the events in this case, § 13-2008 provided as follows:

> A person commits taking the identity of another person or entity if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information or entity identifying information of another person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity whether or not the person or entity actually suffers any economic loss as a result of the offense.

2008 Ariz. Sess. Laws, ch. 152, § 1. The statute has since been amended, however, and the words "or with the intent to obtain or continue employment" have been added to the end of the paragraph. *Id.*; § 13-2008. Relying on the new language and the statute's legislative history, Amavizca argues that prior to its amendment, using the personal

[2]Because we have vacated Amavizca's conviction on count two, the following discussion relates only to count one.

identifying information of another to obtain employment did not constitute an unlawful purpose under the statute. She bases this argument, in part, upon a contention that generally it is not unlawful for an undocumented immigrant to be employed in the United States.

¶8 However, we need not determine whether, before it amended the statute, the legislature intended "any unlawful purpose" generally to include undocumented immigrants obtaining employment, because the state presented substantial evidence that Amavizca was prohibited from obtaining employment in the United States. Her entry visa specifically prohibited her from obtaining employment, and doing so clearly was unlawful; thus, the statute's original unlawful purpose language encompassed her actions.

¶9 Officer Shanley of the Department of Homeland Security, Immigration and Customs Enforcement, Office of Investigation (ICE), testified that Amavizca had been issued a border crossing card, also known as a BCC or B1/B2 visa. He testified that a BCC allows the holder to enter the United States for certain periods ranging from three days to six months, depending on the particular visa. He also testified that it is unlawful for a holder of this type of visa to work in the United States. This testimony thus constituted "substantial evidence" from which reasonable jurors could conclude Amavizca had used the victim's personal information for the unlawful purpose of obtaining employment in violation of her visa.

¶10 Amavizca also argues there was insufficient evidence that she had acted with the intent to cause harm or loss to the victim. Relying on *State v. Sharma*, 216 Ariz.

292, ¶ 19, 165 P.3d 693, 697-98 (App. 2007), she contends intent to cause harm or loss is an essential element of taking the identity of another. In *Sharma*, the court stated that a "fair interpretation of the legislature's purpose [in enacting § 13-2008] is that it intended to punish those who use *another person's* access device or personal information for an unlawful purpose (i.e., to cause harm or loss to the person to whom the access device has been issued or provided)." 216 Ariz. 292, ¶ 19, 165 P.3d at 697-98. Amavizca's reliance on *Sharma* is unavailing.

¶11 In *Sharma*, the defendant used an alias to open bank and other accounts. *Id*. ¶ 3. He then presented checks and bank cards issued to him under the alias to access his own money in the bank accounts and to obtain services for which he had paid. *Id.* ¶ 20. "[N]o evidence showed that [Sharma] ever used the bank cards or checks in his possession to obtain property or services without paying for such property or services or to access accounts belonging to anyone but himself." *Id.* ¶ 21. The court thus concluded that the statute did not apply to his use of a fictitious name to gain access to his own accounts, but rather was intended to cover those situations in which a defendant used another person's access device and caused harm or loss to that other person. *Id.* ¶ 23. Thus, contrary to Amavizca's argument, the court's decision in *Sharma* turned on the fact that the defendant's conduct did not involve another person; the case does not stand for the proposition that proof of intent to cause loss or harm is required in all cases.

¶12 In any event, the language of the statute is clear. Section 13-2008 requires proof of "intent to obtain or use the other person's or entity's identity for any unlawful

purpose *or* to cause loss to a person or entity." (Emphasis added.) Because the statute is written in the disjunctive, the trial court did not err in so interpreting it. *Hourani*, 211 Ariz. 427, ¶ 7, 122 P.3d at 10 ("If the statute is clear and unambiguous, we apply the plain meaning of the statute.").

C. Knowledge that victim was a real or fictitious person

¶13 Amavizca also contends the state failed to present sufficient evidence that she knew the victim was either a real or a fictitious person, which, according to Amavizca's interpretation of the phrase, means a real person or a stage or pen name used by a real person. First, she cites *Flores-Figueroa v. United States*, ___ U.S. ___, 129 S. Ct. 1886 (2009), for the proposition that the state had to prove she knew the victim was another person as opposed to an entirely fictitious person. In *Flores-Figueroa*, the Supreme Court concluded that, based on the statute at issue in that case, the government was required to prove the defendant had used the identity of an actual person without lawful authority. *Flores-Figueroa*, ___ U.S. at ___, 129 S. Ct. at 1893. The statute made it unlawful for a person to '"*knowingly* transfer[], possess[], or use[], without lawful authority, *a means of identification of another person*."' *Id*. at __, 129 S. Ct. at 1888, *quoting* 18 U.S.C. § 1028A(a)(1). The statute contained no additional qualifying language. 18 U.S.C. § 1028A(a)(1). In contrast, § 13-2008 makes it unlawful to use the identity of "another person or entity, *including a real or fictitious person or entity*," which explicitly broadens the definition of "another person" beyond the statutory

language at issue in *Flores-Figueroa*. The analysis in *Flores-Figueroa* therefore is inapposite.

¶14 Second, Amavizca points to an exchange noted in the statute's legislative history between Chairman Tully and Wendy Briggs, a representative of the Arizona Bankers' Association, who spoke in support of the house bill that eventually amended § 13-2008 in May 2008. The report of the exchange states that "Chairman Tully asked for clarification of language relating to *real or fictitious person or entity*. Ms. Briggs explained that [the language] refer[red] to a pen name or stage name; not a birth name but a name a person is commonly known as." Amavizca maintains this exchange supports her interpretation that "fictitious person" refers only to fictitious names of real persons, not fictitious persons.

¶15 However, we do not consider legislative history in the absence of ambiguity in the statutory language, and to interpret "fictitious person" to mean only a fictitious name would be to ignore the plain language. "[T]he 'best and most reliable index of a statute's meaning is its language,' and where the language is plain and unambiguous, courts generally must follow the text as written." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., Inc.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994), *quoting Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). Here, the statutory language explicitly refers to a fictitious person, not merely a fictitious name. Had the legislature intended the meaning Amavizca attributes to the phrase, it would have said so.

See State v. Mahaney, 193 Ariz. 566, ¶ 15, 975 P.2d 156, 158 (App. 1999) (if legislature intended particular interpretation of statute, it would have clearly said so).[3]

¶16 Because the statute refers to both real and fictitious persons, we agree with the state that "[t]he two options encompass all the possibilities concerning [the victim's] existence." The state therefore was only required to prove that Amavizca had known the victim was either a real person or a fictitious person. Because substantial evidence supported all elements of Amavizca's conviction for taking the identity of another, we conclude the trial court did not abuse its discretion in denying her Rule 20 motion for judgment of acquittal. *Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d at 1056.

II. Notice

A. Immigration status

¶17 Amavizca argues the state failed to provide her with sufficient notice that her immigration status would be used as the basis for the charges against her and she therefore did not have time to prepare an adequate defense.[4] She cites to both the United

[3]Even if we were to consider the legislative history, despite the unambiguous language of the statute, it does not support Amavizca's interpretation. First, there is nothing in the report establishing Ms. Briggs's relationship to the bill other than that she was an advocate for it. And, even if she had drafted the bill, "[w]hen seeking to ascertain the intent of legislators, courts normally give little or no weight to comments made at committee hearings by nonlegislators." *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 269, 872 P.2d 668, 673 (1994).

[4]In its answering brief, the state argues Amavizca did not raise this issue below and that our review is therefore limited to one for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). However, Amavizca sufficiently raised the issue in a motion in limine and again during trial. Therefore, we review for harmless error.

States and Arizona Constitutions and to Arizona case law for the proposition that the accused has the right to know the nature and cause of the accusations against her. *See* U.S. Const. amend. VI; Ariz. Const. art. 2, § 24; *State v. Rivera*, 207 Ariz. 69, ¶ 12, 83 P.3d 69, 73 (App. 2004). However, "Arizona law only requires that the indictment be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged." *State v. Arnett*, 158 Ariz. 15, 18, 760 P.2d 1064, 1067 (1988). Thus,"[t]he indictment itself need not inform the defendant of the theory by which the state intends to prove [a] charge so long as the defendant receives sufficient notice to reasonably rebut the allegation." *Rivera*, 207 Ariz. 69, ¶ 12, 83 P.3d at 73.

¶18 The indictment here charged Amavizca with knowingly using the victim's personal identifying information for an unlawful purpose. And as the state points out, based on the grand jury proceedings, Amavizca "knew at all times that the 'unlawful purpose' the state would rely on . . . was her employment at [the retail store]." Because her entry visa explicitly prohibited her from obtaining employment, Amavizca reasonably should have known that her immigration status would be used to establish the unlawful purpose element of the offense. This is all that is constitutionally required; the state was not required to provide Amavizca with additional notice that it intended to introduce evidence of her immigration status at trial.[5]

[5]Amavizca has not argued that the state violated its pretrial duty to disclose the information. *See* Ariz. R. Crim. P. 15.1(b)(1) (requiring, *inter alia*, that the state "make available to the defendant . . . [t]he names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with their relevant written or recorded statements").

B. Evidence concerning dates outside the indictment period

¶19 Amavizca also contends the trial court abused its discretion by allowing her supervisor, Guadalupe R., to testify that she had seen Amavizca sign performance reviews using the victim's name on dates outside those alleged in the indictment. Amavizca argues the testimony created "a substantial risk that the jury would conclude that [she] was guilty of the offense based on th[o]se documents."[6] In the proceedings below, the state sought to have Guadalupe testify that she witnessed Amavizca sign performance evaluations with the victim's name during the time of her employment, but outside of the dates in the indictment. Amavizca objected on the basis that this would "expand[] the whole breadth of the indictment." The court overruled the objection and admitted the evidence for the limited purpose of establishing identity. It noted that its ruling was based, in part, on the jury having already heard testimony that Amavizca worked for the retail store on those dates so the testimony would not be prejudicial to her. We review the court's admission of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶20 On appeal, Amavizca contends Guadalupe's testimony was the only evidence presented that linked her to the signatures on the application paperwork, and, relying on *State v. Mikels*, 119 Ariz. 561, 582 P.2d 651 (App. 1978), she contends this constituted reversible error because it impermissibly "broadened the indictment." That

[6]Amavizca includes this argument in the notice category of her brief, but because her argument is really about the propriety of the court's admission of the evidence, that is the argument we address; Amavizca has not made a separate notice argument on this issue.

case is factually distinguishable. In *Mikels*, the defendant was indicted on several counts of sodomy committed against a fellow inmate in the jail showers. 119 Ariz. at 562, 582 P.2d at 652. During trial, the victim and a co-defendant were permitted to testify about a later act of sodomy upon the same victim that had occurred in a prison cell bunk. *Id.* During closing argument, the prosecutor asked the jury to find the defendant guilty of the sodomy that had occurred in the bunk; defense counsel based his final argument on that same incident. *Id*. The jury's guilty verdict also related to that act, not the one that had been committed in the shower. *Id.* On appeal, this court concluded that "the trial court had [lacked] jurisdiction to try [the defendant] for the sodomy in the bunk when the grand jury indicted [him] for a separate and different act of sodomy which occurred in the shower stall." *Id.* We thus vacated the conviction. *Id*. at 563, 582 P.2d at 653.

¶21 In contrast, here, the testimony was offered for the limited purpose of signature comparison, to prove Amavizca's identity as the person who signed the victim's name on the application paperwork on the dates alleged in the indictment. Amavizca did not request a limiting instruction, nor did the trial court give one sua sponte. However, the prosecutor's closing argument conformed to the limited purpose for which the testimony was admitted in arguing the signed performance reviews allowed the jurors to compare the signatures for themselves to determine whether Amavizca had signed the documents at issue on the dates alleged in the indictment. *See State v. Milke*, 177 Ariz. 118, 123, 865 P.2d 779, 784 (1993) (courts look to totality of circumstances, including closing arguments, to determine whether jury misled). And nothing in the

record suggests the jury found her guilty based on her uncharged conduct in signing the performance reviews. Amavizca therefore has not established that this evidence would have led the jury to convict her on an improper basis, and we cannot say the court abused its discretion in admitting this testimony. *See Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d at 874.

¶22 Because Amavizca had adequate notice of the charges against her and was not prejudiced by the introduction of testimony regarding her immigration status or her performance reviews, we affirm the trial court's ruling on this issue.

Disposition

¶23 For the reasons stated above, we affirm Amavizca's conviction and sentence as to count one but vacate her conviction and sentence as to count two.

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

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

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