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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STATE OF ARIZONA, Appellee, v. MARIA DE LOS ANGELES LEON, Appellant.	2 CA-CR 2009-0235 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084182

Honorable Clark W. Munger, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
Attorneys for Appellee

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E S P I N O S A, Judge.

¶1 After a jury trial, Maria Leon was convicted of five counts of fraudulent scheme or practice. The trial court sentenced her to a total of three years' probation and

ordered her to pay restitution and certain fees. On appeal, she challenges the propriety of a jury instruction given by the court. We affirm.

Factual and Procedural History

¶2 We review the facts and any reasonable inferences therefrom in the light most favorable to sustaining the convictions. *State v. Henry*, 205 Ariz. 229, ¶ 2, 68 P.3d 455, 457 (App. 2003). In October 2008, Leon was indicted on six counts of fraudulent scheme or practice pursuant to A.R.S. § 13-2311 after the City of Tucson Community Services Division determined she had failed to disclose in her initial and renewal applications for subsidized housing that she owned a home. At trial, the court gave a preliminary jury instruction requiring the state to prove Leon acted with "specific intent to defraud or deceive." At the close of evidence, during preparation of the final jury instructions, the state objected to the inclusion of the words "specific intent," arguing the term was "confusing" and "[did not] really have anything to do with [the] case." After discussion with counsel, the court removed the term "specific intent," replacing it with language defining "scheme or artifice to defraud or deceive" as a "plan to mislead." Although Leon initially agreed to this instruction, she later objected, asserting the specific intent instruction the court had given during preliminary instructions was correct and "the one that should be given." The court nevertheless gave the "plan to mislead" instruction and Leon was convicted and sentenced as outlined above.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

[1]The trial court did not explicitly rule on Leon's objection, but implicitly overruled it by issuing the instruction to which Leon had objected.

Discussion

¶3 On appeal, Leon argues the preliminary instruction had been correct and the trial court erred in using the alternative instruction instead because it removed the state's burden of proving she had formed the plan. Although we review for an abuse of discretion whether the trial court erred in giving or refusing to give requested jury instructions, *see State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005), we review de novo whether the instruction it gave correctly states the law, *see State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997).

¶4 Initially, we reject Leon's suggestion that the trial court somehow erred simply by modifying the preliminary jury instruction. She maintains that because there was "no valid reason . . . to change" it, the court abused its discretion in doing so. But a court has discretion to refuse to issue an instruction that is potentially misleading or confusing, *see State v. Rivera*, 152 Ariz. 507, 517, 733 P.2d 1090, 1100 (1987), as the state had argued in its objection to the preliminary instruction. Although Leon now claims the state's confusion argument was predicated on an erroneous reading of case law on specific intent, the state's understanding of the law is irrelevant. The court did not necessarily endorse the state's argument. Rather, it excised the term "specific intent" after a lengthy discussion with both the prosecutor and Leon's counsel, during which it concluded that the "hang-up . . . [wa]s the term 'specific intent.'" In this context, we infer the court removed the language as potentially confusing, which was within its purview to do. *See id.*

¶5 Leon is correct, however, that a trial court has no discretion to change a correct jury instruction to one that is legally incorrect, as she contends the court did here. Section 13-2311(A) states:

> [A]ny person who, pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry is guilty of a class 5 felony.

Although the term "specific intent" to defraud is not found in the statute, this court has held that such proof is required. *State v. Jones*, 222 Ariz. 555, ¶ 2, 218 P.3d 1012, 1014 (App. 2009). Our opinion in *Jones*, however, did not suggest that the words "specific intent" are necessarily indispensable when instructing a jury on elements of the offense. In *State v. Haas*, 138 Ariz. 413, 418, 675 P.2d 673, 678 (1983), on which we relied in *Jones*, our supreme court explained that specific intent to defraud can be established by proof that a "defendant devised the fraudulent scheme or wil[l]fully participated in it with knowledge of its fraudulent nature." Here, the trial court replaced the term "specific intent" with an instruction requiring the jury to find that Leon acted pursuant to a "plan to mislead." We conclude the court's instruction adequately conveyed the definition of specific intent to defraud for purposes of § 13-2311 and *Jones*. *See State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d 662, 665 (2005) (instructions must convey adequate information to allow jury to reach legally correct conclusion).

¶6 Leon also claims this instruction was inadequate because the jury was not required to find she had formed the plan. Relying on *State v. Bridgeforth*, 156 Ariz. 60,

63-64, 750 P.2d 3, 6-7 (1988), Leon argues the trial court was required to instruct the jury that the state had to prove she "*formed*, and acted pursuant to, a plan whose object was to perpetrate a fraud upon another person," because she was the only person charged. *Id*. at 65 (emphasis added). But her argument appears to misconstrue *Bridgeforth*. The contested issue there was whether the defendant had the intent to defraud, not whether the defendant was the one who formulated the plan. *See id.* An instruction requiring the jury to specifically find that Leon, and not anyone else, formulated the plan would be not only confusing, but also a misstatement of the law.

¶7 Leon was the sole defendant and no evidence was presented that any other party was involved in formulating a plot to defraud.[2] The jury instruction required proof of her acting pursuant to a plan. However, contrary to her assertion, the state was not required to prove Leon formulated the plan so long as it established she "wil[l]fully participated in it with knowledge of its fraudulent nature." *Haas*, 138 Ariz. at 418, 675 P.2d at 678. The instructions given required the state to prove Leon had "knowingly" falsified information pursuant to a plan to mislead. To find her guilty, the jury had to find she knowingly lied in order to deceive the City of Tucson Community Services Division. The jury did so, specifically finding she committed the crimes as charged "for the receipt or in the expectation of the receipt of pecuniary gain."

[2]Although Leon testified that a city employee had advised her to indicate that she did not own a house, the city employee in question testified she had no recollection of Leon or the event in question, and after reviewing Leon's application materials, would have had no reason to believe she owned a home.

¶8 Even had the jury accepted Leon's claims at trial that a city employee had advised her to represent that she owned no real property, the court's instructions would not have permitted a guilty verdict unless the jury found Leon agreed, knowing the information she supplied was false, and did so with intent to mislead. Accordingly, contrary to her assertions, Leon could not have been found guilty based on innocent compliance with the suggestion of a city employee. *See State v. Morris*, 215 Ariz. 324, ¶ 55, 160 P.3d 203, 216 (2007) (juries presumed to follow the instructions they are given).

Disposition

¶9 Leon's convictions and sentences are affirmed.

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

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge