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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/18/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0549
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
ANTHONY MERRICK,) Arizona Supreme Court)
)
Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005367-001

The Honorable Janet E. Barton, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General Phoenix
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P O R T L E Y, Judge

¶1 Anthony Merrick appeals his convictions on fraudulent schemes and artifices, a class 2 felony (Count 1); theft, a class 3 felony (Count 2); and nine counts of theft of a credit

card or obtaining a credit card by fraudulent means, class 5 felonies (Counts 6, 8-11, 14-15, 23-24). He argues that his convictions for theft of a credit card should be vacated because the charges are multiplicitous. He also contends that the indictment was defective because several victims were listed for each count, which created the likelihood of non-unanimous verdicts, and requires that his convictions be vacated. For reasons set forth below, we affirm all of his convictions except four counts of theft of a credit card (Counts 9, 10, 11, and 15), which we vacate.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Merrick's roommate and co-owner of their tattoo parlor, Dominick Hurley, was also the sales manager/fleet manager at Henry Brown Buick Pontiac GMC. Hurley used the dealership's computer to fraudulently claim that he sold cars to businesses, and had General Motors, as part of a promotion, send gift cards from Lowe's and Best Buy to him, as well as family and friends, including Merrick. Merrick used most of the cards he received to buy supplies and/or furnishings for their tattoo business.

¹ We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶13 After the dealership discovered Hurley's defalcation, the police were called, and their investigation led them to Merrick. The police ultimately determined that Merrick had received 29 gift cards totaling \$14,500; either in his name, a variant thereof,² or a business or post office box traceable to him. Merrick was subsequently charged for his role in the fraudulent scheme.

¶14 Hurley entered into a plea agreement with the State, and testified at Merrick's trial. Merrick was found guilty as charged, and the jury also found two aggravating factors beyond a reasonable doubt – the offenses involved an accomplice, and the offenses were committed for pecuniary gain. Subsequently, after Merrick admitted that he had four prior felony convictions and was on federal release at the time he committed the offenses, he was sentenced to super-aggravated terms of imprisonment of 35 years for fraudulent schemes and artifices (Count 1), 25 years for theft (Count 2), and 7.5 years on each of the theft of a credit card counts (Counts 6, 8, 9, 10, 11, 14, 15, 23, 24). All of the sentences were to be served concurrently. We have jurisdiction over Merrick's appeal pursuant to the Arizona Constitution, Article 6, Section 9, and

² Defendant, who was born "Paul Dominick Lucketta," legally changed his name in 1994.

Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033 (West 2012).

DISCUSSION

Multiplicitous Charges

¶15 Merrick argues that the nine convictions for theft of a credit card are "multiplicitous" and, therefore, violate the double jeopardy clauses of the federal and state constitutions. Merrick did not raise the issue to the trial court, and has waived appellate relief unless he can show that fundamental error occurred and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "A double jeopardy violation constitutes fundamental, prejudicial error." *State v. Ortega*, 220 Ariz. 320, 323, ¶ 7, 206 P.3d 769, 772 (App. 2008). The State, however, concedes that fundamental error occurred where the use of the same gift card formed the basis for multiple convictions for theft of the same credit card. We agree.

¶16 "The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *Id.* at 323, ¶ 9, 206 P.3d at 772. "Multiplicity occurs when an indictment charges a single offense in multiple counts . . . [and] raises the potential for multiple punishments" for the same offense, thereby "implicating double jeopardy." *State v. Brown*, 217

Ariz. 617, 620, ¶ 7, 177 P.3d 878, 881 (App. 2008) (citations omitted). "Multiplicitous charges alone do not violate double jeopardy; only [the] resulting multiple convictions or punishments are prohibited." *Ortega*, 220 Ariz. at 323, ¶ 9, 206 P.3d at 772 (citation omitted).

¶7 The State charged Merrick with nine counts of "theft of a credit card" pursuant to A.R.S. § 13-2102, which provides in relevant part that a person commits "theft of a credit card or obtaining a credit card by fraudulent means" if the person "controls a credit card without the cardholder's or issuer's consent . . . sells, transfers or conveys a credit card with the intent to defraud . . . or, with the intent to defraud, obtains possession, care, custody or control over a credit card as security for debt." Counts 6, 9, and 10³ charged the use of Best Buy card number 1798 on three separate dates; Counts 8 and 11 charged the use of Best Buy card number 1814 on two separate dates; and Counts 14 and 15 charged the use of Best Buy card number 6274 for two separate purchases on the same date. Count 23 charged the use of five Lowe's gift cards: numbers 6612, 6604, 7711, 1514, and 6596, used on July 9, 2008; and Count 24 charged the use of Lowe's gift card number 6596 in a separate transaction on July 25, 2008.

³ Count 10 actually involved the use of two credit cards: Best Buy card numbers 1798 and 1814.

¶18 To prove "theft of a credit card" under the statute, the State was not required to prove that Merrick actually used the fraudulent gift card to purchase items. The State only needed to prove that Merrick "was in possession" of the fraudulent gift card "to the exclusion of the true owner, so that it was capable of use by [him]." *State v. Jernigan*, 221 Ariz. 17, 19, ¶ 11, 209 P.3d 153, 155 (App. 2009). Although the State could have chosen to charge him with "fraudulent use" of a credit card pursuant to A.R.S. § 13-2105, it did not.⁴ Thus, the fact that Merrick possessed the fraudulent gift cards is the only basis for his convictions under A.R.S. § 13-2102, and any convictions based on his "use" of the same gift cards on separate occasions or in separate transactions renders the additional convictions a violation of double jeopardy. *Ortega*, 220 Ariz. at 323, ¶ 9, 206 P.3d at 772.

¶19 We agree that the appropriate remedy is to simply vacate the multiplicitous convictions. A.R.S. §§ 13-4036, -4037. Accordingly, we: (1) affirm Merrick's conviction on Count 6, but vacate his convictions and sentences on Counts 9

⁴ "A person commits fraudulent use of a credit card if the person: (1) With the intent to defraud, uses, for purposes of obtaining or attempting to obtain money, goods, services or any other thing of value, a credit card or credit card number . . . which the person knows is forged, expired, cancelled or revoked or (2) Obtains or attempts to obtain money, goods, services or any other thing of value by representing, without the consent of the cardholder, that the person is the holder to a specified [credit] card. . . ." A.R.S. § 13-2105(A)(1)-(2) (West 2012).

and 10 based on the same Best Buy gift card number 1792; (2) affirm Merrick's conviction on Count 8, but vacate his conviction and sentence on Count 11 based on the same Best Buy gift card number 1814; and (3) affirm Merrick's conviction on Count 14, but vacate his conviction and sentence on Count 15 based on the same Best Buy gift card number 6274.

¶10 We also affirm Merrick's convictions and sentences on Counts 23 and 24. Count 23 is based on Merrick's possession of five Lowe's gift cards: numbers 6612, 6604, 7711, 1514, and 6596, only one of which, card number 6596, forms the basis for his conviction in Count 24. Merrick's possession of four separate and distinct fraudulent gift cards supports his conviction on Count 23. We see no reason to vacate the conviction in Count 24, since Merrick fails to argue that the jury's determination that he also possessed Lowe's gift card number 6569 was an error, let alone fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

Amendment of Indictment

¶11 Merrick next contends that the indictment was defective because each charge cited multiple victims and created "the likelihood of nonunanimous verdicts." He maintains that we should vacate all of his convictions. We disagree.

¶12 First, Arizona Rules of Criminal Procedure 13.5(e) and 16.1(c) required Merrick to raise his challenge to the

indictment twenty days prior to trial. Having failed to do so, he is now precluded from raising this issue on appeal. See, e.g., *State v. Anderson*, 210 Ariz. 327, 335-36, ¶¶ 14-18, 111 P.3d 369, 377-78 (2005) (challenge to indictment not timely filed is precluded on appeal); *State v. Rushton*, 172 Ariz. 454, 837 P.2d 1189 (App. 1992) (challenge to duplicitous indictment not timely raised is precluded where defendant, if truly concerned regarding possibility of non-unanimous verdict, had ample opportunity to raise issue in trial court).

¶13 Second, Merrick cannot establish that any error, let alone fundamental error, occurred and that it caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. "An indictment is duplicitous if it charges more than one crime in the same count." *Anderson*, 210 Ariz. at 335, ¶ 13, 111 P.3d at 377 (citation omitted). "Duplicitous indictments are prohibited because they fail to give adequate notice of the charge to be defended, present the potential of a non-unanimous jury verdict, and make precise pleading of prior jeopardy impossible in the event of a later prosecution." *Id.* (citation omitted). The indictment here is not duplicitous.

¶14 Merrick contends that the charges were "duplicitous" because they cited Best Buy and/or General Motors and/or Henry Brown and/or Lowe's as possible victims. The fact that the victims were listed in the alternative does not render the

indictment duplicitous because the indictment did not charge Merrick with "more than one crime in the same count." *Id.* The indictment merely charged him with one distinct crime in each count, albeit against several alleged victims. Merrick provides no authority that establishes that there may only be one victim of a fraudulent scheme or theft. In fact, our supreme court recently found that "[a] single count is permissible . . . if several transactions are 'merely parts of a larger scheme.'" See *State v. Hargrave*, 225 Ariz. 1, 11, ¶ 29, 234 P.3d 569, 579 (2010).

¶15 An indictment is sufficient "if it clearly sets forth the offense in such manner as to enable a person of common understanding to know what is intended" and adequately conveys the offense charged. *Id.* at ¶ 31, 234 P.3d at 579. The evidence at trial clearly established that the Henry Brown dealership was ultimately responsible to General Motors for any costs incurred related to the Best Buy and Lowe's gift cards obtained through fraudulent means. The verdict forms for the nine counts of theft of a credit card also specified precisely which Best Buy or Lowe's gift cards were involved and the specific date Merrick possessed them. The record shows that the indictment adequately conveyed the offenses charged and permitted Merrick to defend against them. The fact that the charges listed multiple victims in the alternative did not

render the indictment duplicitous or make the verdicts non-unanimous.

¶16 Moreover, Merrick cannot show prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Even if there is a flaw in the pleading of an indictment, dismissal of any resulting conviction is not required unless a defendant "has actually suffered some prejudice." *State v. Schroeder*, 167 Ariz. 47, 52, 804 P.2d 776, 781 (App. 1990). See also *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (defendant must prove fundamental error in his case caused him prejudice).

¶17 Merrick completely denied any knowledge of Hurley's fraudulent scheme and any knowledge that the gift cards were fraudulent. He also denied receiving some of the cards that were mailed to his post office boxes. Because he completely denied any involvement in the scheme, the identity of the victim or victims did not matter to his defense. *Id.*; see also *State v. Herrera*, 176 Ariz. 9, 15, 859 P.2d 119, 125 (1993) (even fundamental error is not reversible error when error did not, beyond reasonable doubt, contribute to the verdict). Consequently, the listing of alternative victims did not cause any prejudice.

CONCLUSION

¶18 Based on the foregoing, we affirm Merrick's convictions and sentences for Counts 1, 2, 6, 8, 14, 23 and 24. We, however, vacate his convictions and sentences in Counts 9, 10, 11 and 15.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Judge

/s/

LAWRENCE F. WINTHROP, Chief Judge