NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 1/29/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	1 CA-CR 12-0020
Appellee,	DEPARTMENT E
v.	**MEMORANDUM DECISION**
ALISON YOON SOOK WHANG,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-156033-001

The Honorable Susanna C. Pineda, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

Thomas J. Phalen — Phoenix
Attorneys for Appellant

H A L L, Judge

¶1 Alison Yoon Sook Whang (defendant) appeals from her convictions and sentences for three counts of forgery, two counts of theft (one a felony, the other a misdemeanor), and one

count each of taking the identity of another and money laundering in the second degree. She raises issues related to the superior court's evidentiary rulings, and she asserts insufficient evidence supports her felony theft conviction. Defendant also argues the court erred in sentencing on the felony theft conviction. For the reasons explained below, we affirm.

BACKGROUND

¶2 The trial evidence revealed the following.[1] In December 2009, defendant was incarcerated in county jail on an unrelated matter, and she met another inmate, VJ. To "keep in touch," VJ gave defendant her home address, and defendant gave VJ a handwritten note containing defendant's name, booking number, and phone number (Exhibit 7). VJ informed defendant that she "had a trust fund."

¶3 Defendant bonded out of jail around December 15, 2009. In January 2010, VJ's daughter, AS, a banker at Wells Fargo, was monitoring VJ's Wells Fargo checking account (Wells Fargo Account) on-line and noticed a negative balance of almost $50,000.00. AS also noticed a check drawn on the Wells Fargo

[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).

Account dated January 13, 2010 payable to Bank of America in the amount of $50,000.00. Knowing her mother was incarcerated at the time, AS was concerned and proceeded with her grandmother to VJ's home.

¶4 Upon arrival, AS noticed that the home "obviously . . . had been broken into." The only items AS discovered missing from the home were VJ's checkbooks and a folder containing family members' personal information. AS called Peoria police, who responded and conducted an investigation.

¶5 The ensuing investigation revealed that the $50,000.00 check was left in a Bank of America night drop box unaccompanied by a deposit slip. On the memo line of the check, however, a handwritten note indicated the check was for "acct # HLOC ending in 1399[,]" an account that Bank of America determined was a home equity line of credit (HELOC) account held by RW, defendant's ex-fiancé.[2] RW noticed a $50,000.00 deposit to his HELOC account in January, 2010. RW did not know VJ.

¶6 The investigation further revealed that on January 17, 2010, defendant completed an application form at a check cashing business (Cash 1) in order to cash two $25.00 checks payable to defendant dated January 13 and 17, 2010, respectively, and

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[2] Trial evidence revealed that RW had a restitution order against defendant in the amount of $154,000.00 arising from a prior criminal matter.

purportedly signed by VJ and drawn on the Wells Fargo Account (Check Nos. 124 and 127). VJ did not write any of the three checks, nor did she ever give defendant permission to write the checks.

¶7 Based on the foregoing, the State charged defendant with the following:

- Count 1: Forgery, a class four felony, in violation of Arizona Revised Statutes (A.R.S.) section 13-2002 (Supp. 2012) and relating to the $50,000.00 check;
- Count 2: Theft, a class two felony, in violation of A.R.S. §§ 13-1802(A)(1), (G) (Supp. 2012) also relating to the $50,000.00 check;
- Counts 3 and 4: Forgery, class four felonies, in violation of A.R.S. § 13-2002 relating to the two checks presented to Cash 1;
- Count 5: Taking Identity of Another, a class four felony, in violation of A.R.S. § 13-2008(A) (Supp. 2012) relating to VJ's personal identifying information;
- Count 6: Theft, a class one misdemeanor, in violation of A.R.S. §§ 13-1802(A)(1), (G) relating to the two $25.00 checks; and

- Count 7: Money Laundering in the Second Degree, a class three felony in violation of A.R.S. § 13-2317(B)(8) (2010) relating to her application at Cash 1 to cash one of the $25.00 checks.

¶8 The State alleged the offenses involved the taking of property in an amount sufficient to be an aggravating circumstance, and defendant committed the offenses as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value. *See* A.R.S. § 13-701(D)(3), (6) (Supp. 2012). The State further alleged that defendant had four historical prior felony convictions; two relating to offenses committed in 2009 in Maricopa County (Attempted Forgery, a class five felony, and Fraudulent Schemes and Artifices, a class two felony,) and convictions in California for Possession of Bad Checks and for Bank Fraud, occurring in 1995 and 2001, respectively. The State later filed a supplemental allegation of historical priors adding the crimes of Forgery and Perjury, both occurring in California in 1997. Finally, the State alleged defendant committed the present offenses while released on bond for the 2009 Fraudulent Schemes and Artifices offense.

¶9 Defendant waived her right to a jury trial, and the court found her guilty of all counts as charged. At sentencing, defendant conceded she committed the offenses while on release.

The State submitted certified copies of all of defendant's prior convictions and authenticated them through testimony and evidence of defendant's fingerprints. The court found defendant had four prior felony convictions: the two felony convictions arising in Maricopa County, Attempted Forgery and Fraudulent Schemes and Artifices, and the offenses of Forgery and Perjury in California. The court imposed presumptive enhanced sentences for all counts, except Count 2, for which the court imposed a slightly aggravated term of 17.75 years' imprisonment. *See* A.R.S. § 13-703(C), (J) (Supp. 2012).

¶10 The court ordered two additional years' incarceration on all counts because defendant committed the offenses while released on bond, *see* A.R.S. § 13-708(D) (Supp. 2012), and all sentences were ordered to be served concurrently. Defendant appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A) (Supp. 2012).

DISCUSSION

I. Admission of the Cash 1 Application In Evidence

¶11 Defendant argues the court erred in admitting in evidence Exhibit 6, which consisted of defendant's completed Cash 1 "NEW CUSTOMER CHECK CASHING VERIFICATION FORM" and photocopies of defendant's California driver license and Check No. 124. Over defendant's objection on hearsay grounds, the

court, after considering the foundation testimony provided by Cash 1's district manager, admitted Exhibit 6 under the business records exception, Arizona Rule of Evidence (Rule) 803(6).[3] The court also rejected defendant's argument that, notwithstanding Rule 803(6), defendant's handwritten information on the verification form constituted inadmissible hearsay. We review

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[3] Rule 803(6) provides that the following are not excludable under the hearsay rule:

> **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if:
> (a) Made at or near the time of the underlying event,
> (b) by, or from information transmitted by, a person with first hand knowledge acquired in the course of a regularly conducted business activity,
> (c) made and kept entirely in the course of that regularly conducted business activity,
> (d) pursuant to a regular practice of that business activity, and
> (e) all the above are shown by the testimony of the custodian or other qualified witness.
> However, such evidence shall not be admissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness or to the extent that portions thereof lack an appropriate foundation.
> The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

We note that the current Rule 803(6) was "restyled" after the trial in this matter. *See* Comment to 2012 Amendment.

for an abuse of discretion. *State v. Petzoldt*, 172 Ariz. 272, 275, 836 P.2d 982, 985 (App. 1991).

¶12 Relying on *State v. McGann*, 132 Ariz. 296, 645 P.2d 811 (1982), defendant focuses on the handwritten information contained in the verification form (i.e., defendant's name, address, and driver license, social security, and telephone numbers) and argues because the information was not completed by a Cash 1 employee, "but merely a customer of the business," Rule 803(6) is inapplicable.

¶13 We reject this argument. In *McGann*, the statements at issue were inadmissible hearsay because they were made to the victim by the person whose signature the defendant allegedly forged. *McGann*, 132 Ariz. at 298, 645 P.2d at 813. Here, on the other hand, Cash 1's manager testified that a customer completes the form in the presence of a teller who then verifies the customer's written information and identity with "the ID that's presented[.]" The court could reasonably infer from this testimony that the written information in the verification form was provided by defendant herself.[4] *See State v. Murray*, 184

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[4] For this reason, we also reject defendant's argument that Exhibit 6 was not evidence of defendant's identity. Further, because of this independent evidence of defendant's identity, we need not consider defendant's argument that the court improperly compared defendant's handwriting on Exhibit 7 (the handwritten note defendant gave to VJ) to the handwritten information on the Cash 1 verification form to determine identity. In any event, contrary to defendant's arguments, the court's comparison of the

Ariz. 9, 31, 906 P.2d 542, 564 (1995) ("The probative value of evidence is not reduced because it is circumstantial."). Accordingly, the information was not hearsay, *see* Rule 801(d)(2), and the court did not abuse its discretion in admitting the evidence over defendant's hearsay objection. *See State v. McCurdy*, 216 Ariz. 567, 572, ¶ 11, 169 P.3d 931, 936 (App. 2007) (distinguishing *McGann* because "the source of the inmate's identifying information was the inmate himself").[5]

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handwriting fell within the authentication requirements set forth in Rule 901(b)(2-4), and the court therefore did not "become a witness in her own case" in violation of Rule 605. Finally, even if we were to agree with defendant's assertions of error on these additional bases, because this was a bench trial and "sufficient competent evidence" was presented as to defendant's identity, we would not reverse. *See State v. Warren*, 124 Ariz. 396, 402, 604 P.2d 660, 666 (App. 1979) ("An appellate court will not reverse a case tried to the trial court without a jury for errors in receiving improper matters into evidence provided there is sufficient competent evidence to sustain the judgment.").

[5] To the extent defendant argues the trial evidence provided insufficient foundation to admit Exhibit 6 as a business record, we summarily reject such a contention. After explaining that Exhibit 6 was contained in defendant's file at Cash 1, Cash 1's manager testified as follows:

> Q. Now the documents that you have there, were they made at or near the time of the occurrence in the matters set forth by, or from information transmitted by a person with knowledge of those matters?
> A. Yes, they were.
> Q. And are they kept in the course of regularly conducted activity?
> A. Yes, they are.

II. **Sufficiency of Evidence**

¶14 Defendant asserts insufficient evidence supports her conviction on Count 2 because VJ's Wells Fargo Account upon which the $50,000.00 check was drawn lacked sufficient funds to satisfy the check; accordingly, defendant argues it was factually impossible for defendant to have committed the crime of theft. Instead, she contends that, "[a]t worst," she committed the crime of attempted theft. She further argues that the value of the (attempted) theft was not $50,000.00, but rather the actual amount of funds available in the Wells Fargo Account at the time the check was drawn, which according to

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> Q. And are they made by that regularly conducted activity as a regular business practice?
> A. Yes.
> Q. Now what is the procedure if I am going to open an account with your company?
> A. You would come in, and you would then actually fill out a check cashing application. We would need to see the check in question, and your ID.
> Q. Okay, and do the rules require that a person take a look at that ID and see if it matches up with the check?
> A. Yes.
> Q. Okay. And do you, in fact, photo copy those ID's to take and keep that in the file?
> A. Yes, we [] do.
> Q. Okay. Is that the policy and procedure of check -- of Cash [1]?
> A. Yes, it is.

defendant was less than $100.00. These arguments are without merit.

¶15 Defendant was charged with theft under A.R.S. § 13-1802(A)(1), which states: "A person commits theft if, without lawful authority, the person knowingly . . . [c]ontrols property of another with the intent to deprive the other person of such property." Section 1802(G) provides that theft of property with a value of at least $25,000.00 is a class two felony. Defendant's arguments do not require us to review the record to determine what evidence supports each element of the charged offense. Rather, she raises questions of law, which we review de novo. *State v. Wright*, 214 Ariz. 540, 542, ¶ 5, 155 P.3d 1064, 1066 (App. 2007). We conclude that A.R.S. § 13-1801(A)(15) (Supp. 2012) and *State v. Bonney*, 145 Ariz. 368, 701 P.2d 864 (App. 1985), which discusses § 13-1801(A)(15), are dispositive and squarely contrary to defendant's arguments. A.R.S. § 13-1801(A)(15) defines value as:

> the fair market value of the property or services at the time of the theft. . . . Written instruments that do not have a readily ascertained market value have as their value either the face amount of indebtedness less the portion satisfied or the amount of economic loss involved in deprivation of the instrument, whichever is greater. When property has undeterminable value the trier of fact shall determine its value, and, in reaching its decision, may consider all relevant evidence, including evidence of the property's value to its owner.

¶16 In *Bonney*, the defendant was convicted of theft of a certificate of deposit with a value of $10,000.00. 145 Ariz. at 368, 701 P.2d at 864. The appellate court held that the face value of the certificate of deposit was $10,000.00 and that the State was not required to prove that the victim suffered a liquidated financial loss by the theft. *See id.* at 369, 701 P.2d at 864; *see also State v. Martines*, 705 A.2d 1116 (Maine 1998) (holding that for purposes of classifying the degree of the theft, the value of a forged check was its face amount); *Commonwealth v. Lee*, 434 A.2d 1182, 1184 (Penn. 1981) ("As the amount of the hoped-for gain from the forgery [of a check] increases, so too the punishment.").

¶17 Here, the check underlying Count 2 had a face value of $50,000.00 resulting in a class two felony designation under § 13-1801(G). As in *Bonney*, it was not necessary that VJ actually suffer a liquidated loss before defendant could be convicted of theft for placing the forged check in the face amount of $50,000.00 in the Bank of America night drop box for deposit in RW's HELOC account. In any event, we note the record indicates that VJ's Wells Fargo Account *did* suffer a negative balance as a result of defendant's deposit of the $50,000.00 check, and RW did have a temporary deposit of $50,000.00 credited to his account.

¶18 Because the sufficient evidence supported defendant's conviction for theft as a class two felony, the trial court did not err when it denied her motion for a judgment of acquittal.

III. Sentencing

A. Prior Convictions

¶19 Defendant argues the court erred in using her prior California convictions to enhance her sentences and to aggravate her sentence for Count 2. Specifically, defendant contends, and the State concedes, that the court erred in failing to make the determination required under A.R.S. § 13-703(M) (2010),[6] that the

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[6] Effective after defendant's sentencing date, this section of the statute was materially revised in 2012 in the following manner:

> **M.** For the purposes of subsection B, paragraph 2 and subsection C of this section, a person who has been convicted in any court outside the jurisdiction of this state of an offense that ~~if committed in this state would be~~ was punishable by that jurisdiction as a felony is subject to this section. A person who has been convicted as an adult of an offense punishable as a felony under the provisions of any prior code in this state or the jurisdiction in which the offense was committed is subject to this section. A person who has been convicted of a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony under the laws of this state is not subject to this section.

See 2012 Ariz. Sess. Laws Ch. 190, § 2 (2nd Reg. Sess.). We therefore refer to the date of the statute in effect when defendant was sentenced.

California felonies would also have qualified as felonies under Arizona law. We are not bound by the State's concession. *See State v. Sanchez*, 174 Ariz. 44, 45, 846 P.2d 857, 858 (App. 1993).

¶20 Because defendant did not raise this issue in the trial court, we review for fundamental error. Fundamental error will only be found in "those rare cases that involve error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quotation omitted).

¶21 A foreign conviction could not be used for sentencing enhancement purposes under the version of subsection M in effect at the time of sentencing in this matter unless it "include[d] 'every element that would be required to prove an enumerated Arizona offense.'" *State v. Crawford,* 214 Ariz. 129, 131, ¶ 7, 149 P.3d 753, 755 (2007) (quoting *State v. Ault,* 157 Ariz. 516, 521, 759 P.2d 1320 (1988)). It is true, as the State acknowledges, the trial court did not make an explicit on-the-record determination that the elements of the California priors were sufficient to establish that the offense would have been a felony if committed in Arizona. But trial court judges are not normally required to state their legal conclusions on the

record. Instead, we presume that the court knows the law and properly applies it in making its decisions. *State v. Williams*, 220 Ariz. 331, 334, ¶ 9, 206 P.3d 780, 783 (App. 2008) (citation omitted). In any event, the determination whether a foreign conviction constitutes a felony in Arizona raises an issue of law, and we review such issues de novo on appeal. *State v. Smith*, 219 Ariz. 132, 134, ¶ 10, 194 P.3d 399, 401 (2008). Therefore, we would only remand for the trial court to make such a determination if the record on appeal were insufficient to permit us to make that determination ourselves. *Cf. State v. McCurdy*, 216 Ariz. at 574-75, ¶ 19, 169 P.3d at 938-39 (remanding for a determination whether defendant's California conviction would have been a felony in Arizona because "the offense date for the California felony appears nowhere in the record and we therefore cannot determine the precise statute under which [defendant] was convicted").

¶22 Here, documentary evidence of the priors was admitted in evidence and the court implicitly found that they qualified as allegeable prior felonies pursuant to A.R.S. § 13-703(M). On appeal, defendant's sole claim on this issue is that the trial court failed to make the required comparison of elements. She does not argue, and therefore has waived the claim, that the California felonies would not qualify as felonies in Arizona.

¶23 Even if defendant had raised the claim on appeal, and we were to decide that the trial court fundamentally erred by finding that her California convictions qualified as sentence enhancers pursuant to A.R.S. § 13-703(M), defendant would be unable to demonstrate prejudice because the sentencing range defendant faced would remain unchanged. The court also found that defendant had two historical prior felony convictions from Maricopa County, thus exposing her to the same enhanced and aggravated sentences imposed by the court. *See* A.R.S. § 13-105(22)(b), (c) (defining, as relevant here, "Historical prior felony conviction" as any class two felony or class five felony committed, respectively, within ten years or five years immediately preceding the present offense date). Defendant does not contend on appeal that these convictions were invalid sentence enhancers or that the court erred by considering them as aggravators.[7] Accordingly, the superior court did not err because defendant's prior convictions in Maricopa County were sufficient to both enhance and aggravate her sentences.

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[7] Again, even assuming the California offenses did not qualify as felony priors in Arizona, any error committed by the court in using them to minimally aggravate defendant's sentence would not constitute reversible error under the circumstances of this case. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (on fundamental error review, speculation that the trial court might have imposed a lesser aggravated sentence had it not considered an improper aggravator was insufficient to establish prejudice.)

B. Pecuniary Gain and Amount of Loss

¶24 Defendant argues her sentence for Count 2 was improperly aggravated because pecuniary gain is inherent in the crime of theft. Defendant misapprehends the record. Regarding Count 2, the court found:

> I find that the -- as to Count two, and this is as to Count two only, that the pecuniary gain, the amount of the money taken, or attempted to be taken, which was $50,000.00, and the other prior felony convictions that go beyond what are statutory requirements, that those are aggravating circumstances for that count alone.

¶25 Based on the court's findings and the State's sentencing memorandum,[8] it is clear from the record that the

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[8] The State argued:

> The State has alleged the following statutory aggravating factors:
>
> a. The offenses involved the taking or damage to property in an amount sufficient to be an aggravating circumstance; and
> b. The defendant committed the offenses as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
>
> Here, the first aggravator applies to [C]ount 2, where defendant stole $50,000.00 of the victim's money and deposited it into her boyfriend's account. Defendant was facing a huge amount of restitution that was likely to be awarded in her first case, and instead of owning up to her fraud and attempting to pay it back honestly, she stole from another person to "pay back" her first victim. This shows a complete lack of

court did not find mere pecuniary gain as an aggravating circumstance in imposing the sentence for Count 2. Rather, the court found that the amount of $50,000.00 was sufficiently large to constitute an aggravating circumstance. Accordingly, we reject defendant's argument.

¶26 In a related argument, defendant contends the court erred in considering the "value of property taken" as an aggravating circumstance in Count 2 because defendant never actually succeeded in "taking" $50,000.00. For the reasons stated *supra* ¶¶ 16-17, we reject this argument.

> morals and indicates that defendant is willing to do whatever is convenient for her to get out of her financial obligations.
>
> The second aggravator goes to [C]ounts 3, 4, 5, and 7. Defendant forged the checks and stole the victim's identity in the expectation that she would be able to steal from her. She filled out the Cash 1 form with fake information to further this scam.

CONCLUSION

¶27 Defendant's convictions and sentences are affirmed.

_/s/___________________________________
PHILIP HALL, Presiding Judge

CONCURRING:

_/s/___________________________________
MARGARET H. DOWNIE, Presiding Judge

_/s/___________________________________
MAURICE PORTLEY, Judge