DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellant/ Cross-Appellee, v. RICHARD REGAN BESERRA, Appellee/ Cross-Appellant,	)	1 CA-CR 09-0005 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-144721-002 DT

The Honorable Robert H. Oberbillig, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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O R O Z C O, Judge

¶1 Richard Regan Beserra (Beserra) was convicted of fraudulent use of a credit card and sentenced to the minimum

term of 1.75 years' imprisonment. Because he committed the offense while on probation for disorderly conduct, his probation was revoked and he was sentenced to a concurrent, presumptive term of one year imprisonment for disorderly conduct. The State filed a timely appeal in which it presents one issue. The State argues the trial court erred when it ordered the two sentences to run concurrently rather than consecutively pursuant to Arizona Revised Statutes (A.R.S.) section 13-604.02.B (2007).[1]

¶2 Beserra filed a cross-appeal in which he raises four issues. Beserra argues there was insufficient evidence to support his conviction for fraudulent use of a credit card; the evidence supports, at most, a conviction for attempted fraudulent use of a credit card; the trial court erred when it allowed an "effective" amendment of the charging document; and the charge of fraudulent use of a credit card was duplicitous. For the reasons that follow, we affirm Beserra's conviction but vacate the portion of the sentencing minute entry which ordered his sentences to run concurrently.

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[1] Section 13-604.02 has subsequently been renumbered as A.R.S. § 13-708 (2010) and amended. In this decision, we refer to this statute as it was worded and numbered at the time Beserra committed the offense. *See* 1999 Ariz. Sess. Laws, ch. 261, § 7 (former § 13-604.02).

¶3 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 and -4032.5 (2010).[2]

DISCUSSION

Imposition of Concurrent Sentences

¶4 We first address whether the trial court erred when it ordered that the two sentences run concurrently rather than consecutively. The State argues the trial court was required to impose consecutive sentences pursuant to A.R.S. § 13-604.02.B. This section provides, in relevant part, that a person convicted of certain felony offenses while on probation, "parole, work furlough, community supervision or any other release or escape from confinement for conviction of a felony offense shall be sentenced to" no less than the presumptive sentence. A.R.S. § 13-604.02.B. Section 13-604.02.B also provides:

> A sentence imposed pursuant to this subsection shall revoke the convicted person's release if the person was on release and shall be consecutive to any other sentence from which the convicted person had been temporarily released or had escaped, unless the sentence from which the convicted person had been paroled or placed on probation was imposed by a jurisdiction other than this state.

¶5 The State argues this second provision mandates the imposition of consecutive sentences where a defendant is

[2] Unless otherwise noted, we cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

convicted of a felony while on probation for another felony. Beserra argues the second provision does not mandate consecutive sentences because probation is neither a "sentence" nor "release" as contemplated by the statute. The trial court held that the State's interpretation of the statute was incorrect, consecutive sentences in such a situation were not mandatory and whether to impose concurrent or consecutive sentences was a matter of judicial discretion.

¶6 Interpretation of a statute is a question of law which we review *de novo*. *See Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). We addressed nearly identical language in the predecessor to A.R.S. § 13-604.02.B in *State v. Barksdale*, 143 Ariz. 465, 694 P.2d 295 (App. 1984), *disapproved of on other grounds, State v. Rushing*, 156 Ariz. 1, 4, 749 P.2d 910, 913 (1988). Like A.R.S. § 13-604.02.B, the former A.R.S. § 13-604.01.B addressed the sentence to be imposed for a felony offense committed while on probation, parole, furlough or other release for a prior felony conviction and provided that no less than the presumptive sentence could be imposed. *Barksdale*, 143 Ariz. at 467, 694 P.2d at 297. Section 13-604.01.B further provided, "A sentence imposed pursuant to this subsection shall be consecutive to any other sentence from which the convicted person had been temporarily released."

¶7 The defendant in *Barksdale* committed a felony offense while on probation for other felony offenses. 143 Ariz. at 467, 694 P.2d at 297. Just as Beserra does in this case, the defendant in *Barksdale* argued consecutive sentences were not mandatory because probation was not a sentence nor was it a form of release contemplated by the statute. *Id*. at 468, 694 P.2d at 298. We held the legislature intended to require consecutive sentences for a defendant who was convicted of a felony offense while on probation for a prior felony conviction. *Id*. at 468-69, 694 P.2d at 298-99. We reasoned that, "When the legislature used the term 'temporarily released,' they intended to cover persons on 'probation, parole, work furlough or any other release.'" *Id*. at 468, 694 P.2d at 298. Finally, we held,

> In our opinion, where the trial judge sentences a defendant for a felony offense, and at the same hearing, or prior thereto, sentences the same defendant for probation violations, A.R.S. § 13-604.01(B) requires that the sentence for the subsequent felony conviction be consecutive to any other sentence imposed. To not so hold would be to disregard the statue and the clear intention of the legislature in enacting A.R.S. § 13-604.01(B).

Id. at 468-69, 694 P.2d at 298-99.

¶8 Subsequent to *Barksdale*, the Arizona Supreme Court also found that consecutive sentences are mandatory when a defendant is sentenced for a felony committed while on probation and the previous term of probation is revoked. In *State v. Allie*, the defendant committed burglary while on probation for

another offense. 147 Ariz. 320, 322, 710 P.2d 430, 432 (1985). The defendant argued the former A.R.S. § 13-604.01 did not require that his sentence for burglary be served consecutively to the sentence imposed following the revocation of his probation because probation was not a form of "temporary release." *Id*. at 324, 710 P.2d at 434. The Arizona Supreme Court reasoned, "Although this portion of the statute may be loosely worded, we have held that there is 'no distinction between probation and parole for purposes of A.R.S. § 13-604.01.'" *Id*. at 325, 710 P.2d at 435 (quoting *State v. Williams*, 144 Ariz. 433, 445, 698 P.2d 678, 690 (1985)); *see also State v. Bruggeman*, 161 Ariz. 508, 511, 779 P.2d 823, 825 (App. 1989) (there is no distinction between parole and probation under A.R.S. § 13-604.02).

¶9 The language at issue in A.R.S. § 13-604.02.B has not changed in any material way from the language addressed in the former A.R.S. § 13-604.01.B. While the language may still be "loosely worded," probation is still a form of "release" for sentencing purposes under A.R.S. § 13-604.02.B. Therefore, the trial court was required to impose consecutive sentences.

¶10 "Courts have power to impose sentences only as authorized by statutes and within the limits set down by the legislature." *State v. Rosario*, 195 Ariz. 264, 268, ¶ 27, 987 P.2d 226, 230 (App. 1999) (quoting *State v. Harris*, 133 Ariz.

30, 31, 648 P.2d 145, 146 (App. 1982)). The trial court erred when it ordered the sentence for fraudulent use of a credit card be served concurrently with Defendant's sentence for the prior felony conviction of disorderly conduct. We vacate that portion of the sentencing minute entry that ordered Defendant's sentences to run concurrently and remand for proceedings consistent with this decision.

Sufficiency of the Evidence

¶11 Beserra contends there was insufficient evidence to support his conviction for fraudulent use of a credit card. He further argues the evidence established he was guilty of, at most, attempted fraudulent use of a credit card. "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶12 In the context of the charge brought in this case, A.R.S. § 13-2105.A.1 (2010) provides, in relevant part, that a person commits fraudulent use of a credit card if, with intent to defraud, the person uses, "for the purposes of obtaining or

attempting to obtain money, goods, services or any other thing of value, a credit card or credit card number obtained or retained in violation of this chapter." Additionally, "[i]f the value of all money, goods, services and other things of value obtained or attempted to be obtained . . . is two hundred fifty dollars or more but less than one thousand dollars in any consecutive six-month period the offense is a class 6 felony." A.R.S. § 13-2105.B.

¶13 "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). We draw all reasonable inferences that support the verdict. *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999). We do not weigh the evidence, however, as that is the function of the jury. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶14 On July 10, 2007, Beserra checked into a hotel for two nights at the rate of $69 per night. Beserra signed the registration form with his own name, initialed the daily room rate and presented the hotel with a credit card. The next day, personnel at the hotel learned the credit card Beserra used was not legitimate and called police. When police arrived, Beserra was gone.

¶15 The day after Beserra checked into the first hotel, a woman called a second hotel to reserve a room in Beserra's name for two nights at the rate of $215 per night. When making the reservation, the woman provided the hotel with a credit card number. Approximately five minutes after the reservation was made, Beserra and the woman arrived at the second hotel and checked in using a Bank of America Visa credit card with the same number that had been provided over the phone. Beserra's name appeared on the card. Beserra signed his own name to the hotel registration and was informed the room would be charged to that card unless he changed it at checkout. Hotel personnel soon discovered the card presented by Beserra was not legitimate and called police. While there was conflicting evidence as to whether Beserra used the same physical card at both hotels, it was established Beserra obtained the rooms at both hotels with the same credit card number. Once arrested, Beserra admitted he made the card and explained to police how he did so.

¶16 At trial, the card-holder to whom the credit card number actually belonged testified he did not know Beserra and did not give Beserra permission to use his credit card number. The card-holder did not, however, suffer any monetary loss as a result of Beserra's actions.

¶17 The evidence presented at trial was more than sufficient to support Beserra's conviction for fraudulent use of

a credit card. The evidence established Beserra used an illegally obtained account number on a fabricated credit card(s) to obtain or attempt to obtain the use of two hotel rooms for four nights. The evidence further established the value of those two rooms for four nights would have been approximately $568. Nothing further was required to convict Beserra of fraudulent use of a credit card, a class 6 felony.

¶18 Despite Beserra's assertions to the contrary, it is of no matter that the card-holder was not personally defrauded or that the card-holder, the hotels, the card-issuer, a bank or any other entity did not ultimately suffer any financial loss. The offense only requires use of a card or card number with the intent to defraud to obtain or attempt to obtain something of value. A.R.S. § 13-2105. The purpose of the offense is to punish use, coupled with the requisite intent, regardless of whether the use was ultimately successful. There is no requirement that any person or entity suffer any actual loss.

¶19 Further, that the charge alleged Beserra intended to defraud the card-holder specifically is also of no matter. Whom a person intended to defraud is irrelevant for purposes of determining whether fraudulent use of a credit card has occurred. The additional language was surplusage, and surplusage does not create an additional element of the offense that must be found by the jury. *See State v. Olea*, 182 Ariz.

485, 490, 897 P.2d 1371, 1376 (App. 1995); *State v. Suarez*, 137 Ariz. 368, 374, 670 P.2d 1192, 1198 (App. 1983).

Amendment of the charging document

¶20 Beserra next argues the trial court erred when it "effectively amended" the charging document by limiting his closing argument. "The trial court is vested with great discretion in the conduct and control of closing argument and will not be overturned on appeal absent an abuse of discretion." *State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985); *see also Herring v. New York*, 422 U.S. 853, 862 (1975) (trial court has broad discretion in controlling and limiting the scope of closing argument).

¶21 At the beginning of the second day of the two-day trial, the trial court noted that the charging document alleged Beserra intended to defraud the card-holder. As discussed above, this was not an element of the offense. The State moved to amend the charging document to remove this reference. Beserra objected to the amendment, arguing that because the State had alleged Beserra intended to defraud the card-holder specifically, the State was required to prove this as an element of the offense. The trial court correctly held the State need not prove intent to defraud any specific person under A.R.S. § 13-2105.A.1, but denied the motion to amend.

¶22 When Beserra moved for judgment of acquittal at the close of the State's case, he argued the State was required to prove Beserra intended to defraud the card-holder and that the card-holder personally incurred a loss. The trial court held these were not elements of the offense and denied the motion for judgment of acquittal. Because Beserra continued to insist the State was required to prove these non-elements in order to convict him of fraudulent use of a credit card, and had even told the jury this in his opening statement, the State moved to prohibit Beserra from arguing in closing that the State was required to prove any element not identified A.R.S. § 13-2105.A.1. The trial court granted the motion and precluded Beserra from arguing the State was required to prove any element not identified in the statute.

¶23 On appeal, Beserra asserts the trial court erred when it "effectively amended" the charging document by preventing him from arguing in closing that the State was required to prove he intended to defraud the card-holder specifically and that the card-holder sustained a loss. We find no abuse of discretion. As noted above, the additional language in the charge regarding the card-holder was surplusage and did not create new element(s) of the offense which must be proven. *See Olea*, 182 Ariz. at 490, 897 P.2d at 1376*; Suarez*, 137 Ariz. at 374, 670 P.2d at 1198. To argue the State was required to prove intent to

defraud the card-holder specifically and or that the card-holder or any other entity personally incurred a financial loss would be a misstatement of the law. Attorneys should not misstate the law in closing argument. *Tims*, 143 Ariz. at 199, 693 P.2d at 336. We find no abuse of discretion when a trial court prohibits an attorney from presenting argument to the jury that it may not convict unless it finds the State has proven elements which are not statutory elements of an offense or when it otherwise prohibits an attorney from misstating the law.

Duplicity of the Charge

¶24 As the final issue on appeal, Beserra argues the charge for fraudulent use of a credit card was duplicitous. A charging document "is duplicitous if it charges separate crimes in the same count." *State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App. 1993). The count at issue alleged Beserra:

> [W]ith intent to defraud [the card-holder], used [the card-holder's] credit card or credit card number to obtain or attempt to obtain two hotel rooms, of a value of two hundred fifty dollars or more but less than one thousand dollars, in a consecutive six month period, in violation of [various statutes.]

This language combined the language of A.R.S. § 13-2105.A.1, which described the substantive offense, with A.R.S. § 13-2105.B, which defined the class of offense. Beserra argues this language charged him with both the offense of defrauding the

card-holder and a separate offense of attempting to defraud the card-holder.

¶25 Beserra did not raise this issue below. Pursuant to Arizona Rule of Criminal Procedure 13.5.e, "[n]o issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16." Additionally "Rule 16.1(b) requires that such motions be filed at least twenty days before trial; Rule 16.1(c), in turn, provides that any motion not timely filed is 'precluded.'" *State v. Anderson*, 210 Ariz. 327, 335-36, ¶ 16, 111 P.3d 369, 377-78 (2005). This issue is, therefore, waived. *Id.*

¶26 Even absent waiver, we would find no error. The charge for fraudulent use of a credit card did not charge two separate offenses in one count. It charged a single completed offense - fraudulent use of a credit card, which is committed when a person uses a credit card or credit card number with the intent to defraud, to obtain or attempt to obtain anything of value. The completed action of use of a card or credit card number to attempt to obtain anything of value is not the equivalent of attempted use of a card or credit card number. *See Ponds v. State ex rel. Eyman*, 7 Ariz. App. 276, 277, 438 P.2d 423, 424 (1968) (similar argument regarding the "attempt to pass" element of the completed offense of forgery held "specious").

CONCLUSION

¶27 We affirm Beserra's conviction for fraudulent use of a credit card and sentence. We vacate that portion of the sentencing minute entry which ordered the sentence for fraudulent use of a credit card run concurrently with the sentence for disorderly conduct and remand for proceedings consistent with this decision.

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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DANIEL A. BARKER, Judge

/S/
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LAWRENCE F. WINTHROP, Judge