tNOTICE: 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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 08/02/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0248
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RUSSELL GORDON DOEMER,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause Nos. CR-2004-0653 and CR-2007-1700

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

Jill Evans, Mohave County Appellate Defender — Kingman
Attorneys for Appellant

H A L L, Judge

¶1 Russell Gordon Doemer was convicted by a jury in Mohave County Superior Court Cause No. CR-2007-1700 of theft of

four thousand dollars or more, a class 3 felony; and fraudulent schemes and artifices, a class 2 felony. As a result of these convictions, the trial court revoked Doemer's probation in Mohave County Superior Court Cause No. CR-2004-0653 and sentenced him as a repetitive offender in Cause No. CR-2007-1700 to consecutive, aggravated terms of imprisonment totaling twenty-eight years to be served consecutive to a five-year aggravated term of imprisonment imposed on his conviction for attempted fraudulent schemes and artifices in Cause No. CR-2004-0653. Doemer timely appealed.

¶2 On appeal, Doemer raises three issues in regards to his convictions and sentences in Cause No. CR-2007-1700: (1) the evidence was insufficient to support the convictions; (2) the trial court erred in denying his motion for mistrial; and (3) the trial court erred in sentencing him as a repetitive offender. For reasons that follow, we affirm.

I.

¶3 Doemer argues that his convictions for theft and fraudulent schemes and artifices must be reversed because there was insufficient evidence to support them. We review claims of insufficient evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶4 Rule 20 of the Arizona Rules of Criminal Procedure requires a trial court to enter judgment of acquittal "if there

is no substantial evidence to warrant a conviction." "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "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) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶5 In reviewing a claim of insufficient evidence, we do not reweigh the evidence on appeal. *State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997). Instead, we view the evidence in the light most favorable to upholding the verdicts and determine whether substantial evidence supports the verdicts. *Id.* "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).

A.

¶6 A person is guilty of fraudulent schemes and artifices if he, "pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses,

representations, promises or material omissions." Ariz. Rev. Stat. (A.R.S.) § 13-2310(A) (2010).[1] A "scheme or artifice is some plan, device or trick to perpetrate a fraud. The scheme need not be fraudulent on its face but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *State v. Henry*, 205 Ariz. 229, 232, ¶ 12, 68 P.3d 455, 458 (App. 2003) (internal quotation omitted). The statute generally proscribes conduct "lacking in fundamental honesty [and] fair play in the general and business life of members of society." *State v. Haas*, 138 Ariz. 413, 424, 675 P.2d 673, 684 (1983) (internal quotation omitted). It is broadly construed "to cover all of the varieties made possible by boundless human ingenuity." *Id.*

¶7 Our review of the record on appeal finds substantial evidence from which the jury could conclude beyond a reasonable doubt that Doemer committed the offense of fraudulent schemes and artifices. Evidence was presented at trial that Doemer was permitted to purchase supplies for his painting business on credit with a contractor's discount from a building materials

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[1] We apply the substantive law in effect when the offense was committed. A.R.S. § 1-246 (2002); *State v. Newton*, 200 Ariz. 1, 2, ¶ 3, 21 P.3d 387, 388 (2001). Absent material revisions to a statute after the date of an offense, we cite the current version.

store. Before being permitted to make purchase on credit, a credit application was submitted to the store in the name of J and R Touch of Color signed by Doemer and his wife. The credit application contained false statements and misrepresentations, including that J and R Touch of Color had been in business five years and that Doemer had an Arizona Registrar of Contractor's (ROC) license number. The ROC license number indicated Doemer had a contractor's performance bond and permitted Doemer to get a contractor's discount from the store on his purchases.

¶8 In the three to four months after submitting the credit application, Doemer obtained painting supplies from the store on credit totaling approximately $18,000, but made no payments on the account. When Doemer failed to make payments on the account, the store refused to permit further purchases on credit. Doemer informed the store he intended to make payment on the outstanding balance and asked to be permitted to continue to make purchases on a "paying for it as I go" basis. The store agreed and Doemer made several payments to the store by check, but all the checks were returned by the bank for nonsufficient funds. The store contacted the ROC to obtain payment from Doemer's contractor's performance bond. It was then discovered that the license number included on the credit application belonged to a completely different business with no relation to

Doemer and that neither Doemer nor his wife ever held an Arizona contractor's license.

¶9 Doemer argues that the evidence is insufficient to establish that the store relied on the false ROC number in extending credit, noting that the validity of the number was not checked by the store until after the charges had been incurred and that there was evidence that the store was "lackadaisical" in deciding whether to extend credit and conducting credit checks. The law is clear, however, that reliance on the part of any person is not a necessary part of the offense. *State v. Fierson*, 146 Ariz. 287, 291, 705 P.2d 1338, 1342 (App. 1985); A.R.S. § 13-2310(B). Further, the evidence supports the inference that the store was aware of and did rely on the ROC license number on the credit application in its dealings with him in that it considered him a contractor in granting the contractor's discount on his purchases.

¶10 Doemer's argument that there was insufficient evidence on the element of a benefit obtained from the fraud is equally without merit. The term "benefit" means "anything of value or advantage, present or prospective." A.R.S. § 13-105(3) (2010). This definition is very broad and encompasses both pecuniary and non-pecuniary gain. *Henry*, 205 Ariz. at 233, ¶ 15, 68 P.3d at 459. Here, Doemer benefited from submitting the credit

application with the false representations by obtaining $18,000 of supplies for his painting business without paying for them.

¶11 Finally, we reject Doemer's argument that the evidence is insufficient to permit a finding that he knowingly submitted the credit application with the false ROC license number. He claims that there was no evidence of who filled in the number on the application. Doemer and his wife testified at trial that they left that space blank when they turned in the application. However, a recording of a telephone call from Doemer to his wife while in pre-trial detention includes a discussion between them indicating that, although the two cannot be sure whether one of them or a person at the store wrote the number on the form, both were present when the form was completed with the ROC number. Accordingly, regardless of who wrote the number on the form, the jury could reasonably find from this evidence that Doemer submitted the credit application knowing of the false ROC number. There was no error by the trial court in denying the motion for judgment of acquittal on the charge of fraudulent schemes and artifices.

B.

¶12 Doemer also contends there was insufficient evidence to support his conviction for theft. As relevant to this case, a person commits theft "if, without authority, the person knowingly:

> 1. Controls property of another with intent to deprive the other person; or
>
> 2. Converts for an unauthorized term or use . . . property of another entrusted to the defendant or placed on defendant's possession for a limited, authorized term or use; or
>
> 3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services.

A.R.S. § 13-1802(A) (2010). Theft of property with a value of twenty-five thousand dollars or more is a class 2 felony. A.R.S. § 13-1802(G). Theft of property with a value of four thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony. *Id.*

¶13 The indictment alleged one count of theft as a class 2 felony, identifying five victims with losses in the aggregate of over twenty-five thousand dollars. At the close of the State's case-in-chief, the trial court granted Doemer's motion for judgment of acquittal on the theft charge as a class 2 felony based on the State presenting evidence of losses suffered by only four victims and totaling less than twenty-five thousand dollars. The charge of theft was thereafter submitted to the jury on the lesser-included offense of theft of four thousand dollars or more, a class 3 felony, and the jury convicted Doemer on this lesser charge.

¶14 The evidence on the theft charge is undisputed that Doemer obtained a total of $20,900 from four different victims: $3,700 from B.G.; $2,500 from N.T.; $6,700 from D.J.; and $8,000 from E.P. Doemer contends the evidence is insufficient to support a finding by the jury that he obtained any of this money in violation of A.R.S. § 13-1802(A). We disagree.

¶15 Doemer obtained $3,700 from B.G. by telling him he needed the money to invest in a "good deal on some property," which Doemer claimed a doctor wanted to dispose of quickly before his wife's lawyer discovered it. Doemer explained he had the deal down at the title company ready to go and had the money in the bank to buy the property, but was $3,700 short and needed that amount to put in the bank so his check would not bounce. Doemer further stated he had a buyer for the property and that he would get his money back in one week. When B.G. was initially not interested in lending the money, Doemer informed B.G. that the doctor had a "hot rod" that he was getting rid of with the property and that B.G. could have the hot rod along with a little bit of profit from the deal. Doemer was aware from prior conversations of B.G.'s interest in hot rods and this "pushed [him] over the edge" in lending the money.

¶16 B.G. met Doemer at the bank and gave him a check for $3,700. Doemer cashed the check and put the money in his pocket, which B.G. considered odd because Doemer told him he

needed the money to put in the bank to purchase the property. After the one-week deadline for receiving his money back, B.G. had a telephone conversation with Doemer in which Doemer told him that he had sold the property and was "waiting on the money to come in" and that "as soon as the money comes in, I'm gonna settle up with you." B.G. made attempts to get the "hot rod" and repayment of the loan, but Doemer failed to show up for meetings as promised and evaded him. B.G. checked the location where Doemer stated the property was located and concluded it never existed. When Doemer was subsequently interviewed about the transaction by a sheriff's investigator, Doemer claimed it had fallen through and stated that he knew he was wrong to not return the money, but he needed it so he kept it. Doemer further admitted there was no documentation that there was ever a land deal.

¶17 Doemer claims, without argument or authority, that the above factual circumstances are insufficient to permit the jury to find that he took the $3,700 from B.G. "with no intent to complete a false land deal and deal for the 'hot rod,' or with the intent to convert the money to an unauthorized use, or with intent to deprive." Failure to argue a claim usually constitutes abandonment and waiver of the claim. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) (requiring argument be

presented with "the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." In *State v. Rubio*, 219 Ariz. 177, 181, ¶ 14, 195 P.3d 214, 218 (App. 2008), we held that the defendant waived appellate review of his claim that the trial court erred in denying his motion for judgment of acquittal when the defendant failed to properly argue the claim. The same result applies here. Further, we hold that the jury could readily conclude beyond a reasonable doubt from the above factual circumstances that Doemer committed theft regarding the $3,700 obtained from B.G. both by converting the money to an unauthorized use and by obtaining it through material misrepresentation about the existence of the land deal. *See* A.R.S. § 13-1802(A)(2), (3).

¶18 We likewise hold that there was sufficient evidence that Doemer committed theft in violation of A.R.S. § 13-1802(A) in obtaining $2,500 from N.T. Doemer approached N.T., who was a church pastor, and informed him that he wanted to paint the church as a "blessing to you." Saying that business was slow and that he wanted to keep his crew busy, he told N.T. that he would charge only for materials, which he quoted as $2,500. Doemer's proposal included painting the interior of the sanctuary, the "bread room," the foyer, and the parsonage, and the exterior of the sanctuary with Sunday school wing and the parsonage. N.T. obtained approval of the church counsel to have

the work done and the project was documented with a written proposal.

¶19 Doemer told N.T. that he needed a check for $2,500 to purchase the materials. N.T. proposed meeting Doemer at the store and paying for the materials with the church credit card, which would permit the church to pay off the amount over time. Doemer rejected the idea, telling N.T. that paying for materials with the church credit card would prevent him from getting a contractor's discount. As a result, N.T. gave Doemer a check for $2,500. After Doemer received the check, he and his crew began painting the interior of the sanctuary and worked for a day-and-a-half. However, Doemer never returned after that to finish the job, leaving a large majority of the work incomplete and never returned any unused materials to permit completion of the work by someone else. N.T. spoke to Doemer several times about completing the work, which Doemer indicated he would do during his "slack time." Doemer, however, eventually left town and moved to Oregon without ever completing the work.

¶20 Doemer argues that the evidence regarding the payment of $2,500 to him by N.T. was insufficient to prove theft because there was no evidence he used the $2,500 for anything other than the agreed upon painting of the church. Doemer's argument, however, ignores that he quoted $2,500 as an amount that would cover all the materials necessary to complete the project and

that only a fraction of the project proposed by him was actually completed. "It has been repeatedly held that proof of the requisite intent to commit theft or any felony can be shown by circumstantial evidence . . . as no one can read the defendant's mind so his intent must be inferred from his conduct and his comments." *State v. Dusch*, 17 Ariz.App. 286, 287, 497 P.2d 402, 403 (1972) (citation omitted). The fact that only a small portion of the project was completed and that Doemer stopped working at the church after less than two days permits a reasonable inference that Doemer misrepresented the work he would complete to obtain the $2,500 and that it was converted to some other unauthorized use other than materials for painting the church. This inference of criminal intent on Doemer's part finds further support in the fact that instead of having N.T. pay the store for the materials, Doemer convinced N.T. to give the $2,500 directly to him. Viewing the evidence in the light most favorable to sustaining verdicts, it cannot be said that there was a "complete absence of probative facts" to support a finding that Doemer committed theft in obtaining the $2500 from N.T. *Soto-Fong*, 187 Ariz. at 200, 928 P.2d at 624.

¶21 The jury could further reasonably conclude that the aggregate amount of money obtained by Doemer from B.G. and N.T. through his acts of theft with respect to these two victims exceeded four thousand dollars. Consequently, it is unnecessary

to consider whether Doemer's conduct in obtaining additional money from D.J. and E.P. was sufficient to support findings of additional acts of theft in regard to those transactions to sustain the conviction for theft of four thousand dollars or more, a class 3 felony.

II.

¶22 Doemer next argues that the trial court erred in denying his motion for mistrial. Doemer moved for a mistrial after the prosecutor impeached Doemer's character witness by inquiring if the witness was aware of Doemer's multiple prior convictions for theft and fraud related offenses. Although there was no objection at the time of the impeachment with the prior convictions, Doemer argued in his motion for mistrial that seven of the felonies referenced by the prosecutor were not actually his and that it was unfairly prejudicial to have the unsanitized convictions placed before the jury. The trial court denied the motion on the grounds defendant failed to establish that he did not have the prior convictions referenced by the prosecutor and thus there had not been any improper cross-examination of the witness. *See State v. Rainey*, 137 Ariz. 523, 526, 672 P.2d 188, 191 (App. 1983) (recognizing propriety of cross-examining character witness regarding specific instances of conduct of defendant relevant to character).

¶23 "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). We review the denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000).

¶24 The trial court conducted an evidentiary hearing on the motion at which Doemer testified that a number of the prior convictions referenced by the prosecutor did not belong to him, but rather were likely the responsibility of his brother. In support of his claim, Doemer testified that he had a deceased older brother named "Gordon Joseph Doemer," who looked "similar" to him, had a similar birthday and shared the names "Gordon" and "Doemer." Doemer also testified that he was not present in the jurisdictions at the times the disputed convictions occurred.

¶25 We find no abuse of discretion by the trial court in denying the motion for mistrial based on the finding that Doemer failed to establish his non-responsibility for the convictions in question. With respect to the seven convictions in 2001 in Sacramento County, California, the presentence report prepared in 2005 in regards to Doemer's two prior Arizona convictions indicated Doemer acknowledged the earlier California convictions and serving time in that state in connection with them.

Furthermore, when cross-examined during the hearing about the California convictions, Doemer admitted that the photograph in the prison "pen pack" for the convictions was of him. Additionally, the State made an offer of proof that it had a fingerprint examiner who would testify that the fingerprints included in the pen pack belonged to Doemer and later presented that testimony at trial. Given this evidence raising questions about the credibility of his denials of the California convictions, the trial court could also reasonably question the denials of responsibility by Doemer for the other convictions referenced by the prosecutor in cross-examining the character witness.

¶26 As for the use of unsanitized convictions in cross-examining the character witness, the specific nature of the various theft and fraud related convictions was highly relevant to the witness's testimony regarding Doemer's character. Indeed, the character witness testified that if he was aware of the other convictions, it would alter his opinion of Doemer as a fine and trustworthy person. Accordingly, there was no abuse of discretion by the trial court in not precluding such evidence as unfairly prejudicial. *See* Ariz. R. Evid. 403 (authorizing trial court to exclude evidence when "its probative value is *substantially* outweighed by the danger of unfair prejudice") (Emphasis added).

¶27 In addition, because Doemer denied the disputed convictions when he testified at trial, the State was permitted to introduce public records evidence to prove the various convictions. Ariz. R. Crim. P. 609(a). Thus, the particulars of Doemer's extensive criminal record would have been before the jury even if the prosecutor had not used unsanitized convictions in cross-examining the character witness. Further, to minimize any prejudice from the evidence of the prior convictions, the trial court instructed the jurors that they were to consider the prior convictions solely for credibility and not to prove bad character or disposition to criminality. We presume jurors follow their instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). Under these circumstances, there was no error by the trial court in denying the motion for mistrial.

III.

¶28 Finally, Doemer argues that the trial court erred in sentencing him in Cause No. CR-2007-1700 as a repetitive offender pursuant to A.R.S. § 13-703 (2010). At sentencing, the trial court found that Doemer had prior felony convictions for forgery and attempted fraudulent schemes and artifices in Mohave County Superior Court Cause No. CR-2004-0653 and used the two convictions to enhance the sentences imposed on the convictions in Cause No. CR-2007-1700. Doemer asserts the two offenses for

which he was convicted in Cause No. CR-2004-0653 occurred on the "same occasion" and therefore could not be used as two distinct convictions for sentence enhancement purposes. *See* A.R.S. § 13-703(L) ("Convictions for two or more offenses committed on the same occasion shall be counted as only one conviction for purposes of [this statute]."). Whether two prior convictions should be treated as one or two convictions for sentence enhancement is a mixed question of law and fact that is reviewed de novo. *State v. Derello*, 199 Ariz. 435, 437, ¶ 8, 18 P.3d 1234, 1236 (App. 2001).

¶29 Because Doemer did not object at sentencing to the use of his two prior Arizona convictions as multiple convictions, he has forfeited appellate review of this issue except for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under this standard of review, a defendant bears the burden of establishing both that fundamental error exists and that the error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607. The improper double counting of prior convictions for purposes of sentence enhancement constitutes fundamental error. *Derello,* 199 Ariz. at 437, ¶ 6, 18 P.3d at 1236.

¶30 No "all encompassing test" exists for determining whether two crimes occurred on the same occasion. *State v. Kelly,* 190 Ariz. 532, 535, ¶ 9, 950 P.2d 1153, 1156 (1997)

(quoting *State v. Shepard*, 179 Ariz. 83, 84, 876 P.2d 579, 580 (1994)). "Rather, a court must consider the spatial and temporal relationship between the two crimes, whether the crimes involve the same or different victims, whether the crimes were continuous and uninterrupted, and whether they were directed to the accomplishment of a single criminal objective." *Derello,* 199 Ariz. at 437, ¶ 9, 18 P.3d at 1236. Consequently, "[t]he determination necessarily must turn on the specific facts of each case." *Kelly,* 190 Ariz. at 534, ¶ 9, 950 P.2d at 1155.

¶31 In support of his position that the two convictions in Cause No. CR-2004-0653 involved offenses occurring on the same occasion, Doemer argues that the "Forgery of the unauthorized credit card check of victim [G.] was part of the same conduct which supported the Fraudulent Scheme; to wit: to use the victim's identifying information from credit applications to obtain credit in the victim and Doemer's name, and then make unauthorized charges against those accounts." Therefore, Doemer concludes, the two offenses constitute one offense because the time periods for the offenses overlap and the offenses involved the same victim and furthered a single criminal objective.

¶32 Doemer bases his factual contention on the "offense summary" set forth in the presentence report in Cause No. CR-2004-0653. The problem with Doemer's argument is that the presentence report does not clearly and unequivocally show that

the two offenses to which Doemer pled guilty in Cause No. CR-2004-0653 must be viewed as occurring on the "same occasion." The report indicates that there were two separate victims who made separate credit card applications at a business where defendant was employed. One victim thereafter discovered that someone (later determined to be Doemer) had used his personal information to obtain a credit card and charged over $20,000 worth of goods and services between February 25 and March 20, 2000. In what appears to be a separate transaction, the bank account of the other victim revealed a credit card check made payable to "Russell Doemer" on February 28, 2000, in the amount of $3,150, and endorsed by Doemer. Absent additional information regarding the actual factual basis for Doemer's guilty pleas, it is entirely possible that the two convictions were based on separate offenses involving separate victims on separate occasions.

¶33 "[T]o qualify as 'fundamental error' . . . the error must be clear [and] egregious[.]" *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). On this record, we cannot conclude that Doemer has met his burden of establishing the trial court erred in using his two convictions in Cause No. CR-2004-0653 as separate convictions for sentence enhancement purposes under A.R.S. § 13-703. *See State v. Shulark*, 162 Ariz. 482, 485, 784 P.2d 688, 671 (1989) (holding two forgeries

committed on same day were not committed on "same occasion" when there were two separate victims).

IV.

¶34 For the foregoing reasons, we affirm the convictions and sentences imposed in Cause No. CR-2007-1700 and the revocation of probation and sentence imposed in Cause No. CR-2004-0653.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICIA K. NORRIS,
Presiding Judge

_/s/_____
DONN KESSLER, Judge