DIVISION ONE
FILED: 02/01/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0355
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JAMES IRVIN MASON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-166312-001-SE

The Honorable Connie Contes, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

James Irvin Mason — San Luis
Appellant

S W A N N, Judge

¶1 After a first trial ended with a hung jury, James Irvin Mason ("Appellant") was convicted by a jury on four counts of theft by misrepresentation, A.R.S. § 13-1802(A)(3).[1] He appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Appellant's appellate counsel, having searched the record on appeal, finds no arguable non-frivolous question of law. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to review the record independently for fundamental error, and Appellant has filed a supplemental brief. We have reviewed the record and considered the issues Appellant raises in his brief, and find no fundamental error. Accordingly, we affirm.

FACTS[2] *AND PROCEDURAL HISTORY*

¶2 In August 2004 Appellant was the superintendent of a group of charter schools. He obtained materials to build a storage facility at one school from Agate Steel in August 2004.

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[1] The charges were: count 1, theft, a Class 5 felony; count 2, theft, a Class 3 felony; count 3, theft, a Class 3 felony; and count 4, theft, a Class 3 felony.

[2] On appeal, we view the facts in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

He gave Agate Steel a check for $7,092 that was returned. The account the check was written on had been closed by the bank in January 2004 after being more than $3,000 overdrawn, and a notice to that effect had been mailed to Appellant. Despite that, Appellant testified he was unaware the account was closed when he wrote the check. When Appellant was contacted by Agate Steel he promised to honor the debt, and by November 2005 had paid a total of $1,900. Shortly before his second trial was to commence, he paid an additional $3,250, leaving an outstanding balance of $1,942 at the time of trial.

¶3 When the charter school closed, Appellant went back into construction, doing business as Builders Alliance with his partner Milt Hulet, who had a contractor's license. In 2006 Appellant contracted with Mesa Insulation Specialists to supply insulation for a Prescott house that Builders Alliance was completing. In May 2006 Appellant paid Mesa Insulation Specialists for their work with a check for $1,839 that was returned for insufficient funds. The checking account was overdrawn at that time and Appellant was aware checks were bouncing on this account. After several attempts to collect the amount owed, Mesa Insulation Specialists turned the matter over to the Maricopa County bad-check program. Appellant testified he intended to pay Mesa Insulation Specialists when he wrote the check, but that there was not enough money in the account

because Appellant had not been paid for other projects. However, Appellant had been paid for the work on the Prescott house. Appellant paid his debt to Mesa Insulation Specialists shortly before his second trial.

¶4 Builders Alliance worked on several projects for Karl Conover from 2005 to 2006. While working on such a project, Appellant purchased plans for several homes from Scott's Designs and wrote a check for slightly over $5,000 that was returned for nonsufficient funds. The checking account was overdrawn at that time and Appellant was aware checks were bouncing on this account. Appellant claimed he submitted an invoice for Scott's Designs to Conover, but Conover paid only a portion of the bill.

¶5 On July 28, 2006, Appellant purchased a color copier from Sims Business Systems with a check for $7,000 that was returned for insufficient funds. The check was written on an account established to train adult Boy Scout leaders, which account never had more than a few hundred dollars in it. After receiving notice of the dishonor on August 31, 2006, Appellant called the owner of the copier company, saying he could not pay for the copier and that the copier company could come get it.

¶6 Appellant was indicted for three counts of Class 3 felony theft and one count of Class 5 felony theft. The state filed an Allegation Pursuant to A.R.S. § 13-702.02 (2004), claiming the offenses charged in the indictment were multiple

offenses not committed on the same occasion. Appellant's first trial ended in a mistrial when the jurors could not agree on a verdict.

¶7 At his second trial, Appellant testified he never intended to defraud anyone by obtaining services and materials without paying. Appellant argued that his inability to honor the checks was caused by Conover not paying Appellant. However, Conover testified that he had given Appellant money in advance, only to later discover the money had never been paid to the subcontractor or vendor who was supposed to receive it. Conover testified he ceased paying subcontractors through Appellant and instead began to pay them directly, in order to get them back to work on his projects. Conover further testified that as a result he had to pay twice for some of the work, because Appellant had diverted the first payment.

¶8 The jury convicted Appellant of all counts. He was sentenced to five years' probation on count 3, to begin upon his absolute discharge from prison; a mitigated sentence of one year on count 1; and mitigated sentences of four-and-a-half years each for counts 2 and 4. The prison sentences were ordered to be served concurrently and Appellant was given 62 days presentence incarceration credit. Appellant timely appeals.

¶9 This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(1).

DISCUSSION

¶10 Appellant argues three issues: that the trial court erred in denying his motion for judgment of acquittal, that the court should have instructed the jury on what Appellant argues is the lesser included offense of issuing a bad check, and that the prosecutor committed misconduct by misstating the law in his closing statement. Because none of these issues were raised below, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Because we find no error (much less fundamental error) regarding these issues and no fundamental error in the record on appeal, we affirm.

I. THE TRIAL COURT DID NOT ERR IN DENYING THE RULE 20 MOTION.

¶11 When reviewing a denial of a motion for judgment of acquittal pursuant to Ariz. R. Crim. P. 20, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction. Substantial evidence . . . is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005) (citations and internal quotation marks omitted).

¶12 Appellant argues that the state presented insufficient evidence that Appellant had the necessary *mens rea* for the offenses. The offenses Appellant was convicted of require the Appellant "knowingly . . . [o]btain[ed] 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)(3). However,

> [T]he issuer's knowledge of insufficient funds may be presumed if either:
>
> 1. The issuer had no account or a closed account with the bank or other drawee at the time the issuer issued the check.
>
> 2. Payment was refused by the bank or other drawee for lack of funds on presentation within thirty days after issue and the issuer failed to pay the holder in full the amount due on the check, together with reasonable costs, within twelve days after receiving notice of that refusal.

A.R.S. § 13-1808(A). Appellant admitted the facts that support this presumption for every count. Furthermore,

> If a person obtained property or secured performance of services by issuing or passing a check when the issuer did not have sufficient funds . . . the person's intent to deprive the owner of property or to avoid payment for service under § 13-1802 may be presumed if either:
>
> 1. The issuer had no account or a closed account with the bank or other drawee at the time the issuer issued the check.
>
> 2. Payment was refused by the bank or other drawee for lack of funds on presentation within thirty days after issue and the issuer failed to pay the holder in full the amount due on the

> check, together with reasonable costs, within twelve days after receiving notice of that refusal.

A.R.S. § 13-1808(B). Appellant conceded the facts that support this presumption for every count as well. A reasonable jury could therefore find that the state had met its burden to establish Appellant's *mens rea* beyond a reasonable doubt.

II. ISSUING A BAD CHECK IS NOT A LESSER INCLUDED OFFENSE.

¶13 Appellant argues that "although the charging document did not describe the lesser offense of issuing a bad check[3] . . . it is impossible to commit the greater offense[4] without committing the lesser offense." "To constitute a lesser-included offense, the offense must be composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Cheramie*, 218 Ariz. 447, 448-49, ¶ 9, 189 P.3d 374, 375-76 (2008) (citations and internal quotation marks omitted).

¶14 Checks are not mentioned in the text of A.R.S. § 13-1802(A)(3), the offense Appellant was convicted of, and it is possible to commit that offense without using a check. *State v. Brokaw*, 134 Ariz. 532, 533, 658 P.2d 185, 186 (App. 1982)

[3] A.R.S. § 13-1807(A).

[4] The theft by misrepresentation charged here, A.R.S. § 13-1802(A)(3).

(upholding conviction under § 13-1802(A)(3) of a man who obtained limousine services by "falsely claiming that he was the head of security for . . . Fleetwood Mac"). Therefore Appellant's argument has no merit.

III. THE PROSECUTOR DID NOT MISSTATE THE LAW.

¶15 Appellant argues that the prosecutor misstated the elements of theft by misrepresentation in his closing arguments. "It is improper to misstate the law in argument but not necessarily prejudicial." *State v. Daymus*, 90 Ariz. 294, 303-04, 367 P.2d 647, 653 (1962). And because no objection to the complained-of prosecutorial misconduct was made at trial, we review only for fundamental error. *State v. Dann*, 220 Ariz. 351, 373, ¶ 125, 207 P.3d 604, 626 (2009). However, we find no error in the prosecutor's statement of the law.

¶16 "A person commits theft if, without lawful authority, the person knowingly . . . [o]btains 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)(3). "When resolving questions of statutory interpretation, we first consider the language of the statute, which provides the best and most reliable index of a statute's meaning." *State v. Thomas*, 219 Ariz. 127, 129, ¶ 6, 194 P.3d 394, 396 (2008) (citations and internal quotation marks omitted).

¶17 In closing, the prosecutor argued that one element of the offense was satisfied if the jury concluded that Appellant "knew that what he was representing to these people was false, and not that he intended necessarily to defraud them." The prosecutor further explained "[t]he part of the offense that is intentional . . . is that you take the property from someone else." These statements accurately summarize the law in this case. Also, the prosecutor properly advised the jury to refer to the jury instructions, pointing out that "they define every little term in there," and Appellant does not argue that the jury instructions were incorrect.

IV. OTHER ISSUES

¶18 The record reflects Appellant received a fair trial. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Appellant was represented at all stages of the proceedings. The court properly instructed the jury on the elements of the charged offenses. Further, the court properly instructed the jury on the state's burden of proof. The court received and considered a presentence report and imposed a legal sentence. Appellant's sentences were properly reduced to credit presentence incarceration.

CONCLUSION

¶19 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881.

Accordingly, we affirm Appellant's convictions and sentences. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Appellant of the status of this appeal and his future options. *Id.* at 584-85, 684 P.2d at 156-67. Appellant has 30 days from the date of this decision to file a petition for review *in propria persona.* *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Appellant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge