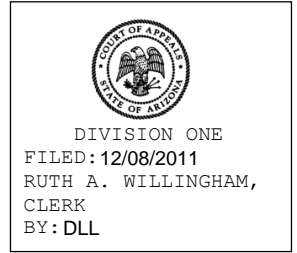


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) No. 1 CA-CR 10-0778  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
TAMMERA RENE THOMPSON, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  

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Appeal from the Superior Court in Navajo County

Cause Nos. SO900CR20090204  
SO900CR20090582

The Honorable Carolyn C. Holliday, Judge

**AFFIRMED**

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**J O H N S E N**, Judge

¶1 Tamera Renea Thompson appeals from her conviction of one count of fraudulent schemes and artifices, a Class 2 felony. We affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 Evidence at trial showed that someone took personal checks from the purse of a podiatry assistant without her authorization.<sup>1</sup> Thompson presented for payment one of the missing checks, which was made out to her in the amount of \$275. Thompson testified she received the check from Audrey Creamer, whom she had known for eight years. She said Creamer told her that she had received the check from a lady for whom she had done some work. Creamer told Thompson that she had asked the lady "to leave the . . . pay to the order of blank so [Creamer] could get it cashed because [Creamer's] bank account was overdrawn and [Creamer] was afraid that the bank would take her money" if Creamer tried to cash it herself. Thompson agreed to cash the check for Creamer. They met in the parking lot of a bank, where Creamer gave her the check. Thompson then took the check directly into the bank to cash it.

¶3 Thompson maintained she did not read the check and only "glanced" at it to make sure that her name was spelled

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<sup>1</sup> Upon review, we view the facts in the light most favorable to sustaining the verdict and resolve all inferences against Thompson. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

correctly. After she cashed the check, she went straight to the parking lot, where she handed the cash to Creamer, accepting Creamer's offer to keep \$25 of the proceeds "for [her] troubles." On cross-examination, Thompson was shown the check, which bore the note, "catering," and testified she knew Creamer did not have a catering license and was not in the catering business. A forensic document examiner testified that all the writing on the front of the check belonged to Creamer. Thompson testified she did not know that the check was stolen or that Creamer had forged it.

¶14 The jury acquitted Thompson of forgery but convicted her of fraudulent schemes and artifices. After finding Thompson had one historical prior felony conviction, the court sentenced her to a mitigated term of 4.5 years in prison. Thompson timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033 (2011).<sup>2</sup>

## DISCUSSION

### A. Failure to Disclose Bank/Victim.

¶15 The United States and Arizona Constitutions guarantee a criminal defendant notice of the charges against her. U.S.

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<sup>2</sup> Absent material revisions after the date of an alleged offense, we cite a statute's current version.

Const. amend. VI.; Ariz. Const. art. 2, §§ 4, 24. Arizona Rule of Criminal Procedure 13.2(a) provides that an indictment must contain a "plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged." There is no requirement, however, that a "defendant receive notice of how the State will prove his responsibility for the alleged offense." *State v. Arnett*, 158 Ariz. 15, 18, 760 P.2d 1064, 1067 (1988).

¶16 Thompson argues her constitutional rights were violated when the prosecution argued at trial that the bank that cashed the forged check was the victim of the fraudulent schemes and artifices charge against her. She argues that prior to trial, the State's theory was that the woman whose checks were stolen was the victim. Thompson explains that the indictment against her also contained fraud charges against Billy Riojas, who was alleged to have taken the checks from the woman's purse. Thompson argues she inferred that the theory of the charge against her was that she had harmed the woman, not the bank that cashed the forged check.

¶17 Under these circumstances, when the State does not formally amend the indictment, we determine whether an amendment "deemed . . . to conform to the evidence" would have been appropriate. See *State v. Phelps*, 125 Ariz. 114, 119, 608 P.2d 51, 56 (App. 1979). We review a decision to amend an indictment

for abuse of discretion. *State v. Sammons*, 156 Ariz. 51, 54-55, 749 P.2d 1372, 1375-76 (1988).

¶18 For Sixth Amendment purposes, we look beyond the four corners of an indictment to determine if the defendant received actual notice of the charges. *Phelps*, 125 Ariz. at 119, 608 P.2d at 56. Under this analysis, Thompson cannot show she was prejudiced by the purported shift in the prosecution's case against her.

¶19 Although the crime of fraudulent schemes and artifices under A.R.S. § 13-2310 (2011) may involve a victim, the identity of the victim is not an element of the crime. See, e.g., *State v. Tschilar*, 200 Ariz. 427, 435, ¶ 34, 27 P.3d 331, 339 (App. 2001). For that reason, the prosecution's decision to identify new or different victims does not necessarily deprive a defendant of notice of the charge. See *State v. Schneider*, 148 Ariz. 441, 445-46, 715 P.2d 297, 301-02 (App. 1985) (evidence of additional victims did not deprive defendant of notice; single scheme to defraud may include numerous acts committed in furtherance of that act); *State v. Ponds*, 4 Ariz. App. 326, 326-27, 420 P.2d 193, 193-94 (1966) (no change in offense when defendant presented forged check to manager who then presented it to assistant manager and charge was amended to substitute name of manager for assistant manager).

¶10 The State's theory of the fraud charge against Thompson always involved her presentment of the stolen and forged check to the bank in order to obtain the \$275. She was charged with forgery for possessing a check she knew was "falsely made, completed or altered," and with fraudulent schemes for presenting the forged check to the bank to obtain money she was not owed.<sup>3</sup>

¶11 As noted, Thompson testified she had agreed to let Creamer write Thompson's name as the payee on the check after Creamer said she did not think the bank would cash the check if it were made out to Creamer. It was only after that testimony that the State argued that even assuming Thompson did not see anything but her name on the check, her admission that she let Creamer put her name on the check for the purpose of perpetrating a fraud on the bank made her guilty just the same.

¶12 Thompson cannot show she was prejudiced because the nature of the crime with which she was charged did not change. The State charged she knowingly participated in a fraudulent scheme by passing a check she knew contained false information or representations to a bank on a specific date to obtain \$275. Whether the bank or the owner of the check ultimately suffered

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<sup>3</sup> As Thompson acknowledges, that the jury acquitted her of forgery does not affect the validity of its guilty verdict on fraudulent schemes. A jury's verdicts need not be consistent. *State v. DiGiulio*, 172 Ariz. 156, 162, 835 P.2d 488, 494 (App. 1992).

the loss did not alter the nature of the transaction or the crime. See generally *Phelps*, 125 Ariz. at 119, 608 P.2d at 56.

¶13 Thompson's reliance on *State v. Martin*, 139 Ariz. 466, 679 P.2d 489 (1984), is misplaced. The defendant in that case was charged with conspiring with a co-defendant; it was only at the close of trial that the State argued the defendant could be liable either for helping his co-defendant sell drugs or for selling the drugs himself to the co-defendant. *Id.* at 470-71, 679 P.2d at 493-94. The supreme court reversed, concluding the last-minute change in theory allowed the jury to find the defendant guilty based on a transaction with which he had not been charged. *Id.* at 472, 679 P.2d at 495.

¶14 That is not the situation here. Thompson was charged with committing a fraudulent act by passing a check that she knew contained false information or misrepresentations in order to obtain a benefit. The elements of that charge did not change according to whether the alleged victim was owner of the check or the bank. All that appears to have changed was that the State argued an additional theory concerning how Thompson knowingly participated in the fraud. The State's argument was supported by Thompson's testimony and was proper rebuttal of her argument she did not knowingly commit a fraudulent act because she did not know the check Creamer gave her was forged. See *State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App.

1993) ("prosecutorial comments which are fair rebuttal to comments made initially by the defense are acceptable").<sup>4</sup>

**B. Denial of Rule 20 Motion.**

¶15 Thompson also argues the superior court abused its discretion when it denied her motion for acquittal. We review the denial of a motion for a judgment of acquittal for abuse of discretion and will reverse "only if no substantial evidence supports the conviction." *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003).

¶16 The statute under which Thompson was convicted provides that "[a]ny person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions," is guilty of the crime of fraudulent schemes. A.R.S. § 13-2310(A). To prove the offense, the State needed to prove (1) a scheme or artifice to defraud, (2) that Thompson knowingly and intentionally participated in it and (3) that it was a scheme for obtaining money "by means of false or fraudulent pretenses, representations or promises." *State v.*

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<sup>4</sup> In the statement of facts section of Thompson's opening brief, she states if had she known that the bank was a "victim," she would have stricken two prospective jurors with ties to the bank. Because she fails to argue or develop this argument in her brief, we consider it waived. See *State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001).



*Haas*, 138 Ariz. 413, 419, 675 P.2d 673, 679 (1983) (quotations omitted).

¶17 There is more than sufficient evidence to sustain the jury's verdict. Thompson admitted she cashed the check, and the jury heard evidence the check was forged. Thompson argued she did not know that the check was forged and therefore did not knowingly participate in a fraudulent scheme by agreeing to cash it. The jury, however, was free to disbelieve Thompson's assertions that she did not look at the check long enough to realize there was something "fishy" about the fact that Creamer was being paid for "catering," a profession in which she never engaged, or to notice that all of the writing on the front of the check, including the podiatry assistant's signature and her own name, looked the same.

¶18 The credibility of witnesses and the weight and value to be given to their testimony "are questions exclusively for the jury." *State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974). There was more than sufficient evidence to support a finding that Thompson committed fraudulent schemes and artifices. Accordingly, the superior court did not abuse its discretion by denying her motion for acquittal.

**C. Evidence of Riojas's Conviction.**

¶19 Thompson next argues the superior court erred by admitting evidence that Riojas had been convicted of attempted

fraudulent schemes and artifices. She maintains that the evidence was not relevant to the charges against her and that she was prejudiced by the evidence.

¶20 We review a court's ruling on the admissibility of evidence for abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 29, 97 P.3d 865, 874 (2004). We will not overturn a judgment on this basis absent prejudice. *State v. Fischer*, 219 Ariz. 408, 416, ¶ 24, 199 P.3d 663, 671 (App. 2008). Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401.

¶21 Thompson objects that the court took judicial notice, over her objection, to the fact that Riojas was convicted of attempted fraudulent schemes and artifices. We agree with the State that evidence of Riojas's conviction was relevant and that Thompson suffered no prejudice from its admission in evidence.<sup>5</sup>

¶22 One of Thompson's principal means of undermining the State's case was to suggest the police insufficiently investigated Riojas's involvement in the theft of the checks.

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<sup>5</sup> Thompson also argues the superior court failed to do the balancing required by Arizona Rules of Evidence 401 and 403 to determine whether the evidence would prejudice her. The record does not support this argument. In ruling on the issue, the superior court specifically stated that it did not see the evidence as "a harm" to Thompson's case.

She also sought to contrast Riojas's behavior with her own. The jury heard evidence that on a different day, like Thompson, Riojas had presented his Arizona driver's license and placed his thumbprint on another stolen check while attempting to cash it at the same bank, but he left the bank quickly without the cash, leaving the check and his driver's license behind.<sup>6</sup> Thompson argued that the fact that *she* did not run from the bank but calmly presented her driver's license, gave her thumbprint and faced the bank's surveillance cameras was proof she lacked the requisite culpable mental state.

¶123 Evidence of Riojas's conviction was relevant to the State's rebuttal of Thompson's assertions concerning the lack of a proper investigation by police of Riojas's involvement, and, by implication, of the State's case against Thompson. Moreover, rather than prejudice her case, the evidence allowed her to argue her lack of culpable intent by contrasting her actions with his.

¶124 We do not accept Thompson's argument that the evidence of Riojas's conviction permitted the jury to find, without any other evidence, that she was involved in a scheme with Riojas. First, the State did not argue that she schemed with Riojas. Second, if anything, it was Thompson who created an inference of

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<sup>6</sup> In fact, Thompson stipulated to the admission of copies of the check and the driver's license Riojas had left behind.

a possible connection between herself and Riojas when she testified she saw him with Creamer in the parking lot.

¶25 In sum, our review of the record persuades us that the superior court did not abuse its discretion in taking judicial notice of Riojas's conviction. See *Aguilar*, 209 Ariz. at 49, ¶ 29, 97 P.3d at 874.

#### CONCLUSION

¶26 For the foregoing reasons, we affirm Thompson's conviction and the resulting sentence.

/s/  
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/  
PATRICIA A. OROZCO, Judge

/s/  
LAWRENCE F. WINTHROP, Judge