IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee/Cross-Appellant,

v.

OTIS L. GRIFFIN,
Appellant/Cross-Appellee.

No. 2 CA-CR 2019-0264
Filed March 2, 2021

Appeal from the Superior Court in Pima County
No. CR20182023001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

COUNSEL

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OPINION

Judge Brearcliffe authored the opinion of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Otis Griffin appeals from his conviction following a jury trial for fraudulent scheme and artifice. The trial court imposed a six-year term of imprisonment. On appeal, Griffin contends the court erred in denying his motion to dismiss because the offense of fraudulent scheme and artifice was not intended to apply to sex offender registration. The state cross appeals as to the court's determination that one of Griffin's prior felony convictions was not an historical prior felony conviction for sentencing purposes. We affirm in part, vacate in part, and remand.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the conviction. *State v. Tucker*, 231 Ariz. 125, ¶ 2 (App. 2012). Otis Griffin is a convicted sex offender who is required to register as such wherever he resides. In Pima County, convicted sex offenders register by, in part, providing their address or, if homeless or transient, identifying where they reside, and a "sex offender registration and tracking" detective then does a compliance check to verify that the registrant is living at the registered address. After the compliance check, the detective sends out a public notification to the nearest two hundred residences or businesses that surround the registered address. The public notification consists of a flyer containing a photo, the registrant's name, address, phone number, and a brief description of his conviction.

¶3 Griffin was first required to register in 2011 and has since done so a number of times. Each time Griffin registered, he had to sign a page of the registration form acknowledging a number of obligations, including to inform the sheriff's department within seventy-two hours of moving and if he becomes homeless or transient, he must register every

ninety days.[1] The acknowledgment states that "if I do not have an address or permanent place of residence (homeless), I must register my physical location (i.e., crossroads) every 90 days with the Sheriff in whose jurisdiction I am physically present." Several of Griffin's past registered addresses were residences as to which sex offender notices were sent to his neighbors. On November 16, 2017, Griffin registered as homeless and identified his "physical location" as the Tucson cross-streets of Grant Road and Alvernon Way.

¶4 On April 16, 2018, a number of deputies with the Pima County Sherriff's Department responded to an apartment complex on West Ina Road ("the Ina Complex") about an unwanted person, Griffin, residing at K.M.'s apartment. Griffin told the deputies that he had been living in the apartment "off and on for a while," including for the immediately preceding two weeks, and he had provided money and food, and had done household chores in exchange for lodging. He said that he kept his belongings in the apartment and slept there. Griffin told the deputies that he had gone for a walk earlier and, when he came back, he was locked out of the apartment. The deputies eventually told K.M. that, given his arrangement with Griffin, they could not make Griffin leave the apartment and that K.M. would have to evict him.

¶5 After the deputies left the apartment, one of them ran a "wants-and-warrants check" on Griffin, which came back showing him to be a registered sex offender. The deputies returned to speak to Griffin, and Griffin said he had lived at K.M.'s apartment for about two weeks and he had not yet updated his sex offender registration information. The deputy reminded him that he needed to update his address. On April 26, 2018, more than five months after he had last registered, Griffin registered as homeless at the Tucson cross-streets of La Cañada Drive and Orange Grove Road, and again acknowledged his obligation to register with his physical location.

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[1]During oral argument Griffin's counsel claimed that the registration form states that it is a misdemeanor to provide false information on the form. However, the form states it is a class six felony, not for failing to accurately register as a sex offender, but rather for falsely filling out a government form generally: "Arizona Revised Statutes define the making of false entries on a public record as a class 6 felony. Anyone who provides false information on this form could be subject to prosecution."

¶6 On May 9, 2018, S.R., a resident of the Ina Complex called the police about a disagreement with Griffin. S.R. reported that during the first week of May she had seen Griffin around when he was at K.M.'s apartment. Deputy Gill responded to S.R.'s call and, before talking with Griffin, did a warrants check on him, which still showed Griffin to be a registered sex offender. Gill talked with Griffin in K.M.'s apartment. Griffin was the only person in the apartment, and Gill asked if he lived there. Griffin responded that the living room was his "room" and he had been sleeping and showering in the apartment for about a month. Griffin later told Gill that he had been to La Cañada and Orange Grove—his registered "address"—but that he spent most of his time at the apartment, including sleeping there. The Ina Complex is more than two and a half miles from the La Cañada and Orange Grove intersection and, as a result, is beyond the reach of any flyers sent to area residents based on Griffin's registration.

¶7 Griffin was charged with fraudulent scheme and artifice pursuant to A.R.S. § 13-2310(A) and failure to register as a sex offender. Before trial, Griffin moved to dismiss the fraudulent scheme and artifice charge, claiming that § 13-2310(A) is unconstitutionally vague and it was not the legislature's intent for it to apply to sex offender registration. Specifically, Griffin claimed that the terms "scheme," "artifice," and "benefit" are not sufficiently definite. The state opposed the motion, and the trial court ruled that "the statute is not unconstitutionally vague, nor is it overly broad." It further found that "the benefit that Mr. Griffin received, if, in fact, this occurred, was the fact that he didn't have to notify folks in the apartment complex of his conviction."

¶8 A jury found Griffin guilty of fraudulent scheme and artifice and not guilty of failure to register as a sex offender. Griffin then filed a motion for new trial, again claiming that § 13-2310 was "improperly applied," and the state presented insufficient evidence to sustain the conviction. Griffin claimed that he received no statutory "benefit" from the false registration. The trial court denied the motion.

¶9 At sentencing, the state offered evidence of Griffin's felony conviction in 2008 for an offense committed in 2007 as an historical prior felony conviction for sentencing enhancement purposes. Griffin objected to the use of that conviction as an enhancement because the resulting sentence had been served more than five years before his conviction here, and was thus ineligible for enhancement consideration. The state argued that, in light of his incarceration for other offenses thereafter, and the exclusion of such periods of incarceration from the time calculation, the 2008 conviction could serve as an historical prior felony conviction

enhancement. The trial court, however, determined that, because a 2016 conviction, for which Griffin had been imprisoned following the 2008 conviction, had been since vacated, the period of imprisonment would not be excluded, and thus the 2008 conviction was ineligible for enhancement consideration.

¶10 Griffin timely appealed his conviction and sentence, and the state cross-appealed the trial court's sentencing determination. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4032, and 13-4033(A).

Analysis

Fraudulent Scheme or Artifice

¶11 Griffin argues on appeal, as he did below, that the application of § 13-2310 to sex offender registration offenses is contrary to legislative intent.[2] He further argues that, even were we to hold that § 13-2310 applies to sex offender registration offenses, he never received a "benefit" as a result of his failure to update his registration and did not "use[] false or fraudulent pretenses" and thus there was insufficient evidence to convict him under § 13-2310.

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[2] Griffin does not expressly raise on appeal that § 13-2310(A) is unconstitutionally vague as he did below. In his opening brief, Griffin merely recounts that he made the argument below, but does not again provide any citations to case law or statutory authority. Thus, the state claims that Griffin waived the vagueness argument. In his reply brief, Griffin claims that the argument is not waived because he "explicitly stated that the arguments in his Opening Brief were to be read in light of that dismissal; therefore, the issues have not been waived." We do not agree. When, as here, an appellant does not cite to any authority and merely refers to a pleading or paper below, it is not sufficient to preserve the argument on appeal. Thus, Griffin has waived any claim regarding the vagueness of § 13-2310(A). *See State v. Hardy*, 230 Ariz. 281, n.3 (2012) (court limits review to arguments supported by authority); *see also* Ariz. R. Crim. P. 31.10(a)(7)(A) (requiring opening brief to include "appellant's contentions with supporting reasons for each contention" and "citations of legal authorities").

Application of § 13-2310

¶12 We review questions of statutory interpretation *de novo*. *State v. Henry*, 205 Ariz. 229, ¶ 13 (App. 2003). In construing a statute, our goal is to give effect to the legislature's intent. *Id.* ¶ 14. A legislature expresses its intent through the words used in the statute; consequently, we look to the statutory words used and give them their plain and ordinary meaning. *State v. Bon*, 236 Ariz. 249, ¶ 6 (App. 2014). We do not engage in other methods of statutory interpretation, such as examining legislative history or statutory context, unless we find the statutory language vague. *Id.*; *Meyer v. State*, 246 Ariz. 188, ¶ 6 (App. 2019).

¶13 Section 13-2310(A) 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 a class 2 felony." Notably, the text of § 13-2310 does not limit its application to specific circumstances, and we have, accordingly, adopted a broad view of the statute. *State v. Haas*, 138 Ariz. 413, 423 (1983). Our supreme court, in interpreting § 13-2310, explained that the "statute proscribes conduct lacking in 'fundamental honesty [and] fair play . . . in the general and business life of members of society'" and thus the "definition of 'fraud' must be broad enough to cover all of the varieties made possible by boundless human ingenuity." *Id.* at 424 (alterations in *Haas*) (quoting *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967)). And, further, that the terms "a scheme or artifice," cover "some 'plan, device, or trick' to perpetrate a fraud." *Id.* at 423 (quoting *State v. Stewart*, 118 Ariz. 281, 283 (App. 1978)).

¶14 "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.'" *Id.* at 418 (emphasis omitted) (quoting *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978)). Accordingly, an individual's failure to properly register as a sex offender by purposefully providing a false address may constitute a scheme or artifice to defraud if done with the intention to "deceive persons of ordinary prudence." *See id.* at 423 (defendant guilty under § 13-2310 when he knowingly led adverse party to believe state of facts which is not true). And an accused's intent to defraud, like any state of mind, may be inferred from other evidence. *State v. Lester*, 11 Ariz. App. 408, 410 (1970). As to what constitutes a "benefit," such includes "'anything of value or advantage,' not merely pecuniary gain." *See Henry*, 205 Ariz. 229, ¶ 15 (quoting A.R.S. § 13-105(3) (holding sexual gratification qualifies as benefit for purposes of § 13-2310)). Here, when

Griffin avoided providing notice to his neighbors of his sex-offender status and to law enforcement of his location, he evaded the burdens of sex offender registration and thereby secured a benefit or advantage not enjoyed by other sex offender registrants.

¶15 Griffin finally claims that the "legislative history clearly demonstrates that the legislature never intended for [§ 13-2310] to be applied to sex offender registration cases" because it "could have placed it with the sex offender registration offenses" and it could have amended the statute to apply to sex offender registration offenses. We need not, however, examine the legislative history or look to the overall statutory scheme given the plain and ordinary meaning of the statutory language. Because the language of § 13-2310 does not limit the acts that may constitute a fraudulent scheme or artifice, and given the breadth of the definition of any motivating or resulting statutory benefit, we conclude that Griffin was properly charged under § 13-2310.

Sufficient Evidence

¶16 As to his final argument, we review *de novo* whether substantial evidence supports Griffin's conviction. *State v. Watson*, 248 Ariz. 208, ¶ 11 (App. 2020). "When considering claims of insufficient evidence, 'we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.'" *State v. Fimbres*, 222 Ariz. 293, ¶ 4 (App. 2009) (quoting *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005)). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Watson*, 248 Ariz. 208, ¶ 11 (quoting *State v. West*, 226 Ariz. 559, ¶ 16 (2011)). We consider both direct and circumstantial evidence. *West*, 226 Ariz. 559, ¶ 16.

¶17 To support a conviction for fraudulent scheme and artifice, the state must prove that (1) pursuant to a scheme or artifice to defraud, (2) Griffin knowingly obtained any benefit, (3) by means of false or fraudulent pretenses, representations, promises, or material omissions. *See* § 13-2310(A). Griffin claims that the state failed to present sufficient evidence to prove any of the elements of § 13-2310.

¶18 As related above, the state presented evidence that Griffin had been living in K.M.'s apartment during the months of April and May 2018. During that time, on April 26, 2018, Griffin registered as homeless, living elsewhere. S.R. testified that she had seen Griffin in K.M.'s apartment

during the first week of May. On May 9, 2018, Griffin told Deputy Gill that the living room was his "room" and that he had been sleeping and showering in the apartment for about a month. This evidence is sufficient for a jury to reasonably conclude that Griffin made fraudulent misrepresentations in his registration as to where he lived, utilizing a scheme or artifice to defraud.

¶19 Witnesses testified that the consequence of Griffin not properly registering where he lived is that the nearby residents would not be informed of his status as a convicted sex offender. Testimony also showed that the numerous other times that Griffin had registered, flyers were distributed to his neighbors. On this evidence, a jury could infer beyond a reasonable doubt that Griffin had obtained a statutory benefit from his fraud—the advantages being that he would be able to evade law enforcement and that his neighbors would not be informed of his status as a convicted sex offender. *See State v. Trujillo*, 248 Ariz. 473, ¶ 46 (2020) (recognizing "public dissemination of an offender's information may have a negative impact on where the offender lives and works, and that the community notification and internet registry provisions increase the number of people who have access to this information"), *cert. denied*, No. 20-6112, 2020 WL 6829145 (U.S. Nov. 23, 2020); *Ariz. Dep't of Pub. Safety v. Superior Court*, 190 Ariz. 490, 495 (App. 1997) (sex offender registration is means of protecting communities).

¶20 Despite that evidence, Griffin argues the state did not show that he obtained any such benefit because "[a] person of ordinary prudence or comprehension would still have been able to determine that [he] was a convicted sex offender, regardless of where he was registered as living near." He claims that the residents of the apartment complex would have been able to conduct a "cursory Google search" of his name or to visit the Arizona Department of Public Safety's "Sex Offender Search" site, enter his name, and learn that he is a convicted sex offender. Griffin's assertion presupposes that those living near him would have both suspicion and sufficient information—such as his name—to conduct an effective search. Notwithstanding, a jury could reasonably find that Griffin derived a benefit by avoiding direct notice to his neighbors of his status and leaving discovery of his status to their initiative or chance. Accordingly, substantial evidence supports Griffin's conviction for fraudulent scheme and artifice.

Sentencing

¶21 The state claims in its cross-appeal that the trial court erred in finding that one of Griffin's prior felony convictions was not an historical

prior felony for purposes of sentence enhancement. A trial court's determination of whether a prior conviction constitutes an historical prior felony conviction for sentencing enhancement is a mixed question of fact and law, which we review *de novo*. *State v. Derello*, 199 Ariz. 435, ¶ 8 (App. 2001). The novel issue before us on appeal is whether time spent incarcerated for a later-vacated criminal conviction should be included in calculating whether an offense was committed within the required time period before the current offense.

¶22 For purposes of sentencing, the state presented evidence to the trial court that on June 11, 2007, Griffin had committed a class six felony in CR20072454 and was then convicted in 2008. Griffin was placed on probation, which was later revoked, after which he was sentenced to nine months in prison. He completed that sentence on December 31, 2008. It also presented evidence that, on February 25, 2016, in CR20151997, Griffin had been convicted of a felony offense and sentenced to 3.5 years' imprisonment. The conviction was later vacated and Griffin was released from prison on November 1, 2017, after having served 900 days of both pre- and post-sentence incarceration for that offense. Between the 2008 conviction and the 2016 conviction, Griffin was incarcerated for other offenses as well.[3]

¶23 A defendant's sentence for a new conviction may be enhanced if the state provides evidence of the defendant's prior felony conviction within the five years preceding the new conviction. *See* A.R.S. §§ 13-105(22)(c), 13-703. Such an earlier conviction is referred to as an "historical prior felony conviction." § 13-105(22). Under § 13-105(22)(c) an "historical prior felony" includes a class six felony "that was committed within the five years immediately preceding the date of the present offense." And that "[a]ny time . . . incarcerated is excluded in calculating if the offense was committed within the preceding five years." § 13-105(22)(c). The state argued below, and again now on appeal, that Griffin's 2008 felony conviction constituted an historical prior felony pursuant to § 13-105(22)(c) because, excluding the time Griffin spent incarcerated for other offenses—including the 2016 now-vacated

[3]The state presented evidence of one other prior felony, and Griffin does not dispute on appeal that it is an historical prior felony for sentencing purposes.

conviction—the crime resulting in the 2008 conviction was committed within five years of the current offense.

¶24 Griffin, however, claimed below and again on appeal that, because the 2016 conviction was vacated, the nine-hundred days served for that offense should be not be excluded in calculating whether the crime resulting in the 2008 conviction was within the preceding five years. The trial court determined that, because the 2016 conviction was vacated, Griffin's time incarcerated for that offense should not be excluded under § 13-105(22)(c). Having not excluded that time, the court determined that the 2008 conviction and sentence occurred more than five years before the instant offense, and therefore could not be considered for sentencing enhancement purposes. That is, by counting the period of time since the 2008 conviction and sentence without regard to his time spent incarcerated for the vacated 2016 conviction, the 2008 conviction offense fell outside of the five-year window for enhancement consideration.

¶25 As stated above, whether a period of incarceration served as a result of a conviction later vacated may be considered for purposes of sentencing enhancement under § 13-105(22)(c) is a novel question. Neither party has directed us to any binding authority on the point, other than the statute itself. In pertinent part, § 13-105(22)(c) states: "Any time spent on absconder status while on probation, on escape status or incarcerated is excluded in calculating if the offense was committed within the preceding five years." As noted above, "[o]ur primary purpose in interpreting a statute is to give effect to the legislature's intent." *State v. Hinden*, 224 Ariz. 508, ¶ 9 (App. 2010). We begin with the text of a statute, and only if the plain text of the statute is ambiguous do we resort to other methods of statutory interpretation to determine the legislature's intent. *Bon*, 236 Ariz. 249, ¶ 6. In that case, we may look to the "statute's subject matter, historical background, effects and consequences, and spirit and purpose." *Meyer*, 246 Ariz. 188, ¶ 6.

¶26 The state argues that the unambiguous language of the statute requires that the time incarcerated, even for a vacated conviction, be excluded. Griffin asserts that § 13-105(22)(c) is ambiguous, and relies on the "spirit and purpose" of the statute, directs us to the "rule of lenity," refers to unrelated, although proximate, statutory language, and cites cases

(discussed below) as close to the point as may be found. Nonetheless, we do not find the statutory language at issue ambiguous.[4]

¶27 Our supreme court has consistently held that a conviction that was later vacated is not itself an historical prior felony and is not to be used as such to increase a defendant's sentence in a later case. *See State v. Gomez*, 212 Ariz. 55, ¶ 15 (2006); *State v. Lindsey*, 149 Ariz. 472, 478 (1986); *State v. Lee*, 114 Ariz. 101, 106 (1976). In *Gomez*, the court interpreted A.R.S. § 13-901.01(B), which states that "[a]ny person who has been convicted of or an indicted for a violent crime" is ineligible for mandatory probation. 212 Ariz. 55, ¶¶ 12-15. It specifically explained that, for purposes of sentencing, the "has been convicted" in § 13-901.01(B) includes only existing convictions, not prior convictions that have been reversed or vacated. *Id.* ¶ 15.

¶28 Here, however, the phrase "any time . . . incarcerated" is not itself textually dependent upon a still-valid conviction. That is, § 13-105(22)(c) does not state "any time . . . incarcerated *as a result of a conviction*" or use similar language, requiring us to apply *Gomez* as to whether a vacated conviction remains a relevant statutory "conviction." Instead, the statute merely refers to the fact of incarceration. Whether or not he was wrongly convicted—whether found so due to actual innocence, procedural infirmity or, as here, substantive unconstitutionality of the statute—Griffin was, nonetheless, incarcerated. The fact of that incarceration is not changed by the later vacation of the conviction. While perhaps it ought to, the language used by the legislature in the statute does not admit any judgment of the justness of that incarceration. We, thus, plainly read "[a]ny time . . . incarcerated" in § 13-105(22)(c) to require exclusion of any time incarcerated, including time spent incarcerated as the result of a later-vacated conviction. Had the legislature intended anything else, it could have said so.

¶29 Thus, in applying § 13-105(22)(c) here, the trial court incorrectly failed to exclude the time Griffin spent incarcerated for the 2016 since-vacated conviction. It therefore ultimately erred in failing to consider

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[4]Although the "rule of lenity" requires a court to interpret penal statutes in favor of the defendant, it applies only where the statute is "susceptible to more than one interpretation." *State v. Pena*, 140 Ariz. 545, 550 (App. 1983).

Griffin's 2008 conviction as an historical prior felony conviction for sentencing enhancement purposes.

Disposition

¶30 For the foregoing reasons, we affirm Griffin's conviction, but vacate the sentence and remand the matter for resentencing consistent with this opinion.