

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JAMES JOHN GENTILE,
Appellant.

No. 2 CA-CR 2015-0223
Filed January 7, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20142660001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Robert A. Kerry, Tucson
Counsel for Appellant

STATE v. GENTILE
Decision of the Court

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 After a jury trial, James Gentile was convicted of fraudulent scheme and artifice, possession of drug paraphernalia, and aggravated identify theft. The trial court sentenced him to concurrent prison terms, the longest of which are 6.5 years.

¶2 Counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting he had reviewed the record but found no arguably meritorious issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, he provided “a detailed factual and procedural history of the case with citations to the record” and asked this court to search the record for error. Gentile did not file a pro se supplemental brief.

¶3 In our review, however, we identified an arguable issue of fundamental error and ordered the parties to file supplemental briefs addressing the sufficiency of the evidence supporting Gentile’s conviction of fraudulent scheme and artifice. *See State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005) (conviction based on insufficient evidence is fundamental error). Both Gentile and the state filed supplemental briefs. In its brief, the state conceded that the evidence was insufficient to support Gentile’s fraudulent scheme and artifice conviction.

¶4 We review de novo whether the evidence is sufficient to support the jury’s verdict. *State v. Burns*, 237 Ariz. 1, ¶ 72, 344 P.3d 303, 322 (2015). “‘Substantial evidence’ to support a conviction exists when ‘reasonable persons could accept [it] as adequate and

STATE v. GENTILE
Decision of the Court

sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, 344 P.3d at 322-23, quoting *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011) (alteration in *Burns*). We view the evidence in the light most favorable to sustaining the jury's verdicts. *Id.*, 344 P.3d at 322.

¶5 In June 2014, during a search of Gentile's car pursuant to a traffic stop, a police officer found scorched aluminum foil which Gentile admitted he used to smoke heroin. The officer also found identification, mail, a gift card, and checks bearing the names of four other individuals, all of which did not belong to Gentile and which he admitted he intended to deliver to an acquaintance for use in making false identification for cashing checks and making fraudulent car titles. This evidence is sufficient to support Gentile's convictions of possession of drug paraphernalia and aggravated identify theft. *See* A.R.S. §§ 13-2009(A)(1); 13-3415(A).

¶6 We agree with the parties, however, that the evidence presented at trial is insufficient to support Gentile's conviction for fraudulent scheme and artifice. To convict Gentile of that offense, the state was required to prove he or an accomplice "knowingly obtain[ed] any benefit by means of false or fraudulent pretenses, representations, promises or material omissions" "pursuant to a scheme or artifice to defraud." A.R.S. § 13-2310(A). The indictment named as victims of fraudulent scheme and artifice those individuals named in the items found in Gentile's car. As the state acknowledges, there is no evidence Gentile or an accomplice obtained those materials, or a benefit from the use of them, through the use of a fraudulent scheme. Accordingly, we must vacate Gentile's conviction and sentence for fraudulent scheme and artifice.

¶7 Gentile admitted having one historical prior felony conviction. His sentences for possession of drug paraphernalia and aggravated identity theft were lawfully imposed and within the statutory range. *See* A.R.S. §§ 13-703(B), (I); 13-2009(E); 13-3415(A). However, we correct the sentencing minute entry to reflect that Gentile was sentenced as a category two repetitive offender.

STATE v. GENTILE
Decision of the Court

¶8 We vacate Gentile's conviction and sentence for fraudulent scheme and artifice. We affirm his remaining convictions and sentences.