

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

EMMANUEL GASTELLUM MENDIVIL,
Appellant.

No. 2 CA-CR 2016-0273
Filed February 3, 2017

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NOT FOR PUBLICATION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. CR20153430001
The Honorable Kenneth Lee, Judge

AFFIRMED IN PART; VACATED IN PART, AND REMANDED

COUNSEL

Steven R. Sonenberg, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

H O W A R D, Presiding Judge:

¶1 Following a jury trial, appellant Emmanuel Mendivil was convicted of fraudulent scheme and artifice, theft, and four counts of forgery of a credit card. The trial court sentenced him to concurrent prison terms on three of the forgery counts, the longest of which was 4.5 years, and suspended the imposition of sentence on the remaining counts, ordering concurrent probation terms, the longest of which was seven years, to commence upon Mendivil's release from imprisonment. Counsel has 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), stating she has reviewed the record and has found no "meritorious issue to raise on appeal." Counsel has asked us to search the record for fundamental error. Mendivil has not filed a supplemental brief.

¶2 Viewed in the light most favorable to sustaining the verdicts, the evidence was sufficient to support the jury's findings of guilt. See *State v. Delgado*, 232 Ariz. 182, ¶ 2, 303 P.3d 76, 79 (App. 2013). The evidence presented at trial showed Mendivil had paid for more than \$13,000 in purchases at various stores using "generated" credit cards produced from stolen account numbers.

¶3 In our review of the record, however, we have discovered inconsistencies in the trial court's imposition of sentence. Mendivil's convictions for forgery of a credit card were class four felonies. A.R.S. § 13-2104(B). At sentencing and in its minute entry, the trial court described the convictions for counts five, six, and seven as class-four, category-one repetitive offenses. The court then imposed the "presumptive term" on each of those counts. But, on

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count five the court imposed a 2.5-year term, while on counts six and seven it imposed 4.5-year terms. *See* A.R.S. § 13-703(A), (H), (I). Because we cannot say, based on the court's statements and the sentences imposed, whether the court intended to sentence Mendivil as a category-one or category-two repetitive offender on counts five through seven, we vacate those sentences and remand for resentencing. *Cf. State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) (remand for clarification of sentence required only if court's intent unclear); *State v. Ojeda*, 159 Ariz. 560, 561, 769 P.2d 1006, 1007 (1989) (remand necessary when unclear if court would impose same sentence absent improper factor). Mendivil's terms of probation, however, were within the statutory limits and lawfully imposed. *See* A.R.S. §§ 13-901, 13-902, 13-1802(A), (G), 13-2104, 13-2310(A).

¶4 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and have found no such error beyond the discrepancy discussed above. Therefore, Mendivil's convictions and terms of probation are affirmed, and the matter is remanded for resentencing on counts five, six, and seven.