IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOHN JOSEPH BERGEN,
Appellant.

No. 2 CA-CR 2017-0066
Filed October 24, 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NOT FOR PUBLICATION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. CR20163394001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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Counsel for Appellee

Dean Brault, Pima County Legal Defender
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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, John Bergen was convicted of theft, and the trial court sentenced him to a presumptive prison term of 3.5 years. On appeal, Bergen contends the indictment and charges against him were duplicitous because the single count of theft of which he was convicted was based on multiple acts committed against four different victims. Because we find no error that was prejudicial, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Bergen's conviction. *See State v. Fimbres*, 222 Ariz. 293, ¶ 2, 213 P.3d 1020, 1023 (App. 2009). On August 28, 2014, Bergen opened a checking account with Sun Bank. By September 10, Bergen used all of the money he had deposited, and Sun Bank sent him notification that the account had become overdrawn. Bergen nonetheless wrote two checks from that account to Brake Max on September 19 and 20 for $1,429.08 and $1,371.33, respectively, for car parts and services. The checks did not clear, and, despite a demand for payment, Brake Max was never paid. Bergen also wrote a $1,938.07 check to Holmes Tuttle Ford on September 22 and a $1,017.00 check to Jim Click Ford on September 24, again for car parts and services. Those checks were also returned for insufficient funds. The businesses sent certified letters to Bergen but never received payment. On September 26 and 27, Bergen wrote two additional checks to a Matco Tools distributor for $4,000.08 and $3,408.18, respectively, for professional tools. Again, the checks "bounced," and, although the distributor requested payment, the amounts are still outstanding.

¶3 A grand jury indicted Bergen for one count of theft, alleging:

> On or about the 19th day of September, 2014 through the 27th day of September, 2014, . . . Bergen committed theft of money and/or services with a value of $4,000 or more but less than $25,000 belonging to Brake Max and/or Holmes Tuttle Ford and/or Jim Click Ford and/or Ma[t]co, in violation of A.R.S. § 13-1802(A).

Bergen was tried in absentia, found guilty as charged, and sentenced as described above.[1] This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶4 Bergen argues the indictment was duplicitous because, "on its face, the indictment allege[d] multiple crimes within one count." He also contends he was duplicitously charged because the state "offered testimony regarding six different inciden[t]s" to support the single count of theft.[2] Because Bergen did not raise either

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[1]Based on the same series of events, a grand jury also indicted Bergen for one count of fraudulent scheme and artifice and six counts of forgery—one for each of the checks—in Pima County Cause No. CR20152813. However, the trial court granted the state's motion to dismiss the six forgery counts. The court consolidated CR20152813 with this case for trial, and the jury convicted Bergen of fraudulent scheme and artifice. This court affirmed Bergen's conviction and sentence in CR20152813. *State v. Bergen*, No. 2 CA-CR 2017-0049, ¶ 4 (Ariz. App. July 25, 2017) (mem. decision).

[2]Bergen suggests these duplicity errors deprived him of his rights to due process and a fair trial. But he does not develop this argument any further. We therefore do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument in opening brief must contain appellant's contentions with supporting authority); *State v. Bolton*, 182

issue below, he has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Hargrave*, 225 Ariz. 1, ¶ 28, 234 P.3d 569, 579 (2010) (applying fundamental-error review to duplicitous indictment).[3] Thus, Bergen bears the burden of showing that error occurred, that the error was fundamental, and that the error caused him prejudice. *See State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009).

¶5 "The law in Arizona requires that each offense must be charged in a separate count." *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989). An indictment is duplicitous if it "charges separate or multiple crimes in the same count." *State v. Ramsey*, 211 Ariz. 529, ¶ 6, 124 P.3d 756, 759 (App. 2005). By contrast, a charge is duplicitous "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). Duplicitous indictments and charges present the same potential problems: they "can deprive the defendant of 'adequate notice of the charge to be defended,' create the 'hazard of a non-unanimous jury verdict,' or make it impossible to precisely plead

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Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

[3]Relying on *State v. Anderson*, 210 Ariz. 327, ¶¶ 17-18, 111 P.3d 369, 378 (2005), the state maintains that Bergen's indictment argument is "precluded" under Rules 13.5(e) and 16.1(c), Ariz. R. Crim. P., "because [he] did not challenge the indictment either before or during trial on duplicity grounds." In *Hargrave*, 225 Ariz. 1, ¶ 28, 234 P.3d at 579, our supreme court recognized *Anderson*, which was decided before *Henderson*, but concluded that, because the defendant had failed to challenge the indictment before trial, he waived the duplicity issue absent fundamental, prejudicial error. We therefore review for fundamental, prejudicial error here. *See State v. Butler*, 230 Ariz. 465, ¶ 15, 286 P.3d 1074, 1079-80 (App. 2012) (describing *Hargrave*'s application to all cases involving duplicitous indictment as "questionable" but nonetheless applying fundamental-error review).

'prior jeopardy . . . in the event of a later prosecution.'" *Id.*, *quoting State v. Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003).

¶6 Bergen contends the indictment was duplicitous because it named four separate victims under one count of theft. In response, the state asserts that the indictment was not duplicitous because, in its discretion, it chose to charge Bergen with one count of theft based on a "singular 9-day unfunded-check-writing scheme." We agree with Bergen that the indictment was duplicitous.

¶7 In *State v. Via*, our supreme court addressed the issue whether an indictment for two counts of theft—each naming a separate bank as the victim—was duplicitous because the counts "aggregate[d] numerous separate and distinct thefts" stemming from fraudulent credit card purchases. 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985). The court concluded the counts were not duplicitous, reasoning, "where numerous transactions are merely parts of a larger scheme, a single count encompassing the entire scheme is proper." *Id.* However, the court pointed out that the numerous thefts alleged in each count pertained to the one specific bank that had issued the credit card. *Id.* The court distinguished the banks from "the various merchants from whom goods were purchased," suggesting that if the merchants were the alleged victims the offenses could not be charged together. *Id.*; *see also Ramsey*, 211 Ariz. 529, ¶¶ 12-13, 124 P.3d at 761 (acknowledging that continuing course of conduct or scheme may be alleged in single count, but suggesting relevant statute must define offense as possible continuing course).

¶8 Here, unlike in *Via*, the indictment alleged a single count of theft involving multiple transactions with four different businesses as the victims. Notably, those victims were listed using an "and/or" rather than an "and," which arguably would have been more consistent with the state's singular scheme theory. We therefore disagree with the state's characterization of the offense as a properly indicted continuing scheme. Simply put, the indictment alleged multiple crimes—committed against the four victims spanning nine days—within a single count of theft. *See* § 13-1802(A)(1), (3) (identifying singular victim); *cf. Davis*, 206 Ariz. 377, ¶ 65, 79 P.3d at 77 (two acts eleven days apart not part of single transaction). The indictment was therefore duplicitous on its face. *See State v.*

Paredes-Solano, 223 Ariz. 284, ¶ 16, 222 P.3d 900, 906 (App. 2009) (indictment alleging six separate criminal acts from two different subsections of criminal statute duplicitous).

¶9 However, any error potentially resulting from a duplicitous indictment may be cured. *Id.* ¶ 17. To cure the error, the basis for the jury's verdict must be clear, the state must elect which act constitutes the crime, or the trial court must instruct the jury to agree unanimously on the specific act constituting the crime. *Id.*

¶10 The error here was not cured; instead, it was compounded. At trial, the state introduced evidence relating to all four victims—Brake Max, Holmes Tuttle Ford, Jim Click Ford, and Matco Tools—in support of the single count of theft. In addition, the state offered evidence of multiple check transactions for both Brake Max and Matco Tools. The state did not elect which of the victims or transactions supported the theft. The jury instructions also did not otherwise explain that the jurors had to be unanimous as to the acts supporting the offense. Notably, Bergen was indicted for theft of property or services having a value of $4,000 or more but less than $25,000. Only one of the six check transactions was greater than $4,000, and several combinations of the other check amounts could meet that threshold.[4] This created the very real possibility of a non-unanimous jury verdict. *See Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847.

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[4]As the state points out, the special interrogatory on the verdict form indicates that the jury found Bergen guilty of theft of property or services with a value of $3,000 or more but less than $25,000, rather than $4,000 or more but less than $25,000, as required by the statute for a class three felony. *See* § 13-1802(G). However, Bergen did not object to the interrogatory below, raise this issue in his opening brief, or file a reply brief after the state recognized the discrepancy. We therefore could deem the issue waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

In any event, because we will not ignore fundamental, prejudicial error, *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007), we note that no such error occurred here. The verdict form states that the jury found Bergen guilty "as alleged in the

¶11 Because the error in the indictment was not cured and because the state offered evidence of all six checks written to the four different businesses in support of the single count of theft, we also agree with Bergen that he was duplicitously charged. *See id.* A defendant has the right to a unanimous jury verdict in a criminal case. Ariz. Const. art. II, § 23; *State v. Millis*, 242 Ariz. 33, ¶ 21, 391 P.3d 1225, 1231 (App. 2017). A duplicitous indictment or charge that violates this right constitutes fundamental error. *State v. Waller*, 235 Ariz. 479, ¶ 34, 333 P.3d 806, 816 (App. 2014). However, if the defendant suffers no prejudice, we need not reverse the conviction. *State v. Petrak*, 198 Ariz. 260, ¶ 28, 8 P.3d 1174, 1182 (App. 2000); *see also Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d at 236 (defendant must show both fundamental error and prejudice).

¶12 Bergen argues he was prejudiced by the duplicitous indictment and charge because he "faced a higher penalty than he would have were his crimes alleged separately." He points out that, if the offenses had been charged as six separate thefts, "he may have only been convicted of one misdemeanor, three class six felonies, and one class three felony," based on the different amounts of the checks. *See* § 13-1802(G). He additionally observes that the original forgery counts for which he was indicted in cause number CR20152813 were all class four felonies. *See* A.R.S. § 13-2002(C). He thus reasons that these scenarios consist of "arguably less serious crimes requiring lesser sentences" than the single class three felony for which he was ultimately convicted.

¶13 However, as the state points out, Bergen does not explain how being convicted of one theft would constitute a "higher penalty" than six thefts or forgeries. *See State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008) (discussing consequences of multiple

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indictment," which does list the correct amount for a class three felony. In addition, as described below, the jury apparently rejected Bergen's defense, which was the same with respect to each check, and necessarily must have found him guilty of the charge based on each of the different acts. *Cf. State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004) (jury, not appellate court, tasked with weighing evidence and determining witness credibility).

convictions). Notably, the trial court ordered Bergen's 3.5-year prison term for his theft conviction to be served concurrently with his four-year prison term for fraudulent scheme and artifice in CR20152813. Even under his alternate scenarios, assuming he was convicted of only one or two of the lesser charges, Bergen does not specify the sentencing schemes for those offenses. And if the state had charged Bergen with six separate thefts, he still could have been convicted of one class three felony for the $4,000.08 Matco check, which is exactly what he was convicted of here. Bergen also overlooks that if he had been convicted of six separate thefts, those counts could have been run consecutively, which would have exposed him to at least as much potential prison time as he received for the concurrent sentence for the single count. Bergen's argument is therefore speculative. *See State v. Munninger*, 213 Ariz. 393, ¶ 14, 142 P.3d 701, 705 (App. 2006) (speculation insufficient for prejudice). Thus, Bergen has not met his burden of showing prejudice. *See State v. Schroeder*, 167 Ariz. 47, 53 n.5, 804 P.2d 776, 782 n.5 (App. 1990) (defendant not prejudiced by indictment where "each separate act of sexual abuse could have been the subject of a separate count [and] defendant could have been subjected to the possibility of several felony convictions with multiple penalties"; instead, defendant faced only one conviction and penalty).

¶14 The state additionally contends that the error here did not prejudice Bergen because he "presented the same defense to the multiple acts." It points out that his "sole defense was that he wrote each check intending to pay the debt, but had been unable to do so." And by finding him guilty, the state reasons that the jury "disbelieved this global defense." Arizona courts have consistently held that defendants with similar all-or-nothing defenses are not prejudiced by duplicity errors. *See, e.g.*, *Whitney*, 159 Ariz. at 480, 768 P.2d at 642; *Schroeder*, 167 Ariz. at 53, 804 P.2d at 782. Simply put, given Bergen's admission that he failed to pay any of the businesses and his sole defense for not doing so, the jury had no reason to distinguish between the four victims and six check transactions.

¶15 Finally, we conclude that overwhelming evidence supports the jury's verdict based on all the acts. *See State v. Kelly*, 149 Ariz. 115, 117, 716 P.2d 1052, 1054 (App. 1986) (defendant not prejudiced when evidence overwhelming); *see also* § 13-1802(A)(1),

(3). At trial, representatives from each of the businesses testified that they had provided property or services, that Bergen paid them with checks from his account, and that those checks never cleared. Moreover, Bergen had been notified by the bank that he no longer had sufficient funds in his account. Bergen did not deny writing the checks; instead, his defense was that he was an "unsuccessful businessman" who had not "intend[ed] to defraud and . . . steal." But all of the representatives explained that they still had not been paid, despite reaching out to Bergen for payment or return of the goods. And throughout these transactions, Bergen had used a false name and address. In addition, a forensic document examiner testified that although the signatures on the checks appeared to be from the same person, he could not compare them to the "request specimen" from Bergen because the signatures were too "simplistic"—"a simple single J." He also explained that the handwriting on the checks "did not appear to be the [individual's] normal writing" and instead appeared "distorted," likening it to a "disguise." Thus, under these circumstances, Bergen has failed to show he was prejudiced by the duplicitous indictment and charge. *See Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d at 236.

Disposition

¶16 For the reasons stated above, we affirm Bergen's conviction and sentence.