

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

CYNTHIA RENA E ORTIZ,  
*Appellant.*

No. 2 CA-CR 2020-0074  
Filed November 18, 2021

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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NOT FOR PUBLICATION  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. 31.19(e).*

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Appeal from the Superior Court in Pima County  
No. CR20192755001  
The Honorable Gus Aragón, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals  
By Amy M. Thorson, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Joel Feinman, Pima County Public Defender  
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*Counsel for Appellant*

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**MEMORANDUM DECISION**

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

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E P P I C H, Presiding Judge:

¶1 Cynthia Ortiz appeals from her convictions and sentences for eleven counts of taking the identity of another; five counts of forgery; two counts of fraudulent schemes and artifices; two counts of theft; and one count of aggravated taking the identity of another. On appeal, she contends that the trial court fundamentally erred by failing to renumber the counts in the indictment and verdict forms after it granted her severance request, and that the error prejudiced her. For the following reasons, we affirm Ortiz's convictions and sentences.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Borquez*, 232 Ariz. 484, ¶ 3 (App. 2013). In February 2015, C.K. hired Ortiz to provide respite care for her husband, C.W. Shortly after, C.W.'s wallet went missing and Ortiz informed C.K. that she had cancelled all of his cards.

¶3 C.W. passed away in March 2015. A few months after his death, C.K. broke her ankle and due to complications, was often bedridden. She continued to employ Ortiz for assistance, providing Ortiz with access to her home, incoming mail, checkbooks, and email. When C.K. started to recover, she noticed many financial documents missing, as well as the titles to her cars and C.W.'s death certificate. She went to a bank and learned that her accounts there had been emptied.

¶4 It was subsequently discovered that Ortiz had used C.W.'s credit card from the missing wallet; applied for a credit card in C.W.'s name with her own contact information; rented a house for herself in C.W.'s name; liquidated stocks belonging to C.W.; and made a claim for C.W.'s death benefits. Ortiz had also used C.K.'s bank account and credit card to pay various bills and expenses of her own; applied for a credit card using C.K.'s birth date and social security number and hyphenating her own last name with C.K.'s last name; and deposited C.K.'s tax refund into her own bank account.

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¶5 During searches of the home Ortiz had rented for herself in C.W.'s name, law enforcement officers discovered a credit card belonging to C.W.; a stock transaction request and account statements for C.W.; the title to C.W.'s car; numerous copies of C.W.'s death certificate; car insurance cards for C.W. and C.K.; social security cards for C.W. and for C.K.'s son; and the credit card Ortiz had opened with C.K.'s identifying information.

¶6 In 2019, Ortiz was charged with fifty-six crimes against four victims. Thirty-two of the counts, counts sixteen through forty-seven, related to C.W. and C.K. At Ortiz's request, the trial court severed the counts regarding the other two victims (counts one through fifteen and counts forty-eight through fifty-six). The court provided the jury with a copy of the indictment and with verdict forms, all of which listed only counts sixteen through forty-seven and retained that numbering. Ortiz did not object to the provided indictment or forms of verdict.<sup>1</sup>

¶7 Ortiz was convicted as described above and sentenced to twenty-one concurrent terms of imprisonment, the longest of which is 9.25 years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

**Discussion**

¶8 On appeal, Ortiz asserts the trial court erred by providing the jury with a copy of the indictment and verdict forms with the counts numbered sixteen through forty-seven, rather than one through thirty-two. She argues such provision improperly referenced the severed counts, did not correctly instruct the jurors on the law, violated her rights to a fair trial and due process, and resulted in prejudice. Because she did not object at trial, we review this issue for fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).

¶9 Ortiz can establish fundamental error by showing "(1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to [her] defense, or (3) the error was so egregious that [she] could not possibly have received a fair trial." *Id.* ¶ 21. Error under the first two prongs requires a separate showing of prejudice, meaning

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<sup>1</sup>Ortiz and the state did provide the trial court with proposed verdict forms that numbered the counts one through thirty-two. But the state later amended the proposed verdict forms to begin at count sixteen.

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Ortiz must show that absent the error, objectively, a reasonable jury could have “plausibly and intelligently returned a different verdict.” *Id.* ¶ 31. If Ortiz establishes the third prong, she has shown both error and prejudice. *Id.* ¶ 21.

¶10 Ortiz asserts the error here fell under the first prong of *Escalante* and “went to the foundation of the case.” But neither party cites binding authority, nor have we found any, directly addressing whether it is error, much less fundamental error, not to renumber an indictment and corresponding verdict forms when counts have been severed. Ortiz analogizes this issue to an attorney improperly arguing inadmissible evidence and cites authority that jury instructions may not mislead the jury. But “[a] verdict form is not a jury instruction.” *State v. Luviano*, No. 2 CA-CR 2019-0102, ¶ 30, 2021 WL 3909623 (Ariz. Ct. App. Sept. 1, 2021). In contrast, the state asserts the indictment and verdict forms were proper, but it also cites no relevant authority.

¶11 Assuming, however, without deciding, that the failure to renumber the counts was error that went to the foundation of the case, Ortiz is not entitled to relief unless she shows the purported error caused her prejudice. *See Escalante*, 245 Ariz. 135, ¶¶ 21, 31. Ortiz contends she was prejudiced because without the error, the jury could have “rejected the State’s evidence and argument that [she] was a serial fraudster, and could have credited [her] arguments that” C.K. had “authorized the payments or [her] third-party culpability defense.” Prejudice is a case-specific inquiry that requires us to “examine the entire record, including the parties’ theories and arguments as well as the trial evidence.” *Id.* ¶¶ 29, 31.

¶12 We first observe that Ortiz’s argument is speculative. *See id.* ¶ 31 (the prejudice inquiry “necessarily excludes imaginative guesswork”). It is just as likely the numbering of the indictment and verdict forms favored Ortiz because the jury could have concluded the state did not have enough evidence to prove counts one through fifteen, which could have made them more critical of the evidence before them. Aside from the numbers, the jury had no information regarding counts one through fifteen, nor did they raise any questions about those counts during the testimony or deliberation. *See Herring v. State*, 16 A.3d 246, 256 (Md. Ct. Spec. App. 2011) (claim of prejudice “speculative at best” because jury did not learn of crimes charged in omitted counts); *cf. State v. Bailey*, 160 Ariz. 277, 280 (1989) (inadmissible statement “relatively innocuous” because jury would have to make a negative inference and no details provided).

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¶13 In contrast, the jury had significant testimonial evidence, supported by physical evidence including a rental agreement and numerous financial statements, showing that Ortiz had repeatedly committed crimes involving fraud against C.K. and C.W. The jury also heard other-acts testimony that Ortiz had previously been investigated for multiple instances of unauthorized use of a credit card belonging to a deceased woman, and that during a search of Ortiz's home, law enforcement collected "documents dealing with other people's property and other items." The numbering of the indictment and verdict forms did not, in any way, alter the evidence in the record.

¶14 Further, the trial court specifically instructed the jury: "The charges in this case involve Counts 16 through 47. The enumeration of the charges is not to be considered by you. You are not to speculate as to the reason why those charges are not before you." Ortiz did not object to this instruction, and we presume jurors follow the court's instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 69 (2006); *cf. State v. Stuard*, 176 Ariz. 589, 600 (1993) (instruction arguably prevented improper use of other-acts evidence and contributed to finding of no unfair prejudice). Moreover, Ortiz was acquitted of eleven forgery counts, demonstrating the jurors had followed the court's instruction that they "must decide each count separately on the evidence with the law applicable to it, uninfluenced by [their] decision on any other count." *See Stuard*, 176 Ariz. at 600 (where defendant acquitted of some charges, record showed jury followed instruction to consider evidence separately on each count).

¶15 Ortiz contends the other-acts evidence and acquittals do not rebut the prejudice, but instead, demonstrate it. She asserts the other-acts evidence, which involved credit card fraud, taken with the jury's guilty verdicts on the credit card fraud charges and not guilty verdicts on some of the forgery charges, show the jury may have improperly relied on the numbering of the indictment and verdict forms to "speculate that [she] had already been convicted of credit card [fraud], giving rise to the reasonable inference that she had a propensity for credit card fraud."

¶16 But Ortiz was found guilty of numerous forgery charges—just not forgery charges as to checks drawn on C.K.'s account, and the record reflects plausible evidentiary reasons for those acquittals.<sup>2</sup> The jury

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<sup>2</sup>C.K. testified that she had not authorized Ortiz to write or sign the checks relating to the charged offenses, but had given Ortiz prior authorization to write out other checks without signing them; the

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additionally found Ortiz guilty of multiple identity theft charges unrelated to credit card fraud. That the jury also found her guilty of charges similar to the other acts alleged does not demonstrate the numbering of the indictment and verdict forms prejudiced her. *See Escalante*, 245 Ariz. 135, ¶ 31 (prejudice requires showing that “without the error, a reasonable jury could have plausibly and intelligently returned a different verdict”).

**Disposition**

¶17 For the foregoing reasons, Ortiz has not demonstrated prejudice warranting relief, and we affirm her convictions and sentences.

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handwriting on the alleged forged checks was inconsistent; and the handwriting had not been analyzed by an expert, nor had the checks been analyzed by a forensic accountant.