DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

LYNN MARIE ROODBERGEN,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

No. 2D19-3250

November 5, 2021

Appeal from the Circuit Court for Manatee County; Charles Sniffen, Judge.

Howard L. Dimmig, II, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant/Cross-Appellee.

Ashley Moody, Attorney General, Tallahassee, and David Campbell, Assistant Attorney General, Tampa, for Appellee/Cross-Appellant.

ROTHSTEIN-YOUAKIM, Judge.

We affirm Lynn Marie Roodbergen's conviction and sentence on Count 3 for scheming to defraud. We also affirm her convictions on Counts 1 and 2 for willfully and without authorization fraudulently using personal identification information (PII)

concerning an individual sixty years old or older without consent to obtain a pecuniary benefit of $5,000 or more. But because the information charged and the jury, by special verdict, specifically found beyond a reasonable doubt that both of those counts involved a pecuniary benefit of $5,000 or more, the trial court erred in concluding that the three-year mandatory minimum sentence required by section 817.568(2)(b), Florida Statutes (2018), could not apply in light of the way that the State brought its charges.[1] *See* § 817.568(2)(b) ("*Notwithstanding any other provision of law*, the court *shall* sentence any person convicted of committing the offense described in this paragraph to a mandatory minimum sentence of 3 years' imprisonment." (emphases added)); *see also State v. Barnhart*, 310 So. 3d 132, 133 (Fla. 1st DCA 2020) ("As the Legislature has prescribed a three-year mandatory minimum [for violations of section 817.568(2)(b)], the trial court had no authority to do otherwise."); *State v. Kremer*, 114 So. 3d 420, 421 (Fla. 5th DCA 2013) ("[M]andatory minimum sentencing enhancements are

[1] The trial court instead imposed concurrent terms of thirty months' imprisonment on all three counts, followed by concurrent terms of sixty months' probation on Counts 1 and 3, with no mandatory minimum.

nondiscretionary and, therefore, trial courts lack the authority to refuse to apply them." (citing *State v. Moore*, 854 So. 2d 832, 833–34 (Fla. 5th DCA 2003))). Even if the State had brought a duplicitous information—and we emphasize that we do not decide that broader question here[2]—the remedy for such an irregularity in the charging instrument is to permit the State to elect the charge on which it intended to proceed. *See United States v. Medel-Guadalupe*, 987 F.3d 424, 428 n.3 (5th Cir.) ("Primarily, [the defendant] contends that a duplicitous indictment requires that the court sentence him to a maximum of sixty months, the least severe punishment between the offenses. Yet, '[t]he proper remedy is to require the Government to elect upon which charge contained in the count it will rely.' " (second alteration in original) (quoting

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[2] "An information is duplicitous when it joins two or more separate offenses, or alternative means of committing the same offense, into a single count." *Saldana v. State*, 980 So. 2d 1220, 1221 n.1 (Fla. 2d DCA 2008) (citing *Fountain v. State*, 623 So. 2d 572, 573–74 (Fla. 1st DCA 1993)). In both the trial court and on appeal, the State's position regarding whether section 817.568(2)(b) and section 817.568(6) prescribe separate enhancements or separate offenses has been inconsistent, to say the least. Consequently, we find that that broader question has not been sufficiently teed up for resolution here.

United States v. McDermot, No. 93-3603, 1995 WL 371036, *4 n.6 (5th Cir. June 5, 1995))), *cert. denied*, 141 S. Ct. 2545 (2021).

Accordingly, we reverse and remand for resentencing on Counts 1 and 2 consistent with this opinion. In all other respects, we affirm.

Affirmed in part; reversed in part; remanded with instructions.

ATKINSON and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.