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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

NO. 29,064

10 **DARRELL AKERS,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

13 **Frank K. Wilson, District Judge**

14 Gary K. King, Attorney General

15 Ann M. Harvey, Assistant Attorney General

16 Santa Fe, NM

17 for Appellee

18 Law Offices of Nancy L. Simmons, P.C.

19 Nancy L. Simmons

20 Albuquerque, NM

21 for Appellant

22 **MEMORANDUM OPINION**

23 **WECHSLER, Judge.**

24 Defendant appeals the judgment and suspended sentence of the district court

1 adjudicating him guilty of fraud over \$250, a fourth degree felony, after a jury trial.
2 He contends on appeal that the evidence was insufficient to support his conviction.

3 When reviewing for sufficiency of the evidence, we determine whether
4 substantial evidence of either a direct or circumstantial nature exists to support the
5 verdict beyond a reasonable doubt as to each element essential for conviction. *State*
6 *v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988); *State v. Kent*, 2006-
7 NMCA-134, ¶ 10, 140 N.M. 606, 145 P.3d 86. We view the evidence in the light
8 most favorable to the verdict, resolving all conflicts and indulging all reasonable
9 inferences in favor of the verdict. *State v. Apodaca*, 118 N.M. 762, 766, 887 P.2d
10 756, 760 (1994).

11 “Fraud consists of the intentional misappropriation or taking of anything of
12 value that belongs to another by means of fraudulent conduct, practices or
13 representations.” NMSA 1978, § 30-16-6(A) (2006). The district court instructed the
14 jury that to convict Defendant of fraud, the State was required to prove the following
15 elements beyond a reasonable doubt: (1) Defendant, “by words or conduct, made a
16 promise he had no intention of keeping, intending to deceive or cheat Darlene
17 Lang[];” (2) “[b]ecause of the promise,” and Lang’s “reliance on it,” Defendant
18 obtained \$2500 (3) that did not belong to him.

19 Defendant contends that the evidence of guilt was insufficient because the

1 evidence did not demonstrate his criminal intent to defraud Lang when he promised
2 to make the repairs. Specifically, Defendant contends that the State failed to present
3 evidence that at the time he received the \$2500 check, he did not intend to purchase
4 and install the heating/cooling unit. However, when we review the evidence
5 supporting the jury's verdict under our standard of review, we reach the opposite
6 conclusion.

7 Defendant had been performing duct, heating, and cooling work on a house
8 being built by Lang and Michael White. He had been paid for portions of the duct
9 work. Lang and White testified that Lang gave Defendant a check in the amount of
10 \$2500 to purchase the heating and cooling units for the house. Lang wrote "HVAC
11 equipment" on the check. She left the payee portion of the check blank because she
12 did not know if the check should have been made payable to Leonard Meeks,
13 Defendant's employer, or whether Defendant was planning to purchase the equipment
14 in another manner. Lang did acknowledge that she understood that Defendant was not
15 performing the work for Meeks but rather as a job on his own. Both Lang and White
16 testified that Defendant never installed the heating and cooling units and never
17 returned the money. Lang stated that the check was cashed the same day as she
18 delivered it to Defendant and that Defendant's name had been inserted as the payee
19 of the check. White testified that Defendant's family contacted White to inform him

1 that Defendant had been arrested in California. Defendant's teenage son offered to
2 perform the work. The son was not licensed, and the district attorney's office had
3 advised White and Lang not to have further contact with Defendant's family.

4 From this evidence, the jury could reasonably have concluded that Defendant
5 promised that he would purchase and install the heating and cooling equipment, did
6 not intend to do so, and obtained the check from Lang because she relied on his
7 promise. Indeed, the jury could reasonably infer the necessary intent to deceive from
8 Defendant's actions of immediately cashing the check, leaving for California, failing
9 to notify Lang and White, and failing to purchase the equipment, perform the work or
10 return the money. Although Defendant's son offered to perform the work, he did so
11 after Lang and White had notified the authorities. The jury had the prerogative to
12 reject Defendant's interpretation of the facts. *Sutphin*, 107 N.M. at 131, 753 P.2d at
13 1319.

14 We note that Defendant cites the Louisiana cases of *State v. Hoffer*, 420 So. 2d
15 1090 (La. 1982), and *State v. Saucier*, 485 So. 2d 584 (La. Ct. App. 1986), in support
16 of his position. *Saucier* relies on *Hoffer*. *Saucier*, 485 So. 2d at 586. As addressed
17 in *Hoffer*, however, a statute in Louisiana requires that when circumstantial evidence
18 is used to convict of a crime, "it must exclude every reasonable hypothesis of
19 innocence." *Hoffer*, 420 So. 2d at 1092 n.6. In New Mexico, circumstantial evidence

1 is sufficient to support a guilty verdict, particularly as to the issue of intent. *See State*
2 *v. McGee*, 2004-NMCA-014, ¶ 15, 135 N.M. 73, 84 P.3d 690.

3 **CONCLUSION**

4 There was sufficient evidence to support Defendant's conviction. We affirm.

5 **IT IS SO ORDERED.**

6

7

JAMES J. WECHSLER, Judge

8 **WE CONCUR:**

9

10 **CELIA FOY CASTILLO, Chief Judge**

11

12 **LINDA M. VANZI, Judge**