

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SHERRI LYNN DASHNEY,
Appellant.

No. 2 CA-CR 2012-0444
Filed December 9, 2013

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Gila County
No. CR201100290
The Honorable Peter J. Cahill, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz, Section Chief Counsel, Phoenix
and Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

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

VÁSQUEZ, Presiding Judge:

¶1 After a jury trial, Sherri Dashney was convicted of one count of fraudulent schemes and artifices, one count of theft, and two counts of forgery. The trial court sentenced her to enhanced, aggravated, concurrent prison terms, the longest of which was nineteen years. On appeal, Dashney argues the court erred by denying her motion to preclude a witness from testifying about Dashney's plea agreement, restitution, and sentencing in a prior case. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining [Dashney's] convictions." *State v. Brown*, 233 Ariz. 153, ¶ 2, 310 P.3d 29, 32 (App. 2013). In November 2010, pursuant to a plea agreement, Dashney was convicted in four different cause numbers of two counts of theft and two counts of fraudulent schemes and artifices. The agreement provided: "At or before the time of sentencing, [Dashney] must pay at least \$5,000 to the Clerk of the Superior Court to be applied toward the restitution owed." Sentencing was set for February 14, 2011.

¶3 At that time, Dashney was self-employed, cleaning and maintaining over one-hundred houses that were in foreclosure, including a residence previously occupied by B.B. and another one owned by M.H. On February 11, Dashney deposited a \$3,000 check purportedly from B.B. into her bank account. On February 14, the morning of the sentencing, Dashney deposited a \$2,000 check purportedly from M.H. into her account. Dashney then obtained a \$5,000 cashier's check drawing on funds from her bank account. She used the cashier's check to pay \$5,000 toward the restitution.

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¶4 Several days later, the checks were returned to Dashney's bank because B.B.'s account had previously been closed and M.H.'s check had an invalid routing number. The bank initiated a fraud investigation. According to B.B., he did not know Dashney and did not write her a check, although he admitted he may have left some checks at his prior residence. The check bearing M.H.'s signature was dated January 25, 2011, but M.H. had died in August 2008. Based on this evidence, a grand jury indicted Dashney with one count of fraudulent schemes and artifices, one count of theft, and two counts of forgery under the cause number in this case.

¶5 Before trial, Dashney filed a motion to preclude the testimony of Cathy Joerns, a probation officer who had interviewed Dashney before her sentencing in the prior case concerning, among other things, her ability to pay the restitution. According to Dashney, Joerns was "expected to testify . . . about [her] prior criminal case, employment, [and] income," as well as the \$5,000 cashier's check tendered for the payment of restitution. Dashney argued that Joerns's testimony would be irrelevant and prejudicial. After a hearing, the trial court denied Dashney's motion.

¶6 Dashney was convicted as charged and sentenced as described above. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶7 Dashney argues the trial court erred by denying her motion to preclude Joerns's testimony regarding the prior plea agreement, restitution, and sentencing. She contends it was evidence of other acts, inadmissible under Rule 404(b), Ariz. R. Evid. She further argues that the evidence was unduly prejudicial and was admitted in violation of Rule 403, Ariz. R. Evid. We review the trial court's admission of evidence over objections made pursuant to Rule 404(b) and Rule 403 for an abuse of discretion. *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007); *State v. Moreno*, 153 Ariz. 67, 69, 734 P.2d 609, 611 (App. 1986).

¶8 In denying Dashney's motion to preclude Joerns's testimony, the trial court explained: "[T]he fact that there was a plea

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agreement, that that agreement required payment at or before sentencing of \$5,000 restitution and that the money was . . . paid at sentencing are necessary and intrinsic relevant facts.” At trial, upon further discussion of Joerns’s testimony, the court suggested that the evidence also was admissible as other-act evidence pursuant to Rule 404(b). Lastly, as to Rule 403, the court noted “there is some prejudice to [Dashney] for the jury to hear such words as . . . plea bargain, sentencing, restitution, those type of things” but found that “the probative value of that evidence, in light of the nature of the charges, outweighs the prejudice.” However, the court precluded the state from introducing evidence of the fraudulent schemes and artifices convictions under the plea agreement because “the prejudicial effect of this evidence will outweigh its probative value.”¹ We address each of the court’s conclusions in turn.

Admissibility as Intrinsic Evidence

¶9 Rule 404(b) provides that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Intrinsic evidence, however, “is not evidence of another crime.” *State v. Butler*, 230 Ariz. 465, ¶ 29, 286 P.3d 1074, 1081-82 (App. 2012). Rather, intrinsic evidence is “evidence of acts that are so interrelated with the charged act that they are part of the charged act,” *State v. Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (2012), and it is thus admissible without regard to Rule 404(b), *State v. Herrera*, 232 Ariz. 536, ¶ 21, 307 P.3d 103, 112 (App. 2013). Our supreme court recently has clarified that evidence is intrinsic “if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act.” *Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d at 513.

¶10 The offense of fraudulent schemes and artifices requires the state to prove that the defendant “knowingly obtain[ed] any benefit by means of false or fraudulent pretenses, representations, promises or material omissions.” A.R.S. § 13-2310(A); *see also State v.*

¹The state had previously agreed to omit any reference at trial to the related theft convictions.

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Bridgeforth, 156 Ariz. 60, 64, 750 P.2d 3, 7 (1988). A “benefit” is “anything of value or advantage, present or prospective.” A.R.S. § 13-105(3). It includes more than just money or property. *State v. Henry*, 205 Ariz. 229, ¶ 15, 68 P.3d 455, 459 (App. 2003).

¶11 Here, the state alleged Dashney had obtained two benefits from depositing the forged checks into her bank account: (1) “she obtained a \$5,000 cashier’s check that was applied toward restitution at her sentencing hearing,” and (2) “she was able to fulfill the terms of the plea agreement.” Proving these benefits required evidence of the prior plea agreement, restitution, and sentencing. We acknowledge that depositing the forged checks and obtaining the cashier’s check likely was sufficient to meet the “any benefit” requirement of § 13-2310(A), and such evidence could have been introduced without reference to the prior case. However, the benefit Dashney ultimately sought was payment of the restitution under the plea agreement. The forged checks and cashier’s check were simply steps to achieve that end. Evidence of the prior plea agreement, restitution, and sentencing thus “directly prove[d] the charged act” of fraudulent schemes and artifices and was admissible as intrinsic evidence. *Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d at 513.

¶12 Relying on *Old Chief v. United States*, 519 U.S. 172 (1997), Dashney nevertheless argues that she offered to stipulate to receiving a benefit and that Joerns’s testimony was therefore unnecessary. In *Old Chief*, the defendant, who had previously been convicted of assault causing serious bodily injury, was charged with various offenses, including a weapons violation for having been previously convicted of a felony and possessing a firearm under 18 U.S.C. § 922(g)(1). 519 U.S. at 174-75. The defendant sought to prohibit the prosecutor from introducing any evidence at trial of the prior felony conviction that was the basis for the charge and offered to stipulate to it instead. *Id.* at 175. The prosecutor refused to stipulate, and the district court admitted the evidence. *Id.* at 177. On appeal, the Supreme Court concluded that, when a prior conviction is an element of the charged offense, evidence of a defendant’s prior conviction may not be admitted if the defendant is willing to concede to the fact of the conviction. *Id.* at 174.

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¶13 But *Old Chief* is inapplicable here. First, the Court was “dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element.” *Old Chief*, 519 U.S. at 185. The reasoning does not extend to the issue presented in this case—whether the circumstances surrounding a prior case are admissible to prove a benefit under § 13-2310(A). Second, the Court in *Old Chief* was concerned about the risk of unfair prejudice associated with evidence of “the name and nature” of the prior conviction. 519 U.S. at 175. A conviction needs no explanation, and, under § 922(g)(1), it was unnecessary to present evidence about the name and nature of the prior offense. *Old Chief*, 519 U.S. at 174-75. In contrast, the benefit required by § 13-2310(A) is clearly fact intensive. And, as the state points out, the trial court in this case addressed one of the concerns mentioned in *Old Chief* by precluding evidence of the specific convictions.

Admissibility under Rule 404(b)

¶14 Although “evidence of other crimes, wrongs, or acts” is generally not admissible to show propensity, such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Ariz. R. Evid. 404(b). “The purpose of Rule 404(b) is ‘to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person.’” *State v. Hardy*, 230 Ariz. 281, ¶ 34, 283 P.3d 12, 20 (2012), quoting *Ferrero*, 229 Ariz. 239, ¶ 23, 274 P.3d at 514. When “evidence is offered for a non-propensity purpose, it may be admissible under Rule 404(b), subject to Rule 402’s [Ariz. R. Evid.] general relevance test, Rule 403’s balancing test, and Rule 105’s [Ariz. R. Evid.] requirement for limiting instructions in appropriate circumstances.” *Ferrero*, 229 Ariz. 239, ¶ 12, 274 P.3d at 512.

¶15 Here, even assuming that evidence of the prior plea agreement, restitution, and sentencing was not intrinsic to the charged offenses,² the evidence was nevertheless admissible other-

²The theft and forgery charges did not require the state to prove “any benefit” to Dashney. See A.R.S. §§ 13-1802(A), 13-2002(A). But, because evidence of the prior plea agreement,

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act evidence pursuant to Rule 404(b). Evidence of the prior plea agreement and the requirement that Dashney pay \$5,000 in restitution before sentencing shows Dashney's motive in depositing the two forged checks into her bank account and in obtaining the cashier's check. *Cf. State v. Collins*, 111 Ariz. 303, 305, 528 P.2d 829, 831 (1974) (evidence of defendant's heroin addiction admissible to show motive for theft of heroin); *State v. Rivers*, 190 Ariz. 56, 60-61, 945 P.2d 367, 371-72 (App. 1997) (evidence of failed urinalysis revealing drug use admissible to show motive for escape from custody). The evidence was thus admissible pursuant to Rule 404(b). *See State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("Although motive is not an element of a crime, a trial court may admit evidence of a defendant's other misconduct if the misconduct furnished or supplied the motive for the charged crime."). Moreover, upon Dashney's request, the trial court provided a proper limiting instruction. *See Ariz. R. Evid. 105; State v. Gulbrandson*, 184 Ariz. 46, 60-61, 906 P.2d 579, 593-94 (1995). Therefore, there was no danger the jury would use that evidence improperly.

Admissibility under Rule 403

¶16 Rule 403 allows a court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice," it has broad discretion in making this determination. *State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998). On appeal, this court views the evidence in the "light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989).

¶17 Here, the trial court's decision to admit Joerns's testimony was within its discretion. *See Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518. The court explicitly weighed the probative value of

restitution, and sentencing was otherwise admissible, we need not determine whether it was intrinsic to these charges.

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the evidence against its prejudicial effect. It acknowledged there was some prejudice to Dashney by admitting evidence of the prior plea agreement, restitution, and sentencing. However, the court noted that the probative value of the evidence was significant—it showed the benefit Dashney received and her motive—and was not outweighed by the danger of unfair prejudice. Notably, the court precluded any reference to the specific convictions under the plea agreement because “the prejudicial effect of this evidence . . . outweigh[ed] its probative value” and also directed the state not to introduce evidence that Joerns was a probation officer.

¶18 In sum, we cannot say the trial court abused its discretion, based on either Rule 404(b) or Rule 403, by admitting Joerns’s testimony about the prior plea agreement, restitution, and sentencing. See *Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d at 946; *Moreno*, 153 Ariz. at 69, 734 P.2d at 611.

Conclusion

¶19 For the foregoing reasons, we affirm Dashney’s convictions and sentences.