

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LEONARD FRANK GISO,
Appellant.

No. 2 CA-CR 2014-0251
Filed April 10, 2015

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NOT FOR PUBLICATION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. CR20132445001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 After a jury trial, Leonard Giso was convicted of two counts of fraudulent schemes and artifices and two counts of forgery. On appeal, he contends his double jeopardy rights were violated because he was convicted of two counts of fraudulent schemes and artifices based on a single scheme to defraud. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Giso. *See State v. Lizardi*, 234 Ariz. 501, ¶ 2, 323 P.3d 1152, 1153 (App. 2014). E.C. owns a strip mall and two apartment complexes in northwest Tucson. In 2012 and again in 2013, Giso approached E.C. about leasing space in the strip mall. Each time, during negotiations, Giso requested and was permitted to stay rent-free in one of E.C.'s furnished corporate apartments. In April 2012, Giso stayed approximately two weeks at E.C.'s Crescent Ridge apartment complex. The following spring, he stayed a week to ten days at Crescent Ridge before moving to E.C.'s Summit Vista apartment complex for about a week. Despite ultimately signing leases for two commercial spaces in the strip mall, Giso never made any payments in connection with the leases and then "disappeared."

Crescent Ridge

¶3 Around March 6, 2013, W.B. saw an online classified advertisement listing a "corporate" apartment for \$350 per month. Thinking the apartment would be "ideal" for his stepson A.P., he telephoned the advertiser, "Leo," and arranged to meet him at the apartment. Giso directed W.B. and A.P. to the Crescent Ridge

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complex, met them outside, and showed them a furnished apartment. He told them A.P. would be renting one bedroom in the apartment. About a week later, A.P. signed a month-to-month lease and W.B. gave Giso \$275 in cash. Giso subsequently notified W.B. that “problems [had] popped up,” delaying A.P.’s move-in date. Sometime later, W.B. met again with Giso and gave him another “\$250 [to] \$275” in cash and received a key. When the key did not unlock the apartment door, W.B. asked for a refund. Giso agreed, but told W.B. he was out of town and would need to send him a check. W.B. declined to give Giso his address, however, and instead reported him to the police.

¶4 S.S. testified that, on March 9 or 10, 2013, he saw an online classified advertisement listing a “corporate” apartment for \$350 a month. He contacted the individual listed, “Leo,” and arranged to view the apartment on March 11. Giso met S.S. in the Crescent Ridge parking lot, and showed him an apartment. Giso said he had a five-year corporate lease on the apartment and that S.S. would be renting a bedroom and a bathroom. S.S. signed a lease the next day and gave Giso \$200 in cash as a security deposit. He later gave Giso \$350 in cash for the first month’s rent and received a key. Giso repeatedly delayed S.S.’s move-in date with explanations of various purported problems occurring at the apartment and renovation work he claimed was being done there. When S.S. could wait no longer, he requested a refund. Giso agreed, but then offered S.S. various excuses for not refunding his money and ultimately ceased communicating with S.S.

Summit Vista

¶5 On April 6, 2013, S.F. saw an online advertisement for a furnished apartment for \$400 per month. He called the advertiser, “Leonard,” and arranged to meet with him. Giso met S.F. in the Summit Vista parking lot and showed him a furnished apartment, which he said he owned and offered S.F. a month-to-month lease for up to five years. S.F. gave Giso \$250 in cash as a security deposit and \$400 in cash for the first month’s rent, but did not sign a lease or receive a key. Giso delayed S.F.’s move-in date, explaining he was unable to vacate the apartment for S.F. because of issues relating to

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the inspection of his new house. S.F. never moved into the apartment and Giso did not refund his money.

¶6 Also on April 6, J.G. responded to an online classified advertisement for a furnished, two-bedroom apartment for \$500 per month, and arranged to meet with “Leonard” at the apartment. Giso met J.G. outside Summit Vista and showed her an apartment. J.G. later returned with her husband, C.G., who gave Giso \$300. Finding it strange that Giso did not ask for identification or offer a receipt for the payment, J.G. telephoned the office at Summit Vista and learned Giso was not the owner of the building as he had claimed. She contacted Giso and requested a refund, but her money was never returned.

¶7 Giso was subsequently charged with two counts of fraudulent schemes and artifices, two counts of forgery, and theft. As to the charges of fraudulent schemes and artifices the indictment provided:

Count One: Fraudulent Scheme and Artifice, a class two felony[:]

On or about the 1st day of March, 2013 through the 31st day of March, 2013, Leonard Giso, pursuant to a scheme or artifice to defraud, obtained a benefit from W.B. and/or Crescent Ridge Apartments and/or S.S., by means of false or fraudulent pretenses, representations, promises or material omissions, in violation of A.R.S. § 13-2310.

Count Two: Fraudulent Scheme and Artifice, a class two felony[:]

On or about the 6th day of April, 2013 through the 7th day of April, 2013, Leonard Giso, pursuant to a scheme or artifice to

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defraud, obtained a benefit from L.C.¹ and/or S.F. and/or C.G. and/or J.G. and/or Summit Vista Apartments, by means of false or fraudulent pretenses, representations, promises or material omissions, in violation of A.R.S. § 13-2310.

Before trial, Giso entered a guilty plea on the theft charge.

¶8 After a three-day trial, a jury found Giso guilty as charged. The trial court later found him to have one historical prior conviction and sentenced him to presumptive, consecutive terms of 9.25 years on the two counts of fraudulent schemes and artifices, as well as concurrent terms on three other offenses. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13 --4031, and 13-4033(A)(1).

Discussion

¶9 Giso argues that both counts of fraudulent schemes and artifices arose from a single scheme to defraud, and therefore “th[e] charges were multiplicitous in violation of the protection against double jeopardy.” We review de novo whether a double jeopardy violation has occurred. *State v. Garcia*, 235 Ariz. 627, ¶ 4, 334 P.3d 1286, 1288 (App. 2014). Because Giso did not raise this argument or challenge the charges or convictions below, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d 601, 607–08 (2005). However, as the state acknowledges, a double jeopardy violation constitutes fundamental, prejudicial error. *State v. Ortega*, 220 Ariz. 320, ¶ 7, 206 P.3d 769, 772 (App. 2008).

¶10 The Double Jeopardy Clauses of the United States and Arizona Constitutions protect a criminal defendant from multiple convictions for the same offense, *State v. Veloz*, 236 Ariz. 532, ¶ 4, 342 P.3d 1272, 1274 (App. 2015); *see also* U.S. Const. amend. V; Ariz. Const. art. 2, § 10, as well as multiple punishments, *see Merlina v. Jejna*, 208 Ariz. 1, ¶ 14, 90 P.3d 202, 205 (App. 2004) (multiplicitous

¹No evidence relating to L.C. was presented at trial and he was not named as a victim in the jury’s verdict.

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charges do not subject defendant to double punishment so long as multiple punishments not imposed). Moreover, double jeopardy rights may be violated even when the sentences are concurrent. *See State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008).

¶11 Under § 13-2310, a person commits the crime of fraudulent schemes and artifices if, “pursuant to a scheme or artifice to defraud, [a person] knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions.” § 13-2310(A). The criminal conduct punishable under § 13-2310 is the scheme to defraud, not any acts committed in furtherance of the scheme. *See State v. Suarez*, 137 Ariz. 368, 373, 670 P.2d 1192, 1197 (App. 1983). A scheme to defraud may involve numerous acts and multiple victims. *See id.* (“A scheme to defraud thus implies a plan, and numerous acts may be committed in furtherance of that plan.”); *State v. Schneider*, 148 Ariz. 441, 445, 715 P.2d 297, 301 (App. 1985) (single scheme involving forty victims).

¶12 To determine if charges of fraudulent schemes and artifices are multiplicitous, we consider whether the defendant embarked on “separate courses of conduct” involving a “distinct scheme” and whether, as to each scheme, the evidence shows a “specific intent” to defraud a “specific and separate victim.” *State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985). In *Via*, our supreme court rejected a multiplicity challenge to two charges of fraudulent schemes and artifices where the fraud consisted of using two stolen credit cards issued by different banks. 146 Ariz. at 116, 704 P.2d at 246. The court explained:

Admittedly, the removal of the victim’s credit cards constituted only one act. Defendant, however, subsequently embarked upon what could only be construed as two separate courses of conduct, each involving a distinct scheme to defraud a bank using a different credit card. The crime of fraudulent schemes and artifices requires that a defendant act with the specific intent to defraud. Defendant may have had the same general intent in

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each count—to defraud banks using stolen credit cards. There was, however, a specific and separate victim, as well as a specific and separate credit card, in each count. There was then specific intent to defraud twice, once as to each card and bank. Charging under two counts was not, therefore, multiplicitous.

Via, 146 Ariz. at 116, 704 P.2d at 246 (citation omitted).

¶13 Here, Giso posted two generally similar online advertisements, one in March and one in April, offering to lease a two-bedroom apartment but without disclosing its location. When W.B. and S.S. responded to the March listing, Giso showed them the apartment at Crescent Ridge and fraudulently led them to believe he had the authority to lease it. S.F. and J.G. responded to a different advertisement in April, and Giso showed them the apartment at Summit Ridge, falsely representing that he could lease it to them. We agree with the state that the two counts involved separate and distinct misrepresentations to different victims at different times, and thus two distinct plans, one to defraud prospective tenants of the Crescent Ridge apartment and one to defraud would-be renters of the Summit Ridge apartment.

¶14 Giso contends, however, that his case is akin to *Suarez* and *Schneider* and unlike *Via* in that “the evidence here shows that [he] engaged in a single scheme to defraud that involved multiple acts.” He notes that he “used essentially identical [online classified] ads to attract anyone willing to respond[,] . . . made similar statements about the apartments,” gave similar reasons as to why the renter could not move in, and agreed to provide a refund, but later made excuses for not doing so. Giso asserts “the fraudulent schemes charges in this case created the potential of multiple convictions for the same offense based on the same act or course of conduct, i.e., obtaining funds from non-specific individuals through the same misrepresentations.”

¶15 In *Suarez*, the defendant, the former finance director for Lake Havasu City, was charged with one count of fraudulent

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schemes based on his involvement in a kickback scheme “that manifested in a course of conduct involving numerous transactions” in which the defendant used city funds to buy overpriced goods and services from two employees of a city supplier, who then would return a portion of the money to the defendant personally. 137 Ariz. at 373, 670 P.2d at 1197. But there was only one victim, the city; thus, *Suarez* did not involve “specific and separate victims” as required for multiple counts. *Via*, 146 Ariz. at 116, 704 P.2d at 146. In *Schneider*, the defendant was charged with participating in a fraudulent scheme involving some forty victims. 148 Ariz. at 443, 715 P.2d at 299. “In each instance [the defendant] offered his victims an opportunity to invest in the purchase and resale of surplus industrial fasteners . . . [and] convince[d] each investor that he would make a substantial profit within weeks or months of his investment.” *Id.* This court determined that this “Ponzi scheme” was “but one scheme to defraud,” which defendant “could only keep going by seeking additional investors.” Notably, however, neither multiplicity of offenses nor double punishment was raised or addressed in that case. *Id.* at 446-47, 715 P.2d at 302-03.

¶16 Here, unlike *Suarez*, there were multiple and separate victims and, unlike the plan in *Schneider*, Giso embarked not on one scheme to defraud but on two separate courses of conduct, at different times, involving discrete and independent instrumentalities and misrepresentations. When he met with W.B. and S.S. in March, he led them to believe he could lease the Crescent Ridge apartment and defrauded them of money based on that scheme. When he solicited S.F. and J.G. in April, he offered them the Summit Ridge apartment, albeit under similar pretenses. Given that Giso carried out separate schemes involving separate and specifically targeted victims once they responded to his solicitations, we find no basis for a double jeopardy violation or for vacating either of his convictions.

Disposition

¶17 For the foregoing reasons, Giso’s convictions and sentences are affirmed.