2014 WL 4230695 (Alaska App.) (Appellate Brief)
Court of Appeals of Alaska.

Edward G. BYFORD, Jr., Appellant/Cross-Appellee,
v.
STATE OF ALASKA, Appellee/Cross-Appellant.

Nos. A-11123, A-11133.
June 9, 2014.

Trial Court No. 3KN-09-01800 CR
Appeal from the Superior Court Third Judicial District At Kenai
Honorable Peter Ashman, Judge

Brief of Appellee

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***vii** AUTHORITIES RELIED UPON

None.

***1** STATEMENT OF ISSUES

1. Did the State present sufficient evidence to convict Edward Byford of deceptive business practices where the website for Byford's company implied that it built certain log homes, when in fact the homes were built by someone else?

2. Did Superior Court Judge Peter Ashman commit plain error by instructing the jury on the elements of the offense of scheme to defraud and explaining that they did not have to be unanimous on the theory of the scheme to defraud when Byford's defense to the case - that he was simply a bad businessman and he did not have the intent to defraud anyone - was not implicated in the purported error in the jury instruction?

3. Did Judge Ashman err in finding the aggravating factors that Byford's offenses were the most serious and that his conduct was designed to obtain substantial pecuniary gain while the risk of prosecution and punishment for his conduct was slight?

4. Is the sentence of three years to serve, a sentence that is within the presumptive range, excessive?

5. Did Judge Ashman err in merging the deceptive business practices conviction with the scheme to defraud conviction since the acts upon which the two convictions were based were different and occurred at different times?

*2 STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In separate agreements, Edward Byford, the president of Prefab Log Homes, Inc. ("Prefab Log Homes"), contracted to build log cabins for at least eight different individuals or families. [R. 2972; Ex. No. 134] These people paid him several hundreds of thousands of dollars, but he did not build their cabins. [R. 2972; Ex. No. 134] Despite their repeated requests to either build the cabins or return their money, Byford did neither. [R. 2972; Ex. No. 134]

II. PROCEDURAL HISTORY

The grand jury indicted Byford on one one count of committing a scheme to defraud (Count I), one count of first-degree theft (Count II), and one count of engaging in deceptive business practices (Count III). [R. 590-93] During the trial, the State adduced evidence that Byford defrauded at least eight different individuals or families. [Ae. Br. 2-9]

A. Greg Diehl

Greg Diehl purchased a plot of land in the River Quest subdivision. [Tr. 325] After obtaining three bids to build the outer shell of a cabin with four walls and a roof, which ranged from $73,000 to $113,000, Diehl selected the lowest bid, which was Byford's bid. [Tr. 328-29, 375] After signing a contract with Byford and making a 50 percent down payment of ***3** $35,000 on January 18, 2005 (with the other half due upon completion) and putting in some steeling pilings, Diehl expected Byford to frame the house in the next 90 days. [Tr. 338-41] In May 2005, Byford still had not built the house. [Tr. 347] By September 15th, Byford had still not made any progress, but promised he would start in October. [Tr. 350] Byford claimed he was buying some logs from Alaska Log Brokers, and he purportedly gave Diehl their phone number. [Tr. 350-52] Diehl attempted to call Alaska Log Brokers at that number to confirm the order. [Tr. 353] After Diehl was unable to get any confirmation, he called back and it turned out to be James Moore's answering machine. [Tr. 352-54] Moore was Byford's employee, foreman and friend, who had nothing to do with Alaska Log Brokers. [Tr. 436, 588, 1380-83] The logs never showed up at Diehl's property. [Tr. 354, 356] By October 2005, since there had not been any work done on his house, nor any logs delivered, Diehl cancelled the contract with Byford and asked to have his money refunded. [Tr. 358-61] Byford never returned Diehl's money. [Tr. 361] Diehl got "nothing" for the $35,300 he paid Byford. [Tr. 361] Diehl testified that Byford simply "stole my money." [Tr. 384]

B. Matthew Leadens

In 2005 Matthew Leadens contacted Byford about building a log cabin on his property. [Tr. 943] Leadens ultimately entered into a contract with Byford, and he made a $13,500 down payment. [Tr. 946] After Leadens ***4** built the foundation and notified Byford that he (Byford) could start building in July 2005, Byford said he would start building in one week. [Tr. 950-51] That week came and went, and Byford never built anything on Leaden's property. [Tr. 951] Byford never delivered any logs to Leadens property, never built his cabin, and never refunded his money. [Tr. 955]

C. Paul Babuscio

Paul Babuscio entered into a contract with Byford in December 2005 for Byford to build him a cabin for $80,000, with construction to be completed by the fall of 2006. [Tr. 1094-97] (Babuscio had initially declined Byford's offer to build a cabin for $105,500, but Byford said he needed money to buy some logs and would pass the savings on to Babuscio. [Tr. 1094-97]) Babuscio initially made a $20,000 down payment. [Tr. 1097-98] Byford represented that he was licensed and bonded and showed Babuscio houses that Byford had purportedly built. [Tr. 1110-11; Exs. 31, 123] By February 1, 2006, Byford was supposed to commence work on clearing the trees and working on the driveway. [Tr. 1101] February came and went, but Byford failed to clear the driveway or build the cabin. [Tr. 1100-04] Babuscio sent Byford numerous emails and left Byford numerous telephone messages, but Byford failed to respond for several months. [Id.] Byford finally got in touch with him and promised him to build a driveway on one of Babusio's other properties. [Tr. 1105-06] However, Byford never cleared any driveways on ***5** any of Babusio's properties, never built a cabin; but he did keep Babusio's $20,000. [Tr. 1106]

D. Karl Kock

In August 2004 Karl Kock became interested in hiring Byford to build a log house on his property on Midway Drive in Sterling when he saw a sign out in front of Byford's business explaining that he had 20 years' experience building log homes. [Tr. 409, 414] In October 2004 Kock and Byford entered into a contract for Byford to build a 1,200 square foot house for $83,000 by January 1, 2005. [Tr. 415-16, 420] Kock paid Byford a down payment of $54,750. [Tr. 420-21] As of January 5, 2005, Byford had not done anything on Kock's property. [Tr. 528] Byford eventually attempted to lay a foundation, but because it was poorly cast and failed an independent inspection performed by a civil engineer, it could not be used. [Tr. 444-45, 448, 533] It cost Kock $3,600 to remove the faulty foundation Byford had installed. [Tr. 450] In July 2005, Kock asked for his money back since Byford was not building his house, and Byford told him, "I'm not going to build you a house. And I'm not going to give you your money back, either." [Tr. 468] Thus, Kock gave Byford $54,750 and got a hole in the ground that cost Kock additional money to fix. [Tr. 520] Kock received no logs, no flooring, no roofing, no windows, and no house. [Tr. 521]

***6** E. Frank Blodgett

In April 2005 Frank Blodgett contracted with Byford to build Blodgett a cabin in Anchorage for $67,000, for which Blodgett made a down payment of $5,000. [Tr. 761-64] Blodgett sent Byford another check for $10,000 the following month. [Tr. 770] Nothing happened after Blodgett sent Byford the money. [Tr. 776] In May 2006, before Byford had performed any work, Blodgett cancelled the contract and requested Byford refund him his money. [Tr. 777-78] Byford never built the house and never refunded the money. [Tr. 779] Using the previously deposited money, Blodgett later entered into a contract with Byford to build a house for him in Kasiloff by the end of June. [Tr. 781-87, 792] In addition to the initial $15,000 he had previously paid, Blodgett paid another $30,550 to Byford in June 2006. [Tr. 790] Months went by and despite repeated inquires by Blodgett, Byford never built the house. [Tr. 791] While Byford had excavated an area for a foundation, he had not performed any other work. [Tr. 794] Byford eventually told Blodgett he was not going to build his house and refused to refund him his $45,000. [Tr. 796-98, 834]

F.Robert Stokes

Robert Stokes became interested in having a log cabin built on his property and looked into having Byford build him one. [Tr. 907-08] Byford referred him to other houses in the area that he claimed he had built. ***7** [Tr. 909 (Exhibits 31, 54)] On May 5, 2005, Stokes and Byford entered into a contract for Byford to build him a log cabin by July 1st for $36,000. [Tr. 912-13, 914, 929] Stokes paid Byford a $17,988 down payment. [Tr. 924] Byford initially cleared some of the trees off the property, dug a foundation, and poured a footer. [Tr. 915-16] Byford did not perform any further work in 2005 or 2006, and he never built the cabin. [Tr. 918, 922-23] At one point, Byford promised to refund his money and pay Stokes back with interest, but he never did. [Tr. 923-24, 926] In hindsight, Stokes thought Byford was running a Ponzi Scheme, where Byford was using his (Stokes‘s) money on someone else's house. [Tr. 937-38]

G. Randy Lukasik

Randy Lukasik was interested in building a log cabin on his lot in the Sumpter Subdivision. [Tr. 708] He saw Byford's sign on the side of the road and started talking with Byford about hiring him to build his cabin. [Tr. 710-13] Lukasik eventually entered into a contract with Byford to build him a cabin that would be completed by May 1, 2005. [Tr. 715, 717-18] Lukasik ended up giving Byford, on behalf of Prefab Log Homes, an initial check for $12,600 in early January 2005. [Tr. 721] In August of 2006, Lukasic requested a refund, but Byford never gave him a refund nor did he ever build Lukasik's cabin. [Tr. 735, 742] Byford also failed to build a cabin for Lukasik's friends, Jeff and Ellen Fondryk. [Tr. 720, 735]

***8** *H. June Blankenship*

June Blankenship and Byford entered into a joint venture to build log homes. [Tr. 267] To advance that endeavor, she wrote Byford a check to buy logs and lumber to build the houses. [Tr. 265] She ended up paying Byford $81,000 and did not get three houses - she got a little excavation work, one poorly finished foundation, and scratched out driveways. [Tr. 268-69, 274, 279] Blankenship testified that throughout this process, Byford deceived her. [Tr. 285] Out of the money she paid Byford, Blankenship got “nothing” back from Byford - neither a usable product nor her money. [Tr. 290] Blankenship hired an attorney, Patricia Hefferan, who wrote a letter to Byford demanding he pay Blankenship the $81,000 he owed her. [Tr. 837-39] Byford acknowledged his responsibility to Blankenship, promised to pay her, but never paid her. [Tr. 839, 842-43]

I. David Sell

In response to a newspaper advertisement, David Sell contacted Byford and inquired about Byford being able to build him a log cabin. [Tr. 881] Byford represented that he was a general contractor who was licensed, bonded, and insured. [Tr. 879] Sell ultimately entered into a contract in May 2005 where Byford agreed to build Sell a log cabin for $41,500, and Sell made a $5,000 down payment. [Tr. 879, 881-82, 900] Sell later found out Byford did not have a general contractor's license and was

not bonded and insured. ***9** [Tr. 889] Byford had not yet performed any work on Sell's property and in June 2005 he demanded his money back. [Tr. 891] Byford failed to respond repeated attempts to communicate with him and he never refunded the money. [Tr. 892-94]

While Byford had accepted contracts to build log cabins for at least eight people and promised his clients that he was using their money to purchase logs, Byford failed to ever order - let alone pay for - any logs for eight or nine of the contracts. [Tr. 1172-79] For example, John Papasodora, the deputy commander of the Alaska Bureau of Investigation, discovered that Byford had only made one large purchase of logs (5,324 lineal feet of rough cut timbers) from Trans North Timber for $16,344.68. [Tr. 579, 581] That amount of logs would be approximately what would be needed to build two houses. [Tr. 616] It appears Byford used these logs to build another person's house, one for Philip Fechtmeyer. [Tr. 1068]

Instead of using the money he received to purchase logs and build the log cabins, Papasodora's analysis of Byford's bank accounts revealed that as soon as Byford received money from his clients, he immediately used the cash, often on himself. [Tr. 1125] For example, two days after receiving a check from Blankenship for $51,000, he cashed it. [Tr. 1127] Rather than using it to purchase logs, soon thereafter Byford made a cash payment of $26,951 to Roma Acceptance, LLC, to pay for his Nissan Frontier truck. [Tr. 1127-28] When Blankenship paid Byford $30,000 on November 12, 2003, ***10** Byford immediately cashed the check, made three cashier's checks for $9,000, which he deposited into various family checking accounts, and took the remainder in cash. [Tr. 1131-33] Subsequent withdrawals were made from those accounts for household goods (i.e., non-business expenses). [Tr. 1149] The vast majority of Byford's spending was for non-construction related items - sunglasses, dinners at restaurants, See's Candy, groceries, Burlington Coat Factory, Old Navy, the Oral Surgery Association, etc. [Tr. 1181-83] Papasodora concluded the Byford was simply using his business account to fund his personal lifestyle. [Tr. 1185] Byford could not account for over $123,000 in cash withdrawals. [Tr. 1413]

Byford ultimately received approximately $313,700 from his customers and built only one house for one customer, and that house had numerous problems with it. [Tr. 1161, 1165] During the time from September 2004 to September 2006, Byford initially had a balance of zero in his **financial** accounts, and despite receiving over $313,700 at the end of the period, he had a zero balance in his accounts. [Tr. 1164-65] According to Papasodora, Byford's conduct and analysis of his **finances** was consistent with criminal behavior. [Tr. 1422] Papasodora explained that with respect to Diehl, Kock, Lukasik, Fondrk, Stokes, Sell, Leadens, Blodgett, and Babuscio, they did not get houses for the money they paid Byford. [Tr. 1199]

Byford did not testify at trial, and he did not meaningfully dispute the underlying facts of the contracts, his failure to build the cabins, ***11** or his failure to return the money to the customers. [Tr. 1683-1726] He defended the case on the grounds that he was simply a bad businessman who lacked the intent to commit any of the crimes. [Tr. 1683-1726]

The jury convicted Byford on all three charges. [Tr. 1746; R. 584-86] Superior Court Judge Peter Ashman merged the convictions and sentenced Byford to three years to serve. [R. 578] Byford has appealed his convictions and sentence. [At. Br. 25-50] The State has cross-appealed Judge Ashman's decision to merge the deceptive business practices and scheme to defraud convictions.

ARGUMENT

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT EDWARD BYFORD OF DECEPTIVE BUSINESS PRACTICES

A. Standard of review

This Court independently reviews the record to determine whether the State presented evidence that would reasonably support a conclusion that the defendant is guilty beyond a reasonable doubt. *See Jeffries v. State,* 169 P.3d 913, 915 (Alaska 2007). In evaluating a claim of insufficient evidence, this Court views the direct and circumstantial evidence in the record, including

the reasonable inferences a jury may draw from the evidence, in the light most favorable to upholding the verdict. See ***12** Dorman v. State, 622 P.2d 448, 453 (Alaska 1981); *Roussel v. State,* 115 P.3d 581, 586 (Alaska App. 2005).

B. The trial proceedings

During the trial, the State presented evidence to the jury that Byford engaged in deceptive business practices. [Tr. 260-1651] As mentioned, Byford was the president of Prefab Log Homes. [Tr. 576; R. 2919] The website for Prefab Log Homes contained various photographs of houses. [Tr. 568-71; R. 2924]

Clint Hall, the owner of Denali Log Homes, testified at trial that various photographs of the houses on the Prefab Log Homes' website were being represented as being built by Prefab Log Homes. [Tr. 607-11; R. 2924] But Hall and his company - not Byford and Prefab Log Homes - had designed and built several of those houses. [Tr. 607-11] Byford had no role in designing or building those houses, and Hall had not given Byford permission to represent on Byford's website that they were designed or built by Byford. [Tr. 611-12]

Seth Crosby was an independent web-developer and designer who had redesigned and rebuilt the website for Prefab Log Homes in January 2009. [Tr. 1017-18, 1020-21] Working primarily with Lorraine Woitel, Crosby created a new domain name for the website, inserted additional photographs and revised content on the website. [Tr. 1022] Woitel was ***13** Byford's fiancee and she also assisted him with his construction business and later became a bookkeeper for Prefab Log Homes. [Tr. 1452-56]

Crosby testified that the changes to the content of the website came to him from Woitel. [Tr. 1022] The photographs Crosby used on the website were obtained from a thumb drive. [Tr. 1023] Crosby was not sure if Byford was present when Woitel gave him (Crosby) the photographs. [Tr. 1230] The photographs that were provided to Crosby were pixelated; they were not originals and they did not contain any metadata. [Tr. 1025, 1039] Crosby did not believe the photographs came off a digital camera appearing the way they did; rather he posited that they were copied from another web page. [Tr. 1025-26]

Crosby explained that in the creation of Prefab Log Homes website, as in any project, he weighed heavily the input from the principal stakeholders. [Tr. 1042] Crosby had between three and five meetings with Woitel; for two of these meetings Byford was present. [Tr. 1026, 1028] Byford actively participated in one of these meetings, at the other meeting he was sitting about ten feet away at a desk near the door working on a computer. [Tr. 1028] Byford could hear what was being discussed at both the meetings. [Tr. 1028-29] At the initial meeting, Byford provided some general ideas to Crosby that he wanted to communicate on the website. [Tr. 1029, 1036-37] At a later meeting, with Byford nearby, Crosby and Woitel discussed the website and in particular the text to be included on the website ***14** and the photographs. [Tr. 1029] The specific information for the website was communicated by Woitel. [Tr. 1029] But Crosby testified that at the two meetings where Byford was present, it was clear to Crosby that Byford knew what Crosby was doing and what he was there for. [Tr. 1031]

One part of the Prefab Log Homes website stated, "The owner of Prefab Log Homes has been manufacturing homes for over 25 years. Customer satisfaction from the initial call of the living experience has always been important to Prefab Log Homes." [Tr. 1032] Crosby testified that based on that language, he thought the owner of Prefab Log Homes was Byford and assumed the photographs were from projects Byford had built. [Tr. 1026, 1033] Crosby testified that had he known the photographs used on the site were not of houses built by Prefab Log Homes, he would not have used them because that would have been dishonest. [Tr. 1031-32]

The misleading representations on the website were not, however, Byford's only deceptive actions that he used to gain customers. [Tr. 879, 889] When meeting with prospective customers, Byford would often inform or imply that he was a licensed, bonded, and insured general contractor. [Tr. 879, 889] For example, Byford represented to David Sell that he was a general contractor and that he was licensed, bonded, and insured, even though this was not true. [Tr. 879, 889] Byford also represented to Paul Babuscio that he was licensed and bonded. [Tr. 1110-11; Exs. 31, 123] Even though Byford did not have a general contractor's license ***15** between September 1, 2001 and July 12, 2005, Byford told Greg Diehl he had a license. [Tr. 340, 372] Byford

told other customers, such as Randy Lukasik, that he had a specialty license, although it was undisputed Byford did not have a specialty contractor license anytime after August 2005. [R. 2934; Tr. 718]

To further attempt to lure prospective customers and convince them to give him money, Byford also told these people to view some of the houses he had built. [Tr. 469-71] But Byford failed to mention that the houses he referred them to were in fact built by other contractors. For example, Kock also testified that he went to a house located off of Sports Lake in Soldotna that Byford claimed he had built. [Tr. 469-71] Diehl testified that he wanted to check out Byford's work and went to a log cabin on Funny River Road that Byford led him to believe he had built. [Tr. 343-45] Byford directed Sell to three houses in the Soldotna area that he claimed he had built. [Tr. 879-80] Lukasik similarly wanted to see what other cabins Byford had previously built, and Byford directed him to a house off Strawberry Road. [Tr. 714-15] Byford led Lukasik to believe that this was a house that Byford had constructed. [Tr. 714-15, 748] Byford also represented to Paul Babuscio about various houses that Byford purportedly built. [Tr. 1110-11; Exs. 31, 123]

Byford also used photographs from Tony Prior's house, but Prior never gave Byford permission to use his house in photographs promoting ***16** Byford's business. [Tr. 397-98] (In fact, while Byford had started doing some work on Prior's house - Byford or his employee had started stacking some of the logs for a wall - the work was done improperly and Prior had to take the few logs down that had been installed and build the entire house himself. [Tr. 394])

At the close of the State's case, Byford moved for a judgment of acquittal on the deceptive business practices count. [Tr. 1233-36] Byford argued that since Crosby's primary contact regarding the creation of the content of the website was Woitel, and Byford was only present for some of these meetings, the State failed to establish Byford had engaged in deceptive business practices. [Tr. 1233-36]

Judge Ashman denied Byford's motion for acquittal. [Tr. 1239-41] Judge Ashman pointed out that this was not a situation where the State was attempting to hold the president of a corporation liable simply because of his status as the president. [Tr. 1239] Rather the State presented direct and circumstantial evidence of Byford's actual involvement both in the company and in the creation of the website. [Tr. 1239-40] Judge Ashman also noted that there was testimony from numerous witnesses that when customers asked to see examples of his work, Byford directed people to log houses that were made by someone else. [Tr. 1240] This was the same type of deception that was at issue regarding the misrepresentations at issue on the website. [Tr. 1239-40] That is, to promote his business and to make a sale, Byford ***17** represented as his own work that which was not his own. [Tr. 1240] Judge Ashman also noted that Byford was present during two of the meetings with Crosby, and Byford specifically discussed with Crosby the direction he wanted the design of the website to take. [Tr. 1240] While Byford did not influence to a huge degree the work Crosby did, it was of significance. [Tr. 1240] And even Crosby testified that he believed that Byford knew why Crosby was there and what Crosby was doing and the primary feature of the site was photographs. [Tr. 1240-41]

C. Byford engaged in deceptive business practices

Byford argues on appeal that there was insufficient evidence for a jury to convict him of engaging in deceptive business practices. [At. Br. 30-32] Specifically, Byford submits that that there was insufficient evidence that he, as opposed to Woitel, knew that the website contained false statements. [At. Br. 30-32]

To prove Byford committed the crime of deceptive business practices, the State was required to prove that Byford, in the course of engaging in a business, used the Internet to knowingly make a false statement in an advertisement or communication addressed to the public, in connection with the promotion of the sale of property or services. AS 11.46.701(a)(1). In addition to instructing the jury on the elements of the crime, Judge Ashman further instructed the jury that

> ***18** if... you find that the defendant acted in his capacity as [p]resident of Prefab Log Homes, Inc., you may only find him guilty if you determine (1) he knew the Prefab Log Homes, Inc. website contained false statements, (2) [Byford] had the authority to prevents its occurrence; and (3) failed to do so. If you find

> [Byford] acted personally, in his own behalf or on behalf of another person or entity and knowingly ordered or performed prohibited acts, you must find him guilty.

[R. 924] *See also* *Stock v. State,* 526 P.2d 3, 15 (Alaska 1974) (quoting *City of Cincinnati v. Duval,* 260 N.E.2d 127, 128 (Ohio App. 1970)) ("The fact that a person is an officer or agent of a corporation does not, of itself, impose criminal liability upon him for the violation of a criminal statute by the corporation.... Before a corporate officer can be guilty of the violation of a penal statute, it must appear that he was either actively engaged in the performance or direction of the act complained of, or that he knew of the violation or proposed violation of the law, and that although he had the authority to prevent its occurrence or continuance he failed to do so.")).

Viewing the previously detailed evidence in the light most favorable to upholding the jury's verdict, the State presented sufficient evidence to convict Byford of engaging in deceptive business practices. AS 11.46.701. There is no meaningful dispute that the Prefab Log Homes website was deceptive and represented directly or impliedly that Prefab Log Homes had built the cabins presented on its website when this was not in fact true. [At. Br. 30-32] The only real dispute is whether Byford knowingly engaged in the deception. [At. Br. 30-32] The jury could have reasonably ***19** concluded the direct and circumstantial evidence demonstrated Byford knew about the deceptive photographs on his website and failed to remove them.

In evaluating this issue, it is important to recognize what type of business was at issue here. [R. 2919] This was not a Fortune 500 multi- national corporation with thousands of employees, where the president of the corporation could not be expected to know every minute detail of all of his employees actions or approve every detail of every advertisement. [R. 2919] Rather this was primarily a one-man business with Byford's children and fiancee occasionally assisting him, and the principal means of attracting customers was through his website and a sign outside his business. [Tr. 408, 761-64, 770, 1252-53; R. 2919] Byford was the person who talked with all the customers, signed all the construction contracts, and was the individual who would design and construct the houses. [*See, e.g.,* Tr. 409, 414-16, 420-21, 715-18, 721, 879, 881-83, 900, 912-16, 929, 943, 946, 1552] While Byford's son would occasionally help him out in the summers or when he was not in school, and Byford's old friend James Moore also occasionally did work for Byford, the record is largely devoid of evidence of other employees. [Tr. 1252-53, 1273]

Woitel's claim that she became Byford's bookkeeper and "chief operating officer" and was Crosby's main source of information regarding the website does not demonstrate that Byford was not intimately involved in the business and the creation of the website and did not have knowledge of the ***20** deceptive photographs on the website. [At. Br. 31] Moreover, since Woitel knew nothing about designing, constructing or manufacturing log houses, and the website made numerous representations about different types of cabins, types of construction, as well as different materials and means of construction, the jury could reasonably conclude Byford looked at his own website to ensure it comported with his business. [Tr. 1565; R. 2924-32] Nor, more importantly, does it demonstrate that Byford did not know that the Prefab Log Homes website contained false statements and knowing this Byford failed to take any action. The jury could reasonably infer that Byford, the president of his small family business, knew about the photographs on his company's own website were of houses that he did not build and that he had and failed to take any corrective action.

The jury could also have reasonably determined that such a conclusion - misrepresenting houses as being built by Byford when they were placed on and continued to stay on his business's website - was consistent with Byford's deceptive in-person actions towards other prospective customers. See A.R.E. 404(b)(1) (evidence of wrongs is admissible to show motive, intent, knowledge, and absence of mistake or accident). As detailed in the testimony and found by Judge Ashman, when customers asked to see examples of his work, Byford personally directed prospective customers to log houses that were made by someone else. [Tr. 343-45, 469-71, 714-15, 748, 879-80, 1110-11, 1240] The similar deceptive use of the photographs of the ***21** houses on the website was completely consistent with Byford's willingness to deceive his customers about other cabins he also had not built. For all of these reasons, the jury could have found Byford liable in his capacity as president of Prefab Log Homes, his concomitant knowledge of the false statements on the website and his failure to take action.

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The jury could have also found Byford guilty of deceptive business practices based on his personal involvement in the deception. [R. 924] Countenancing Crosby's testimony, and the reasonable inferences from it, the jury could have concluded the misleading photographs were placed on the website with Byford's knowledge. [Tr. 1028-42] The jury could have concluded that Byford met with Crosby at least twice and during these meetings they discussed the website. [Tr. 1026, 1028-29, 1036-37] In creating the website Crosby relied heavily on the input of Byford, the principal stakeholder. [Tr. 1042] Moreover, viewing the evidence in the light most favorable to the State, Byford was present and sitting mere feet away when Crosby discussed the content of the website (i.e., the photographs) with Woitel. [Tr. 1028-29] It is certainly reasonable for the jury to infer that a small-business owner such as Byford would review the website that was his principal means of communicating with the public - either at its creation or once it went live - to determine whether it was accurate. No defense witness testified that Byford never reviewed the content on his company's own website. [See, e.g., Tr. 1445-1630]

***22** The jury was also free to disregard some or all of Woitel's testimony and her attempts to exculpate Byford. [R. 939 (explaining that the jury may disregard a witness's testimony and gave whatever weight it choses to a witness's testimony)] The jury could have reasonably concluded that Woitel's testimony was not credible given her personal stake in the case - not wanting to see her fiancee and the man who was in charge of building the houses to sustain their livelihood go to jail - and shaded her testimony accordingly. This is not idle speculation as Woitel repeatedly attempted to downplay even the most basic facts - i.e., if Crosby met with Byford, the length of time Crosby met with Byford, what Crosby and Byford discussed in general and about the website, and where Byford was located during the rest of the meeting(s), etc. [Tr. 1461-63, see generally Tr. 1145-1607] Woitel also attempted to assert, often sua sponte when no question was pending, that she was solely responsible for the content of the website. [Tr. 1565] (Judge Ashman in fact had to remind Woitel not to do this. [Tr. 1565]) Thus despite being engaged to Byford, living under the same roof and working together with him, and Byford having decades of construction experience, Woitel claimed she never consulted with him regarding the content of the website. [Tr. 1564, 1567-68, 1571] Woitel's repeated protestations could have had the opposite effect on the jury. See William Shakespeare, HAMLET act 3, sc. 2 ("The lady doth protest too much, methinks."). Moreover, Woitel ultimately conceded on cross-examination that much of the information for the website, ***23** including the dimensions of the homes, the type of construction, etc., had in fact come from Byford. [Tr. 1563] Had the jury decided not to place much weight, if any, on Woitel's testimony, there is even less reason to conclude the State did not present sufficient evidence that Byford was involved in the deception.

In sum, in evaluating this issue, in addition to viewing the direct and circumstantial evidence and the reasonable inferences from that evidence in the light most favorable to the State, it is also appropriate to apply a little common sense. It strains the bounds of credulity to conclude that Byford would have never - either at its inception or at any time after it went live - looked at his business's own website where he would have immediately been confronted with photographs of houses he did not build. The State presented sufficient evidence to convict Byford of engaging in deceptive business practices.

II. JUDGE ASHMAN DID NOT COMMIT PLAIN ERROR

A. Standard of review

When a party fails to object to the elements of the offense instruction for scheme to defraud, this Court reviews the claim only for plain error. Knix v. State, 922 P.2d 913, 920 (Alaska App. 1996).

*24 B. The evidence and the jury instructions

As previously summarized in the background section of this brief, during the trial the State adduced evidence that Byford defrauded at least eight different individuals or families. [Ae. Br. 2-10]

Judge Ashman instructed the jury that the indictment charged Byford in Count 1 with committing a scheme to defraud in two ways. [R. 913] First, that "Byford engaged in a scheme to defraud five or more persons who contracted with Byford for the supply of a prefabricated home by taking their money and falsely representing that he would supply each of them with a

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prefabricated log home when he did not intend do so and in fact did not do so, although he obtained property in accordance with the scheme." [R. 913] The second theory was that "Byford engaged in a scheme to defraud one or more persons who contracted with Byford for the supply of a prefabricated log home by taking their money and falsely representing that he would supply each of them with a prefabricated log home when he did not intend to do so and in fact did not do so, although he obtained $10,000 or more in accordance with the scheme." [R. 913]

Judge Ashman then instructed the jury on the two theories of committing a scheme to defraud:
There are two different ways by which the state can prove a scheme to defraud. Under the first theory of scheme to defraud, it is necessary for the state to prove beyond a reasonable doubt the following:

***25** (1) the defendant knowingly engaged in a conduct constituting a scheme;

(2) the scheme was to defraud five or more persons or to obtain property or services from five or more persons by false or fraudulent pretenses, representations or promises;

(3) the defendant intended the scheme to defraud these persons; and

(4) the defendant obtained some property or services in accordance with the scheme.

[R. 916]

Judge Ashman then instructed the jury on the second theory:
Alternatively, the state can prove a scheme to defraud by proving beyond a reasonable doubt the following:

(1) the defendant knowingly engaged in a conduct constituting a scheme;

(2) the scheme was to defraud one or more persons of $10,000 or to obtain $10,000 from one or more persons by false or fraudulent pretenses, representations or promises;

(3) the defendant intended the scheme to defraud this person or persons; and

(4) the defendant obtained some property or services in accordance with the scheme.

[R. 916]

Regarding the scheme to defraud count, Judge Ashman then instructed the jury that "if you find the state had proved beyond a reasonable doubt each of the elements in the first set of elements OR each of the ***26** elements in the second set of elements, then you must find the defendant guilty." [R. 917] Judge Ashman further explained, "On the other hand, if you find the state had not proved beyond a reasonable doubt each of the elements in the first set of elements AND the state had not proved beyond a reasonable doubt each of the elements in the second set of elements, then you must find the defendant not guilty." [R. 917] Thus, "[t]o return a verdict of of guilty, each of you individually must find the defendant guilty, but you need not agree among yourselves which of the two elements the state has proved." [R. 917]

C. Judge Ashman did not commit plain error

Byford argues on appeal that Judge Ashman committed plain error by not requiring the jury to be unanimous on which of the two scheme to defraud theories - engaging in a scheme to defraud five or more persons or engaging in a scheme to defraud one

or more persons of $10,000 - Byford committed. [At. Br. 34-40] Byford reasons that the two theories would not apply to all of the people since, under Byford's view, the theory of engaging in a scheme to defraud at least one person of $10,000 would not apply to David Sell and his wife, since they only paid Byford $5,000. [At. Br. 38-39] Byford also speculates that perhaps that theory might also not apply to a few of the other customers since they received some de minimis work from Byford. [At. Br. 39]

***27** A person commits the crime of scheme to defraud if the person engages in conduct constituting a scheme "to defraud five or more persons or to obtain property or services from five or more persons by false or fraudulent pretense, representation, or promise and obtains property or services in accordance with the scheme." AS 11.46.600(a)(1). A person also commits this crime if the person engages conduct constituting a scheme "to defraud one or more persons of $10,000 or to obtain $10,000 or more from one or more persons by false or fraudulent pretense, representation, or promise and obtains property or services in accordance with the scheme." AS 11.46.600(a)(2).

Jurors must be unanimous in returning a guilty verdict. U.S. Const, amend. V, XIV; Alaska Const. art. 1, § 7. While a jury can reach a verdict based on alternative methods of committing the crime or achieving a mental state, the jurors have to unanimously agree what mischief the defendant has committed. *Khan v. State,* 278 P.3d 893, 898 (Alaska 2012). Plain error is an error that (1) was obvious; (2) was not the result of a tactical decision not to object; (3) affected substantial rights; and (4) was prejudicial in that there was a reasonable likelihood that the error affected the outcome of the proceeding. *See Adams v. State,* 261 P.3d 758, 764 (Alaska 2011).

Byford has failed to demonstrate Judge Ashman committed an obvious error by the manner in which he instructed the jury. [At. Br. 38] Neither the Alaska criminal rules, the Alaska statutes, nor any decision by ***28** the Alaska appellate courts have ever addressed the interplay of Alaska's scheme to defraud statute and the unanimity requirement. *See, e.g.,* AS 11.46.600(a)(1)-(2). Byford observes that the legislative history of the scheme to defraud statute reveals it is based in part on the federal mail fraud statute. [At. Br. 34-37] He further observes that the Ninth Circuit in interpreting the federal mail fraud statute has concluded that the jury needs to be in unanimous agreement that the defendant participated in one particular fraudulent scheme. [At. Br. 34-37] These observations are probative, but not dispositive. [At. Br. 34-37] Byford has not cited any other (non-mail) scheme to defraud case from any other jurisdiction that has found plain error by instructing the jury like Judge Ashman instructed the jury in Byford's case. [At. Br. 34-37] Given the novelty of this issue in Alaska, such an instruction would not necessarily be obvious to every minimally competent criminal law practitioner. *Cf. Schad v. Arizona,* 501 U.S. 624, 644-45 (1991) (submitting a multi-theory crime to the jury without requiring unanimity on any one predicate theory is not a constitutional violation); *Evanchyk v. Stewart,* 340 F.3d 933, 937 n.1 (9th Cir. 2003) (same); *see also United States v. Lyons,* 472 F.3d 1055, 1068 (9th Cir. 2007) (explaining that in regards to mail fraud instructions, even the Ninth Circuit has concluded that the jury is not required to be unanimous regarding the particular false promise).

It is also not obvious that every minimally competent jurist would have sua sponte concluded Alaska courts would have followed the ***29** Ninth Circuit's jurisprudence on the federal mail fraud statute and require a unanimity instruction on the particular scheme to defraud element of AS 11.46.600. This is especially true given that there is no genuine possibility of juror confusion in this case. *See United States v. McDowell & Co.,* 148 Fed. Appx. 578, 580 (9th Cir. 2005) (unpublished) (concluding that the district court was not required to give a specific unanimity instruction during mail and wire fraud prosecution, where defendants did not show that there was genuine possibility of juror confusion). The facts of this case illustrate that very point - where an experienced prosecutor, defense attorney and trial judge did not believe such an instruction was required under Alaska law. [Tr. 1124-25, 1520, 1527]

Byford has similarly failed to establish he did not have a tactical decision for not objecting to the instructions. [At. Br. 38-39] As is detailed later in this brief, given the manner in which the case was litigated and Byford's defense, Byford's attorney could have perceived the potential error in the instructions, but in light of his chosen litigation strategy he could have determined the error was harmless or inconsequential, so Byford's attorney could have consciously refrained from objecting because the point was insignificant to his defense. *Khan v. State,* No. A-9552, 2013 WL 6576722, at *7 (Alaska App. Dec. 11, 2013) (unpublished) (Mannheimer, J., concurring). That is, Byford was not defending the case on the distinctions between the two

scheme-to-defraud-theories, rather he was defending the case on the ***30** ground that he had no intent to defraud and he simply was a bad businessman. [Tr. 1683-1726]

The second independent tactical decision could have been that if the jury instructions actually were erroneous, Byford's counsel would obtain a benefit in the form of "sandbagging." Khan, 2013 WL 6576722, at *8 (Mannheimer, J., concurring). Byford's counsel could have made the reasonable deliberate tactical decision "to allow reversible error" from the potentially erroneous jury instructions as an insurance policy against an adverse verdict. *Id.* (citing Paul T. Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default,* 29 DePaul Law Review 753, 754 (1980)).

Moreover, this was not a situation where the issue of a jury unanimity instruction was not on defense counsel's radar (or the radar of the prosecutor or the trial judge). [Tr. 1546-48] Rather, the propriety of the unanimity instruction was discussed by the parties and Judge Ashman, and ultimately affirmatively approved by everyone. [Tr. 1546-48] Thus under the tactical decision prong of a plain error analysis or as a stand-alone claim of invited error, *see Frankson v. State,* 282 P.3d 1271, 1273-74 (Alaska App. 2012), Byford should not be permitted to seek on appeal reversal of a instruction he expressly approved in the trial court, when such a tactical decision inures to his benefit.

***31** Finally, there was no plain error because Byford was not prejudiced by the instructions Judge Ashman provided the jury. [At. Br. 38-40] "To determine whether the lack of a unanimity instruction was harmless beyond a reasonable doubt, [the appellate court] must ask whether, if [the] jury had received a proper instruction on factual unanimity, there is a reasonable possibility that the jury's verdict's would have been different." *Anderson v. State,* 289 P.3d 1, 7 (Alaska App. 2012). This Court addressed similar situations in *State v. Covington,* 711 P.2d 1183 (Alaska App. 1985), and *Anderson v. State,* 289 P.3d 1 (Alaska App. 2012). In both Covington and Anderson, the defendants were charged with sexually **abusing** minors. *See Covington v. State,* 703 P.2d 436, 440-41 (Alaska App. 1985); *Anderson,* 289 P.3d at 4. The indictments included counts that encompassed several alleged acts of **abuse**, but the trial judges erroneously failed to tell the jurors that the defendants could not be convicted unless the jurors reached unanimous agreement as to the particular conduct underlying each count. Id. Nevertheless, this Court concluded in each case that the error in the jury instructions was harmless because the defendants presented a uniform defense to all the counts they faced: that they had never **abused** the victims, and that the victims' accusations were knowingly false. *Covington, 711* P.2d at 1185; *Anderson,* 289 P.3d at 7-8. Thus, in both Covington and Anderson, this Court examined the nature of the State's evidence and the nature of the offered defense and, concluded that the error in the jury instructions was ***32** harmless beyond a reasonable doubt; that there was no reasonable possibility that the juries' verdicts would have been different if they had been correctly instructed regarding the need for factual unanimity. *Covington,* 711 P.2d at 1185; Anderson, 289 P.3d at 8.

This Court recently addressed a similar issue in *Khan v. State,* No. A-9552, 2013 WL 6576722, at *1-5 (Alaska App. Dec. 11, 2013) (unpublished). Izaz Khan was convicted of a single count of perjury for making four false statements of fact in an affidavit he submitted in support of a request for court-appointed counsel - statements that under-reported Khan's assets and his income. *Id.* at *1. The trial judge had instructed the jurors that they did not need to reach unanimous agreement regarding any single one of the four false statements in Khan's affidavit. *Id.* Instead, the judge instructed the jurors that Khan could be convicted of perjury if all the jurors agreed that Khan acted knowingly with respect to at least one of these statements, even if the jurors did not unanimously agree on the identity of that statement. *Id.* Khan argued on appeal that he was legally entitled to demand jury unanimity with respect to each of the four false statements. *Id.* This Court concluded the purported error was harmless because Khan offered no evidence that any of the four statements was actually true, and the defense attorney's argument concerning Khan's mental state was not presented in a way that applied to some of Khan's statements more than others. *Id.* at *5. Instead, the argument about Khan's mental state was a ***33** blanket defense to all four allegations of perjury. *Id.* Thus even if the jurors should have been required to reach unanimity with respect to each of the State's four allegations, the error in the jury instruction was harmless beyond a reasonable doubt. *Id.*

Like in Khan, Covington, and Anderson, Judge Ashman's instruction was harmless in light of the evidence against Byford, his defense, and his arguments to the jury. [Ae. Br. 2-3, 18-27] As previously summarized, the evidence against Byford was overwhelming. Byford took over $200,000 from his victims and he did not build their houses or refund their money. [Tr. 1161, 1165; Ex. 134] Byford's litany of excuses to his victims (purported minor thefts of tools, a muddy road, a fire, etc.) did not obviate his obvious criminal intent. Nor could Byford ever explain why he failed to even order the logs for his customers in the first place.

The strength of the State's case was contrasted with Byford's defense at trial - that he simply was a bad businessman and lacked the intent to commit any of the crimes. [Tr. 1683-1726] This defense, however, was the same for both of the scheme-to-defraud-theories. [Tr. 1683-1726] That is, if the jury believed Byford that he simply was a sloppy businessman who had no criminal intent and simply failed to perform due to circumstances outside his control and because of his poor administrative skills, the jury would have acquitted him on the scheme to defraud charge under either theory. [R. 916] If in light of the overwhelming evidence to the contrary, the ***34** jury rejected his defense, they would convict him for effectuating a scheme to defraud under either theory. [R. 916] In light of the evidence against him and his defense, the manner in which Judge Ashman instructed the jury was harmless and did not prejudice his defense.

The instruction was also harmless for another independent reason. Byford's argument is premised on the fact that at least one customer (the Sells) might have been only subject to one of the scheme-to-defraud-theories - the scheme to defraud five or more persons - and not the scheme to defraud theory of engaging in a scheme to defraud one or more persons of $10,000. [At. Br. 34-40] As mentioned, under Byford's view, the theory of engaging in a scheme to defraud at least one person of $10,000 would not apply to the Sells, since they only paid Byford $5,000. [At. Br. 38-39] (Byford also speculates that perhaps that theory also might not apply to a few of the other customers since they received some de minimis work from Byford. [At. Br. 39]) But this is incorrect. To commit the crime of engaging in a scheme to defraud, Byford was not required to actually obtain more than $10,000, he was simply required to have a "scheme" to defraud a person of $10,000 and obtain "some property. in accordance with the scheme." AS 11.46.600(a)(2). This was true for the alternative theory as well, Byford was simply required to have a scheme to defraud and obtain "some property." AS 11.46.600(a)(1). Thus the jury could have properly convicted Byford under either theory, even if the jury relied solely on the scheme to defraud the Sells.

***35** In other words, while it is true that the Sells ultimately only paid Byford $5,000, the jury could have still convicted Byford under the scheme to defraud the Sells of $10,000, since the amount Byford actually obtained was irrelevant. AS 11.46.600(a)(2). All that was required was that Byford obtain "some property," which Byford did; he obtained $5,000 from the Sells. AS 11.46.600(a)(1)-(2). Moreover, while Byford only obtained $5,000 from the Sells, he had the intent to obtain well-over $10,000; Byford's scheme with the Sells was to obtain $20,750 to $41,500. [Tr. 879, 881-82, 900] When negotiating the contract for the Sells' $41,500 log cabin, Byford sought to obtain half the contract price as a down payment:

> He went over the type of log structure that he built. There was... an example inside his facade... of the building, there were some logs out in the parking lot, and we discussed the structure size and he proceeded to put together a bid, pricing a contract, and asked for $5,000 down - or actually, asked for half, but we stipulated that we did not have the property signed, sealed, delivered, purchased at... Moose Pass, and that we couldn't sign anything to absolutely purchase the log home until we had... the property sealed.

[Tr. 878-79 (emphasis added)] Thus, the record reveals Byford's scheme to defraud the Sells was just like his scheme to defraud the other buyers- asking for half of the contract ($41,500 in the Sells' case, which would have been well over $10,000) as a down payment, knowing as part of his scheme to defraud that he was never going to order the logs, build the cabin, or refund the Sells their money. Consequently, even if the jury relied on the Sells to ***36** convict Byford of the crime of scheme to defraud, the purported error in the jury instructions did not prejudice Byford since the jury could have properly convicted him under either of the two theories.

Byford's related speculation that perhaps there was some conflict between the two theories because there was some evidence that for some of the customers Byford did some de minimis work on their property and this work might have meant he did not defraud them of $10,000 is irrelevant. [At. Br. 39] There was no evidence, testimony by Byford, or argument by Byford's counsel of this point to the jury. That is, Byford never argued to the jury that he could properly be convicted of the scheme to defraud five or more persons, but not the scheme to defraud theory of engaging in a scheme to defraud one or more persons of $10,000, because he had done some de minimis work on a couple of the properties. [Tr. 1683-1726] In any event, as just mentioned, Byford was not required to obtain more than $10,000, he simply had to have a scheme to defraud these customers and obtain some property - which he indisputably did for all of the customers. AS 11.46.600.

In sum, Byford has failed to demonstrate Judge Ashman committed plain error in the manner in which he instructed the jury.

*37 III. THE PROPRIETY OF BYFORD'S SENTENCE

A. Standard of review

A sentence will be upheld on appeal unless it is clearly mistaken. *McClain v. State,* 519 P.2d 811, 813-14 (Alaska 1974). When this Court reviews a sentencing judge's ruling on an aggravating factor, it views the evidence in the light most favorable to the judge's ruling. *Steve v. State,* 875 P.2d 110, 125 (Alaska App. 1994). This Court reviews de novo the sentencing judge's application of statutory aggravating factors. *Michael v. State,* 115 P.3d 517, 519 (Alaska 2005). This Court affirms a trial court's ruling on the existence of aggravating factors unless that ruling is shown to be clearly erroneous. *Lepley v. State,* 807 P.2d 1095, 1099 n. 1 (Alaska App. 1991). Whether merger of convictions warranted is a question of law which this Court reviews de novo. *See Erickson v. State,* 950 P.2d 580, 485 (Alaska App. 1997); *Coleman v. State,* 846 P.2d 141, 142 (Alaska App. 1993).

B. Bvford's sentence and Judge Ashman's findings

Byford was 49 years old at the time of sentencing and did not have any prior criminal convictions. [R. 3875] The State sought two aggravating factors: that the conduct constituting the offense was among the most serious conduct included in the definition of the offense (AS 12.55.155(c)(10)), and Byford's criminal conduct was designed to obtain ***38** substantial pecuniary gain and the risk of prosecution and punishment for his conduct is slight (AS 12.55.155(c)(16)). [Tr. 1765; R. 98]

The victims of Byford's thefts wrote numerous letters detailing the "nightmare" and "**financial** hell" Byford caused them. [R. 3883, 3888, see also R. 3883-3893] Kock detailed how Byford attempted to run him over after he testified against him, and then Byford told Kock that "he knows how to bury a body several feet under a moose carcass so it would not likely be found." [R. 3888] Kock, who was in his mid-seventies, had to go back to work to make up for the money Byford stole from him. [R. 3890] Blankenship detailed how Byford depleted her retirement funds and how Byford's fraud continued to cause her undue anxiety. [R. 3884] Elizabeth Stokes, a retired registered nurse, explained how she also had to go back to work and work 12 hours shifts at medical facilities in different cities in an attempt to recoup her losses. [R. 3886] As one **elderly** victim stated, "Byford has taken our **financial** freedom, the freedom to live our Golden years in peace." [R. 3890]

In evaluating the appropriate sentence, Judge Ashman pointed out that Byford has made no steps whatsoever to compensate any of his multiple victims. [Tr. 1838] Judge Ashman evaluated the Chaney criteria and focused on the need for specific deterrence to deter Byford from doing this, as well as sending a message to other people. [Tr. 1838-40, 1844] Judge Ashman was struck by the "bald-face shamelessness of the behavior, and the fact that [Byford] knew that the likelihood of getting prosecuted was almost ***39** zero." [Tr. 1841-42] Judge Ashman found that Byford was "amoral" and did not care about his victims. [Tr. 1842] Judge Ashman found that it unlikely Byford would change his behavior. [Tr. 1842]

Judge Ashman found both aggravating factors, merged the three convictions, and imposed a sentence of three years to serve with three additional years of suspended time. [Tr. 1845-47; R. 578]

C. Judge Ashman properly found both aggravating factors

Byford argues Judge Ashman erred in finding the aggravating factors. [At. Br. 41-46]

1. Byford's crime was most serious

Byford first argues Judge Ashman should not have found the "most serious" aggravating factor because Byford only took $220,000 from his victims, this purportedly was not a sophisticated or well-planned scheme, and Byford allegedly did not profit lavishly from his crimes. [At. Br. 42]

A trial judge is justified in finding the AS 12.55.155(c)(10) aggravating factor when the offense is among the most serious conduct included in the definition of the offense. AS 12.55.155(c)(10). A person can commit the crime of scheme to defraud, if he had a scheme to defraud one person of $10,000 or more and obtained some property, or a scheme to defraud five or more persons and obtained some property. AS 11.46.600(a)(1)-(2). Byford's conduct was the most serious when considering ***40** both the amount of money he obtained as a result of his actions and the number of people he victimized over several years. See id.; see also Crain v. State, 744 P.2d 423, 424 (Alaska App. 1987) (noting that the amount of money involved and the deliberate and protracted nature of a theft may justify characterizing it as "most serious"). Byford victimized not just one person, but at least ten people (Kock, Lukasik, Diehl, Blodgett, Sell, Stokes, Mahn, Leadens, Babuscio, Blankenship). [Ex. 125; R. 680, 2972, 3878] Moreover, Byford did not just obtain "some property" or even $10,000, rather he obtained in excess of $220,000. [Ex. 134] See Brezenoff v. State, 658 P.2d 1359, 1362-63 (Alaska App. 1983) (upholding most serious finding where the defendant stole $140,000, and committed a number of thefts over a one-year period); Sullivan v. State, No. A-5332, 1996 WL 33686446, at *6 (Alaska App. Jan. 3, 1996) (unpublished) (concluding that the theft of $167,821 justified the most serious finding); Waller v. State, No. A-4394, 1992 WL 12153687, at *1 (Alaska App. Dec. 30, 1992) (unpublished) (explaining the most serious finding was warranted in light of the $132,324 theft and the number of victims).

Moreover, Byford's scheme was both well-planned and somewhat sophisticated - he knew that if he immediately cashed his victim's checks he would be able to use the money on himself and his family and hide the rest of the untraceable cash and his victims would never be able to recover it from him. [Tr. 1125, 1127-28, 1181-83] Byford proved prescient in this regard ***41** since in the many years since he committed his crimes, his victims have not been able to recover any money from him. [R. 3880] Byford has failed to establish Judge Ashman erred in finding the most serious aggravating factor.

2. Byford's conduct was designed to obtain substantial pecuniary gain and his risk of punishment was slight

Byford next argues that Judge Ashman erred in finding the aggravating factor that his criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for his conduct is slight. [At. Br. 44-46] As detailed above, Byford's scheme was clearly designed to obtain "substantial pecuniary gain" since he sought to, and in fact ultimately obtained, between $200,000 and $300,000 as a result of his scheme. [Ex. 134, R. 680, 2972] Cf. Sullivan, 1996 WL at *6 (the conduct was designed to obtain substantial pecuniary gain of obtaining $168,000 over two years and had a slight risk of prosecution and punishment).

Byford's main argument is that his risk of prosecution was not slight because his criminal conduct was not hidden. [At. Br. 44-46] But the fact that in hindsight these victims and the State were ultimately able to discover Byford's scheme and criminal intent does not obviate the fact that Byford's scheme had a very low risk of punishment and it was not obvious he would ultimately be prosecuted for his actions. AS 12.55.155(c)(16). Judge Ashman correctly pointed out that the knowledge that a person is unlikely to be prosecuted for contractor fraud creates a situation where a person could ***42** engage in serial fraud knowing that the chances of him being prosecuted were "almost nil." [Tr. 1774]

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Byford's own trial counsel conceded that while some contractors might believe they are "going to get hammered civilly," other contractors, including Byford, did not believe they are committing a crime for which they are going to be prosecuted. [Tr. 1775] In fact, Byford's trial counsel and the prosecutor both agreed that the risk of prosecution was "slim." [Tr. 1774, 1792] While the State may attempt to occasionally prosecutor bankers or attorneys for misconduct involving a client's funds, prosecuting contractors for doing defective work or not doing any work is rare. In fact, Judge Ashman, who had sat on hundreds of cases during his tenure on the bench, specifically found that Byford "knew that [his] likelihood of getting prosecuted was almost zero." [Tr. 1841-42] Byford has cited no factual or legal authority demonstrating the falsity of this finding. [At. Br. 44-46] (For example, of the over 20,000 criminal investigations or prosecutions last year, there is no evidence any of them involved prosecutions for contractors defrauding their customers.) This is thus unlike the situation in London v. State, 941 P.2d 186, 193 (Alaska App. 1997), a case involving farmers growing marijuana in the Matanuska Valley for commercial purposes, where this Court concluded the (c)(16) aggravating factor was not appropriate because over four dozen growers are prosecuted each year for that crime.

***43** The scheme was also not as "obvious" as Byford suggests on appeal. [At. Br. 44-46] The manner in which Byford conducted his multi-year scheme demonstrated that he thought he could continue to get away with his actions and escape criminal prosecution. By using a predominately cash business model with little or no paper trail, there would be a paucity of business records to assist in demonstrating his intent. [Tr. 1413] Even with an experienced **financial** crimes investigator, it was difficult to piece together Byford's **finances**, as Investigator Papasodora's investigation demonstrated. [Tr. 563-600] Byford could have realistically concluded that if any of his defrauded customers ultimately decided to sue him, he had little to worry about even civilly because he was virtually judgment proof (having already spent or hidden the cash). Alternatively, Byford could have believed he could indefinitely continue his "Ponzi" scheme of using money from his new customers to build a few of his older customers houses. That a Ponzi scheme can continue for several years or several decades cannot be seriously debated. *See, e.g., In re Bernard L. Madoff Inv. Sec. LLC.,* 721 F.3d 54, 59 (2d Cir. 2013) (Ponzi investment scheme lasted at least two decades).

Moreover, the multi-victim scheme only became evident in hindsight. Most of the victims did not know at the time of the scheme that Byford was doing the same thing to other people. [Tr. 805] This is illustrated by the fact that even during the trial in 2011, years after the scheme started in 2004, the State discovered a new victim (Ruhilio San Juan), who had paid ***44** Byford $10,000 and had not received a cabin. [Tr. 805] This despite an extensive criminal investigation by the Alaska State Troopers, the Alaska Bureau of Investigation, and discovery conducted by civil plaintiffs. [Tr. 563- 600]

In sum, Byford has failed to establish Judge Ashman erred in finding this aggravating factor. In any event, even if Judge Ashman erroneously found the aggravating factors, the challenge is moot because Byford's time to serve is nonetheless within the presumptive range. See Cook v. State, 36 P.3d 710, 730 (Alaska App. 2001) (when the sole legal significance of proposed aggravating factors would have been to authorize the sentencing judge to impose a sentencing exceeding the normal ceiling for first felony offenders under AS 12.55.125(k), and when the judge did not exercise this authority, any challenges to the judge's findings on these aggravators factors were moot).

D. The sentence is not excessive

Byford argues that his sentence of three years to serve is excessive because of the unsophisticated nature of the scheme, the fact that Byford was not living an extravagant lifestyle, and in light of sentences given to other offenders convicted of similar crimes. [At. Br. 47-50]

As a result of his scheme-to-defraud conviction, which is a class B felony, and his lack of a prior documented criminal history, Byford faced a ***45** presumptive range of one to three years of incarceration. AS 12.55.125(d)(1). In light of Judge Ashman finding the two aggravating factors, Byford was subject to ten years incarceration. AS 12.55.125(d). Thus Byford's three years to serve is well below the sentence Judge Ashman was authorized to impose, in fact it was a sentence still within the presumptive range. [R. 578]

Byford's citation to sentences imposed by judges in other cases is ultimately irrelevant because, as this Court has repeatedly explained, appellate courts affirming trial courts' sentences only means “the sentence is not excessive.” *See Hum v. State,* 872 P.2d 189, 200 (Alaska App. 1994). The decisions in other cases do “not set a ceiling on sentences in similar cases, nor does it necessarily mean that [this Court] would not have affirmed a greater sentence in the appeal being litigated.” Id. The State would note, however, that his Court has upheld lengthy sentences in other similar cases. *For example, in Karr v. State,* 686 P.2d 1192, 1195 (Alaska 1984), Diana Karr, who had no prior criminal record, was convicted of first-degree theft and embezzlement and received a sentence of five years to serve, a sentence this Court upheld.

While Byford, on appeal, focuses on his background and personal characteristics, he fails to consider the impact his actions had on his victims and the community, and overlooks some flaws in his background. [R. 3833, 3883-93] As mentioned, many of Byford's victims were **elderly** and retired. [Id.] He appropriated their nest eggs, ruined their “Golden years” and forced ***46** many of them to return to work. [R. 3833, 3883-93] Byford also threatened to kill at least one of them (Kock) after he testified against him. [R. 3888] The trial court's statements in Karr are equally applicable here. Karr, 686 P.2d at 1195.

The judge in Karr stated that he did not “see any way that the court system can send a message to the community that you can steal hundreds of thousands of dollars and not get a substantial sentence. If a court does that then the whole criminal justice system... loses credibility,” because societal norms are not maintained. Karr, 686 P.2d at 1195. This Court agreed that substantial sentences are “imperative” in these cases “in order to maintain the integrity of the criminal justice system.” Id. This Court also pointed out that the degree of harm inflicted upon the victim is a consideration properly included within the context of the community condemnation factor. Id. In this case Byford defrauded at least eight people out of over $200,000. [R. 680]

Byford's presentence report author correctly summarized why a lengthy sentence was warranted:

> Mr. Byford took the benefit of people's good will and **abused** it. He was not a beginning business man; he had been operating in this manner for years. He had civil judgments against him for previous uncompleted or shoddily completed work while he continued to solicit more work and fleece more individuals. He is apparently able to present himself very well and gain the confidence of people with some means and then chameleon like, turn on them as soon as they expect a level of performance for their ***47** investment. He seems to do so without remorse and in fact is reported to have openly laughed at his victims. By all accounts Mr. Byford could be class[ifi]ed a “career criminal” through continued uncharged crimes. He has been at his deceptive, manipulative, and dishonest business for a long time. Mr. Byford's arrogance and attitude are what separate him from the individual who is truly working hard and trying to do the right thing, and for a myriad of reasons, just cannot get it right. That does not seem to be the case with Mr. Byford. He seems to know exactly what he is doing, he shows no evidence of remorse and there is nothing evidenced that suggests he will ever pay back his victims or refrain from continuing to do what he does.

[R. 3880]

In sum, Byford has failed to demonstrate Judge Ashman's sentence is clearly mistaken.

E. Merger of the scheme to defraud conviction and deceptive business practices conviction was improper

At sentencing the State conceded that the theft and the scheme to defraud convictions should merge, but the State argued the scheme to defraud conviction and deceptive business practices convictions should not merge. [R. 699] Judge Ashman merged the three convictions at sentencing. [Tr. 1846; R. 578] The State has appealed Judge Ashman's decision to merge the scheme to defraud conviction and the deceptive business practices conviction. (The State on appeal is not contesting Judge Ashman's decision to merge the theft and scheme to defraud convictions.).

The double jeopardy clause prohibits multiple sentences for committing a single crime or the same offense. *See* Alaska Const. art. 1, § 9; ***48** *Whitton v. State,* 479 P.2d 302, 308-10 (Alaska 1970). To determine whether several statutory violations constitute the same offense for double jeopardy purposes, courts should analyze what differences exist between the separate offenses (i.e., the elements, the acts, and intent), and also determine the basic interests sought to be vindicated or protected by the statutes defining the offenses. *Whitton,* 479 P.2d at 312. The court should determine whether the differences are substantial or significant enough to warrant multiple punishments. *Id.* "If such differences in intent or conduct are significant or substantial in relation to the social interests involved, multiple sentences may be imposed, and the constitutional prohibition against double jeopardy will not be violated." *Id.* Merger is not appropriate in this case because Byford's crimes have different elements, entail different conduct in general, and specifically were based on different conduct in this case, protect different societal interests, and the time period when these crimes took place was different.

As previously explained, the crime of scheme to defraud entails implementing a scheme to defraud people and obtain some property from them. AS 11.46.600. A person commits the crime of deceptive business practices when, in the course of engaging in their business, they use the Internet to make a false statement in an advertisement or communication addressed to the public. AS 11.46.710(d). The two crimes not only have different elements, they also protect distinct societal interests. *Compare* ***49** *AS* 11.46.600, *with* AS 11.46.710(d). One is designed to protect people from giving money to another as a result of a scheme to defraud, while the other protects against receiving deceptive advertisements or communications on the Internet. Id.

Merger is also not warranted in light of the specific facts of Byford's case. The scheme to defraud conviction was based on Byford instituting the scheme to take money from at least eight individuals or families under the pretext of building them log homes between October 2004 and February 2007. [R. 591 (Indictment), 913 (Instruction No. 5)] Whereas the deceptive business practices conviction was based on Byford making false statements on his company's revised website two to five years later in 2009. [R. 592-93 (Indictment), 919 (Instruction No. 10)] Byford's criminal actions leading to his scheme to defraud convictions was complete years before he decided to engage in deceptive business practices on the Internet in 2009. Since Byford engaged in two distinct crimes that were committed several years apart, merger of the convictions was not warranted. *See Joseph v. State,* 293 P.3d 488, 492 (Alaska App. 2012) (explaining that merger of convictions of even the same type of crime are not required to merge where there is a sufficient break between the offenses). For these reasons, Judge Ashman erred in merging the scheme to defraud and deceptive business practices convictions.

*50 CONCLUSION

The Court should affirm Byford's convictions, conclude the sentence is not excessive and Judge Ashman did not err in finding the aggravating factors, but reverse Judge Ashman's decision to merge the scheme to defraud and deceptive business practices convictions.

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