NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 09/25/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

STATE OF ARIZONA, Appellee,	1 CA-CR 11-0060
v.	DEPARTMENT B
JUAN DEDIOS MENDIVIL-CORRAL, Appellant.	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-163164-005DT

The Honorable Colleen L. French, Judge Pro Tempore

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Craig W. Soland
Attorneys for Appellee

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K E S S L E R, Judge

¶1 This appeal was filed pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89

(App. 1999), following Juan Dedios Mendivil-Corral's ("Mendivil-Corral") convictions for kidnapping, conspiracy to commit kidnapping and theft by extortion. Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. Mendivil-Corral was given the opportunity to, but did not file, a *pro per* supplemental brief. In response to our order, counsel for the parties submitted *Penson* briefing on multiple issues.

¶2 After reviewing the entire record, we conclude the evidence is sufficient to support the verdicts and sentences for kidnapping and conspiracy to commit kidnapping, there was no reversible error as to those charges and accordingly affirm his conviction and sentences on those charges. However, the evidence is insufficient to support the verdict and sentence for theft by extortion and we therefore reverse that conviction and remand this matter to the superior court to modify the convictions and sentences accordingly.

FACTUAL AND PROCEDURAL HISTORY[1]

¶3 On September 28, 2009, as V.G. and his wife, I.G., were leaving a store in Phoenix, a green car and a white truck pulled into the parking lot. Multiple individuals got out of

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[1] We view the facts in the light most favorable to sustaining the convictions. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

the vehicles and forced V.G. into the car at gunpoint. In a nearby neighborhood, V.G. was transferred from the car into the truck. V.G. was taken to a house where he was bound, blindfolded, and assaulted by the people at the house. V.G. was asked to provide the names of family members who may be able to pay a ransom in the form of $40,000 and his truck for his safe return. Persons in the house told V.G. he and his family members would be killed if they did not provide ransom. The kidnappers called V.G.'s brother-in-law, M.M., and asked him to provide a ransom. The caller demanded $40,000 and V.G.'s truck. The caller instructed M.M. to leave the truck with the money inside, and a ransom location was selected by the caller.

¶4 V.G.'s truck was taken to the ransom location and placed in the parking lot. A Ford Mustang arrived at the location, pulled up to the vehicle and dropped off someone, and then the Mustang left.[2] The Mustang was later stopped. Mendivil-Corral was inside the Mustang with his two-year-old child, and a woman who was driving.

¶5 Shortly thereafter, Detectives S.D. and P.G. separately arrived at the scene. Mendivil-Corral was already taken into custody by SWAT and placed in a patrol car in handcuffs. Detective S.D. confronted Mendivil-Corral, a

[2] The person that was dropped off headed towards the ransom truck and was apprehended by police.

Spanish-speaker, about the kidnapping, and Mendivil-Corral told Detective S.D. that he knew where V.G. was being held and was willing to show the police. Mendivil-Corral accompanied police and directed them to the location of two neighboring houses in the west valley that he said belonged to his boss Juan.[3] Later that evening V.G. was recovered by police in one of the houses that Mendivil-Corral showed police.

¶6 Back at the police station the same night (and into the early hours of September 29, 2010), Detective S.D. interviewed Mendivil-Corral in Spanish. The interview was audiotaped and videotaped. Mendivil-Corral was read his *Miranda* rights[4] and indicated that he understood them. Detective S.D. asked Mendivil-Corral if he knew why he was at the police station and according to the detective, Mendivil-Corral responded, "because he dropped off the other guy in the truck." Mendivil-Corral said that Juan/Alfredo told him to drop off the individual. Mendivil-Corral told the detective that he worked for Juan/Alfredo by running errands for him. When Detective S.D. asked Mendivil-Corral whether he was aware V.G. was kidnapped, Mendivil-Corral replied that he became aware of the kidnapping when Juan/Alfredo called and told him to pick up

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[3] Juan is also known as and referred to throughout the case as Alfredo. He will herein be referred to as Juan/Alfredo.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

another person to collect the money. According to the detective, Mendivil-Corral said the individual he was dropping off was going to pick up money and/or a truck.[5] The detective also read a portion of the interview transcript into the record wherein in the context of discussing payment for the kidnapping, Mendivil-Corral stated, "I think they were going to pay for him with that truck."[6] Mendivil-Corral told the detective that he was not involved in planning or participating in the initial kidnapping, and he denied being inside the house where V.G. was held. The jury convicted Mendivil-Corral of kidnapping, conspiracy to commit kidnapping, and theft by extortion.[7] After a plea-type colloquy, *see State v. Morales*, 215 Ariz. 59, 61, ¶¶ 7-8, 157 P.3d 479, 481 (2007), Mendivil-Corral stipulated to two prior convictions at sentencing. All counts were found to be "Non Dangerous – Repetitive" felonies. Mendivil-Corral was concurrently sentenced to an aggravated term of 25 years' imprisonment for kidnapping, a presumptive term of 15.75 years'

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[5] The detective admitted that he did not exactly know what the ransom was, but that Mendivil-Corral referred to the truck as being involved in connection with payment for V.G.

[6] The detective testified that in the context of the conversation, "him" referred to V.G.

[7] The jury also found each offense to be dangerous, *see* Arizona Revised Statutes ("A.R.S.") section 13-105(13) (2009), but the dangerousness findings were dismissed upon the State's motion at sentencing.

imprisonment for conspiracy, and a presumptive term of 15.75 years' imprisonment for theft by extortion.

DISCUSSION[8]

I. *Miranda* warnings

¶7 At trial, police testimony established that after being pulled over by police and taken into custody, Detective S.D. confronted Mendivil-Corral about the kidnapping. Mendivil-Corral offered to show police where V.G. was being held, accompanied police to the houses where he thought V.G. was at, and later, the police recovered V.G. from one of the houses. The prosecution also presented evidence in its case-in-chief of the discussions that police had with Mendivil-Corral about V.G.'s whereabouts after locating the houses but before going to the police station.[9] Although Detective S.D. testified that

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[8] In an *Anders* appeal, this Court must review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

[9] After showing the police the houses, Mendivil-Corral and the police went to a nearby convenience store. While at the store, Mendivil-Corral claimed that he saw his own car (Volkswagen Jetta) drive by, and he informed police that it was possible Juan/Alfredo was in the car along with V.G., and a third person who was possibly guarding V.G. Mendivil-Corral indicated to the police that he had seen the people that were in the Jetta earlier in the day. Detective S.D. never actually saw V.G. in the car, and the car was never stopped by police to confirm

Mendivil-Corral voluntarily provided information about V.G.'s whereabouts, there was no evidence presented that Mendivil-Corral was given *Miranda* warnings until he participated in a formal interrogation at the police station later in the evening wherein he indicated that he understood his rights and proceeded to answer questions about his involvement in the kidnapping.

¶8 "Voluntariness and *Miranda* are two separate inquiries. '[T]he necessity of giving *Miranda* warnings . . . [relates directly to the] admissibility [of a confession].'" *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983) (quoting *State v. Morse*, 127 Ariz. 25, 29, 617 P.2d 1141, 1145 (1980)); *cf. State v. Pettit*, 194 Ariz. 192, 196, ¶¶ 17, 19, 979 P.2d 5, 9 (App. 1998) (When *Miranda* warnings are required but not given, that factor weighs against a finding of voluntariness). Subject to exceptions not applicable here, "[u]nless law enforcement officers advise a defendant in custody of the *Miranda* rights before questioning him, any statement made by that person in custody is inadmissible against him at trial 'even though the statement may in fact be wholly voluntary.'" *Montes*, 136 Ariz. at 494, 667 P.2d at 194 (quoting *Michigan v. Moseley*, 423 U.S. 96, 100 (1975)).

Mendivil-Corral's assertions. Later, during his interview at the police station, Mendivil-Corral told police that he delivered marijuana to the house where V.G. was held, but he never went inside the house.

¶9 Here, the record does not show that Mendivil-Corral was given *Miranda* warnings at any time before going to the police station. However, assuming warnings were not given, reversal is not required if we can say that admission of the pre-warning statements was harmless error. *See id.* at 497, 667 P.2d at 197 (applying harmless error analysis after determining trial court committed error by failing to suppress a pre-warning statement and stating "[t]he question is whether the appellate court can say beyond a reasonable doubt that the jury would have found the defendant guilty without the evidence").

¶10 Here, the police testified that Mendivil-Corral led them to the house in which V.G. was being held. Such evidence was admissible regardless of a *Miranda* violation. *See United States v. Patane*, 542 U.S. 630, 636-37, 642 (2004) (determining that the Self-incrimination Clause of the Fifth Amendment is not implicated by the admission of nontestimonial evidence obtained as a result of voluntary statement where police failed to warn, and declining to apply the fruit of the poisonous tree doctrine). Moreover, the court did not reversibly err in admitting Mendivil-Corral's later pre-warning statements to police because those statements did not affect the verdict given the non-testimonial evidence and the post-warning testimonial statements implicating Mendivil-Corral in the kidnapping. Nor did the post-warning statements become suspect because the

record does not objectively establish that the police intended to obtain statements from Mendivil-Corral before giving him warnings and then to repeat their questions after giving him his *Miranda* warnings. *See Missouri v. Seibert*, 542 U.S. 600, 616 (2004) (determining objective measures showed a police strategy to undermine *Miranda* warnings); *State v. Zamora*, 220 Ariz. 63, 69-71, ¶¶ 15-20, 202 P.3d 528, 534-36 (App. 2009) (explaining that under *Seibert* to show error in admission of statements there must be evidence that police deliberately failed to warn in order to elicit statements and then police re-elicited the same statements after giving warnings).

¶11 Accordingly, admission of the pre-warning statements, even if erroneous, was harmless error.

II. Voluntariness

¶12 "In Arizona, a suspect's statement is presumptively involuntary. However, '[a] prima facie case for admission of a confession is made when the officer testifies that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty.'" *State v. Ellison*, 213 Ariz. 116, 127-28, ¶ 31, 140 P.3d 899, 910-11 (2006) (citation omitted) (quoting *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979)).

¶13 Mendivil-Corral did not file a motion to suppress any of his statements or request a voluntariness hearing to

determine whether his statements to police during his interrogation at the police station were voluntary. The record does not suggest that his statements were involuntary, and he did not object to or otherwise challenge Detective S.D.'s trial testimony that his statements were voluntary. Absent an explicit request or a suggestion from the evidence that a statement may be involuntary, the superior court does not have to *sua sponte* inquire into the nature of a defendant's statement. *See State v. Alvarado*, 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979) (under procedure for determining voluntariness the defendant must move for a hearing); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974) (no *sua sponte* duty to conduct examination outside of presence of jury since voluntariness was not raised by defense or evidence); *State v. Fassler*, 103 Ariz. 511, 513, 446 P.2d 454, 456 (1968) (remanding for voluntariness determination when testimony suggested hearing was necessary); *State v. Goodyear*, 100 Ariz. 244, 248, 413 P.2d 566, 569 (1966) (stating the court has a duty to hold a voluntariness hearing if question is raised by attorneys or presented by evidence); *State v. Simoneau*, 98 Ariz. 2, 7, 401 P.2d 404, 407-08 (1965) ("[W]here no question is presented to the court either by counsel or by the evidence at the trial suggesting that a confession is involuntary, there is no issue of fact to be determined by the court . . . and no need for a

specific ruling."); *State v. Wilson*, 164 Ariz. 406, 407, 793 P.2d 559, 560 (App. 1990) (no burden on prosecution to show statements were voluntary because no suppression motion filed). Because here the evidence did not suggest that Mendivil-Corral's statements were coerced, the court was not required to *sua sponte* hold a voluntariness hearing.

III. Sufficiency of the Evidence

A. Count One: Kidnapping - A.R.S. § 13-1304(A)(1)

¶14 Kidnapping is committed "by knowingly restraining another person with the intent" to "hold the [person] for ransom." A.R.S. § 13-1304(A)(1) (2010).[10] To "'[r]estrain' means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13-1301(2) (2010). "Restraint is without consent if it is accomplished by . . . [p]hysical force, intimidation or deception." A.R.S. § 13-1301(2)(a).

¶15 The evidence established that V.G. was taken at gunpoint and restrained in two different vehicles and then in a west valley house until police rescued him. Thus, he was restrained within the meaning of the statute. *See id.* While at

[10] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

the house, V.G. was asked to give the names of his family members who might be able to provide ransom for his release. V.G.'s brother-in-law was contacted by the kidnappers in an effort to collect $40,000 and a truck as ransom. Thus, there is sufficient evidence that the kidnapping was committed with the intent to collect ransom.

¶16 There is sufficient evidence that Mendivil-Corral acted as either a principal or an accomplice to the kidnapping because kidnapping is an ongoing crime until the victim is no longer restrained. *State v. Jones*, 185 Ariz. 403, 407, 916 P.2d 1119, 1123 (App. 1995) (deciding for double-jeopardy purposes that "[a]lthough the offense of kidnapping was complete after defendant compelled the victim at knife point into his truck, the offense continued until the victim escaped"). Police testimony established that during Mendivil-Corral's interview he admitted that he agreed with Juan/Alfredo to pick up and drop off another individual at the ransom location. The testimony also established that Mendivil-Corral did so knowing that V.G. was being held for ransom and that the purpose of dropping off the other individual at the ransom location was to collect the ransom for V.G.'s release. Thus, a reasonable jury could have found Mendivil-Corral guilty as a principal to the ongoing kidnapping.

¶17 Additionally, because Mendivil-Corral "with the intent

to promote or facilitate the commission of [kidnapping for ransom]," aided, agreed to aid, or attempted to aid Juan/Alfredo in committing the kidnapping for ransom, by taking another to the ransom location while V.G. was being restrained, there is sufficient evidence to find him guilty as an accomplice to the ongoing kidnapping. A.R.S. §§ 13-301(2) (2010), -303(A)(3) (2010); *see State v. Phillips*, 202 Ariz. 427, 435-36, ¶¶ 35-36, 46 P.3d 1048, 1056-57 (2002).

B. Count Two: Conspiracy to Commit Kidnapping - A.R.S. § 13-1003

¶18 Conspiracy to commit kidnapping requires proof of kidnapping under A.R.S § 13-1304 and proof that "with the intent to promote or aid the commission of an offense, [Mendivil-Corral] agree[d] with one or more persons that at least one of them or another person [would] engage in conduct constituting [kidnapping for ransom]." A.R.S. § 13-1003(A) (2010) ("an overt act shall not be required if the object of the conspiracy was to commit any felony upon the person of another").

¶19 Here, the evidence established that Mendivil-Corral agreed with Juan/Alfredo to take a third person to the ransom location knowing that his purpose for doing so was to pick up ransom for V.G.'s release. Thus, there is sufficient evidence that Mendivil-Corral intended to promote or aid the ongoing kidnapping for ransom by agreeing with Juan/Alfredo to drive

another person and/or driving the other person to the ransom location. There is sufficient evidence that Mendivil-Corral committed conspiracy to commit kidnapping.

C. Count Three: Theft by Extortion - A.R.S. § 13-1804(A)(1)

¶20 The State charged Mendivil-Corral with theft by extortion under A.R.S. § 13-1804(A)(1) (Supp. 2011). To prove that crime, the State had to show beyond a reasonable doubt that Mendivil-Corral or one of the other defendants knowingly sought (1) "to obtain property or services," (2) by making a future threat to, (3) "[c]ause physical injury to anyone by means of a deadly weapon or dangerous instrument." *Id.*

¶21 The State named M.M., V.G.'s brother-in-law, as the victim of extortion. M.M. was threatened with V.G.'s murder if he did not provide $40,000 and V.G.'s truck to the extortioners. Specifically, M.M. was told several times by the extortioners that "they were going to kill [V.G.]." Thus, there is sufficient evidence in the record to prove that a future threat of physical injury was made to obtain property. However, there is no evidence that Mendivil-Corral was involved in such threat

as either a principal or an accomplice.[11]

1. Penson Order

¶22 We ordered counsel to file *Penson* briefs addressing whether there was substantive evidence to support Mendivil-Corral's conviction for theft by extortion as either a principal or an accomplice. *Defense counsel* argues that there was sufficient evidence to find Mendivil-Corral guilty of theft by extortion because:

> [i]n the context of the entire proceeding it was reasonable for the jury to conclude [M.M.] understood the threat to kill [V.G.] was by use of a gun and it was reasonable for the jury to conclude the threat to kill [V.G.] was intended to convey it would be with a gun. It was thus reasonable for the jury to reject [Mendivil-Corral's] denial's [sic] to police that he was not involved in the kidnapping and never in the house by concluding he possessed the credit card because he got it from [V.G.] at the house and was in the house because he also had

[11] Unlike subsection (A)(1), A.R.S. § 13-1804(A)(2) does not require a threat involving deadly weapons or dangerous instruments and governs circumstances where there is a future threat to "[c]ause physical injury to anyone except as provided in paragraph 1 of this subsection." A.R.S. § 13-1804(A)(2); *see State v. Garcia*, 227 Ariz. 377, 379, 381, ¶¶ 10, 18, 258 P.3d 195, 197, 199 (App. 2011) (exercising discretion under Ariz. R. Crim. P. 31.17(d) to consider subsection (A)(2) as a necessarily included lesser offense where there was no evidence of a deadly weapon or dangerous instrument, modifying the judgment from a class 2 to a class 4 felony, and remanding for resentencing). Because there is no evidence that Mendivil-Corral was involved in the threats here, an element that is common to both subsections, there is no need to consider the sufficiency of evidence under A.R.S. § 13-1804(A)(2) or remand for resentencing on that basis.

> "touched the gun" and knew exactly which house the victim was held. Moreover, it was reasonable and there was sufficient evidence for the jury to conclude based on those facts and the fact [Mendivil-Corral] was attempting to pick up the ransom that he was an accomplice to the threat to kill [V.G.] made to [M.M.].

Counsel concludes, "[t]hus, is was reasonable for the jury to believe [Mendivil-Corral] was a principle in the kidnapping and an accomplice in the threat made to [M.M.] . . . ."

2. There is insufficient evidence to support a conviction of theft by extortion because there is no evidence to establish that Mendivil-Corral threatened the extortion victim.

¶23 Putting aside whether defense counsel even approached meeting the standard for providing effective assistance of counsel by arguing to affirm his client's guilt of extortion in supplemental briefing, we conclude that no reasonable fact-finder could determine that Mendivil-Corral was a principal or accomplice to the threats made upon M.M.

¶24 Although Mendivil-Corral admitted to police that he knew V.G. was being restrained for ransom, and that he drove another person to retrieve the ransom, his statements do not establish the elements of theft by extortion. In the *Penson* briefs, counsel point to the following facts to support the conviction: Mendivil-Corral knew where V.G. was being held; upon Juan/Alfredo's request Mendivil-Corral dropped someone off at

the ransom location; Mendivil-Corral knew he was dropping someone off to collect ransom; V.G.'s credit card was found in the urinal in the police station after Mendivil-Corral used the restroom; two people were arrested inside the house; only one of four kidnappers were identified at trial; a co-defendant stated to police "we all touched the gun."

¶25 These facts however, are not probative of theft by extortion. At most, the facts establish that Mendivil-Corral admitted going to the house where V.G. was held, but he denied going inside the house. Even assuming the jury disbelieved the denial that he went into the house, this does not establish that Mendivil-Corral threatened M.M. or intended to aid in the threats to M.M. to cause physical injury to V.G. As discussed above, theft by extortion requires proof that Mendivil-Corral knowingly sought to obtain property by making a future threat to M.M. to cause physical injury to V.G. *See* A.R.S. § 13-1804(A)(2). Neither Mendivil-Corral's statements to police nor the circumstantial facts above establish that he made a threat to M.M. to physically harm V.G.

¶26 In addition, the facts do not establish that Mendivil-Corral was an accomplice to theft by extortion. Although the evidence established that Mendivil-Corral knew a kidnapping ransom was being paid there is no evidence that he *intended* to promote theft by extortion involving a threat to cause physical

injury to V.G. "as evidenced by actions such as soliciting, aiding, promoting, or providing the means for another person to commit [the] offense." *State v. Prasertphong*, 206 Ariz. 70, 91, ¶ 84, 75 P.3d 675, 696 (2003), *vacated on other grounds*, 541 U.S. 1039 (2004); A.R.S. §§ 13-301, -303(A)(3); *State v. Johnson*, 215 Ariz. 28, 32, ¶ 16, 156 P.3d 445, 449 (App. 2007) ("[I]t is the intent of the one charged as an accomplice, rather than the intent of the main actor, that controls the accomplice's criminal responsibility." (quoting *State v. Wall*, 212 Ariz. 1, 5, ¶ 20, 126 P.3d 148, 152 (2006)). "A defendant may be liable as an accomplice under A.R.S. § 13–303(A)(3) 'only for those offenses the defendant intended to aid or aided another in planning or committing.'" *Ellison*, 213 Ariz. at 134, ¶ 67, 140 P.3d at 917 (quoting *Phillips*, 202 Ariz. at 436, ¶ 37, 46 P.3d at 1057).

¶27 In addition, the crime of theft by extortion is complete when the threat is made. Thus, Mendivil-Corral's participation in the attempted ransom collection is insufficient to prove him guilty of an earlier theft by extortion. A few hypothetical scenarios help make the point. *See Garcia*, 227 Ariz. at 380, ¶ 13, 258 P.3d at 198 (quoting *In re Andrew C.*, 215 Ariz. 366, 370, ¶ 21, 160 P.3d 687, 691 (App. 2007) for the proposition that "[f]requently, hypothetical examples shed light on the viability, or lack thereof, of an asserted legal

principle”). First, suppose that an extortioner tells her neighbor that she is going to use a gun to beat a third person the next day if the neighbor does not pay her money that day. The crime of extortion under subsection (A)(1) and (A)(2) is complete when the threat is made. Now suppose the same scenario except that the extortioner never mentions that she is going to use a gun and only threatens a future beating. The crime of extortion under (A)(2) is complete when the threat is made. Assume further that whether she is paid or not, the next day the extortioner actually beats the third person using a gun. The fact that she used a gun to cause injury does not change the nature of the threat to her neighbor the day before. The crime of extortion is complete when the threat is made and does not depend upon whether, or how, the threat is actually carried out on another person.

¶28 Thus, while the facts are sufficient to establish Mendivil-Corral’s accomplice liability in the ongoing kidnapping by aiding in the ransom collection effort, they are not sufficient to show that he was an accomplice to theft by extortion involving threats made to M.M. involving physical harm to V.G. *See State v. Johnson*, 215 Ariz. 28, 34, 156 P.3d 445, 451 (App. 2007) (“[T]o be an accomplice, a person’s first connection with a crime must be prior to, or during, its commission; it cannot be after the commission of the offense.”

(citation omitted)). "A conviction must be based on substantial evidence, which is proof that reasonable persons could find 'sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *Johnson*, 215 Ariz. at 29, ¶ 2, 156 P.3d at 446 (citation omitted) (quoting *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996)). Because there is an absence of probative facts to support Mendivil-Corral's guilt under A.R.S. § 13-1804(A), the extortion conviction is not based on substantial evidence. *See Johnson*, 215 Ariz. at 29, ¶ 2, 156 P.3d at 446 (citing *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988)); *see also Ellison*, 213 Ariz. at 133-34, ¶ 65, 140 P.3d at 916-17 ("A conviction will be reversed for insufficient evidence only if it is not supported by substantial evidence."). We reverse Mendivil-Corral's conviction for theft by extortion.

3. There is insufficient evidence to support a conviction of theft by extortion under A.R.S. § 13-1804(A)(1) because there is no evidence to establish that Mendivil-Corral threatened to cause physical injury to anyone by means of a deadly weapon or dangerous instrument.

¶29 In addition, there is no evidence that the threat that was communicated to M.M. was to "[c]ause physical injury to anyone by means of a deadly weapon or dangerous instrument" as

required under A.R.S. § 13-1804(A)(1).[12] *See State v. Garcia*, 227 Ariz. 377, 380, ¶ 14, 258 P.3d 195, 198 (App. 2011) ("Under A.R.S. § 13-1804(A)(1), the act of threatening death alone neither results in, nor qualifies for, punishment . . . . What is required is that the assailant threaten to 'cause physical injury'—not necessarily death—and that he or she do so 'by means of a deadly weapon or dangerous instrument.'"). *But see State v. Mendoza-Tapia*, 229 Ariz. 224, 229, ¶ 14, 273 P.3d 676, 681 (App. 2012) ("A.R.S. § 13-1804(A)(1) does not require that the threat to use a dangerous instrument or deadly weapon be communicated to the person from whom the property is demanded.").

¶30 In *Garcia* this Court analyzed A.R.S. § 13-1804 and determined that "the act of threatening death alone neither results in, nor qualifies for, punishment" under subsection (A)(1) of the statute. 227 Ariz. at 380, ¶ 14, 258 P.3d at 198. We stated that "[w]hat is required is that the assailant threaten to 'cause physical injury'—not necessarily death—and that he or she do so 'by means of a deadly weapon or dangerous

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[12] "'Dangerous instrument' means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. § 13-105(12) (Supp. 2011).

"'Deadly weapon' means anything designed for lethal use, including a firearm." A.R.S. § 13-105(15).

instrument.'" *Id.* (quoting A.R.S. § 13-1804(A)(1)). In *Garcia*, the state did "not contend that the telephone calls in which the kidnappers threatened the [kidnapping] victim's life contain any reference to using a deadly weapon or dangerous instrument," but rather, argued that "a jury should be permitted to assume that because the [kidnapping] victim's life was threatened the use of a deadly weapon or dangerous instrument may be inferred." *Id.* at 381, ¶ 16, 258 P.3d at 199. We rejected the state's argument, noting that "when asked to know whether the victim was still alive, the extortioners stated they could 'call [and] . . . would be able to listen . . . while they *were beating* [the kidnap victim]". We acknowledged that a beating can occur with or without the use of a deadly weapon or dangerous instrument. *Id.* at ¶ 17. We concluded that there was evidence to support extortion under subsection (A)(2) which does not require a threat of injury by means of a deadly weapon or dangerous instrument, but not under subsection (A)(1) because "[t]o allow a jury to speculate about the existence of a deadly weapon or dangerous instrument, when no evidence (or inference) of one is presented to the one being extorted," is contrary to the statutory requirements in subsection (A)(1). *Id.*

¶31 In *Mendoza-Tapia*, this Court upheld a conviction under subsection (A)(1) after distinguishing *Garcia*. We explained that a knife and a gun were used to kidnap the victim and

threaten him. We also explained that the kidnappers would "rack the guns" to scare the victim while the kidnap victim was being held. *Mendoza-Tapia*, 229 Ariz. at 228, ¶ 12, 273 P.3d at 680. We further described the extortion stating:

> [w]ith this foundation of fear in place, the kidnappers told the victim that they wanted money, and that if the ransom was not paid they would kill him and his son. The men told the victim's wife that if she did not get the money, the victim would be killed and his head would be found on her doorstep [and] [a]s a result of the threats, beatings, and the use of the guns, the victim told his wife "to do what they were telling her to do."

Id. It was in this context that we determined that unlike *Garcia*, the jury did not need to speculate about the use of a weapon because "reasonable persons could conclude that the threats to kill the victim by shooting or by beheading, both necessarily involving the use of a deadly weapon or dangerous instrument, were intended to coerce the surrender of funds in ransom." *Id.* at ¶ 13.

¶32 We also rejected Mendoza-Tapia's argument that the evidence was insufficient to support his conviction under subsection (A)(1) because "none of the calls to the victim's wife [the extortion victim] mentioned the use of any weapon or dangerous instrument." *Id.* at 229, ¶ 14, 273 P.3d at 681. We disagreed with the implication in *Garcia* that the victim of the extortion must know about the deadly weapon or dangerous

instrument to satisfy (A)(1). *Id.* (citing *Garcia*, 227 Ariz. at 381 n.5, ¶ 17, 258 P.3d at 199 n.5).

¶33 Our decision in *Mendoza-Tapia* noted that "A.R.S. § 13-1804(A)(1) does not require that the threat to use a dangerous instrument or deadly weapon be communicated to the person from whom the property is demanded." *Id.* (citing *State v. Roberts*, 131 Ariz. 519, 522, 642 P.2d 864, 867 (App. 1981), *approved in relevant part*, 131 Ariz. 513, 642 P.2d 858 (1982)). Although we cited *Roberts* as support for this determination, *Roberts* actually addressed a different issue on appeal. There, the appellant argued "that there was no evidence that the person or persons from whom the money or property was sought in the extortion either *saw a deadly weapon or had a deadly weapon used upon him or her*." *Roberts*, 131 Ariz. at 522, 642 P.2d at 867 (emphasis added). Roberts never argued, and the court did not address whether the threat requirement in A.R.S. § 13-1804(A)(1) necessitated that the threat communicated to the extortion victim indicate the use of a deadly weapon or dangerous instrument to cause physical injury.

¶34 Here, the *Penson* brief that defense counsel filed asserts that V.G.'s wife, I.G., witnessed V.G.'s kidnapping at gun point, and she later spoke to the extortion victim——M.M. Defense counsel claims: "It was not unreasonable for the jury to infer that [I.G.] not only confirmed [V.G.] was kidnapped to

[M.M.] but also mentioned the use of guns. In fact it would be highly unlikely she did not mention guns when telling [M.M.] on the phone about [V.G.] being kidnapped." According to defense counsel, unlike *Garcia*, here the jury did not have to speculate about the use of a weapon because the record demonstrates that weapons were used during the initial kidnapping and then at the house. Defense counsel further argues that in *Mendoza-Tapia* this Court stated that "repeated threats to kill the victim were more effective because of the threatening exhibition of guns during the initial kidnapping." *Mendoza-Tapia*, 229 at 229, ¶ 13, 273 P.3d at 681. Counsel concludes, "[t]hus, it was reasonable for the jury to believe [Mendivil-Corral] was a principle in the kidnapping and an accomplice in the threat made to [M.M.] . . . ."

¶35 The State, however, acknowledges that M.M. called V.G.'s wife, I.G., "who handed the telephone to a police officer" and concedes that "the record contains no evidence that the kidnappers told [M.M.] that they would use deadly weapons or dangerous instruments to injure or kill [V.G.]." The State's concession as to this fact is well-received.

¶36 There is no evidence that V.G.'s wife, I.G., told M.M. about the use of guns during the initial kidnapping. The testimony reflects that when M.M. called I.G. she answered the phone crying, confirmed V.G. was kidnapped, and "passed the

phone to a police officer." Neither I.G. nor M.M. testified that she told M.M. about guns or any of the facts surrounding the kidnapping. In addition, neither M.M. nor any police officer testified that M.M. was told that a deadly weapon or dangerous instrument was used against V.G. during the kidnapping. Moreover, there is no evidence that V.G. ever spoke to I.G., M.M., or the police during the extortion effort. Indeed, V.G. testified that he was not present to hear the calls made to M.M.

¶37 The State argues that nevertheless, under *Mendoza-Tapia*, it is inconsequential that M.M. did not know about the use of a deadly weapon or dangerous instrument "because there was ample evidence that the kidnappers made such express or implied threats to [V.G.], both to control him and to get the names [of someone] . . . who might pay the ransom." The State maintains that *Mendoza-Tapia* confirms that a "threat" for purposes of extortion "can be made either to the person from whom the ransom is demanded (*e.g.* by threatening to kill the kidnapping victim if the ransom demands are not met), or to the *kidnapping victim himself* (*e.g.* to obtain the [kidnapping] victim's cooperation)." The State argues this is a correct interpretation of the extortion statute because the statute "includes threats to cause 'physical injury to *anyone*.'"

¶38 The State's argument fails because the statute does

not provide that the threat of physical injury includes *threats* made to anyone. Rather, it says the threat made is a threat to "cause *physical injury to anyone*." A.R.S. § 13-1804(A)(1) (emphasis added). In other words, the threat must be made to the extortion victim, but the injury may be to anyone. So for instance, here, the threats the extortioners made to V.G. to kill him, in conjunction with the deadly weapons and dangerous instruments used against him, would be appropriate evidence to prove the elements of subsection (A)(1) if V.G. was the victim of extortion. However, the State charged that the victim of extortion in this case is M.M. As discussed above, there is no evidence that M.M. had knowledge that the threat to kill V.G. involved causing injury by means of a deadly weapon or dangerous instrument.

¶39 The general statement is correct in *Mendoza-Tapia* that under A.R.S. § 13-1804(A)(1), the use of a deadly weapon or dangerous instrument need not be communicated to the extortion victim when the threatened injury indicates it requires the use of a deadly weapon or dangerous instrument. So for instance, an extortioner need not explicitly threaten the use of a gun to cause injury if the threat is to shoot someone or put a bullet in someone because such a threat would be reasonably understood as involving a gun which is a deadly weapon. Likewise, as in *Mendoza-Tapia*, an extortioner need not explicitly threaten the

use of a specific object to cause injury if the threat is to behead someone. In such a case, it is reasonably implied that a dangerous instrument would be required to effectuate the threat. Thus, to the extent *Mendoza-Tapia* stands for the proposition that if a fact-finder can reasonably infer the threat necessarily involves the use of a deadly weapon or dangerous instrument it is supported by the statutory language.

¶40 However, to the extent *Mendoza-Tapia* can be interpreted, as the State suggests here, to propose that an extortion victim need not know that the threat communicated to him or her was to cause injury to another by means of a deadly weapon or dangerous instrument, it cannot be reconciled with the statutory language in subsection (A)(1), particularly in a non-kidnapping context as illustrated in the hypothetical scenarios described at *supra* ¶ 27.

¶41 In *Garcia*, we stated that it was the legislature's prerogative to punish more harshly a threat of injury by a deadly weapon or dangerous instrument (subsection (A)(1)), than a threat of injury that does not involve a weapon or dangerous instrument (subsection (A)(2)). 227 Ariz. at 380-81, ¶ 15, 258 P.3d at 198-99; *see State v. Casey*, 205 Ariz. 359, 362, ¶ 10, 71 P.3d 351, 354 (2003) (quoting *State v. Jackson*, 186 Ariz. 490, 491, 924 P.2d 494, 495 (App. 1996) for the proposition that "[t]he authority to define crimes and fix the penalties for such

crimes rests with the legislature, not the judiciary”). In other words, the plain language and structure of the statute makes it clear that a threat to shoot someone in the foot, for instance, carries a harsher penalty than the threat to starve someone to death, because the former involves the use of a deadly weapon or dangerous instrument while the latter example does not. However, there is nothing to indicate that the legislature intended to treat an extortion threat more harshly under (A)(1) simply because a person who might be injured if a demand is not fulfilled (here V.G.) knew that the extortioner had a dangerous instrument. Rather it is the type of threat communicated to the extortion victim that is more harshly penalized under the statutory language. To be guilty of extortion under subsection (A)(1) the type of threat must be to “[c]ause physical injury to anyone by means of a deadly weapon or dangerous instrument.” A.R.S. § 13-1804(A)(1). Thus, the focus has to be on what the extortioner communicated in the threat to the extortion victim and how the extortion victim understood the threat.

IV. Mendivil-Corral is entitled to two additional days of presentence incarceration credit for a total of 479 days.

¶42 Mendivil-Corral was taken into custody on September 28, 2009, and remained in custody until sentencing on January 20, 2011. He was granted 477 days of presentence incarceration

credit. However, excluding the day of sentencing, Mendivil-Corral was entitled to 479 days of presentence incarceration credit and should be credited with an additional two days.

V. No other fundamental error occurred during Mendivil-Corral's trial.

¶43 After careful review of the record, we find no meritorious grounds for reversal of Mendivil-Corral's convictions for kidnapping and conspiracy to commit kidnapping or modification of the sentences imposed. The record reflects Mendivil-Corral had a fair trial.

¶44 Mendivil-Corral was present, aided by an interpreter, and represented by counsel at all critical stages prior to and during trial, as well as for the verdict and at sentencing. Mendivil-Corral was given an opportunity to speak at sentencing, but declined. The jury was properly comprised and properly instructed on the burden of proof and reasonable doubt, the presumption of innocence, that the defendant need not testify, elements of the offenses, accomplice liability, mere presence, and to only consider statements Mendivil-Corral made to the police if the jury determined his statements were voluntary beyond a reasonable doubt. The evidence is sufficient to sustain the verdicts in Counts 1 and 2, and the court imposed legal sentences for Mendivil-Corral's offenses.

CONCLUSION

¶45 After reviewing the entire record, we conclude the evidence is sufficient to support the verdicts and sentences for Counts 1 and 2. Thus, we affirm his convictions and sentences for kidnapping and conspiracy to commit kidnapping. However, the evidence is insufficient to support the verdict and sentence for Count 3, theft by extortion, and so we reverse that conviction. We also grant Mendivil-Corral two additional days of presentence incarceration credit for a total of 479 days and remand this case for resentencing consistent with this decision.

¶46 Upon the filing of this decision, counsel shall inform Mendivil-Corral of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

/S/
____
DONN KESSLER, Judge

D O W N I E, Presiding Judge, specially concurring:

¶47 I agree that the convictions for kidnapping and conspiracy to commit kidnapping should be affirmed and that there was insufficient evidence to support the theft by extortion conviction, requiring its reversal. I do not,

however, join in the discussion contained in ¶¶ 29-41 regarding the proper interpretation of A.R.S. § 13-1804(A)(1). The evidence was insufficient to support the conviction, regardless of how the statute is interpreted, and further legal analysis of the theft by extortion offense is unnecessary.

/S/

MARGARET H. DOWNIE, Presiding Judge

S W A N N, Judge, specially concurring:

¶48 I join in Judge Downie's special concurrence. I also note that I am unpersuaded that the discussion contained in paragraphs 29-41 is correct as a matter of law.

/S/

PETER B. SWANN, Judge