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

DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 11-0157
v.	DEPARTMENT A
DYWAYNE EARL MADISON, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006355-001DT

The Honorable Samuel A. Thumma, Judge

AFFIRMED IN PART, VACATED IN PART

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Dywayne Earl Madison appeals his convictions and sentences for three counts of kidnapping, two counts of

aggravated assault, one count of misconduct involving weapons, one count of receiving the earnings of a prostitute, and fourteen counts of pandering. For the reasons stated, we vacate the kidnapping conviction based on Count 1 of the indictment but affirm in all other respects.

DISCUSSION

I. Sufficiency of the Evidence

¶2 Madison contends the evidence was insufficient to survive his motion for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"), or to support convictions for offenses involving victim A.H. because the State did not present evidence regarding "the specific dates alleged in the indictment."

¶3 We review *de novo* the denial of a motion for judgment of acquittal and the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted). We view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). We do not distinguish between direct and circumstantial evidence. *State v. Stuard,* 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there

sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶4 The dates the crimes were committed is not an element of any of the charged offenses. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 13-1203 (assault), -1204 (aggravated assault), -1304 (kidnapping), -3209 (pandering), -3204 (receiving earnings of prostitute), -3102 (misconduct involving weapons). Therefore, absent an alibi defense not present here, the State need not prove the exact date of the crimes. *State v. Verdugo*, 109 Ariz. 391, 392, 510 P.2d 37, 38 (1973). Evidence is sufficient if it establishes an offense was committed "on or about the date charged in the indictment." *State v. Cummings*, 148 Ariz. 588, 591-92, 716 P.2d 45, 48-49 (App. 1985).

¶5 The indictment alleged that on or between August 7th, 2009, and November 7th, 2009, Madison committed 13 counts of pandering -- that is, he knowingly compelled, induced or encouraged A.H. to lead a life of prostitution. *See* A.R.S. § 13-3209(A)(4) (pandering). The indictment also charged Madison with one count of receiving the earnings of a prostitute, "on or between" August 1, 2009, and November 7, 2009. *See* A.R.S. § 13-3204 (receiving earnings of prostitute).

¶6 A.H. testified that Madison encouraged and forced her to engage in prostitution, beginning in late July 2009 and

ending when she fled on November 7, 2009. During that time, A.H. testified, Madison drove her to the areas where she worked as a prostitute, imposed rules for her to follow, punished her for violating the rules, and collected all of her earnings. A.H. recalled specific incidents that could be correlated to dates in the indictment alleging pandering, and police officers testified that they observed A.H., and she admitted, engaging in prostitution on other dates alleged. This evidence was sufficient for the jury to conclude that Madison committed each of the 13 pandering offenses involving A.H. on the dates alleged in Counts 6-18 and that he received money from prostitution during those times, as alleged in Count 5.

¶7 A.H.'s testimony, considered with the other evidence, was also sufficient to prove that Madison kidnapped and assaulted her on the dates alleged. A.H. testified that Madison kept her from leaving her hotel room and then forced her into his truck at gunpoint the day she was released from her first arrest, which occurred on August 26, 2009, bringing the conduct within the timeframe alleged in Counts 1-3. A.H. also testified that Madison held her at gunpoint and threatened her with a gun at a park about a month before her October 24, 2009 arrest, bringing the conduct within the range of dates alleged in Counts 21-22. Finally, police officers testified that they found a firearm in the truck that Madison, a convicted felon, was

driving when he was arrested on April 21, 2010, supporting the conviction for misconduct involving weapons, as alleged in Count 4.

II. Double Jeopardy

¶8 Madison argues his convictions and sentences for the kidnapping offenses in Counts 1 and 2 violate prohibitions against double jeopardy because the evidence established one continuous restraint of the victim. We agree.

¶9 "The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9, 206 P.3d 769, 772 (App. 2008); *see also* U.S. Const. amend. V; Ariz. Const. art. 2, § 10. Because an additional felony conviction constitutes punishment, a double jeopardy violation occurs even if the court imposes concurrent sentences. *State v. Brown*, 217 Ariz. 617, 621, ¶ 13, 177 P.3d 878, 882 (App. 2008). We review claims of double jeopardy violations *de novo*. *State v. Welch*, 198 Ariz. 554, 555, ¶ 5, 12 P.3d 229, 230 (App. 2000) (citation omitted).

¶10 "The proper inquiry when a defendant is convicted of multiple violations of the same statutory provision is whether the individual's acts are punishable separately as discrete offenses." *State v. Jones*, 185 Ariz. 403, 405, 916 P.2d 1119, 1121 (App. 1995). Because kidnapping is a "continuing crime,"

the uninterrupted restraint of the victim will "not give rise to more than one count of kidnapping." *Id.* at 406-07, 916 P.2d at 1122-23.

¶11 The evidence established that Madison subjected A.H. to uninterrupted restraint on August 26, 2009, from her restraint in the hotel room until she was forced into the truck at gunpoint and driven around while she pleaded for her life -- the bases for the kidnapping charges in Counts 1 and 2. The State does not dispute that A.H.'s restraint was uninterrupted, but instead urges us to overturn *Jones*, arguing it was wrongly decided.

¶12 We disagree with the State's contention that Arizona Revised Statutes ("A.R.S.") section 13-1304(A) permits multiple convictions when, as here, the restraint was for different purposes, using different means: 1) in Count 1, physical restraint with the intent to place A.H. in fear of imminent physical injury under subsection (A)(4); and 2) in Count 2, restraint using a firearm with the intent to hold A.H. in involuntary servitude under subsection (A)(2). Our supreme court has held that kidnapping is one crime, regardless of the purpose of the restraint. *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993); *see also State v. Eagle*, 196 Ariz. 188, 190, ¶ 7, 994 P.2d 395, 397 (2000) ("Subsection (A) of the text completely defines the crime of kidnapping as it exists in

Arizona. Its elements are plainly set forth: a knowing restraint coupled with one or more of the specifically listed intentions.”). We are bound by *Herrera*’s interpretation of the kidnapping statute, and we decline Madison’s invitation to depart from *Jones*.

¶13 We typically vacate the “lesser” of two convictions when a double jeopardy violation occurs. *State v. Scarborough*, 110 Ariz. 1, 6, 514 P.2d 997, 1002 (1973). The sentences for the kidnapping convictions in this case were identical and concurrent. The jury, though, found Count 2 to be a dangerous offense. The jury was not asked to, and did not, find Count 1 to be a dangerous offense. We accordingly vacate the conviction and sentence on Count 1 as the “lesser” of the two convictions.

III. Foreign Convictions

¶14 Madison also argues the trial court erred in concluding that two out-of-state convictions were prior historical felony convictions for purposes of sentence enhancement. We review this question of law *de novo*. *State v. Smith*, 219 Ariz. 132, 134, ¶ 10, 194 P.3d 399, 401 (2008) (citation omitted).

¶15 An offense committed in another state qualifies as a prior historical felony conviction for purposes of sentence enhancement if the offense would be punishable as a felony if committed in Arizona. A.R.S. § 13-703(M). At the time of

Madison's sentencing, a trial court determined whether a foreign conviction qualified "by comparing the statutory elements of the foreign crime with those in the relevant Arizona statute." *State v. Crawford*, 214 Ariz. 129, 131, ¶ 7, 149 P.3d 753, 755 (2007). A trial court may consider charging documents only for the purpose of narrowing "the foreign conviction to a particular subsection of the statute that served as a basis of the foreign conviction." *Id.* at 132, ¶ 11, 149 P.3d at 756.

A. Oklahoma Conviction

¶16 Madison argues that the factual basis for his guilty plea to the Oklahoma offense demonstrates he was convicted of "mere possession of marijuana," not possession of marijuana with intent to distribute, as the trial court found. We disagree.

¶17 The information, guilty plea, judgment, and sentencing documents establish that Madison was charged with, and convicted of, unlawful possession of marijuana with intent to distribute under Oklahoma Statutes ("Okla. Stat.") Title 63, section 2-401(B)(2)[1], based on his possession of 493 grams of the drug. The Oklahoma crime is analogous to the Arizona offense of possession of marijuana for sale, a class four felony, based on the amount of marijuana involved. *Compare* A.R.S. § 13-3405(A)(2) and (B)(4) ("A person shall not knowingly . . .

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[1] Throughout this decision, we cite the version of statutes in effect at the relevant times.

[p]ossess marijuana for sale," making it a class 4 felony if the weight is two pounds or less) *with* Oklahoma Statutes ("Okla. Stat.") tit. 63, § 2-401(A)(1) and (B)(2) (prohibiting possession with intent to distribute a controlled dangerous substance, and providing that such conduct with respect to a Schedule II drug[2] is a felony punishable by a sentence of not less than two years). Even if the offense could be construed only as possession of marijuana, the offense would be punishable as a class six felony under Arizona law, and accordingly could constitute a prior historical felony. *See* A.R.S. §§ 13-3405(A)(1) and (B)(1), -703(M).

¶18 The court found that the Oklahoma conviction constituted Madison's third prior felony conviction, and thus qualified as a historical prior felony conviction on this basis. A.R.S. § 13-105(22)(d).[3] We find no error in the determination that this was Madison's third prior felony conviction, and thus that the Oklahoma conviction qualified as a historical prior felony conviction. *See* A.R.S. § 13-105(22)(d).

B. California Conviction

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[2] *See* Okla. Stat. tit. 63, § 2-206(D)(6) (identifying "tetrahydrocannibinols" as a Schedule II drug).

[3] The court also found that Madison had been convicted in 1998 for the California offense of possession of a firearm by a felon, which would constitute the Arizona offense of misconduct involving weapons, A.R.S. § 13-3102(A)(4) and (K), and was a historical prior felony conviction under Arizona law. Madison does not challenge this finding.

¶19 Madison also argues his 1997 California conviction for residential burglary did not qualify as a historical prior felony conviction because: 1) the State failed to prove the date of the crime's commission; 2) the California statute defines a structure differently than the Arizona statutes; and 3) the offense was too old.

¶20 The abstract of judgment established that Madison committed the California offense in 1997. The court thus did not err by concluding that Madison committed the offense "on or after January 1, 1997."

¶21 Nor did the court err in finding that the elements of residential burglary under California Penal Code §§ 459 and 460, as they existed at the time, matched Arizona's offense of burglary in the second degree, A.R.S. § 13-1507, a class three felony. We have previously rejected an argument identical to Madison's and held that the term "structures," as used in Arizona, includes the prohibited locales enumerated in the California statute, and thus any conviction under the California statute would necessarily constitute a felony in Arizona. *State v. Cotten*, 228 Ariz. 105, 110-11, ¶¶ 18-22, 263 P.3d 654, 659-60 (App. 2011). Moreover, the record here established that Madison was convicted and sentenced to two years for "res[idential] burglary." *See* Cal. Penal Code §§ 460 (designating burglary of an "inhabited dwelling" and certain other structures as a

burglary in the first degree), 461 (designating punishment for first degree burglary as a minimum of two years, and for second degree burglary as not exceeding one year). Under California law, the offense of "residential burglary," or, using the statutory term, burglary of an "inhabited dwelling," requires proof that the structure is a place where people ordinarily live and is currently being used as a dwelling. *See People v. Fleetwood*, 217 Cal. Rptr. 612, 614 (Cal. Ct. App. 1985). Arizona requires only that the structure be adapted for human residence, whether occupied or not. *See* A.R.S. § 13-1501(11). A person convicted of committing residential burglary in California in 1997 necessarily committed the offense of second-degree burglary in Arizona, a class three felony. A.R.S. § 13-1507(B).

¶22 Finally, the court did not err in concluding that the California conviction qualified as a historical prior felony conviction because it was committed within ten years of the present offenses. Any time spent incarcerated "is excluded in calculating if the offense was committed within the preceding ten years." A.R.S. § 13-105(22)(b). The record establishes that Madison was incarcerated for more than four years on his burglary, firearm, and drug convictions between the California residential burglary in 1997 and his commission of the present offenses in 2009 and 2010. Excluding the time Madison spent in

prison, he committed the California offense within ten years of the instant offenses.

CONCLUSION

¶23 For the reasons stated, we vacate the kidnapping conviction and sentence based on Count 1 of the indictment. We affirm Madison’s convictions and sentences in all other respects.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge