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

STATE OF ARIZONA,	)	1 CA-CR 08-0924
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
RAFAEL MARTINEZ,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-148276-001 DT

The Honorable Julie P. Newell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Nicole Farnum — Tempe
Attorney for Appellant

H A L L, Judge

¶1 Rafael Martinez (Defendant) appeals his convictions and sentences for armed robbery and theft of means of transportation. He raises various evidentiary issues, and he

claims the trial court erred by denying his *Batson* challenge to the State's peremptory strike of a Hispanic juror. Defendant also argues his convictions unconstitutionally represent double punishment, and that the trial court erred in ordering his sentences served consecutively. For the reasons that follow, we affirm.

BACKGOUND

¶2 "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). In the early afternoon of July 25, 2007, Defendant and Nicholas Perez were passengers in the back seat of D.M.'s taxi.[1] When the three-mile trip ended and D.M. requested the fare, Perez pointed a loaded handgun at D.M.'s neck and demanded money. D.M. gave Perez between eleven and thirty dollars and was reaching for more money when Perez ordered him out of the vehicle. D.M. complied. Defendant moved into the driver seat and sped away.

¶3 Five to ten minutes later, D.M. called 9-1-1 and gave physical descriptions of the suspects and their clothing. Within thirty minutes, police officers apprehended two suspects within one-half mile of the robbery. The stolen cab was

[1] D.M. leased the vehicle from Discount Cab.

discovered about the same time abandoned behind a nearby shopping center. Shortly thereafter, D.M. identified Defendant and Perez during separately held one-on-one show-ups. Additional details are discussed in the context of the issues addressed below.

¶4 Under an accomplice liability theory, the State charged Defendant and Perez each with one count of armed robbery, a dangerous offense and class two felony, and one count of theft of means of transportation, a class three felony.[2] Perez entered into a plea agreement with the State. Defendant's trial resulted twice in a hung jury. After his third trial, however, the jury found him guilty as charged. The trial court imposed aggravated consecutive terms of imprisonment: twenty-one years for the armed robbery conviction, and seven years for the theft of means conviction. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(1) (2010).[3]

[2] The State also charged Perez with one count of misconduct involving weapons.

[3] We cite to the current version of applicable statutes as no revisions material to this decision have since occurred.

DISCUSSION

I. *Batson*

¶5 At the conclusion of voir dire, the State exercised one of its peremptory challenges to strike venire person no. 10 (Juror no. 10). Defendant raised a *Batson*[4] challenge noting he and Juror no. 10 are both Hispanic and "[Juror no. 10] never answered any questions." In response, the prosecutor said she eliminated Juror no. 10 because he was young, did not have a high school degree and did not use proper English when he introduced himself during voir dire by stating, "I ain't been on no jury."[5] As further proof that she did not strike Juror no. 10 because of his race, the prosecutor noted two other Hispanic panel members would be seated on the jury and stated "I don't have a problem with either of them." The court overruled Defendant's objection finding Juror no. 10's lack of education to be a race-neutral reason for the strike, and the court found Defendant failed to demonstrate racial prejudice to rebut the State's explanation.

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[4] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[5] Although the transcript reflects that Juror no. 10 stated: "I'm married, and never been a juror before," the prosecutor specifically stated that she was quoting Juror no. 10 when she recited his statement as "I ain't been on no jury." Neither defense counsel nor the trial court challenged the prosecutor's recitation of Juror no. 10's statement.

¶6 On appeal, Defendant argues that the prosecutor's excuse for striking the juror was pretextual, and the court abused its discretion by denying Defendant's *Batson* challenge. As evidence of the prosecutor's purported race-based motivation for striking Juror no. 10, Defendant points to the prosecutor's comment regarding the juror's improper English. We find no error.

¶7 The Supreme Court held in *Batson* that peremptory strikes of prospective jurors based solely on race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson,* 476 U.S. at 89. When a party challenges a strike based on *Batson,* the trial court conducts a three-step analysis. *State v. Gay,* 214 Ariz. 214, 220, ¶ 17, 150 P.3d 787, 793 (App. 2007). Initially, the party raising the challenge must make a prima facie showing of discrimination based on race, gender, or some other protected characteristic. *State v. Lucas,* 199 Ariz. 366, 368, ¶ 7, 18 P.3d 160, 162 (App. 2001). The proponent must then provide a neutral explanation for the strike. *Id.* Finally, the challenging party must persuade the court that the proffered reason is pretextual. *Id.* In this third step, the trial court must determine the credibility of the proponent's explanation and "whether the proffered rationale has some basis in accepted trial strategy." *Gay,* 214 Ariz. at 220, ¶ 17, 150 P.3d at 793 (internal quotation omitted). "Th[e] third step is fact

intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is [an appellate c]ourt." *State v. Newell,* 212 Ariz. 389, 401, ¶ 54, 132 P.3d 833, 845 (2006). We therefore defer to the trial court's factual findings and will reverse only if those findings are clearly erroneous. *Gay,* 214 Ariz. at 220, ¶ 16, 150 P.3d at 793.

¶8 Here, the prosecutor's proffered reasons for dismissing Juror no. 10 were race-neutral.[6] Defendant's argument regarding the purported pretextual nature of those reasons is essentially a challenge to the prosecutor's credibility. But, "determining the validity of those explanations required the court to evaluate the sincerity of the prosecutor as well as the behavior of the juror[]. These are credibility determinations that the court was in the best position to make." *Id.* at 221, ¶ 19, 150 P.3d at 794. "We will not second-guess the trial court's credibility determination, especially when, as here, both parties agree that at least one juror with a Hispanic surname was ultimately chosen."[7] *State v. Garcia*, 224 Ariz. 1, 10, ¶ 27, 226 P.3d 370, 379 (2010) (noting that "[a]lthough not

[6] Defendant points to no authority that supports his implication that Juror no. 10's use of improper English reflects a race-based characteristic.

[7] Defendant acknowledged that two impaneled jurors have Hispanic surnames.

dispositive, the fact that the state accepted other [minority] jurors on the venire is indicative of a nondiscriminatory motive"). Accordingly, on this record, we will not hold that the trial court clearly erred in finding the State's proffered race-neutral reason for striking Juror no. 10 was not pretextual. We therefore affirm the court's order denying Defendant's *Batson* challenge.

II. Evidentiary Rulings

A. Communication Between Defendant and Perez

¶9 Before trial, Defendant moved *in limine* to preclude a sheriff deputy's testimony regarding his observation of a "high-five" and other communication between Defendant and Perez while they were previously in court on June 5, 2008 waiting for a pretrial hearing to commence. Defendant claimed the proposed testimony was irrelevant and unduly prejudicial because it would show Defendant was in custody at the time the observed activities took place. Defendant further argued that Arizona Rule of Evidence 404(b)[8] precluded the "prior bad act" evidence

[8] Rule 404(b) provides, in pertinent part:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

that purportedly showed Defendant being disrespectful of the court. The trial court found the anticipated testimony to be relevant but prohibited the State from eliciting evidence that Defendant and Perez were in custody at the time of the perceived high-five.[9]

¶10 Defendant argues the court should have precluded testimony regarding the observed high-five because there was no connection between that exchange and the robbery incident that occurred over a year before, and the high-five could be explained by Defendant and Perez becoming acquainted *after* the robbery.[10] Defendant also contends the evidence should have been precluded pursuant to Rule 404(b), and he implies without elaboration that the evidence was "unduly prejudicial[.]" We reject these arguments.

¶11 "The trial court has considerable discretion in determining the relevance and admissibility of evidence." *State v. Amaya-Ruiz,* 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Absent a clear abuse of its discretion, we will not disturb the

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[9] At trial, the deputy testified that he observed Defendant and Perez exchange a "high-five" and engage in conversation at a pretrial court hearing. Based on Defendant's and Perez's body language and mannerisms during this exchange, in addition to three or four previously observed conversations between the two, the deputy opined that Defendant and Perez had known each other as friends "for a long time."

[10] Defendant does not challenge the admissibility of the deputy's testimony regarding his observations of Defendant and Perez speaking together a number of times before trial.

trial court's ruling. *Id.; State v. Van Adams,* 194 Ariz. 408, 415, ¶ 20, 984 P.2d 16, 23 (1999) (admission of other-act evidence reviewed for abuse of discretion).

¶12 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," among other factors. Ariz. R. Evid. 403. "The threshold for relevance is a low one[.]" *State v. Roque*, 213 Ariz. 193, 221, ¶ 109, 141 P.3d 368, 396 (2006). Rule 404(b) prohibits using other-act evidence to infer a defendant's guilt by showing a disposition to criminality. *State v. Ramirez Enriquez,* 153 Ariz. 431, 432, 737 P.2d 407, 408 (App. 1987).

¶13 Here, evidence of Defendant and Perez exchanging a high-five after the robbery incident tends to prove that they knew each other and were accomplices in committing the charged offenses. The deputy's testimony was therefore relevant. *See State v. Beard,* 107 Ariz. 388, 391, 489 P.2d 25, 28 (1971) ("companionship[] and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred.") (internal quotation omitted). Other

explanations for the high-five may affect the weight to be afforded the evidence, but they have no bearing on its admissibility. *See State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995). Further, the trial court properly addressed Defendant's concern regarding the potential undue prejudice of the evidence by barring the State from eliciting testimony regarding Defendant's and Perez's in-custody status at the time of the high-five.[11] Finally, the high-five evidence was not required to be excluded pursuant to Rule 404(b) because the evidence was not used to show Defendant's "disposition toward criminality from which guilt on this occasion is to be inferred." *Ramirez Enriquez,* 153 Ariz. at 432, 737 P.2d at 408. For these reasons, the trial court did not abuse its discretion in admitting evidence of the high-five between Defendant and Perez.

B. Motions to Suppress: Investigatory Stop and In-Court Identification

¶14 Before trial, Defendant moved to suppress evidence of D.M.'s identification of Defendant on the date of the alleged offenses. Defendant also sought to preclude D.M.'s anticipated in–court identification of Defendant. Defendant argued two bases to support his motions. First, Defendant argued that the police lacked reasonable suspicion to initially detain him for

[11] Defendant does not contend the State violated the court's order.

purposes of the show-up identification thereby rendering evidence of that identification inadmissible pursuant to the "fruit of the poisonous tree" doctrine.[12] Second, he claimed the show-up procedure used to facilitate the out-of-court identification was unduly suggestive and unreliable, which in turn would taint any in–court identification. The court held evidentiary hearings on the motions and denied both. Defendant challenges both rulings.

¶15 In reviewing the denial of a motion to suppress, we review only the evidence submitted at the suppression hearing, and we view those facts in the manner most favorable to upholding the trial court's ruling. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996); *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003). Although we defer to the trial court's factual determinations, we review de novo its ultimate legal conclusion. *Box*, 205 Ariz. at 495, ¶ 7, 73 P.3d at 626. A trial court's ruling on a motion to suppress should not be reversed on appeal absent clear and manifest error. *State v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579,

[12] For this same reason, Defendant requested preclusion of a receipt police discovered in his pocket after he was arrested following the show-up identification. The receipt revealed a purchase of two beverages from a store in the same shopping center where the stolen taxi was discovered. The purchase occurred approximately ten minutes after D.M. called 9-1-1.

590 (1995). We first address the propriety of Defendant's detention before the show-up identification.

1. Investigatory Stop

¶16 Defendant claims the police unconstitutionally detained him for purposes of conducting the show-up identification because they lacked reasonable suspicion that he robbed D.M. Accordingly, Defendant contends the evidence obtained as a result of his detention—namely, D.M.'s identification and the receipt—should have been suppressed. The issue of "whether the police had a reasonable suspicion of criminal activity that justified conducting an investigatory stop is a mixed question of law and fact which we review de novo." *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

¶17 The Fourth Amendment prohibits the police from making unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). The exclusionary rule prevents the introduction of evidence seized in violation of a person's Fourth Amendment rights. *State v. Hackman*, 189 Ariz. 505, 508, 943 P.2d 865, 868 (App. 1997). An investigatory stop is a seizure that is justified if it is "[s]upported by reasonable suspicion that criminal activity is afoot." *Rogers*, 186 Ariz. at 510, 924 P.2d at 1029 (quoting *Ornelas*, 517 U.S. at 693).

¶18 The reasonable suspicion necessary to justify an investigatory stop is based on the totality of the circumstances sufficient for officers to demonstrate "a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation omitted). We consider "[s]uch objective factors as the suspect's conduct and appearance, location, and surrounding circumstances . . . ." *State v. Fornof*, 218 Ariz. 74, 76, ¶ 6, 179 P.3d 954, 956 (App. 2008). Finally, the grounds for a stop must be based on "a justifiable suspicion that the particular individual to be detained is involved in criminal activity." *Id.* at 75, ¶ 5, 179 P.3d at 956 (internal quotation omitted). Because we find that the officers who detained Defendant had a reasonable suspicion that he committed the charged offenses, we conclude that the trial court properly did not exclude the challenged evidence.

¶19 The State concedes that Defendant was detained. Thus, the pertinent issue is whether the detention was based on a reasonable suspicion that Defendant committed the offenses.

¶20 The undisputed evidence from the suppression hearings relevant to this issue is as follows.[13] Based on D.M.'s

[13] At the hearing that addressed the propriety of Defendant's detention, the parties did not introduce evidence; instead, they agreed to rely on interviews, police reports and the facts adduced at the *Dessureault* hearing.

description of the suspects, police officers searched the area surrounding the crime for two skinny Hispanic males in their early twenties wearing long shorts and long shirts, with one of the suspects wearing a red baseball cap. One suspect was described as being over six feet tall, and the other was "substantially shorter." Within an hour of the crime, police located two men matching these descriptions, absent the red hat and long shirts,[14] approximately a half mile from the crime scene and less than one-third of a mile from where the cab had been discovered. The suspects were walking the same direction on opposite sides of the street. When police initially approached one of the suspects, subsequently identified as Defendant, the other suspect, Perez, jumped over a fence and fled. Apparently, Defendant was then detained until D.M. arrived with other officers to conduct an identification.

¶21 On appeal, Defendant argues the officers lacked reasonable suspicion to detain him because he was not at that time wearing the clothing described by D.M., and the only similarity to D.M.'s description of the suspects was that Defendant was a young Hispanic male. This argument is without merit.

[14] The police later located the shirts and hat near the location Defendant and Perez were apprehended, and D.M. identified the items as those worn by the suspects during the robbery.

¶22 The totality of circumstances that led to the investigatory stop of Defendant gave rise to a reasonable suspicion that he was involved in the robbery incident. Defendant was located in close spatial and temporal proximity to the crime. Further, he and Perez were located near each other, and they matched the description of skinny young Hispanic males of disparate heights. *See State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993) (police justified in stopping a person for further investigation when he was located within short time and distance of crime scene, and he matched description of suspect). The fact that Defendant was not wearing easily discarded clothing items worn by the suspects during the robbery does not undermine the impact the foregoing circumstances had on any reasonable suspicion that Defendant committed the offenses.

¶23 Because reasonable suspicion existed, the police acted in accordance with the Fourth Amendment when they stopped and temporarily detained Defendant for further investigation. Accordingly, the trial court did not err in suppressing evidence obtained as a result of the detention.

2. In-Court Identification

¶24 In response to Defendant's motion to suppress evidence of D.M.'s pre-trial and anticipated in-court identifications of Defendant, the trial court held a hearing pursuant to *State v.*

Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969). The court applied the factors from *Neil v. Biggers*, 409 U.S. 188 (1972), to the testimony from D.M. and the officer who accompanied him to the show-up identification of Defendant, and the court found that, although one-man show-ups are inherently suggestive, "the reliability of the identification significantly overcomes any suggestiveness."[15] The court then cited Arizona Rule of Criminal Procedure 16.2(b) and concluded: "The State has proven the legality of the identification by a preponderance of the evidence." Defendant argues the trial court committed fundamental error by applying a preponderance-of-evidence standard rather than a clear-and-convincing-evidence standard.

¶25 To obtain relief under fundamental error review, Defendant has the burden to show that error occurred, the error was fundamental, and that he was prejudiced thereby. *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 20-22, 115 P.3d 601, 607-08 (2005). Without deciding whether the court fundamentally erred by applying an incorrect standard, *see Dessureault*, 104 Ariz. at 384, 454 P.2d at 985, we conclude Defendant cannot sustain his burden of establishing the requisite prejudice.

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[15] The court specifically found that (1) D.M. had sufficient opportunities to view Defendant as Defendant approached and entered the taxi; (2) D.M. had a high degree of confidence that Defendant was the person "at the scene"; and (3) the show-up occurred soon after the robbery. The record supports these findings.

¶26 Defendant claims he was prejudiced because "[u]ndoubtedly, [Defendant] would not have been convicted if the court had determined that the State has not proven by clear and convincing evidence that [D.M.]'s in-court identification of [Defendant] was reliable." This argument, however, speculates that, had the trial court applied the heightened standard, it would have found no clear-and-convincing evidence of the identification procedure's reliability. We will not presume prejudice when none appears affirmatively in the record.[16] *See State v. Trostle*, 191 Ariz. 4, 13-14, 951 P.2d 869, 878-79 (1997); *State v. Munninger,* 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006); *see also Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (noting burden of persuasion placed on the defendant in a fundamental error review to discourage him from taking his chances on a favorable verdict, "reserving the 'hole card' of a later appeal" on a matter that was wholly curable at trial, and then seeking reversal on appeal) (quotation omitted). Defendant's speculation is therefore insufficient to warrant reversal under fundamental error review.

[16] We also note that the court instructed the jury to only consider D.M.'s in-court identification of Defendant if the State proved beyond a reasonable doubt that the identification was reliable. D.M. testified at trial that he clearly observed Defendant before and during the robbery, and that he performed the show-up of Defendant less than one hour after the incident, during which he recognized Defendant "right away." D.M. had "no doubt" at trial that Defendant was "the man."

III. Double Punishment and Sentencing

¶27 Finally, Defendant contends that his armed robbery and theft of means of transportation convictions "arose out of the same fact situation," and therefore constituted a "single act." Thus, Defendant claims the court erred by imposing consecutive sentences in violation of A.R.S. § 13-116 (2010), and similarly, his convictions and sentences constitute unconstitutional double punishment because "theft is a lesser-included offense of robbery." In considering these issues, we employ a de novo standard of review.[17] *State v. Urquidez,* 213 Ariz. 50, 52, ¶ 6, 138 P.3d 1177, 1179 (App. 2006); *State v. Musgrove*, 223 Ariz. 164, 167, ¶ 10, 221 P.3d 43, 46 (App. 2009).

¶28 Section 13-116 provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Thus, if a defendant's conduct constitutes a "single act" and results in two or more convictions, a trial court may not impose consecutive sentences.

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[17] The State argues Defendant failed to raise these issues at trial, thus we should review only for fundamental error. With respect to a purported violation of A.R.S. § 13-116, we disagree. The record indicates that Defendant argued in his sentencing memorandum that the events underlying his convictions "were all part of a continuing course of conduct." In any event, as the State notes, an illegal sentence or violation of double jeopardy constitutes fundamental error. *State v. Musgrove*, 223 Ariz. 164, 167, ¶ 10, 221 P.3d 43, 46 (App. 2009); *State v. Cox*, 201 Ariz. 464, 468, ¶ 13, 37 P.3d 437, 441 (App. 2002).

State v. Hampton, 213 Ariz. 167, 182, ¶ 64, 140 P.3d 950, 965 (2006) (quoting *State v. Gordon,* 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989)).

¶29 In *Gordon*, our supreme court set forth the following steps for determining whether a defendant's conduct constitutes a single act for sentencing purposes:

> [We first] consider[] the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge-the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

161 Ariz. at 315, 778 P.2d at 1211.

¶30 Applying *Gordon*'s three-prong analysis to this case, Defendant was clearly eligible for consecutive sentences. First, the facts show Defendant was criminally liable for armed robbery when his accomplice, Perez, pointed a loaded handgun at

D.M. to take his money. *See* A.R.S. §§ 13-1902, -1904 (2010). Subtracting this evidence, the remaining facts support Defendant's theft of means conviction: after the robbery was completed and D.M. was forced out of the cab, Defendant moved to the driver seat and sped away. *See* A.R.S. § 13-1814(A)(5) (2010). Second, it would have been possible for Defendant to have committed the armed robbery without also committing theft of means. Had Defendant left the scene on foot immediately after the robbery and not fled in the cab, he would not have been subjected to the theft of means charge. *See State v. Stock*, 220 Ariz. 507, 510, ¶ 17, 207 P.3d 760, 763 (App. 2009) (had defendant ceased attempting to escape and avoid being taken into custody after a high-speed vehicle pursuit by police, he would have been subject only to unlawful flight, not the additional charge of resisting arrest). Finally, under *Gordon*'s third prong, the theft of the cab additionally harmed D.M. (and its owner, Discount Cab).[18] For these reasons, Defendant's actions did not constitute a single act when he committed the robbery and theft of means of transportation. Accordingly, the

[18] The trial court found Defendant eligible for consecutive sentences based on the additional victim in the theft of means crime. We need not address the propriety of this additional basis for imposing consecutive sentences. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (noting superior court's ruling will be upheld if it is legally correct for any reason).

court did not violate A.R.S. § 13-116 in imposing consecutive sentences.

¶31 Similarly, Defendant's ostensible double jeopardy argument fails. The Fifth Amendment protection against double jeopardy bars "multiple punishments for the same offense." *Whalen v. U.S.*, 445 U.S. 684, 688 (1980) (internal citation omitted). If the statutory elements of crimes for which a defendant is sentenced are different, double jeopardy concerns are not implicated. *State v. Cook*, 185 Ariz. 358, 361, 916 P.2d 1074, 1077 (App. 1995) ("If each statute does contain an element not found in the other, then the offenses are not the same and the double jeopardy bar does not apply.").

¶32 Here, the crimes of armed robbery and theft of means of transportation each contain at least one element not found in the other. *See* A.R.S. §§ 13-1902, -1904 (armed robbery requires a defendant to threaten to use force via a deadly weapon to take property from another); A.R.S. § 13-1814(A)(5) (theft of means of transportation requires a defendant to knowingly control, without lawful authority, another's use of means of

transportation knowing that the property was stolen). Thus, contrary to Defendant's assertion, theft of means is not a lesser-included offense of armed robbery under the facts of this case. No double jeopardy violation occurred.

CONCLUSION

¶33 We affirm the convictions and sentences.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
JOHN C. GEMMILL, Judge