DIVISION ONE
FILED: 12/07/10
RUTH WILLINGHAM, ACTING CLERK
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>CARLOS ESTRADA-MARROQUIN,<br><br>Appellant. | ) | No. 1 CA-CR 09-0566<br><br>DEPARTMENT B<br><br>**MEMORANDUM DECISION**<br><br>(Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-009128-001 DT

The Honorable Kristin C. Hoffman, Judge

**AFFIRMED**

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Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffell, Deputy Public Defender
Attorneys for Appellant

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**J O H N S E N**, Judge

**¶1** Carlos Estrada-Marroquin ("Defendant") appeals from his convictions for kidnapping and theft by extortion. For reasons set forth below, we affirm.

## FACTS AND PROCEDURAL HISTORY[1]

**¶2** A man named Gustavo entered the United States illegally from Mexico with the assistance of smugglers who eventually deposited him with four other similarly situated men in an apartment in Phoenix. There Gustavo was held by Defendant and his associate, Daniel Bonilla. Gustavo and the four others were confined to a bedroom with no furniture. Defendant and Bonilla were in charge. They occupied a bedroom from which they could look directly into Gustavo's room. There was a bed in Defendant's bedroom, and Defendant and Bonilla kept a gun with them on the bed whenever they were there.

**¶3** Defendant and Bonilla told Gustavo he needed to get $1,300 for his release or they "didn't know what was going to happen" to him. Gustavo took that as a threat. Defendant and Bonilla told Gustavo to telephone his girlfriend Linda to get her to pay the money for his release. Defendant and Bonilla also repeatedly telephoned Linda for the money. Gustavo heard

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

Defendant tell Linda in one phone call that she "needed to pay." In the first phone call Linda received, someone with "a very gruff voice . . . very mean" said that they "had [Gustavo]" and that she needed "to pay money if [she] wanted to see [Gustavo] again." Linda was "scared because of the tone of his voice" and scared for Gustavo as well. Gustavo later called her and told her "[p]lease pay the money;" he also "said he was scared."

**¶4** Over the next few days, Linda received "well over 50" phone calls asking her for the money. Finally, Linda received a telephone call from "a gentleman that spoke Spanish," with "an older voice." That person told Linda that "he'd seen [her] daughter just take out the garbage, and she had had a bright yellow shirt on, and if [Linda] ever wanted to see her again, [she] better pay the money." The call arrived just as Linda's daughter, who was wearing a bright yellow shirt at the time, walked back into the house after having deposited trash in a dumpster.

**¶5** Linda then contacted 911. Working with the Maricopa County Sheriff's Office, she eventually agreed to meet the callers at a strip mall. At the agreed-upon location, Bonilla pulled his vehicle alongside Linda's vehicle. Defendant, who was in the front passenger seat of Bonilla's vehicle, rolled down his window and asked Linda for the money. Linda asked him

"how much," and Defendant "repeated that he wanted $1,300." At that, officers intervened and arrested Defendant and Bonilla.

**¶6** The State charged Defendant with smuggling, a Class 4 felony; kidnapping, a Class 2 dangerous felony; and theft by extortion, a Class 3 dangerous felony.

**¶7** At trial, Defendant testified he himself was a victim of smugglers and had been detained at the apartment for three months because his family could not come up with an additional $800 that Bonilla and others demanded for his release. He denied threatening Gustavo or Linda and also denied asking Linda for money. Defendant testified he had not tried to escape from his confinement because he was afraid of what his captors would do to his family if it left. He said he had been allowed to meet with his daughter and her children, but only because his captors trusted him not to flee. He said that was also why Bonilla had allowed him to leave one day with a contractor to do a tiling job. Defendant admitted he had not told any of this to officers who arrested him at the scene, telling them instead that he was in the vehicle only because his friend Bonilla had asked him to go out for a beer. He also admitted he had lied to the detective who questioned him.

**¶8** The jury found Defendant not guilty of smuggling, but guilty of kidnapping and theft by extortion. In a separate

trial, jurors found aggravating circumstances applied to both offenses.

**¶9** Having previously found that Defendant had two prior felony convictions, the superior court sentenced him to concurrent, presumptive terms of 15.75 years in prison on each 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 (2010) and -4033 (2010).[2]

## DISCUSSION

### A. Sufficiency of Evidence: Extortion.

**¶10** The State alleged Defendant committed theft by extortion when he "knowingly obtain[ed] or [sought] to obtain property or services by means of a threat to . . . [c]ause physical injury to [Gustavo] by means of a deadly weapon or dangerous instrument." A.R.S. § 13-1804(A)(1) (2010). Defendant maintains there was no evidence that he threatened anyone with a deadly weapon or dangerous instrument. Accordingly, he argues the superior court erred by denying his motion for judgment of acquittal pursuant to Arizona Rule of Criminal Procedure 20 and also that the evidence was insufficient to support his conviction.

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[2] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

**¶11** Rule 20 requires the court to enter a judgment of acquittal before the verdict is rendered "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Hall*, 204 Ariz. 442, 454, ¶ 49, 65 P.3d 90, 102 (2003) (quoting *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996)). Substantial evidence may be comprised of both circumstantial and direct evidence, and "[a] conviction may be sustained on circumstantial evidence alone." *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). If reasonable persons could differ on the inferences to be drawn from evidence, which we must construe in favor of upholding the superior court's ruling, then the motion for a judgment of acquittal was properly denied and we must affirm. *State v. Sullivan*, 205 Ariz. 285, 287, ¶ 6, 69 P.3d 1006, 1008 (App. 2003). We review a superior court's denial of a Rule 20 motion for an abuse of discretion. *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003).

**¶12** The evidence established that Defendant and Bonilla had ready access to a gun while they kept Gustavo captive. They kept the gun next to them on the bed from which they openly surveilled their captives. Although Defendant denied threatening Gustavo with the gun, he told Gustavo that he did

not know what would happen if Gustavo did not come up with the ransom money, which Gustavo testified he understood as a threat. Moreover, Linda testified that when they met at her car, she recognized Defendant's voice as one of the voices on the telephone demanding money.

**¶13** Based on this evidence, reasonable persons could infer that Defendant and Bonilla threatened Linda and Gustavo that if the ransom was not paid, they would use the gun to injure or kill Gustavo. It was not necessary for Defendant to have actually pointed the gun at Gustavo to establish the threat that he would shoot or kill him. *See, e.g., State v. Stevens*, 184 Ariz. 411, 413, 909 P.2d 478, 480 (App. 1995) (even absent overt threat, jury reasonably could conclude that defendant's "threatening behavior" was directed at coercing victim to surrender property); *see also People v. Oppenheimer*, 26 Cal. Rptr. 18, 25 (Ct. App. 1962) (no particular words necessary to establish threat; threats can be made by innuendo in light of circumstances and relations between parties).

**¶14** Therefore, the fact that Defendant and Bonilla exhibited the gun where they knew Gustavo could see it was sufficient to support the jury's inference that they intended to use it if Gustavo did not get them the ransom money. Accordingly, the superior court did not abuse its discretion in denying Defendant's Rule 20 motion under these circumstances.

*See Henry*, 205 Ariz. at 232, ¶ 11, 68 P.3d at 458. For the same reason, substantial evidence supported the jury's verdict.

**B. Response to Jury Question.**

**¶15** Defendant next argues the superior court committed fundamental error when it responded to a jury question concerning the elements of the crime of kidnapping.

**¶16** The court had instructed the jurors that kidnapping required proof that "a defendant or an accomplice knowingly restrained another person with the intent to, one, hold the person for ransom; or, two, inflict physical injury on the person; or, three, aid in the commission of a felony; or, four, place the victim or a third person in reasonable fear of immediate . . . physical injury to the victim or such third person." During their deliberations, the jury asked the following question: "Kidnapping, # 3. Does this mean any felony or just kidnapping?" The following discussion then ensued between the court and counsel:

> THE COURT: The jurors want to know, "Does this mean any felony or just kidnapping?"
>
> [PROSECUTOR]: Any felony.
>
> [DEFENSE COUNSEL]: I'm sorry. [The phone] was cutting out a little bit. Will you repeat the question one more time?
>
> THE COURT: With regard to the kidnapping instruction, the jurors say, "Kidnapping, Number 3. Does this mean any kind of felony or just kidnapping?" [A]nd it reads,

> "Kidnapping, knowingly restrained another person with the intent to," and that is three, "aid in the commission of a felony." And so that would be any felony. Do you agree?
>
> [DEFENSE COUNSEL]: Yes. Or is the question "or is it a listed felony?"
>
> THE COURT: It says, "Does this mean any felony or kidnapping?"
>
> [DEFENSE COUNSEL]: Got you. Got you. It means any felony.
>
> [PROSECUTOR]: In fact it can't be kidnapping because that's the over arching – it's circular, if it were to say kidnapping.
>
> THE COURT: I'm going to tell them that it is any felony, not just kidnapping. Thank you all.
>
> [DEFENSE COUNSEL]: Thank you.
>
> [PROSECUTOR]: Thank you.

**¶17** Defendant now argues that if the act of kidnapping is allowed to satisfy the felony requirement for the offense of kidnapping, he was convicted of a non-existent offense. He acknowledges that because he did not object to the superior court's response, we need only review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is error that goes "to the foundation of a case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id*. (citation

omitted). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id*. at ¶ 20.

**¶18** The State argues Defendant invited any error that occurred by agreeing to the superior court's proposed response. *See State v. Logan*, 200 Ariz. 564, 565-66, ¶¶ 8, 9, 30 P.3d 631, 632-33 (2001). Without reaching that issue, even assuming *arguendo* the court erred when it responded to the juror's question, we conclude Defendant has not established that the response constituted fundamental error requiring reversal.

**¶19** The jury instructions specified that it could find Defendant had committed kidnapping if it found he restrained Gustavo for ransom. As the State notes, that was the only theory the prosecution argued at trial, and the evidence supported that conclusion. Defendant's argument that the jury convicted him not because it found he restrained Gustavo for ransom but because it found he restrained Gustavo "in aid of the commission of" the kidnapping itself is only speculation. *See State v. Walton*, 159 Ariz. 571, 578, 769 P.2d 1017, 1024 (1989) (speculation about "potential confusion among jurors" insufficient to establish actual jury confusion).

**¶20** For that reason, even if the court erred in its response to the jury, the error did not deprive Defendant of any right essential to his defense. *See Henderson*, 210 Ariz. at

567, ¶ 19, 115 P.3d at 607. As the State notes, Defendant's defense was not that Gustavo was not being held for ransom; it was that he, like Gustavo, *also* was being held for ransom. Thus, defense counsel conceded in closing that "nobody is going to deny certain things from Gustavo and from Linda. What they have gone through is a crime. And there's a conviction waiting there for a certain person, for a coyote. Not [Defendant]."

**¶21** The jury was free to believe either version of events. *See State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (credibility of witnesses is issue to be resolved by jury). The jury rejected Defendant's version when it found that he acted with an accomplice to commit both kidnapping and extortion. *See State v. Fimbres*, 222 Ariz. 293, 304, ¶ 41, 213 P.3d 1020, 1031 (App. 2009) (had jury believed defendant's rendition of facts it would have found him not guilty under any subsection of the statute). Accordingly, even if the superior court erred in responding to the jury question, Defendant has not shown the error was fundamental, and reversal is not warranted. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 567.

## CONCLUSION

**¶22** For the reasons stated above, we affirm Defendant's convictions and the resulting sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge