IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 03/06/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 10-0053
	)	
Appellee,	)	DEPARTMENT D
	)	
	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication-
	)	Rule 111, Rules of the
DAMIAN DUDLEY,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR2007-128171-001 DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

Damian Dudley, Appellant

T H O M P S O N, Presiding Judge

¶1 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969). Counsel for Damian Dudley (defendant) has advised us that, after searching the entire record, she has been unable to discover any arguable questions of law and has filed a brief requesting this court conduct an *Anders* review of the record. Defendant has been afforded an opportunity to file a supplemental brief *in propia persona*, and he has done so.

FACTS AND PROCEDURAL HISTORY

¶2 In the evening of May 2, 2007, defendant followed the victim, an elderly woman, as she left the grocery store. Victim noticed the defendant and asked if he was following her. Defendant approached the victim and hit her on the side of the head. The victim fell to the ground. Defendant proceeded to kick the victim and then took her purse. Defendant removed the victim's credit cards and put the cards in his pocket. Defendant told the victim that if she got up, he would kick her again. Several nearby witnesses intervened and called 911, one witness tried to distract defendant. At the same time, victim tried to stand a couple of times, but defendant would hit her and prevent her from getting up. The victim dropped to the ground in a fetal position. Shortly thereafter, the police arrived and placed defendant in custody.

¶3 Defendant was charged with one count of robbery, a class 4 felony, one count of kidnapping, a class 2 felony, and one count of aggravated assault, a class 6 felony. Following a

jury trial, defendant was convicted of all charges. This timely appeal followed.

DISCUSSION

¶4 In addition to those issues raised by defendant in his supplemental brief, defense counsel raised issues at defendant's request in the opening brief. We address the issues raised in both briefs, treating together those issues that overlap.

¶5 Defendant first argues that the indictment failed to establish the place of the alleged crimes. "An indictment is legally sufficient if it informs the defendant of the essential elements of the charges; is sufficiently definite so that the defendant can prepare to meet the charges; and protects the defendant from subsequent prosecution for the same offense." *State v. Rickard-Hughes*, 182 Ariz. 273, 275, 895 P.2d 1036, 1038 (App. 1995); *see* Ariz. R. Crim. P. 13.2. In this case, the indictment alleged the specific statutes that the defendant was charged with violating, the date of the incident, and the name of the victim. The indictment also included the approximate place of the alleged acts by stating that they took place in Maricopa County. Defendant asserts that the actual street names were required in order to "allege venue of place." "[A]n information is sufficient if the offense is set forth in such a manner that a person of common understanding would know what was intended." *State v. Suarez*, 106 Ariz. 62, 64, 470 P.2d 675, 677

(1970). The indictment here included sufficient detail to apprise defendant of the charges in order for him to prepare a defense and to protect him against double jeopardy. An exact address of the crime is not required. We hold the indictment was therefore legally sufficient. *See State v. Van Vliet*, 108 Ariz. 162, 163, 494 P.2d 34, 35 (1972).

¶6 Defendant next argues the trial court erred in refusing to include theft as a lesser included offense of robbery. "A defendant is only entitled to a lesser included offense instruction if there is evidence upon which the jury could convict of the lesser offense and find the state had failed to prove an element of the greater offense." *State v. Conroy*, 131 Ariz. 528, 532, 642 P.2d 873, 877 (App. 1982); *see also* Ariz. R. Crim. P. 23.3. "Merely asserting the jury might have disbelieved the evidence supporting an element of the greater offense is insufficient." *State v. Price*, 218 Ariz. 311, 316, ¶ 21, 183 P.3d 1279, 1284 (App. 2008) (citing *State v. Wall*, 212 Ariz. 1, 4, ¶ 18, 126 P.3d 148, 151 (2006)). To warrant a separate instruction, "the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Wall*, 212 Ariz. at 4, ¶ 18, 126 P.3d at 151.

¶7 A jury question does not constitute proof that the state failed to prove an element of a crime. It is the jury's

responsibility to weigh the evidence presented by both sides of a case. An indication that the jury is performing its duty is not evidence that the elements were not proven. Because defendant does not point to any evidence from which a rational jury could find that he was guilty of only the lesser offense of theft but not robbery, we conclude that the trial court did not abuse its discretion in refusing to instruct on the lesser offense.

¶8 Defendant asserts that his Massachusetts prior was too old to be used to enhance his sentence. The date of the offense was December 27, 1990. Pursuant to A.R.S. § 13-105(22)(c), any time spent incarcerated is excluded for computation of the five year period. Here, the record is undisputed that defendant was incarcerated for a total of thirteen years and seven months between that date and the current offenses. When this period of incarceration is subtracted, the Massachusetts conviction falls within the five year period required by § 13-105(22)(c). We find no error in the court's determination that the Massachusetts conviction qualified as a historical prior felony conviction.

¶9 Defendant argues that error occurred because the prosecutor referenced a witness in her opening statement that never testified. The court instructed the jury, before opening statements, that "[w]hat is said in opening statements is not

evidence, nor is it argument." The prosecutor's closing argument did not refer to the witness. The discrepancy between the prosecutor's opening statement and the evidence presented is not grounds for reversal. *See State v. Cartwright*, 155 Ariz. 308, 746 P.2d 478 (1987) (citing *State v. Bowie*, 119 Ariz. 336, 339-40, 580 P.2d 1190, 1193-94 (1978) (prosecutor's good faith reference to evidence in opening statement not grounds for reversal where the trial testimony fails to support the statement, and the "evidence" is not referred to in the closing)).

¶10 Defendant contends that the kidnapping statute, A.R.S. 13-1304, is unconstitutional because the statute is vague and indefinite. In order for a penal statute to be constitutional it must be sufficiently definite and certain to inform society what conduct is, and is not, prohibited. *State v. Berry*, 101 Ariz. 310, 312, 419 P.2d 337, 339 (1966). We find no ambiguity in the statute. "The 'restraint' required for kidnapping also may occur when one confines the victim without consent." *State v. Latham*, 223 Ariz. 70, 74 n.3, ¶ 16, 219 P.3d 280, 284 n.3 (App. 2009). Thus, "the crime occurs absent any movement by the victim." *Id*. The state presented evidence at trial that defendant confined the victim without her consent. Defendant told the victim that if she got up, he would kick her again.

When victim tried to stand, defendant would hit her and prevent her from getting up.

¶11 Defendant alleges that the trial transcripts were altered and incomplete and that they include testimony that did not occur. Upon our review of the record, we find no evidence indicating the transcripts have been tampered with or altered. Moreover, the appellate forum is not the appropriate one in which to develop facts and receive evidence. Any evidence of document tampering must be presented in a Rule 32 proceeding. *State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982).

¶12 Defendant argues that his preliminary hearing did not occur in the ten day time frame, and therefore, the state violated defendant's Fourth Amendment right by failing to provide prompt judicial determination of probable cause. Defendant's initial appearance took place on May 3, 2007, and his preliminary hearing was scheduled for May 14, 2007. Defendant argues that ten days from May 3 was May 13 and that the preliminary hearing should have occurred by that date.[1] However, May 13, 2007 was a Sunday. Pursuant to Arizona Rule of Criminal Procedure 1.3, when the last day of a period is a

[1] Defendant's argument is of no consequence, however, because the preliminary hearing was vacated due to a supervening indictment. *See State v. Meeker*, 143 Ariz. 256, 265, 693 P.2d 911, 920 (1984) (an indictment by a grand jury is a "constitutionally proper method of bringing an accused felon to trial.").

Saturday, Sunday, or legal holiday, "the period shall run until the end of the next day which is neither a Saturday, Sunday nor a legal holiday." Thus, the preliminary hearing was scheduled within the ten day period.

¶13 Defendant next argues that the kidnapping charge should have been dismissed because defendant was never arraigned on that charge. Defendant was charged with robbery, kidnapping, and aggravated assault. The record shows that at the arraignment hearing defendant entered a plea of not guilty to all charges. Consequently, we find no evidence that defendant was not arraigned on the kidnapping charge.

¶14 Defendant asserts that the court erred in not granting a directed verdict on the kidnapping charge because of insufficient evidence. Defendant also points out that one of the witnesses testified he saw the crime take place and defendant did not rob victim. We will not reverse a conviction for insufficiency of the evidence unless there is no substantial evidence to support the jury's verdict. *State v. Hallman*, 137 Ariz. 31, 38, 668 P.2d 874, 881 (1983). "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981), *cert. denied*, 459 U.S. 882 (1982) (citation omitted). The state presented evidence at trial that

defendant confined the victim without her consent. Defendant told the victim that if she got up, he would kick her again. When victim tried to stand, defendant would hit her and prevent her from getting up. "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974); *see also State v. Lehr*, 201 Ariz. 509, 517, 38 P.3d 1172, 1180 (2002). We do not reweigh credibility or trial evidence on appeal. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). After reviewing the record, we find the court did not err in finding substantial evidence existed to allow the jury to decide the case, and we find the jury had substantial evidence to rely on for its verdict. We will not second-guess the jury's finding of fact on appeal. *See State v. Lucero*, 204 Ariz. 363, 366, ¶ 20, 64 P.3d 191, 194 (App. 2003); *State v. Hernandez*, 191 Ariz. 553, 557, ¶ 11, 959 P.2d 810, 814 (App. 1998).

¶15 Finally, Defendant contends that victim's testimony that she did not get up because she was afraid should not have been admitted because fear is not one of the elements of kidnapping. Kidnapping is the knowing restraint of another person with the intent to commit one of six enumerated offenses.

A.R.S. § 13-1304(A). "[T]he very act of kidnapping is intertwined with actually instilling fear in the victims." *State v. Tschilar*, 200 Ariz. 427, 434, ¶ 28, 27 P.3d 331, 338 (App. 2001). We find no error in allowing the testimony.

¶16 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentences imposed were within the statutory limits. Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), defendant's counsel's obligations in this appeal are at an end.

CONCLUSION

¶17 We affirm defendant's convictions and sentences.

__/s/_____
JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/
_____
MAURICE PORTLEY, Judge

/s/
_____
JOHN C. GEMMILL, Judge