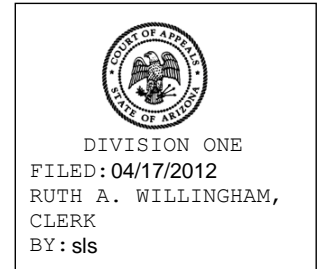


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-1036
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
EULALIO PLASCENCIA-MORENO,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-167235-002DT

The Honorable James T. Blomo, Judge Pro Tem

AFFIRMED

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

Maricopa County Public Defender Phoenix
By Thomas Baird, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Presiding Judge

¶1 Eulalio Plascencia-Moreno (defendant) appeals his conviction and sentence for theft by extortion, a class 2 dangerous felony. Defendant contends that insufficient evidence existed to sustain his conviction. For the reasons set forth below, we affirm defendant's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On October 15, 2007, a co-defendant forced victim at gun-point to lie face down in the back of a vehicle. Two men blindfolded victim, removed \$700 to \$800 in cash from his wallet, beat him repeatedly, and threatened to kill him. After driving to another location, the men forced victim into a house, tied him up, and again beat him and threatened him. Victim could hear the "racking" of a gun before it was placed next to his head. The men told victim they wanted a ransom, and one of them called victim's wife, Nancy N.¹, several times, threatening to kill victim if she did not pay the ransom. They advised her that victim's head would "turn up at [her] doorstep" if she did not pay the ransom.

¶3 After Nancy N. called the police, arrangements were made for an undercover officer to drop the ransom money at a local park. At the park, police observed three men in a vehicle

¹ Nancy N. is referred to as victim's wife or his common-law wife. It is undisputed that she is the mother of victim's children. The precise relationship is not important for our purposes here.

acting suspiciously. The men became agitated by the activity at the park and drove away. One of them called Nancy N. complaining that suspicious cars were in the area and stating that if she had called the police they were going to kill victim. Officers stopped the vehicle and arrested the three men. They found two loaded handguns on the floorboard of the vehicle, and a large amount of cash and the cell phone used to make the extortion calls were found on the co-defendants.

¶14 Defendant told an officer that he was also the victim of a kidnapping and that he was forced to drive the vehicle. He directed the police to a house where victim was found alone, blindfolded, and bound. Defendant later told officers that he had nothing to do with the initial kidnapping, but was called in to retrieve the vehicle and money, which were to be divided equally between the participants. He admitted that he was the driver of the vehicle and that he had been given a gun by one of his co-defendants. A co-defendant told police that defendant had thrown the gun and cell phone into the backseat.

¶15 A grand jury indicted defendant for kidnapping, theft by extortion, and misconduct involving weapons. Defendant pled guilty to misconduct involving weapons. After the state's case-in-chief, defendant moved for a directed verdict pursuant to Rule 20, Arizona Rules of Criminal Procedure. The court denied the motion. The jury convicted defendant of kidnapping and

theft by extortion. The jurors found both offenses to be dangerous and further found three aggravating circumstances. The trial court sentenced defendant to concurrent aggravated sentences of 13 years' imprisonment for kidnapping and theft by extortion, and a concurrent presumptive sentence of 2.5 years for misconduct involving weapons.

¶16 Defendant did not file a timely notice of appeal. However, his petition for post-conviction relief requesting to file a delayed notice of appeal was granted by the superior court. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-120.21 (2010).

DISCUSSION

¶17 Defendant contends that the state offered insufficient evidence of theft by extortion because the state "failed to present any evidence concerning the threatened use of a deadly weapon or a dangerous instrument." To support this contention, defendant makes two arguments. First, relying on *State v. Garcia*, 227 Ariz. 377, 258 P.3d 195 (App. 2011), defendant argues that a jury may not infer the use of a deadly weapon or dangerous instrument for the purposes of A.R.S. § 13-1804(A)(1) just because threats were made to the victim's life. Second, defendant asserts that our memorandum decision in *State v. Ochoa-Suarez*, 1 CA-CR 08-0503, 2009 WL 2525274 (Ariz. App. Aug.

18, 2009), should be considered "law of the case" because it involves "the same parties at the same proceedings, all with commensurate objectives and motivations to assert and defend challenges of law and fact."

¶18 We recently considered the identical arguments in our opinion *State v. Mendoza-Tapia*, 1 CA-CR 09-0809, 2012 WL 1108290 (Ariz. App. Apr. 3, 2012), and adopt our analysis and holdings from that case. 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. In addition, defendant in his Rule 20 motion below did not challenge the sufficiency of the evidence as to theft by extortion, and in fact urged the jury to convict him of theft by extortion, acknowledging that the evidence showed the requisite threat element, and to acquit on kidnapping.

¶19 It is beyond dispute that a gun was used to kidnap the victim and thereafter to periodically threaten, terrorize, and control him. Defendant himself was armed when apprehended. Defendant and his accomplices also threatened to leave victim's severed head on Nancy N.'s doorstep. From a threat to sever a human head from its torso an inference is compelled that a deadly instrumentality would be requisite to the purpose. Therefore, we hold that sufficient evidence existed to convict

