DIVISION ONE
FILED: 04/12/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0048
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
SONIA DELMY RAMIREZ,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-113981-001 DT

The Honorable Susanna C. Pineda, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Sonia Delmy Ramirez challenges her convictions for kidnapping, theft by extortion, aggravated assault, and theft of means of transportation. She contends the trial court abused its discretion when it denied her request to reopen her case based on newly discovered evidence. She also argues that the court committed fundamental error by ordering the sentences for kidnapping, counts one and two, to run consecutively. For the following reasons, we affirm the convictions and sentences.

FACTS[1] AND PROCEDURAL BACKGROUND

¶2 Four friends were outside preparing for a barbeque at a Mesa apartment complex on February 21, 2009. One, Ruben T., went inside, while another, Antonio L., saw a woman come around the corner. When she backed up after seeing him and the others, he went to investigate and was hit with a gun and forced into a Dodge Stratus. Other men forced the two other friends, Juan M. and Cruz M., into the car.

¶3 As the car drove away, a woman pointed a gun at the hostages and told them not to lift their heads. The hostages were subsequently transferred to another vehicle and taken to a

[1] "We view the evidence in the light most favorable to sustaining [the] convictions and resolve all reasonable inferences against [the defendant]." *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005) (citation omitted).

house where they were held in a bedroom for three days. Their captors asked for money and property, and called Ruben T. demanding money and property if he wanted his friends released.

¶4 Ruben T. contacted the police, and the police began to record the phone calls as part of their investigation. Juan M. was released two nights later to help Ruben T. get money and property, including Juan M.'s truck.

¶5 The following day, the police entered the house pursuant to a search warrant and rescued the remaining hostages. Defendant and others were arrested, and subsequently indicted on multiple counts of kidnapping, theft by extortion, and aggravated assault, all dangerous offenses, and theft of means of transportation.

¶6 At her first trial, Defendant and her ex-husband, Sergio Perez, were tried together, and a mistrial was declared after the jury could not reach a unanimous verdict. They were retried in September 2010. After her motion for acquittal was denied, Defendant testified and provided an alibi defense; namely, that she was not involved in the kidnappings because she and her former husband were working at a swap meet and she was unaware that her home was being used to hold the hostages.

¶7 At the completion of her testimony, the jury indicated that it had questions. The judge and counsel reviewed the written questions, and then the judge asked Defendant some of

the questions.[2] She answered, and the defense rested. After the lunch recess, the court was informed that Defendant had located a swap meet receipt in her wallet which supported some of her answers to juror questions. The court, however, denied her request to reopen the case. The jury received its instructions, listened to closing arguments, and after deliberations, convicted Defendant on all charges.

¶8 She was subsequently sentenced to ten and one-half years for each kidnapping and theft by extortion count; seven and one-half years for each aggravated assault count; and three and one-half years for the car theft. Based on the convictions, which were ordered to be concurrent and consecutive, Defendant was sentenced to a total of twenty-one years of imprisonment. She also received 162 days of presentence incarceration credit.

¶9 We have jurisdiction over her appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A) (West 2012), 13-4031 (West 2012), and 13-4033 (West 2012).

[2] The question at issue was whether there was "any documentation to show that [Defendant and her co-defendant] were at the swap meet on Saturday in February 2009, the day the kidnapping took place in Mesa." Defendant responded, "Uh, no, because I would pay every other week, or once a month. I wouldn't pay every Saturday." Her lawyer then asked follow-up questions to clarify her answer, and she indicated that she would pay for her space weeks later and would then get a receipt.

DISCUSSION

I.

¶10 Defendant argues that the trial court abused its discretion when it denied her motion to reopen her case to allow her to offer the newly discovered swap meet receipt into evidence. She contends the receipt was relevant to her alibi defense. She further argues that the ruling was prejudicial because it prevented her from fully responding to the juror's question, and the admission of the receipt would have dispelled any doubts about the veracity of her response.

¶11 We review a ruling on a motion to reopen for an abuse of discretion. *State v. Dickens*, 187 Ariz. 1, 12, 926 P.2d 468, 479 (1996) (citation omitted) ("Courts have broad discretion in deciding whether a party may reopen a case to admit evidence."); *State v. Doody*, 187 Ariz. 363, 378, 930 P.2d 440, 455 (App. 1996) (citation omitted) ("The trial court exercises its discretion in evaluating a motion to reopen."). "In deciding whether to reopen, the trial court should consider whether all the evidence, offered in good faith and necessary to the ends of justice has been heard." *Doody*, 187 Ariz. at 378, 930 P.2d at 455 (citations and internal quotation marks omitted). Our supreme court has held that an abuse of discretion occurs when a defendant suffers prejudice. *State v. Cota*, 99 Ariz. 237, 241, 408 P.2d 27, 29 (1965) (citing *State v. Moreno*, 92 Ariz. 116,

118, 374 P.2d 872, 873 (1962)). And, prejudice results when a defendant is "deprived of a substantial right." *Id.* (citation omitted).

¶12 Here, Defendant was not deprived of any substantial right. She was allowed to respond fully to the juror's question, and she had the opportunity to answer follow-up questions to clarify her initial response. Moreover, despite finding a receipt during a lunch recess before the final phase of the trial, she had ample opportunity between the indictment and the start of the second trial to find, list, and produce the receipt or other documents to attempt to substantiate her alibi on the day of the kidnappings.

¶13 Additionally, the receipt found during the recess was dated the weekend *before* the kidnappings; it simply supported her testimony that when she paid for the space she received a "basic" receipt. She did not explain why she could not have discovered the receipt sooner and timely disclosed it as an exhibit. As a result, the receipt was untimely disclosed and the court did not err in excluding it.

¶14 She also argues that the receipt was relevant to her defense. Even assuming that the receipt was generally relevant pursuant to Arizona Rule of Evidence 401, the court had to determine whether to allow her to reopen her case in order to present a receipt that she had been unable to discover until the

last day of her second trial. And, because the receipt did not support her claim that she was at the swap meet on the date and time of the kidnappings, it did not support her alibi. As a result, denying Defendant's request to reopen her case did not deprive her of a substantial right to present evidence. We find no abuse of discretion.

II.

¶15 Defendant also argues that the court committed fundamental error when it ordered her sentence for one kidnapping conviction (count one) to be consecutive to another kidnapping conviction (count two). According to her, the court's statement that "there's a presumption in the law that different sentences involving different individuals would . . . run consecutive" demonstrates that the court misunderstood its discretion under A.R.S. § 13-711 (West 2012),[3] which, under *State*

[3] Appellant cites A.R.S. § 13-708, which was renumbered as § 13-711 effective January 1, 2009, by Laws 2008, ch. 301, § 27. That statute states:

> Except as otherwise provided by law, if multiple sentences of imprisonment are imposed on a person at the same time, the sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence.

A.R.S. § 13-711(A).

v. Garza, 192 Ariz. 171, 176, ¶ 17, 962 P.2d 898, 903 (1998) (citation omitted), requires the matter to be remanded for resentencing. Because she admittedly failed to raise the objection during sentencing, we review only for fundamental error. As a result, to obtain relief, she must establish "both that fundamental error occurred and that the error caused [her] prejudice." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005).

¶16 In *State v. Garza*, our supreme court clarified that A.R.S. § 13-711 (formerly § 13-708) does not create a "presumption"[4] that sentences run consecutively. 192 Ariz. at 174-75 ¶¶ 10-12, 962 P.2d at 901-02. The court explained that the statute does not contain a statutory presumption that confines judicial discretion, but simply obligates the trial court "to set forth reasons for imposing concurrent rather than consecutive sentences and creates a default designation of consecutive sentences when the judge fails to indicate whether the sentences are to run concurrently or consecutively." *Id.* at 175, ¶ 12, 962 P.2d at 902. And, "[e]ven when the sentence imposed is within the trial judge's authority, if the record is unclear whether the judge knew he had discretion to act

[4] "[A] presumption creates a conclusion that must be rebutted or overcome by evidence meeting some particular burden of proof." *Garza*, 192 Ariz. at 174 n.6, ¶ 10, 962 P.2d at 901 n.6 (citation omitted).

otherwise, the case should be remanded for resentencing." *Id.* at 176, ¶ 17, 962 P.2d at 903 (citation omitted). We therefore review the record to determine whether the court believed its sentencing discretion was statutorily constricted.

¶17 Although the court incorrectly used the term "presumption" when discussing the sentences, the record reveals that the judge clearly understood that she had discretion in deciding whether Defendant's sentences would be concurrent or consecutive. After imposing the sentences, the court stated:

> Now, the factors that you've addressed, the fact that your letters address, your criminal history come[s] into play on how these sentences are to be served. The prosecutor [is] correct, there were four different victims in this case, and there's a presumption in the law that different sentences involving different individuals would be – would run consecutive. However, I also have to weigh and balance the type of person you are, because if it was so simple it would be one where there would not be judges. There would just be a calculation done, and a sentence imposed, and there wouldn't be any need for any kind of judgment. That's not what's here. I need to make a judgment call.

¶18 Despite the statement as to the "presumption in the law,"[5] the judge was aware that she had sentencing discretion,

[5] "A trial judge's ruminations on the record, even when incorrect, are an insufficient ground on appeal to set aside the judgment entered in the trial court where there is sufficient evidence in the record to support the findings of fact and the judgment." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 308, 681 P.2d 390, 460 (App. 1983).

and she exercised that discretion when she ordered Defendant to serve her sentences both concurrently and consecutively. As a result, we find no sentencing error.

CONCLUSION

¶19 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Presiding Judge

/s/
_____
JOHN C. GEMMILL, Judge