

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



DIVISION ONE
FILED: 03/22/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,)
) No. 1 CA-CR 11-0095
)
 Appellee,) DEPARTMENT B
)
 v.)
) MEMORANDUM DECISION
 MANUEL NAHOM SALCIDO-MEGUI,)
) (Not for Publication -
 Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-153146-001 DT

The Honorable Sherry K. Stephens, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Myles A. Braccio, Assistant Attorney General
Attorneys for Appellee

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

B R O W N, Judge

¶1 Manuel Nahom Salcido-Megui ("Defendant") appeals from his convictions and sentences for first degree burglary, eight

counts of kidnapping, theft by extortion, and misconduct involving weapons. Defendant challenges only his convictions for kidnapping on Counts 2 and 11. He argues these convictions violate the prohibition against double jeopardy because they (1) pertain to the same victim and (2) arise out of one continuing offense. For reasons set forth below, we affirm, except that we vacate Defendant's conviction and sentence for Count 11.

BACKGROUND¹

¶12 On August 10, 2009, Defendant and Saul Madrigal Gomez burst into a Phoenix home while the victim, her father, and her six children were present. Both men were armed with shotguns. Gomez ordered the family to get down on the kitchen floor. One of the children was in the bathroom at the time; he locked the door and kept quiet when he heard the others scream.

¶13 In response to demands for money, the victim offered the men her purse, which contained roughly fifty dollars. Gomez held the family members in the kitchen at gunpoint while Defendant went through the home looking for more money. After returning without finding any additional money, Defendant and Gomez decided to take the victim with them and hold her for ransom.

¹ We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

¶14 One of the men grabbed the victim by the hair to get her up from the floor, and the two men walked her outside to their car. They drove her to an unknown location and forced her to sit in a small room. They began calling her family members, initially demanding \$10,000 and, later, \$15,000 for her safe return. Throughout the ransom negotiations, the victim was guarded by either of the men at gunpoint.

¶15 After the ransom arrangements were made, the men drove the victim to a desert area near Sun City. Defendant left the victim with Gomez while he went to retrieve the ransom. Gomez continued to guard the victim with a shotgun. Police arrested Defendant as he attempted to retrieve the ransom from a vehicle parked at a shopping mall. He told the police where the victim was being held. The police rescued her and apprehended Gomez. Later, after being read his *Miranda*² rights, Defendant confessed his involvement in the crimes, including his decision to kidnap the victim, because he was unemployed and he "needed the money to pay bills."

¶16 A jury convicted Defendant of first degree burglary, eight counts of kidnapping, theft by extortion, and misconduct involving weapons. Defendant was sentenced to concurrent and consecutive presumptive terms of imprisonment totaling 99.5

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

years, with credit for 541 days of presentence incarceration. This timely appeal followed.

DISCUSSION

¶7 Defendant's convictions for Counts 2 and 11, under Arizona Revised Statutes ("A.R.S.") section 13-1304(A) (2010),^{3,4} related to (1) the restraint of the victim in the home during the home invasion and (2) the removal of the victim from the home and her captivity for ransom. Defendant argues that these two convictions constitute a double jeopardy violation because he kidnapped the victim only once as part of one "continuing

³ The statutory definition of kidnapping reads:

A. A person commits kidnapping by knowingly restraining another person with the intent to:

1. Hold the victim for ransom, as a shield or hostage; or

2. Hold the victim for involuntary servitude; or

3. Inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony; or

4. Place the victim or a third person in reasonable apprehension of imminent physical injury to the victim or the third person; or

5. Interfere with the performance of a governmental or political function; or

6. Seize or exercise control over any airplane, train, bus, ship or other vehicle.

A.R.S. § 13-1304.

⁴ Absent material revision after the date of the offense, we cite the statute's current version.

offense." The State counters that Defendant was properly convicted because he was charged under two different subsections of the kidnapping statute in connection with two distinct criminal episodes.⁵

¶18 "The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9, 206 P.3d 769, 772 (App. 2008); see also U.S. Const. amend. V; Ariz. Const. art. 2, § 10. Because an additional felony conviction itself constitutes punishment, a double jeopardy violation occurs even if concurrent sentences are imposed. *State v. Brown*, 217 Ariz. 617, 621, ¶ 13, 177 P.3d 878, 882 (App. 2008). We review potential double jeopardy violations de novo. *State v. Welch*, 198 Ariz. 554, 555, ¶ 5, 12 P.3d 229, 230 (App. 2000).

¶19 We review for fundamental error only because Defendant did not raise the issue below. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). A double jeopardy violation, however, constitutes fundamental error. *Ortega*, 220 Ariz. at 323, ¶ 7, 206 P.3d at 772.

⁵ According to the State, the first episode occurred when Defendant knowingly restrained the victim in order to burglarize her home; the second, when Defendant moved the victim by force from her house for the purpose of taking her for ransom.

¶10 In determining whether a double jeopardy violation exists for multiple convictions of the same offense, the issue turns on "whether the individual's acts are punishable separately as discrete offenses." *State v. Jones*, 185 Ariz. 403, 405, 916 P.2d 1119, 1121 (App. 1995). Because kidnapping is a "continuing crime," we held in *Jones* that the uninterrupted restraint of the victim would "not give rise to more than one count of kidnapping." *Id.* at 406, 916 P.2d at 1122.⁶ Kidnapping is a continuing crime even where the kidnapping counts allege different reasons for restraining the victim pursuant to the subsections of A.R.S. § 13-1304(A). *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993) (holding that the six subsections of A.R.S. § 13-1304(A) are not separate offenses); *Jones*, 185 Ariz. at 406, 916 P.2d at 1122.

¶11 In *Herrera*, our supreme court held that the jurors need not unanimously agree on the specific intent the defendant had in committing the offense because "kidnapping is *one* crime, regardless of whether it occurs as a result of a knowing restraint with the intent to inflict physical injury or with the intent to interfere with the performance of a governmental

⁶ We disagree with the State's argument that *Jones* was "wrongly decided" and therefore decline the State's invitation to reexamine the court's holding that the victim must be "free from restraint" for some period of time to support multiple kidnapping convictions.

function." 176 Ariz. at 16, 859 P.2d at 126; see also *State v. Eagle*, 196 Ariz. 188, 190, ¶ 7, 994 P.2d 395, 397 (2000) ("Subsection (A) of the text completely defines the crime of kidnapping as it exists in Arizona. Its elements are plainly set forth: a knowing restraint coupled *with one or more* of the specifically listed intentions.") (emphasis added). Stated differently, kidnapping is a single offense that can be committed in more than one way. Accordingly, under current Arizona law, a defendant cannot be convicted of multiple counts of kidnapping for one continuous restraint.⁷

¶12 Here, the victim was subjected to continuous restraint from the time Defendant and Gomez ordered her to the floor of the kitchen at gunpoint until the police rescued her. Because it is undisputed, even on appeal, that the victim "was never free from [Defendant's] restraint during the entire episode," there can only be one conviction for her kidnapping.

¶13 The State asserts the two kidnappings were not the same in fact or law because the locations, the form of restraint, and the intent and objectives were different in each.

⁷ Furthermore, contrary to the State's contentions, throughout the entire arc of the crime, Defendant's intent was to secure money from the victim, whether it was by taking it from her outright or using her as bait to induce the family to pay a ransom. Therefore, while his method of procuring the money may have evolved in response to the circumstances, his intent did not change.

The State argues that the first kidnapping effectively ended when Defendant began his second kidnapping, in moving the victim from her home to his residence, and eventually into the desert, to hold her for ransom. For this proposition, the State relies on *State v. Dombos*, 180 P.3d 675 (N.M. Ct. App. 2008). However, *Dombos* is not persuasive here. In that case, the defendant restrained his wife against her will and forced her to perform sexually on multiple occasions, but released her for several days in between the episodes of restraint. *Id.* at 678, 680. The court found that the defendant's two kidnapping convictions did not violate double jeopardy because the instances of confinement "were separated by days; intervening events that included consensual sex, drinking, and daily activities; and terminations of the intent to restrain." *Id.* at 680. Unlike the situation in *Dombos*, Defendant never released the victim from restraint, there were no intervening events indicating consensual activities, and Defendant never varied his intent to secure money from her.

¶14 We also find the State's reliance on *State v. Jones* ("*Jones I*"), 123 Ariz. 373, 599 P.2d 826 (App. 1979), misplaced. In *Jones I*, we affirmed multiple convictions for kidnapping (armed kidnapping and kidnapping for rape) under different statutory provisions in the old criminal code. *Id.* at 375, 377, 599 P.2d at 828, 830 (citing former A.R.S. §§ 13-491, -492,

effective prior to October 1, 1978). Since *Jones I*, the legislature has combined the different kidnapping statutes into one unified offense. See *Herrera*, 76 Ariz. at 16, 859 P.2d at 126. Because the kidnapping statute our supreme court addressed in *Jones I* has changed, that decision cannot support the State's argument.

¶15 We generally vacate the "lesser" of two convictions when double jeopardy is violated. *State v. Scarborough*, 110 Ariz. 1, 6, 514 P.2d 997, 1002 (1973); *Welch*, 198 Ariz. at 557, ¶ 13, 12 P.3d at 232. However, because the sentences imposed here are equal in length and concurrent to each other, we cannot view either of the two kidnapping convictions as "lesser". Cf. *Jones*, 185 Ariz. at 407-08, 916 P.2d at 1123-24 (holding that where one sentence is concurrent and the other is consecutive to other sentences, the concurrent sentence is considered the "lesser"). Accordingly, we vacate the conviction and sentence imposed on Count 11 as the second of the two convictions.

CONCLUSION

¶16 For the foregoing reasons, we vacate the conviction and sentence imposed on Count 11. We affirm the convictions and sentences imposed on all of the remaining counts.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

DONN KESSLER, Judge