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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANTON GEORGE ADAMS, Appellant.	)	2 CA-CR 2010-0370 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091383001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst — Tucson
Attorneys for Appellee

Vanessa C. Moss — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 After a jury trial, appellant Anton Adams was convicted of attempted sexual assault, kidnapping, robbery, and second-degree burglary. The trial court sentenced Adams to consecutive, aggravated prison terms for the first three offenses,

totaling sixty years,[1] and to an aggravated prison term of twenty years for the fourth offense, to be served concurrently with the other sentences. On appeal, Adams contends the court erred when it denied his motion for judgment of acquittal on the attempted sexual assault count, when it imposed consecutive sentences on the first three counts, and when it denied his motion to reinstate the state's first plea offer. For the reasons stated below, we affirm.

¶2 In May 2009, the state offered a plea agreement which would have allowed Adams to plead guilty to attempted sexual assault and robbery, with a sentencing range of two to 12.5 years. Neither the state nor Adams mentioned the plea offer at status conferences held in June and July 2009. However, at an August motions hearing, the prosecutor informed the court that, although the state had made "a very reasonable [plea] offer" which Adams had rejected, the state "is not in a position to re-extend the offer."

¶3 The state subsequently offered Adams a different plea agreement with a sentencing range of five to 33.75 years. At a February 2010 change-of-plea hearing, the court explained to Adams, "if you go to trial and you lose and the State proves the priors that they have alleged, you could be facing a maximum of about 100 years in prison." Adams nonetheless rejected the plea offer. His new defense attorney, William Perry, explained that Adams "seriously" had wanted to accept the original plea offer, but that his former attorney, Paul Skitzki, had "lost it and then the offer went up."

[1]Although Adams intermittently refers to his sentence as sixty and sixty-eight years, the record is clear it is sixty years.

¶4 In August 2010, Adams filed a motion to require the state to reinstate the original plea agreement, asserting the state should be so ordered because Skitzki had been ineffective based on his "failure to get the plea back, his failure to convey the full range of sentencing to Mr. Adams, [and] the lack of a *Donald*[2] record . . . ." The court conducted an evidentiary hearing on Adams's motion in September 2010. At that hearing, the court noted "[t]he case law is pretty clear I can't make a finding of ineffective assistance of counsel pretrial." However, after the state informed the court it "would be interested in hearing from Mr. Skitzki," who was present, the court proceeded with the evidentiary hearing. Skitzki testified he had discussed the plea agreement with Adams "as soon as [he] had time after [he] had received [the] plea," noting that the agreement erroneously contained a presumptive sentence of three years, rather than 3.5 years. Although Adams had asked Skitzki to obtain a corrected plea agreement from the state, the state withdrew the offer before that was done. Skitzki acknowledged that, although Adams "never committed one way or another" regarding his acceptance of the plea agreement, because of a "breakdown in communication" between himself and Adams, he was unable to discuss the plea agreement meaningfully with Adams.

¶5 Adams also testified at the hearing, avowing that Skitzki had shared the plea agreement with him five weeks after he had received it, and that although he had requested a corrected version of the agreement, he never was presented with one. He

[2]*State v. Donald*, 198 Ariz. 406, ¶¶ 14, 30, 10 P.3d 1193, 1200, 1202 (App. 2000) (trial court may compel state to reinstate previously offered plea agreement if defendant rejected agreement because counsel failed to inform defendant adequately of terms of plea offer and merits of offer compared to proceeding to trial).

further testified he had told Skitzki he wanted to accept the plea offer and it was Skitzki's fault he did not receive the corrected version in a timely manner. In fact, Adams testified, Skitzki himself had told Adams it was Skitzki's own fault Adams did not "get" the plea agreement. Adams further testified he would still enter into the original plea agreement if given the opportunity.

¶6 Although the trial court determined that if it found "some sort of deficient performance on counsel's part" it could "take some interim remedial measures," it concluded it did not "see any evidence of deficient performance" by Skitzki. The court determined that without knowing the reason the state had withdrawn the plea, and in light of the strained relationship between Skitzki and Adams, it was "in a tough spot to find that this was a plea that was actually available for Mr. Adams to take." The court thus denied the motion to reinstate the plea and made the following findings:

> So I am not going to order the State to do anything at this point. I think the State has information in front of it where it can make decisions about whether or not they are comfortable and want to proceed with the record that is at least in effect for this case. But I don't find any deficient performance on Mr. Skitzki's part, and I think the case law is pretty clear, I can't order the State to reinstate the plea and I don't know that there is any other remedial measure that the Court would take at this time having found that Mr. Skitzki's performance was not deficient.

¶7 In September 2010, the court held a *Donald* hearing on the state's third plea offer, which provided a sentencing range of five to twenty-five years in exchange for Adams's pleading guilty to attempted sexual assault, kidnapping and robbery. Because

Adams failed to provide a factual basis on all three counts, specifically on the attempted sexual assault count, the matter proceeded to trial.

¶8 On appeal, we view the facts[3] in the light most favorable to sustaining Adams's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In June 2006, Adams approached the then-eighty-six-year-old victim, G., in the carport of her townhome and asked her for a glass of water. When G. went inside to get the water, Adams followed her into her kitchen without her permission. Adams "stood up very close" to G. and said in a "gruff" voice, "take your clothes off." When G. refused, Adams said, "[O]h, yes you are, I'm going to rape you," and then "grabbed" G.'s shirt "so hard that two of the buttons came off," and hit her on the side of her face. Despite G.'s efforts to resist, Adams backed her into the hall, repeatedly told her he was going to rape her, threw her onto the floor in the hallway, and then threw her across the bed in her bedroom with such force that she fell on the floor. He also "grabbed [her arm] so hard that he [tore] the skin." After G. began to pray out loud, Adams told her he would not rape her, but he wanted her money. Adams took $12 from G.'s wallet

[3]In the future, we urge defense counsel to direct the court to the specific date of the trial transcript to which she refers. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall contain "citations to the . . . parts of the record relied on"). Although we could, in our discretion, refuse to consider Adams's opening brief for this reason, because "we remain inclined to decide cases on their merits and not to punish litigants because of the inaction of their counsel," *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966), and in light of the state's accurate and complete citations to the record, we nonetheless consider the arguments presented. We also note that, although defense counsel repeatedly refers to her request for oral argument, she did not file a separate instrument requesting an oral argument, as Rule 31.14(a), Ariz. R. Crim. P., requires.

and an additional $120 from her dresser, and left. Samples taken from G.'s clothing matched Adams's DNA.[4]

¶9 At trial, Adams testified that he had asked G. if he could use her telephone, and that after he had entered her home, he told her "you old rose, I'm here to rob you." G. then fell to the ground and when Adams picked her up "by the arms," G. "started screaming, rape," to which Adams responded, "[W]ell, you want to be raped or something? I'm just here to rob you." He also testified that G. may have "rubbed her blouse" when she grabbed his arms, that she had gone into the bedroom to get the money he took from her, and that he had "pushed her on the bed" when he had walked out of the room.

Motion for Judgment of Acquittal

¶10 Adams contends the trial court erred when it denied his motion for judgment of acquittal on attempted sexual assault, made at the close of the state's case and renewed after trial. A motion for judgment of acquittal should be granted only if "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20; *see also State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (judgment of acquittal appropriate only where complete absence of substantial evidence supporting conviction). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We review de

[4]Deoxyribonucleic acid.

novo a trial court's denial of a motion for judgment of acquittal. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "'If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury.'" *Id.*, *quoting State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006).

¶11 Viewing the facts and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdict, *see Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d at 34, we reject Adams's assertion that G.'s testimony "indicates that Mr. Adams never intended to rape her. . . . [because t]here is no forensic evidence to support an intent to rape: no blood, semen, fingerprints, no ripped clothing, no injuries, etc." We also reject his assertion that, even assuming G.'s version of what occurred to be accurate, the evidence only shows he intended to "attempt [to] inflict fear in order to effectuate the robbery."

¶12 Section 13-1406(A), A.R.S., provides, "[a] person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person," while A.R.S. § 13-1401(5)(a) provides "[w]ithout consent" means "[t]he victim is coerced by the immediate use or threatened use of force against a person or property." And, A.R.S. § 13-1001(A)(2), provides that "[a] person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person . . . [i]ntentionally does . . . anything which, under

the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense."

¶13 As set forth above, G. testified that Adams ordered her to take her clothes off and repeatedly told her he intended to rape her. He threw her on the floor and stood over her, ultimately backing her into her bedroom and "[throwing her] so hard that [she] rolled right across [the bed] and . . . went down on the floor," before he told her "I won't rape you but I want your money." A victim's uncorroborated testimony is sufficient to support a conviction for a sexual crime. *State v. Dutton*, 106 Ariz. 463, 465, 478 P.2d 87, 89 (1970). Additionally, evidence may be substantial whether circumstantial or direct. *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). Moreover, proof of "intent is a state of mind which is seldom, if ever, susceptible of proof by direct evidence and must ordinarily be proven by circumstantial evidence." *State v. Lester*, 11 Ariz. App. 408, 410, 464 P.2d 995, 997 (1970). It is for the jury as the trier of fact to weigh the evidence, resolve conflicts in the evidence, and assess the credibility of the witnesses. *See State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). Not only did G. testify about the incident, but the jury also was presented with physical evidence that two buttons were missing from her blouse and that she had been injured, in addition to the testimony of the police officer who responded to the scene that G.'s right arm was injured and bleeding and her clothing looked a "little disheveled." Based on these facts, there was substantial evidence to allow a rational juror to conclude beyond a reasonable doubt that Adams intended to sexually assault G. Therefore, the trial court did not abuse its discretion in denying Adams's motion for judgment of acquittal.

Consecutive Sentences

¶14 Adams argues the trial court erred by imposing consecutive sentences for attempted sexual assault, kidnapping, and robbery, arguing these charges were based on a single act. Because Adams failed to object to the imposition of consecutive sentences below, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). But a court's imposition of a consecutive sentence that is unauthorized under A.R.S. § 13-116 is fundamental error, *State v. White*, 160 Ariz. 377, 379, 773 P.2d 482, 484 (App. 1989), and patently prejudicial, *cf. State v. Joyner*, 215 Ariz. 134, ¶ 32, 158 P.3d 263, 273 (App. 2007) (but for sentencing error, sentence would have been suspended). Accordingly, we review de novo the court's decision to impose consecutive sentences. *See State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶15 Section 13-116 prohibits the imposition of consecutive sentences for offenses arising out of a single "act or omission." *See also State v. Stock*, 220 Ariz. 507, ¶ 11, 207 P.3d 760, 762 (App. 2009) (court may not impose consecutive sentences if defendant's conduct constituted single act). To determine whether offenses arise out of a single act, we first must decide which is the "ultimate charge," that is "the essence of the factual nexus." *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). The ultimate charge is usually the most serious of the charged offenses. *Id.* If, after subtracting the evidence necessary to support the elements of the ultimate charge, sufficient evidence remains to satisfy the elements of the secondary charge, the offenses likely arise out of multiple acts and consecutive sentences are permissible. *Id.* Assuming

sufficient evidence exists, we then consider whether (1) it is factually possible for the defendant to have committed the ultimate charge without also committing the secondary charge, or (2) the secondary charge "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime." *Id.*; *see also State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993).

¶16 Adams asserts, without more, that the ultimate crime here "would almost certainly be the robbery," and then concludes that "the remaining facts are insufficient to support consecutive sentences." Based on the nature of the instant offenses and the underlying facts, however, it is difficult to identify the ultimate offense for purposes of our analysis under *Gordon*. However, focusing on the "'facts of the transaction,'" rather than the elements of the offenses, *see State v. Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d 1150, 1155 (App. 2002), *quoting Gordon*, 161 Ariz. at 313 n.5, 778 P.2d at 1209 n.5, the offenses at issue all have distinct elements, such that each may be committed independently without necessarily committing any other. Therefore, it is not necessary to identify the ultimate offense to conclude that the sentencing court's imposition of consecutive sentences was not erroneous. *See* A.R.S. §§ 13-1406, 13-1401(5), and 13-1001(A) (sexual assault, consent, and attempt, defined above), 13-1304 (kidnapping, defined as knowing restraint of another person with intent to inflict physical injury, sexual offense, or to commit felony, or to place victim in reasonable apprehension of imminent physical injury), and 13-1902 (robbery occurs if, "in the course of taking any property of another from his person or immediate presence and against his will, such

person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property").

¶17 The following facts support Adams's conviction for attempted sexual assault: he demanded G. remove her clothing; he grabbed her blouse "so hard" that two buttons popped off; he hit her in the face; and he repeatedly told her he was going to rape her. The kidnapping conviction was supported by the following facts: Adams knowingly restrained G. by grabbing her by the arms, pulling her from the kitchen and backing her into the hallway while she "resisted every step of the way," throwing her down with such force that she fell to the floor, and grabbing her by the arms again and backing her into the bedroom. And, the following facts support the robbery conviction: once Adams and G. were in G.'s bedroom, Adams threw G. down and told her, "[O]kay old lady, I won't rape you but I want your money." After Adams took the $12 G. had in her purse, he became "furious" and said, "[W]here's the rest of it," after which G. gave him $120 from her dresser.

¶18 Therefore, based on this evidence it was factually possible for Adams to have committed each of these offenses without necessarily committing the others. In addition, each presented an additional risk of harm not present in the others, namely: the threat of rape posed a distinct type of harm to G.'s body; kidnapping G. and throwing her down restrained her physical freedom and also threatened her with physical harm; and, robbery presented a threat to G.'s property. Accordingly, we cannot say the court abused its discretion by imposing consecutive sentences.

Motion to Reinstate Plea Offer

¶19 Adams argues the trial court erred by failing to order reinstatement of the original plea agreement based on *Donald,* asserting that Skitzki rendered ineffective assistance and thus violated his right to due process. Specifically, he asserts he is entitled to reinstatement not only because Skitzki's "advice . . . was impeded by timing issues, a difficult attorney-client relationship, an error in the State's plea offer, and an unexplained and sudden withdrawal of the plea by the State without deadline or notice," but also as an "equitable remedy under contract principles." He also argues he "did not have to wait until after trial and then file a Rule 32 petition and prove ineffective assistance of counsel to prevail on his motion."

¶20 However, our supreme court has ruled that "a request for reinstatement of a plea offer under *Donald* must be premised on a showing of ineffective assistance of counsel," and such claims are cognizable "*only* in a Rule 32 post-conviction proceeding—not before trial, at trial, or on direct review." *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶¶ 16, 20, 153 P.3d 1040, 1043,1044 (2007); *see State v. Spreitz,* 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) ("[I]neffective assistance of counsel claims are to be brought in Rule 32 proceedings."). Therefore, we do not consider Adams's contentions further. *See id.* We additionally reject Adams's assertion he somehow was entitled to relief based on principles of contract, noting that the prosecutor has plenary authority to withdraw a plea offer at any time prior to the court's acceptance of the plea agreement. *See* Ariz. R. Crim. P. 17.4(b).

¶21 For all of the aforementioned reasons, Adams's convictions and sentences are affirmed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge