IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 07/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

STATE OF ARIZONA, Appellee,	)	1 CA-CR 11-0114
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
LORETO VALENZUELA LOPEZ, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-108965-002 DT

The Honorable James T. Blomo, 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 Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Defendant-Appellant Loreto Valenzuela Lopez ("Lopez") was tried and convicted of kidnapping under Arizona Revised Statutes ("A.R.S.") section 13-1304 (2010),[1] theft by extortion under A.R.S. § 13-1804 (Supp. 2011), and aggravated assault under A.R.S. § 13-1204 (Supp. 2011); and sentenced to twenty-one years imprisonment. Counsel for Lopez filed a brief in accordance with *Anders v. California,* 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Lopez has submitted a supplemental brief *in propia persona*, raising the following issues: (1) sufficiency of the evidence, (2) whether there was an unreasonable search and seizure in violation of the Fourth Amendment, (3) whether the State failed to disclose exculpatory evidence, (4) whether the court improperly allowed the State to present non-disclosed evidence to the jury, (5) improper admission of cell phones into evidence, (6) improper admission of hearsay, (7) improper preclusion of Lopez from cross-examining the victim, (8) the jury improperly viewing Lopez in prison attire and handcuffs, (9) improper jury instruction, (10) improper consideration of aggravating and mitigating factors at sentencing, and (11) improper consideration of the same factors

[1] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

to sustain all three sentences. For the reasons that follow, we affirm Lopez's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 Martha M. ("M.") was at work at an auto body shop when she was approached by two men who wanted an estimate to fix their cars and to buy a truck from M. The men said that the cars in need of repair were not drivable and asked M. to follow them to the cars to do the estimate. M. drove to a trailer park where the cars were supposed to be, but she did not see the cars. While at the park, the persons she had followed seized her at gunpoint and took her to a house where she was kept against her will.

¶3 When they arrived at the house, M. jumped out of the car, but the man driving got angry and pulled her back into the truck and beat her. The men then pulled M. out of the truck, took her into the garage of the house, and continued beating her. The men wanted $300,000 from M. as repayment for a drug debt that her children's father allegedly owed them.

¶4 M. was later moved to a second house where the same man who beat her originally beat her again and threatened to kill her children because she did not have the ransom money. The men made several calls to M.'s family members demanding money and let M. speak to the family members.

¶5 M. was kept at the second location overnight. She was

sexually abused at the second location the following morning.

¶6 Lopez then arrived at the second house and he and another man took M. to the third location. The third house belonged to Lopez's co-defendant, Jose Carlos Lizarraga ("Lizarraga"). Lizarraga identified the second man who brought M. to his house as "Charranga." M. was placed in a room at the third house, and initially there were four men there with her. Later, two of the men left so that only Lopez and one of the men who had previously beaten M. were left in the room with her. The man who had beaten M. placed a gun to her head and continued to threaten M. while Lopez stood by and watched. M. was kept at the third house overnight, from February 7 to February 8.

¶7 On February 8, M. was taken from the third house to be exchanged for the ransom money after Lopez put tape over her eyes, sunglasses over the tape, and her jacket hood up. Lopez dropped M. off near 19th Avenue and Grand. She eventually made her way to her mother's home where she called her brother; her brother was at the police station with M.'s mother, and the police came and picked M. up to take her to the police station.

¶8 Lizarraga accepted an open plea bargain in exchange for testifying against Lopez. Lizarraga testified that he permitted his house to be used to keep M. kidnapped and that he picked up the ransom money. Lizarraga also testified that Lopez was the one who asked if Lizarraga wanted to be a part of the

kidnapping in exchange for a share of the ransom money.

¶9 M. did not immediately identify any of her captors when she first went to the police station on February 8, 2008. However, M. identified Lopez in a photo lineup on February 11, 2008. M. also identified Lizarraga in a photo lineup on February 11, 2008.

¶10 Lopez claims to not have any involvement in the kidnapping. He testified that Charranga walked to his house one day in February, and the two men went to Lizarraga's house so Lopez could buy a pit bull from Lizarraga. Lopez said that when he arrived at Lizarraga's house he saw a woman being held there, and Lizarraga did not want Lopez to leave the house because he had seen M. Lopez said that Lizarraga and another man hit him so that he fell to the ground, kicked him, and pointed a gun at him, threatening him not to call the police or tell anyone what he saw. When they let him go, Lopez testified that he left as fast as he could, with Charranga still at Lizarraga's house.

¶11 A jury found Lopez guilty of kidnapping, theft by extortion, and aggravated assault. The jury found all three counts to be dangerous offenses under A.R.S. § 13-604 (2008). The jury found seven aggravating factors proven for all three counts.[2] Lopez received 1062 days of presentence incarceration

[2] The aggravating factors found were: (1) the offense involved the infliction or threatened infliction of serious physical

credit.

DISCUSSION

I. Standard of Review

¶12 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citation omitted). To obtain reversal, the defendant must also show the fundamental error prejudiced him. *Id.* at ¶ 20. We view the facts in the light most favorable to sustaining the conviction. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

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injury; (2) the offense involved the use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, specifically a handgun; (3) the offense involved the taking of or damage to property in an amount sufficient to be an aggravating circumstance; (4) the offense involved the presence of an accomplice; (5) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value; (6) the offense caused physical, emotional or financial harm to the victim; (7) the offense involved lying in wait for the victim or ambushing the victim during the commission of any felony, specifically kidnapping.

II. Sufficiency of the Evidence

¶13 In reviewing the sufficiency of evidence at trial, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶14 A person is criminally accountable for the conduct of another if the person is an accomplice of another in the commission of an offense. A.R.S. § 13-303(A)(3) (2010). Accomplice means a person who with the intent to promote or facilitate the commission of the offense: (1) solicits or commands another person to commit the offense; or (2) aids, counsels, agrees to aid, or attempts to aid another person in planning or committing the offense; or (3) provides means or opportunity to another person to commit the offense. A.R.S. § 13-301 (2010). While Lopez may not have committed all of the substantive acts, there is sufficient evidence in the record to support the jury's conviction on all three counts based on his participation in the events as a principle or an accomplice.

¶15 There is evidence in the record to support the jury's conviction of Lopez for the crime of kidnapping. To obtain a conviction the State must show that the defendant: (1) knowingly restrained another person with the intent to (2) hold the person for ransom, as a shield or as a hostage. A.R.S. § 13-1304(A)(1).

¶16 First, evidence in the record shows that M. was taken by armed men against her will to three different houses and restrained. Second, there is sufficient evidence to support that M. was held for ransom because of the numerous calls made to her family demanding money, and she was not let go until the family agreed to provide money for her release.

¶17 Although Lopez testified that he was not involved in any way with the kidnapping, M. identified Lopez as the man who drove her from the second to third house and was in the room at the third house with her when another man beat her. Further, M. was able to see that the truck in which she was driven to the third house was a black Chevy, the same kind of truck Lopez drives. Lizarraga also testified that Lopez was the man who got him involved in the kidnapping scheme. While Lopez was not the man who originally abducted M., he still knowingly restrained her when he transported her between locations, and he was one of the men who kept her held at Lizarraga's house. Since kidnapping "involves the element of unlawful detention, it is a

continuing crime; that is, it is continuously committed so long as the unlawful detention lasts." *State v. Jones*, 185 Ariz. 403, 406, 916 P.2d 1119, 1122 (App. 1995) (citation omitted). Thus, Lopez was involved with the kidnapping while it was going on.

¶18 There is evidence in the record to support the jury's conviction of Lopez for the crime of theft by extortion. To obtain conviction the State must show that the defendant: (1) knowingly obtained or sought to obtain property or services by threatening in the future to (2) cause physical injury to anyone by means of a deadly weapon or dangerous instrument. A.R.S. § 13-1804(A)(1).

¶19 The indictment listed M. as the victim of the theft by extortion. At the second house the kidnappers threatened to kill M. and her children if she did not provide the money. The men said that if they did not get the money, they would bring in M.'s children and kill them in front of her, one by one. They also hit M. with a gun on her head and threatened to cut M. up with a chainsaw or burn her with a lighter. In response, M. told them they could have all the money in her purse and go to her house and take whatever they wanted. The threats against M.'s life in exchange for ransom money continued when she was at the third house. At the third house, M. offered to sell her house to come up with the money the kidnappers demanded.

¶20 Lopez came to the second location to drive M. to the third house, and at the third house he was involved in planning the continued efforts to extort money from M. The jury was justified in finding that Lopez was an accomplice to the crime of theft by extortion by aiding the men at the second and third locations who threatened her life if the money was not provided.

¶21 There is evidence in the record to support the jury's conviction of Lopez for the crime of aggravated assault. To obtain conviction the State must show that the defendant: (1) intentionally placed another person in reasonable apprehension of imminent physical injury pursuant to A.R.S. § 13-1203(A)(2) (2010)[3] and (2) used a deadly weapon or dangerous instrument. A.R.S. § 13-1204(A)(2).

¶22 There is sufficient evidence to support the jury's conviction of Lopez for aggravated assault against M. While there is no evidence in the record that suggests that Lopez ever assaulted M. himself, there is evidence to support the conviction under an accomplice theory. Specifically, at the third house, Lopez stood guard in the room while another man threatened M.'s life with a gun. The man placed the gun against M.'s head and told her if her family did not provide money, M.'s

[3] "A person commits assault by . . . [i]ntentionally placing another person in reasonable apprehension of imminent physical injury." A.R.S. § 13-1203(A)(2).

family would find her in a garbage dump. The jury could have concluded Lopez's action intended to provide the means for the man to commit the aggravated assault against M. because his action insured both that M. could not escape and that the assault could be completed uninterrupted.

¶23 The jury found all three counts to be dangerous offenses. To obtain a dangerous finding, the State must show that the offense involved the "intentional or knowing infliction of serious physical injury upon another," or the "discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." A.R.S. § 13-604(I). There is evidence in the record to support that all three offenses included the use or threatening exhibition of a gun against M., thereby satisfying the requirement for a dangerous offense and Lopez's guilt as an accomplice.

III. Search and Seizure

¶24 Lopez contends there was an unreasonable search and seizure in violation of the Fourth Amendment, but he does not identify what the unreasonable search and seizure was or how it prejudiced him. There is no evidence on the record that any of the searches or seizures made by police were unreasonable or made without a warrant. We therefore find no error.

IV. Disclosure of Exculpatory Evidence

¶25 Lopez claims that the State failed to disclose exculpatory evidence in violation of Arizona Rule of Criminal Procedure 15.1 when it did not disclose that Lizarraga had been engaging in "free talks" with the State and made a plea agreement in which he would cooperate and testify against Lopez. The State faxed Lopez a notice of the plea agreement on March 24, 2009, but Lizarraga had engaged in a "free talk" in October of 2008 that was not disclosed until March 27, 2009. Lizarraga engaged in a second "free talk" with the State in July of 2008, and the State did not disclose that until April of 2009. The plea agreement also stated that Lizarraga had no priors, but Lopez's counsel discovered that Lizarraga had one prior felony and three prior misdemeanor convictions, including one for providing false information to police officers.

¶26 Lopez filed a motion to dismiss the indictment, with prejudice, based on the State's "bad faith" and "wilful [sic] and deliberate violation [of] Arizona's Rules of Criminal Procedure, Rule 15." The court denied the motion to dismiss but ordered a continuance and ordered the State to provide information regarding Lizarraga's false information conviction. Lopez alleges that the failure to disclose amounted to prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972),

violating both Rule 15 and due process.

¶27 Rule 15.1(b)(1) provides that the prosecutor must make available to the defendant "[t]he names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with their relevant written or recorded statements." If a party fails to comply with this disclosure provision, the court may order any appropriate sanction under Arizona Rule of Criminal Procedure 15.7, including dismissing the case with or without prejudice and granting a continuance. At the hearing on Lopez's motion to dismiss, Lopez noted that while the plea agreement was disclosed on March 24, 2009 there were at least two recorded occasions dating back to July 2008 where Lizarraga gave recorded corroborating statements to the police that had not previously been disclosed. While this late disclosure may be considered a violation of Rule 15.1, the court's order does not amount to reversible error.

¶28 Lopez claims that his convictions must be vacated because he was deprived of a fair trial. We do not agree. The trial court did not err in its failure to exclude Lizarraga's testimony, and it was not prejudicial to Lopez because the plea agreement and Lizarraga's prior felony were disclosed at trial.

¶29 Lopez sought as sanctions for the late disclosure either dismissal or preclusion of Lizarraga. However, unlike *Brady* and *Giglio*, the prosecutor's actions here had less

potential to do harm because trial had not yet started.[4] The trial court did not want to take such drastic sanctions and instead granted a continuance and ordered the State to provide the false information conviction. We conclude that because the late disclosure occurred before trial started, the trial court granted a continuance, and the trial court ordered the State to provide the information regarding Lizarraga's prior convictions, the trial court was within its discretion in granting the continuance and not finding any willful misconduct on the part of the State. *See State v. Armstrong*, 208 Ariz. 345, 353, ¶ 36, 93 P.3d 1061, 1069 (2004).

V. Presentation of Non-Disclosed Evidence to the Jury

¶30 Lopez also alleges that the court abused its discretion by allowing the State to present non-disclosed evidence to the jury. On the fifth day of trial, Lizarraga provided Lopez and the State with two pages of cell phone records in the name of Carla Herrera, Lizarraga's fiancé. Lopez had asked Lizarraga about phone records when Lopez first interviewed Lizarraga prior to trial, but the records were not provided until after trial began. Lopez's counsel argued that

[4] Rule 15.7 provides in relevant part "[a]ll orders imposing sanctions shall take into account the significance of the information not timely disclosed, the impact of the sanction on the party and the victim *and the stage of the proceedings at which the disclosure is ultimately made*." Ariz. R. Crim. P. 15.7 (emphasis added).

not providing the records until trial was already underway was ambush discovery. The trial court disagreed and denied Lopez's motion to continue to investigate to whom the incoming calls belonged. The trial court reasoned that the State had no intention of using the records because it discovered them at the same time Lopez did. While the State briefly mentioned the existence of the records during redirect examination of Lizarraga, the records were never offered or admitted into evidence.

¶31 The phone records were from February 7 and 8, 2008. Lizarraga testified that Lopez called him during that time to see if he was still going to be involved in the kidnapping and Lopez subsequently brought M. to Lizarraga's house. Lopez does not specifically address in his supplemental brief why the late disclosure of the records prevented him from presenting a complete defense, but it is possible that his counsel wanted to investigate the phone records in an attempt to show that Lopez never did call Lizarraga on the dates the kidnapping occurred. If the records so reflected, it could discredit Lizarraga's testimony regarding Lopez's involvement in the kidnapping.

¶32 However, with only two pages of records at issue, we cannot say that there was any error in denying a continuance when Lizarraga disclosed the records. First, if it was Lopez's intention to show that his phone number was not on the records,

it would not require a continuance to review two pages of phone records to determine that. Furthermore, the phone records themselves would not disprove Lopez's involvement in the kidnapping but could only potentially show a discrepancy in Lizarraga's testimony. Second, there was no form of prosecutorial misconduct regarding the late disclosure of the cell phone records because they were not in the State's possession; the State found out about the records the same time Lopez did.

VI. Admission of Cell Phones into Evidence

¶33 Lopez alleges that the trial court improperly admitted cell phones into evidence that were not connected to the crime in question. The standard of review regarding admission of evidence is abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990).

¶34 The State introduced into evidence seven cell phones that police found at Lopez's house on March 5, 2008. The court allowed the admission because numerous cell phones were used by multiple people throughout the commission of the kidnapping. Lopez asserts that the phones were improperly admitted because the State could not retrieve any relevant information from them and failed to connect them to him. Lopez also objected to the admission of the cell phones under *State v. Poland*, 132 Ariz. 269, 281, 645 P.2d 784, 796 (1982), which held that it was an

abuse of discretion to admit a taser gun into evidence when the weapon was not connected to the commission of the crime.

¶35 Irrelevant evidence is not admissible. Ariz. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401.

¶36 The police were unable to retrieve the numbers of the cell phones found in Lopez's home and could not say with certainty whether they were the specific phones used in the commission of the crime. We do not need to decide if the admission of the cell phones into evidence was an abuse of discretion; even assuming that the admission was an abuse of discretion, there was no prejudice to Lopez because the other evidence against him was so overwhelming. The evidence against him is so strong that any error coming from admitting the cell phones cannot be said to have affected the jury's verdict. *See State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996) (finding the evidence so strong, and the defense so incredible, that the court could "say with certainty that [the defendant] was not denied a fair trial by improper joinder"); *State v. Reffitt*, 145 Ariz. 452, 462, 702 P.2d 681, 691 (1985) (assuming that even if appellant was entitled to a *Willits* instruction, the court did not find prejudice because there was "no

reasonable possibility that the assigned error contributed to the jury's verdict").

VII. Hearsay Statements

¶37 Lopez alleges that the victim's "hearsay" statements to law enforcement and Lizarraga had a "substantial and injurious effect" on the jury's verdict. Lopez does not identify to which statements he was referring or how specifically they affected the jury's verdict. As the record does not reflect any impermissibly admitted hearsay statements or resulting prejudice, we cannot say that there was fundamental error.

VIII. Cross Examination of M.

¶38 Lopez asserts that the court improperly precluded him from fully cross-examining the State's "star witness," the victim. Defense counsel wanted to explore the motive for the kidnapping as it related to M.'s husband's drug debt. Lopez wanted to use this drug debt to show that other people had a motive for the kidnapping, but Lopez did not.

¶39 It is within the discretion of the trial court to preclude or limit a witness's testimony. *State v. Moody*, 208 Ariz. 424, 457, ¶ 135, 94 P.3d 1119, 1152 (2004). We therefore will not reverse the trial court's ruling on the issue unless there is an abuse of discretion. *Id.*

¶40 "In Arizona, a trial judge 'may place reasonable

limits upon the scope of cross-examination, without infringing upon the defendant's right of confrontation.'" *Id.* at 458, ¶ 137, 94 P.3d at 1153 (quoting *State v. Lehr*, 201 Ariz. 509, 518, ¶ 30, 38 P.3d 1172, 1181 (2002)). These limits are unconstitutional only if they deny the defendant the opportunity to present "information which bears either on the issues in the case or on the credibility of the witness." *State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977).

¶41 In this case, the court precluded any questions to M. regarding "why [M.'s husband] is in jail and what he is in jail for or the theory that [the $300,000 ransom] is a drug debt." The court found that the matter was irrelevant as to M. because she was not the one that owed the debt and had no dealings with it, and it did not go to M.'s motive for testifying. The court further found that even if the testimony was not irrelevant, the prejudicial effect to M. or the State's case far outweighed any probative value because kidnapping has no exceptions or justification for any sort of drug debt.

¶42 We conclude that the trial court's limitation does not amount to an abuse of discretion because the information allegedly sought from the witness did not relate to her credibility nor did it go to the issue of her kidnapping. The trial judge reasoned that it did not matter how much money M.'s husband owed or what the debt was for because that does not

provide any justification for the crime.

IX. Jury Viewing Lopez in Handcuffs

¶43 Lopez asserts that the court improperly allowed the jury to view him in identifiable jail attire and handcuffs. There is no evidence on the record that the jury ever saw Lopez in jail clothing during the trial. The jury did see a video of Lopez being interrogated by the police after he was arrested when he was wearing handcuffs. The State showed the video for impeachment purposes because Lopez's story changed when he testified from when he was originally interviewed at the time of his arrest.

¶44 The trial court ruled that it was permissible to show the video, over Lopez's objection, because it was an interview done on the day Lopez was arrested. The trial court reasoned that since Lopez was already arrested and in custody when he was interviewed, it would be no surprise to the jury that he would be handcuffed. There is no evidence the jury was aware that Lopez was still in custody during the trial, and the trial court found that there would be no prejudice in showing the video with Lopez in handcuffs when the jury knew that he was in custody when the interview took place.

¶45 Lopez cites *Estelle v. Williams*, 425 U.S. 501, 512 (1976), for the proposition that the State cannot "compel an accused to stand trial before a jury while dressed in

identifiable prison clothes," but the State never forced Lopez to be at trial in prison attire. *Estelle* also notes that when a defendant is tried for an offense that was committed in confinement or during an attempted escape, there is no error in trying defendants in prison clothes because "[n]o prejudice can result from seeing that which is already known." *Id.* at 507 (citation omitted). Similarly, no prejudice resulted from showing a video of Lopez in handcuffs when the jury knew that he was under arrest when the video was taken. The trial court did not err in permitting the jury to view the video which showed Lopez in handcuffs.

X. Jury Instruction

¶46 Lopez raises the issue of improper jury instruction, alleging that a mere presence instruction[5] was crucial to his theory of events. "When the issue is accomplice liability based on actual presence, a mere presence instruction provides a necessary aid to jurors in properly interpreting the acts of the accused accomplice and divining his true intent. . . . [I]n a prosecution for accomplice liability based on actual presence,

[5] A mere presence instruction typically states: "[g]uilt cannot be established by the defendant's mere presence at a crime scene or mere association with another person at a crime scene. The fact that the defendant may have been present does not in and of itself make the defendant guilty of the crimes charged." *See State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996).

the trial judge must, *if requested*, give a mere presence instruction." *State v. Noriega*, 187 Ariz. 282, 286, 928 P.2d 706, 710 (App. 1996) (emphasis added). The instruction's purpose is to insure that any conviction is based on the jury correctly understanding accomplice liability. *Id.*

¶47 However, defense counsel never requested a mere presence instruction be given. The issue therefore has been waived. *See* Ariz. R. Crim. P. 21.3(c). "[A] trial judge's failure to give an instruction *sua sponte* provides grounds for reversal only if such failure is fundamental error." *State v. Gallegos*, 178 Ariz. 1, 12, 870 P.2d 1097, 1108 (1994).

¶48 Consistent with the State's theory and the court's instruction on accomplice liability, the jury could have found Lopez guilty on all three counts because of his transportation of the victim between the second and third house and participation in holding the victim at the third house. While "[a] defendant is entitled to an instruction on his theory of the case if reasonably supported by the evidence," *State v. Miller*, 108 Ariz. 441, 445, 501 P.2d 383, 387 (1972), we do not think that Lopez was deprived of a substantial right. Since there was overwhelming evidence to allow the jury to convict based on Lopez's involvement in the kidnapping, not his mere presence at the third house as he alleges, there is no prejudice resulting from the instruction not being given to the jury. *See*

State v. Randolph, 99 Ariz. 253, 256, 408 P.2d 397, 399 (1965) (trial court's failure to give an instruction on defendant's theory of the case, even when he requested such instruction, was not reversible error because it was not prejudicial and did not deprive defendant of a substantial right).

¶49 For these reasons, we find no fundamental error in the court's failure to instruct the jury *sua sponte* on mere presence.

XI. Sentencing

¶50 The superior court stated at the sentencing hearing that it considered the following aggravating factors found by the jury:[6] the offense involved the taking of or damage to property, the offense involved the presence of accomplices, Lopez committed the offense in consideration for the receipt or

[6] The aggravating factors were presented to the jury after the verdict was delivered. The court did not consider during sentencing the first aggravating factor found by the jury (the offense involved the infliction or threatened infliction of serious physical injury) because that was an element of the aggravated assault. The court also did not consider the second aggravating factor (the offense involved the use or threatening use of a deadly weapon) because the jury found the offense to be dangerous, which required a finding that the offense involved the use or threatened use of a deadly weapon. The court did not consider the sixth aggravating factor (the offense caused physical, emotional or financial harm to the victim) because the harm done to the victim was not necessarily any greater than would normally be expected. Because the trial court did not consider these factors as aggravating factors at sentencing, we cannot agree with Lopez's assertion that the court "double counted" aggravating factors.

in expectation of anything of pecuniary value, and the offense involved lying in wait. The court also considered Lopez's lack of criminal history, age, and family support as mitigating factors. We therefore find no merit in Lopez's assertion that the court failed to consider mitigating factors. The court found the aggravating factors to outweigh the mitigating factors for all three counts. Lopez asserts that the trial court improperly considered his failure to admit guilt at the sentencing hearing, but there is no evidence on the record to suggest that the judge considered the fact that Lopez continued to maintain his innocence as an aggravating factor.

XII. Double Jeopardy

¶51 Lopez further asserts that the trial court violated A.R.S. § 13-116 (2010) by double counting factors to sustain all three sentences, which resulted in double jeopardy and multiple punishments for the same crime. Section 13-116 provides in relevant part "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."

¶52 Lopez's contention is without merit. The trial court found Counts 1 and 2 to run concurrently because they involved

the same victim and conduct over the same time period.[7] The trial court found Count 3, the aggravated assault, to be a separate and distinct offense from the first two counts.[8] It therefore was not error for the trial court to order Count 3 to run consecutively to Counts 1 and 2.

CONCLUSION

¶53 After careful review of the record, we find no meritorious grounds for reversal of Lopez's conviction or modification of the sentence imposed. The evidence supports the verdict, the sentence imposed was within the sentencing limits, and Lopez was represented at all stages of the proceedings below. Accordingly, we affirm Lopez's conviction and sentence.

¶54 Upon the filing of this decision, counsel shall inform Lopez of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Lopez shall have thirty days from the date of this decision to proceed, if he so

[7] The kidnapping took place when M. was taken against her will to the three houses and held for ransom. The theft by extortion took place at the same time and as a result of the same conduct.

[8] The aggravated assault took place when M. was physically beaten by her captors and her life threatened with a gun.

desires, with a *pro per* motion for reconsideration or petition for review.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge