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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 08/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,

Appellee,

v.

LUIS ALBERTO AYALA GONZALEZ,

Appellant.

1 CA-CR 11-0235

DEPARTMENT C

MEMORANDUM DECISION

(Not for Publication -
Rule 111, Rules of the
Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-163164-008 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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D O W N I E, Judge

¶1 Luis Alberto Ayala Gonzalez appeals his convictions
and sentences for kidnapping, conspiracy to commit kidnapping,
and theft by extortion. For the following reasons, we reverse

Gonzalez's conviction and sentence for theft by extortion, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On September 28, 2009, two men pushed V.G. into a car at gunpoint and drove away while V.G.'s wife watched. The men beat V.G., put guns to his head, and asked where they could find a friend of V.G.'s wife, who had allegedly stolen drugs from them. Shortly thereafter, V.G. was transferred to another vehicle, where two men hit him and interrogated him at gunpoint. V.G. was ultimately taken to a house, where he was blind-folded and bound.¹

¶3 The men told V.G. they would kill him unless he disclosed the friend's whereabouts or paid "the money that was owed" (\$40,000) and gave them his truck. The men called V.G.'s brother-in-law and said they had kidnapped V.G. and would kill him unless the brother-in-law paid \$40,000 and gave them V.G.'s truck.

¶4 A ransom pick-up was arranged at a parking lot specified by the abductors. Officers set up surveillance. A green Mustang entered the parking lot. Gonzalez got out of the vehicle and walked up to V.G.'s truck. When officers

¹ En route to the scene of the kidnapping, officers spotted the original abductors' vehicle. The driver and two passengers attempted to flee but were detained; officers found several firearms in the vehicle.

approached, Gonzalez fled on foot. He and the Mustang's driver were later apprehended. The driver disclosed where V.G. was being held. Officers found V.G. restrained and guarded by Guadalupe Castro, who admitted receiving money to guard V.G.

¶15 Gonzalez initially denied knowledge of the kidnapping and told Detective Gamez he had gone to the ransom pick-up site because a man named "Jesus Alberto" sent him there to retrieve a truck in exchange for \$100. Later, though, Gonzalez "nodded his head" when Detective Gamez asked if he knew "the victim had been kidnapped prior to going to pick up the truck." Gonzalez stated that the Mustang driver "had told him."

¶16 Gonzalez was charged with kidnapping, conspiracy to commit kidnapping, theft by extortion, and two counts of aggravated assault.² Gonzalez and Castro were tried together. After the State rested, Gonzalez moved for a judgment of acquittal on all charges pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"). The trial court dismissed the two aggravated assault counts but otherwise denied Gonzalez's motion. The jury returned guilty verdicts on the remaining counts.

¶17 Gonzalez was sentenced to concurrent five year prison terms for kidnapping and conspiracy to commit kidnapping, and

² A charge of misconduct involving weapons was dropped before trial.

five years' supervised probation for theft by extortion. This timely appeal followed.

DISCUSSION

¶8 Gonzalez challenges the sufficiency of the evidence supporting his convictions and contends the trial court erred in denying his Rule 20 motion. We review a trial court's ruling on a Rule 20 motion *de novo*. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted). The relevant inquiry is whether the record contains "substantial evidence to warrant a conviction." *Id.* at 561, ¶ 6, 250 P.3d at 1190; *see also State v. Money*, 110 Ariz. 18, 25, 514 P.2d 1014, 1021 (1973) ("So long as there is substantial admissible evidence for submission to the jury which could support a guilty verdict[,] we will not disturb the trial court's denial of a motion for directed verdict."). We determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *West*, 226 Ariz. at 562, ¶ 16, 250 P.3d at 1191 (internal quotation marks omitted). "Substantial evidence, Rule 20's lynchpin phrase, is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

I. Kidnapping

¶9 In support of his Rule 20 motion, Gonzalez argued the State had presented "no compelling evidence" that he knew about the kidnapping or "specifically said that he had any information about" it. Defense counsel argued the State's entire case was based on Gonzalez's appearance at the ransom pick-up site and "a nod of the head."

¶10 The crime of kidnapping occurs when, *inter alia*, a person knowingly restrains another with the intent to hold the victim for ransom. Ariz. Rev. Stat. ("A.R.S.") § 13-1304(A)(1). Kidnapping is a continuing offense that lasts as long as the victim is deprived of his freedom. *State v. Jones*, 185 Ariz. 403, 407, 916 P.2d 1119, 1123 (App. 1995) (citations omitted).

¶11 Although the State did not prove that Gonzalez participated in the initial kidnapping or that he personally restrained V.G., Gonzalez could nevertheless be convicted if he were an accomplice to the crime. See A.R.S. § 13-303(A)(3) ("A person is criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense"); see also *id.* § 13-301(2), (3) (an accomplice is "a person . . . who with the intent to promote or facilitate the commission of an offense . . . [a]ids, counsels, agrees to aid, or attempts to aid another person in

planning or committing an offense," or who provides a "means or opportunity" to another to commit the offense); *State v. McNair*, 141 Ariz. 475, 480, 687 P.2d 1230, 1235 (1984) (internal quotation marks omitted) ("[A]n accomplice is one who knowingly and with criminal intent participates, associates, or concurs with another in the commission of a crime.").

¶12 The inquiry thus becomes whether the State presented sufficient evidence from which reasonable jurors could conclude that Gonzalez, with the intent to promote or facilitate the kidnapping of V.G., aided, counseled, agreed to aid, or attempted to aid others in committing the crime. See *State v. Wall*, 212 Ariz. 1, 5, ¶ 20, 126 P.3d 148, 152 (2006) ("[I]t is the intent of the one charged as an accomplice, rather than the intent of the main actor, that controls the accomplice's criminal responsibility."). "[A]n intent to engage in the criminal venture may be shown by the relationship of the parties and their conduct before and after the offense." *McNair*, 141 Ariz. at 481, 687 P.2d at 1236; see also *State v. Ortiz*, 9 Ariz. App. 116, 119, 449 P.2d 953, 956 (1969) ("[I]nferences can be drawn from the totality of circumstances, flight, presence, time and place, and an absence of any rational explanation for the defendant's presence [at the crime scene]").

¶13 The record includes evidence from which jurors could conclude that Gonzalez intended to facilitate the ongoing

offense of kidnapping by obtaining the ransom for which V.G. was being held.³ Cf. *State v. Dove*, 757 P.2d 990, 994 (Wash. Ct. App. 1988) ("even if [defendant] did not participate directly in [victim's] abduction, the kidnapping continued until she was released and therefore, any assistance by [defendant] until her release made him an accomplice" to kidnapping). Jurors could have found that Gonzalez's "buddy," the Mustang driver, advised him before he attempted to retrieve the truck that its owner had been kidnapped and was being held. Other evidence also pointed to Gonzalez's knowledge that he was facilitating an ongoing criminal endeavor, not simply retrieving property in satisfaction of a debt. Gonzalez offered conflicting accounts of his involvement to police officers. Additionally, he ran from the scene when officers approached. See *Ortiz*, 9 Ariz. App. at 119, 449 P.2d at 956 (citations omitted) (flight is a factor that may be considered in determining guilt).

¶14 Detective Gamez testified about Gonzalez's statements and actions during the police interview that led him to believe Gonzalez knew of the kidnapping and was "part of" it:

[State] So, just for a frame of reference,
[Gonzalez] initially tells you

³ An accomplice to a crime "need not act out each element of the charged offense; the acts of one accomplice are imputed to all." *State v. Marchesano*, 162 Ariz. 308, 314, 783 P.2d 247, 253 (App. 1989), overruled on other grounds in *State v. Phillips*, 202 Ariz. 427, 437 n.4, ¶ 41, 46 P.3d 1048, 1058 n.4 (2002).

that he doesn't know anything about a kidnapping; is that correct?

[Gamez] Correct.

[State] When you go back and received information [that V.G.] has been found, what did you ask [Gonzalez] and his knowledge of the kidnapping when he went to pick up the truck?

[Gamez] I confronted him about what he told me about not knowing, and asked him if he knew. And he nodded his head that he did know, and then he told me that [the Mustang's driver] had told him.

[State] That he knew what?

[Gamez] That the victim had been kidnapped.

[State] And he knew, did he know the victim had been kidnapped prior to going to pick up the truck?

[Gamez] Yes.

[State] What did he tell you why he was involved in this?

[Gamez] He said that he needed money. And that it seemed easy.

¶15 On cross-examination, Detective Gamez testified that, throughout the interview, he would ask questions, and Gonzalez would "nod, agreeing with the question, or he would shake his head from side to side, not agreeing with the question or the

comment I was making." The following colloquy then occurred between the detective and defense counsel:

[Counsel] So, a simple nod of the head meant to you that he is, now he is admitting that he was aware of the kidnapping and was part of that?

[Gamez] Correct, and I had asked him specifically if he knew.

. . . .

[Counsel] Okay. Did he ever specifically say that he was aware that this was a kidnapping, and the victim had been kidnapped?

[Gamez] After I asked him and he nodded his head, I asked him, I had asked him if he was saying yeah and/or yes, I am sorry. And then he told me that his buddy told him.

. . . .

[Counsel] So, he indicated to you that it was [the Mustang's driver] that told him that the person had been kidnapped?

[Gamez] Correct.

¶16 The jury was free to accept or reject the evidence implicating Gonzalez as an accomplice. See *Money*, 110 Ariz. at 25, 514 P.2d at 1021 ("[I]t is the jury's function to weigh the evidence as a whole, to resolve any inconsistencies therein, and then to determine whether or not a reasonable doubt exists.").

It is immaterial that the State relied on circumstantial evidence. See *West*, 226 Ariz. at 562, ¶ 16, 250 P.3d at 1191 (citation omitted) (in determining the sufficiency of the evidence supporting a particular conviction, we consider both direct and circumstantial evidence); *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985) ("Criminal convictions may rest solely on circumstantial proof.").

II. Conspiracy to Commit Kidnapping⁴

¶17 To convict Gonzalez of conspiracy to commit kidnapping, the State was required to prove: (1) with the intent to promote or aid the commission of kidnapping, (2) Gonzalez agreed with someone that at least one of them or another person, (3) would engage in conduct constituting the offense of kidnapping. See A.R.S. § 13-1003(A). As discussed *supra*, the evidence was sufficient to prove Gonzalez's intent to promote or aid in the commission of kidnapping. The State also presented substantial evidence regarding the other elements of the conspiracy offense. Gonzalez agreed to pick up the ransom at the kidnapers' selected drop location, knowing the vehicle's

⁴ We reject Gonzalez's *corpus delicti* argument, which he raises for the first time on appeal. "The corpus delicti rule requires that, before a defendant's statements are admissible as evidence of a crime, the State must show both proof of a crime and that someone is responsible for that crime." *State v. Nieves*, 207 Ariz. 438, 440, ¶ 7, 87 P.3d 851, 853 (App. 2004) (citation omitted). The State presented abundant evidence that V.G. had been kidnapped and that multiple players participated in the offense.

owner was being held captive. Reasonable jurors could conclude Gonzalez knew that the truck was part of the ransom demanded in exchange for V.G.'s release.

III. Theft by Extortion

¶18 To convict Gonzalez of theft by extortion, the State was required to prove that he knowingly obtained or sought to obtain property "by means of a threat to . . . [c]ause physical injury to anyone by means of a deadly weapon or dangerous instrument." A.R.S. § 13-1804(A)(1).⁵ Unlike kidnapping, theft by extortion is not a continuing offense.

¶19 The State offered no evidence that Gonzalez personally made any threats. It therefore had to prove that he acted as an accomplice. To do so, the State was required to demonstrate that, with the intent to promote or facilitate theft by extortion, Gonzalez aided or attempted to aid in committing the offense by: (1) knowingly seeking to obtain property, (2) by a threat, (3) to cause physical injury by means of a deadly weapon or dangerous instrument. A.R.S. §§ 13-301(A)(1), -1804(A)(1).

¶20 As discussed previously, there was evidence from which jurors could conclude that Gonzalez knew V.G. had been kidnapped and was being held captive in exchange for, *inter alia*, his truck. By agreeing to pick up the truck, Gonzalez knowingly

⁵ This statute was amended in March 2012. Because the crime took place in 2009, we refer to the statute in effect at that time.

view the State also failed to present substantial evidence supporting Gonzalez's convictions and sentences for kidnapping and conspiracy to commit kidnapping.

¶23 To convict Gonzalez of kidnapping, the State was required to prove he "knowingly restrain[ed] another person with the intent to . . . [h]old the victim for ransom, as a shield or hostage." A.R.S. § 13-1304(A)(1). The majority properly recognizes that the State presented no evidence Gonzalez restrained another person; thus, Gonzalez could only potentially be found guilty as an accomplice. But I disagree with the majority's reliance on the notion that because kidnapping is a "continuing offense," it necessarily supports a finding of accomplice liability here.

¶24 Citing *Jones*, 185 Ariz. at 407, 916 P.2d at 1123, the majority notes that kidnapping is a continuing offense that lasts as long as the victim is deprived of his freedom. In *Jones*, the defendant argued that double jeopardy prohibits the State from charging him with two counts of kidnapping for the same prolonged restraint of the same victim. *Id.* at 405, 916 P.2d at 1121. The State argued it was proper for the jury to convict him of two counts of kidnapping because although the defendant continuously restrained only one victim, he first restrained the victim for the purpose of committing sexual assault and then restrained the victim for the purpose of

injuring or killing her. *Id.* We held that double jeopardy barred the jury from convicting defendant of two counts of kidnapping because kidnapping is a continuous crime, and the restraint was uninterrupted. *Id.* at 1122, 916 P.2d at 406. Although *Jones* established that kidnapping is a continuous crime for double jeopardy purposes, it did not address the issue here—whether a defendant may be convicted of kidnapping when the State has failed to present evidence that the defendant helped facilitate the restraint or abduction of the victim. Instead, the issue must be analyzed within the context of the language of Arizona’s statutes governing accomplice liability.

¶125 “A person is criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.” A.R.S. § 13-303(A)(3) (2010). “To be an accomplice, a person’s first connection with a crime must be prior to, or during, its commission; it cannot be after the commission of the offense.” *State v. Johnson*, 215 Ariz. 28, 34, 156 P.3d 445, 451 (App. 2007) (citing 21 Am. Jur. 2d Criminal Law § 205 (1998)). Stated differently, accomplice liability attaches based on evidence showing that a defendant participated in some manner in committing each element of the offense. See

State v. Lewis, 169 Ariz. 4, 5, 816 P.2d 263, 264 (App. 1991) (accomplice liability found when defendant assisted a friend in dragging victims out of a bar, placed them in the back of friend's pickup truck, drove to an isolated area away from the bar, observed friend execute victims, and then assisted friend in disposing of the bodies); *People v. Simpson*, 66 Cal.App.2d 319, 152 P.2d 339 (1944) (accomplice liability found when the defendant had brought the gun used to intimidate the victim while he was tied up and placed in a car, in which she and her co-robbers rode with the victim to another location while they robbed him).

¶26 Here, the State failed to present evidence that Gonzalez aided, counseled, agreed to aid, or attempted to aid in the planning or committing the element of knowingly restraining the victim. Nor did the State prove that Gonzalez intended to promote or facilitate the restraining of the victim. Instead, the evidence demonstrated at most that Gonzalez knew the victim had been kidnapped and Gonzalez agreed to retrieve a truck in exchange for \$100. The State presented no evidence, however, that Gonzalez had any other role in the kidnapping at any point. Unlike *Dove*, 52 Wash. App. at 88 (finding accomplice liability where defendant had knowledge of the planned kidnapping, was asked twice to participate prior to the kidnapping, and eventually assisted in collecting the ransom by making a ransom

call to the victim's family and driving to the drop off location), the State failed to show that Gonzalez was involved in planning or facilitating restraint of the victim. Unquestionably, the evidence shows that Gonzalez knew the victim had been kidnapped. But mere knowledge that a crime is being committed is not sufficient to establish guilt. *State v. Carroll*, 90 Ariz. 411, 413, 368 P.2d 649, 650 (1962).

¶27 Similarly, there is insufficient evidence showing Gonzalez provided the means or opportunity for another person to restrain the victim. The State has presented no authority, and our research has revealed none, supporting the notion that Gonzalez could be found guilty based on accomplice liability where there is no evidence he planned, facilitated, or was involved with restraining the victim.

¶28 It is true that Gonzalez provided conflicting accounts of his involvement and ran from the scene when approached by police officers. Although flight is a factor that a jury may consider in determining guilt, see *Ortiz*, 9 Ariz. App. at 119, 449 P.2d at 956, more than that was required here to prove beyond a reasonable doubt that Gonzalez was guilty of kidnapping. A jury could reasonably infer that Gonzalez fled from police because he knew the truck was not his and the victims had been kidnapped. But a reasonable jury could not

infer that Gonzalez planned or assisted in restraining the victim.

¶129 To convict Gonzalez of conspiracy to commit kidnapping, the State was required to prove: (1) with the intent to promote or aid the commission of kidnapping, (2) Gonzalez agreed with someone (3) that at least one of them or another person would engage in conduct constituting the offense of kidnapping. A.R.S. § 13-1003(A) (2010).

¶130 The State did not present any evidence that Gonzalez agreed with anyone to help restrain the victim. None of the witnesses testified they had an agreement with Gonzalez to kidnap the victim, nor was there any circumstantial evidence showing that Gonzalez made such an agreement. The evidence demonstrated at most that Gonzalez knew the victim was being restrained. "Mere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy." *State v. Arredondo*, 155 Ariz. 314, 317, 746 P.2d 484, 487 (1987).

¶131 Thus, although Gonzalez planned to retrieve the victim's truck, that conduct is insufficient to prove that he agreed with anyone that some person would "engage in conduct" that would constitute the crime of kidnapping. Instead, the evidence revealed that Gonzalez agreed with someone to engage in

