

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.R. 31.24



DIVISION ONE
FILED: 06/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 11-0240
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
STEPHANIE ANN HARRINGTON,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
_____)

Appeal from the Superior Court in La Paz County

Cause No. S1500CR200900069

The Honorable Richard Weiss, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

David Goldberg Fort Collins, CO
Attorney for Appellant

T H U M M A, Judge

¶1 Stephanie Ann Harrington appeals her conviction and sentence for perjury, a class four felony, on grounds of double

jeopardy and insufficiency of the evidence. For the reasons set forth below, we affirm.

¶12 Harrington argues her federal constitutional right against double jeopardy was violated when the State prosecuted her for perjury based on statements she made for which she had already been held in contempt. The trial judge rejected Harrington's claim, holding a prior contempt finding did not bar the perjury prosecution. We review claims of double jeopardy *de novo*. *State v. Welch*, 198 Ariz. 554, 555, ¶ 5, 12 P.3d 229, 230 (App. 2000).

¶13 In a child custody proceeding, Harrington was cited for, and held in, contempt and jailed for five days for lying under oath in open court about the location of two children. Harrington was held in direct criminal contempt because she lied under oath in the immediate presence of the judge, and the jail term was designed to punish, not force compliance. See *Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966) ("[C]riminal contempt is the commission of a disrespectful act directed at the court itself which obstructs justice . . . direct contempt is an act committed in the presence of the court or so near thereto as to obstruct the administration of justice") (citation omitted); see also *Hirschfeld v. Superior Court*, 184 Ariz. 208, 211, 908 P.2d 22, 25 (App. 1995) ("The proceeding . . . was for criminal contempt because its purpose

was to punish his behavior as opposed to compel him to comply with an order of the court.").¹ Such direct criminal contempt may be adjudicated summarily. *Ong Hing*, 101 Ariz. at 99, 416 P.3d at 423; see A.R.S. § 12-864 (Westlaw 2012);² Ariz. R. Crim. P. 33.2.

¶14 Harrington was later charged with perjury, a class 4 felony, based upon these same statements made under oath in the child custody proceeding. The jury found Harrington guilty as charged. Harrington argues the perjury conviction violated her right against double jeopardy. We disagree.

¶15 Double jeopardy "protects only against the imposition of multiple criminal punishments for the same offense." *Hudson v. United States*, 522, U.S. 93, 99 (1997). It is unclear whether jeopardy attaches to the direct criminal contempt here. See *United States v. Dixon*, 509 U.S. 688, 697 n.1 (1992) (holding jeopardy attaches to "nonsummary criminal contempt prosecutions" (a term of art not used in Arizona's contempt jurisprudence), but noting "[w]e have not held" jeopardy attaches to "summary contempt") (citing cases). Because the issue is not dispositive of this appeal, we will assume -- without deciding -- that

¹ Herrington also was cited for direct civil contempt and was jailed on that basis until the children were delivered approximately ninety minutes after she was held in contempt. See *Ong Hing*, 101 Ariz. at 98, 416 P.3d at 422 (defining, *inter alia*, direct civil contempt).

² Absent material revisions, we cite the current Westlaw version of applicable statutes.

jeopardy attached to Harrington's direct criminal contempt proceeding.³

¶6 In determining whether Harrington's perjury conviction violated her double jeopardy rights, we apply the "same elements" test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). See *State v. Eagle*, 196 Ariz. 188, 190, ¶ 6, 994 P.2d 395, 397 (2000). "In deciding whether a defendant has been punished twice for the same offense, it is necessary to examine the elements of the crimes for which the individual was sentenced and determine 'whether each [offense] requires proof of an additional fact which the other does not.'" *Id.* (quoting *Blockburger*, 284 U.S. at 304).⁴ Thus, in evaluating Harrington's double jeopardy claim, we must decide whether direct criminal

³ But see A.R.S. § 12-865(B) (noting a "proceeding for contempt . . . shall not bar a criminal prosecution for the same act").

⁴ Harrington's reliance on *State v. Mojarro*, 169 Ariz. 1, 816 P.2d 260 (App. 1991) is misplaced. *Mojarro* based its analysis on the *Grady v. Corbin*, 495 U.S. 508 (1990), "same conduct" rule, which was expressly overruled in 1992. See *Dixon*, 509 U.S. at 704, 711 ("The 'same-conduct' rule [*Grady*] announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy. . . . We would mock *stare decisis* and only add chaos to our double jeopardy jurisprudence by pretending that *Grady* survives when it does not. We therefore accept the Government's invitation to overrule *Grady*"). Arizona courts have acknowledged that *Grady* is no longer good law and follow *Blockburger*, meaning *Mojarro* is no longer valid on this point. See, e.g., *Eagle*, 196 Ariz. at 190, ¶ 6, 994 P.2d at 397; *State v. Cook*, 185 Ariz. 358, 359, 916 P.2d 1074, 1075 (App. 1995); *Hernandez v. Superior Court*, 179 Ariz. 515, 520, 880 P.2d 735, 740 (App. 1994).

contempt and perjury "each contain an element not present in the other." *Eagle*, 196 Ariz. at 190, ¶ 6, 994 P.2d at 397. The focus is on the legal elements, "not on the factual proof that is offered or relied upon to secure a conviction." *State v. Cook*, 185 Ariz. 358, 361, 916 P.2d 1074, 1077 (App. 1995).

¶7 As applicable here, direct criminal contempt is "willfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court." Ariz. R. Crim. P. 33.1.⁵ The elements of direct criminal contempt applicable here are: (1) Harrington engaged in conduct; (2) that was willfully contumacious; and (3) that either obstructed the administration of justice or lessened the dignity and authority of the court. By contrast, the perjury charge alleged Harrington made "a false sworn statement in regard to a material issue, believing it to be false." A.R.S. § 13-2702(A)(1). Proof of perjury requires that Harrington (1) made a false statement; (2) under oath; (3) regarding a material issue (4) while believing the statement to be false.

¶8 As applied, Arizona Rule of Criminal Procedure 33.1 and A.R.S. § 13-2701(A)(1) lack even one common element, and

⁵ This type of criminal contempt is distinguishable from contempt proceedings initiated by a party, or against a person engaging in criminal conduct specifically prohibited by court order, which are governed by A.R.S. §§ 12-861 to -863. See *Ong Hing*, 101 Ariz. at 96-98, 416 P.2d at 420-22; Ariz. R. Crim. P. 33.1 cmt.

each contain an element not present in the other. The contempt citation did not require any statement and, instead, focuses on Harrington's conduct; the perjury charge required Harrington to make a false, sworn statement. Accordingly, under the *Blockburger* test, double jeopardy did not bar the perjury prosecution.⁶

¶19 Harrington also argues there is insufficient evidence to support her perjury conviction because her lie regarding the whereabouts of the children was not material. We review *de novo* the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached

⁶ Harrington was held in direct criminal contempt for her actions in open court before a judge (and not for violating a prior court order). Accordingly, we need not address the competing double jeopardy views expressed in *Dixon* applicable to a criminal contempt citation based on a claimed violation of a court order prohibiting criminal conduct. See 509 U.S. at 697-700 (Scalia, J., plurality opinion); 731-41 (White, J., concurring in the judgment in part and dissenting in part); 743-64 (Blackmun, J., concurring in the judgment in part and dissenting in part).

by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶10 Harrington's statement was material if it "could have affected the course or outcome of any proceeding or transaction." A.R.S. § 13-2701(1). At trial, Harrington conceded the State proved materiality beyond a reasonable doubt. Having waived the materiality issue at trial, it is too late for Harrington to claim that her statements were not material. See *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) ("As a general rule, a party cannot argue on appeal legal issues not raised" before the superior court.)

¶11 Independent of Harrington's waiver, the purpose of the custody proceeding was to locate the children so that they could be placed in the physical custody of the husband. Harrington's lie to the court under oath as to the whereabouts of the children affected the course of the court proceedings. The lie was no less material because the judge ordered Harrington jailed until the children were placed in the husband's custody. Harrington, after all, might have chosen to remain jailed for a longer time to keep the children from the husband. Under the circumstances, Harrington's lie certainly "could have affected the course or outcome" of the proceeding and, accordingly, was material. See A.R.S. § 13-2701(1).

