DIVISION ONE
FILED: 2/26/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 11-0501
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
LAURO CORONA PALAFOX, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-162530-001

The Honorable Samuel A. Thumma, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

H O W E, Judge

¶1 Lauro Corona Palafox appeals his multiple convictions and sentences for kidnapping, unlawful imprisonment, sexual assault, sexual abuse, and luring a minor for sexual

exploitation. The offenses arose from three separate incidents in which Palafox, while driving his vehicle, approached a pedestrian female victim and grabbed her. In two of the incidents, the seventeen-year-old victims, J.W. and L.B., were able to break free and run away before Palafox could pull them in to the vehicle. In the other incident, Palafox succeeded in pulling twenty-year-old S.G. into his car where he sexually assaulted her. Palafox raises two issues on appeal.

I. Sufficiency of Evidence

¶2 Palafox first argues insufficient evidence supports his convictions for kidnapping in Counts 1 and 9. Count 1 is based on an incident that occurred on or about April 19, 2004, involving J.W. Count 9 is based on an incident that occurred on or about September 24, 2009, involving L.B.[1]

¶3 We review claims of insufficient evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). We will affirm a jury's verdict if substantial evidence supports it. *State v. Cox*, 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269

[1] The remaining incident, involving S.G., occurred on or about August 14, 2007, and formed the basis for Counts 3 to 8. Before trial, the court denied Palafox's motion to sever and granted the State's motion to admit evidence of the three incidents under Arizona Rule of Evidence 404(c). In doing so, the court made the appropriate findings under Rule 404(c) that evidence of the three offenses would be cross-admissible in the event of separate trials. Palafox does not contest these rulings.

(2007). When addressing a sufficiency of evidence argument, "[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). We "draw all reasonable inferences that support the verdict," *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999), and we resolve any conflict in the evidence in favor of sustaining the verdict, *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We will reverse only if a complete absence of probative facts supports the conviction. *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). We will not weigh the evidence, because that is the jury's function. *Guerra*, 161 Ariz. at 293, 778 P.2d at 1189. Finally, credibility determinations are for the jury, not the trial judge or this Court, *see State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995), and no distinction exists between circumstantial and direct evidence, *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

¶4 "A person commits kidnapping by knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony[.]" A.R.S. § 13-

1304(A)(3) (West 2013).[2] In accordance with A.R.S. § 13-1301(2)(a), the trial court instructed the jury,

> "Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by . . . [p]hysical force, intimidation or deception[.]

¶5 Palafox limits his sufficiency of evidence argument to whether substantial evidence existed that he "restrained" J.W. and L.B. Specifically, he argues that no trial evidence supports the conclusion that he confined the victims because they were not "enclosed, imprisoned, or prevented from movement."[3] We reject this argument.

¶6 J.W. testified that, as she was waiting in a nearby shopping plaza for school to open, Palafox "pulled up in a van" and said, "Let's go . . . get in." Palafox told J.W. he wanted to have sex with her, and when she refused, he grabbed J.W.'s right arm through the open door. J.W. screamed, pulled away, and

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[2] We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

[3] Palafox also argues that, because "[t]he contact seems to have lasted mere seconds in each instance[,]" he did not restrain the victims for purposes of the kidnapping charges. We summarily reject this argument. Section 13-1304(A)(3) does not include temporal duration as an element of the offense, and Palafox points to no authority imposing such a requirement.

Palafox drove off. L.B. testified she was waiting at a bus stop after she left school when Palafox "came up in a van," exited the vehicle, and as L.B. crossed the street, pointed to the van and said "ride." When L.B. refused and continued walking, Palafox grabbed her arm, saying, "Van, the van." L.B. was "scared," and thought "[she] wasn't going to go home." She "jerked [her] arm away" and fled.

¶7 This is sufficient evidence of restraint in both cases. Palafox nevertheless apparently argues that neither victim was "restrained" because he did not "confine" them, and cites a dictionary defining "to confine" to mean "to enclose within bounds" or "to shut in or keep in; prevent from leaving a place because of imprisonment." But as Palafox's definition notes, "to confine" also means to "limit or restrict." The Random House Dictionary of the English Language 428 (2d ed. 1987). "Confine" also means "to prevent free outward passage or motion of[.]" Webster's Third New International Dictionary 476 (3d ed. 2002). Based on the foregoing testimony, a reasonable juror could conclude that when Palafox forcefully grabbed the victims' arms, he restricted or limited their free motion. Accordingly, sufficient evidence supports Palafox's convictions on Counts 1 and 9.

II. Jury Instruction: Fundamental Error

¶8 Also relating to the kidnapping convictions in Counts

1 and 9, Palafox next contends that the trial court fundamentally erred in *sua sponte* failing to instruct the jury on the lesser-included offense of unlawful imprisonment on Counts 1 and 9. *See State v. Tschilar*, 200 Ariz. 427, 437, ¶ 40, 27 P.3d 331, 341 (App. 2001) (holding unlawful imprisonment is a lesser-included offense of kidnapping). The record reflects, however, that when the court inquired whether an unlawful imprisonment instruction was warranted on Counts 1 and 9, Palafox specifically stated it was not:

> THE COURT: Okay. Let's talk about that for kidnapping, the lesser-included. For Count 1 and Count 9, it seems to me that either the victims were kidnapped or the Defendant attempted to kidnapped [sic] them or they weren't kidnapped.[4] I'm hard-pressed for those two victims, victim 1 and 3, to see how unlawful imprisonment would pertain. So if I am overlooking something I want to know.
>
> [DEFENSE COUNSEL]: No, Judge, that's perfect.

¶9 In light of Palafox's strategic election to proceed without instructing the jury on unlawful imprisonment, the court's failure to do so *sua sponte* cannot constitute fundamental error. *State v. Sanderson*, 182 Ariz. 534, 542-43, 898 P.2d 483, 491-92 (App. 1995) ("When counsel specifically

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[4] The court instructed the jury on attempted kidnapping for Counts 1 and 9.

declines an instruction, no fundamental error is present because the court's failure to instruct does not interfere with the defendant's theory of the case nor does it deny him a right essential to his defense."). The principle recognized in *State v. Vowell*, 25 Ariz. App. 404, 405, 544 P.2d 228, 229 (1976), that the giving of a lesser-included offense instruction, *sua sponte*, "could infringe upon the appellant's trial strategy and work to his prejudice," supports our conclusion.[5]

CONCLUSION

¶10 For the reasons stated, we affirm Palafox's convictions and sentences.

__/s/_____
RANDALL M. HOWE, Judge

CONCURRING:

__/s/_____
PATRICIA K. NORRIS, Presiding Judge

_/s/_____
ANDREW W. GOULD, Judge

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[5] Palafox focuses his jury instruction challenge on the apparent inconsistency in the jury's guilty verdict for the lesser-included offense of unlawful imprisonment for Count 3, a kidnapping charge that pertained to the victim S.G. As Palafox points out, the record reflects that he acted more forcefully in the incident involving S.G.——indeed, he was found guilty of sexually assaulting her——than he did in the incidents underlying Counts 1 and 9. We reject this argument. To the extent the verdicts are inconsistent, Arizona law permits such verdicts. *State v. Garza*, 196 Ariz. 210, 212, ¶ 7, 994 P.2d 1025, 1027 (App. 1999) (listing cases).