DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0133
Appellee,	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
HECTOR MANUEL GARCIA-CISNEROS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-122410-003

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 Hector Manuel Garcia-Cisneros ("Defendant") appeals his convictions and sentences for kidnapping, theft by extortion, armed robbery, human smuggling and weapons misconduct. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The convictions of Defendant and his codefendants, Juan Carlos Peralta-Garcia and Vidal Mondragon-Diaz, on identical charges, stem from their operation of a drop house in west Phoenix for immigrants smuggled across the border illegally from Mexico.[1] Defendant and the others ordered their captives to surrender their belts, shoes and wallets as soon as they arrived, then kept them in a bedroom with no furniture and boarded-up windows until they paid a fee to be released. Mondragon-Diaz guarded the bedroom door with a knife and a firearm; Defendant also served as an armed guard. Peralta-Garcia, Defendant's nephew, also carried a gun.

¶3 The defendants periodically threatened to kill their captives who refused to pay the release fee. Peralta-Garcia made most of the threats and held a gun as he did so; he also periodically called relatives of the captives to demand the fee

[1] On appeal, we view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

for their release. Defendant made some calls as well. Alerted by a relative of one of the captives, police raided the drop house, rescued the captives and arrested the defendants.

¶4 All of the defendants were tried together; the State alleged each was guilty as an accomplice of the others. *See* Ariz. Rev. Stat. ("A.R.S.") § 13-301 (West 2013).[2] The jury convicted all of the defendants of all charges except one charge of armed robbery. The court sentenced Defendant to presumptive concurrent terms, the longest of which is 10.5 years. Defendant filed a timely delayed appeal. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. sections 12-120.21(A)(1) (West 2013), 13-4031 (West 2013) and -4033(A)(1) (West 2013).

DISCUSSION

A. Theft by Extortion: Sufficiency of the Evidence.

¶5 Defendant argues first that his three theft-by-extortion convictions should be reversed because the State presented no evidence that he or the other defendants sought to obtain property by threatening to injure the victims using a dangerous instrument or deadly weapon.

¶6 In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's

[2] Absent material revisions after the date of the alleged offense, we cite a statute's most current version.

verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Substantial evidence is that which "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *Id.* at 412, ¶ 6, 103 P.3d at 914 (quotation omitted).

¶7 At the time these offenses were committed, theft by extortion was a Class 2 felony if the defendant "knowingly obtain[ed] or s[ought] to obtain property or services 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), (C) (Supp. 2010). In *State v. Garcia*, 227 Ariz. 377, 258 P.3d 195 (App. 2011), we held that, by themselves, telephoned threats to kill the victim were insufficient to prove that the threat was to cause physical injury using a deadly weapon or dangerous instrument, and thus insufficient to support a conviction under § 13-1804(A)(1). *Id.* at 381, ¶¶ 16-18 & n.5, 258 P.3d at 199.[3] We subsequently clarified, however, that a

[3] The legislature subsequently expanded A.R.S. § 13-1804(A)(1) to include threats to "cause *death* or *serious* physical injury to anyone" without requiring that the threat

threat to cause injury using a deadly weapon or dangerous instrument may be inferred from evidence showing the defendants imprisoned the victims under armed guard and repeatedly threatened them while armed with a deadly weapon or dangerous instrument. *State v. Mendoza-Tapia*, 229 Ariz. 224, 228-29, ¶ 13, 273 P.3d 676, 680-81 (App. 2012). We also held that A.R.S. § 13-1804(A)(1) "does not require that the threat to use a dangerous instrument or deadly weapon be communicated to the person from whom the property is demanded." *Id.* at 229, ¶ 14, 273 P.3d at 681.

¶8 The evidence in this case was sufficient to support the convictions. The evidence demonstrated that the defendants kept the captives under armed guard, threatened to shoot them and repeatedly threatened to kill them if they did not pay the ransom. One captive, who was held for a $2,500 ransom and was forced to work as a cook to reduce the fee, testified that all the defendants at one time or another had guns, Peralta-Garcia had threatened to kill captives who failed to come up with the fee, and the defendants threatened to shoot him if he tried to escape. He testified that Defendant held a gun while Peralta-Garcia made the ransom calls to relatives. Another captive testified he was held under armed guard at all times, and

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involve use of a deadly weapon or dangerous instrument. 2012 Ariz. Legis. Serv. Ch. 83 (West) (emphasis added).

Peralta-Garcia held a gun during the ransom calls and threatened to kill him if he did not persuade his relative to come up with the money.[4] A relative of one of the captives testified that she received numerous phone calls threatening to kill her relative if she did not send the money, and she feared for his safety among "guys with guns."

¶9 On this record, because a reasonable jury could conclude that defendants implicitly threatened to use guns to carry out their threats, sufficient evidence supported Defendant's convictions for use of a deadly weapon in the extortion offenses.

B. Armed Robbery: Sufficiency of the Evidence.

¶10 Defendant argues that his conviction for armed robbery must be vacated because the evidence failed to establish that he or his codefendants used force or threats of force with the intent to coerce surrender of property from a captive.

¶11 A person commits robbery "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

[4] A captive testified Defendant also made two calls to his relative and threatened to "f" him over if he did not demand the money from his relatives. Defendant admitted before trial that he had a firearm and guarded the captives, but told police that the firearm did not have any bullets and was hidden from sight in his pocket, and said he never made any extortion calls.

property or to prevent resistance to such person taking or retaining property." A.R.S. § 13-1902(A) (West 2013). "A person commits armed robbery if, in the course of committing robbery . . . such person . . . [i]s armed with a deadly weapon or a simulated deadly weapon." A.R.S. § 13-1904(A)(1) (West 2013).

¶12 A captive testified that when he arrived at the drop house, Peralta-Garcia and Mondragon-Diaz, while armed with guns and a knife, ordered him to surrender his belt, shoes, wallet and money. The captive told police that Mondragon-Diaz yelled at the captives that "they needed to give up everything or they were going to [] pay." This evidence, along with the other evidence recounted above, was sufficient for the jury to conclude that the defendants implicitly threatened to use force if the captive did not hand over the property, and thus was sufficient to support a conviction for armed robbery. *See State v. Leyvas,* 221 Ariz. 181, 191, ¶ 35, 211 P.3d 1165, 1175 (App. 2009) (defendant holding a gun when asking victims if they had money supported inference defendant intended to take the money by force).

¶13 Defendant also argues there was insufficient evidence that he intended to aid in the commission of armed robbery, citing *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002). In *Phillips*, an accomplice of the defendant killed a victim

during the course of an armed robbery. *Id.* at 436-37, ¶ 41, 46 P.3d at 1057-58. The supreme court, interpreting the then-existing version of A.R.S. § 13-303(A)(3) (West 2002), reasoned that there was no evidence that the defendant intended to aid in the murder even though he intended to aid in the robbery. *Id.* In 2008, however, the legislature amended the accomplice statute at issue in *Phillips* to expand accomplice liability to include "any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice." 2008 Ariz. Legis. Serv. Ch. 296, § 2 (West) (amending A.R.S. § 13-303(A)(3)).

¶14 Defendant admitted to police that shoes, belts and other belongings were taken from other captives when they first arrived at the drop house. Witnesses testified that the items were removed from the victims to prevent them from escaping or resisting while the defendants collected fees to secure the victims' release. A reasonable jury could conclude from the evidence regarding Defendant's role at the drop house that he intended to aid in the commission of the armed robbery committed by his accomplices because it furthered his intention to commit kidnapping and extortion.

C. Sentencing.

¶15 Finally, Defendant argues the superior court fundamentally erred, resulting in prejudice, by improperly

considering the threatened infliction of serious physical injury and the use of a deadly weapon as aggravating circumstances in imposing his sentences.

¶16 The jury found the kidnapping, armed robbery and extortion offenses were dangerous offenses. The jury also found five aggravating factors: Infliction or threatened infliction of serious physical injury; pecuniary motive; physical, emotional or financial harm to the victim; use or possession of a deadly weapon or dangerous instrument; and presence of an accomplice. The court sentenced Defendant as a dangerous offender on the kidnapping, armed robbery and extortion offenses, and to presumptive concurrent terms for all of his convictions, the longest of which was 10.5 years.

¶17 Defendant argues the court improperly considered the "infliction or threatened infliction of serious physical injury" as an aggravating factor in sentencing him on the extortion and armed robbery convictions. The court may consider the "[i]nfliction or threatened infliction of serious physical injury" as an aggravating factor unless, in pertinent part, "this circumstance is an essential element of the offense of conviction." A.R.S. § 13-701(D)(1) (West 2013).

¶18 Defendant argues the use of this aggravator was impermissible "because the threatened infliction of serious physical injury is an essential element of theft by extortion

and armed robbery." At the time of these offenses, however, theft by extortion required proof only of a threat to inflict injury, and did not require a threat to inflict serious physical injury. A.R.S. § 13-1804(A)(1). Moreover, the threatened infliction of serious physical injury is not an essential element of armed robbery. *See* A.R.S. § 13-1902(A); -1904(A)(1). Accordingly, Defendant's challenge to this aggravator fails.

¶19 Defendant also argues that the superior court improperly considered the use of a dangerous weapon or dangerous instrument as an aggravating circumstance in sentencing him on the kidnapping, extortion and armed robbery counts because it already had used the jury finding of dangerousness to enhance his sentences.

¶20 A court may consider the "[u]se, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under § 13-704" based on a finding of dangerousness. A.R.S. § 13-701(D)(2). Because the court sentenced Defendant on the kidnapping, extortion and armed robbery offenses based on the jury's finding of dangerousness, the court was not permitted to consider the use of a dangerous weapon as an aggravating circumstance in sentencing Defendant on these crimes.

¶21 Defendant, however, did not object to the court's use of the aggravator in sentencing him, and so has forfeited his right to obtain relief unless he can show fundamental error. *State v. Munninger*, 213 Ariz. 393, 396, ¶ 10, 142 P.3d 701, 704 (App. 2006). Fundamental error is only found "in those rare cases that involve 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) (quotation omitted). The defendant has the burden to show that fundamental error occurred and, as a result, he suffered prejudice. *Munninger*, 213 Ariz. at 396-97, ¶ 10, 142 P.3d at 704-05. We will not vacate a defendant's sentences based on mere speculation that the court might have imposed shorter sentences absent an improper aggravator. *See id.* at 397, ¶ 14, 142 P.3d at 705.

¶22 Defendant argues this error "was fundamental because it denied [him] his right to be sentenced based on aggravating circumstances authorized by Arizona law." Nothing in the record, however, supports Defendant's argument that he might have received shorter sentences absent the deadly-weapon aggravator. As noted, the jury found five separate aggravating factors; the court gave no indication that supports Defendant's

speculation that it would have imposed different sentences if it had considered only the other four aggravators.

¶23 At the outset of the hearing at which the court sentenced each of the defendants, the court recited the aggravating factors found by the jury and then cited several mitigating factors in announcing the sentences imposed on Peralta-Garcia. Proceeding on to Defendant, the court then stated it would impose the same sentences on Defendant as it had imposed on Peralta-Garcia. Defendant argues that absent consideration of the improper aggravating factor, he would have received the mitigated sentences the court imposed on Mondragon-Diaz. But the jury found the same five aggravating factors against Mondragon-Diaz as it did against Defendant. Contrary to Defendant's argument, the court imposed shorter sentences on Mondragon-Diaz because the evidence clearly showed that Mondragon-Diaz was a captive himself before he joined in the crimes of which all of the defendants were convicted.

¶24 Defendant thus has failed to meet his burden on fundamental error review to establish he was prejudiced by any error in sentencing.

CONCLUSION

¶25 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/
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DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
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SAMUEL A. THUMMA, Presiding Judge

/s/
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MICHAEL J. BROWN, Judge