

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



DIVISION ONE  
FILED: 12/02/2010  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) CA-CR 09-0292  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
GILBERT ANTHONY MARTINEZ, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court of Maricopa County

Cause No. CR2006-007790-003 DT

The Honorable Rosa Mroz, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
And William S. Simon  
Criminal Appeals/Capital Litigation Section  
Attorneys for Appellee

Theresa M. Armendarez, P.L.C. Phoenix  
By Theresa M. Armendarez  
Attorney for Appellant

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**T H O M P S O N, Judge**

¶1 Gilbert Anthony Martinez (defendant) appeals his convictions of burglary, armed robbery, and theft, arguing the jury instruction given defining reasonable doubt is unconstitutional and

deprived him of a fair trial. For the following reasons, we affirm.

¶2 The state indicted defendant on (1) three counts of burglary in the first degree, class 2 dangerous felonies (Counts 2, 4, 6); (2) three counts of armed robbery, class 2 dangerous felonies (Counts 3, 7, 8); (3) two counts of kidnapping, class 2 dangerous felonies (Counts 9, 10); (4) burglary in the second degree, a class 3 felony (Count 5); and theft, a class 2 felony (Count 11).<sup>1</sup> Counts 6 through 10 were subsequently dismissed without prejudice, and defendant pled guilty to Count 5. Over the course of three separate trials, a jury found defendant guilty of Counts 2, 3, 4, and 11.<sup>2</sup>

¶3 The trial court sentenced defendant to concurrent terms of 10.5 years imprisonment each on Counts 3 and 4, and 11.25 years imprisonment on Count 11, to be served consecutively to Counts 3 and 4. Defendant received 1,104 days of presentence incarceration credit with respect to Counts 3 and 4. The trial court sentenced defendant to five years probation on Counts 2 and 5, to be served concurrently upon absolute discharge from the sentences imposed on Counts 3, 4, and 11. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 12-

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<sup>1</sup> Under the circumstances, we find it unnecessary to relate the specific facts underlying defendant's charges.

<sup>2</sup> The jury found Count 2 to be a non-dangerous offense.

120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

¶14 Defendant appeals his convictions and sentences on the grounds that the reasonable doubt jury instruction read in each trial is unconstitutional. In *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), our supreme court required, as a matter of state law, that the reasonable doubt instruction articulated in its opinion be given in every criminal case.<sup>3</sup> Defendant argues that the instruction impermissibly "lets the jury convict even if it has reasonable doubt, so long as it is firmly convinced of guilt," and "sets the bar for conviction below the 'reasonable doubt' standard required by state and federal law."

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<sup>3</sup> The reasonable doubt instruction is as follows:

The state has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt to find him/her not guilty.

*Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974.

¶15 The Arizona Supreme Court has rejected similar constitutional challenges to the *Portillo* instruction. See, e.g., *State v. Ellison*, 213 Ariz. 116, 133, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Dann*, 205 Ariz. 557, 575-76, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, 441, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, 417-18, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). We are bound to follow our supreme court's decisions. *State v. Sullivan*, 205 Ariz. 285, 288, ¶ 15, 69 P.3d 1006, 1009 (App. 2003) (citation omitted). Accordingly, we do not address this argument further.

¶16 We affirm defendant's convictions and sentences.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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DONN KESSLER, Presiding Judge

/s/

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DANIEL A. BARKER, Judge