DIVISION ONE
FILED: 07/21/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. EDUARDO SEGON PEREZ, Appellant.	)	1 CA-CR 10-0314 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-112436-001DT

The Honorable Michael D. Jones, Judge

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS MODIFIED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

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

J O H N S E N, Judge

¶1 Eduardo Segon Perez was convicted of unlawful imprisonment, a Class 5 felony, and two counts of sexual assault, Class 2 felonies. For the reasons set forth below, we

affirm the convictions and the resulting sentences, but amend one of the sentences to reflect credit for 38 days of presentence incarceration.

FACTS AND PROCEDURAL HISTORY

¶2 The victim, V., met Perez during an evening of drinking and dancing at a Phoenix club.[1] A few hours later, Perez forced V. into a car with his friends. They drove to Perez's apartment complex, where Perez talked V. into going upstairs with him by saying he needed to get his car keys to drive her home. In the apartment were three other men, one of whom was Leisner Quiada. According to V., Perez and Quiada held her against her will and forced her to perform various sex acts. Eventually, V. was able to escape and ran, naked, to a nearby house, where a couple called 911.

¶3 When police later went to Perez's apartment, Perez said he recalled "a female being there, but he didn't know why she had run out of the apartment." He said he "wasn't sure" if Quiada had sexual contact with the female. Perez permitted police to take a swab for DNA testing. The victim subsequently identified both Perez and Quiada in photo lineups as the two men who assaulted her. Police later took a swab from Quiada, who

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

denied touching V. and said he was not aware of anyone who had any "physical contact" with her. Nonetheless, DNA evidence taken from V. matched Quiada's. While the police were at the apartment, Quiada pulled a bag containing V.'s clothing and jewelry from under the couch and gave it to police.

¶4 The State indicted Perez and Quiada on kidnapping and three counts of sexual assault. Each of the sexual assault charges alleged a distinct sex act performed on the victim.

¶5 At trial, Perez testified V. consented to having sex with him. He said he asked Quiada early that morning if Quiada had "done anything" to the victim, but Quiada did not say he had had sex with her. Perez also testified he did not see Quiada having sex with V. The jury found Perez guilty of the lesser-included offense of unlawful imprisonment and two counts of sexual assault but acquitted him of the third sexual assault charge. The court sentenced Perez to consecutive sentences of one year in prison for unlawful imprisonment, with credit for 403 days of presentence incarceration, and seven years for each sexual assault, also to be served consecutively.

¶6 We have jurisdiction of Perez's appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033(A)(1) (2010).

DISCUSSION

A. Statements of Non-Testifying Co-Defendant.

¶7 The charges against Quiada and Perez were to be tried together. Before the sixth day of trial, however, Quiada entered into a plea agreement in which he agreed to testify for the State. The prosecutor offered Perez the same plea agreement, but Perez rejected it. Outside the presence of the jury, the court noted the parties had spoken of other matters "off the record," including whether Perez would seek a mistrial because of Quiada's plea. On the record, Perez's counsel stated that Perez was not moving for a mistrial and "waiv[ed] that objection or that potential objection." Instead, he said Perez "prefer[red] to go ahead and proceed with this jury."

¶8 Trial resumed with testimony by a police officer who had acted as an interpreter during an interview of Quiada. Perez's counsel questioned the officer about statements Quiada made during the interview. When Perez's counsel later began to cross-examine the next police witness about statements by Quiada, the prosecutor objected on grounds of hearsay, and a bench conference ensued. The court allowed the testimony based on "a good faith basis to believe that Mr. Quiada is going to testify."

¶9 The following day, Quiada's attorney announced that she would advise her client to "plead the Fifth" if he were

called to testify. The court again raised the issue of a mistrial, but Perez's lawyer responded that Perez was "totally against a mistrial."

¶10 A third officer then was recalled to testify. Midway through an examination by the State about statements Quiada had made at the police station, Perez objected based on hearsay. After the court overruled the objection, the officer testified Quiada said he had left Perez and V. alone in the bedroom and that when he returned, V. was unclothed and Perez pushed him out of the bedroom. The officer also testified Quiada denied having had sex with V. that night. The officer went on to confirm that Quiada had made inconsistent statements. For example, he testified that even though Quiada had denied having sex with V., Quiada also claimed to have had consensual sex with her that night. The officer also testified that Quiada not only told him Perez had forced V. to have oral sex and that the three of them had had sex "simultaneously," but that Quiada claimed to have "forced" V. to have sex with him "first," before she had sex with Perez. According to the officer, Quiada explained that "the things he said he said only in order to [make] a plea," and that although Quiada said he saw Perez having sex with the victim, Quiada then "changed his mind" and said he did not see that. Indeed, the officer conceded that Quiada had "pretty much retracted everything he had said."

¶11 Perez argues the superior court violated his Sixth Amendment right to confront witnesses by allowing the third officer's testimony about statements by Quiada. U.S. Const. amend. VI; *see* Ariz. Const. art. 2, § 24; *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (when court allows evidence of a testimonial statement by a witness who is not available to testify, Sixth Amendment is violated if defendant has not had an opportunity to cross examine the declarant).

¶12 As Perez concedes, he did not object to the officer's testimony on Sixth Amendment grounds at trial.[2] As a result, he has forfeited relief unless he can demonstrate fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail on fundamental error review, a defendant "must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id*. at ¶ 20, 115 P.3d at 607. We conclude that even assuming *arguendo* that it was error to admit the officer's testimony about Quiada's statements, Perez has failed to show he was prejudiced.

¶13 First, we note that Perez declined to move for a mistrial even after it was clear that Quiada would not testify. We infer that was a strategic decision on Perez's part that was

---

[2] Perez objected to the testimony solely on the ground that it was inadmissible hearsay. A hearsay objection, however, does not preserve a Confrontation Clause argument for appellate review. *State v. Alvarez*, 213 Ariz. 467, 469, ¶ 7, 143 P.3d 668, 670 (App. 2006).

premised on the notion that his defense would benefit by placing before the jury the many inconsistencies in Quiada's various accounts to police. Moreover, in Quiada's absence (after the plea agreement), Perez knew that the jury would not hear Quiada swear allegiance to any specific account, thereby leaving Perez free to argue that any of the several versions of the story Quiada gave to officers was correct. *Cf. State v. Levato*, 186 Ariz. 441, 445, 924 P.2d 445, 449 (1996) (defendant may be bound by counsel's choice of trial strategy).

¶14 Second, Quiada's conflicting statements and retractions bolstered Perez's defense, which in large part was based on pointing the finger at his missing co-defendant. Thus, evidence that Quiada was willing to change his story to get a plea agreement undermined the incriminating statements he made against Perez.

¶15 For these reasons, we conclude that any Confrontation Clause violation that occurred did not prejudice Perez but instead likely supported his trial strategy. *See, e.g., State v. Davis*, 226 Ariz. 97, 102, ¶ 20, 244 P.3d 101, 106 (App. 2010) (failure to object was not fundamental error when it could be viewed as "a reasoned, strategic choice"). Because Perez has not shown prejudice, we will not reverse. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

B. Consecutive Sentences on Counts 1 and 2.

¶16 The superior court ordered Perez's three sentences to be served consecutively. Perez argues the court erred in ordering the sentence for unlawful imprisonment to be consecutive to the first sexual assault sentence because the "facts underlying [unlawful imprisonment] and [the first sexual assault] constitute a single act" and A.R.S. § 13-116 (2010) prohibits consecutive sentences for a single act.[3]

¶17 Section 13-116 states in part that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may [the] sentences be other than concurrent." To determine whether a defendant's conduct constitutes one act for sentencing purposes, we apply the three-part test crafted in *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). First, we consider the facts of each crime separately, and subtract from the factual transaction the evidence necessary to convict on the ultimate crime, i.e., the crime "that is at the essence of the factual nexus and that will often be the most serious of the charges." *Id.* If the remaining evidence is sufficient to satisfy the elements of the other crime, then consecutive sentences may be permissible. *Id*. We then consider whether,

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

given the entire transaction, it was factually impossible to commit the more serious offense without also committing the less serious offense. *Id*. If that is the case, then the likelihood increases that the defendant committed a single act under A.R.S. § 13-116. *Id*. We must then go on to consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer an additional risk of harm beyond [the harm ordinarily] inherent in the ultimate crime." *Id*. If so, the defendant consecutive sentences may be imposed. *Id*.

¶18 We review a superior court's decision to impose a consecutive sentence *de novo*. *State v. Urquidez*, 213 Ariz. 50, 52, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). The evidence in this case clearly sustains the superior court's implicit finding that the unlawful imprisonment and sexual assault involved two distinct acts. Therefore no error was committed.

¶19 Unlawful imprisonment requires the defendant to knowingly restrain the victim. A.R.S. § 13-1303(A) (2010). "Restrain" is defined as "restrict[ing] 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." A.R.S. § 13-1301(2) (2010). "Restraint is without consent if it is accomplished by . . . [p]hysical force, intimidation or deception." A.R.S. § 13-1301(2)(a). Sexual

assault, on the other hand, is committed when a person "intentionally or knowingly engag[es] in sexual intercourse or oral sexual contact with any person without consent of such person." A.R.S. § 13-1406(A) (2010).

¶20 Applying step one from *Gordon*, when the evidence of the sexual assaults is subtracted from the entire "factual transaction" at issue here, sufficient evidence remains to support the elements of unlawful imprisonment. *See* 161 Ariz. at 315, 778 P.2d at 1211. Perez grabbed the victim by the arm and forced her into the car against her will, and she testified she went up to his apartment only because he convinced her that he was going to get his car keys to drive her home. That evidence satisfies the elements of unlawful imprisonment separate and apart from any "restraint" that may have occurred during the sexual assault. Applying the second step of *Gordon*, it was factually possible for Perez to sexually assault V. without also forcing her into the car against her will and lying to induce her to go to the bedroom. Finally, applying the third step, the unlawful imprisonment likely caused V. to suffer an additional harm separate from the harm caused by the sexual assault.

¶21 Perez argues, however, that because the jury acquitted him of one sexual assault, it must have found that the victim willingly accompanied him to his apartment. Therefore, he posits that the only restraint the jury could have found he

committed was his conduct in preventing V. from leaving the bedroom. But his acquittal on the sexual assault count is not relevant to whether a factual basis supports a conviction of unlawful imprisonment. *See State v. Garza*, 196 Ariz. 210, 212, ¶ 7, 994 P.2d 1025, 1027 (App. 1999) (inconsistencies do not warrant reversal of guilty verdict so long as verdict is reasonably supported by evidence).

D. Presentence Incarceration Credit.

¶22 The State agrees with Perez's contention that the superior court failed to properly credit him with all of the 403 days of presentence incarceration credit to which he was entitled. *See* A.R.S. § 13-712(B) (2010). The court allocated the entire 403 days against Perez's one-year sentence for unlawful imprisonment. As a result, Perez was deprived of 38 days of presentence incarceration credit, which should have been applied to his sentence on the first sexual assault conviction.

¶23 Accordingly, we modify Perez's sentence on count 2 by ordering that he be credited with 38 days of presentence incarceration credit toward that sentence. *See* A.R.S. § 13-4037(A) (2010).

CONCLUSION

¶24 For the foregoing reasons, we affirm Perez's convictions and sentences as modified.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Presiding Judge

/s/
MAURICE PORTLEY, Judge