

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.P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/02/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,

Appellee,

v.

VICTOR MANUEL CASTILLO ESTOBAR,

Appellant.

1 CA-CR 10-0442

DEPARTMENT E

MEMORANDUM DECISION

(Not for Publication -
Rule 111, Rules of the
Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007077-001 DT

The Honorable Maria Del Mar Verdin, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Attorney General
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Phoenix

The Hopkins Law Office, PC
by Cedric Martin Hopkins
Attorneys for Appellant

Tucson

I R V I N E, Judge

¶1 Victor Manuel Castillo Estobar ("Estobar") was
convicted by a jury of participation in a criminal syndicate,

smuggling, two counts of kidnapping and forgery. On appeal, Estobar contends the trial court erred by not sentencing him to concurrent sentences pursuant to Arizona Revised Statutes ("A.R.S.") section 13-116 (2010). For the reasons that follow, we affirm Estobar's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 The underlying facts regarding the crimes are not discussed because they are not relevant to the issue on appeal. See *State v. Garcia*, 220 Ariz. 49, 50, ¶ 2, 202 P.3d 514, 515 (App. 2008). Estobar was found guilty of participation in a criminal syndicate (count 1); smuggling (count 2); 2 counts of kidnapping (counts 9 and 10); and forgery (count 11).¹ The jury found aggravating factors for some of Estobar's convictions. As a result, the court sentenced Estobar as follows:

Count 1: 10 years from 5/25/10
Presentence Incarceration Credit: 473 days
Aggravated
Sentence is concurrent with Counts 2, 9, 10,
and 11.

Count 2: 2.5 years from 5/25/10
Presentence Incarceration Credit: 473 days
Presumptive
Sentence is concurrent with Counts 1, 9, 10
and 11.

Count 9: 16 years from upon completion of
sentence in Counts 1 and 2
Presentence Incarceration Credit: 0 days
Aggravated

¹ For ease of reference in this decision, we refer to the counts as they were numbered in the trial court.

This sentence is to be consecutive to Counts 1 and 2.

Count 10: 16 years from upon completion of sentence in Counts 1, 2 and 9
Presentence Incarceration Credit: 0 days
Aggravated
This sentence is to be consecutive to Counts 1, 2, and 9.

Count 11: 2.5 years from 5/25/10
Presentence Incarceration Credit: 473 days
Presumptive
Sentence is concurrent with Counts 1, 2, 9, and 10.

Estobar timely appealed.

DISCUSSION

¶3 Citing A.R.S. § 13-116, Estobar contends consecutive sentences are improper because all his offenses arose out of the same conduct. *See State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). Section 13-116 states: "An 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 sentences be other than concurrent." We review de novo a decision to impose consecutive sentences. *See State v. Urquidez*, 213 Ariz. 50, 52, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). Because Estobar failed to raise this objection below, however, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Estobar bears the burden of establishing error, that the error was fundamental,

and that the error caused him prejudice. *Id.* at 568, ¶¶ 22-23, 115 P.3d at 608.

¶4 Although A.R.S. § 13-116 bars consecutive sentences when a defendant's conduct is a "single act," it does not preclude consecutive sentences for offenses involving multiple victims. *State v. Hampton*, 213 Ariz. 167, 182, ¶¶ 64-65, 140 P.3d 950, 965 (2006). Estobar does not challenge the fact that each kidnapping conviction was for a separate victim. Even assuming Estobar's crimes arose from a "single act," because there were two victims and he was convicted of two counts of kidnapping, there was no error by the trial court in imposing consecutive sentences for the kidnapping convictions. *See, e.g., State v. Burdick*, 211 Ariz. 583, 585, ¶ 6, 125 P.3d 1039, 1041 (App. 2005) (consecutive sentences proper where crime of disorderly conduct committed against multiple victims); *State v. White*, 160 Ariz. 377, 379-81, 773 P.2d 482, 484-86 (App. 1989) (consecutive sentences upheld when a single criminal act harmed multiple victims).

¶5 Estobar also argues the kidnappings were such an integral part of the criminal syndicate that the charges must be viewed as a single act. The "victims" of the crime of participation in a criminal syndicate are not the same as the kidnapping charges, so the sentences for participating in a criminal syndicate may also be consecutive to the kidnapping

convictions. Moreover, we agree with the State that the elements of participating in a criminal syndicate and kidnapping are sufficiently distinct that consecutive sentences may be imposed. Kidnapping is not a necessary element of a criminal syndicate. Therefore, consecutive sentences are permissible.

Sentencing order correction

¶16 Our review of the record indicates that the sentencing minute entry is inconsistent with the oral pronouncement of Estobar's sentences. In its sentencing order, the trial court ordered count 1 to run concurrently with count 9, and then ordered count 9 to run consecutive to count 1. Similarly, it ordered count 1 to run concurrent with count 10, and then ordered count 10 to be consecutive to counts 1, 2 and 9. The oral pronouncement of Estobar's sentence resolves this ambiguity. The court stated that in regards to count 9, "[t]his term will run consecutive to Count 1 and 2" and then clarified that count 9 "is an aggravated term of 16 years, consecutive to Count 1 and 2."

¶17 Where there is an inconsistency between the oral pronouncement of sentence and the sentencing order, the oral pronouncement controls. *State v. Zinsmeyer*, 222 Ariz. 612, 622, ¶ 23, 218 P.3d 1069, 1079 (App. 2009). If the inconsistency can be resolved by reference to the record, we can correct the minute entry without a remand for resentencing. *State v. Hanson*,

138 Ariz. 296, 304, 674 P.2d 850, 858 (App. 1983). Therefore, we clarify the sentencing order dated May 25, 2010, to reflect that count 9 runs consecutively to counts 1 and 2, and count 10 runs consecutively to counts 1, 2 and 9.²

CONCLUSION

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

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
MAURICE PORTLEY, Judge

² We order the trial court to prepare an amended sentencing order reflecting the modification.