DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0469
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	
	)	**MEMORANDUM DECISION**
SAUL MADRIGAL GOMEZ,	)	(Not for Publication -
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-153146-002 DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED IN PART; VACATED IN PART

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P O R T L E Y, Judge

¶1 Saul Madrigal Gomez was convicted of first-degree burglary, kidnapping (nine counts), theft by extortion, and

misconduct involving weapons. His convictions stemmed from his involvement in a home invasion and holding a person for ransom. Gomez only challenges his convictions on two kidnapping counts, and argues that one is not supported by the evidence and the other violates the guarantee against double jeopardy. For reasons that follow, we vacate one of the kidnapping convictions on double jeopardy grounds, but affirm the remaining convictions and sentences.

FACTS AND PROCEDURAL HISTORY[1]

¶2 G.[2] was at home with her father and six children on August 10, 2009, when Gomez and his brother-in-law, Manual Salcido, burst into the home through the kitchen door. Gomez was armed with a shotgun and Salcido had a handgun. Gomez ordered G., her father, and the five children in the kitchen to get down on the floor. The sixth child, R., was in the hallway bathroom; he locked the bathroom door and kept quiet once he heard the others scream.

¶3 In response to demands for money, G. offered them her purse. Gomez then held the family members at gun point in the kitchen while Salcido went through the home looking for money.

[1] We view the evidence in the light most favorable to sustaining the verdicts. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

[2] We use only the first initial to identify any of the victims.

When he encountered the locked hallway bathroom, Salcido banged on the door and jiggled the doorknob. R. remained quiet.

¶4 After returning to the kitchen, Salcido repeated his demand for money. When G. again told them that they had none, Salcido stated that they would hold her for ransom. As G.'s father attempted to object, Gomez hit him in the side with his weapon and fractured one of his ribs. Gomez then directed the family members into the bathroom in the master bedroom and told them to stay there until they left.

¶5 Gomez and Salcido took G., drove to an unknown location, and told her to lie face down on a couch in a storage room. They then called her family members and initially demanded $10,000 and later $15,000 for her safe return. After the ransom arrangements were made, Salcido and Gomez drove G. to a desert area on the outskirts of town. Salcido then went to get the ransom while Gomez continued to hold G.

¶6 Because the police had been contacted about the kidnapping, Salcido was arrested when he attempted to pick up the ransom. After Salcido disclosed where G. was being held, the police located G. and Gomez walking along the side of the road. They located the shotgun Gomez had hidden under a pile of rocks. Although initially denying any knowledge of the crimes, Gomez admitted his involvement in the home invasion and kidnapping for ransom because he needed money to pay bills.

¶7 Gomez and Salcido were both indicted on one count of first-degree burglary, a class 2 felony and dangerous offense; nine counts of kidnapping, each a class 2 felony and dangerous offense; one count of theft by extortion, a class 2 felony and dangerous offense; and one count of misconduct involving weapons (prohibited possessor), a class 4 felony. They had separate trials, and a jury found Gomez guilty as charged. Gomez was subsequently sentenced to concurrent and consecutive presumptive terms of imprisonment totaling 72 years. We have jurisdiction over his 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 and -4033(A)(4) (2010).

DISCUSSION

A. The trial court did not err in denying the motion for judgment of acquittal on Count 5.

¶8 Count 5 of the indictment charged both defendants with kidnapping R., the child in the bathroom. Gomez contends the trial court erred in denying his motion for judgment of acquittal on Count 5 because there was insufficient evidence to support a conviction. Specifically, he argues that there was no evidence that either he or Salcido were aware of R.'s presence, and therefore they could not have "knowingly" restrained R. as required for the offense of kidnapping. We review a claim of insufficient evidence de novo, "viewing the evidence in a light

most favorable to sustaining the verdict." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶9 A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990); *see* Ariz. R. Crim. P. 20(a) (requiring the trial court to enter a judgment of acquittal "if there is no substantial evidence to warrant a conviction"). "Substantial evidence is proof that reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Kuhs*, 223 Ariz. 376, 382, ¶ 24, 224 P.3d 192, 198 (2010) (quoting *State v. Bearup*, 221 Ariz. 163, 167, ¶ 16, 211 P.3d 684, 688 (2009)) (alteration in original) (internal quotation marks omitted). "Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citations omitted). We will not disturb the verdict unless it clearly appears "that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶10 The crime of kidnapping is defined as "knowingly restraining another person with the intent to . . . otherwise

aid in the commission of a felony." A.R.S. § 13-1304(A)(3) (2010).[3] A person acts "knowingly" for purposes of committing a criminal offense if the person "is aware or believes that [the] person's conduct is of that nature or that the circumstances exists." A.R.S. § 13-105(10)(b) (2010). "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 [or] intimidation . . . ." A.R.S. § 13-1301(2) (2010).

¶11 Gomez argues that there was no evidence that either he or Salcido were aware of R.'s presence in the bathroom.[4] We disagree. A defendant's state of mind can be shown by circumstantial evidence, and the defendant's conduct is evidence of his state of mind. *Bearup*, 221 Ariz. at 167, ¶ 16, 211 P.3d

[3] We apply the substantive law in effect when the offense was committed. A.R.S. § 1-246 (2002); *State v. Newton*, 200 Ariz. 1, 2, ¶ 3, 21 P.3d 387, 388 (2001). Absent material revisions to a statute after the date of an offense, we cite the current version.

[4] Pursuant to A.R.S. § 13-303(A)(3) (2010), "[a] person is criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense . . . ." A person is an accomplice if he, with the intent to promote or facilitate the commission of the crime, aids the other person. A.R.S. § 13-301(2) (2010). Thus, if the evidence is sufficient to support a conviction of Salcido for kidnapping R., the evidence is likewise sufficient to support Gomez's conviction based on accomplice liability.

at 688. Here, Gomez and Salcido were aware that there numerous persons in the home. Although there was no testimony that Salcido said anything to indicate that anyone was in the locked bathroom, the jury could have reasonably viewed banging on the door and jiggling the handle as the equivalent of yelling, "I know you are in there" because a natural assumption is that the door was locked because someone was inside the bathroom. While "reasonable persons may fairly differ" as to whether Salcido was actually aware or believed that there was anyone hiding inside the locked bathroom, when the evidence creates such a debatable issue, "then such evidence must be considered as substantial." *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87, 84 P.3d 456, 477 (2004) (quoting *State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996)) (internal quotation marks omitted).

¶12 There was also sufficient evidence to permit the jury to find that the actions of Gomez and Salcido involuntarily confined R. inside the bathroom. Although R. locked himself in the bathroom, the evidence indicates that he did so in response to the screams of family members after the home invasion. R. testified that he felt trapped in the bathroom and thought he would place himself in even more danger and risk his life if he left the bathroom. The jury, as a result, could have reasonably concluded that the unlawful actions of Gomez and Salcido in threatening the other family members restricted R.'s movements

by causing him to confine himself in the bathroom out of fear of them and that they thereby interfered substantially with his liberty in no less a manner than they did with the other family members. *See State v. Pickett*, 121 Ariz. 142, 146, 589 P.2d 16, 20 (1978) (holding that "the essence of the crime of kidnapping . . . is . . . the unlawful compulsion to stay somewhere or go somewhere against the victim's will"); *State v. Latham*, 223 Ariz. 70, 74-75, ¶ 20, 219 P.3d 280, 284-85 (App. 2009) (upholding a conviction for the kidnapping of a wife where threat to kill her husband caused her to move from one place to another). Consequently, the trial court did not err in denying the motion for acquittal on Count 5.

B. The convictions on two counts of kidnapping with respect to G. violate double jeopardy.

¶13 Gomez was charged with two counts of kidnapping with respect to G. Count 2 involved her restraint in her home after the home invasion; Count 11 pertained to her removal to the desert location and holding her for ransom. The jury found Gomez guilty on both counts, and he was sentenced to concurrent prison terms on those convictions. Relying on *State v. Jones*, 185 Ariz. 403, 916 P.2d 1119 (App. 1995), Gomez argues that the multiple convictions for kidnapping G. constitute a double jeopardy violation because he kidnapped her only once.

¶14 "The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9, 206 P.3d 769, 772 (App. 2008); *see also* U.S. Const. amend. V; Ariz. Const. art. 2, § 10. A double jeopardy violation occurs even if concurrent sentences are imposed on the convictions because an additional felony conviction itself constitutes punishment. *State v. Brown*, 217 Ariz. 617, 621, ¶ 13, 177 P.3d 878, 882 (App. 2008). The question of whether double jeopardy is violated is reviewed de novo. *State v. Welch*, 198 Ariz. 554, 555, ¶ 5, 12 P.3d 229, 230 (App. 2000).

¶15 Because Gomez did not raise the issue below, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). A double jeopardy violation, however, constitutes fundamental error. *Ortega*, 220 Ariz. at 323, ¶ 7, 206 P.3d at 772.

¶16 In determining whether there is a double jeopardy violation for multiple convictions of the same offense, the issue turns on "whether the individual's acts are punishable separately as discrete offenses." *Jones*, 185 Ariz. at 405, 916 P.2d at 1121. Because kidnapping is a "continuing crime," we held in *Jones* that the uninterrupted restraint of the victim would "not give rise to more than one count of kidnapping." *Id.*

at 406, 916 P.2d at 1122. Kidnapping is a continuing crime even where the kidnapping counts alleged different reasons the victim was restrained pursuant to the subsections of A.R.S. § 13-1304(A). *Jones*, 185 Ariz. at 406, 916 P.2d at 1122. Accordingly, we concluded that one of the two convictions for kidnapping in *Jones* had to be vacated. *Id.* at 407, 916 P.2d at 1123.

¶17 The *Jones* analysis applies here. G. was subject to continuous restraint from the time Gomez and Salcido ordered her at gun point to get down on the floor of her kitchen until the police rescued her. Because it is undisputed that G. was never free from restraint during the entire episode, there can only be one conviction for her kidnapping. *Id.*

¶18 Although the State argues that our holding in *Jones* is contrary to double jeopardy principles and that Gomez was properly convicted because he was charged under two different subsections of the kidnapping statute, we disagree. Under the "same elements" test, the inquiry is "whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment." *United States v. Dixon*, 509 U.S. 688, 696 (1993); *see Blockburger v. United States*, 284 U.S. 299, 304 (1932).

¶19 Our supreme court has already clearly stated that the six subsections of A.R.S. § 13-1304(A)[5] are not separate offenses. *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993). In *Herrera*, the court held that because "kidnapping is *one* crime, regardless of whether it occurs as a result of a knowing restraint with the intent to inflict physical injury *or* with the intent to interfere with the performance of a governmental function," the jurors need not unanimously agree on the specific intent the defendant had in committing the offense. *Id.; see State v. Eagle*, 196 Ariz. 188, 190, ¶ 7, 994 P.2d 395, 397 (2000) ("Subsection (A) of the text completely defines the

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[5] The statutory definition of kidnapping reads:

> A. A person commits kidnapping by knowingly restraining another person with the intent to:
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> 1. Hold the victim for ransom, as a shield or hostage; or
> 2. Hold the victim for involuntary servitude; or
> 3. Inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony; or
> 4. Place the victim or a third person in reasonable apprehension of imminent physical injury to the victim or the third person; or
> 5. Interfere with the performance of a governmental or political function; or
> 6. Seize or exercise control over any airplane, train, bus, ship or other vehicle.

A.R.S. § 13-1304.

crime of kidnapping as it exists in Arizona. Its elements are plainly set forth: a knowing restraint coupled *with one or more* of the specifically listed intentions.") (emphasis added). In other words, kidnapping is a single offense that can be committed in more than one way. Accordingly, under current Arizona law, a defendant cannot be convicted of multiple counts of kidnapping for one continuous restraint.

¶20 The State's reliance on *State v. Jones (Jones I)*, 123 Ariz. 373, 599 P.2d 826 (App. 1979), is also misplaced. In *Jones I*, we affirmed multiple convictions for kidnapping (armed kidnapping and kidnapping for rape) under different statutory provisions in the old criminal code. *Id.* at 375, 377, 599 P.2d at 828, 830; (former A.R.S. §§ 13-491, -492, effective prior to October 1, 1978). Since *Jones I*, the legislature has combined the different kidnapping statutes into one unified offense. *See Herrera*, 76 Ariz. at 16, 859 P.2d at 126. Consequently, the *Jones I* decision cannot support the argument because the kidnapping statute, as reviewed by the supreme court, was changed.

¶21 Generally, when it becomes necessary to vacate one of two convictions on double jeopardy grounds, the "lesser" conviction is vacated. *State v. Scarborough*, 110 Ariz. 1, 6, 514 P.2d 997, 1002 (1973); *Welch*, 198 Ariz. at 557, ¶ 13, 12 P.3d at 232. Here, neither of the two kidnapping convictions

involving G. can be viewed as "lesser" because the sentences imposed on the two convictions are equal in length and concurrent to each other. *Cf. Jones*, 185 Ariz. at 407-08, 916 P.2d at 1123-24 (holding that where one sentence is concurrent and the other is consecutive to other sentences, the concurrent sentence is considered the "lesser"). Accordingly, we vacate the conviction and sentence imposed on Count 11 as the second of the two convictions.

CONCLUSION

¶22 We vacate the conviction and sentence imposed on Count 11. We affirm the convictions and sentences imposed on all of the other remaining counts.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
DANIEL A. BARKER, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge