

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: 10/27/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0547
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARMANDO CARLOS OROZCO-QUESADA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-181273-001 DT

The Honorable Margaret R. Mahoney, Judge

AFFIRMED

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

Sharmila Roy Laveen
Attorney for Appellant

D O W N I E, Judge

¶1 Armando Carlos Orozco-Quesada timely appeals his convictions for kidnapping and theft of credit card or obtaining

a credit card by fraudulent means in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1304 and -2102. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record, found no arguable question of law, and asks that we review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Orozco-Quesada did not file a supplemental brief *in propria persona*. On appeal, we view the evidence in the light most favorable to sustaining the convictions. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

FACTS AND PROCEDURAL HISTORY

¶12 One morning in December 2007, J.L. left his house for work. His wife L.O. followed, carrying their five-year-old son, while two older children remained in the house. J.L. saw Orozco-Quesada and two other men exit a van parked across the street from his house. Orozco-Quesada pointed a gun at J.L., and the men ran toward him. L.O. saw Orozco-Quesada point a gun at J.L. and watched the men struggle before running back into the house. The men forced J.L. to the ground, and Orozco-Quesada pointed the gun at him. J.L. was forced into the van. L.O. watched from the living room window as the van drove away. L.O. called the police, who arrived in marked vehicles and put yellow tape around the house.

¶13 Inside the van, J.L.'s hands were bound. Orozco-Quesada told J.L. he would shoot him in the head if J.L. looked at him. J.L. heard the men speak Spanish, which he understood, with a Cuban accent.

¶14 The men took J.L. out of the van and Orozco-Quesada pointed a gun at him as they directed him toward an apartment, where a woman opened the door. J.L. was blindfolded and his hands remained bound. The men took J.L.'s wallet, which contained bank cards, identification, and family pictures, and his cell phone. Orozco-Quesada told J.L. he was "the boss" of the operation and advised J.L. "to cooperate or [he] wasn't going to get out of there" and threatened to "take care" of J.L.'s family if he did not cooperate. Orozco-Quesada demanded \$50,000 for J.L.'s release. Orozco-Quesada asked J.L. for his bank card PIN, which J.L. gave him.

¶15 J.L. was able to move his blindfold so he could see. A few hours after his abduction, J.L. saw Orozco-Quesada enter the apartment holding a gun. He was angry and told J.L. he was "going to have to kill" him because J.L.'s house was full of police, and the men were unable to negotiate with L.O. The other men told Orozco-Quesada to wait until night to kill J.L. so they could get "rid of" him under cover of darkness. Orozco-Quesada asked J.L. what he could do to save his life, and J.L. said he might be able to raise \$20,000 by refinancing his house.

J.L. began to explain his financial situation and negotiate with Orozco-Quesada. Over the course of the day, J.L. and Orozco-Quesada continued to talk about how much money J.L. could raise. Eventually, Orozco-Quesada agreed to let J.L. go if he dropped \$25,000 in a dumpster the next day. Orozco-Quesada gave J.L. specific instructions about the money drop and threatened to kill J.L.'s family "one by one," starting with his youngest son, if J.L. did not comply. The men drove J.L. to a convenience store, where they released him.

¶16 J.L. agreed to cooperate with the police and dropped a red shoe box wrapped in duct tape at the dumpster in accordance with Orozco-Quesada's instructions. Detectives watched three men, including Orozco-Quesada, scope out the area as they approached the drop site. They watched Orozco-Quesada "peek[]" over a wall and then jump the wall, pick up the box, and jump back over the wall. A detective followed the men as they walked away and heard Orozco-Quesada say there was no money in the box. The detective ordered the men to get on the ground, but they dropped the opened shoe box and fled; a foot pursuit ensued. Officers found Orozco-Quesada hiding in a nearby apartment and arrested him. A second suspect was also apprehended ("co-defendant"), but the third man was never found.

¶17 At the police station, Orozco-Quesada was searched. Officers found car keys and "duct tape with paper on it" in his

pockets. Detectives took the keys to the apartment building near the drop site and located a black van by activating the remote car alarm. Officers conducted a warranted search of the van and found a bank receipt on the floor between the driver and passenger seats. Behind an interior quarter panel, officers found a gun holster, magazine, bullets, and J.L.'s bank card and ID. They also found a phone bill and passport in the name of co-defendant.

¶18 Orozco-Quesada was indicted for kidnapping, a class 2 dangerous felony (count 1); theft of a credit card or obtaining a credit card by fraudulent means, a class 5 felony (count 2); and fraudulent use of a credit card, a class 6 felony (count 3). The State alleged aggravating circumstances and other factors it planned to use at sentencing.

¶19 J.L. and L.O. viewed a photo lineup. J.L. immediately picked out Orozco-Quesada, but L.O. could not identify anyone. Before trial, Orozco-Quesada requested a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380 (1969). After briefing and argument, the court denied Orozco-Quesada's request for a *Dessureault* instruction at trial.

¶10 An eight-day jury trial ensued. J.L., L.O., and numerous law enforcement officers testified. At the conclusion of the State's case-in-chief, Orozco-Quesada moved for a

judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure. The motion was denied.

¶11 Orozco-Quesada testified and admitted going to the drop site in the black van and collecting the shoe box. He denied knowing about or participating in the kidnapping and ransom. He testified that an uncle who owed him money called one day and said he was ready to pay the debt. The uncle told Orozco-Quesada that co-defendant would pick him up and take him to a dumpster, where he could retrieve some money, take what he was owed, and give the remainder to co-defendant. Although Orozco-Quesada suspected the money was gleaned from illegal activity, he complied with his uncle's instructions. Orozco-Quesada also testified that an unknown third man, wearing glasses, sat in the back of the van.

¶12 The jury convicted Orozco-Quesada on counts 1 and 2, but did not find count 1 to be a dangerous crime. It also found the State had proved two aggravating factors on each count. Orozco-Quesada was sentenced to an aggravated nine-year term of imprisonment on count 1, to run consecutive to a separate offense.¹ The court ordered three years' probation for count 2.

¹ Because the sentences were consecutive, the trial court appropriately applied Orozco-Quesada's presentence incarceration credit to the first count. See *State v. Jackson*, 170 Ariz. 89, 94, 821 P.2d 1374, 1379 (App. 1991).

DISCUSSION

¶13 We have read and considered the brief submitted by Orozco-Quesada's counsel and have reviewed the entire record. *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Orozco-Quesada was present at all critical phases of the proceedings and represented by counsel. The jury was properly impaneled and instructed.² The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

I. Rule 20 Motion

¶14 A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a

² An initial attempt to select a jury was flawed, and a mistrial was granted. Orozco-Quesada moved to dismiss the indictment on double jeopardy grounds, which the trial court denied, and Orozco-Quesada sought special action review by this Court. Although we accepted jurisdiction, we denied relief.

complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). In the case at bar, the State presented substantial evidence of guilt.

A. Count 1

¶15 The jury found Orozco-Quesada guilty of kidnapping and found that the State proved two aggravating factors: the offense involved the infliction or threatened infliction of serious physical injury and the presence of accomplices. "A person commits kidnapping by knowingly restraining another person with the intent to . . . [h]old the victim for ransom." A.R.S. § 13-1304(A)(1).

¶16 J.L. and L.O. testified that J.L. was abducted at gun point by Orozco-Quesada and two other men, who held him blindfolded and bound for approximately 12 hours. J.L. testified he had numerous opportunities to see Orozco-Quesada before being blindfolded and after he was able to surreptitiously adjust his blindfold. Additionally, J.L. testified he recognized Orozco-Quesada's voice as "the same voice as the person who kidnapped [him]." He further testified that Orozco-Quesada was the self-described "boss," who pointed the gun at him and threatened to shoot him in the head and to "take care" of his family if J.L. did not comply with his ransom demand. J.L. also described the on-going negotiations to "let

[him] live" after Orozco-Quesada angrily announced he would kill him, and their ultimate agreement that J.L. would pay \$25,000 for his release. Based on the evidence presented, reasonable jurors could have found Orozco-Quesada guilty of kidnapping.

B. Count 2

¶17 The jury found Orozco-Quesada guilty of theft of a credit card or obtaining a credit card by fraudulent means and also found two aggravating factors: the offense was committed for pecuniary gain and involved an accomplice. "A person commits theft of a credit card or obtaining a credit card by fraudulent means if the person . . . [c]ontrols a credit card without the cardholder's or issuer's consent through" theft or theft by extortion. A.R.S. § 13-2102(A)(1); see also A.R.S. §§ 13-1802(A)(1) (a person commits theft by "controll[ing] property of another with intent to deprive the other person of such property"), 13-1804 (a person commits theft by extortion by knowingly obtaining property by threatening to cause physical injury to anyone).

¶18 J.L. testified that the men took his wallet, which contained bank cards, and Orozco-Quesada demanded his debit card PIN access number. He further testified that Orozco-Quesada left the apartment after obtaining J.L.'s credit cards. Officers testified there were nine attempts to withdraw money using J.L.'s debit card and three attempts to use his credit

card during the time J.L. was held captive. J.L.'s credit card and an ATM receipt showing a withdrawal from his account were found in the van. Orozco-Quesada possessed the van key and admitted he was a passenger in it. J.L. specifically testified he did not give permission for the men to take or use his bank card.

¶19 At trial, the State introduced surveillance photos depicting persons wearing sunglasses using J.L.'s bank cards during the hours he was held captive. Two pairs of sunglasses were found in the van, and one pair at the apartment patio where Orozco-Quesada was taken into custody. Orozco-Quesada wore sunglasses when he picked up the shoe box, and he testified the third person in the van was wearing glasses. Given these facts, a reasonable trier of fact could find that Orozco-Quesada intended to control the bank cards without J.L.'s consent. To the extent conflicting evidence was presented, and discrepancies in J.L.'s and L.O.'s accounts were brought out at trial, "it is the jury's function to weigh the evidence as a whole, to resolve any inconsistencies therein, and then to determine whether or not a reasonable doubt exists." *State v. Money*, 110 Ariz. 18, 25, 514 P.2d 1014, 1021 (1973).

CONCLUSION

¶20 We affirm Orozco-Quesada's conviction and sentence. Counsel's obligations pertaining to Orozco-Quesada's

representation in this appeal have ended. Counsel need do nothing more than inform Orozco-Quesada of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Orozco-Quesada shall have thirty days from the date of this decision to proceed, if he desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/

MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/

PETER B. SWANN, Judge

/s/

DONN KESSLER, Judge