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: 11/29/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 10-0932
	)	DEPARTMENT C
v.	)	MEMORANDUM DECISION
ADALBERTO CANO, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007803-001 DT

The Honorable Steven P. Lynch, Judge Pro Tempore

CONVICTIONS AFFIRMED AS MODIFIED; REMANDED FOR RESENTENCING

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals Section/
Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Peg Green, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Adalberto Cano (defendant) appeals the trial court's order finding him guilty of kidnapping, a class 2 dangerous

felony, aggravated assault, a class 3 dangerous felony, and theft by extortion, a class 2 dangerous felony. For the following reasons, we affirm defendant's convictions for kidnapping and aggravated assault and affirm as modified defendant's conviction for theft by extortion, a class 4 felony, and remand that count for resentencing.

FACTS[1] AND PROCEDURAL BACKGROUND

¶2 In November 2009, defendant was indicted on one count of kidnapping, a class 2 dangerous felony, one count of theft by extortion, a class 2 dangerous felony, three counts of aggravated assault, class 3 dangerous felonies, and one count of drive by shooting, a class 3 dangerous felony.

¶3 The case proceeded to trial and M.C.[2] testified that at approximately 8:30 p.m. on June 4, 2009, M.C.'s boyfriend, S.R., and friend, F.L., went to Target to buy ice cream. As S.R. and F.L. began walking toward the entrance to Target, defendant, holding a black handgun, and Martin Bustamante exited a vehicle driven by Brittney Lewis, and approached S.R. A witness saw defendant put the gun to S.R.'s chest and heard defendant tell S.R., "Get in the car. Get the fuck in the car." S.R. was "taken away" in a vehicle occupied by defendant, Bustamante, and

[1] We review the evidence and inferences drawn from the evidence in a light most favorable to upholding the verdict. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

[2] The victims' initials are used to protect their identities.

Lewis. F.L. immediately called M.C. and explained what had happened.

¶4 At approximately 9:15 p.m. that same evening, M.C. received a telephone call from S.R. saying to "do what they say" and he hung up. M.C. contacted the police, and a police officer arrived at M.C.'s house soon thereafter. S.R. called M.C. a second time that evening and instructed M.C., per orders from his abductors, to take $30,000.00 and her Mercedes Benz and drop both the money and the Mercedes Benz off at a specified location. M.C. received one other phone call that evening from S.R. telling her to "[h]urry up" and that if she did not take the money to the captors, "they were going to kill him." M.C. did not drop off the money and the vehicle that evening.[3] The following morning, M.C. went to the police station and received another call on her cellular phone from S.R. asking what had happened to her. She also received a telephone call from an unidentified caller telling her to "hurry up and drop off [her] car, put [her] keys in the gas tank . . . and put the . . . $30,000 in the trunk of the car" at a shopping mall parking lot.

¶5 Detective Pablo Garcia testified that on the morning of June 5, 2009, he observed a black vehicle approach the Mercedes Benz, which was parked in the shopping mall parking

[3] The record is unclear why M.C. failed to comply with the captors' demands that evening.

lot. Defendant, Bustamante, Lewis, and S.R. were inside the vehicle.[4] Defendant exited the vehicle, approached the Mercedes Benz, removed the car keys from the gas cap, and opened the door. The SWAT Team then arrested Defendant, Bustamante, and Lewis. Police found S.R. in the backseat of the black vehicle, wearing only a shirt, boxers, and socks. S.R. had a cut on the bridge of his nose and the side of his head, as well as other injuries on his body that were consistent with being hit. The police impounded the suspects' vehicle and found, among other items, a loaded revolver handgun under the driver's seat.

¶6 After the State rested, defendant's counsel moved, pursuant to Arizona Rules of Criminal Procedure (Rule) 20, for a directed verdict on all counts. The trial court denied the motion for the charges of kidnapping, theft by extortion, and one aggravated assault count. The court, however, granted the motion for the remaining counts. The jury found defendant guilty of kidnapping, a class 2 dangerous felony, theft by extortion, a class 2 dangerous felony, and aggravated assault, a class 3 dangerous felony. The court sentenced defendant to 9.5 years for kidnapping, 7 years for aggravated assault, to be served concurrently with the kidnapping count, and 9.5 years for theft by extortion, to be served consecutively with the other two counts.

[4] Video surveillance confirmed Detective Garcia's observations.

¶7 Defendant appealed his theft by extortion conviction. We have jurisdiction under Article VI, section 9 of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031, and -4033(A) (2010).

DISCUSSION

¶8 Defendant argues that the trial court erred by denying his Rule 20 motion for the theft by extortion count because theft by extortion as a class 2 felony requires the State prove defendant threatened to cause physical injury by means of a deadly weapon or dangerous instrument and the State failed to do so. A.R.S. § 13-1804(A) (Supp. 2010). We review the denial of a Rule 20 motion "for an abuse of discretion and will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001).

¶9 Theft by extortion is a class 2 felony if a person "knowingly obtaining or seeking to obtain property or services by means of a threat to do in the future . . . [c]ause[s] physical injury to anyone by means of a deadly weapon or dangerous instrument." A.R.S. § 13-1804(A)(1), (C). Theft by extortion is a class 4 felony if a person "knowingly obtaining or seeking to obtain property or services by means of a threat to do in the future" "[c]ause[s] physical injury to anyone" in

the absence of a deadly weapon or dangerous instrument. A.R.S. § 13-1804(A)(1), (2).

¶10 Defendant argues that the holding in *State v. Garcia*, 227 Ariz. 377, 258 P.3d 195 (App. 2011), which was issued after the trial in this case, supports his argument that the trial court erred in denying his Rule 20 motion because the State failed to present substantial evidence of a threat to cause physical injury using a deadly weapon or dangerous instrument. In *Garcia*, the victim was approached by four men who beat him with a shotgun, a rifle, and another weapon before kidnapping him. *Id*. at 378, ¶ 3, 258 P.3d at 196. One of the captors threatened to kill the victim after abducting him. *Id*. The kidnappers asked for money and methamphetamines from the victim's family and "said they would kill the victim if their demands were not met." *Id*. at ¶ 6. Police officers arranged to drop the money off at a specified location and arrested the defendant and the other suspects after they retrieved money from the drop point. *Id*. at 379, ¶ 7, 258 P.3d at 197. The defendant was tried and convicted of several counts, but solely appealed his two class 2 felony theft by extortion convictions, arguing that the State presented no evidence he had threatened to injure the victim with a deadly weapon or dangerous instrument. *Id*. at ¶ 11. This court held that "the act of threatening death alone neither results in, nor qualifies for,

punishment as a class 2 felony" and a deadly weapon or dangerous instrument may not be inferred because a victim's life was threatened. *Id*. at 380, 381, ¶ 14, ¶ 16, 258 P.3d at 198, 199. This court concluded that although Garcia's convictions for theft by extortion under § 13-1804(A)(1) were not supported by sufficient evidence, the evidence supported convictions under § 13-1804(A)(2), class 4 felonies. *Id*. at 381, ¶ 18, 258 P.3d at 199.

¶11 In this case, defendant approached S.R., and a witness saw defendant put a gun to S.R.'s chest and demand S.R. get in the car. S.R. subsequently told his girlfriend that the captors were going to kill him if she did not meet their demands. S.R. did not say how they were going to kill him or with what. Thus, because a jury cannot infer the use of a deadly weapon or dangerous instrument merely because S.R.'s life was threatened, and the State presented no evidence to support such an inference, we hold that there was insufficient evidence to support defendant's conviction for theft by extortion under A.R.S. § 13-1804(A)(1). *See Garcia*, 227 at 381, ¶ 18, 258 P.3d at 199. We do, however, conclude there was sufficient evidence to support a conviction for the lesser included offense of theft by extortion pursuant to § 13-1804(A)(2), a class 4 felony. We therefore modify the judgment to reflect that the theft by

extortion conviction is a class 4 felony and remand for resentencing. Ariz. R. Crim. P. 31.17(d).

CONCLUSION

¶12 For the foregoing reasons, we affirm defendant's convictions for kidnapping and aggravated assault and affirm as modified defendant's conviction for one count of theft by extortion as a class 4 felony and remand for resentencing on this count.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MICHAEL J. BROWN, Presiding Judge

_/s/_____
ANN A. SCOTT TIMMER, Judge