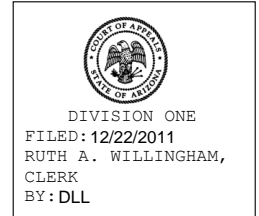


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0245  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
RAYMOND JAMES MERCADO, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-125243-001 DT

The Honorable Susan M. Brnovich, Judge

**AFFIRMED**

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

James J. Haas, Maricopa County Public Defender Phoenix  
By Eleanor S. Terpstra, Deputy Public Defender  
Attorney for Appellant

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**D O W N I E**, Judge

¶1 Raymond James Mercado timely appeals his conviction  
for one count of first-degree burglary and four counts of

kidnapping, all class 2 dangerous felonies, in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1301, -1304, -1501, -1507, and -1508. 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). Mercado did not file a supplemental brief *in propria persona*, but counsel has identified three issues for our review. We view the evidence in the light most favorable to sustaining the conviction. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied*, 459 U.S. 882 (1982).

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Late in the evening of May 14, 2010, Mercado and his friend "Garrett" went to a fast food restaurant; while there, Garrett suggested they "rob" a nearby apartment for marijuana and possibly money. Mercado and Garrett drove to the apartment building in Garrett's vehicle and saw M.B. sitting outside. They asked her "where the guy went that works across the street at the gas station." Believing the men knew her next door neighbor, M.B. directed them to his apartment.

¶3 K.B., W.B., L.G., and D.G. were inside when Garrett and Mercado knocked on the apartment door. When K.B. answered,

the two men "barged in" and threw K.B. to the ground. Garrett pointed a gun at the occupants and asked, "Where is the money? What do you got here?" Mercado told the four to empty their pockets and began searching W.B. while Garrett searched the apartment. D.G. retrieved his gun from behind a couch and chambered a round. When Garrett went into another room, D.G. put the gun to Mercado's head. Mercado grabbed the gun, but D.G. tackled him and pinned him down. D.G. pointed his gun toward the hallway and waited for Garrett to emerge. When he did, D.G. told Garrett to lower his gun. When Garrett instead raised his weapon, D.G. shot twice, and Garrett returned fire. K.B., W.B. and L.G. fled and called 911.

¶4 Officers responded to a "shots fired call." At the scene, officers determined people were still inside the apartment, with someone being held at gunpoint. An officer using a public address system announced police presence and commanded the occupants to exit with "their hands empty." When Mercado exited, an officer asked questions to "figure out what [was] going on," specifically whether there was a weapon or injured people inside. Mercado stated that he and Garrett had attempted to rob the apartment, but when Garrett "pulled out [his gun], the homeowner also pulled out a gun and pointed it at Garrett." At that point, Mercado said he closed his eyes and "heard gunshots going off."

¶15 Inside the apartment, officers found a handgun on the coffee table, a handgun magazine on the floor nearby, and bullet holes in the walls. Garrett was on the floor in the bedroom with a handgun by his feet; he was pronounced dead at the scene.

¶16 Mercado was taken to the police station. After receiving *Miranda* warnings, Mercado stated that he and Garrett went to the apartment to "possibly buy some marijuana" and that he acted as a "mediator" after Garrett and D.G. pulled out their weapons. When confronted with his on-the-scene comments, though, Mercado admitted he and Garrett planned the burglary, that "he went in there with Garrett, Garrett produced a gun, and [Mercado] told everybody . . . to stay down and . . . started searching" W.B.'s pockets. Officers impounded a vehicle parked near the apartment complex that matched a description Mercado provided. Inside, officers found legal papers belonging to Garrett and a fast food restaurant receipt dated May 14 at 10:46 p.m.

¶17 Mercado was indicted on one count of first-degree burglary (count 1), four counts of kidnapping (counts 2-5), and one count of first-degree murder (count 6). Each count was charged as a dangerous felony because a handgun was used. A three-day jury trial ensued. At the conclusion of the State's case, Mercado moved for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure. The motion was denied.

After deliberation, the jury found Mercado guilty of counts 1-5, which were found to be dangerous felonies; it found him not guilty of count 6.

¶8 The trial court sentenced Mercado to presumptive terms of 10.5 years on counts 1, 2, and 3, running concurrent to each other, but consecutively to counts 4 and 5. On counts 4 and 5, Mercado received presumptive terms of 10.5 years, running concurrent to each other but consecutively to the other counts. Mercado received 324 days' pre-sentence incarceration credit for counts 1, 2 and 3.

#### **DISCUSSION**

¶9 We have read and considered the brief submitted by 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. Defendant was present at all critical phases of the proceedings and was represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

¶10 In the opening brief, counsel presents three issues at Mercado's request, which we address in turn.

## I. Sentencing

¶11 Mercado contends the trial court should have imposed concurrent terms for each count.<sup>1</sup> We disagree.

¶12 "Except as otherwise provided by law, if multiple sentences of imprisonment are imposed on a person at the same time, the sentence or sentences . . . shall run consecutively unless the court expressly directs otherwise . . . [and] set[s] forth on the record the reason for its sentence." Ariz. Rev. Stat. ("A.R.S.") § 13-711(A). Consecutive sentences cannot, however, be imposed "[i]f a defendant's conduct constitutes a 'single act[.]'" *State v. Stock*, 220 Ariz. 507, 509, ¶ 11, 207 P.3d 760, 762 (App. 2009). To determine whether a defendant committed a "single act," we subtract the evidence necessary to convict on the most serious charge and consider whether the remaining evidence satisfies the elements of the other crime. *Id.* (citation omitted). If it does, "the defendant committed multiple acts and should receive consecutive sentences." *Id.* (citation omitted). As we discuss next, the trial evidence

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<sup>1</sup> Mercado also contends his sentence was excessive, but the sentences imposed fall within the statutory range. We also find no error in the classification of the first-degree burglary conviction as a dangerous offense, even though use of a deadly weapon is an element of first degree burglary. See *State v. Rybolt*, 133 Ariz. 276, 281, 650 P.2d 1258, 1263 (App. 1982), overruled on other grounds by *State v. Diaz*, 142 Ariz. 119, 688 P.2d 1011 (1984).

clearly demonstrates that Mercado committed separate acts warranting the imposition of consecutive terms.

**A. Burglary**

¶13 A person commits burglary in the first degree if he enters or remains unlawfully in a residence with the intent to commit a theft or any felony therein while the person or accomplice knowingly possesses a dangerous weapon in the course of committing a theft or felony. A.R.S. §§ 13-1507(A), -1508(A). An accomplice is a person who acts with the intent to promote or facilitate the commission of an offense and aids another in planning or committing an offense. A.R.S. § 13-301.

¶14 Mercado told officers that he and Garrett planned to rob the apartment to "get some marijuana and possibly some money." K.B. testified she opened the door that night expecting friends, but Mercado and Garrett "barged in," threw her to the ground, and immediately "demanded money, and . . . started searching the house." Mercado told officers that Garrett produced the gun once they were inside and that Mercado told "everybody to stay down." From these facts, a reasonable juror could conclude that Mercado unlawfully entered the apartment with the intent to take drugs and money, and that Garrett was Mercado's accomplice and possessed a deadly weapon.

## **B. Kidnapping**

¶15 Mercado was convicted of four counts of kidnapping, each pertaining to an individual victim. "A person commits kidnapping by knowingly restraining another person with the intent to . . . [p]lace the victim or a third person in reasonable apprehension of imminent physical injury to the victim or third person . . . ." A.R.S. § 13-1304(A)(4). The pre-sentence investigation report recounted the individual losses each victim suffered.

¶16 W.B. testified that Garrett "was screaming, telling everyone to get on the ground or he [would] shoot them." The other occupants also testified that Garrett pointed the gun at them, told them to get down on the ground, and that Mercado kept the occupants in the living room while Garrett checked the apartment. They further testified that Garrett carried the gun as he went back and forth between the other areas in the apartment and the living room. L.B. testified that she was terrified and kept her head down while D.G. and Garrett exchanged gunfire because shots were "going over [her] head." Even after D.G. restrained Mercado, the occupants stayed in the apartment because they did not know where "the other guy with the gun" was. Given these facts, reasonable jurors could conclude the four occupants were restrained with the intent to



place them in reasonable apprehension of imminent physical injury. A.R.S. § 13-1304(A)(4).

## II. Statements

¶17 Mercado next contends his statements were involuntary and should not have been admitted. Mercado does not, however, identify the statements he believes were inadmissible. We presume his objection relates to on-the-scene questions posed immediately after he exited the apartment and before *Miranda* warnings were issued.

¶18 Police officers are required to inform suspects of certain constitutional rights before conducting custodial interrogation, but that requirement is "not intended to hamper the traditional function of police officers in investigating crime." *Miranda v. Arizona*, 384 U.S. 436, 447 (1966) (citation omitted). The record here does not establish that Mercado was subject to the type of interrogation that *Miranda* seeks to prevent. See *State v. Schinzel*, 202 Ariz. 375, 380, ¶ 21, 45 P.3d 1224, 1229 (App. 2002) (citations omitted) ("*Miranda* warnings are meant to preserve the privilege against self-incrimination during 'incommunicado interrogation of individuals in a police-dominated atmosphere' because such surroundings create 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'").

¶19 Officers responded to a "home invasion/robbery" with "shots fired." They knew that people were still in the apartment, but were unsure what was happening inside. The uncontroverted trial evidence was that an officer questioned Mercado about weapons and injuries in order for the police "to know what [was] going on." This type of on-the-scene questioning is "not affected" by *Miranda* because "the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U.S. at 477-78; see also *State v. Heath*, 122 Ariz. 36, 39, 592 P.2d 1302, 1305 (App. 1979) (*Miranda* warnings not required in "emergency situation" where officer's questions are "designed to determine what had occurred and to protect those present").

¶20 Additionally, jurors were instructed not to consider statements Mercado made to officers unless they first determined the statements were voluntarily made. We presume the jury followed its instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (citation omitted).

### **III. Ineffective Assistance of Counsel**

¶21 Finally, Mercado raises claims of ineffective assistance of counsel. Such claims must be brought in proceedings pursuant to Rule 32, Arizona Rules of Criminal Procedure. "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts

regardless of their merit." *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

**CONCLUSION**

¶22 We affirm Mercado's conviction and sentence. Counsel's obligations pertaining to Mercado's representation in this appeal have ended. Counsel need do nothing more than inform Mercado 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, Mercado shall have 30 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