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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALFREDO QUIJADA, Appellant.	2 CA-CR 2012-0157 DEPARTMENT B <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111320001

Honorable Clark W. Munger, Judge

AFFIRMED

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Attorneys for Appellee

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K E L L Y, Judge.

¶1 Following a jury trial, Alfredo Quijada was convicted of one count each of assault and kidnapping, and two counts of sexual assault. The trial court imposed a sentence of time-served on the assault count and consecutive, maximum, twenty-eight

year terms of imprisonment on the remaining counts, for a total sentence of eighty-four years. On appeal, Quijada argues his conviction for kidnapping violates double jeopardy, and the court erred both in imposing consecutive sentences and in considering his lack of remorse as an aggravating factor.[1] We affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Gray*, 227 Ariz. 424, ¶ 3, 258 P.3d 242, 243 (App. 2011). One night in October 2009, victim A.V. went with her boyfriend to his cousin's home in Tucson. Around 3:00 a.m., A.V. asked her boyfriend to drive her home but he refused. A.V. then telephoned her friend A.A. who agreed to pick her up at a nearby intersection. While A.V. was walking to the intersection, Quijada approached and grabbed her arm, forced her to an area near an abandoned building, and then penetrated her vagina with his fingers and penis. Quijada eventually released A.V. and fled.

¶3 A.A. had been on the telephone with A.V. while she was walking to the intersection. She testified A.V. had "sounded scared" and had asked A.A. "to stay on the phone . . . until [she] got to her." A.A. heard a "scuffle," followed by A.V. saying "[s]top, [l]et me go." A.V.'s telephone "went dead" and after trying to call her numerous times and receiving no answer, A.A. contacted the police.

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[1]Quijada also claims his assault conviction must be reversed based upon duplicity in the indictment and charge. Because he withdraws this argument in his reply brief, we do not address it.

¶4 A.V. was taken to the hospital and a sexual assault examination was performed. Semen containing Quijada's DNA[2] was discovered on her body. After a jury trial, Quijada was convicted and sentenced as noted above and this appeal followed.

Discussion

Double Jeopardy

¶5 Quijada argues his conviction for kidnapping violates principles of double jeopardy because kidnapping is a lesser-included offense of sexual assault. Because he did not object on this ground at trial, we review for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). A double jeopardy violation is fundamental error. *State v. Siddle*, 202 Ariz. 512, n.2, 47 P.3d 1150, 1153 n.2 (App. 2002).

¶6 The double jeopardy clauses of the Arizona and United States Constitutions prohibit the imposition of multiple convictions and punishments for the same offense. *Lemke v. Rayes*, 213 Ariz. 232, ¶ 10, 141 P.3d 407, 411 (App. 2006). Therefore, when a defendant is convicted of an offense, double jeopardy prohibits further prosecution for that or any lesser-included offense. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 10, 965 P.2d 94, 96-97 (App. 1998). To determine whether offenses are the "same offense" for purposes of double jeopardy, we apply the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). *See Lemke*, 213 Ariz. 232, ¶ 16, 141 P.3d at 413.

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[2]Deoxyribonucleic acid.

¶7 In *State v. Eagle*, our supreme court applied *Blockburger* and determined sexual assault and kidnapping are separate offenses that may be punished separately without violating double jeopardy. 196 Ariz. 188, ¶¶ 6, 18, 994 P.2d 395, 397, 399-40 (2000). Quijada argues at length that *Eagle* was wrongly decided. However, as he concedes, we are bound by the decisions of our supreme court and thus have no authority to overrule it. *See State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007).

¶8 Quijada also claims his case is distinguishable from *Eagle* because the verdict form for his kidnapping charge contained an interrogatory asking the jury to determine if he had released A.V. voluntarily and without harm in a safe place before his arrest and before sexually assaulting her.[3] *See* A.R.S. § 13-1304(B). He contends the interrogatory constituted "an additional element" of the kidnapping offense that required completion of the sexual assault and therefore his convictions "violate double jeopardy in a way that Eagle's did not." But, our supreme court considered and rejected a similar argument in *Eagle*. 196 Ariz. 188, ¶¶ 9, 10, 17, 994 P.2d at 397-98, 399-400 (holding voluntary and unharmed release not an element of kidnapping but rather a "mitigating factor relevant solely for sentencing purposes"). Therefore, because kidnapping is a separate offense from sexual assault, Quijada's convictions do not violate double jeopardy. *See id.* ¶ 18.

[3]As the state points out, Quijada requested this interrogatory and the state objected. Therefore, to the extent Quijada claims it resulted in error, the error was invited. *See State v. Logan*, 200 Ariz. 564, ¶ 8, 30 P.3d 631, 632 (2001) (party requesting erroneous instruction invites error and thus waives right to challenge on appeal).

Consecutive Sentences

Kidnapping

¶9 Quijada argues the trial court erred in ordering his kidnapping sentence to be served consecutive to the sexual assault sentences because Arizona's double punishment statute, A.R.S. § 13-116, requires that it be concurrent. Quijada did not object on this ground at sentencing and we therefore review solely for fundamental prejudicial error.[4] *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. An illegal sentence, however, constitutes fundamental error. *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d 1069, 1080 (App. 2009); *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007).

¶10 Section 13-116 may "bar consecutive sentences even though double jeopardy principles do not." *State v. Price*, 218 Ariz. 311, ¶ 13, 183 P.3d 1279, 1283 (App. 2008). It provides: "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." § 13-116. "Unlike our double jeopardy analysis, which focuses on the elements of distinct statutory offenses to determine if they are the same offense, our analysis under § 13-116 focuses on the 'facts of the transaction' to determine if the defendant committed a single act." *Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d at 1155, *quoting State v. Gordon*, 161 Ariz. 308, 313 n.5, 778 P.2d 1204, 1209 n.5

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[4]Because we find no error, fundamental or otherwise, we need not determine whether the limited exception to fundamental error review set forth in *State v. Vermuele* applies. *See* 226 Ariz. 399, 249 P.3d 1099 (App. 2011).

(1989). To determine whether conduct constitutes a single act for the purposes of § 13-116, we apply the following test:

> First, we must decide which of the two crimes is the "ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." Then, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge." If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." Finally, we consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime."

State v. Urquidez, 213 Ariz. 50, ¶ 7, 138 P.3d 1177, 1179 (App. 2006), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (citations omitted; alteration in *Urquidez*).

¶11 The parties assert, and we agree, that sexual assault is the "ultimate charge." *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. To convict Quijada of that charge, the state was required to prove he "intentionally or knowingly engag[ed] in sexual intercourse . . . with [A.V.] without [her] consent." A.R.S. § 13-1406(A). The evidence established that after Quijada shoved A.V. against the wall of the abandoned building, he pushed her to the ground and had nonconsensual sexual intercourse with her.

¶12 Subtracting the facts necessary to establish sexual assault, sufficient evidence remained to prove the kidnapping charge. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Quijada restrained A.V. by grabbing her arm and taking her to an abandoned

building where he pushed her against a wall and attempted to remove her pants.[5] *See* A.R.S. § 13-1304(A) ("A person commits kidnapping by knowingly restraining another person with the intent to . . . [i]nflict . . . physical injury or a sexual offense.").

¶13 Proceeding to the next part of the *Gordon* test, we consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Quijada argues that here, as in *Gordon*, it was impossible to commit sexual assault without also committing kidnapping. In *Gordon*, the defendant sexually assaulted the victim within her home. *Id.* at 309, 315, 778 P.2d at 1205, 1211. The court reasoned that, because the restraint used for the kidnapping charge was that inherent in the sexual assault, the defendant could not have committed the sexual assault without committing the kidnapping. *Id.* at 315-16, 778 P.2d at 1211-12.

¶14 Unlike *Gordon*, the restraint necessary for the kidnapping charge here was not limited to that used by Quijada during the sexual assault, but also existed beforehand when Quijada forced A.V. to the building from the street. *See* A.R.S. § 13-1301(2) (restraint element of kidnapping may be met by either "confining" person or moving person "from one place to another" without consent). Under the facts presented here, it was not impossible to commit the ultimate crime of sexual assault without committing the secondary crime of kidnapping. Accordingly, because we conclude Quijada's

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[5]Although A.V. testified that Quijada had pointed a gun at her when he approached, and had held the gun against her head while sexually assaulting her, the jury found unproven the allegation Quijada had used a firearm while committing the assault.

conduct did not constitute a single act, the trial court's imposition of a consecutive sentence did not violate § 13-116.[6] *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

Sexual Assault

¶15 Quijada also claims the trial court erred in ordering the sexual assault counts to be served consecutive to one another because it may have wrongly interpreted A.R.S. § 13-1406(C) and thus been "unaware of th[e] fact" that sentences for sexual assault convictions may be concurrent. We review the court's decision to impose consecutive sentences for abuse of discretion. *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). We review de novo questions involving interpretation of sentencing statutes. *State v. Diaz*, 224 Ariz. 322, ¶ 10, 230 P.3d 705, 707 (2010).

¶16 Section 13-1406(C) provides "[t]he sentence imposed on a person for a sexual assault shall be consecutive to any other sexual assault sentence imposed on the person at any time." Quijada asserts that, despite the plain language of the statute, its

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[6]Because we conclude Quijada's conduct did not constitute a single act, we need not consider the third *Gordon* factor—whether the kidnapping increased the risk of harm to A.V. beyond that inherent in the sexual assault. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (if analysis of the first and second factors indicates a single act under § 13-116, the court "will then consider" the third factor); *see also State v. Anderson*, 210 Ariz. 327, ¶ 143, 111 P.3d 369, 400 (2005) (determining offenses were not a single act without reaching third factor of *Gordon* analysis); *State v. Carreon*, 210 Ariz. 54, ¶¶ 104-06, 107 P.3d 900, 920-21 (2005) (same); *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (*Gordon* does not require reaching third factor if consecutive sentences permissible under first two factors); *accord State v. Urquidez*, 213 Ariz. 50, ¶ 9, 138 P.3d 1177, 1179 (App. 2006) (considering third *Gordon* factor because first and second factors not determinative).

legislative history indicates the legislature intended only to "permit[]" rather than mandate the trial court to impose consecutive sentences.[7]

¶17 Our primary goal in interpreting a statute is to effectuate the intent of the legislature. *State v. Ross*, 214 Ariz. 280, ¶ 22, 151 P.3d 1261, 1264 (App. 2007). We look first to the plain language of the statute as the best indicator of that intent and give that language effect when it is clear and unambiguous. *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7, 111 P.3d 1027, 1030 (App. 2005). Therefore, "[w]hen the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernible from the face of the statute." *State v. Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d 1241, 1243 (2003).

¶18 Quijada urges us to look beyond the language of the statute to its legislative history, which he claims establishes the legislature did not intend to require consecutive sentences under the circumstances of his case. However, because § 13-1406(C) clearly and unambiguously states that a sentence for sexual assault "shall be consecutive to any other sexual assault sentence imposed . . . at the same time," we need not consider its legislative history. *Id.*; *see also State v. Lewis*, 224 Ariz. 512, ¶ 17, 233 P.3d 625, 628 (App. 2010) ("'[S]hall' typically indicates a mandatory provision."). Section 13-1406(C)

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[7]Although the state argued the trial court was required to impose consecutive sentences on the sexual assault convictions "pursuant to the statute," the court did not expressly rely on § 13-1406(C). However, we presume the court was aware of and properly applied the provision. *See State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996) (trial court "presumed to know and follow the law").

mandated consecutive sentences on the sexual assault counts; therefore the trial court did not err in ordering the sentences be served consecutively.

Aggravated Sentence

¶19 Quijada argues the trial court erred in considering his "lack of remorse and . . . theory of defense" as a factor supporting aggravated sentences. "A trial court has broad discretion" to determine the appropriate sentence and we will not disturb its decision absent a clear abuse of discretion. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003).[8]

¶20 At sentencing, the trial court stated it had considered the aggravating and mitigating factors presented. It then found the aggravating factors outweighed the mitigating factors and cited Quijada's prior criminal history, specifically mentioning several felony convictions, and the traumatic impact of the assault on A.V. *See* A.R.S. § 13-701(D)(9), (11). The court also cited Quijada's testimony at trial, explaining:

> The third aspect of this that I want to mention is this is a case where the . . . defendant took the stand on his own behalf, which he has every right to do, but his testimony showed a complete lack of compassion and remorse. He testified that the victim was, in fact, a prostitute. And that the basis for this case was he just didn't pay her.
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> Now it's one thing to sexually assault a person. It's another to aggravate it by accusing them of being a prostitute.

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[8]Quijada did not object on this ground at sentencing. But, as he argues, and the state concedes, because the alleged error did not "become apparent until the court's pronouncement of sentence," we do not limit our review to fundamental error. *Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d at 1101.

¶21 On appeal, Quijada argues the trial court's statement indicated it was considering his lack of remorse as an aggravating factor. Citing our decisions in *State v. Hardwick*, 183 Ariz. 649, 905 P.2d 1384 (App. 1995) and *State v. Trujillo*, 227 Ariz. 314, 257 P.3d 1194 (App. 2011), he contends this violated his Fifth Amendment privilege against self-incrimination. This privilege "'protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.'" *State v. Thornton*, 187 Ariz. 325, 330, 929 P.2d 676, 682 (1996), *quoting Schmerber v. California*, 384 U.S. 757, 761 (1966).

¶22 In *Hardwick*, we concluded the trial court erred by considering the defendant's lack of remorse as an aggravating factor. 183 Ariz. at 656, 905 P.2d at 1391. We reasoned that failure to express remorse is "tantamount to a refusal to admit guilt" and the use of a "convicted defendant's decision not to publicly admit guilt" as an aggravating factor violates the Fifth Amendment privilege against self-incrimination. *Id.* Similarly, following the reasoning of *Hardwick*, in *Trujillo* we concluded the defendant's lack of remorse amounted to failure to admit guilt and the court's consideration of this factor therefore violated the Fifth Amendment. 227 Ariz. 314, ¶¶ 11, 12, 15, 257 P.3d at 1197-98; *see also State v. Carriger*, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984) ("A defendant is guilty when convicted and if he chooses not to publicly admit his guilt, that is irrelevant to a sentencing determination.").

¶23 Quijada argues that "[a]kin to *Hardwick* and *Trujillo*," the trial court aggravated his sentences because he "chose to remain silent as to culpability for the crime." We disagree, however, with Quijada's characterization of the court's remarks,

and instead conclude the court's focus was on what Quijada actually said rather than on what he chose not to say. Unlike *Trujillo* and *Hardwick*, the court's statement was not "tantamount" to considering the defendant's refusal to admit guilt as an aggravating factor. *See Trujillo*, 227 Ariz. 314, ¶¶ 6, 14, 257 P.3d at 1196, 1198; *Hardwick*, 183 Ariz. at 656-57, 905 P.2d at 1391-92. Nor did the court focus upon the lack of remorse—instead referring to it a single time while discussing Quijada's testimony. *Cf. Trujillo*, 227 Ariz. 314, ¶¶ 6, 14, 257 P.3d at 1196, 1198 (trial court "repeatedly admonished" defendant for lack of remorse and "failure to admit responsibility for his crimes"). And the context in which the statement occurred indicates the court was not concerned with Quijada's lack of remorse or failure to admit guilt, but instead with his incredible testimony that A.V. was a prostitute "[a]nd that the basis for th[e] case was he just didn't pay her."[9]

¶24 In *United States v. Grayson*, 438 U.S. 41, 50, 55 (1978), the United States Supreme Court held that a sentencing judge properly may consider a defendant's false testimony. The Court explained, "[a] defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, [is] probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." *Id*. at 50; *see also State v. Suniga*, 145 Ariz. 389, 395, 701 P.2d 1197, 1203 (App. 1985) ("The

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[9]Quijada testified A.V., who had been alone and "standing on a street corner," approached him and asked if he "wanted to have a good time." He claimed she had asked him for money several times, but he had told her he would "give her the money after." He stated A.V. had taken him to the abandoned building and had consensual sex with him, and afterward he had refused to pay her. He contended A.V. was "angry" because she had not been paid.

trial court . . . may consider all evidence and information presented at all stages of the trial . . . [including] the general moral character of the defendant.”). And, consideration of a defendant’s false testimony does not undermine a defendant’s right to testify or present a defense because “[t]here is no protected right to commit perjury.” *Grayson*, 438 U.S. at 54; *see also United States v. Dunnigan*, 507 U.S. 87, 97 (1993) (A defendant who resorts to false testimony under oath “is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process.”).

¶25 We addressed a similar situation in *State v. McDonald*, 156 Ariz. 260, 751 P.2d 576 (App. 1987). In that case, the trial court aggravated the defendant’s sentence based on the “outrageous falsehood” presented in his testimony. 156 Ariz. at 263, 751 P.2d at 579. On appeal, the defendant argued the court effectively aggravated his sentence based upon his refusal to admit guilt. *Id.* Citing *Grayson*, we affirmed, concluding the court had aggravated the defendant’s sentence based upon his false testimony, not his failure to admit guilt. *Id.*

¶26 Under the facts presented, we conclude the trial court did not aggravate Quijada’s sentence based upon his failure to admit guilt.[10] Rather, as in *McDonald*, the court was concerned with the false nature of the testimony and its reflection on Quijada’s character. 156 Ariz. at 263, 751 P.2d at 579. The court was permitted to consider this in

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[10]In his reply brief, Quijada concedes the trial court may consider a defendant’s false testimony in determining an appropriate sentence. However, he argues it is unclear the court aggravated his sentence on this basis because his testimony “was not . . . obviously perjured” and the court did not expressly find it was false. But, the jury rejected Quijada’s defense, and it is clear from the court’s comments that it also considered Quijada’s testimony to be false.

determining an appropriate sentence and, accordingly, did not abuse its discretion. *See Grayson*, 438 U.S. at 50; *McDonald*, 156 Ariz. at 263, 751 P.2d at 579; *Suniga*, 145 Ariz. at 395, 701 P.2d at 1203.

Disposition

¶27 Quijada's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge