IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAMIEN STEVEN DOYLE,
Appellant.

No. 2 CA-CR 2016-0231
Filed June 26, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20150060001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Elizabeth B. N. Garcia, Assistant Attorney General, Phoenix
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Damien Doyle was convicted of kidnapping and aggravated robbery. On appeal, he argues the trial court erred by precluding text messages sent between the victim and a witness before the incident and by failing sua sponte to give an instruction during jury deliberations on unlawful imprisonment as a lesser-included offense of kidnapping. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). On November 23, 2014, C.A. visited Jessica Vantsant at her apartment. Vantsant, David Aguirre, and Doyle had previously planned for Aguirre and Doyle to rob C.A. during the visit.

¶3 About fifteen minutes after C.A. arrived, Doyle and Aguirre arrived, put a shirt over C.A.'s head, forced him onto the floor, and tied his hands together using zip ties. Doyle told C.A. that Vantsant "owed a debt and she wasn't able to pay it, so it had" become C.A.'s responsibility. Doyle and Aguirre took C.A.'s car keys, wallet, cigarettes, cell phone, and necklace. Doyle and Vantsant then left in Doyle's car, and Aguirre left in C.A.'s car. C.A. was eventually able to remove the zip ties and went to a neighbor who called 9-1-1.

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[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

¶4 A grand jury indicted Doyle for one count each of armed robbery, kidnapping, aggravated robbery, and aggravated assault.[2] The jury found him guilty of the aggravated robbery and kidnapping counts and not guilty on the remaining charges. The trial court sentenced him to concurrent sentences, the longest of which is 9.25 years. We have jurisdiction over Doyle's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Text Messages

¶5 Doyle first argues the trial court erred by precluding text messages sent between C.A. and Vantsant nearly six weeks before the November 23 incident. He contends this violated his Confrontation Clause rights because he was prevented from effectively impeaching C.A. and Vantsant.[3] We review the admission of evidence for an abuse of discretion, but review de novo evidentiary rulings that

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[2]The grand jury also indicted Doyle for weapons misconduct, possession of a dangerous drug, and possession of drug paraphernalia. The drug charges were severed from this trial, and Doyle pled guilty to the weapons misconduct charge. Those charges are thus not at issue in this appeal. *See* A.R.S. § 13-4033(B).

[3] Below, Doyle objected on the ground that he could not effectively impeach C.A. and Vantsant on cross-examination, but he did not explicitly raise a Confrontation Clause issue. Although the state argues that Doyle has waived any review of the issue because of his failure to raise it below, this court has found that an objection based on a defendant's inability to cross-examine a witness is sufficient to preserve a Confrontation Clause argument on appeal. *State v. King*, 212 Ariz. 372, ¶ 14, 132 P.3d 311, 314 (App. 2006). Consequently, because Doyle asserts that his inability to impeach C.A. and Vantsant caused a Confrontation Clause violation, we address his argument on the merits. *See id.*; *see also Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (right to confront witnesses includes right to impeach on cross-examination); *State v. Goudeau*, 239 Ariz. 421, ¶ 52, 372 P.3d 945, 967 (2016) (same).

implicate the Confrontation Clause. *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006).

¶6 During trial, Doyle stated his "theory" of the case was that Vantsant and C.A. made up the allegations after a drug deal they were involved in "didn't . . . play out the way that they had been promised." He sought to introduce text messages dated October 13, and November 15, 21, and 23 from Vantsant's cell phone which, he argued, showed the nature of Vantsant and C.A.'s relationship was "in part based on drug use and exchanging drugs, if not selling them, particularly [C.A.] giving or supplying to [Vantsant]." [4] He additionally contended the messages would be used for impeachment purposes because C.A. had told police officers he was "not involved in drug-related activity." The trial court allowed Doyle to introduce the messages from November but precluded the October 13 messages as too remote.[5]

¶7 Doyle argues the trial court's preclusion of the October 13 text messages prevented him from introducing evidence of C.A. and Vantsant's bias or motivation to lie to cover up C.A.'s criminal conduct based upon his defense that C.A. "was at [Vantsant's] apartment to take part in a drug deal." He contends this improperly limited his cross-examination of C.A. and Vantsant and

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[4]Doyle did not make an offer of proof below as to the exact contents of the October 13 text messages and instead only generally claimed they supported his theory as to the "nature" of C.A. and Vantsant's relationship. Consequently, we lack any record of the precise content of the messages. On this basis alone, we could reject Doyle's argument. *See* Ariz. R. Evid. 103(a)(2); *see also State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) ("an offer of proof stating with reasonable specificity what the evidence would have shown is required" for review on appeal). In our discretion, however, we address the issue because even if the messages are consistent with Doyle's characterization, any error, as we explain below, was harmless beyond a reasonable doubt.

[5]Doyle does not argue on appeal that the trial court abused its discretion by finding the text messages were too remote.

deprived him of his right to present exculpatory evidence. As Doyle acknowledges, any potential error in the preclusion of this evidence is subject to harmless error review. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *see State v. Coghill*, 216 Ariz. 578, ¶¶ 27-28, 169 P.3d 942, 949 (App. 2007) (errors in admitting or precluding other act evidence reviewed for harmless error). The erroneous exclusion of evidence that is "merely cumulative of other evidence in the case" constitutes harmless error. *State v. Carlos*, 199 Ariz. 273, ¶ 24, 17 P.3d 118, 124 (App. 2001); *see Van Arsdall*, 475 U.S. at 684.

¶8 C.A. testified that he and Vantsant met a few years before November 2014. He stated he was aware she had a drug problem, but he did not use drugs and had never helped her get drugs. He acted as her "support person" and wanted to "help [her] overcome" her addiction. C.A. testified he planned to go to Vantsant's residence on November 23 and "get something to eat . . . [and] hang out at the house for a little bit." Vantsant testified that, in November 2014, she had been addicted to heroin for two years and had been using heroin on November 23, and that C.A. did not use drugs but had helped her get drugs in the past. On November 23, she had made plans to "hang out" with C.A. at her apartment in order to help Doyle "set [C.A.] up."

¶9 However, Doyle testified that Vantsant called him about purchasing $1,000 worth of methamphetamine and said C.A. would pay for it. He stated that when he arrived at Vantsant's apartment with the drugs, Vantsant and C.A. only had $350 but asked Doyle to take C.A.'s car as "collateral," which he did. He denied putting C.A. on the ground, threatening him, restraining his hands, and "set[ting] up a robbery to get money from" C.A.

¶10 The trial court allowed Doyle to cross-examine both C.A. and Vantsant about the text messages sent between them the same month as the incident. Doyle argued to the jury that those messages showed C.A. was, contrary to his own testimony, involved in buying and selling drugs or, at a minimum, helping Vantsant get money to buy drugs. [6] Doyle also impeached Vantsant with her prior

[6]In one exchange on November 22, for example, Vantsant asked C.A. what he was doing. C.A. replied, "Chilling making money."

statements to detectives that C.A. did sell methamphetamine and that C.A. was going to buy methamphetamine from Doyle on November 23. Doyle does not argue that the October 13 messages precluded by the trial court were different than the messages admitted into evidence. Because Doyle did not establish the precluded messages in some way offered new insight into C.A. and Vantsant's relationship or the events of November 23, they were merely cumulative and any error in precluding them was harmless beyond a reasonable doubt. *See Carlos*, 199 Ariz. 273, ¶ 24, 17 P.3d at 124; *see also Van Arsdall*, 475 U.S. at 684.

¶11 Doyle, however, relies on *State v. Salazar*, 182 Ariz. 604, 898 P.2d 982 (App. 1995), to support his argument that the trial court's ruling precluded him from impeaching C.A. and Vantsant as to their bias and motivation to lie. In that case, the trial court precluded Salazar from impeaching two juvenile witnesses with the fact that they had been adjudicated delinquent and had violated a term of their probation by being together at the time of the shooting. *Id.* at 609, 898 P.2d at 987. This court concluded that based on those undisputed facts, the trial court erred. *Id.* The jury reasonably could have found the witnesses' testimony was biased because it was based on "the hope of avoiding proceedings to revoke their probation." *Id.*

¶12 Here, however, the text messages sent nearly six weeks before the robbery, indicating that C.A. and Vantsant were generally involved with drugs, would not demonstrate C.A. or Vantsant had a motive to lie about the events of November 23 or that they were attempting to cover up their own involvement in criminal activity. *See State v. Mata*, 125 Ariz. 243, 244, 609 P.2d 58, 59 (1980) (uncorroborated evidence that victim exchanged sexual favors for drugs with co-defendant one month before her killing did not demonstrate motive on co-defendant's part and instead was impermissible "attack on the victim's character"). Moreover, as we noted above, the additional messages would have been needlessly

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Doyle argued that this meant C.A. was selling drugs because he told officers after the incident he did not have a job.

cumulative and unfairly prejudicial to C.A. and Vantsant's testimony. *See* Ariz. R. Evid. 403; *see also Mata*, 125 Ariz. at 244, 609 P.2d at 59.

Lesser-Included Offense

¶13 Doyle next argues the trial court erred by failing to sua sponte give an instruction on unlawful imprisonment as a lesser-included offense of kidnapping in response to a jury question during deliberations. Although a trial court must instruct the jury on all requested lesser-included offenses that are supported by the evidence, Doyle has forfeited review of the issue for all but fundamental, prejudicial error by failing to request the instruction below. *State v. Tschilar*, 200 Ariz. 427, ¶¶ 38-39, 27 P.3d 331, 340-41 (App. 2001). In *State v. Gipson*, 229 Ariz. 484, ¶ 13, 277 P.3d 189, 191 (2012), our supreme court recognized that "judges are no longer invariably required in non-capital cases to instruct on lesser included offenses supported by the evidence." But fundamental error occurs if the evidence shows that the defendant was "clearly entitled" to a trial court's sua sponte instruction on the lesser-included offense. *State v. Flores*, 140 Ariz. 469, 474, 682 P.2d 1136, 1141 (App. 1984), *disagreed with on other grounds by State v. Angle*, 149 Ariz. 478, 479, 720 P.2d 79, 80 (1986).

¶14 "A person commits unlawful imprisonment by knowingly restraining another person." A.R.S. § 13-1303(A). Kidnapping, as the jury was instructed here, is committed "by knowingly restraining another person with the intent to . . . aid in the commission of a felony." A.R.S. § 13-1304(A)(3). The jury was also instructed, consistent with the indictment, on armed robbery, aggravated robbery and aggravated assault with a deadly weapon, and that those offenses are felonies.

¶15 During deliberations, the jury asked, "Can the defendant be found guilty of kidnapping if he is found not guilty of committing another felony?" After discussing whether the jury was asking if it could find Doyle guilty based on the commission of an uncharged felony, the parties agreed to the trial court's proposed answer: "[T]he State must prove each element of the crime of kidnapping beyond a reasonable doubt. For purposes of the crime of kidnapping you may only consider those felony offenses that are listed in the indictment."

¶16 Doyle argues the jury's question shows that, "had the jury been instructed on unlawful imprisonment, they [likely] would have convicted Doyle of that offense and acquitted him of kidnapping and aggravated robbery." Rule 22.3, Ariz. R. Crim. P., authorizes a trial court to provide additional instructions after a jury has begun deliberations, and Rule 23.3, Ariz. R. Crim. P., requires the court to provide verdict forms on all necessarily included lesser offenses. However, "[a] reinstruction presenting for the first time choices for lesser-included offenses not presented in the initial instructions, if proper at all, would be a rare event, only done in exceptional circumstances." *State v. Villa*, 236 Ariz. 63, ¶ 8, 335 P.3d 1142, 1145 (App. 2014), *quoting State v. LaPierre*, 754 A.2d 978, ¶ 21 (Me. 2000) (alteration in *Villa*). Although "not per se illegal," such a practice "is dangerous and will often cause reversible error." *Id.* ¶ 18, *quoting United States v. Welbeck*, 145 F.3d 493, 497 (2d Cir. 1998).

¶17 In *Flores*, we found the trial court's failure to sua sponte instruct the jury on unlawful imprisonment as a lesser-included offense of kidnapping was fundamental error and required reversal. 140 Ariz. at 473-74, 682 P.2d at 1140-41. The kidnapping charge in that case was based on the defendant's intent to aid in the commission of a robbery. *Id.* at 473, 682 P.2d at 1140; *see* § 13-1304(A)(3). The defendant argued he had believed in good faith that he had a legal right to take the property. *Flores*, 140 Ariz. at 473, 682 P.2d at 1140. The trial court determined sufficient evidence supported that defense, and it therefore instructed the jury that such a "good faith belief" would negate the robbery charge. *Id*. On appeal, this court noted that if the jury found no robbery had occurred based on that belief, then the kidnapping charge could not be based on an intent to commit robbery. *Id.* However, the jury could still find unlawful imprisonment had occurred. *Id.* We therefore held that because the defendant "was so clearly entitled to an instruction and verdict form on unlawful imprisonment, he did not have a fair trial on the kidnapping charge." *Id.* at 474, 682 P.2d at 1141.

¶18 Conversely, in *Tschilar*, we found the trial court's failure to sua sponte instruct the jury on unlawful imprisonment as a lesser-included offense was not fundamental error based on the evidence. 200 Ariz. 427, ¶¶ 38, 44, 27 P.3d at 340-42. In that case, the

kidnapping charge was grounded on the defendant's intent to place the victims in reasonable apprehension of imminent physical injury with a gun. *Id.* ¶ 41; *see also* § 13-1304(A)(4). He did not dispute that he restrained the victims or pointed a gun at them, but instead argued his intent "was to gather information." *Tschilar*, 200 Ariz. 427, ¶ 41, 27 P.3d at 341. This court concluded, "[e]ven if the jury believed that [the defendant's] purpose was to gather information as he contended, his admitted manner of attempting to accomplish this purpose established the intent to place the [victims] in reasonable apprehension of imminent physical injury." *Id.* Consequently, because his actions constituted an element of the underlying offense of aggravated assault, the jury could not have rationally failed to find the distinguishing element between kidnapping and unlawful imprisonment. *Id.* ¶¶ 41-42.

¶19 At trial, Doyle's defense was that C.A. and Vantsant fabricated the entire incident, and that he and Aguirre were at the apartment as part of a drug deal and he never restrained C.A. in any way or took any of his belongings without his permission. Doyle contends that, like *Flores*, his intent was at issue because he claimed he did not rob or assault C.A. Doyle, however, also denied restraining C.A. in any way. The jury was thus presented with two starkly different versions of events: either, as C.A. and Vantsant testified, Doyle and Aguirre restrained and robbed C.A., or, as Doyle claimed, C.A. and Vantsant bought methamphetamine from Doyle, offered C.A.'s car as collateral, and then fabricated the robbery to cover up the drug transaction. Thus, while the evidence and arguments in *Flores* offered a version of events in which the defendant had restrained, but did not rob, the victim, here, like *Tschilar*, neither the evidence nor arguments supports a version of events in which Doyle restrained C.A. but not to aid in the commission of one of the three charged felonies.

¶20 Doyle contends, however, "[t]he jury seemed to agree that it was likely that the incident concerned a drug transaction gone awry rather than a home invasion because they acquitted Doyle of armed robbery, aggravated assault, and the dangerous nature allegations" of the aggravated robbery and kidnapping charges. He argues this means the jury "felt some sort of unlawful restraint had

occurred" and was therefore forced to find Doyle guilty of aggravated robbery in order "to support their conclusion that a restraint offense had occurred." But if the jury did not believe aggravated robbery had occurred, it was required, as it was instructed, to find Doyle not guilty on that count. *See State v. Reyes*, 232 Ariz. 468, ¶ 7, 307 P.3d 35, 38 (App. 2013) (we presume a jury follows its instructions). And if the jury found Doyle not guilty of all three charged felonies, it was then required, as it was similarly instructed, to find him not guilty of kidnapping. *See id.*

¶21 Additionally, the commonality between the armed robbery and aggravated assault charges, and the dangerous nature allegations, were that each required the state to prove that Doyle used a firearm during the incident. A.R.S. §§ 13-1904(A), 13-1204(A)(2). Thus, contrary to Doyle's claim, those verdicts demonstrate, at most, the jury did not believe Doyle had a gun during the incident, not that this was a "drug transaction gone awry." And in any event, the jury's not guilty verdicts on the armed robbery and aggravated assault charges are "immaterial . . . since it could have found [Doyle] not guilty for any number of reasons." *Flores*, 140 Ariz. at 473, 682 P.2d at 1140.

¶22 Finally, Doyle's defense and failure to request the lesser-included instruction following the jury's question suggests that, in "the professional judgment of [Doyle's] counsel[,] . . . there was not enough evidence to convict [Doyle] on the . . . kidnapping charge and . . . the jury would have to acquit him." *Villa*, 236 Ariz. 63, ¶ 17, 335 P.3d at 1147, *quoting Garza v. State*, 55 S.W.3d 74, 77-78 (Tex. Ct. App. 2001). A sua sponte instruction on unlawful imprisonment would have risked overriding that judgment. *See id.* Moreover, to give an unlawful imprisonment lesser-included instruction in response to the jury's question ran the risk of the court appearing coercive or could have been viewed as "an intimation of the desire of the court that the defendant be convicted of some offense." *Id.* ¶¶ 13-14, *quoting People v. Stouter*, 75 P. 780, 781 (Cal. 1904).

¶23 Accordingly, based on the evidence, Doyle was not "clearly entitled" to an instruction on unlawful imprisonment as a lesser-included offense, *see Flores*, 140 Ariz. at 474, 682 P.2d at 1141, and, had it done so sua sponte, the trial court risked committing

reversible error, *see Villa*, 236 Ariz. 63, ¶ 18, 335 P.3d at 1147. The court therefore did not deprive Doyle of a fair trial and fundamental error did not occur. *See Tschilar*, 200 Ariz. 427, ¶¶ 38-39, 27 P.3d at 340-41.

Disposition

¶24 For the foregoing reasons, we affirm Doyle's convictions and sentences.