IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MANUEL ANDRADE JR.,
Appellant.

No. 2 CA-CR 2019-0176
Filed October 26, 2020

Appeal from the Superior Court in Pima County
No. CR20181840001
The Honorable Christopher Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Acting Section Chief Counsel
By Heather A. Mosher, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Manuel Andrade Jr. was convicted of aggravated assault causing serious physical injury and third-degree burglary. The trial court sentenced him to consecutive prison terms totaling sixteen years and ordered $16,254 in restitution. On appeal, Andrade argues that the court violated A.R.S. § 13-116 by imposing consecutive sentences and applied the incorrect legal standard when ordering restitution. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Andrade's sentences and the trial court's restitution order. *See State v. LaPan*, No. 2 CA-CR 2018-0342, ¶ 30, 2020 WL 4592713 (Ariz. App. Aug. 11, 2020) (restitution order); *State v. Morgan*, 248 Ariz. 322, ¶ 2 (App. 2020) (sentence). In November 2017, Andrade sold some jackets to C.S., but the two disagreed about whether C.S. ever paid for them.

¶3 In April 2018, Andrade entered the Tucson convenience store where C.S. was working as a clerk. Andrade asked C.S. about the money he believed C.S. owed and was unsatisfied when C.S. said his "money [was] tied up." Andrade then asked C.S. for some cigarettes from behind the counter. As C.S. turned back toward him with the cigarettes, Andrade struck C.S. in the face. Andrade then went behind the counter, picked C.S. up in a "bear hug[]," and slammed him to the ground. Andrade continued assaulting C.S. by punching and kicking him as he lay on the ground unconscious.

¶4 As C.S. seized on the floor, Andrade left the convenience store. Eventually, paramedics arrived and transported C.S. to a hospital. He suffered from bleeding in his brain and a traumatic brain injury.

¶5 A grand jury indicted Andrade, and he was convicted as charged and sentenced as described above. This appeal followed. We have

jurisdiction over Andrade's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1), (3).[1] *See also State v. Grijalva*, 242 Ariz. 72, ¶ 11 (App. 2017) ("A restitution order made after sentencing does not impair appeal rights because such orders are separately appealable.").

Consecutive Sentences

¶6 Andrade argues that § 13-116 requires his sentences be concurrent and that his consecutive sentences were therefore improper. "We review de novo whether consecutive sentences are permissible under § 13-116." *State v. Siddle*, 202 Ariz. 512, ¶ 16 (App. 2002).

¶7 First, the state argues Andrade waived this issue by failing to "meaningfully argue it in his Opening Brief." Appellants must include an "argument" containing their contentions with supporting reasoning, citations to legal authorities, and references to the record in their opening briefs, or they risk waiving their claims. *See* Ariz. R. Crim. P. 31.10(a)(7); *State v. Cons*, 208 Ariz. 409, ¶ 18 (App. 2004) (rejecting claims as waived when appellant failed to "provide sufficient argument for us to address the claim"). Here, Andrade's opening brief cites to the record and both § 13-116 and *State v. Gordon*, 161 Ariz. 308 (1989), but includes only thin analysis at best. For example, the only reference to the second part of the *Gordon* test is in a heading. Although Andrade has arguably waived this issue, *see State v. McCall*, 139 Ariz. 147, *supp. op.*, 137 Ariz. 163, 164 (1983), we nonetheless

[1] Andrade filed a notice of appeal on August 16, 2019, which designated the transcripts from the restitution hearings as additional records but failed to specifically refer to the restitution order as the order being appealed. On August 30, 2019—twenty-one days after the restitution order was filed—he filed an amended notice of appeal referencing the date of the restitution hearing but again failing to specifically mention the restitution order. The state has not argued that the notice was untimely or that it was prejudiced by any lack of notice. We conclude that this was a technical deficiency that does not defeat the appeal of the restitution order. *See State v. Rasch*, 188 Ariz. 309, 311 (App. 1996) ("A 'mere technical error[],' however, does not render the notice ineffective, unless the appellee shows that the error prejudiced him." (alteration in *Rasch*) (quoting *State v. Good*, 9 Ariz. App. 388, 392 (1969))). In conjunction with the full record, it appears that Andrade was attempting to appeal the restitution order and that the state has not demonstrated surprise or prejudice. Accordingly, we have jurisdiction of Andrade's appeal from the order.

address it. *See State v. Kinney*, 225 Ariz. 550, n.2 (App. 2010) (appellate court may review waived issue).

¶8 Generally, courts are prohibited from imposing consecutive sentences for a single act. *See* § 13-116 ("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."). We review whether separate convictions punish a single act, thereby requiring concurrent sentences, using the test set forth in *Gordon*, 161 Ariz. at 315. *See State v. Dunbar*, 249 Ariz. 37, ¶ 48 (App. 2020). Under that test, a trial court first must determine which of the two offenses is the "ultimate charge," i.e. the one at the "essence of the factual nexus and that will often be the more serious offense." *Gordon*, 161 Ariz. at 315.

¶9 The *Gordon* test then requires a trial court to consider "the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge." *Id.* If, after doing so, there is enough remaining evidence to satisfy each element of the secondary crime, consecutive sentences may be appropriate. *Id.*

¶10 A trial court next considers the entire "transaction," determining whether it was factually impossible to commit the ultimate charge without also committing the secondary crime. *Id.* In cases where the secondary offense is burglary, it must consider whether the secondary crime was a necessary component of the ultimate charge or if the actions underlying each of the convictions are "distinct." *See State v. Bush*, 244 Ariz. 575, ¶ 91 (2018) (burglary "was not a necessary component of" murder convictions); *State v. Carreon*, 210 Ariz. 54, ¶ 106 (2005) (concluding that burglary could have been committed even if ultimate charge of attempted murder was not committed as acts involved in ultimate charge were "distinct" from acts comprising burglary).

¶11 Finally, a trial court will consider "whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Gordon*, 161 Ariz. at 315. "If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences." *Id.* If the analysis of both the first two parts of the test indicates that a defendant committed separate acts, we need not consider the third. *See State v. Boldrey*, 176 Ariz. 378, 383 (App. 1993).

¶12 Here, as both parties agree, the ultimate charge is the aggravated assault. *See Gordon*, 161 Ariz. at 315. Andrade maintains that

all three parts of the *Gordon* test mandate he receive concurrent sentences. He contends that absent the evidence required to prove the aggravated assault there is insufficient evidence to prove burglary.

¶13 A person commits aggravated assault under A.R.S. § 13-1204(A)(1) by carrying out an assault that causes serious physical injury to another person. An assault is committed by "[i]ntentionally, knowingly or recklessly causing any physical injury to another person," "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury," or "[k]nowingly touching another person with the intent to injure, insult or provoke such person." A.R.S. § 13-1203(A). "Serious physical injury" is defined to "include[] physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(39). Aggravated assault under § 13-1204(A)(1) is a class three felony. § 13-1204(E). A person commits third-degree burglary by "[e]ntering or remaining unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein." A.R.S. § 13-1506(A)(1).

¶14 Here, Andrade completed the burglary when he entered the employee-only area intending to commit an aggravated assault. Subtracting the evidence necessary to support Andrade's aggravated assault conviction under § 13-1204(A)(1)—the evidence of the beating that took place behind the counter and the actual severity of C.S.'s injuries—leaves Andrade's statements regarding his intent to harm C.S., the initial assault, and his entry behind the counter, which are sufficient to support his conviction for third-degree burglary. *See Gordon*, 161 Ariz. at 315.

¶15 Regarding the second part of the *Gordon* test, Andrade contends that the aggravated assault and burglary "were simultaneous" and that "neither could have been committed without also committing the other." He reasons that the burglary was committed when the ultimate charge occurred, only then making his presence unlawful. However, the burglary was complete the moment Andrade went behind the counter after hitting C.S. in the face to administer the beating that constituted the aggravated assault. Neither the initial blow nor entering behind the counter are necessary components of aggravated assault, *see Bush*, 244 Ariz. 575, ¶ 91, and both of the acts are distinct from those acts constituting the aggravated assault, *see Carreon*, 210 Ariz. 54, ¶ 106. Our supreme court has affirmed consecutive sentences in similar circumstances. *See State v. Runningeagle*, 176 Ariz. 59, 67 (1993) ("possible to kill the [victims] without"

burglarizing their home); *see also State v. Cornish*, 192 Ariz. 533, ¶ 19 (App. 1998) (relying on *Runningeagle*, 176 Ariz. at 66, 67, to conclude that consecutive sentences for burglary and attempted aggravated assault were appropriate). Thus, we conclude that the second part of the *Gordon* test was satisfied.

¶16 Because our analysis of the first two parts of the *Gordon* test indicates that Andrade committed separate acts, we need not consider the third. *See Boldrey*, 176 Ariz. at 383. We conclude that Andrade's conduct did not constitute a single act and, thus, that his consecutive sentences do not violate § 13-116. *See Gordon*, 161 Ariz. at 315.

Restitution

¶17 Andrade contends the trial court applied "an incorrect legal standard in ordering [him] to pay restitution" for C.S.'s lost wages for the period he spent looking for new employment. Andrade argues that this error is fundamental and violates his due process rights. We generally review a court's restitution order for abuse of discretion, *State v. Leon*, 240 Ariz. 492, ¶ 6 (App. 2016), and constitutional issues de novo, *State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007). But because Andrade raises his due process claim for the first time on appeal, we review it for fundamental, prejudicial error.[2] *See Leon*, 240 Ariz. 492, ¶ 6.

¶18 After sentencing Andrade, the trial court conducted a restitution hearing. C.S. testified that prior to the assault he had been working forty hours a week at a rate of $10.75 per hour. He further testified that after the assault he had been unable to work because of his injuries, the anti-seizure medication he had been prescribed, and his related inability to drive. After receiving medical clearance to work, he decided he "didn't want to go back" to his previous employer, despite there being an available position. When asked by the court, C.S. acknowledged he did not want to

[2]The state argues that Andrade has forfeited the constitutional claims by failing to argue fundamental and prejudicial error on appeal. Andrade sets forth that the court erred by ordering the requested restitution, cites to the record where the error allegedly occurred, cites to legal authority, and argues that "[i]mproper imposition of restitution is an illegal sentence that constitutes fundamental error." Accordingly, we find that this argument was not waived. *Cf. State v. Vargas*, 249 Ariz. 186, ¶ 14 (2020) (setting forth requirements when claiming cumulative error of prosecutorial misconduct). Even assuming it had been waived, we would exercise our discretion to consider the merits of the claim. *See Kinney*, 225 Ariz. 550, n.2.

return to his former job because he had been assaulted there and was concerned about his personal safety. C.S.'s job search lasted four to five months, and in January 2019, he accepted the first offer he received. He stated that the sole reason for the change was to "feel more secure . . . and safer" in the new position. C.S. requested approximately nine months of lost wages totaling $16,254.[3] The court stated that it was "eminently reasonable, understandable, and appropriate that [C.S.] remained out of work for nine months as a direct result of [Andrade]'s too harsh assault on him" and awarded the requested restitution.

¶19 Victims have a constitutional right to receive restitution from the person convicted of the criminal act that caused their loss. Ariz. Const. art. II, § 2.1(A)(8). "A defendant who has been convicted of a crime shall be ordered 'to make restitution to the person who is the victim of the crime . . . in the full amount of the economic loss as determined by the court.'" *State v. Lewis*, 222 Ariz. 321, ¶ 6 (App. 2009) (quoting A.R.S. § 13-603(C)); *see also State v. Holguin*, 177 Ariz. 589, 591 (App. 1993). "Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense." § 13-105(16). Restitution, however, is only recoverable for a victim's economic losses that were "directly caused by the criminal conduct." *State v. Linares*, 241 Ariz. 416, ¶ 7 (App. 2017). This does not impose a "but for" causality test; instead, restitution can be based on "damages that flow directly from the defendant's criminal conduct, without the intervention of additional causative factors." *State v. Wilkinson*, 202 Ariz. 27, ¶ 7 (2002). "The key to the analysis is reasonableness, which is determined on a case by case basis." *State v. Quijada*, 246 Ariz. 356, ¶ 42 (App. 2019) (quoting *Linares*, 241 Ariz. 416, ¶ 10).

¶20 Andrade does not contest restitution for the five-month period after the assault that C.S. was medically unable to work. Instead, he argues that the trial court erred in considering if the economic losses caused by C.S. rejecting the position left open for him were "reasonable" when "determining whether there was a sufficient causal connection between [Andrade]'s criminal conduct and [C.S.]'s claimed losses." He contends that the analysis in *Quijada* is incorrect as "neither the statutes governing restitution nor *Wilkinson* mentions 'reasonableness' as a relevant consideration in determining the amount of restitution that may be

[3] Initially, C.S. requested $200 to replace his glasses. He later withdrew the request because he was able to have them repaired. C.S.'s original request for lost wages was for $18,520, but the state revised the figure after an in-court calculation.

ordered" and that the court should have instead concentrated on "causation and the presence or absence of intervening causative factors."

¶21 In *Quijada*, the defendant was convicted of facilitation to commit trafficking in stolen property and ordered to pay restitution, including the activation fee for the security system the victim had installed and the monitoring service payments for one year. 246 Ariz. 356, ¶¶ 5, 12, 46. We stated that the expenses related to activating the home security system may be ordered as restitution if "incurred 'in an effort to restore the victim's equanimity' following the criminal offense," comparing the costs to those incurred for mental-health counseling or moving. *Id.* ¶ 44 (quoting *State v. Brady*, 169 Ariz. 447, 448 (App. 1991)). The cost for maintaining the home security system could only be ordered for "a reasonable period necessary to restore the victim's equanimity." *Id.* ¶ 45. We concluded that one year of monthly service payments appeared to be reasonable. *Id.* ¶ 47. We find no reason to deviate from our reasoning or to abrogate our decision in *Quijada*, as Andrade advocates.

¶22 Here, the expenses related to C.S. finding new employment were clearly economic losses. *See* § 13-105(16); *see also State v. Stutler*, 243 Ariz. 128, ¶ 6 (App. 2017) (affirming restitution for lost earnings when assault caused victim to avoid workplace). They also stemmed directly from the aggravated assault by Andrade, as these expenses were incurred to make C.S. feel safer and more secure after the attack. *See Quijada*, 246 Ariz. 356, ¶ 45; *Stutler*, 243 Ariz. 128, ¶ 7 (stating expenses incurred by victims to protect themselves from future attack can be awarded as restitution). Additionally, Andrade does not repeat his argument made in the trial court that the actual time frame for C.S. to find employment was unreasonable, and the court did not err in concluding that it was reasonable. *See Quijada*, 246 Ariz. 356, ¶ 47. We further conclude the court applied the correct standard, *see id.*, and did not abuse its discretion in awarding restitution, *see Leon*, 240 Ariz. 492, ¶ 6.

¶23 Andrade also argues, for the first time on appeal, that his due process rights were violated because the trial court's restitution order amounts to an illegal sentence. Because we find that the restitution order was proper, no due process violation occurred. *See id.*

Disposition

¶24 For the reasons stated above, we affirm Andrade's sentence and restitution.