

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

LUIS R. BURGOS-CASTRO,  
*Petitioner.*

No. 2 CA-CR 2022-0004-PR  
Filed May 10, 2022

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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NOT FOR PUBLICATION  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. 31.19(e).*

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Petition for Review from the Superior Court in Cochise County  
No. S0200CR202000001  
The Honorable Timothy B. Dickerson, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

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## MEMORANDUM DECISION

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Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Espinosa concurred.

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V Á S Q U E Z, Chief Judge:

¶1 Luis Burgos-Castro seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Burgos-Castro has not shown such abuse here.

¶2 In late 2019, Burgos-Castro lied to a seventeen-year-old girl, F.Y., and her father, R.R., to convince R.R. to allow F.Y. to attend a party he was purportedly hosting. There was no party; Burgos-Castro instead took F.Y. to a friend's apartment and had sexual contact with her. He subsequently pled guilty to kidnapping, fraudulent schemes and artifices, luring a minor for sexual exploitation, attempted sexual assault, sexual abuse, and possession of a dangerous drug.

¶3 In a sentencing memorandum, Burgos-Castro argued consecutive sentences for kidnapping and fraudulent schemes were inappropriate under A.R.S. § 13-116 because his crimes were "one single act." Noting that R.R. was the "primary victim" of Burgos-Castro's fraudulent scheme, the sentencing court rejected Burgos-Castro's claim under § 13-116 and sentenced him to consecutive five-year prison terms for kidnapping and fraudulent schemes and artifices. For his remaining convictions, the court suspended the imposition of sentence and imposed probation terms to follow Burgos-Castro's prison terms, including lifetime probation for his sex offenses.

¶4 Burgos-Castro then sought post-conviction relief, again arguing his consecutive prison terms were unlawful because the kidnapping and fraudulent schemes and artifice convictions "constitute[] a single act," despite the fact he deceived both F.Y. and R.R. The trial court<sup>1</sup> dismissed Burgos-Castro's petition concluding the crimes "were separate

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<sup>1</sup>Burgos-Castro's sentencing and post-conviction proceedings were before different judges.

acts, with separate victims, and with separate harm caused to each victim.” This petition for review followed.

¶5 “[M]ultiple prosecutions and punishments for the same offense” are constitutionally prohibited. *State v. Watson*, 248 Ariz. 208, ¶ 18 (App. 2020). This prohibition is codified in § 13-116, which 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.” “Arizona uses the identical elements test to determine whether a ‘constellation of facts’ constitutes a single act, which requires concurrent sentences, or multiple acts, which permit consecutive sentences.” *Id.* ¶ 19 (quoting *State v. Gordon*, 161 Ariz. 308, 312 (1989)).

¶6 But when a single act harms multiple victims, consecutive sentences are appropriate without implicating § 13-116 or any constitutional provision. *See Gordon*, 161 Ariz. at 312 n.4; *State v. Riley*, 196 Ariz. 40, ¶ 21 (App. 1999) (“[Section] 13-116 does not apply to sentences imposed for a single act that harms multiple victims.”). The sentencing court and the trial court concluded that Burgos-Castro’s fraudulent scheme had two victims—F.Y. and R.R. He argues, however, that *Watson*, 248 Ariz. 208, nonetheless forecloses consecutive prison terms here.

¶7 *Watson*, a bank employee, directed bank tellers to withdraw funds from customer accounts, purportedly on behalf of the customer for an investment transaction, but he would instead direct the money to an accomplice or to himself. *Id.* ¶¶ 2-3. *Watson* was convicted of one count of fraudulent schemes and artifices, which encompassed numerous thefts, and seven counts of theft (three of which were misdemeanors). *Id.* ¶ 8. At sentencing, the trial court imposed concurrent prison terms for the felony theft counts and, for fraudulent schemes and artifices, suspended the imposition of sentence and placed *Watson* on a consecutive probation term to begin upon his release from prison. *Id.* ¶ 9. Applying *Gordon*, Division One of this court determined on appeal that the consecutive probation term was improper because the fraudulent schemes and thefts were based on the same conduct, that is, *Watson* had “committed a single crime resulting in the commission of a series of crimes.” *Id.* ¶¶ 20-22.

¶8 Burgos-Castro argues *Watson* controls the outcome here because, like *Watson*, his single scheme deceived more than one person. He analogizes his deception of R.R. to *Watson*’s deception of the bank tellers, claiming he obtained no “benefit from R.R.” But *Watson* did not address whether the bank tellers were victims of *Watson*’s fraudulent scheme—the only victims discussed in the case were the individual theft victims, who were also the victims of the scheme. Here, in contrast, the sentencing court

and trial court found Burgos-Castro's scheme victimized R.R. He has identified no error in that determination—he received a benefit directly from R.R.: permission to allow R.R.'s minor child to be with Burgos-Castro unsupervised.

¶9 Burgos-Castro correctly observes that a single charge of fraudulent schemes and artifices could encompass numerous misrepresentations. *See* A.R.S. § 13-2310(A). He relatedly suggests, then, that the state was required to charge “two separate frauds,” one against each victim, for consecutive sentences to be appropriate. On these facts, the state could have charged Burgos-Castro with two violations of § 13-2310. But we cannot agree that fact alters the core principle that a defendant who victimizes multiple people may be punished separately for each victim.

¶10 We reach the same outcome applying the three-part test prescribed by *Gordon*. To apply that test, we first “subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge” and determine whether “the remaining evidence satisfies the elements of the other crime.” *Gordon*, 161 Ariz. at 315. The “ultimate charge” under *Gordon* “is at the essence of the factual nexus and that will often be the most serious of the charges.” *Id.* We then determine if “it was factually impossible to commit the ultimate crime without also committing the secondary crime.” *Id.* If so we “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.” *Id.*; *Roseberry*, 210 Ariz. 360, ¶ 58 (evaluation of third factor required only when “factual impossibility exists” under second factor).

¶11 To have committed kidnapping, Burgos-Castro must have knowingly restrained F.Y. with the intent to commit a sexual offense. A.R.S. § 13-1304(A)(3). Restraint may be accomplished in numerous ways, including by intimidation or deception or, in the case of a minor, by “[a]ny means including acquiescence of the victim.” A.R.S. § 13-1301(2). To have committed fraudulent schemes and artifices, Burgos-Castro must have, “pursuant to a scheme or artifice to defraud, knowingly obtain[ed] any benefit by means of false or fraudulent pretenses, representations, promises or material omissions.” § 13-2310(A).

¶12 Under the facts of this case, both offenses are class two felonies. §§ 13-1304(B), 13-2310(A). And both represent the “essence of the factual nexus,” in that both crimes were necessary to achieve Burgos-Castro’s goal—sexual contact with F.Y. But we need not resolve which offense is the “ultimate charge” under *Gordon* because we reach the same conclusion in either scenario.

¶13 According to Burgos-Castro, he restrained, and therefore kidnapped, F.Y. by deceiving her into coming to the apartment – the same conduct, he asserts, that formed his fraudulent scheme. But this framing disregards that the factual basis for the plea also included that Burgos-Castro kept F.Y. in the apartment by intimidation and, while there, directed her to go in the bedroom and to lie on the bed. There is no question that Burgos-Castro’s restraint of F.Y. began with deception, but Burgos-Castro cites no authority, and we find none, suggesting that we must disregard his means of continuing that restraint when evaluating whether his conduct constituted multiple acts under *Gordon*. The only facts necessary to support Burgos-Castro’s conviction for kidnapping are that he kept F.Y. in the apartment not by deception, but by intimidation and her acquiescence, and that he intended to commit a sex crime. See §§ 13-1304(B), 13-2310(A). The remaining facts – that he misled her and R.R. into believing there was a party and gained the benefit of having unsupervised access to her – constitute a fraudulent scheme. See § 13-2310(A). The element is also met if we reverse the analysis and treat the fraudulent scheme as the ultimate charge. Subtracting the necessary facts to support a conviction for Burgos-Castro’s fraudulent scheme leaves facts sufficient to support his conviction of kidnapping.

¶14 We agree with Burgos-Castro, however, that he could not have committed kidnapping without having engaged in his fraudulent scheme, and vice-versa, since it was that scheme that triggered F.Y.’s initial restraint and brought her unsupervised to the apartment. Thus, consecutive sentences are appropriate under *Gordon* only if the lesser charge caused an additional risk of harm to that caused by the greater. Assuming kidnapping is the greater charge, we note that Burgos-Castro’s fraudulent scheme also victimized R.R., thus causing harm additional to that caused by his kidnapping of F.Y.<sup>2</sup> Conversely, if Burgos-Castro’s fraudulent scheme is the greater charge, his intimidation of F.Y. to keep her in the apartment similarly caused harm in addition to that necessary to commit that crime. Due to this further harm, we conclude Burgos-Castro “committed multiple acts” and could “receive consecutive sentences.” *Gordon*, 161 Ariz. at 315.

¶15 Because Burgos-Castro’s consecutive prison terms are authorized by law, the trial court did not err in summarily dismissing his

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<sup>2</sup> In his victim’s statement, R.R. spoke extensively about the emotional distress Burgos-Castro’s conduct caused him, and R.R. explained that he felt “betrayed” by Burgos-Castro. *Watson* is thus distinguishable because there is no suggestion in that case that Watson’s conduct harmed anyone but the theft victims.

petition for post-conviction relief. Therefore, although we grant review, we deny relief.