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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THE STATE OF ARIZONA, Appellee, v. RYAN ROBERT BAKER, Appellant.	2 CA-CR 2008-0224 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072882

Honorable Deborah Bernini, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Ryan Baker was convicted of two counts of attempted armed robbery and two counts of aggravated assault. The trial court sentenced him to concurrent and consecutive prison terms totaling 37.5 years. On appeal, Baker contends the trial court erred by not giving a jury instruction on third-party culpability and by imposing consecutive sentences in violation of A.R.S. § 13-116, the Due Process Clause of the Fourteenth Amendment, and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. For the reasons that follow, we affirm.

Facts and Procedure

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Just after 2:00 a.m. on June 26, 2007, F. and V. were walking along Stone Avenue, when a vehicle with two men inside pulled alongside them. The driver leaned over the passenger and demanded money from them. He then got out of the car and approached them, again demanding money. F. told the man they did not have any money, and he and V. began to walk away. The driver got back in the vehicle and followed F. and V. for a time before again getting out of the car and approaching them on foot. When the driver demanded money again, V. told him to leave them alone. The driver returned to the vehicle to retrieve a bat. He once again demanded money and hit F. in the head with the bat. The driver then got in the car and drove away. F. suffered a traumatic brain injury.

¶3 After receiving no investigative leads, Tucson Police Detective Haynes resorted to media publicity in an attempt to acquire additional information about the crime.

Within the following ten days, Davonn B. came forward, stated that he had been the passenger in the vehicle, and identified Baker as the driver who had assaulted F.

¶4 Baker was charged with attempted armed robbery against F. (count one), aggravated assault with a deadly weapon or dangerous instrument, and aggravated assault causing serious physical injury both committed against F. (counts two and three respectively), and attempted armed robbery against V. (count four). The jury found him guilty of all charges, and the trial court sentenced him to aggravated, concurrent prison terms of fifteen years for the two aggravated assaults, a consecutive, aggravated term of fifteen years for the attempted armed robbery count against F., and a consecutive, presumptive term of 7.5 years for the attempted armed robbery against V. This appeal followed.

Discussion

Third-Party Culpability Instruction

¶5 Baker first contends the trial court erred by refusing to give a requested jury instruction on third-party culpability. "A party is entitled to a[jury] instruction on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). However, a court is not required to give a proposed instruction when its substance is adequately covered by other instructions. *Id.* We review a court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004).

¶6 At trial, the parties presented evidence that during the investigation Detective Haynes received a telephone call from "[a]n ambassador for the Fourth Avenue Merchant

Association," who had told him that a man known as "Nick Nack" had been bragging about hitting someone in the head with a bat. Nick Nack was described as a "skinny white male," with five or six facial piercings, which he "always wears." Haynes testified that he had been told Nick Nack "hangs around with" a black male with braided hair. Baker requested a jury instruction on third-party culpability, "based on the testimony regarding Nick Nack and the black male with the braids." The trial court denied the request, finding the evidence had not "met the minimum standards under Arizona case law to present that as . . . a jury instruction to the jury."

¶7 On appeal, Baker relies on *Rodriguez* to support his argument that he was entitled to a third-party culpability instruction. We find that case distinguishable. There, Rodriguez claimed he had an alibi for the time of the murder. 192 Ariz. 58, ¶ 15, 961 P.2d at 1009. At trial, he produced evidence of his "time records from work, the testimony of a co-worker, and his own testimony" in support of his defense, which, if the jury had believed it, would have placed him at a different location during the period in which, according to the forensic pathologist, the murder "probably occurred." *Id.* ¶¶ 18, 19. Our supreme court concluded this evidence "reasonably supported an alibi defense" and found the trial court had erred in refusing to give an instruction because "the standard burden of proof instructions do not redress the risk of burden shifting engendered by alibi evidence." *Id.* ¶¶ 21, 26. And, "[g]iven the lack of overwhelming proof of guilt and the importance of the alibi defense," the court found the error was not harmless and reversed Rodriguez's convictions. *Id.* ¶ 27.

¶8 Baker contends that, as in *Rodriguez*, he elicited evidence that supported his defense, and the trial court's failure to give the instruction resulted in reversible error. However, to the extent Baker argues *Rodriguez* stands for the proposition that any evidence in support of a defense requires a jury instruction, he is mistaken. In *Rodriguez*, before determining whether an alibi instruction was appropriate, the court evaluated the "sufficiency of the evidence to support an alibi defense." *Id.* ¶ 17. And only after the court concluded that Rodriguez's alibi evidence, if believed by the jury, "prevented him from committing the crime," did it find he had presented sufficient evidence and the trial court had erred by failing to give an instruction. *Id.* ¶¶ 18-20; *see State v. Berry*, 101 Ariz. 310, 313-14, 419 P.2d 337, 340-41 (1966) (failure to give alibi instruction not error because alibi not supported by evidence). Although Baker's third-party culpability evidence arguably supported his theory that someone else had committed the crime, it was not inconsistent with Baker having committed the crime. Therefore, we cannot say the trial court erred in refusing the instruction.

¶9 Baker presented no other, specific evidence connecting Nick Nack to the crimes with which he was charged. Although Nick Nack had been seen in an area near where the crime occurred and had claimed to have used a bat, nothing linked the assault he claimed to have committed to the date and location where F. was attacked. Neither victim had described the assailant as having facial piercings. Furthermore, Haynes also testified that Nick Nack had never been known to have a car and he had been told the black man with whom Nick Nack associated had been arrested at a local restaurant for robbery, but the only

person arrested there during the relevant time frame was a Native American man who was arrested for disorderly conduct. Thus the information about the man with whom Nick Nack associated was inconsistent at best. *See Rodriguez*, 192 Ariz. 58, ¶ 20, 961 P.2d at 1010 (alibi defense supported where "defendant presented evidence that his location prevented him from committing the crime").

¶10 Furthermore, even assuming the trial court erred by refusing to instruct the jury on third-party culpability, any error was harmless beyond a reasonable doubt. *See State v. Marshall*, 197 Ariz. 496, ¶ 33, 4 P.3d 1039, 1048 (App. 2000) (failure to give jury instruction harmless error). Both victims identified Baker in court as the assailant, and the police found a metal bat in his car. Davonn testified at length about Baker's involvement in the offense. And, although Davonn's credibility was questionable due to a prior conviction for false reporting to a police officer and he arguably had a motive to lie, his testimony about the crimes was consistent with the victims' testimony. It also established that when he called the police to tell them what had happened, he was concerned about his own potential criminal liability. Davonn's girlfriend also testified that she had heard Baker talking to Davonn about the crime, and, "from what [she] heard, the guy got hit because [Baker] . . . was trying to rob him."

¶11 Additionally, the jury was specifically and appropriately instructed on reasonable doubt and the state's burden of proof, and the trial court permitted defense counsel to argue Nick Nack's culpability to the jury. Thus, considering the weight of evidence against Baker, his ability to present argument on this issue to the jury, and the

proper and adequate instructions on the law, we conclude the trial court's failure to instruct the jury on third-party culpability was harmless beyond a reasonable doubt. *Id.*

Imposition of Consecutive Sentences

¶12 Baker also challenges his consecutive sentences for the attempted armed robbery and aggravated assaults committed against F. He contends his sentence is illegal because consecutive sentences were imposed in violation of § 13-116 and the Double Jeopardy Clause.[1] He essentially argues the test and procedure used to determine whether conduct constitutes a single act for purposes of imposing concurrent or consecutive sentences under A.R.S. § 13-116 is insufficient to protect a defendant's right to due process at sentencing.[2]

A. Application of § 13-116

¶13 At sentencing the trial court found "the aggravated assaults were . . . separate and completed offense[s] after the attempted armed robbery." The court stated it had made

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[1]Baker argues that "because the legislature has prohibited consecutive sentences for offenses arising from a single act, a violation of § 13-116 also works to violate the state and federal constitutional prohibitions against double jeopardy." However, he did not make this argument below and has failed to develop it on appeal separately from his discussion of § 13-116 or cite any authority in support of its merits. *See* Ariz. R. Crim. P. 13.13(c)(vi) (opening brief "shall contain the contentions of the appellant . . . and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on"). We thus find it abandoned. *See State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005) (finding waiver where defendant did not properly develop argument).

[2]The state argues that Baker "did not object . . . below" that consecutive sentences were imposed in violation of § 13-116. However, at sentencing, Baker's counsel argued that concurrent sentences were appropriate in this case because the events constituted one act. The issue was thus preserved.

that finding on the bases "of the facts presented to the jury and as a matter of law which permits the Court to stack those offenses." Baker contends that under § 13-116 he "had a substantive liberty interest . . . in receiving concurrent sentences" because the aggravated assault and attempted armed robbery of F. arose "from the same act."

¶14 Section 13-116 provides, in pertinent part, "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." To determine whether the defendant has committed a single act requiring concurrent sentences, we apply the following test set forth in *State v. Gordon*:

> [W]e . . . judge a defendant's eligibility for consecutive sentences by considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge . . . . If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible . . . . In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act . . . . We will then 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. If so, then ordinarily the court should find that the defendant committed multiple acts.

161 Ariz. 308, 314-15, 778 P.2d 1204, 1210-11 (1989). Thus, we "focus[] on the 'facts of the transaction' to determine if the defendant committed a single act." *State v. Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d 1150, 1155 (App. 2002), *quoting Gordon*, 161 Ariz. at 313 n.5, 778 P.2d at 1209 n.5.

¶15 Preliminarily, we identify the "ultimate crime," which, in this case, was attempted armed robbery. *See State v. Alexander*, 175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993) (ultimate crime usually "primary object of the episode"). Then, we apply the *Gordon* factors and compare attempted armed robbery with aggravated assault with a deadly weapon or dangerous instrument and aggravated assault causing serious physical injury respectively.

¶16 In assessing the first *Gordon* factor, "we subtract the evidence necessary" to convict Baker of attempted armed robbery to determine whether the remaining evidence is sufficient to obtain a conviction for aggravated assault with a deadly weapon or dangerous instrument. *See State v. Carreon*, 210 Ariz. 54, ¶ 104, 107 P.3d 900, 920 (2005). The jury was instructed that to find Baker guilty of attempted armed robbery it had to find he "intentionally committed any act which was a step in a course of conduct which [he] planned would end or believed would end in the commission of an armed robbery." The trial court further instructed the jury that armed robbery required proof Baker (1) took another person's property from that person's immediate presence and against his will; (2) threatened or used force to obtain the property or prevent resistance to the taking; and (3) used an accomplice or threatened to use a deadly weapon. *See* A.R.S. §§ 13-1902(A), 13-1904(A)(2). Thus, at the point when Baker retrieved the bat from his car intending to demand money from F., he had committed an attempted armed robbery.[3] *See State v. LaGrand*, 138 Ariz. 275, 280, 674

[3]Contrary to Baker's argument, the fact that the attempted armed robbery continued and could have included hitting F. with the bat is irrelevant. This element of the test requires only a delineation of the evidence *necessary* to convict, not a consideration of all evidence

P.2d 338, 343 (App. 1983) (noting evidence of attempted armed robbery sufficient where defendant entered store with intent to rob and gun found underneath defendant's car seat). Additionally, Baker brandished the bat while demanding money but before actually striking F.

¶17 When we subtract the evidence necessary to establish attempted armed robbery, there is evidence remaining that Baker used the bat to physically injure F. and the injury was serious.[4] *See* A.R.S. §§ 13-1203(A), 13-1204(A). Thus, there was sufficient additional evidence to support Baker's convictions for aggravated assault with a deadly weapon or dangerous instrument and aggravated assault causing serious physical injury. Application of the first factor does not suggest concurrent sentences were required.

¶18 "The second inquiry under *Gordon* is whether, given the entire 'transaction,' it was factually impossible to commit the ultimate crime—[attempted armed robbery]—without committing the secondary crime—[aggravated assault with a deadly weapon or dangerous instrument]." *State v. Viramontes*, 163 Ariz. 334, 339, 788 P.2d 67, 72 (1990); *see also Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Considering the factual transaction as a whole, the evidence demonstrated that Baker had committed attempted

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relevant to the charge, and it is not necessary to reach Baker's actual use of the bat in order to have sufficient facts to support the attempted armed robbery conviction.

[4]The jury was instructed on three theories of aggravated assault with a deadly weapon or dangerous instrument, based on physical injury; reasonable apprehension of imminent physical injury; and touching with intent to injure, insult, or provoke. However, because the jury also found Baker guilty of aggravated assault causing serious physical injury, we can assume it found him guilty of aggravated assault with a deadly weapon based on the infliction of physical injury.

armed robbery by brandishing the baseball bat while demanding money from the victims. When the victims told him they did not have any money and to leave them alone, Baker then hit F. with the bat, an act that was unnecessary and ancillary to his commission of the attempted armed robbery. The jury reasonably could infer this from the fact that after assaulting F., Baker got back into the car and drove away without making any further demand for money. Thus, it was possible for Baker to have committed the attempted armed robbery without also committing the aggravated assaults. This factor also supports the imposition of consecutive sentences.

¶19 Because we have already found consecutive sentences permissible after applying the first two factors, we need not consider the third—whether Baker's conduct in committing the aggravated assaults exposed F. to a greater risk of harm than that inherent in attempted armed robbery. *See State v. Urquidez*, 213 Ariz. 50, ¶ 10, 138 P.3d 1177, 1180 (App. 2006). Thus, the trial court was not required under § 13-116 to impose concurrent sentences for the attempted armed robbery and aggravated assaults.

B. Due Process

¶20 Baker argues that "[b]ecause A.R.S. § 13-116 guarantees concurrent sentences for offenses arising from a single act, it partially defines a defendant's liberty interests." He asserts that before his liberty interest in concurrent sentences could be taken away, there must be procedural protections to ensure it was not taken away unjustifiably. The primary focus of his argument seems to be that the procedure for determining when consecutive sentences

are permissible, as set out in *Gordon*, does not sufficiently protect a defendant's due process rights.

¶21 In particular, Baker argues due process requires an explicit designation of the fact-finder, an allocation and determination of the burden of proof, and specific findings of fact supporting the sentences imposed. He suggests "[t]here can be no meaningful opportunity to be heard where there is no determination of who must listen." However, his argument amounts to little more than a critique of *Gordon* and what he views as its shortcomings. To the extent Baker is suggesting *Gordon* provides an incomplete or incorrect procedure for determining the propriety of concurrent or consecutive sentences under § 13-116, it is a decision of our supreme court, which we are not at liberty to overrule or disregard. *State v. Foster*, 199 Ariz. 39, n.1, 13 P.3d 781, 783 n.1 (App. 2000).

¶22 Furthermore, Baker's reliance on *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine what procedural safeguards due process requires, is misplaced. In *State v. Wagner*, 194 Ariz. 310, ¶ 15, 982 P.2d 270, 273 (1999), our supreme court explicitly held that "the balancing test set forth in *Mathews* does not provide the correct standard to evaluate constitutional challenges to criminal sentencing procedures." Baker has not persuaded us that the current procedure, whereby a defendant is given an opportunity at the sentencing hearing to argue whether he is entitled to concurrent prison terms and an evaluation by a sentencing judge of the propriety of consecutive sentences based on *Gordon*, fails to provide "a fair sentencing procedure." *See State v. Grier*, 146 Ariz. 511, 515, 707 P.2d 309, 313 (1985).

Disposition

¶23 For the reasons stated above, we affirm Baker's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge