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.

FILED BY CLERK
AUG 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

JAMISON SCOTT WILLETT,

Appellant.

2 CA-CR 2008-0278
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200700788

Honorable Wallace R. Hoggatt, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson — Tucson
Attorneys for Appellee

Sharmila Roy — Laveen
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Jamison Willett was convicted of custodial interference, a class three felony. The trial court sentenced him to an enhanced, presumptive prison term of 6.5 years, to be served consecutively to a mitigated, two-year term that had been imposed as punishment for a prior felony conviction following the revocation of his probation. On appeal, Willett contends the trial court erred when it denied his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. Additionally, Willett contends the trial court erred when it ordered him to serve a term in this cause consecutive to the term imposed for the prior conviction. We affirm his conviction but vacate his sentence for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We view the facts on appeal in the light most favorable to upholding the jury's verdict. *See State v. Hamblin*, 217 Ariz. 481, ¶ 2, 176 P.3d 49, 50 (App. 2008). On October 24, 2007, the Cochise County Sheriff's Office responded to a call from a father reporting his minor daughter M. was missing. Sheriff's Deputy Joseph Gilbert interviewed several of M.'s classmates and talked to Willett. Willett stated he had not seen M. for several days. However, later that afternoon, M. and Willett boarded a bus in Willcox, Arizona, and traveled to Wytheville, Virginia.

¶3 M. called Deputy Gilbert three days later. She told him she had left the state of Arizona with Willett. Willett also spoke with Gilbert and identified himself as M.'s fiancé. Both M. and Willett expressed a desire to remain out of the state and continue their

relationship. M. also talked to her father and asked him if he knew where she was. She told her father she wanted to remain with Willett without further interference from her family or the Cochise County Sheriff's Office. From one of Willett's telephone calls to Gilbert, the Cochise County Sheriff's Office was able to trace the address from which the call had been made. The next day, Virginia authorities took Willett and M. into custody.

¶4 M. informed Cochise County authorities that she and Willett had an ongoing sexual relationship before they had left Arizona, that Willett had purchased M.'s bus ticket to Virginia, and that they had been staying with an acquaintance of Willett's. M. also confirmed that Willett had never obtained permission from any person in her family to take her out of the state, nor did she know where they were traveling when they left.

¶5 Willett was charged with custodial interference, a class three felony. *See* A.R.S. § 13-1302(A)(1), (D)(1).[1] Before trial, Willett appeared at a hearing on a petition to revoke probation that had been imposed for a prior conviction for attempted theft. Willett pled no contest to an allegation he had violated probation with the understanding that his probation would be revoked, that he would receive a two-year prison term on the theft

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[1]Section 13-1302 provides, in pertinent part, as follows:

> A. A person commits custodial interference if, knowing or having reason to know that the person has no legal right to do so, the person does one of the following:
>
> 1. Takes, entices or keeps from lawful custody any child, or any person who is incompetent, and who is entrusted by authority of law to the custody of another person or institution.

offense, and that sentence would be concurrent with any sentence arising from the custodial interference charge. At the revocation hearing, the state had not yet agreed to be bound by Willett's understanding of any agreement regarding his sentences in the two causes. At a subsequent hearing, the trial court accepted Willett's admission that he had violated probation. The court deferred disposition pending resolution of the custodial interference charge. The trial on that charge began on May 28, 2008, before Judge Hoggatt. At the close of the state's case, Willett moved pursuant to Rule 20 for a judgment of acquittal. Willett argued the state had not produced substantial evidence that he had "enticed" M. within the meaning of § 13-1302(A)(1). The court denied the motion, and the jury subsequently found Willett guilty.

¶6 On June 2, 2008, the court held the disposition hearing on the prior attempted theft conviction. The state then expressly agreed that, in exchange for Willett's admission that he had violated probation, Willett would be sentenced to a two-year prison term, to be served concurrently with the prison term to be imposed on the custodial interference conviction. Judge Desens revoked probation and sentenced Willett accordingly and specifically ordered that the terms be served concurrently with any sentence yet to be imposed on the custodial interference charge. At the subsequent sentencing hearing, Judge Hoggatt sentenced Willett to the presumptive term of 6.5 years for custodial interference. But finding the offense had been committed while Willett was on probation for another offense, and unaware the state had entered any agreement with Willett, Judge Hoggatt

ordered that the term be served consecutively to that imposed in the other matter. Willett has timely appealed his conviction and sentence on the custodial interference charge.

SUFFICIENCY OF THE EVIDENCE

¶7 Willett first contends the trial court erred when it denied his Rule 20 motion, asserting on appeal, as he did below, that the state presented insufficient evidence that he had enticed M. into leaving home. He maintains the evidence showed he made no promises to M. that caused her to leave her father's custody and she would have done so regardless of any actions he took to facilitate that departure.

¶8 We will not reverse a trial court's ruling on a Rule 20 motion unless "there is a complete absence of 'substantial evidence' to support the conviction." *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). "'Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003), *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In determining whether there was sufficient evidence to withstand a Rule 20 motion and support a conviction, we view the evidence and the reasonable inferences therefrom in the light most favorable to upholding the convictions. *See State v. Cox*, 214 Ariz. 518, ¶ 2, 155 P.3d 357, 358 (App.), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007). Furthermore, "the substantial evidence required to warrant a conviction may be either circumstantial or direct," and its

probative value is not reduced simply because it is circumstantial. *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981).

¶9 As a threshold matter, Willett contends that, in ruling on his Rule 20 motion, the trial court misconstrued the statutory meaning of the word "entice[]," one of the elements of the offense of custodial interference. *See* § 13-1302(A)(1).[2] He argues a person cannot "entice" another in the context of § 13-1302(A)(1) without promising another either a reward or something of value.

¶10 There is no statutory definition of the word "entice" for purposes of § 13-1302. Under such circumstances, we give "words [in a statute] their usual and commonly understood meaning unless the legislature clearly intended a different meaning." *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). Nothing in the statute suggests the legislature intended the word to have a meaning other than its common meaning. "Entice" is defined in *Black's Law Dictionary* 553 (7th ed. 1999), as follows: "To lure or induce; esp[ecially] to wrongfully solicit (a person) to do something." Similarly, *The American Heritage Dictionary* 457 (2d college ed. 1991) defines the word as follows: "To attract by arousing hope or desire; lure." This court has adopted similar definitions of the word in the context of other criminal laws. *See State v. Cook*, 139 Ariz. 406, 408, 678 P.2d 987, 989 (App. 1984) (relying on dictionary and defining "entice" as "draw[ing] on by arousing hope

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[2]Although a person may also commit custodial interference by taking or keeping a child from the person with lawful custody of the child, the state concedes that "the jury here was instructed only on an enticement theory."

or desire; tempt[ing]; lur[ing]" in the context of Tucson ordinance prohibiting enticing another to commit unlawful sexual acts); *see also State v. Schwartz*, 188 Ariz. 313, 319, 935 P.2d 891, 897 (App. 1996) (adopting same definition of "entice" in context of offense of enticing another into house of prostitution).

¶11 Contrary to Willett's suggestion, none of these definitions expressly or implicitly requires the giving of a reward of tangible value. And, based on the common definitions of the term, the state presented sufficient evidence from which reasonable jurors could conclude Willett had tempted or lured M. into leaving her home and traveling to Virginia without her parent's consent. Willett made travel arrangements for their departure to Virginia and appropriated housing for M. once they arrived there. Indeed, Willett does not dispute that he paid for the bus ticket to Virginia. According to M., Willett suggested that they might marry and establish a permanent life together outside of Arizona. Willett also promised M. that their "life would be better" and that he "would give [her] the world." The jury reasonably could conclude that Willett had tempted or lured M. away from parental custody by arousing M.'s hopes.

¶12 In a related argument, Willett contends M. independently had decided to run away from home, which precluded a finding he had enticed her to do so. But in *Schwartz*, we held that enticement can occur without the victim's acquiesce in the enticer's plans and that a finding of enticement therefore rests on the intent of the perpetrator, not the victim. *Id.* Although M. may have expressed an independent desire to run away from home, our

focus is properly on the intent of Willett in tempting or luring M. away from parental custody. The facts discussed above provided the jury with ample evidence from which they could have concluded beyond a reasonable doubt that Willett intended to tempt or lure M. from her home.[3] The trial court did not err in finding the state presented sufficient evidence to support the conviction.

SENTENCING ERROR

¶13 Willett next contends Judge Hoggatt abused his discretion in ordering the 6.5-year sentence imposed in this case be served consecutively to the two-year term previously imposed by Judge Desens for Willett's prior conviction. He asserts that he and the state had in fact entered into an agreement whereby the 6.5-year sentence for the custodial interference charge would be served concurrently with the two-year sentence he received for attempted theft. Accordingly, Willett argues Judge Hoggatt erred in failing to investigate fully whether such an agreement existed and erred in imposing a consecutive sentence contrary to the agreement.[4] *See State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001) (abuse

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[3]Embedded in Willett's challenge to the sufficiency of the evidence and the denial of his Rule 20 motion is the suggestion that the trial court erroneously excluded testimony from M. regarding her prior adult relationships and prior attempts to run away from home. This exclusion argument was not squarely raised on appeal, and we need not reach the merits. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must contain argument and citations to authority for each contention raised on appeal).

[4]The state argues Willett "did not assert this claim in [the] trial court and it is, therefore, forfeited for all but fundamental, prejudicial error." *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). We disagree. Willett's counsel specifically contended during sentencing that Willett had reached a prior agreement with the state requiring a concurrent term.

of discretion might occur when trial court fails to conduct adequate investigation into facts relevant to sentencing).

¶14 To address Willett's claim, we must first assess whether the state and Willett had entered into an agreement entitling Willett to concurrent sentences. The record of the first two pertinent hearings on the probation violation proceedings related to the prior theft conviction shows there were ongoing discussions between the parties about resolving the two matters, with some dispute about whether Willett would be required to plead guilty to the custodial interference charge. But the transcript from the disposition hearing on the theft matter, which was conducted after the jury had found Willett guilty of custodial interference, establishes the state ultimately agreed Willett would be sentenced to concurrent prison terms, and the trial court accepted the terms of that agreement.

¶15 At the inception of that hearing, Willett's defense counsel stated his understanding that the parties had "stipulated" to a "two-year concurrent prison sentence in the Department of Corrections." The following exchange then occurred between Judge Desens and the prosecutor:

> THE COURT: . . . . Ms. Udall, is that your understanding of the agreement by and between the State and defendant?
>
> MS. UDALL: Yes, Your Honor.
>
> THE COURT: Okay. And it will be [a] slightly mitigated term of two years, with presentence incarceration to run concurrently with any sentence that may be imposed [in the custodial interference matter]?

MS. UDALL: Yes, Your Honor.

After confirming that Willett himself understood the agreement and had, based on that agreement, knowingly, voluntarily, and intelligently waived his right to a probation violation hearing, Judge Desens found "the stipulated sentence is proper and appropriate under all the facts and circumstances known to the Court." Thus, the state ultimately agreed to the terms of the "stipulated" agreement described by Willett's counsel at the disposition hearing. That agreement included a promise that the sentence imposed on the theft conviction would be concurrent with any sentence imposed on the custodial interference charge.

¶16 We next address whether the agreement reached in the probation violation proceedings and accepted by Judge Desens was binding on Judge Hoggatt. The state suggests the two cases are separate and must be evaluated separately. But based on the record before us, the agreement was intended to apply to both cases. Any agreement regarding the concurrent or consecutive nature of prison terms encompassed two causes and necessarily is enforceable as to both. Were we to conclude otherwise, the agreement would be wholly illusory. And we assume that both parties entered into the agreement with a good faith intention to honor all its obvious implicit terms.

¶17 Once a defendant and the state have entered into an agreement regarding a defendant's conviction and the terms of any sentence, the trial court may, in the exercise of its discretion, accept or reject the agreement. *State v. De Nistor*, 143 Ariz. 407, 411, 694

P.2d 237, 241 (1985). With respect to plea agreements, Rule 17.4(d), Ariz. R. Crim. P., provides in part:

> **Acceptance of Plea.** After making such determinations [of the accuracy of the agreement and the voluntariness and intelligence of the plea] and considering the victim's view, if provided, the court shall either accept or reject the tendered negotiated plea.

During the disposition hearing for Willett's probation violation on the theft charge, Judge Desens expressly found that the agreement to a concurrent sentence was "proper and appropriate" and thereby formally accepted it, implicitly binding the parties as to both cases. But, because Judge Hoggatt rather than Judge Desens conducted the trial and sentencing on the custodial interference charge, we must decide whether Judge Desens's acceptance of the agreement at the disposition hearing also bound Judge Hoggatt when sentencing Willett in this case.

¶18 We can find no authority in the Arizona Rules of Criminal Procedure or case law for the proposition that an agreement may be accepted only by the judge who will ultimately conduct the sentencing as to the matter controlled by the plea. Rather, our rules require only that "[i]n the Superior Court, a plea of guilty or no contest . . . be accepted by a court having jurisdiction to try the offense." Ariz. R. Crim. P. 17.1(a).[5] Judge Desens, a

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[5]We do not believe this lack of specificity was an oversight. Our supreme court might well have concluded that any further limitation on the identity of a judge qualified to accept a plea agreement would hamper the administrative flexibility of a court in efficiently utilizing its judicial personnel. And, as shall be discussed, the rules elsewhere provide an opportunity for the actual sentencing judge to reject any term of a previously accepted agreement upon review of the presentence report. *See* Ariz. R. Crim. P. 17.4(d).

judge of the Cochise County Superior Court, had such jurisdiction and therefore could accept an agreement germane to the custodial interference charge—even if he was not the ultimate sentencing judge on that matter.

¶19 As the state emphasizes, Judge Hoggatt was not bound, in the absence of any agreement between the state and Willett, to abide by any sentence Judge Desens imposed in the previous matter. *See State v. Moreno*, 173 Ariz. 471, 473-74, 844 P.2d 638, 640-41 (App. 1992) (imposing sentence to be concurrent with unimposed future sentence impermissible); *State v. King*, 166 Ariz. 342, 344, 802 P.2d 1041, 1043 (App. 1990) (holding imposition of consecutive sentence to unimposed future sentence prohibited). Indeed, in the absence of an agreement by the state to withdraw the allegation that Willett had committed custodial interference while on probation, Judge Hoggatt had no discretion to impose anything other than a consecutive prison term. *See* former A.R.S. § 13-604.02(B), 1999 Ariz. Sess. Laws, ch. 261, § 7 (sentence imposed for felony committed while defendant on probation for felony offense "shall be consecutive to any other sentence from which the convicted person had been temporarily released").

¶20 But Willett was entitled to have his custodial interference sentencing conducted in recognition of, and in accordance with, an agreement that pertained to both cases and which the court accepted. That agreement bound the state to take those steps necessary to effectuate its promise that Willett's two prison terms would be served concurrently: withdraw the allegation under the former § 13-604.02(B) and recommend a concurrent

sentence. *See Coy v. Fields*, 200 Ariz. 442, ¶ 5, 27 P.3d 799, 801 (App. 2001) (once court accepts plea agreement, state may not withdraw unless defendant breaches obligations under agreement). And, the trial court, having accepted the agreement, was bound to order that the sentences be served concurrently, unless it found that the sentence was "inappropriate" based on the presentence report. *See* Ariz. R. Crim. P. 17.4(d) ("The court shall not be bound by any provision in the plea agreement regarding the sentence . . . if, after accepting the agreement and reviewing a presentence report, it rejects the provision as inappropriate.").

¶21 In this case, Judge Hoggatt, after having received erroneous information from the trial prosecutor, concluded no such agreement had been reached.[6] The trial court therefore did not assess the propriety of the plea in light of the presentence report nor did the state withdraw the allegation requiring a consecutive sentence.

¶22 For the foregoing reasons, we affirm Willett's conviction. But we vacate his sentence, remand this matter to the trial court, direct the state to move to dismiss the allegation that Willett committed the offense while on release pursuant to the former § 13-604.02(B), and order that the trial court sentence Willett in conformity with the agreement,

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[6]The state was represented by a different prosecutor at the disposition hearing on the theft matter. We therefore presume that the state's later incorrect contention that no agreement had been reached arose from a mere lack of communication within the Cochise County Attorney's Office, rather than from any effort to intentionally mislead the court or capitalize on an illusory promise. Because Judge Hoggatt was entitled to assume that the state was providing him accurate information, because the agreement was not expressly reflected in any of the minute entries within the available probation revocation file, and because, in the absence of any agreement, a consecutive sentence was required pursuant to § 13-604.02(B), we understand Judge Hoggatt's predicament.

unless it determines that information set forth in the presentence report would render the agreement inappropriate. In the event the trial court rejects any part of the agreement between the state and Willett, it must provide Willett the opportunity to withdraw his admission that he violated probation in the theft matter. *See* Ariz. R. Crim. P. 17.4(e).

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge