IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALEXANDRO MORAGA, JR.,
Appellant.

No. 2 CA-CR 2013-0056
Filed January 28, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201100488
The Honorable Joseph R. Georgini, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

M I L L E R, Judge:

¶1 Alexandro Moraga was convicted after a jury trial of two counts of kidnapping and one count each of aggravated assault, hindering prosecution, and misconduct involving a weapon. On appeal, he contends there was insufficient evidence to establish guilt on the weapons misconduct count and the jury's finding that the kidnapping and aggravated assault counts were dangerous offenses. Although we affirm as to the arguments raised on appeal, we vacate one of Moraga's kidnapping convictions because we find fundamental error, which the state concedes in its supplemental brief.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Moraga. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). Moraga kidnapped and assaulted M.H. because of the latter's assault complaint in a Maricopa criminal case. In the Maricopa case, M.H. had been assaulted by a husband who suspected M.H. of having an affair with his wife, Julia Romero. To avoid a criminal conviction against her husband, Romero was willing to trade money and drugs in return for M.H.'s agreement not to testify against her husband. In August 2010, Romero arranged a meeting with M.H., wherein she would drive him to a casino to give him money and drugs. On August 22, M.H. received a text message on his cellular telephone stating Romero was nearby and he should come outside. M.H. saw a car parked in front of the neighbor's

driveway, opened the passenger door, and saw Christopher Muckerman in the driver's seat. M.H. thought he had the wrong car and moved to walk away when Moraga approached from the driveway, pointing a rifle at M.H.'s head. Moraga told M.H. to get in the car.

¶3 M.H. got in the front passenger seat, while Moraga sat in the back seat. Muckerman drove the car toward Mesa, making one stop to change the license plate, and a second stop to get gas. M.H. was instructed to put a shirt over his head and keep his head down, and they drove five or ten more minutes until their last stop. When they stopped, Moraga left the car.

¶4 A Mesa police officer drove by, saw a man walking down the street, and turned around. Although the officer lost sight of the man, he saw a car parked on the wrong side of the street, and as he approached, he saw two people in the front seats duck their heads. The officer looked in the car, saw a rifle on the back floorboard, and had M.H. get out of the car.[1] When M.H. was separated from Muckerman, M.H. explained he had been kidnapped.

¶5 Moraga, Muckerman, and Romero were arrested for kidnapping. Muckerman and Romero both pled guilty to conspiracy to commit kidnapping and testified against Moraga at trial. The jury found Moraga guilty of all charges and the trial court sentenced him to enhanced, maximum, concurrent prison terms, the longest of which were life terms. This timely appeal followed.

Insufficient Evidence Claims

¶6 Moraga contends there was insufficient evidence to support the guilty verdict on the weapons misconduct count and the jury's finding that the kidnapping and aggravated assault counts were dangerous offenses. He argues the state failed to meet its burden because it did not produce any evidence to show that either

[1]Law enforcement officers also recovered another gun from the floor of the back seat.

the rifle or the gun used during the kidnapping had been in working condition.

¶7 We review a claim of insufficient evidence "only to determine whether substantial evidence supports the jury's verdict[s]." *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). "Substantial evidence has been described as 'more than a mere scintilla' of evidence; but it nonetheless must be evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913-14, *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997).

¶8 A person commits weapons misconduct by "knowingly possessing a deadly weapon, to wit: a firearm, while being a prohibited possessor, in violation of A.R.S. § 13-3102(A)(4)." Section 13-105(15), A.R.S.[2] defines a deadly weapon as "anything designed for lethal use, including a firearm." "Firearm" is further defined, and includes the exception that "it does not include a firearm in permanently inoperable condition." A.R.S. § 13-105(19).

¶9 During closing arguments, Moraga contended the state had failed to prove the weapons had been operable; therefore, it failed to prove each element of the weapons misconduct charge beyond a reasonable doubt. The state objected on the ground that operability of a firearm is an affirmative defense, which Moraga failed to assert. The trial court agreed, directed Moraga not to make further arguments on this point, and allowed the state to make a brief rebuttal argument in its reply.

¶10 This court has previously determined that the question of whether a firearm is in working condition is an affirmative defense that must be raised by the defendant. *State v. Rosthenhausler*, 147 Ariz. 486, 490-92, 711 P.2d 625, 629-31 (App. 1985). In

---

[2]Section 13-105, A.R.S., has been amended three times since the date of the offense. Although the definitions applicable here have been renumbered, the text has not changed. *See* 2008 Ariz. Sess. Laws, ch. 301, § 10.

Rosthenhausler, the defendant was charged with aggravated assault with a deadly weapon. *Id.* at 490-91, 711 P.2d at 629-30. At trial, no witness was asked whether the gun used in the assaults had been operable, and during closing arguments, the defendant argued that the state had failed to prove that the gun had been operable. *Id.* at 491-92, 711 P.2d at 630-31. The state objected and the trial court determined the operating condition of the gun was an affirmative defense, not an element of the offense. *Id.* at 492, 711 P.2d at 631. This court agreed, concluding as follows:

> We do not believe that by "excepting" from the definition of "firearm" weapons which are in a permanently inoperable condition, the legislature intended that the state be required to prove the non-existence of the exception. That is, the state is not required to prove that the weapon is *not* permanently inoperable to establish a prima facie case.

Id. at 493, 711 P.2d at 632; *see also State v. Valles*, 162 Ariz. 1, 7, 780 P.2d 1049, 1055 (1989) (citing *Rosthenhausler* and noting, "Absent reasonable doubt as to the operability of a firearm, the state has no burden to prove the gun was not permanently inoperable").

¶11 Unless otherwise provided by law, a defendant must prove an affirmative defense by a preponderance of the evidence. A.R.S. § 13-205. Moraga has not cited to any part of the record, nor have we found any in our review, establishing that he raised this affirmative defense or otherwise questioned the operability of the firearms at any time before closing arguments. Because Moraga provided no evidence the weapons had been inoperable at the time of the offenses, and because the state was not required to prove they had been operable, there was sufficient evidence to support the jury's verdict on the weapons misconduct count and the finding of dangerousness as to the kidnapping and aggravated assault charges. *See Rosthenhausler*, 147 Ariz. at 490-93, 711 P.2d at 629-32.

Fundamental Error in Kidnapping Counts

¶12 In reviewing the record in connection with the claims Moraga raised on appeal, we found a double jeopardy violation resulting from his having been convicted of both kidnapping counts. "Although we do not search the record for fundamental error, we will not ignore it when we find it." *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). A double jeopardy violation is fundamental, prejudicial error. *State v. Ortega*, 220 Ariz. 320, ¶ 7, 206 P.3d 769, 772 (App. 2008). We ordered the parties to submit supplemental briefs on the issue. The state conceded that the "convictions for two counts of kidnapping violate the prohibition against double jeopardy and constitute fundamental prejudicial error." Moraga joined in the arguments and authorities submitted by the state in lieu of filing a supplemental brief.

¶13 The double jeopardy clauses of the federal and state constitutions protect criminal defendants from multiple convictions for the same offense. *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008); *see also* U.S. Const. amend. V; Ariz. Const. art. 2, § 10. "[W]hen a defendant is convicted more than once for the same offense, his double jeopardy rights are violated even when . . . he receives concurrent sentences." *State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008); *see also Ball v. United States*, 470 U.S. 856, 861, 864 (1985) (concluding concurrent sentences do not remedy double jeopardy violation).

¶14 Multiple kidnapping convictions involving one person require the confinement to end and then begin anew. *See State v. Jones*, 185 Ariz. 403, 407, 916 P.2d 1119, 1123 (App. 1995); *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993). There is no evidence that M.H.'s confinement ended before he was rescued by law enforcement. Rather, the prosecutor argued multiple motivations justified two kidnapping counts:

> Now, you may be wondering why there are two kidnapping statutes. Well, that's because we know from Christopher Muckerman that this plan was evolving. Originally the plan was to go down there

> and just kill [M.H.] right there in front of his house. But for whatever reason the defendant changed his mind and he took [M.H.] at gunpoint.
>
> [M.H.] testified that, you know, at certain times he thought he was going to be killed and at other times he didn't know what was going on because at this point the defendant is winging it.
>
> . . . .
>
> This kidnapping evolved. At one point they were threatening [M.H.] with physical injury and threatening his family. And at other points they were planning to kill him.

¶15 The state concedes in its supplemental brief that "[t]he prosecutor in [Moraga's] case appears to have believed that, if [Moraga's] intent changed during the course of the kidnapping, that circumstance could support two separate kidnapping charges." The state acknowledges that this court has repeatedly rejected that argument. *See Jones*, 185 Ariz. at 406, 916 P.2d at 1122; *see also State v. Braidick*, 231 Ariz. 357, ¶ 7, 295 P.3d 455, 457 (App. 2013) (uninterrupted restraint of victim, even with varying intents, does not give rise to more than one count of kidnapping). Moraga's convictions on two counts of kidnapping violated the prohibition against double jeopardy, resulting in error that was fundamental and prejudicial.

¶16 Although we usually vacate the "lesser" of the two convictions when double jeopardy is violated, *State v. Ballez*, 102 Ariz. 174, 175, 427 P.2d 125, 126 (1967), here, the two kidnapping sentences are both life sentences. We vacate Count Two as the second, concurrent life sentence. *See Braidick*, 231 Ariz. 357, ¶ 13, 295

P.3d at 458-59 (vacating second conviction where neither one is "lesser").

Conclusion

¶17 The conviction and sentence for kidnapping on count two is vacated. The remaining convictions and sentences are affirmed.