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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0059
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ANDREW JOHN GONZALEZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2010-006222-001 DT

The Honorable John R. Hannah, Jr., Judge

AFFIRMED

Thomas Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and W. Scott Simon, Assistant Attorney General
Attorneys for Appellee

Tyrone Mitchell, P.C. Phoenix
By Tyrone Mitchell
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Andrew John Gonzalez (defendant) appeals his
convictions for one count of attempted second degree murder, a

class 2 dangerous felony, two counts of armed robbery, class 2 dangerous felonies, one count of conspiracy to commit armed robbery, a class 2 dangerous felony, two counts of aggravated assault, class 3 dangerous felonies, and one count of misconduct involving weapons, a class 4 dangerous felony. Defendant argues that there was insufficient evidence to sustain his convictions, and that the trial court abused its discretion by not allowing him to question a witness about the witness's prior conviction and by failing to grant a mistrial. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On July 11, 2009, defendant and another individual, Carlos Robles, were picked up by Daniel Gutierrez, T.K. and E.S. Gutierrez was driving a Chevy Silverado pickup truck which belonged to T.K. Robles suggested that the men "jack" two men whom he thought were cocaine dealers. Gutierrez drove the men to the area of 27th Drive and Pierce in Phoenix, where they located the victims' vehicle, a white SUV, which was parked in an alley.

¶3 After the men stopped and observed the SUV, Gutierrez drove up to the SUV and blocked it in the alley. Defendant and Robles exited the truck and shot at the victims, both of whom

were hit.¹ One of the shooters took a black shaving bag from inside the SUV. Defendant and Robles got back into the truck and the five men fled the scene.

¶4 Shortly thereafter, police observed the truck proceeding northbound on 35th Avenue and initiated a stop. Defendant jumped out of the bed of the truck and fled on foot. Defendant was later apprehended while hiding behind a garbage can at a nearby school. Two witnesses, Maria C. and Jeremy S., were brought to a restaurant parking lot near 35th Avenue and McDowell, where they identified T.K.'s truck. Additionally, Maria C. identified defendant and Jeremy S. identified Gutierrez.

¶5 Police found the nine millimeter semi-automatic handgun used by defendant in the bed of the truck. They found six nine millimeter cartridge casings that been fired by the gun at the scene of the shooting. Police also found a shotgun, a pistol, and the black shaving bag in the truck. Defendant admitted that he had been in T.K.'s truck and fled from police. Defendant stipulated that he had a prior felony conviction and was a prohibited possessor at the time of the shooting.

¹ Victim Leon R. was shot in the face and thigh; his femoral artery was severed and he was "dead on arrival" before being resuscitated by doctors. The other victim, Edwin R., was grazed by a bullet and suffered an abrasion to the left buttock.

¶6 After a jury trial, defendant was convicted as charged. The trial court sentenced defendant to an aggravated term of 20 years in prison on count one; presumptive terms of 15.75 years on counts two, three, and four; presumptive terms of 11.25 years on counts five and six, and the presumptive term of 10 years on count seven. The court ordered defendant to serve the sentence for count three consecutive to the other six counts and the remaining counts to be served concurrently. The trial court gave defendant credit for 558 days of presentence incarceration.

¶7 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A) (2010).

DISCUSSION

A. Sufficiency of the Evidence

¶8 In considering a claim of insufficient evidence, we construe the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against the defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). Reversible error based on insufficiency of the evidence occurs only if 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 more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. DiGiulio*, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App. 1992) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990)). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Evidence may be direct or circumstantial; circumstantial evidence has no less probative value than direct evidence. *State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (App. 1991) (citing *State v. Blevins*, 128 Ariz. 64, 623 P.2d 853 (App. 1981)).

¶9 The evidence was sufficient to support defendant's convictions. The evidence indicated that defendant and his co-defendants planned to "jack" the victims, whom they believed to be drug dealers. The men located the victims parked in their SUV in an alley, and defendant and Robles got out of their vehicle and began firing at the victims. Victim Leon R. was shot in the face and femoral artery. Victim Edwin R. was also shot and there were multiple bullet holes in the victims' SUV and multiple bullet casing found in the surrounding area. Leon R.'s black bag was taken from the SUV and later found by police,

smearred with Leon R.'s blood, in the back of the truck. Police also found a nine millimeter semi-automatic handgun in the back of the truck. Defendant admitted to police that he had been in the back of the truck and that he ran away after police pulled the truck over. His fingerprint was also found on T.K.'s truck, and Maria C. identified defendant as one of the assailants.² The evidence was substantial and clearly sufficient to support the jury's convictions in this case. We find no error.

B. Witness Edwin R.'s Prior Conviction

¶10 Defendant next argues that the trial court abused its discretion by refusing to allow defense counsel to question a witness, Edwin R., about his prior felony conviction, and by failing to grant a mistrial for the same reason. We review the trial court's decision to grant or deny a mistrial under an abuse of discretion standard. *State v. Ferguson*, 149 Ariz. 200, 211, 717 P.2d 879, 890 (1986). Likewise, we review the trial court's evidentiary rulings for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004). "The trial court has wide discretion in deciding whether to exclude evidence of prior convictions because its prejudicial effect is greater than the probativeness on lack of credibility,

² Although defendant calls Maria C.'s identification "unduly suggestive," he cites no authority to support this assertion and so we do not consider it. See *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

and the exercise of this discretion should not be disturbed absent a clear showing of abuse." *Blankinship v. Duarte*, 137 Ariz. 217, 219, 669 P.2d 994, 996 (App. 1983).

¶11 On November 15, 2010, the prosecutor advised the court that victim/witness Edwin R. had told her that he had a felony conviction in New Jersey in 1989 and served five years in prison for intent to distribute drugs. Although the prosecutor's office had run a criminal history for Edwin R. multiple times, no official criminal history for him had been found. Regardless, the prosecutor asked the trial court to make a Rule 609, Arizona Rules of Evidence, determination as to whether Edwin R.'s prior conviction would be allowed in evidence. The trial court granted the state's motion to preclude the defendants from asking Edwin R. about the conviction at trial, stating:

The presumption is that an old conviction is not admissible. Furthermore, evidence of an old conviction is not admissible unless the proponent gives the adverse parties sufficient and advance written notice of intent to use such evidenced [sic] by the adverse party when it's their opportunity to contest the use of the evidence.

Now, I understand that it's the State that's notified the defendants of this. So I'm not saying that the defendants broke the rule or did anything improper. However, what I take from that language is that the--it's in support of the presumption that an old conviction is not admissible unless there's something about it that causes the probative

value substantially to outweigh prejudicial effect.

If the defendants can come up with something that demonstrates that probative value outweighs prejudicial effect, then I might reconsider my ruling. But at this point, all we have is that there appears to be an old prior drug sale conviction. And that by itself is not enough.

I take the prosecutor's representations about her knowledge of the prior conviction and her efforts to learn about and disclose any criminal record of these witnesses at face value. She just learned about it. She told you all about it. But that doesn't make it admissible by itself. That's my ruling.

Defendant Gutierrez subsequently requested that defense counsel be allowed to interview Edwin R.; the trial court denied the request citing Edwin R.'s victim's rights. Defendant Robles's defense attorney moved for a mistrial, which defendant's counsel joined. The court denied the motion, stating that if new information about Edwin R.'s conviction that would be exculpatory to the defendants was brought to the court's attention, it would reconsider its ruling. Defendant did not thereafter provide any further information about the alleged conviction.

¶12 Arizona Rule of Evidence 609(b) limits the use of evidence of a criminal conviction for impeachment purposes when more than ten years have passed since the witness's conviction

or release from confinement. As applicable here, Rule 609(b)³ provided:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

¶13 The trial court had wide discretion to rule that the probative value of Edwin R.'s alleged 1989 conviction would not outweigh its potential prejudicial effect on the jury. We find no abuse of discretion.

CONCLUSION

¶14 For the foregoing reasons, we affirm defendant's

³ After defendant's trial had been completed, Arizona Rule of Evidence 609 was amended, effective January 1, 2012. See Order Amending the Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure, Ariz. Sup. Ct. No. 12-10-0035 (Sept. 7, 2011). The citations to Rule 609 contained herein are to the text of the rule as it existed at the time of defendant's trial.

convictions and sentences.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

SAMUEL A. THUMMA, Judge