DIVISION ONE
FILED: 10/1/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0689
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
VINCENT ARROYO, JR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR201000313

The Honorable Denise D. Gaumont, Judge Pro Tem (Retired)

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee

Mary Elizabeth Perez — San Diego, CA
Attorney for Appellant

T H O M P S O N, Judge

¶1 Vincent Arroyo, Jr. (defendant) appeals his convictions for three counts of aggravated assault. For the

reasons set forth below, we affirm defendant's convictions and sentences.[1]

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Defendant was terminated from Associated Citrus Packers in Yuma around the end of February 2010. A week or two later, defendant parked his car alongside Gregorio P. (Greg), the plant superintendant, and told him to tell Barbara H. (Bobbie), the human resources director, and Mark S., an owner of the company, that "they were marked for death." Defendant repeated the threat once or twice more before Greg challenged defendant to a fist fight. Before getting out of his car, defendant reached over to the side of the front seat and "pulled out [a] machete." Defendant raised the machete up to waist level as he again told Greg to tell "Bobbie and Mark" that "they were marked for death."

¶3 After Greg drove back to the plant and told Bobbie about the threats, her "eyes got big" and she appeared scared and nervous. Mark instructed Greg to call the police. Officer Ernesto Rangel arrived at the plant and told Greg, Bobbie, and Mark that he "could not do anything" and "could not stop" defendant. Bobbie announced over the intercom that the plant was on "lockdown." She then returned to her office to tell her

[1] Defendant has not appealed from two attempted murder convictions.

co-workers, Elizabeth L. and Guadalupe L. (Lupe) about the threats because she was angry that the police "couldn't stop" defendant. As Bobbie was talking with Elizabeth and Lupe, they heard "glass breaking" and crashing and banging noises that sounded like gunshots. Lupe testified that she felt she "was in danger and nervous, worried for [her] life." She got down and crawled under a desk. Elizabeth saw defendant "hitting the door with the machete," and then exclaimed, "He's at the door. Run." Elizabeth and Bobbie ran toward the back door; as they ran down a flight of stairs, Bobbie fell and sprained both her ankles. Other employees helped Bobbie up while Elizabeth yelled at Lupe to get out of the office.

¶4 The three women saw defendant drive away from the plant, and Elizabeth went inside to call 911. Soon thereafter, defendant returned and smashed Bobbie's car windows with the machete. Defendant then opened the office door where Elizabeth was calling 911, and with "the machete in his hand" made a "beeline" toward Elizabeth. When he was within five feet of Elizabeth he raised up the machete and said "I told you not to call the f***ing cops." Elizabeth felt "really fearful" and ran toward the back door with defendant in pursuit hitting a computer server with the machete. Elizabeth turned the lock and slammed the door as she exited into the yard where Bobbie and Lupe were. As she was telling them to start running because

defendant was behind her, defendant "busted the back door open." Although Lupe was five months pregnant and Bobbie had two sprained ankles, all three women started running. At one point, Bobbie looked behind her and defendant said, "You better f***ing run," and, "When I catch up with you I'm going to f***ing kill you." Lupe heard defendant say, "run for your life," and she felt scared and "in danger," and "thought [her] life was ending." The three women ran into the sales office to hide from defendant.

¶5 When defendant saw Mark in the yard, he changed directions and began walking "directly towards [Mark] at a fast pace," "yelling and screaming," and waving the machete in a hacking motion while pointing at Mark. Officer Zaragoza heard defendant say, "Do you want to talk s*** about me now, mother f***er? I'm going to f***ing kill you." Mark was "fearful" and "looked frightened." Mark was able to escape to the other side of the perimeter fence where several police officers were standing, and defendant continued on to the sales office where he "broke the window" with the machete, and "kicked in" the door before entering the office. Elizabeth was standing near the window and had to turn her head to block the shattering glass. Bobbie and Lupe were hidden under a desk, and they heard the window break and the door swing open and footsteps. Bobbie heard the shipping clerk "pleading" with defendant, "Vincent,

no. Please, Vincent, no." Police officers were finally able to get into the yard and subdue defendant with tasers. Even after he was taken into custody, defendant continued to scream, saying, "I'm going to kill them," he "wasn't going to let them get away with this," and telling the officers to "hurry up [and] take [me] to prison."

¶6 Defendant was charged with four counts of attempted first degree murder, class 2 felonies (Counts 1, 2, 3, and 7), and three counts of aggravated assault, class 3 felonies (Counts 4, 5, and 6). Bobbie was the alleged victim of Counts 1 and 4, Lupe was the alleged victim of Counts 2 and 5, Elizabeth was the alleged victim of Counts 3 and 6, and Mark was the alleged victim of Count 7.

¶7 During opening statements at trial, defendant's counsel asserted that defendant "threaten[ed] people," but "never had any sort of intent, as demonstrated by his actions, to kill anyone, to even harm anyone," and that he "never even touched these women that felt threatened." The state subsequently filed a requested jury instruction that stated:

> In order for the defendant to be found guilty of Aggravated Assault pursuant to A.R.S. 1204(a)(2), 13-1203(a)(2), it is not a necessary element that the victim be in actual substantial risk of imminent death or physical injury. All that is required is that the victim be in reasonable apprehension of physical injury. [R 89]

Defendant objected because it was "a confusing instruction." The trial court added the jury instruction over defendant's objection. The jury acquitted defendant of Counts 2 and 3, but found him guilty on the remaining charges, and found Counts 4, 5, and 6 to be dangerous offenses.

¶8 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), -4033(A) (2010).

DISCUSSION

¶9 Defendant argues that he was denied a fair trial as a result of the state's proposed and final jury instruction on aggravated assault. We review the trial court's decisions on jury instructions for an abuse of discretion. *State v. Hurley*, 197 Ariz. 400, 402, ¶ 9, 4 P.3d 455, 457 (App. 2000). We review de novo whether jury instructions adequately state the law. *State v. Hausner*, 230 Ariz. 60, 83, ¶ 107, 280 P.3d 604, 627 (2012).

¶10 Jury instructions "must be viewed in their entirety to determine whether they adequately reflect the law." *State v. Ovante*, 231 Ariz. 180, 188, ¶ 35, 291 P.3d 974, 982 (2013) (citation omitted). We evaluate them in context and in conjunction with the closing arguments of counsel. *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989);

see also State v. Valverde, 220 Ariz. 582, 586, ¶ 16, 208 P.3d 233, 237 (2009) ("In assessing the impact of an erroneous instruction, we also consider the attorneys' statements to the jury."). The instructions given "need not be faultless," *State v. Rutledge*, 197 Ariz. 389, 393, ¶ 15, 4 P.3d 444, 448 (App. 2000), and we will not reverse a conviction on the basis of improper instructions "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors," *State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995).

¶11 Defendant was charged with violating A.R.S. § 13-1204(A)(2) (2003), which provides that a person commits aggravated assault by "[i]ntentionally placing another person in reasonable apprehension of imminent[2] physical injury" while using "a deadly weapon or dangerous instrument." *See* A.R.S. § 13-1203(A)(2) (2003). The trial court instructed the jurors on assault and aggravated assault as follows:

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[2] Although the statute uses the word "imminent," the jury instruction used the word "immediate," per defendant's request. Webster's dictionary defines "imminent" as "[a]bout to occur at any moment: impending." Webster's II New College Dictionary 553 (1995). "Immediate" was defined for the jury as "not separated in time; acting or happening at once; without delay; instant." The state argues this was a "very defense favorable definition" that was clear error. In light of our holding, we do not address this argument. However, we recognize that "immediate" and "imminent" have distinct definitions and that they are not synonymous. We encourage trial courts to use the statutory language when instructing juries in order to avoid the type of issue raised in this case.

> The crime of assault requires the proof that the defendant:
>
> __. . . .
>
> 2. Intentionally put another person in reasonable apprehension of immediate physical injury;
>
> The crime of aggravated assault requires proof of the following:
>
> 1. The defendant committed an assault, *and*
>
> 2. The assault was aggravated by at least one of the following factors:
>
> __. . . .
>
> __ The defendant used a deadly weapon or dangerous instrument;
>
> __. . . .
>
> In order for the Defendant to be found guilty of Aggravated Assault, it is not a necessary element that the victim be in actual substantial risk of imminent death or physical injury. All that is required is that the victim be in reasonable apprehension of physical injury.

Defendant argues that the lack of the qualifying term "imminent" or "immediate" in the last sentence "unnecessarily confused the jurors and ran afoul of controlling Arizona case law."

¶12 The supplemental instruction came from *State v. Morgan*, 128 Ariz. 362, 367, 625 P.2d 951, 956 (App. 1981), in which this court held that endangerment was not a lesser included offense of aggravated assault. A required element of

endangerment "is that the victim must be placed in actual substantial risk of imminent death or physical injury," compared to aggravated assault, which requires a person to "intentionally place 'another person in reasonable apprehension of imminent physical injury' using a deadly weapon or other dangerous instrument." *Id.* (citations omitted). Reasoning that there were many situations in which an assault could be committed without placing the victim in *actual* risk, the court concluded that actual substantial risk of imminent death or physical injury was not an element of aggravated assault, but that the victim must be "in reasonable apprehension of physical injury." *Id.*

¶13 Defendant cites *State v. Rineer*, 131 Ariz. 147, 639 P.2d 337 (App. 1981), and *Appeal of Juvenile Action No. J-78539-2*, 143 Ariz. 254 (1984), to argue that the instruction was inaccurate, confusing, and contradictory. The *Rineer* court stated that "[w]e are in complete agreement with the *Morgan* opinion as it relates to the offense of endangerment." 131 Ariz. at 148, 639 P.2d at 338. What the *Rineer* court disagreed with was the *Morgan* court's holding regarding threatening or intimidating, which has no bearing on our discussion. *Id.* *Juvenile Action No. J-78539-2* addressed the conflict between *Morgan* and *Rineer*, and also does not relate to the issue presented here. 143 Ariz. at 255-56, 693 P.2d at 910-11.

¶14 Considered in their entirety, the jury instructions adequately stated the law. *See Rutledge*, 197 Ariz. at 389, ¶ 15, 4 P.3d at 448. The trial court accurately instructed the jury that in order to convict defendant of aggravated assault, it had to first find that he committed an assault. Jurors were instructed that an assault requires proof that defendant "[i]ntentionally put another person in reasonable apprehension of immediate physical injury," and that "immediate" means "not separated in time; acting or happening at once; without delay, instant." We assume that juries follow the instructions they are given. *State v. McCurdy*, 216 Ariz. 567, 574, ¶ 17, 169 P.3d 931, 938 (App. 2007).

¶15 In addition, defense counsel's arguments to the jury made it clear that it first had to find defendant placed the victims in reasonable apprehension of *immediate* physical injury. Defense counsel repeatedly emphasized the importance of the word immediate, stating that assault "happens when someone puts another in apprehension of immediate [] harm. The person has to fear that this injury is going to come immediately, or instantly. And that's defined in your jury instruction as not separated in time, without delay, instant." The prosecutor read the definition of assault from the jury instructions to the jury, and emphasized that in order for the jury to convict defendant of aggravated assault, it would have to find that he

"intentionally put another person in reasonable apprehension of immediate physical injury."

¶16 Although the last sentence of the aggravated assault instruction did not include the word "immediate," we do not find that this omission negated all the emphasis put on the word in the jury instructions and throughout closing arguments. We cannot reasonably conclude the jurors were confused or misled by the instruction. *See Strayhand*, 184 Ariz. at 587, 911 P.2d at 593. At most, the omission of "immediate" in the last sentence would be harmless error. *See State v. McKeon*, 201 Ariz. 571, 573, ¶ 9, 38 P.3d 1236, 1238 (App. 2002) ("Error is harmless if we can conclude beyond a reasonable doubt that it did not influence the verdict.").

¶17 Defendant asserts that the erroneous instruction was "emphasized by the [s]tate in its rebuttal argument, further exacerbating the prejudicial effect of the instruction." The prosecutor did state in rebuttal that the statute does not require actual touching, but that the victims have to be "in reasonable apprehension of injury or death." This was in response to defense counsel's argument that defendant did not touch anyone. Defense counsel reiterated throughout closing argument that defendant "never even touched anyone that day," and that if defendant "wanted to touch them, he would have. It would have been very easy for him to do that." However, when

considered in context, and in light of the jury instructions as a whole and in conjunction with all of the closing arguments, the prosecutor's statement was not prejudicial. Consequently, we hold that the jury instructions adequately set forth the elements of aggravated assault and that the trial court did not abuse its discretion.

¶18 Defendant also argues that there was insufficient evidence that he committed aggravated assault upon Lupe. We review de novo the trial court's denial of a motion for judgment of acquittal. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). On a motion for a judgment of acquittal "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Parker*, 231 Ariz. 391, ¶ 70, 296 P.3d 54, 70 (2013) (emphasis omitted) (citation omitted). If the record contains substantial evidence establishing the elements of the offense then the motion for judgment of acquittal must be denied. *See id.* Substantial evidence is "such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *West*, 226 Ariz. at 562, ¶ 16, 250 P.3d at 1191 (citation omitted).

¶19 To prove defendant committed aggravated assault upon Lupe, the state was required to establish that he intentionally placed her in reasonable apprehension of imminent physical injury while using a deadly weapon or dangerous instrument. *See* A.R.S. §§ 13-1203(A)(2), -1204(A)(2). Defendant asserts that he did not have the specific intention of placing Lupe in apprehension, and that the requisite intent cannot be presumed from the act of chasing Bobbie and Elizabeth. "[A]bsent a person's outright admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances." *In re William G.*, 192 Ariz. 208, 213, 963 P.2d 287, 292 (App. 1997); *see also State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983) ("Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind.").

¶20 Here, the evidence presented at trial showed that defendant followed Elizabeth out the door into the yard and pursued Elizabeth, Bobbie, and Lupe who were running from him in fear for their lives. Defendant chased them while holding a machete and yelling out threats to "kill." Lupe testified that she felt she was "in danger" and was being "chased." Lupe heard defendant say, "Run for your life," and she felt scared and "thought [her] life was ending." Although Lupe was not one of

defendant's initial targets when he first arrived at the plant, the jurors could reasonably find that defendant saw Lupe and was aware that she was running from him in fear for her life. Even if defendant only intended to break windows with the machete, he intended to act in a manner that would place the women in reasonable apprehension of imminent physical injury that would cause them to flee for their lives. *See Juvenile Action No. J-78539-2*, 143 Ariz. at 256, 693 P.2d at 911 (shooting out the tires of an officer's vehicle was an act intended to "place the officer in reasonable apprehension of imminent physical injury in order to make him stop the car"). Whether defendant had the specific intention of placing Lupe, in addition to Elizabeth and Bobbie, in reasonable apprehension of imminent physical injury was a question for the jury, and we will not reweigh the evidence. *See State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶21 Therefore, we conclude the state presented sufficient evidence. Accordingly, the trial court did not err in denying the motion for a judgment of acquittal.

CONCLUSION

¶22 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
MARGARET H. DOWNIE, Judge