IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

IRNESTO CHACON, *Appellant.*

No. 1 CA-CR 15-0403
FILED 3-9-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-148454-001
The Honorable John R. Ditsworth, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Alice Jones
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Nicholaus Podsiadlik
Counsel for Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 Irnesto Chacon ("Chacon") appeals from his convictions for two counts of aggravated assault, both class 3 dangerous felonies. For the reasons stated below, we affirm the convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 Chacon has two brothers, T and J. After Chacon attempted to talk to J about whether T was having an affair with Chacon's wife, Chacon and J got into a fight. There were no witnesses, and Chacon and T presented different accounts of the encounter.

¶3 Chacon testified J started the fight and beat him up, choking him before finally letting him go. He stated he did not see any injuries on J or a knife, and that he left the house after the fight and did not see J for three days.

¶4 J, on the other hand, testified that he was cooking dinner and chopping vegetables with a kitchen knife when he noticed Chacon becoming agitated. The two brothers started to argue after Chacon started talking about "family drama." Eventually J went out onto the patio, and Chacon punched J in the head. The brothers continued to fight outdoors. J testified Chacon hit him multiple times and that at some point during the fight, he saw something flying through the air at him and he blocked it with a chair. J said he did not know what the item was at the time, but after the fight, he noticed blood on the floor and his clothes, a 1.5-inch laceration on his hand, and a 3.5-inch laceration on his abdomen. J asked Chacon whether he had stabbed him, and Chacon said yes. J then ran back in the house and locked the door, noticing the knife on the outside patio along the way.[1] J said the entire fight lasted fifteen to seventeen seconds and that after the

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[1] J later admitted he disposed of the knife to protect his brother.

fight, Chacon ran away. J called his father and told him he needed to go to the hospital because Chacon had stabbed him.

¶5 At the hospital, medical staff called the police. The officer who came to the hospital, Officer T, opined J's injuries appeared to have been caused by a sharp weapon such as a knife. J did not initially identify his attacker to police or medical staff, but told police it was Chacon three days after the fight. Another officer, Officer M, then conducted a traffic stop of Chacon and arrested him after he attempted to run away. Chacon initially denied a fight occurred three days earlier, but he later admitted he was with his brother J on that day.

¶6 The State indicted Chacon on two counts of aggravated assault, both class 3 dangerous felonies. Ariz. Rev. Stat. ("A.R.S.") §§ 13-1203 (2016), -1204 (2016).[2] Count 1 was for the wound to J's abdomen, Count 2 was for the wound to J's hand. The State also alleged Chacon had five prior felonies. At trial, Chacon attempted to elicit testimony regarding the affair between Chacon's wife and T to argue J had motive to start the fight and bias to lie at trial, but the court sustained the State's objections, holding that these statements were irrelevant.

¶7 Chacon moved for a judgment of acquittal, arguing the aggravated assault charge was not supported by sufficient evidence,[3] but the court denied the motion. The jury found Chacon guilty on both counts and determined both offenses were dangerous and caused physical, emotional, or financial harm to the victim. The superior court sentenced Chacon to minimum, concurrent sentences of five years' imprisonment.

¶8 Chacon timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2016), 13-4031 (2016), and 13-4033(A) (2008).

DISCUSSION

¶9 Chacon challenges his two convictions for aggravated assault. He argues (1) his two convictions violate his Fifth Amendment protection from being punished twice for one offense; (2) the convictions are not supported by sufficient evidence; and (3) the superior court's exclusion of

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[2] We cite to the current version of statutes unless changes material to this decision have occurred.

[3] Specifically, Chacon argued there was no evidence showing J saw a weapon, that a weapon was used, or that J's injuries were significant.

his proposed evidence about the affair and comment on his evidence denied him a neutral court, a fair trial, and due process.

I. Double Jeopardy

¶10 Chacon argues his two convictions violate Double Jeopardy because he only committed one "assault." He asserts A.R.S. § 13-1203(A)(1) defines "assault" according to the formation of a distinct mental state, and that he only committed one "assault" because there was no evidence of a break in the action that would have allowed him to form a separate and distinct mental state. Because Chacon failed to raise this issue at trial, we review for fundamental error. *State v. Jurden*, 239 Ariz. 526, 528, ¶ 7 (2016) (citations omitted). A sentence that violates the Double Jeopardy Clause constitutes fundamental error. *State v. Millanes*, 180 Ariz. 418, 421 (App. 1994). Chacon's claim involves issues of statutory interpretation that we review de novo. *Jurden*, 239 Ariz. at 528, ¶ 7.

¶11 "The Double Jeopardy Clause protects against multiple punishments for the same offense." *Id.* at 529, ¶ 10 (citations omitted). "[I]f multiple violations of the same statute are based on the same conduct, there can be only one conviction if there is a single offense." *Id.* at ¶ 11 (citations omitted). "In such cases, the statutory definition of the crime determines the scope of conduct for which a discrete charge can be brought, which . . . [is] referred to as the 'allowable unit of prosecution.'" *Id.* (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)). To determine which "unit of prosecution" was intended by the Legislature, we look to

> the language and purpose of the statutes, to see whether they speak directly to the issue of the appropriate unit of prosecution, and if they do not, to ascertain that unit, keeping in mind that any ambiguity that arises in the process must be resolved, under the rule of lenity, in the defendant's favor.

Id. at 530, ¶ 13 (citations and quotations omitted).

¶12 In construing a statute, our goal is to give effect to the legislative intent, examining the statute's "individual provisions in the context of the entire statute to achieve a consistent interpretation." *Short v. Dewald*, 226 Ariz. 88, 93-94, ¶ 26 (App. 2010) (citations and quotations omitted). If the statute is unambiguous, we apply it without further analysis. *Jurden*, 239 Ariz. at 530, ¶ 15 (citation omitted).

¶13 Pursuant to A.R.S. § 13-1203(A)(1), a person commits assault by "[i]ntentionally, knowingly or recklessly causing any physical injury to

another person."[4] Our criminal code specifies that the "minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act," A.R.S. § 13-201 (2016), and defines an "act" as "a bodily movement," A.R.S. § 13-105(2) (2015). Section 13-1203(A)(1) may therefore be fairly read to define assault as "[i]ntentionally, knowingly or recklessly [performing a voluntary bodily movement] causing any physical injury to another person." We find A.R.S. § 13-1203(A)(1) unambiguous because, when read in the context of our criminal code, the language indicates the unit of prosecution is a bodily movement taken with one of the requisite mental states that results in any physical injury. Here, the jury convicted Chacon of two counts of aggravated assault after hearing testimony that Chacon swung at J multiple times and that after the fight, J had two separate lacerations on his hand and his abdomen that he did not have previous to the fight. Because these convictions are based upon separate, voluntary bodily movements resulting in injury to J and not simply two wounds from one stabbing, they do not violate Chacon's Fifth Amendment protection from being punished twice for one offense.

II. Sufficiency of the Evidence

¶14 Chacon argues the evidence was insufficient to support his convictions because the State only produced evidence of one action of stabbing, one formation of the requisite mental state, and one victim. He does not otherwise challenge the evidence supporting his convictions.

¶15 "Th[e] question of sufficiency of the evidence is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011) (citation omitted). "In reviewing sufficiency of the evidence, we examine the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89 (1997) (citation omitted). We will uphold a conviction if "reasonable persons could accept [the evidence] as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87 (2004) (citation omitted). We do not reweigh the evidence, *State v. Williams*, 209 Ariz. 228, 231, ¶ 6 (App. 2004) (citation omitted), and we defer to the jury's credibility determinations, *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996).

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[4] The parties agree that "any" indicates any number of injuries could result from an assault and that A.R.S. § 13-1203(A)(1) does not define "assault" on a per-injury basis.

¶16 Although J stated to police and at trial that he did not know exactly how the stabbings occurred, sufficient evidence supports Chacon's convictions for two separate acts of aggravated assault. At trial, J testified that Chacon swung at him multiple times, and that after the fight, he had two separate lacerations on his hand and his abdomen that he did not have previous to the fight. He said he saw a knife on the ground after the fight, and Officer T testified that, based on his training and experience, he believed J's injuries were "pretty severe" and were caused by a sharp weapon, possibly a knife. Although the jury could have reached a different conclusion based on this evidence, the evidence was sufficient to support the jury's determination that Chacon thrust the knife at J two separate times, causing two separate injuries to J's abdomen and hand. *See Hutcherson v. City of Phoenix*, 192 Ariz. 51, 56, ¶ 27 (1998) (citation and quotation omitted) (clarifying we "are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions").

III. Due Process

¶17 Chacon argues the superior court's exclusion of testimony about Chacon's brother, T, and the court's comment on excluded evidence precluded his theory of defense, denying him a neutral court, a fair trial, and due process. Because Chacon failed to raise this issue in the superior court, we review for fundamental error. *State v. Henderson*, 210 Ariz 561, 567, ¶ 19 (2005) (citation omitted).[5]

¶18 Chacon's arguments regarding the exclusion of his testimony fail because Chacon did not make an offer of proof. *See State v. Towery*, 186 Ariz. 168, 179 (1996) (citation omitted) (clarifying "an offer of proof stating with reasonable specificity what the evidence would have shown is required" for review on appeal). Chacon argues his opening statement made his theory regarding the relevance and substance of the testimony apparent. But under Arizona Rule of Evidence ("Rule") 103(a)(2), "if the

[5] We reject Chacon's argument that we should review this claim for structural error because the court's exclusion of Chacon's testimony completely denied Chacon his right to counsel. *See State v. Ring (Ring III)*, 204 Ariz. 534, 552, ¶ 46 (2003) (citation omitted). The ruling did not deny Chacon defense counsel or even a theory of defense. As we discuss *infra*, ¶ 20, the excluded testimony about the affair was cumulative to other admitted evidence.

ruling excludes evidence, a party [must] inform[] the court of its substance by an offer of proof, unless the substance was apparent from the context."

¶19 Although Chacon's opening statement argued J's relationship with T gave J a motive to start the fight and bias to lie at trial, it was not obvious from the context of questioning that Chacon was testifying to these issues. Although Chacon argues that evidence is "always relevant to show any bias, interest, motive or special relationship relative to a witness or a party to an action," *Thomas v. Bowman*, 24 Ariz. App. 322, 324 (1974) (citation omitted), this is true for evidence introduced to "attack the *witness's* credibility," Rule 607 (emphasis added). Here, Chacon's counsel was questioning Chacon, not J, therefore *Thomas* does not support Chacon's assertion that it was apparent that the questions were being asked to determine J's bias to preserve the issue without an offer of proof.

¶20 Moreover, even if the opening statement had made clear what the testimony would have been to preserve this issue of bias without an offer of proof, the record shows defense counsel cross-examined J and that J testified Chacon tried to talk to J about T because Chacon was upset T was having an affair with Chacon's wife. And one of the police interviews with J also showed J told police that shortly before the fight began, Chacon was talking about his wife and J did not want to talk about it. Thus, the excluded testimony about the affair, to the extent that it was to show J started the fight, was merely cumulative to other evidence about the affair and motive to start the fight. *See* Rule 403 (stating a trial court has the discretion to prevent the presentation of cumulative evidence); *Ott v. Samaritan Health Serv.*, 127 Ariz. 485, 489 (App. 1980) (citations omitted) ("Failure to admit cumulative evidence will not be held to be prejudicial error if its admission would not have changed the result.").

¶21 We also reject Chacon's argument that the court's comment in excluding the testimony precluded his theory of defense, thereby denying him a neutral court, a fair trial, and due process.

¶22 Although "Article 6, Section 27 of the Arizona Constitution prohibits judges from commenting upon evidence presented at trial," *State v. Dann*, 205 Ariz. 557, 571, ¶ 50 (2003), "[a] mere ruling of the court on an objection is not a comment on the evidence," *State v. Copley*, 101 Ariz. 242, 244 (1966) (citation omitted). Here, the court sustained the prosecution's objection to Chacon's statement regarding the ages of Chacon's wife and T, noting the evidence was irrelevant. This does not constitute a "comment on the evidence" so as to violate the prohibition on judicial commentary on evidence. *See Dann*, 205 Ariz. at 571, ¶ 50 (citation and quotation omitted)

("A judge violates this prohibition by expressing an opinion as to what the evidence proves, in a way that interferes with the jury's independent evaluation of that evidence."). We therefore reject Chacon's argument that the court committed fundamental error by stating Chacon's evidence was irrelevant. *See Copley*, 101 Ariz. at 244 (holding a mere ruling of the court is not a comment on the evidence); *see also State v. Tuttle*, 58 Ariz. 116, 120-21 (1941) (same).

CONCLUSION

¶23 For the foregoing reasons, we affirm Chacon's convictions.

AMY M. WOOD • Clerk of the Court
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