DIVISION ONE
FILED: 02/25/10
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0262
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CESAR NICOLAS-HERNANDEZ,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR-2008-151937-001 DT

The Honorable James T. Blomo, Judge Pro Tem

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James Haas, Maricopa County Public Defender — Phoenix
By Margaret Green, Deputy Public Defender
Attorney for Appellant

H A L L, Judge

¶1 Defendant, Cesar Nicolas-Hernandez, appeals his convictions for armed robbery, a class two felony, and attempted

armed robbery, a class three felony. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 "[W]e view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant." *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009) (quoting *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984)).

¶3 L.C. visited his friend, E.D. to help him fix his car's cooling fan.[1] They did the work in E.D.'s apartment parking lot. Later that evening, while standing outside next to L.C.'s truck, they noticed a white, four-door sedan pull into the parking lot. After first appearing to attempt a u-turn, the car parked on the entrance of the apartment complex.

¶4 Defendant and two other men got out of the parked car. One of the men asked for a beer, and L.C. responded that they didn't have any. Defendant approached L.C., pointed a gun at him, and told him to give defendant everything he had. L.C. gave defendant all of the money in his wallet, close to $500. Defendant asked if that was all he had, and L.C. confirmed that it was.

[1] We use the initials of the victims' names to protect their privacy. *See State v. Maldonado*, 206 Ariz. 339, 341 n.1, 78 P.3d 1060, 1062 n.1 (App. 2003).

Defendant then took L.C.'s keys from his pocket and told him not to look at defendant's car when they left.

¶5 While defendant was talking to L.C., L.C. saw one of defendant's companions approach E.D. and point a gun at him, but did not see E.D. give the man any property. As the men got into the car to leave, defendant threw L.C.'s keys back at him. As they drove away, L.C. noted the car's license plate number. He called 9-1-1 and reported the license number and incident to the authorities.

¶6 About thirty minutes later, an officer stopped a car with the license number L.C. provided about six blocks away from the parking lot. L.C. and E.D. arrived in separate patrol vehicles about thirty minutes after the stop, and police conducted one-on-one identifications of the suspects. Each victim sat in the backseat of a patrol car as officers showed them each of the three men stopped, one at a time, at a distance of thirty-seven feet. During this identification, L.C. identified defendant as the person who had pointed a gun at him and took his money. In an interview with officers after being given his *Miranda*[2] warnings, defendant identified himself as Cesar Nicolas-Hernandez.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶7 After obtaining a warrant, officers conducted a search of the perpetrators' car. They found twenty-two caliber rounds on the driver's side floorboard, loaded guns under both the driver's seat and the front passenger's seat, and fifteen dollars in the dashboard ashtray.

¶8 L.C. testified at trial, but E.D. was unavailable. When called as a witness, L.C. could not identify defendant in court as one of the men who robbed him. L.C. did, however, identify a photo of the perpetrators' car as the one used in the robbery, and identified one of the guns recovered from the car as the one pulled on him during the robbery. One officer testified that he recognized defendant as the person he interviewed after the traffic stop; another officer could not identify him. At the end of the State's case, defendant moved for a judgment of acquittal under Rule 20 of the Arizona Rules of Criminal Procedure. The court denied the Rule 20 motion.

¶9 The jury found defendant guilty of both charges, and found both counts to be dangerous offenses. The court sentenced defendant to a 9-year sentence for the armed robbery charge and a 7.5-year sentence for the attempted armed robbery charge, and ordered that the sentences run concurrently. Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes

(A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A) (Supp. 2008).

DISCUSSION

¶10 Defendant argues that the court erred in rejecting his motion seeking a judgment of acquittal of both the armed robbery of L.C. and the attempted armed robbery of E.D. under Rule 20 of the Arizona Rules of Criminal Procedure. Defendant contends that the State did not produce substantial evidence identifying him as one of the men that participated in either crime. For the first time on appeal, defendant also claims that the evidence supporting his conviction for attempted armed robbery of E.D. was insufficient because the State did not produce substantial evidence that defendant's accomplice[3] demanded property from E.D. when he drew a gun on him.

¶11 With respect to the issues defendant raised at trial, we review the trial court's denial of the motion for a judgment of acquittal for an abuse of discretion. *State v. Leyvas*, 221 Ariz. 181, 191, ¶ 33, 211 P.3d 1165, 1175 (App. 2009). We reverse such a

[3] Defendant does not specifically challenge the jury's conclusion that he was criminally accountable for his companion's acts as an accomplice. *See* A.R.S. § 13-301(1)-(2) (2001), -303(A)(3) (Supp. 2008) (holding an accomplice responsible for conduct of another and defining an accomplice as one who aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense with the intent to promote or facilitate its commission).

denial only if there is "a complete absence of probative facts to support a conviction," *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990), as "no substantial evidence . . . warrant[s] a conviction." Ariz. R. Crim. P. 20; *see also Leyvas*, 221 Ariz. at 191, ¶ 33, 211 P.3d at 1175. Substantial evidence is proof that reasonable jurors could accept as "sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Mathers*, 165 Ariz. at 67, 796 P.2d at 869; *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009). 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. Jones*, 188 Ariz. 388, 396, 937 P.2d 310, 318 (1997) (citing *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981)). If reasonable minds can draw different inferences from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶12 We conclude that the State's evidence warranted submitting the case to the jury. Although the State did not present evidence that the victims described the robbers' physical characteristics to police, they did show that the victims provided a description of the robbers' vehicle, including its license plate

number. A rational jury could infer from this circumstantial evidence that the three occupants of a car matching the victims' description that was stopped six blocks away from the scene of the robbery approximately thirty minutes after its commission were the same three individuals who committed the crime.

¶13 Likewise, although L.C. was unable to identify defendant as one of the robbers at trial, he did make a positive one-on-one identification at the traffic stop.[4] An officer present at the stop positively identified defendant in court as the same person L.C. identified in the one-on-one identification. L.C. made positive identifications in court of both a photograph of the stopped white sedan and the gun pointed at him during the robbery, which was later found in the car. A reasonable jury could infer that L.C.'s identification of defendant at the stop was correct, as was the officer's in-court identification.

¶14 Nor is the absence of the stolen cash from the stopped car or the individuals a circumstance tending to show that the evidence was substantially lacking. One of the officers on the scene of the traffic stop testified that it took place

[4] In his appeal brief, defendant claims that L.C.'s one-on-one identification of him was "suggestive," implying that it was not strong evidence of identity. But defendant does not argue on appeal that the court erred in admitting testimony about the identification, so the determination of the strength and reliability of the evidence was an issue for jury consideration.

approximately thirty minutes after the robbery 9-1-1 call. A reasonable person could infer that defendant hid or otherwise rid himself of the money between the robbery and the traffic stop. Accordingly, we reject the argument defendant raised at trial, that the trial court abused its discretion by rejecting the Rule 20 motion, because we conclude the State presented sufficient evidence to support a conviction.

¶15 We now address defendant's other claim, which he raises for the first time on appeal. Defendant argues that the State's evidence supporting defendant's conviction for attempted armed robbery of E.D. was insufficient, particularly the evidence that defendant's accomplice demanded property from E.D. when he drew a gun on him.

¶16 Although defendant moved for a Rule 20 judgment for acquittal at trial, in doing so he did not make the argument now raised on appeal. He has therefore forfeited this argument, and we review only for prejudicial, fundamental error. *State v. Zinsmeyer*, 222 Ariz. 612, 623, ¶ 27, 218 P.3d 1069, 1080 (App. 2009) (concluding that defendant forfeited his argument construing a burglary statute by failing to raise it in his Rule 20 motion at trial, resulting in fundamental error review); *see also State v. Martinez*, 210 Ariz. 578, 580 n.2, ¶ 4, 115 P.3d 618, 620 n.2 (2005) (explaining that a defendant who fails to object at trial does not

"waive" the claim; rather it is forfeited unless defendant can prove fundamental error occurred). A conviction is fundamental error if it is based on insufficient evidence. *Zinsmeyer*, 222 Ariz. at 623, ¶ 27, 218 P.3d at 1080 (citing *State v. Stroud*, 209 Ariz. 410, 412 n.2, ¶ 6, 103 P.3d 912, 914 n.2 (2005)).

¶17 A person commits robbery if he or she threatens or uses force against any person in the course of taking any property of another against their will with the intent to coerce surrender of the property or to prevent resistance. A.R.S. § 13-1902(A) (2001). An individual commits attempted armed robbery when he or she uses or threatens to use a deadly weapon intending to commit robbery and making an overt act toward that end that "advance[s] beyond the stage of mere preparation." A.R.S. §§ 13-1904(A)(2) (2001), -1001(A)(2) (2001); *State v. Clark*, 143 Ariz. 332, 334, 693 P.2d 987, 989 (App. 1984).

¶18 The crime of attempted armed robbery does not require a statement by defendant to the victim indicating the intent to rob them, because the attempt offense requires only an overt act that is a "step in a course of conduct planned to culminate in commission of an offense." *Clark*, 143 Ariz. at 334, 693 P.2d at 989. In *Clark*, the owner of a gas station entered the station's restroom and encountered the defendant, who wore gloves and a mask and pointed a sawed-off shotgun at him. *Id.* When the owner fled,

defendant left the restroom and pointed the shotgun at the night watchman, who shot and wounded him. *Id.* Defendant told authorities he had been rabbit hunting before he entered the restroom. *Id.* The court upheld the denial of Clark's motion for judgment of acquittal. *Id.* The court reasoned that although defendant never made a statement to a victim indicating his intent to rob them, the overt acts of lurking behind a corner at the station, wearing gloves and a mask, and pointing a sawed-off shotgun at both the owner and watchman constituted "sufficient steps in a course of conduct planned to culminate in a robbery." *Id.* at 334-35, 693 P.2d at 989-90.

¶19 We think this case is analogous to *Clark*. Even if defendant's accomplice did not make a verbal demand for property from E.D., he pointed a gun at him while defendant said, "Give me everything you have." Like *Clark*, in which the defendant's behavior at the gas station and suspicious attire made pointing his gun an overt act sufficient for an attempted armed robbery charge, the context and circumstances surrounding the accomplice's gun threat make the accomplice's intent to rob E.D. evident. Thus, the jury could reasonably infer that accomplice's gun threat, considered with defendant's statement, amounted to an overt act that went beyond mere preparation and was planned to culminate in

robbing both L.C. and E.D. We therefore uphold defendant's attempted armed robbery conviction as well.

CONCLUSION

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

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge