DIVISION ONE
FILED: 07-01-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0467
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication - Rule 111 – Rules of the Arizona Supreme Court)
PHILIP EDWARD CHARNEY, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-163780-001 DT

The Honorable Julie P. Newell, Judge *Pro Tem*

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Joseph T. Maziarz, Assistant Attorney General
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Janelle A. Mc Eachern, — Chandler
Attorney for Appellant

D O W N I E, Judge

¶1 Philip E. Charney ("Defendant") appeals his conviction for aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Defendant lived with V.G. and her children for several years. Defendant and V.G.'s son, C.Z., did not get along. After Defendant moved out, V.G. gave birth to their son, Wyatt, in 2006. In August 2008, shortly before Wyatt's birthday, Defendant sent V.G. an e-mail, stating:

> You know, if you weren't such a c---, you would invite my girls to Wyatt's party. That's why I'm doing what I'm doing. You think that it's only four kids that he has, full brothers and sisters when he has another family that loves him and that is normal. You f------ c---. Just keep playing your game [V.G.], you will get me to the point where I will come down there and beat your ass like a man. *And, don't think your little fag of a son can stop me either. He's about hospital bound and that's if I don't put him in the ground.* I'm tired of playing your f------ games, it's time you saw what I'm going to do.

(Emphasis added.)

¶3 On October 6, 2008, Defendant discovered that the valve stem on his truck tire had been cut. He saw C.Z. in the yard and suspected he was responsible. T.F. gave Defendant a ride to an auto parts store to buy a new valve stem. He testified that Defendant was "agitated" and "upset about the

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant. *State v. Vandever,* 211 Ariz. 206, 207 n.2, ¶ 1, 119 P.3d 473, 474 n.2 (App. 2005).

whole situation." Defendant said "the cops were looking for [C.Z.]" and that they "better find him before [Defendant] did." T.F. understood this comment to mean that Defendant wanted to harm C.Z.

¶4 On October 9, Defendant went to V.G.'s home. C.Z. was in the backyard working on a toy for Wyatt. Defendant yelled at C.Z., "[C]ome out here bitch." He pushed V.G. aside and went into the backyard.[2] As C.Z. approached, he leaned in, as if to swing at Defendant. Defendant picked up a bass guitar that was propped against the house. Holding it like an "axe," Defendant hit C.Z. twice in a downward motion, "like chopping wood." C.Z. fell back. Defendant hit him again, and C.Z. fell to the cement. As he lay unconscious, Defendant stomped on C.Z.'s chest and kicked him in the head and face. Defendant was wearing steel-toed boots.

¶5 Defendant ran back to his truck, which was still idling. Blood was pouring from C.Z.'s ear, and he was unconscious for approximately fifteen minutes. At the hospital, C.Z. was placed into an induced coma so doctors could remove part of his skull to release pressure from the swelling of his brain and to extract blood and other dead tissue. C.Z. remained in the hospital and a rehabilitation facility for two-and-a-half

[2] Defendant knew he was not allowed to enter the backyard at V.G.'s home.

months and suffered brain damage that affects his ability to read and write.

¶6 Defendant was charged with one count of aggravated assault, a class 3 dangerous felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204 (2010).[3] A jury trial ensued. After the State rested, the court denied Defendant's motion for judgment of acquittal pursuant to Arizona Rule of Criminal Procedure ("Rule") 20. Defendant testified and presented witnesses. The jury deliberated and returned a guilty verdict, finding the assault to be a dangerous offense. The jury also found that the State proved the following aggravating factors: the infliction or intended infliction of serious physical injury; and physical, emotional or financial harm to the victim. Defendant was sentenced to ten years in prison and ordered to pay restitution.

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

DISCUSSION

¶8 Defendant contends the trial court erred by denying his Rule 20 motion. He argues there was no substantial evidence of guilt because all of the State's witnesses had "credibility

[3] We cite to the current version of statutes because no material changes relevant to this appeal have occurred.

issues." Defendant also claims the State failed to prove that his use of force in self-defense was not justified.

¶9 A motion for judgment of acquittal should be granted only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87, 84 P.3d 456, 477 (2004). 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." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citations omitted). We review the denial of a Rule 20 motion for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, 510, ¶ 32, 154 P.3d 1046, 1056 (App. 2007) (citation omitted). In determining whether there was sufficient evidence to withstand a Rule 20 motion, "we view the evidence in the light most favorable to sustaining the verdict." *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984). "[I]f reasonable minds can differ on inferences to be drawn [from the evidence], the case must be submitted to the jury . . . [and the] trial judge has no discretion to enter a judgment of acquittal." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted).

¶10 The State presented substantial evidence of guilt. Before the assault, Defendant threatened that he would send C.Z. to the hospital or even "put him in the ground." Prosecution

witnesses testified Defendant was visibly upset when he came to the house on the date of the assault, yelling for C.Z. to come out. Defendant admitted that he beat C.Z. on the head with the guitar. Witnesses testified that Defendant also kicked and stomped on C.Z. with steel-toed boots as C.Z. lay on the ground unconscious.

¶11 Defendant offered a different version of events, testifying he did not want a confrontation, but planned "just to have a gentlemanly conversation" with C.Z. He admitted hitting C.Z. with the guitar, but testified he did so in self-defense after C.Z. charged him with a hammer, which C.Z. allegedly raised above his head and threw. That testimony was directly contradicted by the prosecution witnesses, who stated C.Z. had nothing in his hand and never threw anything or raised his hand over his head.

¶12 Where witnesses offer contradictory testimony, "the trier of fact assesses the quality of the testimony by weighing its credibility and assigning greater value to the most credible testimony based on perceptible aspects of witness demeanor." *State v. Uriarte,* 194 Ariz. 275, 283, ¶ 41, 981 P.2d 575, 583 (App. 1998). In the case at bar, the jury weighed the conflicting evidence and obviously found the State's witnesses to be more credible. *See State v. Gallagher,* 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991) ("the credibility of a

witness is for the trier-of-fact, not an appellate court.") (citation omitted). Because reasonable minds could differ about inferences to be drawn from the evidence, the trial court properly denied Defendant's Rule 20 motion and submitted the case to the jury.

¶13 The State also presented substantial evidence that Defendant's use of deadly force was not justified. Its witnesses described Defendant as the aggressor and testified C.Z. was unarmed. The only evidence of a hammer was Defendant's own testimony, which the jury could have disbelieved. The jury also heard a recorded jail telephone call between Defendant and his mother, wherein Defendant stated:

> I just proceeded to beat [C.Z.] with the God-damned bass guitar. I hit him once over the head and he kind of spun around and I hit him once on [sic] across the face with it and then he went down just like a little kitten. So I looked down at him and I tell [sic] him if he ever mess [sic] with my shit again I'd kill him.

A reasonable juror could conclude that Defendant's own description of the incident belied his claim of self defense.

¶14 Defendant does not challenge the jury instruction about self defense, which was consistent with 2006 amendments to A.R.S. § 13-205(A), placing the burden of proof on the State. We presume that jurors follow their instructions. *State v.*

Velazquez, 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007) (citation omitted).

CONCLUSION

¶15 For the foregoing reasons, we affirm Defendant's conviction and sentence.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PETER B. SWANN, Judge