DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0676
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
GERMAIN P. VAUGHN, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-164157-001 DT

The Honorable Christopher T. Whitten, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Germain P. Vaughn ("defendant") timely appeals his criminal convictions and sentences. His appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and

State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for defendant has searched the record and found no arguable question of law that is not frivolous, and requests that we search the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* but did not do so.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Ebony W., her eight-year-old son, and defendant lived together for three-and-a-half years. On September 9, 2008, Ebony and defendant were "broken up" but still lived together in a Glendale apartment ("apartment 1088"). On that day, Ebony, her sister Fawn W., friend Leoandous G. and five children were at apartment 1088. That evening, Ebony went to the store while Fawn slept on the living room couch and the children slept in the bedroom. When Ebony returned, she saw Leoandous outside the apartment. Ebony entered the apartment, threw her keys to Fawn on the couch, and turned to shut the door. She saw Leoandous run back toward the door and defendant coming across the street toward them. Before defendant got to the door, Ebony heard two gunshots from "across the way," outside the apartment.

[1] "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

Leoandous entered and tried to close the door against defendant. When he could not get the door shut, Leoandous ran to the back bedroom and its bathroom, and defendant slid through the front door.

¶3 Fawn woke up in the dark to a lot of movement and a gunshot inside the house, and saw defendant, holding a gun, run through the living room toward the bedroom, where the children were sleeping. Leoandous tried to hold the bathroom door shut against defendant, while defendant tried to "get at" Leoandous. Fawn warned defendant about the children, and he paused. Ebony tried to pull defendant out of the bedroom. When defendant could not "get to" Leoandous, he went to the front door, fired one more time and left. The children did not wake up during the incident. Fawn found a "bullet strike" above where her daughter was lying, and two bullet holes in the living room.

¶4 Fawn called the police and officers arrived within minutes. At apartment 1088, officers found a shell casing in the living room; four bullet strikes, including one made by a "bullet that came through the outer wall and started to punch through inside the pantry but did not make it all the way through"; and a bullet in the bedroom air conditioner filter located "directly above the child's bed." The bedroom door "looked like it had been kicked in," the door to the bathroom "looked like it had been kicked in or forcibly opened," and the

toilet was dislodged from its base. Glendale patrol officer William Powers photographed Leoandous with "fresh blood running down the left side of his head" and an "injury on the left side of his head . . . midway up the hairline." Another officer interviewed Fawn, Ebony and Leoandous. Glendale Police Officer Thomas Ward placed a "file stop" on defendant because he was not present at the scene.[2] On September 23, 2008, Officer Ward returned to apartment 1088, and found a bullet strike six inches away on the door of an adjacent apartment and an exit hole behind the door of apartment 1088.[3]

¶5 On October 12, 2008, Phoenix police officers "made contact" with defendant, who was driving a car that belonged to a friend. Officer Ward interviewed defendant at the Glendale police station, where he issued *Miranda* warnings and defendant agreed to talk. The interview was videotaped. Six days later, Officer Ward searched the vehicle and found three bullets -- one was the same caliber as those recovered from apartment 1088.

¶6 Defendant was charged with one count of discharge of a firearm at a structure, a class 2 dangerous felony ("count 1");

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[2] Officer Ward testified that a file stop is "placed on an individual that the police need to talk to. . . . people that are hard to find."

[3] Officer Ward assumed "that crime scene officers photographed it" on September 9. When he later learned that no photographs were taken that night, he ordered them. The day the photographs were taken, the bullet hole was being patched.

two counts of aggravated assault, both class 3 dangerous felonies ("counts 2 and 3"); six counts of endangerment, all class 6 felonies ("counts 4-9"); and one count of unlawful discharge of a firearm, a class 6 dangerous felony ("count 10"). A four-day jury trial was held. The State presented six witnesses, including Ebony and Fawn. At the conclusion of the State's case, defendant moved for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure. The motion was denied. Defendant testified and the defense rested. In rebuttal, the State presented defendant's videotaped interview. After deliberations, the jury found defendant guilty of all counts and found each count was a dangerous offense.

¶7 Defendant was sentenced to a five-year mitigated term on count 2, a five-year mitigated term on count 3, and a 1.5-year mitigated term on count 4; those counts ran consecutively, with 321 days of presentence incarceration credit given for count 2.[4] Defendant was also sentenced to concurrent 1.5-year terms each for counts 4-9 and count 10; and a seven-year mitigated term on count 1. The judge intended a total sentence of eleven and a half years.

[4] The defendant was credited with an excess of presentence incarceration credit, but the State did not file a cross-appeal so we have no jurisdiction to correct that error. *See State v. Dawson,* 164 Ariz. 278, 282-83, 792 P.2d 741, 745-46 (1990).

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

DISCUSSION

¶9 We have read and considered the brief submitted, and have reviewed the entire record. *Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was represented by counsel and was present at all critical phases of the proceedings. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

I. SIXTH AMENDMENT

¶10 On the second day of trial, defendant orally moved for a mistrial, claiming his Sixth Amendment right to confrontation was violated when the trial court allowed the State to admit photographs of Leoandous and proceed on the aggravated assault charge involving Leoandous when he was not available to testify at trial. The trial court denied defendant's motion.

¶11 The Sixth Amendment guarantees that in all criminal prosecutions the accused "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend.

VI.[5] "The primary focus of the Confrontation Clause is to assure that a jury has an adequate basis upon which to evaluate the truth of a witness's statement." *State v. Riley,* 196 Ariz. 40, 43, ¶ 6, 992 P.2d 1135, 1138 (App. 1999) (citation omitted). We review de novo a trial court's determination of whether a defendant's constitutional right to confront witnesses was violated, *State v. King,* 212 Ariz. 372, 375, ¶ 16, 132 P.3d 311, 314 (App. 2006), but we review the facts bearing on the confrontation issue in the light most favorable to the proponent of the challenged evidence, *State v. Alvarez,* 213 Ariz. 467, 468, ¶ 3, 143 P.3d 668, 669 (App. 2006).

A. Photographs

¶12 The trial court refused to admit any statements made by Leoandous, unless he was available to "take the stand and be subject to cross-examination." *See Crawford v. Washington,* 541 U.S. 36, 53-54 (2004) (barring admission of testimonial

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[5] The Sixth Amendment right to confrontation is applicable to the states through the Fourteenth Amendment. *State v. Speerschneider,* 25 Ariz. App. 340, 343, 543 P.2d 461, 464 (1975). Arizona has a similar clause providing that a criminal defendant "shall have the right . . . to meet the witnesses against him face to face." Ariz. Const. art. 2, § 24. But defendant did not object below on the basis of the Arizona Constitution. Failure to preserve an issue for review limits the appellate court to a fundamental error analysis. *State v. Gatliff,* 209 Ariz. 362, 364, ¶ 9, 102 P.3d 981, 983 (App. 2004) (citations omitted). As we discuss *infra*, we find no error, much less fundamental error, in the admission of the photographs, so we do not address the Arizona constitutional issue.

statements of a witness who did not appear at trial, unless he was unavailable to testify at trial and the defendant had a prior opportunity for cross-examination). But the trial court allowed the State to admit "people's observations" of Leoandous because defendant could "cross-examine the people about their observations." Officer Powers testified that Leoandous suffered "a minor injury" and had a "fair amount" of blood on him on September 9. The State also offered the photographs of Leoandous that Officer Powers took that night.

¶13 Even assuming *arguendo* that the photographs could be considered a "testimonial statement,"[6] their admission was appropriate to support Officer Powers' observations. *See State v. Boggs,* 218 Ariz. 325, 334, ¶ 33, 185 P.3d 111, 120 (2008) (finding that the Confrontation Clause is not violated "by the use of a statement to prove something other than the truth of the matter asserted.") (citation omitted). Defendant cross-

[6] At one point, defendant's counsel admitted that the photographs were "non-testimonial," but believed their admission "still" violated the Confrontation Clause, pursuant to *Crawford.* Presumably, the defendant's objection relates to the holding in *Crawford* that "[s]tatements taken by police officers in the course of interrogations are also testimonial." 541 U.S. at 52. *See also Davis v. Washington,* 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

examined Officer Powers about his failure to "check [Leoandous's] ID" that night and his acceptance of Leoandous's self-identification.[7] Likewise, defendant questioned Officer Powers about the origin of Leoandous's wounds since the officer took the word of "officers on-scene that [Leoandous] was inside the apartment at the time" but did not ascertain for himself the cause of the wounds.

¶14 Under these facts, there was no Sixth Amendment violation.

B. Aggravated Assault Charge

¶15 "A person commits assault by: 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or 2. Intentionally placing another person in reasonable apprehension of imminent physical injury. . . ." A.R.S. § 13-1203(A). The assault is "aggravated" when a person "uses a deadly weapon," including a firearm. A.R.S. §§ 13-1204(A)(2), 13-105(15).

¶16 While a victim is a "necessary element" of aggravated assault, *State v. Tschilar,* 200 Ariz. 427, 435, ¶ 34, 27 P.3d 331, 339 (App. 2001), nothing in the statutes requires the testimony of the victim to prove the assault occurred. Here, the court refused to admit any statements made by Leoandous,

[7] Another officer testified that he interviewed Leoandous that night and got "[p]aper ID."

because he was not present at trial. Instead, the State presented other witnesses who testified that Leoandous was present in apartment 1088 on September 9, that he was injured that night, and that defendant's actions caused Leoandous's injuries. The witnesses were cross-examined by defendant. *See Bohsancurt v. Eisenberg*, 212 Ariz. 182, 184, ¶ 8, 129 P.3d 471, 473 (App. 2006) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.") (citation omitted).

¶17 Under these facts, there was no Sixth Amendment violation in allowing the State to proceed on the aggravated assault charge.

II. RULE 20 MOTION

¶18 The trial court properly denied defendant's Rule 20 motion. A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. 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). "Reversible error based on insufficiency of the evidence occurs only where there is a

complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶19 The State presented substantial evidence of guilt on all counts.

A. Count 1

¶20 Defendant moved for judgment of acquittal because there was "absolutely no physical evidence outside whatsoever" that defendant discharged the weapon at the apartment. "A person who knowingly discharges a firearm at a residential structure is guilty of a class 2 felony." A.R.S. § 13-1211. A residential structure includes a permanent structure "adapted for human residence or lodging." *Id.* An offense is "dangerous" if it involved the discharge of a handgun. A.R.S. § 13-604(P) (2008).

¶21 The events of September 9 occurred at an apartment complex. Ebony heard two gunshots coming from outside the apartment. Although officers found no shell casings outside the apartment, they found a bullet strike on the front door of the apartment located "six inches" from apartment 1088 and recovered a bullet from inside the apartment "that came through the outer wall." Defendant testified that he shot the gun inside the apartment. In the videotaped interview, defendant stressed that he never fired the gun outside the apartment, but admitted that

he “might have been moving so fast . . . that I don’t remember ‘busting’ outside.”

¶22 Although conflicting evidence was presented, the credibility of witnesses and the weight and value to give to their testimony are questions exclusively for the jury. *State v. Clemons,* 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). *See also State v. Brown,* 125 Ariz. 160, 162, 608 P.2d 299, 301 (1980) (explaining that it is an appellate court’s duty to review the entire record on appeal in a criminal proceeding, but not to sit as the trier of fact and once again balance the evidence adduced at trial).

¶23 On this evidence, a reasonable jury could well have determined that defendant was guilty of discharging a firearm at a residential structure. Likewise, defendant’s admission that he fired the handgun inside the apartment supported the jury’s finding that defendant’s actions constituted a dangerous offense.

B. Counts 2 and 3

¶24 Defendant was charged with aggravated assault on Leoandous and Ebony. At trial, defendant moved for a judgment of acquittal because Leoandous’s name was misstated and there were no “indicia of apprehension” for either Leoandous or Ebony.

¶25 As we stated *supra,* the identity of a victim is not a necessary element of aggravated assault -- all that need be

proven is that defendant used a firearm and intentionally, knowingly or recklessly caused *any* physical injury to another, or put another in reasonable apprehension of imminent physical injury. A.R.S. § 13-1203, -1204. *See also Tschilar,* 200 Ariz. at 435, ¶ 34, 27 P.3d at 339. An offense is "dangerous" if it involved the discharge of a handgun. A.R.S. § 13-604(P).[8] Circumstantial evidence can prove a victim's apprehension, which eliminates the need for a victim to testify that he or she was "actually frightened." *State v. Wood,* 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994).

¶26 Sufficient circumstantial evidence was presented to show that defendant's actions placed Ebony in reasonable apprehension of imminent physical injury. Ebony testified that she heard shots from outside. When she saw defendant approaching the apartment, Ebony tried to "shut the door to keep [defendant] from coming in." On cross-examination, Ebony testified that she "never felt in fear" because she "never thought [defendant] was shooting at" her. But Officer Jeremy Esh testified about Ebony's prior inconsistent statement to him on September 9 that she had received "threatening phone calls

[8] Although an element of aggravated assault is the use of a deadly weapon, like a gun, that element can also be used to enhance sentencing under A.R.S. § 13-604. *State v. Lara,* 171 Ariz. 282, 284-85, 830 P.2d 803, 805-06 (1992) (allowing an element of the underlying crime to also be used to enhance sentence); *State v. Superior Court (Miller),* 169 Ariz. 513, 821 P.2d 174 (App. 1990).

all day" from defendant who told her "he was going to put a bullet in her head," that Leoandous was present that evening to protect her from defendant, and that defendant "came out of the darkness and began to fire shots" at them, which prompted them to run into the apartment. *See State v. Acree,* 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (allowing a witness's prior inconsistent statement to be used for substantive and impeachment purposes if the declarant testifies at trial and is subject to cross-examination). Ebony's presence at trial was secured by subpoena and she was held in custody pending trial.

¶27 Officer Powers' testimony and the photographs demonstrated that Leoandous was injured September 9. Fawn testified that she saw Leoandous "moving quickly" through the house with defendant "right behind him," and that Leoandous "looked scared." The condition of the bathroom –- with the door kicked in and the toilet dislodged from its base -- supported a reasonable conclusion that, as Ebony and Fawn testified, a struggle between Leoandous and defendant took place in the bathroom. Leoandous's actions holding the door against defendant and fleeing from defendant to the back bathroom supported a reasonable conclusion that defendant's actions placed Leoandous in apprehension of physical injury.

¶28 Defendant testified at trial that he arrived at apartment 1088 the evening of September 9 and found an unknown

individual in the living room. Because "it was pitch dark" and defendant thought the individual was armed, defendant "fired for [his] safety." When the individual remained inside the apartment, defendant "fired again" and followed the individual when he ran to the back of the apartment. Defendant "kept firing" until his gun ran out of bullets. Defendant's videotaped interview supported his trial testimony, except that he admitted that he was angry seeing Ebony with Leoandous that night and he wanted to scare Leoandous and "let him know she [had] a husband."[9]

¶29 Although contradictory testimony was presented at trial, "the credibility of a witness is for the trier-of-fact, not an appellate court." *State v. Gallagher,* 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991) (citation omitted). On this record, a reasonable jury could have determined that the State's case was more credible and defendant was guilty of aggravated assault. Likewise, defendant's admission that he fired the handgun inside the apartment supported the jury's finding that defendant's actions constituted a dangerous offense.

C. Counts 4-9

¶30 Defendant was charged with endangerment of Fawn and each of the five children. At trial, defendant moved for a

[9] Defendant and Ebony were not married, but he often referred to her as his wife during the videotaped interview.

judgment of acquittal on Counts 4-9 because Fawn was not "fearful," the gun was not aimed at Fawn, and "the bullet didn't hit near enough to [the children] to cause them a substantial risk."

¶31 "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." A.R.S. § 13-1201. An offense is "dangerous" if it involved the discharge of a handgun. A.R.S. § 13-604(P). "Recklessly" means "that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." A.R.S. § 13-105(10)(c).

¶32 Here, the apartment measured 480 square feet. The couch where Fawn was sleeping was located immediately inside the front door of the apartment. Fawn woke up to the sound of "a gunshot inside the [apartment]." Fawn warned defendant about "the kids" when she saw him inside the house holding a gun. Before he left the apartment, defendant fired the gun toward the bedroom where the children slept. Fawn found a bullet strike above where her daughter was sleeping, and officers found a bullet hole in the wall leading into the bedroom and a spent

bullet in the air conditioning unit located directly above one child's bed. Although the children slept through the September 9 incident, the charge of endangerment does not require "that the victim be aware of the conduct of the actor." *State v. Morgan,* 128 Ariz. 362, 367, 625 P.2d 951, 956 (App. 1981). Likewise, defendant's testimony that he was shooting at an unknown intruder and *not* at Fawn or the children does not preclude the jury's finding that he was guilty of endangerment. *Id.* at 366, 625 P.2d at 955 ("The statute is designed to cover 'situations where the actor's recklessness endangers another's well being without the actor technically intending or knowing he is doing so.'")(citation omitted).

¶33 On this evidence, a reasonable jury could have found defendant guilty of endangerment. Likewise, defendant's admission that he fired the handgun inside the apartment supported the jury's finding that defendant's actions constituted a dangerous offense.

D. Count 10

¶34 Defendant objected that Count 10 had "not been met" because he claimed "protection and protecting himself or property" as a justification for shooting the gun inside the house.

¶35 "A person who with criminal negligence discharges a firearm within or into the limits of any municipality is guilty

of a class 6 felony." A.R.S. § 13-3107(A). No violation is committed if the firearm is discharged more than one mile from any dwelling house or in self-defense against an animal attack. A.R.S. § 13-3107(C), -3101(A)(6).

¶36 Apartment 1088 was located in Glendale. Defendant admitted shooting the gun inside the apartment. Fawn and the officers found bullet holes, bullet strikes, a bullet and a shell casing inside the apartment.

¶37 On this testimony, a reasonable jury could have found that defendant was guilty of discharging a firearm within the city. Likewise, defendant's admission that he fired the handgun inside the apartment supported the jury's finding that defendant's actions constituted a dangerous offense.

CONCLUSION

¶38 We affirm defendant's convictions and sentences. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, defendant shall have thirty days from the date of this decision to proceed, if he so

desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge