DIVISION ONE
FILED: 04-27-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION OF

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0769
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JAMES CRAIG COWDY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-112012-001 SE

The Honorable James T. Blomo, Judge *Pro Tem*

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 Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

James Craig Cowdy — Tucson
Appellant *In Propria Persona*

D O W N I E, Judge

¶1 James Craig Cowdy ("defendant") appeals his conviction for two counts of aggravated assault in violation of Arizona Revised Statutes ("A.R.S.") section 13-1203 and -1204 (2010).[1] Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has advised that he has thoroughly searched the record and found no arguable question of law and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant filed a supplemental brief *in propria persona*. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied,* 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

¶2 On February 15, 2009, M.C. saw two men drinking by a wall outside the tobacco store where he worked. It was M.C.'s habit to bring his dog to work for protection. As M.C. walked his dog into the tobacco shop, one of the men, later identified as defendant, told him to "get your dog out of here. I don't like dogs." When M.C. later took his dog outside, defendant again said, "I don't like dogs. Get your dog." Defendant became "loud and belligerent," and the dog lunged and barked at

[1] We cite to the current version of statutes when no revisions material to this decision have occurred.

him, chasing him into the parking lot. M.C. apologized to defendant. Defendant responded, "You just fucked up. I'll be back," and continued yelling at M.C. as he left.

¶3 The next day, as he was returning from getting a beverage and snack at a nearby convenience store, M.C. saw a man "banging on the window" of the tobacco store, yelling for him to come out. Defendant rushed toward M.C., and another man came "running out of nowhere," carrying a stick.[2] M.C. ran back to the convenience store, with the men following and yelling threats of bodily harm. M.C. ran into the store and asked the owner for assistance. Defendant and co-defendant came into the store and chased M.C. Defendant was carrying a large stick, and both men threatened to kill M.C.

¶4 E.A., the store owner, told the two men to leave, but they threatened E.A., saying they would "F [him] up." M.C. and a store employee went into a back room to escape. The co-defendant took the stick from defendant, turned toward E.A., and "started to raise it up." E.A. drew a gun and said, "If you hit me with that stick, I will shoot you." Defendant took the stick from the co-defendant, and both men left the store.

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[2] The man was named as a co-defendant; he is not a party to this appeal. Defendant was charged under accomplice statutes. *See* A.R.S. §§ 13-301 through -304 (2010). We thus reference the co-defendant's actions where appropriate.

¶5 Defendant was charged with two counts of aggravated assault.[3] He waived his right to a jury trial, and a two-day bench trial was held. The State presented five witnesses. Defendant moved for a judgment of acquittal pursuant to Arizona Rule of Criminal Procedure ("Rule") 20, asserting the State failed to prove that a deadly weapon or dangerous instrument was used. The motion was denied. The court took a brief recess, after which defendant did not return. Defendant had previously advised counsel that he would not testify, so the defense rested. The court found defendant guilty of both counts. He was sentenced to two concurrent and mitigated terms of 2.5 years' imprisonment, receiving sixty-two days of presentence incarceration credit.

DISCUSSION

¶6 We have read and considered the briefs submitted by defendant and his counsel 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.

¶7 Defendant's supplemental brief presents four "Reasons And-Or Issue's [sic] why my Case should Be Acquitted At Trail

[3] The charges were originally designated dangerous offenses, but that allegation was dropped.

[sic] And Some Things Went Wrong In My Case." We discuss only two of these issues, though, because the others have no basis in the record.[4]

1. Voluntariness

¶8 Defendant contends the trial court should not have admitted his statements because Officer C.C. violated his *Miranda* rights. Defendant provides no citations to the record to support this claim, and the record demonstrates that a voluntariness hearing was held. In a voluntariness hearing, the State must prove by a preponderance of the evidence that a statement was voluntarily made. *State v. Arredondo*, 111 Ariz. 141, 144-45, 526 P.2d 163, 166-67 (1974). We will uphold the trial court's findings regarding voluntariness if they are supported by adequate evidence. *State v. Rhymes,* 129 Ariz. 56, 57, 628 P.2d 939, 940 (1981) (citation omitted).

[4] Defendant says he agreed to a "Deal with The prosecutor" that made probation possible, but that his case went to trial with "No Further Say About This plea Bargain." The record reflects that such a plea was available, but it was contingent on acceptance by both defendant and the co-defendant. When the co-defendant rejected the plea, it was unavailable to defendant--a fact the trial court clearly explained to him. Defendant also claims his attorney failed to sever his case from the co-defendant's. However, ineffective assistance of counsel claims must be brought in proceedings pursuant to Rule 32. "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

a. Statements Before *Miranda* Warnings

¶9 Officers handcuffed defendant and sat him on a curb when the investigation commenced. Without issuing *Miranda* warnings, Officer C.C. asked defendant "what he was doing and what was going on." Defendant said he had come back in "retaliation" for the dog attack the previous day.

¶10 During the voluntariness hearing, Officer C.C. testified that he never threatened defendant or promised him anything. During cross-examination, defense counsel asserted that Officer C.C. coerced defendant to answer questions by standing on his hands. Officer C.C. denied this allegation. Officer T.Z. testified that he was nearby and never saw Officer C.C. standing on defendant's hands or doing anything "out of the ordinary." The trial court ruled defendant's statements were voluntarily made, but excluded them because Officer C.C.'s questions violated defendant's *Miranda* rights.

b. Statements After *Miranda* Warnings

¶11 At some point during the investigation, Officer T.Z. arrested defendant and issued *Miranda* warnings. Defendant said he understood the warnings and refused to answer questions. Officer C.C. transported defendant to jail in the back of a patrol vehicle. Defendant was agitated, angry, and talking "nonstop" during the transport. Defendant told Officer C.C. "over and over again that he was going to go back after he got

out of jail and he was going to put him to sleep permanently." Officer C.C. believed defendant meant he planned on returning to kill M.C. Officer C.C. testified he did not question defendant or initiate any conversation with him during the transport. Nor did he promise him anything or coerce him to talk. The trial court ruled that defendant's statements were voluntarily made after *Miranda* warnings were issued and were admissible.

¶12 The record supports the trial court's rulings. *See State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979) (citation omitted) (holding that a prima facie case for voluntariness is made when an officer testifies a confession was obtained without threat or coercion). Although conflicting evidence was presented about coercion, it is the trial court's role to weigh and assess competing claims. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (citations omitted) ("When reviewing the sufficiency of the evidence, an appellate court does not reweigh that evidence to decide if it would reach the same conclusions as the trier of fact."). The trial court was in the best position to judge the credibility of the witnesses. *See State v. Gallagher,* 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991) (finding that the "credibility of a witness is for the trier-of-fact, not an appellate court.") (citation omitted).

2. Dangerous Instrument

¶13 An assault is committed when a person intentionally places another in "reasonable apprehension of imminent physical injury." A.R.S. § 13-1203(A)(2). An assault is aggravated when the perpetrator uses a "deadly weapon or dangerous instrument." A.R.S. § 13-1204(A)(2). A dangerous instrument is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. § 13-105(12) (2010). "[I]f an instrument is not inherently dangerous as a matter of law, like a gun or knife, the jury can determine whether the defendant used the object in such a way that it became a . . . dangerous instrument." *State v. Schaffer,* 202 Ariz. 592, 595, ¶ 9, 48 P.3d 1202, 1205 (App. 2002) (citations omitted).

¶14 The stick at issue was described in various ways. The complaint called it a "WOODEN STAFF." Defense counsel described it as a "real small, rotten old part of a tree branch that is really as light as a feather." E.A. described it as "really large . . . maybe about a three or three and-a-half foot stick." The trier of fact examined it and found it to be a "very solid, heavy stick."

¶15 M.C. testified that the men raised the stick and chased him with it; he feared they would attack him with it. E.A. testified that the co-defendant "aggressively" lifted the

stick "like a baseball bat" and threatened to kill him. The State's evidence was sufficient to allow a reasonable trier of fact to conclude that the stick was readily capable of causing death or serious physical injury.

3. Waiver of Jury Trial

¶16 The trial court appropriately accepted defendant's jury trial waiver. Before accepting such a waiver, "the court shall address the defendant personally, advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent." Ariz. R. Crim. P. 18.1(b)(1). Whether a waiver is made knowingly will depend on the unique circumstances of each case. *State v. Butrick,* 113 Ariz. 563, 566, 558 P.2d 908, 911 (1976) (citation omitted). The pivotal consideration "is the requirement that the defendant understand that the facts of the case will be determined by a judge and not a jury." *State v. Conroy,* 168 Ariz. 373, 376, 814 P.2d 330, 333 (1991) (citation omitted). To ensure that a defendant understands the right he is waiving, the court must address the defendant personally and receive an affirmative response. *Butrick,* 113 Ariz. at 566, 558 P.2d at 911.

¶17 The trial court here explained that "[n]ormally in a jury trial, the jury is the group that makes the determination on guilt or innocence," while in a bench trial, it is the judge who does so. The court ascertained that defendant had an

opportunity to discuss the waiver with counsel and that his questions had been answered, that no one coerced him into making the waiver, and that he understood it could not be revoked once trial started. After each question, defendant responded affirmatively. Defendant further signed a "waiver of trial by jury" form that explained his rights. The record supports the trial court's finding that the waiver was knowingly, intelligently, and voluntarily made.

4. Rule 20 Motion

¶18 Finally, 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) (citation 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. After M.C.'s dog lunged at and chased defendant, defendant warned that he would return. He and the co-defendant did so the

next day, banging on the window of M.C.'s workplace and demanding that he come out. Defendant chased M.C., carried a "really large" stick, and threatened to kill M.C. The evidence established that defendant and his co-defendant also threatened E.A. Based on the evidence presented, a reasonable trier of fact could find defendant guilty of aggravated assault.

CONCLUSION

¶20 We affirm defendant's conviction and sentence. 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/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge