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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 02/14/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0586
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ADRIAN HERNANDEZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-005152-002 DT

The Honorable Christopher T. Whitten, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Myles Braccio, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Karen M. V. Noble, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Adrian Hernandez (Defendant) appeals his convictions and sentences for three counts of kidnapping a person under the age of fifteen, each classified as a dangerous crime against

children, arguing that the State failed to prove that he knowingly targeted a child for each count. For the following reasons, we disagree and affirm the convictions and sentences.

PROCEDURAL AND FACTUAL HISTORY

¶12 In the early morning of October 28, 2009, Defendant and an accomplice¹ forcibly entered a residence, armed with semi-automatic handguns, intending to burglarize the house. Present in the house were adults Leyva, Peralta and Martinez. Also present were Leyva's three minor children, ages one, four and six.

¶13 Once inside the house, Defendant and the accomplice forced all the occupants into one room and took turns guarding the occupants at gun point. Defendant and the accomplice fled after police arrived. Defendant was arrested shortly thereafter and identified as one of the men who entered the home and restrained the victims. Defendant later admitted participating in the burglary.

¶14 On November 5, 2009, the State indicted Defendant on: (1) first-degree burglary, a class 2 dangerous felony; (2) three counts of kidnapping, class 2 dangerous felonies; (3) three counts of kidnapping, alleged as dangerous crimes against children and class 2 dangerous felonies; (4) three counts of

¹ Defendant's accomplice was not tried with Defendant and is not a party to this appeal.

armed robbery, class 2 dangerous felonies; and (5) misconduct involving weapons, a class 4 felony.²

¶15 After the State presented its case, Defendant moved for a judgment of acquittal on all counts pursuant to Rule 20 of the Arizona Rules of Criminal Procedure; the court denied the motion. Defendant then testified in his own defense, claiming that he was forced to participate in the burglary and that he was not aware of the children's presence in the house.

¶16 A jury found Defendant guilty on all remaining counts. The jury also found the State proved three of the kidnapping charges constituted dangerous crimes against children pursuant to Arizona Revised Statutes (A.R.S.) section 13-705 (2010)³ (Dangerous Crimes Against Children Statute) because the child victims were under fifteen years of age. The trial court sentenced Defendant to mitigated terms on the burglary, adult kidnapping and armed robbery counts, all to be served concurrently. However, because the Dangerous Crimes Against Children Statute triggers mandatory enhanced sentences, the court sentenced Defendant to enhanced terms for each of the child kidnapping counts, to be served consecutively to Defendant's concurrent sentences.

² The State later dismissed one of the armed robbery counts and the misconduct involving weapons charge.

³ We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

¶7 Defendant filed a timely notice of appeal from the convictions and sentences. 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 (2010) and 13-4033.A.1 (2010).

DISCUSSION

¶8 Defendant argues the trial court erred in denying his motion for judgment of acquittal regarding the three counts of kidnapping a child under the age of fifteen because: (1) the Dangerous Crimes Against Children Statute does not apply in this case; and (2) the State "failed to produce sufficient evidence that [Defendant] knowingly restrained the three children."

¶9 We review de novo the trial court's ruling on a motion for judgment of acquittal and also independently review the court's constitutional and legal conclusions. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (*citing State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993)); *State v. Gay*, 214 Ariz. 214, 217, ¶ 4, 150 P.3d 787, 790 (App. 2007). Judgment of acquittal is appropriate only when there is no substantial evidence to support each element of the offense beyond a reasonable doubt. Ariz. R. Crim. P. 20.a; *State v. Mathers*, 165 Ariz. 64, 66-67, 796 P.2d 866, 868-69 (1990). Substantial evidence is "such proof as a reasonable mind would employ to support the conclusion reached," and if reasonable persons could differ as to whether the evidence establishes a

fact in issue, then the evidence is substantial. *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981) (citation omitted). In determining the sufficiency of the evidence to withstand a Rule 20 motion, we view the evidence in a light most favorable to sustaining the verdict. *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984).

The Dangerous Crimes Against Children Statute

¶10 Defendant contends the Dangerous Crimes Against Children Statute does not apply in this case. Under the statute, a person commits a dangerous crime against children if he commits a crime against a victim under the age of fifteen. A.R.S. § 13-705.P. However, the offense must be "focused on, directed against, aimed at, or target[ed]" at the child victim, and an offense is not a dangerous crime against children when the child was only accidentally injured by generalized "unfocused conduct." *State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993).⁴

¶11 Citing *State v. Samano*, 198 Ariz. 506, 11 P.3d 1045 (App. 2000), Defendant argues that to be sentenced under the Dangerous Crimes Against Children Statute, a defendant must target a child victim specifically because of the child's age.

⁴ The Dangerous Crimes Against Children Statute, formerly A.R.S. § 13-604.01, was amended several times before being renumbered as § 13-705. See 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29 (2d Reg. Sess.). For ease of reference, we cite to the version now in effect, which does not differ in any material way from the statute interpreted in earlier cases.

As we have previously noted, however, our supreme court has rejected that argument. See *State v. Miranda-Cabrera*, 209 Ariz. 220, 224, ¶ 19, 99 P.3d 35, 39 (App. 2004) (noting that *State v. Sepahi*, 206 Ariz. 321, 78 P.3d 732 (2003) substantially rejected the rationale on which *Samano* was based).

¶12 Under *Sepahi*, it is not necessary that a defendant victimize a child because of the child's age. *Miranda-Cabrera*, 209 Ariz. at 224, ¶¶ 17-19, 99 P.3d at 39. Instead, the Dangerous Crimes Against Children Statute applies when a targeted victim is younger than fifteen years old, even if the defendant reasonably intended to direct his criminal conduct only at adults. *Id.* at 224, ¶ 18, 99 P.3d at 39 ("[F]or the statute to apply, the victim must only be the person against whom the crime is directed, and no requirement exists that the accused must know the person is under fifteen.") (citation and internal quotation marks omitted); *Sepahi*, 206 Ariz. at 324, ¶ 17, 78 P.3d at 735 ("[A] defendant who intends to direct his criminal conduct only at adults can nonetheless be subjected to the special sentencing provisions of [the Dangerous Crimes Against Children Statute] when his victim turns out to be a child, even if the defendant quite reasonably believed to the contrary"); *Williams*, 175 Ariz. at 103, 854 P.2d at 136 (holding that knowledge of the victim's age is not required under the Dangerous Crimes Against

Children Statute because a defendant "assumes the risk that the victim will turn out to be within a protected age group").

¶13 Here, substantial evidence supported the jury's finding that Defendant's kidnapping offenses involved conduct directed or targeted at children. As Defendant concedes, the State proved that the "children were under the age of fifteen and present" when Defendant restrained them. Furthermore, by forcibly entering the home and using a gun to restrain the victims, Defendant necessarily "targeted" the entire group of victims, including the children. Even if he did not know that children lived in the home and did not plan to kidnap them prior to the invasion, he nonetheless did restrain them during the event. This evidence is all that is required under *Sepahi*. 206 Ariz. at 324, ¶ 19, 78 P.3d at 735 (reaffirming the holding in *Williams* that the State must prove the victim was under the age of fifteen and the victim was the person against whom the crime was directed); see also *State v. Coghill*, 216 Ariz. 578, 590, ¶ 49, 169 P.3d 942, 954 (App. 2007) (holding that under *Williams* and *Sepahi*, the State must only prove that the defendant knowingly targeted the victim and that his victim was under the age of fifteen).

¶14 Accordingly, we reject Defendant's argument that the Dangerous Crimes Against Children Statute does not apply in this case.

Sufficiency of the Evidence

¶15 Defendant also argues that the State failed to present sufficient evidence that he knew the children were present in the bedroom during the robbery. He contends that because the event occurred during the early morning hours and the house was dark, he was completely unaware of their presence. He further argues that no evidence was presented that the children made themselves known, and because the adult witnesses were unable to differentiate between the intruders in their testimony, the jury should have accepted Defendant's testimony that he never entered the bedroom where the children were located. In addition, he claims that because he was intoxicated during the crime, his sensory faculties were diminished and he was therefore unable to detect the children's presence. Accordingly, he asserts that the State failed to prove that he knowingly restrained and targeted the children at all, regardless of their ages.

¶16 Although Defendant testified that he was unaware of the children's presence and denied entering the room where the children were located, it is the duty of the jury to weigh the evidence and determine the credibility of witnesses. *State v. Brown*, 125 Ariz. 160, 162, 608 P.2d 299, 301 (1980). Accordingly, the jury was free to reject Defendant's testimony and draw its own conclusions based on other evidence, including the testimony of other witnesses. On appeal, we will not re-

weigh the evidence and will review only to determine whether substantial evidence supports the jury's findings. *Tison*, 129 Ariz. at 552, 633 P.2d at 361.

¶17 Viewed in the light most favorable to sustaining the verdict, we find the evidence presented at trial was sufficient to support the jury's findings. See *Mincey*, 141 Ariz. at 432, 687 P.2d at 1187. Leyva and Peralta each testified that Defendant and the accomplice forced all the occupants of the house, including the children, into a single room and that both intruders took turns guarding the victims at gunpoint. Peralta also testified that while being guarded, he repeatedly told both Defendant and the accomplice that "the children were there and that they were getting frightened." In addition, Leyva testified that while attempting to make a 911 call, she shielded herself behind the children. She testified that either Defendant or the accomplice saw her behind the children and that both intruders discovered that she was attempting to contact police. Finally, a responding officer testified that upon entering the house, he noticed that children were present. This evidence is sufficient to sustain the finding that Defendant knew the children were present during the crime and he knowingly restrained and targeted them.

CONCLUSION

¶18 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PHILIP HALL, Judge

/S/

JOHN C. GEMMILL, Judge