DIVISION ONE
FILED: 03/22/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0786
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
SHANNON CONNELY,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-131155-001

The Honorable Steven P. Lynch, Judge *Pro Tempore*

AFFIRMED

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By Kent E. Cattani, Chief Counsel
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J O H N S E N, Judge

¶1 Shannon Connely appeals his convictions of aggravated assault and disorderly conduct. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 A police officer drove to the Connely home one evening in search of a child who had been reported missing.[1] In the patrol car with the officer was a 12-year–old neighbor boy who was assisting in the search. Shortly after the officer parked in front of the home, Connely's wife and daughter drove up and parked in the driveway.

¶3 While the officer was standing on the sidewalk next to his patrol car speaking with Connely's wife, Connely emerged from the house, holding a black semi-automatic pistol in his right hand. Connely immediately began screaming obscenities at the officer, accusing him of trespassing.[2] The officer testified that, based on Connely's actions and demeanor, Connely was "very, very angry, very agitated that I was there, I felt – I

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[1] Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Connely. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

[2] There was a "No Trespass" sign on one of the front windows of the home. The sign proclaimed that "[t]he Owner has the character suae potestate esse" and has enacted a "Five thousand dollar Land use fee" payable in silver coin for each entry upon "This land." It further included a specific "Notice to agents of the government" that "[v]iolation of the rights of the Owner, or those under His protection, shall be assessed a civil penalty of one million dollars in silver coin for each violation."

immediately felt that my life was being threatened." He further testified that he also was concerned for the safety of the boy in the front seat of his patrol car, stating he thought Connely was an imminent threat to "both my welfare and also the child's."

¶4 In response to the threat he perceived, the officer drew his service weapon and ordered Connely to drop his gun. Connely refused, telling the officer that his gun was in a holster, and continued to scream obscenities. The officer again commanded Connely to drop the gun. Connely paused for a brief second, then threw down the gun. Connely then stepped away from the gun as instructed, but continued to scream at the officer. The officer directed Connely to turn around and kneel. When Connely refused and assumed an aggressive stance with clenched fists as if he wanted to fight, the officer deployed a Taser to subdue him.

¶5 Connely was indicted on charges of aggravated assault, a Class 2 felony and dangerous offense, and disorderly conduct, a Class 6 felony and dangerous offense. A jury found Connely guilty on both counts. The superior court sentenced Connely to a presumptive 10.5-year prison term on the aggravated assault conviction and a concurrent, mitigated 1.5-year prison term on the conviction for disorderly conduct. The superior court additionally made a finding, pursuant to Arizona Revised

Statutes ("A.R.S.") section 13-603(L) (2012), that Connely was eligible to petition for commutation of his sentence because the mandatory sentence required for the aggravated assault conviction was clearly excessive.[3] The court based this finding on the fact that at no time during the confrontation did Connely ever remove his gun from its holster, point the gun at the officer or discharge the gun.

¶6 Connely timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(1) (2012).

DISCUSSION

A. Aggravated Assault Conviction.

¶7 Connely argues that because the evidence was insufficient to support his conviction for aggravated assault, the superior court erred in denying his motion for judgment of acquittal on this charge. We review this issue *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶8 Arizona Rule of Criminal Procedure 20 requires the superior court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(A). "Substantial evidence" may be direct or circumstantial and "is proof that reasonable persons could

[3] Absent material revisions after the date of an alleged offense, we cite a statute's current Westlaw version.

accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). We construe the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against the defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "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) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶9 Connely was charged with aggravated assault under A.R.S. §§ 13-1203(A)(2) and -1204(A)(2) (2012). A person commits aggravated assault in violation of these statutes if the person "uses a deadly weapon or dangerous instrument" to intentionally place "another person in reasonable apprehension of imminent physical injury." It is not necessary that the victim actually be at risk of physical injury, only that the victim reasonably apprehend physical injury. *State v. Morgan*, 128 Ariz. 362, 367, 625 P.2d 951, 956 (App. 1981).

¶10 Citing the superior court's finding at sentencing that he never removed his handgun from its holster, pointed the gun at the officer or discharged it, Connely argues the evidence was

insufficient to permit the jury to find that he "used" the gun to assault the officer. We disagree.

¶11 Relying on *People v. Chambers*, 498 P.2d 1024, 1027 (Cal. 1972), Connely asserts that because the legislature chose to use the term "use" in § 13-1204(A)(2) rather than "while armed," the statute "requires something more than merely being armed." Connely suggests that the proper definition of the verb "use" in § 13-1204(A)(2) is that in the Webster's New World College Dictionary (4th ed. 2000): "[T]o put into action or service; employ for or apply to a given purpose." *Id.* at 1574. We agree with Connely that § 13-1204(A)(2) does not impose liability on a defendant who merely possesses or is armed with a deadly weapon or dangerous instrument. Our disagreement is with his conclusion that the evidence does not permit a finding that he "used" the gun to assault the officer in this case.

¶12 When Connely emerged from his house and began screaming at the officer, he was carrying his gun in a small nylon case not attached to his belt or otherwise tied around his waist or leg. He was holding the gun in a manner that would permit it to be fired. The gun was loaded and readily capable of being fired by slipping a finger inside the holster. Although he never pointed the gun at the officer, Connely repeatedly gestured with his hands, moving the gun around, as he

continued to scream profanities at the officer.[4] Considering the totality of the circumstances, the jury reasonably could find that Connely was not merely armed with or in possession of the gun during his confrontation with the officer. To the contrary, the jury could find that because Connely chose to grab his gun and take it with him when he charged outside to confront the officer, and because he gestured with the gun and initially refused to drop it to the ground, he was actually employing it as a means of intimidating the officer. Indeed, in his brief on appeal, Connely argues that his possession of the gun was part of his "specific message" to the officer to get off his property.

¶13 On this record, the evidence was more than sufficient to permit the jury to find beyond a reasonable doubt that Connely "used" the handgun to intentionally place the officer in reasonable apprehension of imminent physical injury. *See State v. Canion*, 199 Ariz. 227, 236, ¶ 38, 16 P.3d 788, 797 (App. 2000) (defendant may "use" deadly weapon for purposes of § 13-1204(A)(2) by exhibiting the weapon, "so long as the other person actually and reasonably feared immediate physical

[4] Asked how Connely was holding the gun, the officer testified, "It was pointed down, towards the ground. He did use hand gestures with his hands as he was screaming at me and yelling obscenities. And although he never pointed it up toward anybody, he did move the handgun around as he was gesturing."

injury"). Accordingly, the superior court did not err in denying the motion for judgment of acquittal.

B. Sentence Enhancement.

¶14 Connely next argues that the superior court erred in enhancing his sentences pursuant to A.R.S. § 13-704 (2012) based on jury findings that the offenses were dangerous. A "dangerous offense" includes "an offense involving the discharge, use or threatening exhibition of a deadly weapon." A.R.S. § 13-105(13) (2012). This sentence enhancement provision "recognizes the increased risk posed by the use of a deadly weapon and accordingly, enhances the punishment." *State v. Bice*, 127 Ariz. 312, 315, 620 P.2d 227, 230 (App. 1980).

¶15 As we understand his argument, Connely argues the law does not permit "use of a gun" for sentence enhancement purposes when it is an element of the charged offense. Our supreme court has rejected this argument. *State v. Bly*, 127 Ariz. 370, 372-73, 621 P.2d 279, 281-82 (1980); *see also State v. Garcia*, 176 Ariz. 231, 234, 860 P.2d 498, 501 (App. 1993) (upholding use of deadly weapon to turn simple assault into aggravated assault and to support finding of dangerousness to enhance sentence). To the extent that Connely simply means to argue that the record does not support the jury's finding that he "used" or exhibited the gun in a threatening manner, we reject that argument, for the reasons set forth in the prior section.

C. Disorderly Conduct Conviction.

¶16 Connely also argues there was insufficient evidence of reckless conduct to support his conviction for disorderly conduct. Connely was charged with disorderly conduct under A.R.S. § 13-2904(A)(6) (2012). This statute states:

> A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:
>
> * * *
>
> 6. Recklessly handles, displays or discharges a deadly weapon or dangerous instrument.

¶17 Connely contends there was no evidence he was reckless in handling his gun. As discussed, however, there was substantial evidence to support Connely's conviction for aggravated assault for *intentionally* placing the officer in immediate fear of physical injury with the handgun. Proof of intentional use of a weapon is sufficient to prove reckless use of a weapon. A.R.S. § 13-202(C) (2012); *see also State v. Angle*, 149 Ariz. 478, 479, 720 P.2d 79, 80 (1986) (adopting dissenting opinion in *State v. Angle*, 149 Ariz. 499, 508, 720 P.2d 100, 109 (App. 1985), that disorderly conduct under § 13-

2904(A)(6) is a lesser-included offense of aggravated assault under § 13-1204(A)(2)).[5]

¶18 Connely also argues the superior court erred by not fully defining the culpable mental state of "recklessly" as set forth in A.R.S. § 13-105(10)(c) (2012). This statute provides, in pertinent part:

> "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense, 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.

Without objection, the superior court instructed the jury only on the first sentence of the statutory definition. Connely argues that if the full definition had been given, the jury would have acquitted him.

¶19 Because Connely failed to object to the instruction at trial, we review solely for fundamental error. *State v. Valenzuela*, 194 Ariz. 404, 405, ¶ 2, 984 P.2d 12, 13 (1999);

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[5] Although the matter is not raised on appeal, the record contains sufficient evidence to support a finding by the jury that Connely committed disorderly conduct against the child in the car. *See* A.R.S. § 13-2904(A)(6) (one "commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person . . . [r]ecklessly handles, displays or discharges a deadly weapon."

Ariz. R. Crim. P. 21.3(c). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain relief under this standard of review, a defendant must establish both that fundamental error occurred and the error caused him prejudice. *Id.* at ¶ 20. Given that the jury found that Connely engaged in intentional conduct in committing aggravated assault using a deadly weapon, he cannot establish either fundamental error or prejudice resulting from any error in the instruction defining "recklessly."

D. Alleged Violation of Constitutional Rights.

¶20 Finally, Connely maintains that his convictions violate his constitutional rights to freedom of speech and to bear arms. We review issues of constitutional law *de novo*. *State v. Bomar*, 199 Ariz. 472, 475, ¶ 5, 19 P.3d 613, 616 (App. 2001).

¶21 The constitutional rights to freedom of speech and to bear arms are set forth in the First and Second Amendments of the United States Constitution and made applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*,

130 S.Ct. 3020, 3049 (2010); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Freedom of speech and the right to bear arms are also guaranteed by the Arizona Constitution. Ariz. Const. art. 2, §§ 6, 26. These rights, however, are not absolute and never have been recognized as sanctioning violence or threats of violence to others. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, 520, ¶ 28, 115 P.3d 107, 114 (2005) (recognizing the "true threat" doctrine, *i.e.*, serious expression of intent to commit an act of unlawful violence against a particular individual or group of individuals is not constitutionally protected). Connely was convicted based on his intentional conduct placing the officer in reasonable fear of imminent physical injury using a deadly weapon and for disturbing the peace of the child by recklessly handling or displaying the gun. Thus, we find no merit in Connely's contention that his rights to freedom of speech and to bear arms preclude the convictions for aggravated assault and disorderly conduct.

¶22 We further reject Connely's argument that the Arizona statutes proscribing aggravated assault and disorderly conduct involving a deadly weapon are unconstitutionally overbroad or

vague. A statute is presumed to be constitutional and one challenging it "bears the burden of establishing that it infringes upon a constitutional guarantee or violates a constitutional provision." *State v. Moerman*, 182 Ariz. 255, 257-58 n.1, 895 P.2d 1018, 1020-21 (App. 1994). Whether a statute is unconstitutional as applied is a question of law we review *de novo*. *State v. Evenson*, 201 Ariz. 209, 212, ¶ 12, 33 P.3d 780, 783 (App. 2001).

¶23 In challenging the aggravated assault and disorderly conduct statutes, Connely simply asserts that they must be unconstitutionally overbroad or vague if they permit his convictions because the convictions violate his rights to freedom of speech and to bear arms. Connely has failed to establish that any of the statutes criminalizing his conduct infringes upon any constitutional guarantee or violates any constitutional provision.

CONCLUSION

¶24 For the foregoing reasons, we affirm Connely's convictions and sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
ANDREW W. GOULD, Judge