DIVISION ONE
FILED: 04/12/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0817
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOSE HUMBERTO VEGA-ORDUNO,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-109079-001 SE

The Honorable Cari A. Harrison, Judge

AFFIRMED

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

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

J O H N S E N, Judge

¶1 Jose Humberto Vega-Orduno appeals his conviction of aggravated assault, a Class 3 dangerous felony, and the resulting sentence. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 M.A. was driving another woman home at about 4 a.m. one morning.[1] They saw a group of men and pulled over because one of them recognized Vega-Orduno and his brother. The women gave the men a ride to a second location. Vega-Orduno was standing beside the car as they were preparing to leave the second location, and told M.A. to watch out to avoid rolling the car over his foot. With Vega-Orduno back in the car, M.A. drove the group to another location, where the men again exited the car.

¶3 Later, as Vega-Orduno was climbing back into the car, M.A. almost ran over Vega-Orduno's foot. Vega-Orduno became extremely upset and, while seated in the back seat, pulled out a handgun. He pointed the gun at M.A.'s head, cocked the gun and told her he was going to kill her. M.A. then drove to a friend's house, where the men exited the car. The women then heard four or five gunshots fired into the back of the car. M.A. testified that although she did not see Vega-Orduno shoot

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

at her car, she knew he did because he was the only one with a gun, and she heard Vega-Orduno's brother telling him to stop shooting.

¶4 Vega-Orduno was convicted of three counts of aggravated assault and one count of discharging a firearm at a structure. He timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033 (West 2012).[2]

DISCUSSION

¶5 The indictment charged Vega-Orduno with "using a gun" to "intentionally place [M.A.] in reasonable apprehension of imminent physical injury." *See* A.R.S. §§ 13-1203 and -1204 (West 2012). Vega-Orduno challenges the superior court's denial of his motion for judgment of acquittal on the charge of aggravated assault for pointing a gun at M.A.[3]

¶6 Under Arizona Rule of Criminal Procedure 20, a defendant may move for a judgment of acquittal before the verdict if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). We review the superior court's denial of a Rule 20 motion for abuse of discretion and

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

[3] Vega-Orduno does not argue for the reversal of his other convictions.

will reverse only when "there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001). "Substantial evidence is more than a mere scintilla and 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) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). Both direct and circumstantial evidence may support a conviction, and "[a] conviction may be sustained on circumstantial evidence alone." *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981).

¶7 Vega-Orduno argues that because M.A. testified she was not scared when he pointed the gun at her, she was not in "reasonable apprehension of imminent physical injury," as required by A.R.S. § 13-1203(A)(2). In support, Vega-Orduno relies on *State v. Baldenegro*, 188 Ariz. 10, 932 P.2d 275 (App. 1996), for the proposition that the victim's "mere presence in a car at which someone fired shots" is insufficient by itself to support the conclusion that the victim reasonably apprehended imminent physical injury.

¶8 In *Baldenegro*, the victim did not testify at trial, and there was no evidence the victim saw the gun before the shooting or reacted in a way that demonstrated she apprehended

imminent harm. *Id.* at 13, 932 P.2d at 278. M.A., by contrast, saw a gun was pointed at her head from the back seat of the car and heard Vega-Orduno threaten her. After she saw the gun, she told Vega-Orduno, "If you're going to shoot me, shoot me. Some day I'm going to be dead." M.A. also testified that she was not afraid and that she did not think Vega-Orduno was going to shoot her. Asked if she feared for her safety, she said, "At the same time yes. At the same time not. . . . If I'm going to die, I'm going to die." But M.A. also testified that when the gun was pointed at her head, she worried what would happen to her baby if she was killed. And the officer who interviewed M.A. after the shooting testified she told him she was fearful for her safety. Moreover, despite M.A.'s bold words in the car, a little while after the shooting occurred she broke down crying and had a hard time speaking. And she testified that when Vega-Orduno telephoned her later to ask her not to report the incident, she thought, "[W]hat if you kill me? My baby, where he's going to go?"

¶9 To the extent there was contradictory evidence about whether M.A. reasonably apprehended imminent harm as she sat in the front seat of the car while Vega-Orduno pointed his handgun at her from the back seat, we resolve the conflict against Vega-Orduno. *See State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "If reasonable minds could differ on the

inferences to be drawn from the evidence, the motion for judgment of acquittal must be denied." *State v. Sullivan*, 205 Ariz. 285, 287, ¶ 6, 69 P.3d 1006, 1008 (App. 2003).

¶10 Moreover, the jury could find M.A. reasonably apprehended imminent injury based on evidence other than her own words. In *State v. Garza*, 196 Ariz. 210, 211, ¶ 4, 994 P.2d 1025, 1026 (App. 1999), we held that because the trier of fact was able to observe the victim's demeanor as she testified that the defendant pointed a gun at her and threatened her, and because she testified she was concerned for the safety of children playing nearby, the jury had sufficient evidence to infer that she was in reasonable apprehension of imminent physical injury. Here, the jury was able to evaluate M.A.'s demeanor as she testified that Vega-Orduno pointed the gun at her head and threatened her. Though M.A. did not unequivocally testify she was fearful while the gun was pointed at her, she testified that she worried about what would happen to her baby if Vega-Orduno killed her, and she later told an officer that she feared for her safety. This was sufficient evidence for the jury to find M.A. was in reasonable apprehension of imminent physical injury when Vega-Orduno pointed the gun at her head.

CONCLUSION

¶11 For the foregoing reasons, we affirm Vega-Orduno's convictions and resulting sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Chief Judge

/s/
PETER B. SWANN, Judge