

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
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: 04/12/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0379
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
TERRY DEAN PATTON,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-113783-001SE

The Honorable Joseph C. Kreamer, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Matthew Binford, Assistant Attorney General
Attorneys for Appellee

Law Office of Nicole T. Farnum Phoenix
By Nicole t. Farnum
Attorneys for Appellant

O R O Z C O, Judge

¶1 Terry Dean Patton (Defendant) appeals his conviction
and sentence for aggravated assault, a class 3 dangerous felony.

He argues the trial court erred in denying his motion to dismiss the allegation of dangerousness because the State failed to present sufficient evidence that the weapon used to strike the victim constitutes a "dangerous instrument" as defined by Arizona Revised Statutes (A.R.S.) section 13-105.12 (Supp. 2011).¹ For the following reasons, we affirm Defendant's conviction and sentence.

PROCEDURAL AND FACTUAL HISTORY

¶2 One morning Defendant went for breakfast at a shelter in Mesa. While Defendant was sitting on a bench outside the shelter, the victim walked toward him and a verbal altercation ensued.² When the victim attempted to walk away from the argument, Defendant hit the victim in the back of the head with a metal pipe. After striking the victim, Defendant chased the victim around the parking lot and continued to swing the pipe at the victim in an attempt to hit him again. These attempts were unsuccessful. Following the incident, the victim was taken to the Emergency Room where he was treated for a cut on the back of his head and released. Defendant was arrested with the pipe in his possession and transported to jail.

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

² Defendant testified that the victim attempted to punch him during this altercation. Defendant's version of the altercation was not corroborated by the victim or an eye-witness.

¶3 Defendant was charged with one count of aggravated assault, a class 3 dangerous felony. At trial, Defendant testified that he struck the victim in self-defense and that the pipe was not a dangerous instrument or meant to be used as a weapon. The manner in which the pipe was used to strike the victim in the head was presented to the jury and the pipe was admitted into evidence.

¶4 At the conclusion of the State's case, Defendant moved to dismiss the allegation of dangerousness, arguing the State failed to present sufficient evidence that the pipe met the definition of a dangerous instrument. The trial court denied the motion. A jury found Defendant guilty and found the crime constituted a "dangerous offense" pursuant to A.R.S. § 13-105.13. Because A.R.S. § 13-704.A (2010) imposes mandatory enhanced sentences for dangerous offenses, the trial court sentenced Defendant to a term of five years, the minimum sentence allowable by statute. Defendant was given 282 days of pre-sentence incarceration credit.

¶5 Defendant filed a notice of appeal.³ 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).

³ The trial court granted Defendant's Petition for Post-Conviction Relief to file a delayed notice of appeal.

DISCUSSION

¶16 Defendant contends that because the State presented insufficient evidence that the pipe used to strike the victim constituted a dangerous weapon or instrument, the court erred in denying his motion to dismiss the allegation of dangerousness.⁴ "On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20.a. "Substantial evidence, Rule 20's lynchpin phrase, 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. West*, 226 Ariz. 559, 562, ¶16, 250 P.3d 1188, 1191 (2011) (citation and internal quotation marks omitted). We review de novo the trial court's denial of Defendant's Rule 20

⁴ It is unclear from the record whether Defendant's motion to dismiss the allegation of dangerousness was intended to be a motion for judgment of acquittal pursuant to Rule 20.a of the Arizona Rules of Criminal Procedure. However, because the "use[] [of] a deadly weapon or dangerous instrument" was an essential element of the aggravated assault charge in this case, see A.R.S. § 13-1204.A.2 (Supp. 2011), we interpret Defendant's motion to dismiss the allegation of dangerousness as a Rule 20 motion for judgment of acquittal. See *State v. Mathers*, 165 Ariz. 64, 66-67, 796 P.2d 866, 868-69 (1990) (judgment of acquittal is appropriate when there is no substantial evidence to support each element of the offense beyond a reasonable doubt).

motion to dismiss an allegation of dangerousness. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶7 A "dangerous instrument" is defined by A.R.S. § 13-105.12 as "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." (emphasis added). This broad definition allows many innocuous objects to rise to the status of dangerous instruments depending on the circumstances in which they are used. See *State v. King*, 226 Ariz. 253, 260, ¶ 26, 245 P.3d 938, 945 (App. 2011) ("We recognize that depending on the circumstances of their use, most objects and household items can constitute dangerous instruments." (citation omitted)). The trier of fact must decide whether the defendant used an instrument that is not inherently dangerous, in contrast to a gun or knife, in such a manner that it became a dangerous instrument. *State v. Schaffer*, 202 Ariz. 592, 595, ¶ 9, 48 P.3d 1202, 1205 (App. 2002).

¶8 In the present case, reasonable evidence exists to support the court's determination that the pipe could constitute a dangerous instrument. The victim testified that not only did Defendant strike the victim in the head with a metal pipe but that Defendant continued to attack the victim with the pipe after the initial blow. A reasonable jury could conclude that Defendant "used or threatened to use" the pipe in way that was

"readily capable of causing death or serious physical injury" pursuant to A.R.S. § 13-105.12. See *West*, 226 Ariz. at 563, ¶ 18, 250 P.3d at 1192 ("when reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury" (citation and internal quotation marks omitted)).

¶9 Appellant's arguments that the evidence is insufficient because the pipe was not made of lead and the victim did not suffer serious physical injury are immaterial. The court, in denying the motion, need only determine whether a reasonable jury could find that the instrument was readily capable of inflicting serious injury or death, not whether it actually did cause serious injury or death. See *State v. Molina*, 211 Ariz. 130, 133, ¶10, 118 P.3d 1094, 1097 (App. 2005) ("[T]he jury could conclude that [Defendant] committed aggravated assault if he used a dangerous instrument to inflict any physical injury to another person" (citation and internal quotation marks omitted)). Here, the jury was capable of making this finding when the uncontested testimony revealed that Defendant injured the victim after he used a pipe to hit the victim in the head. Furthermore, there is no statutory requirement that the pipe be made of lead, or any particular element, to qualify as a dangerous instrument. See A.R.S. § 13-105.12. Instead, it is a defendant's use of an object, as opposed to its composition, that is the focus of the inquiry into the object's status as a dangerous instrument or

weapon. See *Schaffer*, 202 Ariz. at 595, ¶ 9, 48 P.3d at 1205.
Accordingly, we find no error.

CONCLUSION

¶10 For the foregoing reasons, we affirm Defendant's conviction and sentence.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PHILIP HALL, Judge

/S/

JOHN C. GEMMILL, Judge