IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LARRY ALEXANDER ELEM,
Appellant.

No. 2 CA-CR 2014-0437
Filed May 12, 2016

Appeal from the Superior Court in Pima County
No. CR20124581002
The Honorable Scott Rash, Judge

REVERSED AND REMANDED

COUNSEL

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By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Larry Elem appeals his convictions for endangerment and discharging a firearm at a residential structure, for which he received concurrent sentences, the longer of which was seven years. He argues the trial court prejudicially erred by denying his request to allow his expert to examine and test-fire the victim's gun. We agree, and reverse and remand for a new trial. We also address his argument that the evidence was insufficient to support the convictions, because that issue would bar retrial if meritorious.[1]

Factual and Procedural Background

¶2 In December 2012, C.S. was at home with her two sons when Larry knocked on her front door. C.S. knew Larry, and his brother and co-defendant Melvin, from their neighborhood. Larry repeatedly demanded to speak with C.S.'s boyfriend A.A., who also lived in the home. Larry wanted to speak to A.A. about an arson accusation involving Melvin. C.S. told Larry several times that A.A. was at work and not home. C.S. also asked Larry to leave multiple times, but he refused and began yelling angrily. He was "aggressive from the get-go," C.S. testified. She called 9-1-1 to report Larry's behavior.

[1]Larry makes numerous other arguments that we decline to address in light of the remand.

¶3 After finishing the 9-1-1 call, C.S. looked out at Glenn Street, which runs along the northern edge of her corner-lot property. She saw Melvin in his car parked in front of her house. C.S. approached Melvin with the hope he would persuade Larry to leave. Instead, Melvin got out of the car with a gun in his hand and, when she immediately started retreating to the house, began following her.

¶4 Once C.S. was back inside the house, Melvin yelled threats at her from outside. While standing in her front yard, Melvin threw a rock through C.S.'s front living room window, shattering it. C.S.'s four-year-old son was standing about eight feet away from the window at that point. She ran to get her one-year-old son out of his crib, and brought both sons into one of the bedrooms. Then she went outside to see what Melvin and Larry were doing, fearing that they might try to shoot her through the window or invade the home. She saw Melvin standing in her yard with a rock in one hand and a gun in the other. When Melvin saw her, he started "coming after" her as though "[h]e was . . . getting ready to run towards [her], like lunge." As she stood on her porch just a couple of feet north of her fully open screen door, C.S. pulled her own gun out of her pocket and fired three shots in quick succession. One shot hit Melvin, knocking him down. C.S. believed that either the second or third shot struck Melvin.

¶5 When C.S. began shooting, Larry was with his truck, which was parked on the side street running along the western edge of C.S.'s property and close to the intersection with Glenn. Standing on the ground between the open driver's door and the cab of his truck, Larry pointed his own handgun over the hood of his truck toward the house and fired one or two shots at the house.

¶6 After the shots were fired, a neighbor who had heard the commotion began video-taping the scene, and the video recording was admitted in evidence. The video shows Melvin saying to Larry, "C'mon bro, I'm going to get my gun," and then firing one gunshot from his moving vehicle at the front of C.S.'s house. It then shows Larry and Melvin driving away eastbound in their separate vehicles.

¶7 Police officers apprehended Larry and Melvin soon thereafter. A search of Melvin's car found what appeared to be a bullet hole on the front passenger side fender near the headlight. In addition, Larry told a police officer that C.S. had shot at both Melvin and himself. "It was a threat to me because she shot towards my truck," he explained. Another of Larry's brothers testified that when he picked up Larry's truck later that night, he had found a bullet hole in a washing machine that was in the truck bed during the shooting.

¶8 Melvin and Larry were jointly charged with endangerment, discharging a firearm at a residential structure, drive-by shooting, and aggravated assault with a deadly weapon or dangerous instrument. Larry's theory at trial was that his shooting was justified both as self-defense and as defense of Melvin. *See generally* A.R.S. §§ 13-405(A), 13-406. He further argued he was not an accomplice to Melvin's drive-by shooting. The trial court granted Larry's motion for a directed verdict pursuant to Rule 20, Ariz. R. Crim. P., as to the aggravated assault charge. The jury, which was instructed on accomplice liability, found Larry not guilty of drive-by shooting, but found him guilty of discharging a firearm at a residential structure and of endangerment.[2] He was sentenced as detailed above and now appeals. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Motion to Examine Victim's Gun

¶9 As he did below, Larry contends the trial court violated his constitutional right to present a complete defense by denying his pretrial motion, filed pursuant to Rule 15.1, Ariz. R. Crim. P., to compel the state to provide C.S.'s gun for expert examination and a ballistics test-fire. We review a court's decision not to compel Rule

[2] The jury found Melvin guilty of drive-by shooting, endangerment, discharging a firearm at a residential structure, and the lesser-included offense of disorderly conduct. *State v. (Melvin) Elem*, No. 2 CA-CR 2014-0167, ¶ 8 (memorandum decision filed Nov. 30, 2015). We affirmed Melvin's convictions on appeal. *Id.* ¶ 36.

15.1 disclosures for an abuse of discretion, *State v. Piper*, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976), but review matters involving rules of constitutional law and criminal procedure de novo, *State ex rel. Montgomery v. Chavez ex rel. Cty. of Maricopa*, 234 Ariz. 255, ¶ 3, 321 P.3d 420, 421 (2014).

¶10 Although the record is not clear regarding the precise contents of the state's Rule 15.1(b) mandatory disclosure, it appears the state listed C.S.'s gun as a tangible object that the prosecutor intended to use at trial. Larry's counsel requested the victim's gun, identifying it by make and model, for the purpose of inspection and "forensic testing." The prosecutor replied, "I'll have to talk with the detective about the gun[] but I'm sure it can be arranged." The state subsequently declined to produce the gun, and Larry filed a motion to compel disclosure.[3]

¶11 Larry argued his expert would test-fire the gun with the same ammunition C.S. had shot so that the expert could determine the angle at which that particular gun ejected shell casings. The ejection pattern and trajectory analysis would allow the expert to form an opinion regarding the direction C.S.'s gun had been pointing when she fired each shot. Larry explained that C.S.'s firing direction was relevant because the closer he was to C.S.'s line of fire, the more reasonable it would have been for a person in his situation to believe deadly force was immediately necessary to defend himself.[4] *See* § 13-405(A)(2). Larry contended that "each gun has a

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[3]The motion sought additional items of disclosure that are not the subject of this appeal; therefore, we only discuss those items to the extent they affected disclosure of C.S.'s gun.

[4]Larry similarly argued that the closer Melvin was to C.S.'s line of fire, the more reasonable it would have been for Larry to believe deadly force was immediately necessary to protect Melvin. § 13-406. Because it was undisputed that C.S. shot directly at Melvin, further testimony about C.S.'s angle of fire when aiming at Melvin was cumulative on the issue of whether Larry was justified in defending Melvin.

particular ejection pattern specific to that firearm," and insisted that without an opportunity to test-fire C.S.'s gun and to determine its unique shell casing ejection pattern, the defense expert could not complete the requisite mathematical analysis to determine firing direction. He summarized:

> Establishing [C.S.'s] position when she fired, and possibly the direction in which her firearm was pointed, is directly relevant to the issue[s] of self-defense, crime prevention and defense of third party asserted by Defendant Larry Elem. A defense expert will test fire [C.S.'s] pistol and determine where it would have deposited ejected casings, and the position and angle of the firearm that would have resulted in the depositing of casings at the location where they were found. An inspection of the premises is necessary in order to make such a finding, so that measurements may be made, and the character of the scene assessed by the expert. Likewise, according to the defense expert, an inspection of the firearm used, and the ammunition used will be necessary in order to make these determinations.

¶12 The state opposed Larry's motion to disclose the gun before trial, arguing that because the state conceded C.S. shot Melvin outside her home and the gun was operable, Larry's ballistics expert could not offer a relevant opinion that would add to indisputable facts affecting his justification defense. Moreover, to the extent that the trajectory of the bullets was at issue, the state argued Larry "may thoroughly cross-examine the officers on the stand and ask

questions about the bullet strike [on C.S.'s house] during defense interviews."[5]

¶13 At a hearing on the motion, both the state and the trial court questioned whether Larry would be able to mount a self-defense claim at all if he chose not to testify. The prosecutor also voiced her belief that C.S. was presently in possession of the gun, and argued Arizona law allows a crime victim to refuse a discovery request. *See* Ariz. R. Crim. P. 15.1(b), 39(b). The court denied Larry's motion to examine the gun at the conclusion of the hearing. A few days later, the state revealed that it was mistaken about possession of the gun: law enforcement officers had possession of the gun. Larry moved for reconsideration, but the court denied the motion. C.S.'s gun was admitted into evidence during the trial.

¶14 After his conviction, Larry moved for a new trial, again arguing the court should have allowed his expert to inspect C.S.'s gun. He supported the motion with an affidavit from his expert stating that if the expert had been allowed to test-fire the gun, he probably would have been able to eliminate some potential directions at which C.S. might have fired it during the incident. The court denied Larry's motion for a new trial, finding that the expert's proposed testimony was cumulative to the evidence presented at trial.[6]

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[5] The state's argument about bullet strikes on the house touched on several disputed issues in addition to the trajectories of Larry's shots.

[6] The court also found that granting Larry's motion to inspect the gun would have caused undue delay, noting Larry had asserted his speedy trial rights at the time he brought the motion. But had the court granted Larry's motion, any resulting delay would have been excluded from computation of Larry's speedy trial date under Rule 8.4, Ariz. R. Crim. P. For instance, earlier in the same motions hearing, the court granted another of defense counsel's discovery requests, finding it to be a "strategic decision of the defense" that

¶15 The Due Process and Confrontation Clauses guarantee a criminal defendant "'a meaningful opportunity to present a complete defense.'" *State v. Abdi*, 226 Ariz. 361, ¶ 27, 248 P.3d 209, 215 (App. 2011), *quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *see* U.S. Const. amends. VI, XIV; Ariz. Const. art. II, §§ 4, 24. And "in some cases exculpatory information may be of little or no value unless the defendant has access to it prior to trial[, such as] . . . when [the] information must be considered by experts in preparing for their trial testimony." *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 241, 836 P.2d 445, 454 (App. 1992) (Lankford, J., concurring).

¶16 In furtherance of these rights, Rule 15.1 provides the procedural mechanism by which a defendant is notified about the evidence the state intends to use against him, and it permits examination and testing to determine which defenses may be asserted. *See State v. Martinez-Villareal*, 145 Ariz. 441, 447, 702 P.2d 670, 676 (1985) (purpose of Rule 15.1 is to give full notification of each side's case). Because the state has no duty to perform any particular test, it is incumbent upon a defendant to conduct whatever tests or follow-up he believes necessary to assert a defense. *See State v. Ramirez*, 178 Ariz. 116, 132, 871 P.2d 237, 253 (1994) (no duty to perform DNA test); *State v. Dodds*, 112 Ariz. 100, 102, 537 P.2d 970, 972 (1975) (where state provided what rule required, additional examination responsibility of defendant). More specifically, "the prosecutor shall make available to the defendant . . . [a] list of all papers, documents, photographs or tangible objects that the prosecutor intends to use at trial," subject to the victims' rights provisions of Rule 39(b), Ariz. R. Crim. P. Ariz. R. Crim. P. 15.1(b)(5). Furthermore, upon written request, the prosecutor shall "make available to the defendant for *examination, testing* and reproduction . . . [a]ny specified items" in such list, unless the court orders otherwise. Ariz. R. Crim. P. 15.1(e)(1) (emphasis added).

¶17 The state did not contend in the trial court or on appeal that Larry's written request to examine and test C.S.'s gun was

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would have waived his speedy trial time during any resulting delays.

outside the scope of its mandatory disclosure duty under Rule 15.1(e). Additionally, although it has authority to "impose reasonable conditions . . . to protect physical evidence," *id.*, it did not do so. Instead, it relied on its own inferences about witness testimony and the post-shooting video to conclude that testing by a ballistics expert could not lead to relevant or admissible evidence. But even when the state marshals substantial and arguably overwhelming evidence, it cannot limit a defendant's due process and Confrontation Clause rights to examine the evidence so that he might challenge its admission or the weight a jury should give to it. *See State v. Schreiber*, 115 Ariz. 555, 558-59, 566 P.2d 1031, 1034-35 (1977) (defense counsel alone could determine what use and development could be made of material evidence not properly disclosed before trial; prosecutor's speculations as to how defense might have used it were not controlling); *cf. State ex rel. Helm v. Superior Court*, 90 Ariz. 133, 138-39, 367 P.2d 6, 9-10 (1961) (examination of DWI report before trial "essential to the adequate preparation of [the] defense" under the circumstances). In view of these rights and the requirements of Rule 15.1, the trial court abused its discretion in concluding the state was not required to provide Larry an opportunity to examine and test the gun it intended to use as an exhibit at trial. Ariz. R. Crim. P. 15.1(b)(5), (e)(1).

¶18 Even were we to assume arguendo that C.S.'s gun was outside the scope of Rule 15.1 mandatory disclosure, the trial court abused its discretion in denying Larry's motion. Upon a showing of "substantial need" for an item that the defendant is "unable without undue hardship to obtain the substantial equivalent [of] by other means," the court has discretion to "order any person to make [the item] available to the defendant." Ariz. R. Crim. P. 15.1(g). Larry showed he had a substantial need to examine and test-fire C.S.'s gun in order to determine its firing direction during the incident. He also showed he could not obtain substantially equivalent evidence in any other manner because different guns have unique ejection patterns. Ariz. R. Crim. P. 15.1(g). C.S.'s firing direction was relevant to the issue of justification—whether a reasonable person in Larry's situation would have believed deadly force was immediately necessary for self-defense. *See* § 13-405. And Larry would not have

needed to testify in order to advance a justification defense. Self-defense is based on what a reasonable person in the defendant's circumstances would have believed, not what the defendant actually believed. *See* § 13-405; *see also State v. King*, 225 Ariz. 87, ¶¶ 11-12, 235 P.3d 240, 243 (2010) (disapproving "any language in cases suggesting or requiring that the defendant's fear of imminent harm be the sole motivation for employing self defense"). C.S.'s firing direction was relevant notwithstanding what Larry actually believed or testified to.

¶19 Furthermore, if the gun was in the possession of law enforcement when Larry requested it, as it apparently was, then the Victims' Bill of Rights had no effect on the prosecutor's duty to make it available. Ariz. R. Crim. P. 15.1(f)(2); *see Romley*, 172 Ariz. at 239, 836 P.2d at 452 ("[T]he Victim's Bill of Rights does not give victims a right to prevent the prosecution from complying with requests for information within the *prosecutor's* possession and control."); *see also Carpenter v. Superior Court*, 176 Ariz. 486, 490, 862 P.2d 246, 250 (App. 1993) (law enforcement agency is arm of prosecutor for Rule 15.1 purposes).

¶20 It was the state's burden to show good cause for a court order protecting it from complying with Rule 15.1(e). *See Cervantes v. Cates*, 206 Ariz. 178, ¶ 21, 76 P.3d 449, 454 (App. 2003), *superseded in part on other grounds by* Ariz. R. Crim. P. 15.1(j). It failed to meet that burden because none of its proffered reasons to withhold the gun—irrelevance, victim's rights, and the defense's ability to obtain equivalent information through other means—are legally sufficient. Thus the trial court abused its discretion by failing to grant Larry's Rule 15.1(g) motion because it denied him a meaningful opportunity to present a complete defense.

Harmless Error

¶21 The state principally argues the error in denying Larry's motion was harmless. It contends that C.S. shot only at Melvin, one shot hit Melvin, and Larry was in the line of fire directed at Melvin. From these assumed facts, it reasons that the jury necessarily considered and rejected both the defense of others and the self-

defense justifications. Based on these assumed facts and inferences, it argues that a ballistics opinion showing a more specific bullet trajectory would have been cumulative to admitted evidence. Because it is undisputed that C.S. shot Melvin and that Larry's return fire was asserted in part as a defense of Melvin, we only examine the evidence that Larry was in the line of fire as it pertains to his self-defense justification.

¶22 To avoid reversal, the state must prove beyond a reasonable doubt that the Rule 15.1 error did not contribute to or affect the verdict. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005); *see also State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) ("We must be confident beyond a reasonable doubt that the error had no influence on the jury's judgment."). "'The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *Bible*, 175 Ariz. at 588, 858 P.2d at 1191, *quoting Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

¶23 Although we generally view evidence in the light most favorable to upholding the jury's verdict, on reviewing precluded evidence we "'must look at the evidence in a light most favorable to its *proponent*, maximizing its probative value and minimizing its prejudicial effect.'" *See State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989) (emphasis added in *Castro*), *quoting United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983). This principle also applies in the context of harmless error. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191 (state's burden to prove error had no effect on jury's judgment beyond a reasonable doubt); *cf. State v. Coghill*, 216 Ariz. 578, ¶¶ 27-30, 33, 169 P.3d 942, 949, 950 (App. 2007) (error in admitting evidence that defendant possessed adult pornography not harmless beyond a reasonable doubt in close child pornography case that amounted to "a credibility contest" between defendant and another computer user).

¶24 Larry's and C.S.'s positions at the time C.S. fired her gun were undisputed. At that point, Larry and his truck were on the side street that runs along the western edge of C.S.'s property,

just south of its intersection with Glenn Street, which runs along the northern edge. The truck was facing northeast. As for C.S., all the evidence showed that at the relevant time she was standing right in front of her fully open screen door on the north side of her house. Thus, to shoot at Larry from her position, C.S. would have needed to aim northwest.

¶25 Two eyewitnesses testified regarding Melvin's position when C.S. fired her gun: C.S. and T.W., a motorist driving westbound on Glenn. C.S. testified multiple times that Melvin had been in her yard north and east of her when she shot at him. She added that she shot "at an angle" to "[her] right," i.e., in a northeasterly direction.

¶26 At oral argument on appeal, the state contended the other eyewitness, T.W., had been consistent in testifying that Melvin was running toward Larry's truck when C.S fired her gun. Because there was no dispute that C.S. was aiming at Melvin and in fact shot Melvin, the state continued, it follows that "Larry necessarily [was] in [C.S.'s] line of fire" and further evidence on C.S.'s firing angle therefore would have been cumulative as to the issue of the reasonableness of self-defense.

¶27 The record does not support the state's contention for two reasons. First, T.W.'s testimony regarding Melvin's direction of movement was more ambiguous than the state asserts. T.W. testified he had seen Melvin throw a rock through C.S.'s window, and then immediately turn around and begin to move away from the house. At one point, T.W. testified Melvin had been moving at an angle toward the west part of the yard, arguably suggesting he was running northwest toward Larry's truck. But at another point, T.W. said Melvin's back had been toward the house when C.S. fired, meaning Melvin was facing north; he added Melvin "seemed to be making his way back out to" his own car directly north of the house. T.W. admitted he was not certain about whether Melvin had been heading north to his car or northwest to Larry's truck. We cannot resolve conflicts in the evidence, including inconsistencies by an individual witness. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶¶ 38-39, 312 P.3d 123, 133 (App. 2013) (reviewing court does not reweigh

evidence or assess credibility of a witness, even if inconsistent or vague).

¶28 Second, even assuming for the sake of argument that Melvin was heading northwest toward Larry's truck when C.S. fired, T.W. explained Melvin had still been "in the front yard in the gravel" about twenty to thirty feet away from the house when he was shot. If that is true, then photographs in the record demonstrate that Melvin could not have been any further west than C.S. was when he was shot. Under either scenario, T.W.'s testimony places Melvin in C.S.'s yard at least twenty or thirty feet north and east of C.S. at the time he was shot.

¶29 The record shows the angle between Melvin and Larry from C.S.'s vantage point when she fired was at least forty-five degrees and possibly up to ninety degrees or more. Thus, a conclusion that the evidence showed C.S. "likely shot in Larry's direction" simply by virtue of aiming at Melvin is clearly erroneous as a matter of geometry. *See Hodai v. City of Tucson*, 239 Ariz. 34, ¶ 14, 365 P.3d 959, 965 (App. 2016) (finding is clearly erroneous where "'reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'"), *quoting Merryweather v. Pendleton*, 91 Ariz. 334, 338, 372 P.2d 335, 338 (1962).

¶30 Finally, the state argued in closing that C.S. had fired all three shots at Melvin. However, based on the evidence presented at trial, a reasonable juror could conclude that although C.S. fired two shots in a north-to-northeasterly direction toward Melvin, the first of which missed him (perhaps hitting his car) and the second of which hit him, C.S. fired her third shot toward Larry's truck to the northwest, as Larry told the police officer (perhaps hitting the washing machine in the truck bed).[7] If, before firing the third shot, C.S. aimed at Larry and his truck, rather than at Melvin who was

[7]Larry's attorney tried to argue as much from the existing record in his closing argument, but he lacked the benefit of expert testimony to corroborate his theory.

still at least forty-five degrees away, then it would have made it that much more reasonable for a person in Larry's situation to conclude deadly force was immediately necessary for self-defense. *See* § 13-405. The state has not shown beyond a reasonable doubt that an expert analysis that "probably" could have ruled out some of C.S.'s potential firing directions could not have made this scenario any more or any less likely. Thus, the state has not met its "heavy burden" of showing that the jury's verdicts of guilt in this case were surely unattributable to the lack of expert testimony regarding the trajectory of C.S.'s bullets. *Cf. Bible*, 175 Ariz. at 588-90, 858 P.2d at 1191-93. Because the state has not shown that the error was harmless beyond a reasonable doubt, reversal of both convictions is required. *Cf. Romley*, 172 Ariz. at 240-41, 836 P.2d at 453-54 (denial of pretrial disclosure of victim's medical records prevented defendant from preparing complete justification defense, meriting relief via special action).

Sufficiency of the Evidence

¶31 Larry also challenges the sufficiency of the evidence, as he did below in a motion for judgment of acquittal pursuant to Rule 20(a), Ariz. R. Crim. P. We consider the argument to resolve his claim that retrial is barred under double jeopardy principles. *See, e.g.*, *State v. Moya*, 129 Ariz. 64, 67 n.2, 628 P.2d 947, 950 n.2 (1981) (double jeopardy bars retrial following reversal for insufficient evidence). We review de novo a challenge to the sufficiency of the evidence. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). A jury verdict cannot be vacated for insufficient evidence unless it clearly appears that "upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987); *see also West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191 ("'[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

¶32 Larry argues the evidence was insufficient to support the jury's conclusion that he committed endangerment against all three victims.[8] "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death." A.R.S. § 13-1201(A). The state also must show defendant's conduct actually placed the victim at substantial risk of imminent death. *See State v. Doss*, 192 Ariz. 408, ¶¶ 8-9, 966 P.2d 1012, 1015 (App. 1998). The endangerment statute does not require that the

[8] In his opening brief, Larry argued the indictment was duplicitous as to the endangerment count, which alleged Melvin and Larry "recklessly endangered [C.S.], [C.S.'s younger son], [C.S.'s older son] with a substantial risk of imminent death," with no coordinating conjunction among the victims' names. Larry argued that if the indictment should be read in the disjunctive and the state was only required to prove endangerment of any one of the three victims, then it was duplicitous. After Larry filed his opening brief, we issued our decision in Melvin's appeal. *(Melvin) Elem*, No. 2 CA-CR 2014-0167. In that decision, although we concluded the indictment was duplicitous, we determined the error was not prejudicial as to Melvin, because the jury had checked off all three victims in an interrogatory on Melvin's endangerment verdict form, leaving no doubt that the jury was actually unanimous that all three victims had been endangered beyond a reasonable doubt. *Id*. ¶¶ 34-35 (duplicitous indictment can be cured "'when the basis for the jury's verdict is clear'"), *quoting State v. Paredes-Solano*, 223 Ariz. 284, ¶ 17, 222 P.3d 900, 906 (App. 2009). The jury also checked off all three victims on Larry's endangerment verdict form. In his reply brief, Larry concedes that our reasoning in Melvin's case is applicable and he withdraws his duplicitous indictment argument.

Larry also argues the trial court erred by instructing the jury on accomplice liability, reasoning the instruction rendered the charges duplicitous in that some jurors could have convicted him based on his own gunshots while others could have convicted him as an accomplice to Melvin's gunshot. Having already identified a separate basis for reversal as discussed above, we need not address this issue.

victim actually be physically injured, *Campas v. Superior Court*, 159 Ariz. 343, 345, 767 P.2d 230, 232 (App. 1989), nor does it require the victim to be aware of the risk, *State v. Morgan*, 128 Ariz. 362, 367, 625 P.2d 951, 956 (App. 1981).

¶33 Larry argues the evidence showed he had been on the windowless west side of the brick house when he fired,[9] adding that because there was no evidence of a bullet actually entering the house, the state did not prove the two children inside were actually endangered. But in the light most favorable to the state, a reasonable juror could have concluded that when Larry fired from behind his truck, the truck was positioned at an angle sufficient for him to shoot at the north side of the house, which had a large picture window, even though it was parked on the street along the side of the house. Consistent with this theory, the jury reasonably could have determined that a bullet hole found just above C.S.'s front window came from one of Larry's gunshots, and that this shot actually placed the two children inside at substantial risk of imminent death. *Accord State v. (Melvin) Elem*, No. 2 CA-CR 2014-0167, ¶¶ 21-22 (memorandum decision filed Nov. 30, 2015); *cf. State v. Carreon*, 210 Ariz. 54, ¶¶ 38, 42, 107 P.3d 900, 909, 910 (2005) (evidence that children's bedroom shared thin wall with room where shooting occurred and bullet was recovered from doorjamb of that bedroom sufficient for jury to find children in bedroom at actual substantial risk of imminent death).

¶34 Further, the jury could have concluded that another of Larry's multiple gunshots actually placed C.S. at substantial risk of imminent death and that in fact he had been aiming at her directly. A reasonable juror also could have rejected Larry's justification defenses, concluding instead his actions were "aggressive from the get-go" and motivated by a grudge against A.A., and by extension, C.S. The evidence was sufficient to support Larry's endangerment conviction. *Cf.* (*Melvin) Elem*, No. 2 CA-CR 2014-0167, ¶¶ 19-22.

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[9]Photographs in the record show that even that side of the house does have at least one window, contrary to Larry's assertion that it is windowless.

¶35 Likewise, the evidence was sufficient to support Larry's conviction for discharging a firearm at a residential structure. Larry went to the house that day to confront A.A. and he knew A.A. lived in the house. From this fact, a reasonable juror could conclude the house was a permanent structure adapted for human residence. *See* A.R.S. § 13-1211(C)(2). Testimony that Larry was aggressive and had a grudge was sufficient to permit a reasonable inference that he purposefully fired his gun. *See* A.R.S. §§ 13-105(10)(a), 13-202(C). In addition, the jury reasonably could have concluded he fired his gun "at" the house. An eyewitness testified Larry pointed his gun "[t]owards the house," and the jury reasonably could have believed the bullet hole in the front of the house came from one of his gunshots. The evidence was sufficient on this count as well. *See* A.R.S. § 13-1211(A); *cf.* (*Melvin) Elem*, No. 2 CA-CR 2014-0167, ¶¶ 17-18.

Disposition

¶36 For the reasons stated above, we reverse Larry's convictions and sentences, and remand for a new trial.