IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DONALD JAMES STUTLER,
Appellant.

No. 2 CA-CR 2015-0110
Filed February 4, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20140818001
The Honorable Richard D. Nichols, Judge

AFFIRMED AS CORRECTED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Brad Roach, Tucson
Counsel for Appellant

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 A jury found Donald Stutler guilty of aggravated assault, domestic violence, a nondangerous offense, for which the trial court sentenced him to a one-year term of imprisonment. He argues the court erred by denying his motions for a judgment of acquittal and for a new trial under Rules 20 and 24.1, Ariz. R. Crim. P., because there was insufficient evidence to support his conviction and to sentence him as a repetitive offender. Finding no error, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Carlson*, 237 Ariz. 381, n.1, 351 P.3d 1079, 1085 n.1 (2015). In January 2014, as S.B. was exiting her vehicle in front of her house, Stutler, the father of her baby, approached her in an upset manner. He was angry that she continued to nurse the infant and threatened to remove the child from her. She was holding the baby in a carrier and Stutler snatched the carrier from her. She followed him and screamed for him to stop, and he yelled at her to "shut up, shut up, bitch," so that the neighbors would not overhear and call the police. He grabbed her by covering her nose and mouth with one hand and squeezing her throat with the other hand such that she was unable to breathe. He eventually let her go.

¶3 S.B. retrieved the baby carrier and tried to leave. Stutler came up from behind her and lifted her up, trying to get her to go into the house. He again covered her nose and mouth with his hand and screamed at her to shut up. She planted her feet on a step and

pushed back against him, causing herself and the baby in the carrier to fall down.

¶4 Over the next half-hour, the situation calmed down. Stutler and S.B. drove to a nearby gas station to get gas. Later, back at the house, a sheriff's deputy arrived to investigate because a neighbor who witnessed the incident on the driveway had called 9-1-1. S.B. talked to the deputy, telling him that "everything was okay" because she was "afraid of what would happen" if she told the truth. She was in Stutler's line of sight throughout the interview. Later, she phoned the officer, indicating that "she would say anything that she had to[,] to get out of [the] relationship" if the deputy would return to the house. S.B. explained that by this statement, she meant she "was ready to tell them what had happened and what [Stutler] had done." However, lacking any new information warranting further investigation, the deputy did not return to the house. At about 3:00 or 4:00 a.m. the next morning, S.B. slipped out of the house while Stutler was asleep, drove to the police station, and told police what had happened.

¶5 Stutler was charged with one count of aggravated assault, domestic violence, a class four felony, and was convicted after a jury trial. The court sentenced him, as a category one repetitive offender, to a mitigated, one-year prison term. He now appeals. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Motion for Judgment of Acquittal

¶6 Stutler contends the trial court erred by denying his pre- and post-verdict motions for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., in which he challenged the sufficiency of the evidence. We review de novo a claim of insufficient evidence. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). The relevant question is whether the record contains "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).

¶7 A person commits aggravated assault as an act of domestic violence if he intentionally, knowingly, or recklessly causes physical injury, by "intentionally or knowingly imped[ing] the normal breathing or circulation of blood of another person by applying pressure to the throat or neck or by obstructing the nose and mouth," A.R.S. § 13-1204(B)(1), and the victim is a person with whom he has "a child in common," A.R.S. § 13-3601(A)(2). S.B. testified that Stutler squeezed her throat with one hand and covered her nose and mouth with his other hand, impeding her normal breathing. Evidence of knowing or intentional mens rea included his statements to S.B. that she had to "shut up" while he was simultaneously covering her mouth in a deliberate effort to silence her. *See* A.R.S. § 13-105(10)(a)-(b) (defining "intentionally" and "knowingly"). A rational jury could have found that Stutler's actions caused S.B. physical injury, including the bruises and scratches she testified she incurred during the struggle over the baby carrier, which were visible in photographic exhibits admitted at trial. There also was sufficient evidence supporting the domestic violence component. *See* A.R.S. § 13-1204(B)(2). S.B. testified she had a child in common with Stutler, as described in A.R.S. § 13-3601(A)(2). Reasonable persons could accept this evidence as sufficient to establish every element of the charged offense beyond a reasonable doubt.

¶8 Stutler acknowledges that the uncorroborated testimony of a crime victim can alone be sufficient to sustain a conviction, unless it describes events that are physically impossible or is so incredible that no reasonable person could believe it, *see State v. Munoz*, 114 Ariz. 466, 469, 561 P.2d 1238, 1241 (App. 1976), but he contends S.B.'s testimony was too incredible for any reasonable person to believe. He argues that her willingness to "say anything," contrasted with her failure to report the assault to police until many hours later, demonstrate that her "inconsistencies rendered it impossible to reasonably conclude that it supported proof beyond a reasonable doubt." We disagree. A reasonable jury could have believed her testimony, concluding she told police what really happened the next morning at the police station because it was the first time she felt safe to do so. And a reasonable jury could have

believed that when she said she would say anything to leave the relationship, she meant that she was ready to tell the deputy the truth, as she explained on the stand. "When reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal." *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶9 Assuming, for the purpose of addressing Stutler's argument that S.B.'s testimony was insufficient, another eyewitness, J.S., substantially corroborated that testimony. J.S. testified that on the day in question he saw Stutler put his hands around S.B.'s throat and "chok[e]" her on the driveway of their house. He also observed a baby in a baby carrier nearby. The trial court did not err in denying Stutler's Rule 20 motions.

Motion for New Trial

¶10 Stutler contends the trial court erred by denying his motion for a new trial pursuant to Rule 24.1(c)(1), Ariz. R. Crim. P., which argued the verdict was contrary to the weight of the evidence. We review a trial court's denial of a motion for a new trial for an abuse of discretion. *State v. Neal*, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984).

¶11 In denying Stutler's motion, the trial court explained:

> The Court will state on the record that it was somewhat surprised by the verdict of guilty, but nevertheless finds that the verdict was not contrary to the weight of the evidence. The trier of fact simply chose to believe the victim and the witness even though there was ample opportunity to impeach them with inconsistencies [and] every other means available, so the motion for a new trial is denied as well.

Stutler argues this statement shows that the judge failed to act as a "so-called thirteenth juror" in ruling on the motion, as he contends was required by *Peak v. Acuna*, 203 Ariz. 83, ¶ 9, 50 P.3d 833, 835 (2002). *Peak* is inapposite because it was limited to whether the double jeopardy clause bars retrial after a motion for a new trial has been granted based on insufficient evidence. *Id.* ¶ 7. Moreover, we recently observed that the thirteenth-juror language "overstates the judge's role" when considering the sufficiency of the evidence. *State v. Fischer*, 238 Ariz. 309, ¶ 19, 360 P.3d 105, 110 (App. 2015). In view of a defendant's right to a jury trial, the trial judge "may not set aside a verdict 'merely because, if he had acted as trier of fact, he would have reached a different result,' nor may he substitute his own judgment for that of the jury." *Id.* ¶¶ 19-22, *quoting Cano v. Neill*, 12 Ariz. App. 562, 569, 473 P.2d 487, 494 (1970). Even if the court harbors "serious doubts" about the jury's resolution of conflicts in the evidence, it still must exercise "great caution" before granting a motion for a new trial and may only interfere with the verdict if it is "'quite clear that the jury has reached a seriously erroneous result'" and a new trial is necessary to prevent a "'miscarriage of justice.'" *Id.* ¶¶ 21-22, *quoting Cano*, 12 Ariz. App. at 569, 473 P.2d at 494. In fact, if "'no mistake of law or fact was made and . . . the evidence fully sustains the conviction, it is an abuse of discretion to grant a new trial.'" *State v. Jones*, 120 Ariz. 556, 559, 587 P.2d 742, 745 (1978), *quoting State v. Villalobos*, 114 Ariz. 392, 394, 561 P.2d 313, 315 (1977).

¶12 As discussed above in the Rule 20 context, the evidence was sufficient for a reasonable person to conclude, beyond a reasonable doubt, that Stutler committed the offense. Nothing occurred subsequently to cause the court to question its pre-verdict ruling. *Cf. Neal*, 143 Ariz. at 97, 692 P.2d at 276 (denial of motion for new trial is abuse of discretion "only if the evidence was not sufficient to allow the jury to find [elements of offense] beyond a reasonable doubt"). The court's surprise at the verdict could not affect—nor did it—the determination of whether the evidence fully supported the conviction. *Jones*, 120 Ariz. at 559, 587 P.2d at 745; *see Fischer*, 238 Ariz. 309, ¶¶ 19-20, 360 P.3d at 110 (trial judge not to substitute his own judgment for that of jury); *cf. Munoz*, 114 Ariz. at

469, 561 P.2d at 1241 ("[T]he jury believed the victim, and her testimony alone provides sufficient evidence to support appellant's conviction.").

¶13 Stutler also asks this court to "reweigh the evidence" upon review. It is well settled that we may not do so. *See, e.g.*, *State v. Lee*, 189 Ariz. 608, 615, 944 P.2d 1222, 1229 (1997) ("When the evidence supporting a verdict is challenged on appeal, an appellate court will not reweigh the evidence.").

Use of Prior Conviction

¶14 Stutler argues the trial court erred by sentencing him as a category one repetitive offender[1] with a non-historical prior felony conviction under A.R.S. § 13-703(A),[2] rather than as a first-time offender under A.R.S. § 13-702. Although the range of prison terms is the same for a first-time offender and a category one repetitive

---

[1]At sentencing, the judge stated that the instant offense was "repetitive." But the sentencing minute entry describes the offense as nonrepetitive. "Where there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of sentence controls." *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983); *see* Ariz. R. Crim. P. 26.16(a). We therefore correct the sentencing minute entry to show that the offense was a category one repetitive offense pursuant to A.R.S. § 13-703(A).

[2]The sentencing statute in effect on the date of the offense controls a defendant's sentencing. *State v. Newton*, 200 Ariz. 1, ¶ 3, 21 P.3d 387, 388 (2001). Here, the date of the offense was January 8, 2014. Thus, throughout this decision, we refer to the version of § 13-703 in effect on that date, i.e., 2013 Ariz. Sess. Laws, ch. 55, § 3. At the relevant time, § 13-703(A) provided: "A person shall be sentenced as a category one repetitive offender if the person is convicted of two felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions." *See* 2015 Ariz. Sess. Laws, ch. 51, § 1.

offender, *see* §§ 13-702(D), 13-703(H), a repetitive offender is not eligible for probation, *see* § 13-703(O). We review sentencing issues involving statutory interpretation de novo. *State v. Urquidez*, 213 Ariz. 50, ¶ 11, 138 P.3d 1177, 1180 (App. 2006).

¶15 Stutler contends Fla. Stat. § 812.13, the Florida robbery statute under which he was convicted, is not a "felony offense[]" within the meaning of § 13-703(A). As the trial court correctly observed, we have held to the contrary. *State v. Benenati*, 203 Ariz. 235, ¶ 26, 52 P.3d 804, 811 (App. 2002) (elements of materially identical former version of Fla. Stat. § 812.13 "strictly conform[]" to elements of A.R.S. § 13-1902, an Arizona felony). In light of his non-historical prior felony conviction,[3] the trial court did not err in sentencing Stutler as a category one repetitive offender under A.R.S. § 13-703(A).

¶16 Stutler further contends his Florida conviction could not be used as a historical prior felony, citing *State v. Clough*, 171 Ariz. 217, 219-20, 829 P.2d 1263, 1265-66 (App. 1992) and *State v. Crawford*, 214 Ariz. 129, ¶ 7, 149 P.3d 753, 755 (2007). He argues that pursuant to *Bailey v. United States*, 516 U.S. 137, 143 (1995), "us[ing]" a firearm under A.R.S. § 13-105(22)(f) (defining "[h]istorical prior felony conviction") connotes "active employment" of a firearm, unlike mere "carry[ing]" of a firearm under Fla. Stat. § 812.13(2)(a). This argument is moot, however, because the trial court did not use his

[3]The state filed a notice of its intent to allege the Florida conviction as both a historical prior felony conviction and, if the requirements of A.R.S. § 13-105(22) were not met, as a non-historical felony conviction. At a hearing conducted pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), however, the court advised Stutler that if he rejected a proffered plea, the applicable sentencing range at trial would be for a class four felony, a category one offense with a non-historical prior felony conviction, pursuant to A.R.S. § 13-703(A) and (H). The state did not disagree. As a consequence of the advisement during the *Donald* hearing, the state later withdrew its assertion that the Florida conviction could be used as a historical prior felony conviction under § 13-703(B)(2).

Florida conviction as a historical prior felony conviction. *See In re MH 2008-000028*, 221 Ariz. 277, ¶ 13, 211 P.3d 1261, 1265 (App. 2009) ("A case is moot when it seeks to determine an abstract question which does not arise upon existing facts or rights."), *quoting Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229, 696 P.2d 1376, 1378 (App. 1985).

Disposition

¶17 For the foregoing reasons, we affirm Stutler's conviction and sentence as corrected.