IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTONIO C. TAVENA,
Appellant.

No. 2 CA-CR 2016-0031
Filed November 21, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201502133
The Honorable Kevin D. White, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S TA R I N G, Judge:

¶1 Appellant Antonio Tavena was convicted after a jury trial of disorderly conduct with a deadly weapon or dangerous instrument, a dangerous offense. On appeal, he contends the trial court erred when it denied his motion for judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., arguing there was insufficient evidence to support a conviction.

¶2 We review de novo a trial court's denial of a Rule 20 motion for judgment of acquittal. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). "[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." *Id.* ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). We will reverse only if no substantial evidence supports the conviction. *State v. Rivera*, 226 Ariz. 325, ¶ 3, 247 P.3d 560, 562 (App. 2011). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*, *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996).

¶3 A person commits disorderly conduct, inter alia, when the person, "with intent to disturb the peace or quiet of a . . . person, or with knowledge of doing so, . . . [r]ecklessly handles, displays or discharges a deadly weapon or dangerous instrument." A.R.S. § 13–2904(A)(6). The evidence established Tavena had been standing outside a shop M.D. owned and yelling at customers. M.D.'s son, K.R., the victim identified in the indictment, escorted a woman who had been inside the shop to her boyfriend's car; the two drove away,

and M.D. testified at trial they appeared "scared." K.R. then spoke to Tavena, telling him to "calm down," and leave. Tavena tried to give the three- to five-inch knife he was holding to K.R., who refused to take it and again urged Tavena to leave.

¶4 Although Tavena walked away from the shop, minutes later he returned, and started "clinking on the [shop] window with the knife." K.R. testified Tavena made an obscene gesture to M.D. and then left. A little while later, however, when K.R. and M.D. were outside of the shop, standing near K.R.'s truck, Tavena came running towards them from across the street and, according to K.R., looked "aggressive." K.R. testified Tavena had the "knife in his hand, and . . . looked very angry for some reason." K.R. testified further he had been concerned about his mother's safety and his own. He told M.D. to go inside the shop and lock the door, and then he called 9-1-1. M.D. testified that as Tavena ran towards them, she went inside the shop and called the police; Tavena started to bang on the window. K.R. got in his truck, backed into an alley, and came back around the street; Tavena approached him and got as close as twenty to twenty-five feet from him. Tavena was making signals with his hands and waving the knife at K.R. K.R. testified he had been afraid and the situation had been stressful, even though he had known he could have run over Tavena.

¶5 At trial, after the state rested, Tavena moved for a judgment of acquittal on the ground that the state had failed to prove that the knife was "a dangerous instrument under the circumstances in which it was used." And he insisted K.R.'s only testimony about Tavena's use of the knife against him had been when he stated Tavena came running towards him from across the street and was twenty to twenty-five feet away from K.R., who was by then in his truck. Although Tavena seems to raise this argument again on appeal, he also contends the state failed to present sufficient evidence that he had the requisite intent to commit the offense by intending to disturb K.R.'s peace. We address both arguments because if a conviction is not supported by sufficient evidence, the resulting error is fundamental and prejudicial and the right to seek relief on that ground is not forfeited by the defendant's failure to raise it below. *See State v. Rhome*, 235 Ariz. 459, ¶ 4, 333

P.3d 786, 787 (App. 2014) (addressing challenge to sufficiency of evidence despite the fact that it was not raised below because state and federal constitutions require convictions to be supported by sufficient evidence).

¶6 As this court stated in *In re Robert A.*, upon which Tavena relies, in order to establish a person committed disorderly conduct under § 13–2904(A)(6), the state must prove "two mental states: (1) intent or knowledge of disturbing the peace, and (2) recklessly discharging a deadly weapon or dangerous instrument." 199 Ariz. 485, ¶ 13, 19 P.3d 626, 629 (App. 2001). A person acts "recklessly" when he "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance" that a statute defines as an offense "exists." A.R.S. § 13–105(10)(c). "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." *Id*.

¶7 Although "[m]ental states cannot be assumed," *Robert A.*, 199 Ariz. 485, ¶ 14, 19 P.3d at 629, an inference based on circumstantial evidence is not an assumption, *see State v. Vann*, 11 Ariz. App. 180, 182, 463 P.2d 75, 77 (1970) ("What the defendant does or fails to do . . . may be evidence of what is going on in his mind."). Reasonable persons could find that by yelling at a customer and displaying a knife, tapping on the window of the shop with the knife, running towards K.R. and M.D. aggressively and angrily while wielding the knife, and approaching K.R., while gesturing and making stabbing motions with the knife in a threatening manner, Tavena had intended to or knew his conduct would disturb K.R.'s peace and quietude.

¶8 Similarly, there was sufficient evidence from which reasonable persons could find beyond a reasonable doubt that Tavena had recklessly handled and displayed the knife, which is clearly a deadly weapon or dangerous instrument, in a threatening, aggressive, and dangerous manner. *See State v. Williams*, 110 Ariz. 104, 105, 515 P.2d 849, 850 (1973) (knife was a deadly weapon); *State v. Clevidence*, 153 Ariz. 295, 300–01, 736 P.2d 379, 384-85 (App. 1987)

(same). That K.R. was able to get into his truck, where he could have defended himself had it become necessary, and drive away from Tavena does not alter the fact that Tavena had handled and displayed the knife, threatening K.R., M.D., and a customer with it in a manner proscribed by § 13-2904(A)(6). In fact, it shows K.R. was disturbed by Tavena's actions.

¶9 The trial court correctly denied the Rule 20 motion and the verdict is amply supported by the evidence. We therefore affirm the conviction and the 4.5-year prison term imposed.