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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GILBERTO NAHUM NUNEZ, Appellant.	)	2 CA-CR 2010-0243 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093344001

Honorable Charles S. Sabalos, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Nicole Farnum — Tempe
Attorney for Appellant

E C K E R S T R O M, Judge.

¶1 In September 2009, appellant Gilberto Nunez was charged with aggravated assault with a deadly weapon and possession of a dangerous drug. A jury found him guilty of the drug charge and a lesser-included charge of attempted aggravated assault

with a deadly weapon. The trial court sentenced him to concurrent terms of imprisonment, one minimum and one substantially mitigated, the longer of which is four years. On appeal, Nunez maintains the court erred in instructing the jury, over his objection, on the lesser-included offense of attempted aggravated assault. We affirm.

¶2 At trial, Nunez testified he had been angry when his girlfriend, D., had refused to prepare food for him after she had returned home from a party. During the argument that followed, he took a rifle from his closet and pointed it at her head at close range. After several seconds, Nunez lowered the gun and told D. to leave. When asked why he had pointed the rifle at D., Nunez stated he "wasn't thinking straight" because he had used methamphetamine earlier that evening.

¶3 D. testified she had feared for her life when Nunez pointed the gun at her and that after Nunez told her to leave, she went into the backyard and telephoned Nunez's mother before calling the police. Nunez's mother told the jury D. had sounded "[n]ormal" on the telephone. A Tucson police detective testified that D. had seemed "very nervous and in disbelief" when he interviewed her that night, but she had not been crying. When cross-examining the state's witnesses, Nunez's counsel elicited testimony that another police officer did not recall D. crying when he interviewed her and that Nunez's mother did not know if D. had been crying during their telephone conversation. D. acknowledged during cross-examination that she had told a Tucson police detective she did not know if the gun had been loaded or if it was a toy.

¶4 After the close of its case, the state asked the trial court to instruct the jury on the crime of attempted aggravated assault, as a lesser-included offense of aggravated assault, arguing the attempt charge was supported by the evidence. Nunez objected,

arguing that the state's theory of the case had rested on D.'s fear of imminent physical injury when Nunez pointed a rifle at her head. The following colloquy ensued:

> THE COURT: Do you plan to argue or insinuate in any way that there is insufficient evidence from which the jury could find that the victim was, in fact, scared?
>
> [DEFENSE COUNSEL]: I have—in fact, I do intend to argue that her responses to the incident were, perhaps, not appropriate to someone who had just been assaulted.
>
> THE COURT: So you plan to argue—you plan to defend that charge on both fronts: No. 1, he didn't intend to place her in reasonable apprehension of imminent physical injury; and/or No. 2, that she wasn't in reasonable apprehension of physical injury. In fact, she wasn't fearful, correct?
>
> [DEFENSE COUNSEL]: That she wasn't assaulted.
>
> THE COURT: Well, I'll give the instruction then over your objection. Okay.

¶5 "We review [a] trial court's decision to give or refuse a jury instruction for an abuse of discretion." *State v. Hurley*, 197 Ariz. 400, ¶ 9, 4 P.3d 455, 457 (App. 2000). "If the evidence does not support a conviction for a lesser[-]included offense, the trial court should not invite the jury to speculate or compromise by giving lesser[-]included offense instructions that are not rationally supported by the evidence." *State v. Angle*, 149 Ariz. 499, 505, 720 P.2d 100, 106 (App. 1985), *vacated in part on other grounds*, 149 Ariz. 478, 479, 720 P.2d 79, 80 (1986). Thus, "an offense is 'necessarily included,' and so requires that a jury instruction be given, only when it is lesser included *and* the evidence is sufficient to support giving the instruction." *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006), *quoting* Ariz. R. Crim. P. 23.3. Nunez does not dispute that attempted aggravated assault is a lesser-included offense of aggravated assault. Rather,

he maintains the evidence was insufficient to support a jury finding of attempted aggravated assault, and the jury therefore should not have been instructed about or provided a verdict form for that offense.

¶6 As our supreme court explained in *Wall*,

> We deem evidence sufficient to require a lesser-included offense instruction if two conditions are met. The jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense. It is not enough that, as a theoretical matter, "the jury might simply disbelieve the state's evidence on one element of the crime" because this "would require instructions on all offenses theoretically included" in every charged offense. Instead, the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense.

212 Ariz. 1, ¶ 18, 126 P.3d at 151, *quoting State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984) (citations omitted).

¶7 Relying on this and other language in *Wall*, Nunez appears to argue the instruction was not warranted because it was based on the possibility the jury would "'simply disbelieve the state's evidence'" that D. had been afraid of imminent physical injury.[1] *Id.*, *quoting Caldera*, 141 Ariz. at 637, 688 P.2d at 645. According to Nunez, he presented an "all-or-nothing defense" that he lacked the necessary *mens rea* to assault D., and that, therefore, "an assault was never even attempted." He further asserts "[t]here

[1]Although Nunez correctly cites this dicta in *Wall* and *Caldera*, all properly given lesser-included offense instructions rest, in part, on the possibility that the state failed to prove an element of its case. *See Wall*, 212 Ariz. 1, ¶¶ 18, 22-23, 126 P.3d at 151, 152 (lesser-included offense instruction appropriate when "jury could rationally find that the State failed to prove an element" of greater offense, "but did prove the elements" of lesser-included offense).

was no evidence" to support a guilty verdict on the offense of attempted aggravated assault because Nunez "never testified that he tried to scare D[.] with the rifle" or intended to do so, and D. "never testified that [Nunez] only tried to scare her with the rifle, and that she was not scared."

¶8 The state maintains Nunez misrepresents his defense strategy at trial and, relying on this court's decision in *Angle*, argues Nunez "opened the door to the attempt instruction" by disputing whether D. had "actually apprehended imminent physical injury." *See* 149 Ariz. at 505, 720 P.2d at 106. Although we agree that Nunez placed this issue in dispute, we still must consider whether the evidence presented could reasonably support a finding that Nunez had attempted to frighten D., but had failed to do so, when he aimed a rifle at her head. *See Wall*, 212 Ariz. 1, ¶ 28, 126 P.3d at 153 (appropriate inquiry for reviewing court is "whether sufficient evidence supported giving the lesser-included offense instruction"); *cf. Angle*, 149 Ariz. at 505, 720 P.2d at 106 (lesser-included offense instruction appropriate where "'the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute'" to permit jury finding defendant not guilty of greater offense but guilty of lesser), *quoting State v. Jacobs*, 479 A.2d 226, 230-31 (Conn. 1984).

¶9 In *Angle*, the defendant faced charges of aggravated assault and, as in this case, the jury was instructed on the lesser-included offense of attempted aggravated assault over his objection. *Id.* at 501, 720 P.2d at 102. Angle had maintained at trial that he had lacked the intent required to commit the offenses. *Id.* at 504, 720 P.2d at 105. But he also had tried to demonstrate, through cross-examination, that two of his three victims "were not in reasonable apprehension of imminent injury." *Id.* at 505, 720 P.2d at 106. According to the court in *Angle*, the jury was not compelled to accept the state's view of

the evidence and, "[b]y disputing whether the [two victims] were apprehensive, [Angle] opened the door to an attempt instruction." *Id.*

¶10 In addition, the *Angle* court found the instruction on attempted aggravated assault also was justified for a third count charging Angle with aggravated assault against his wife, even though he had not challenged the state's evidence that she had feared imminent injury. *Id.* at 505-06, 720 P.2d at 106-07. After reviewing her testimony, this court reasoned,

> [A]lthough there was substantial evidence that the wife was in reasonable apprehension of imminent bodily injury, there was some evidence which would permit the inference that she was not. As long as there is some evidence which could lead a reasonable jury to acquit on the greater offense but convict on the lesser, an instruction on a lesser[-]included offense is proper.

Id. at 506, 720 P.2d at 107.

¶11 We find the reasoning in *Angle* instructive and conclude the evidence elicited by Nunez, in combination with evidence presented by the state, was sufficient to warrant the instruction on attempted aggravated assault. *See Wall*, 212 Ariz. 1, n.2, 126 P.3d at 151 n.2 (court "must consider all the evidence in the record, not just that presented by the defense, when determining whether to give a lesser-included offense instruction"); *Angle*, 149 Ariz. at 505, 720 P.2d at 106 (lesser-included offense instruction must be supported by "'some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense'"), *quoting Jacobs*, 479 A.2d at 230.

¶12 We reject Nunez's suggestion that direct evidence was required to support the instruction. *See Angle*, 149 Ariz. at 504, 720 P.2d at 105 (victim's apprehension may

be established by circumstantial evidence); *see also State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009) ("'[c]riminal intent, being a state of mind, is shown by circumstantial evidence'"; conduct is evidence of state of mind), *quoting State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983). The jury could have considered Nunez's actions, D.'s actions and statements after Nunez had pointed the rifle at her, and evidence of D.'s demeanor, to find that D. had not been placed in apprehension of imminent physical injury, despite Nunez's intent to frighten her.

¶13 Accordingly, we affirm Nunez's convictions and sentences.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge