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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. JAMES ROY PEREZ, Appellant.	)	2 CA-CR 2010-0265 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090336002

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Joseph T. Maziarz — Phoenix
Attorneys for Appellee

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K E L L Y, Judge.

¶1 Appellant James Perez appeals from his convictions for aggravated assault. He argues the trial court erred in denying his motion for a judgment of acquittal, made

pursuant to Rule 20, Ariz. R. Crim. P., because insufficient evidence supported the convictions. Finding no error, we affirm.

Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In January 2009, victim H. lived in an apartment in the same complex as Gregory Roetteis. H. and Roetteis had met and occasionally greeted one another.

¶3 On the evening of January16, 2009, H. answered a knock at the door and found Roetteis and another man waiting. H. had seen the second man, later identified as Perez, "once or twice" before and believed he had seen him entering Roetteis's apartment. H. was hesitant to let Roetteis and Perez into his apartment due to the late hour, but, the men "kind of forced their way in." After entering the apartment, Perez sat down, and Roetteis "started arguing about something" with H. Roetteis struck H. with his fist, and H. struck Roetteis in return. Perez joined Roetteis, and they repeatedly struck H. in the head and face with their fists. H. testified that the attack lasted several minutes. At some point, H. lost consciousness and when he awoke Roetteis and Perez still were attacking him. Eventually, Roetteis and Perez left.

¶4 Theodore Quinonez, who lived in an apartment two doors away from H., heard him yelling for help the night of the assault. Quinonez had a "friendly" relationship with H. and had known him for several months before the attack. Quinonez asked his fiancé to call the police. He then stepped outside and saw someone running down the stairs. Quinonez let H. stay at his house until the police arrived. While waiting

for help, H. realized he had been stabbed repeatedly during the attack.[1] H. was transported to the hospital and treated for extensive injuries.

¶5 Perez was charged with first-degree burglary and two counts of aggravated assault. A jury found him guilty of the aggravated assault charges and not guilty of the burglary charge. Perez was sentenced to concurrent terms of imprisonment for the aggravated assault charges, the longest of which was 7.5 years. This appeal followed.

Discussion

¶6 At the close of the state's case, Perez moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. Perez argued that because H. did not "definitively identify [him]" and no physical evidence was found on him at the time of his arrest, "no reasonable jury could find . . . that [Perez] was the . . . second assailant . . . ." The trial court denied the motion.

¶7 On appeal, Perez argues the trial court erred because insufficient evidence existed to prove he had committed aggravated assault as a principal or an accomplice. "We review the trial court's ruling on a motion for judgment of acquittal for an abuse of discretion." *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *Id.* "If reasonable persons could differ as to whether the evidence establishes a fact in issue, then the evidence is substantial." *Id.* "In determining the sufficiency of the evidence to withstand a Rule 20

[1]Although H. was uncertain about which of the attackers had stabbed him, he testified that he "vaguely remember[ed] seeing something glisten in . . . [Roetteis]'s hand."

motion, we view the evidence in a light most favorable to sustaining the verdict." *Id.* And, a criminal conviction "may rest solely on circumstantial proof." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985).

Identification

¶8 Perez first claims the state presented insufficient evidence he had been in H.'s apartment during the assault. Kaycie Mattias, who had known Perez for twelve years, provided evidence that Perez had been present. At the time of the attack, she was living in Roetteis's apartment. The morning after the assault, Perez told Mattias he had been with Roetteis in a neighbor's apartment. He told her there had been a conflict between Roetteis and the neighbor, that Roetteis had stabbed the neighbor, and Perez had pulled Roetteis off of the neighbor. Mattias also testified Perez had a knife with him and told her it had been used in the attack. Later the same day, Mattias saw Perez's brother take the knife away from Perez. Viewed in the light most favorable to sustaining the verdict, we conclude Mattias's testimony alone provided sufficient evidence from which the jury could have found Perez had been with Roetteis during the attack. *See McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d at 937.

¶9 Perez, nevertheless, claims the evidence presented was insufficient because "[H.] and Quinonez were unable to identify [him]." As to H., Perez relies on H.'s inability to identify him in the courtroom as the second assailant. But H. later explained that when he had initially "looked over the crowd, [he had] overlooked [Perez]" and after "looking at [Perez] closely," he believed he was "similar looking" to the second assailant.

H. also explained that "no one in [the courtroom] . . . fit the description [even] partially except for . . . [Perez]."

¶10 Similarly, Perez points out that "Quinonez was the only person who witnessed anyone near [H.]'s door around the time of the assault [and h]e was unable to positively identify [Perez]." Quinonez testified that before the attack he had seen two men standing in front of H.'s door. At trial, Quinonez noted that a year had passed since the incident, and he could not positively identify Perez as the second man he had seen outside H.'s door. But, when Quinonez spoke with a police detective the night following the attack, he categorically identified Perez as one of the men he had seen standing outside H.'s apartment.

¶11 We therefore conclude that the testimony of Mattias, H. and Quinonez constituted sufficient evidence from which the jury could find that Perez was in H.'s apartment during the assault. Perez's arguments essentially invite us to reweigh the testimony of these witnesses, which we will not do. *See State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981) (appellate court "will not engage in re-weighing the evidence"). We therefore find no error here.

Participation

¶12 Perez next argues that insufficient evidence was presented to establish he had assaulted H. or acted as an accomplice to Roetteis during the assault. We disagree. H. consistently testified that both men had attacked him. When defense counsel referred to "the assailant," H. corrected her stating "[t]here were two of them, assailants, make this plural."

¶13 Perez takes issue with the credibility of H.'s testimony. He asserts that H. took medication for bipolar disorder, had consumed alcohol the day of the attack and suffered from short-term memory loss. But he presented these same contentions to the jury and it is for "the jury to weigh the evidence and determine the credibility of the witnesses." *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). We will not reweigh this evidence on appeal. *Tison*, 129 Ariz. at 552, 633 P.2d at 361.

¶14 Perez next cites evidence he believes contradicts H.'s testimony. This includes H.'s uncertainty as to which attacker stabbed him,[2] H.'s "vague" description of the second attacker,[3] Mattias's testimony that Perez claimed he had pulled Roetteis off of H., and the lack of "forensic evidence . . . linking [Perez] to the assault." But, he does not dispute that he admitted to Mattias that he had been present with Roetteis in H.'s apartment when Roetteis attacked H. And H. clearly testified that both of the men in his apartment had assaulted him. "[I]t is unnecessary for the prosecution to negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence." *Nash*, 143 Ariz. at 404, 694 P.2d at 234. We therefore conclude that H.'s testimony provided substantial evidence from which the jury could find that Perez participated in the assault. *See McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d at 937.

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[2]Perez is correct that the evidence was unclear as to which assailant stabbed H. But the trial court gave an accomplice liability instruction from which the jury could have found Perez guilty of aggravated assault with a dangerous instrument if it found he had aided Roetteis in the commission of the offense.

[3] At trial, H. testified that the second assailant was a "young Hispanic male, . . . 20 to 23 years old, about 160, 180 pounds [and] about five[-]foot eight [or] five[-]foot nine." This description generally matched that of Perez.

¶15 Viewing the evidence in the light most favorable to sustaining the convictions and resolving all reasonable inferences against Perez, we find that sufficient evidence was presented to support Perez's convictions. Accordingly, the trial court did not abuse its discretion in denying the Rule 20 motion.

Disposition

¶16 We affirm the convictions and sentences imposed.

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

CONCURRING:

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

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