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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THE STATE OF ARIZONA, Appellee, v. FERNANDO RENE MOLINA, Appellant.	2 CA-CR 2010-0373 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094591001

Honorable Jane L. Eikleberry, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Lisa M. Hise
Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Fernando Molina was convicted of two counts of aggravated assault with a deadly weapon or dangerous instrument and one count of aggravated assault against a minor under fifteen. The jury found the latter offense to be a dangerous crime against children. Molina argues the trial court erred by failing to grant his motions for a judgment of acquittal and to correct or clarify the verdict. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict[s] and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). One evening in November 2009, G.C. and his eight-year-old sister A.C. took G.C.'s girlfriend A.R. out for ice cream and then drove her back to her house. After A.R. went inside, and while G.C. and A.C. were still standing outside, G.C. noticed a silver car slowly drive by two times. Concerned, G.C. telephoned A.R. to ask her about the car, and she came back outside. At that point, the car returned for a third time, and G.C. saw two men jump out and start running towards them. He "grabbed [his] sister and ran inside the house" with A.R. and closed the door. G.C. put A.C. on the floor and got on top of her to protect her while A.R. attempted to lock the door. Shots were fired from outside, several bullets hit the door, and one came through and grazed A.R.'s leg. Once the gunshots stopped, they heard glass breaking outside. They later saw that several windows on G.C.'s car had been broken.

¶3 A nearby police officer heard the shots and investigated the incident. After the officer located the silver car, a police helicopter followed it to another residence,

where two men, one of whom was Molina, were found inside. Molina was intoxicated and had cuts on his hand. Police officers found his blood on a gun inside the house and on G.C.'s car, and four cartridges found at the scene of the shooting matched the gun with Molina's blood on it.

¶4 Molina was charged with one count of discharging a firearm at a residential structure, two counts of aggravated assault with a deadly weapon or dangerous instrument, and one count of aggravated assault of a minor under fifteen, which was alleged to be a dangerous crime against children. The other suspect eventually accepted a plea agreement and testified at Molina's trial. After both sides rested, Molina moved for a judgment of acquittal on the charge of aggravated assault against a minor under fifteen and its corresponding allegation that the offense was a dangerous crime against children. The trial court denied the motion, and the jury found Molina guilty of all three aggravated assault counts.[1] He was sentenced to concurrent terms of imprisonment, the longest of which was twenty-one years. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Sufficiency of Evidence

¶5 Molina argues there was insufficient evidence to support his conviction of aggravated assault on a minor under fifteen and therefore the trial court erred in denying

[1]The jury could not reach a verdict on the count of discharging a firearm at a residential structure. The court later dismissed this count with prejudice pursuant to the state's motion.

his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. He also contends there was insufficient evidence to support the corresponding allegation that the offense was a dangerous crime against children. We review the denial of a Rule 20 motion de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). In evaluating a Rule 20 ruling, "'the 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). "'Substantial evidence,' Rule 20's lynchpin phrase, 'is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869.

Aggravated Assault Conviction

¶6 To sustain his conviction for the aggravated assault of a minor under fifteen, the record must reflect substantial evidence that Molina "[i]ntentionally plac[ed] [A.C.] in reasonable apprehension of imminent physical injury," A.R.S. § 13-1203(A)(2), and that Molina was eighteen years old or older and A.C. was under fifteen, A.R.S. § 13-1204(A)(6).[2] Molina contends there was insufficient evidence that he acted intentionally or that A.C. was placed in reasonable apprehension of imminent physical injury.

[2]Molina does not dispute he was over eighteen and A.C. was under fifteen at the time of the offense.

¶7 We first address whether there was substantial evidence Molina acted intentionally. "The State ha[s] the burden at trial of proving [the defendant] intended to place one or more victims in reasonable apprehension of imminent physical injury." *State v. Johnson*, 205 Ariz. 413, ¶ 6, 72 P.3d 343, 346 (App. 2003). The term "intentionally" is defined to mean, "with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct." A.R.S. § 13-105(10)(a). Notably, "a defendant's intent to cause reasonable apprehension of imminent physical injury in the victim can be inferred from the evidence." *State v. Salman*, 182 Ariz. 359, 362, 897 P.2d 661, 664 (App. 1994).

¶8 Here, although Molina implies he intended to shoot only at G.C., a reasonable jury could infer that he intentionally placed both G.C. and A.C. in reasonable apprehension of imminent physical injury when he chased them to the house and then fired a gun at the doorway through which they had just fled. *See Johnson*, 205 Ariz. 413, n.7, 72 P.3d at 349 n.7 ("From the very act of shooting one of several people in close proximity to each other, jurors could permissibly infer that [defendant] intended to place the bystanders in reasonable apprehension of imminent physical injury."). Because reasonable persons could accept this evidence as sufficient to support a conclusion beyond a reasonable doubt that Molina had intended to place A.C. in reasonable apprehension of imminent physical injury, *see West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, the trial court properly denied Molina's motion for a judgment of acquittal on this basis.

¶9 Second, we conclude there was substantial evidence that A.C. had been in reasonable apprehension of imminent physical injury. At trial, A.C. testified she had seen two men get out of a car and "run to the house." She saw that one of them had a shirt wrapped around what she believed to be a gun. G.C. "pulled [her] in and put [her] in the house" and "they started shooting the house," and the gunshots "scared" her. Based on this evidence, the jury reasonably could conclude that A.C. had been in reasonable apprehension of imminent physical injury, *see* § 13-1203(A)(2), and we therefore conclude the trial court correctly denied Molina's Rule 20 motion on this basis as well.

Dangerous Crime Against Children Allegation

¶10 Molina next argues the trial court erred by failing to grant his Rule 20 motion as to the allegation that the aggravated assault against A.C. was a dangerous crime against children. Section 13-705, A.R.S., prescribes enhanced penalties for persons so convicted and lists various offenses that, if "committed against a minor who is under fifteen years of age," constitute dangerous crimes against children, including "[a]ggravated assault . . . involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." § 13-705(P)(1)(b).

¶11 An offense is not a dangerous crime against children, however, when the child victim was only "fortuitously" injured by "unfocused conduct." *State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993). Thus, "to prove that a defendant has committed a dangerous crime against a child, the State must prove that the defendant committed one of the statutorily enumerated crimes and that his conduct [targeted or] was

'focused on, directed against, [or] aimed at . . . a victim under the age of fifteen.'" *State v. Sepahi*, 206 Ariz. 321, ¶ 19, 78 P.3d 732, 735 (2003), *quoting Williams*, 175 Ariz. at 103, 854 P.2d at 136.

¶12 Molina argues "there was no evidence presented that [his] actions were directed at, aimed at, targeted, or focused upon A[.C.]" because there was no evidence "he had seen [her] or knew that she was there" and "the testimony all indicated that it was too dark to see." The state counters that "[a]lthough it was dark out, the light was apparently sufficient to allow both G[.C.] and A[.C.] to see two men run toward the house" and to see that one of the men had something wrapped around his hand. Based on this evidence, the jury reasonably could have concluded that Molina likewise could see both G.C. and A.C. run toward and into the house.

¶13 Moreover, even if Molina was unable to see how old A.C. was, "a defendant who intends to direct his criminal conduct only at adults can nonetheless be subjected to the [dangerous crimes against children] sentencing provisions . . . when his victim turns out to be a child," even if the defendant "believed to the contrary at the time the crime was committed." *Sepahi*, 206 Ariz. 321, ¶ 17, 78 P.3d at 735; *see also State v. Fernandez*, 216 Ariz. 545, ¶ 27, 169 P.3d 641, 650 (App. 2007) ("A reasonable juror could conclude from the evidence offered at trial that [the defendant's] conduct targeted each of the victims who was in the line of his fire, some of whom happened to be children."). Accordingly, we find no error in the trial court's denial of Molina's Rule 20 motion as to the dangerous crimes against children allegation.

Verdict Form

¶14 Molina next contends the trial court improperly refused to "allow clarification or correction" of the dangerous crimes against children verdict and argues the jury's finding should be vacated and the case remanded for resentencing. Some additional factual background is necessary for our resolution of this issue. When the jury found Molina guilty of aggravated assault against a minor under fifteen, the verdict form further indicated the state had "[p]roven" this offense was a dangerous crime against children. However, in the portion of the form stating, "Complete this portion of the verdict form only if you find that the offense was a dangerous crime against a child," which concerned Molina's and A.C.'s ages at the time of the offense, a mark next to one of the entries was crossed out and initialed and all other entries were left blank.

¶15 The verdict form was read in open court in the jury's presence as follows:

> We, the jury . . . do find [Molina] guilty of the offense of aggravated assault of a minor under 15 as alleged in Count 2 of the indictment.
>
> There is a check mark beside "proven" on the interrogatory.
>
> It reads: We, the jury . . . do find that the offense was a dangerous crime against children.
>
> Oh, I understand. I will read it again.
>
> We, the jury . . . do find that the offense was a dangerous crime against a child. That has been proven. There's an X beside "proven."

¶16 Thereafter, the trial court, in questioning the jury as to whether it had intended to make a finding regarding the ages of Molina and A.C., stated, "Members of

the jury, on the verdict form for Count 2, you have found the defendant guilty. You have found that it's a dangerous crime against children."[3] After all verdict forms were read, the jurors collectively responded that those were their verdicts. They were then individually polled and each juror responded affirmatively.

¶17 After the jury had been dismissed, a juror approached the trial court's law clerk and expressed "that she was confused as to whether the verdicts had been read correctly." The court subsequently issued a notice to the parties to this effect.[4] The juror thereafter provided the defense with an affidavit stating, "[T]he verdict rendered pursuant to the finding of a Dangerous Crime Against Children was in error and it was not the intent of the jury to make that finding." The defense then filed a "Motion to Clarify Verdict" and attached the affidavit as an exhibit.

¶18 At the ensuing hearing, the trial court denied the motion, finding "the verdicts are not in need of clarification" because the jurors had agreed both collectively

[3]The jury's foreperson confirmed the jury had not intended to make a finding on the interrogatory concerning the victim's and defendant's ages and that the "scratched out" mark on the verdict form in this area "was just an error, so I initialed it." At the ensuing bench conference, both counsel agreed it was not necessary for the jury to make a finding on this interrogatory because the jury had already found that the victim was under fifteen.

[4]In addition, the trial court's notice stated another juror had "indicated that she was also confused" and asked that the prosecutor contact her "so she could ask him why he did not introduce some type of evidence." Molina contends on appeal that these statements from the second juror demonstrate she also agreed the verdict had been misread concerning the dangerous crime against children finding. But we disagree the information contained in the notice supports this inference. Instead, it appears this juror had a question about the evidence introduced by the state. Notably, the court provided this juror's contact information to the parties and we assume Molina had the opportunity to clarify her concern.

and individually that the verdicts as read were correct, and "[t]he fact that one juror is now saying that . . . one verdict was incorrect does not mean that the verdicts are unclear or need to be changed in any way." Defense counsel then asked the court to hold an additional hearing to allow all of the jurors to testify on the issue. The court denied the request, explaining, "We set this hearing. If you wanted any testimony, now was the time to bring anyone in to testify," and stating that it had considered the only submitted affidavit.[5]

¶19 Generally, "a jury verdict cannot be impeached by the affidavit of a juror who has agreed to the verdict in open court." *State v. Childs*, 113 Ariz. 318, 324, 553 P.2d 1192, 1198 (1976). In determining whether the trial court properly denied Molina's motion, we will not disturb its decision absent an abuse of discretion. *Cf. State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996) (trial court's ruling on whether to grant new trial based on newly discovered evidence concerning jurors reviewed for abuse of discretion).

¶20 Molina argues "[t]he verdict finding that the charge . . . was a dangerous crime against children was clearly an error that was brought to the trial court's attention" and should have been corrected. In support, he relies on Rule 24.4, Ariz. R. Crim. P., which provides, "Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time after such notice, if any, as the court orders." "When a party believes that there

[5]Because the parties have not raised the issue, we assume without deciding that the court's consideration of the affidavit was proper. *Cf.* Ariz. R. Crim. P. 24.1(d).

is a clerical error in the record, the proper procedure is to bring a motion in the trial court under . . . [R]ule 24.4 . . . so that the trial court may determine if in fact there is an error in the record and, if so, order the error corrected." *State v. Chavarria*, 116 Ariz. 401, 402, 569 P.2d 831, 832 (1977). "The object of such an entry is to correct the record to make it speak the truth and not to supply judicial action." *State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982).

¶21 We disagree that Rule 24.4 applies in this instance or that the trial court otherwise erred. The record demonstrates the jury filled out the verdict form, the foreperson signed it, and an "X" was written next to "Proven" on the interrogatory stating that count two was a dangerous crime against children. This same finding was then read in open court three different times. Thereafter, the jury both collectively and individually agreed in open court that the verdicts had been correctly read. Furthermore, because the court was present during both the reading of the verdict and the ensuing hearing on this issue, it was in the best position to determine whether there was a need to correct the verdict. *Cf. State v. Soto-Fong*, 187 Ariz. 186, 196, 928 P.2d 610, 620 (1996) (trial court in "best position" to determine whether new trial should be granted based on newly discovered evidence).

¶22 Accordingly, we cannot conclude on this record that the trial court abused its discretion by determining the juror's affidavit failed to demonstrate the verdict was erroneous or otherwise in need of correction. *See* Ariz. R. Crim. P. 24.4; *Childs*, 113 Ariz. at 324, 553 P.2d at 1198 (affirming verdict despite affidavit of one juror stating she had been pressured into verdict). For the same reasons, we likewise reject Molina's

argument that the verdict should be vacated because it was not unanimous. Accordingly, the trial court did not abuse its discretion by denying Molina's motion to clarify the verdict.

Disposition

¶23 For the foregoing reasons, Molina's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

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

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