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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/12/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0975
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
COREY DEMAR SHIVERS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-130017-001DT

The Honorable Timothy J. Ryan, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Corey Demar Shivers (Defendant) appeals his
convictions and the sentences imposed on one count each of

threatening or intimidating and assisting a criminal street gang. Defendant argues that there was insufficient evidence to support the convictions and that the imposition of enhanced sentences constitutes improper double punishment. For reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 A grand jury indicted Defendant on two counts of threatening or intimidating to promote, further or assist in the interest of a criminal street gang and one count of assisting a criminal street gang, each a class 3 felony. The charges stemmed from threatening remarks made by Defendant after being taken into custody by the police following a traffic stop.

¶13 Prior to trial, the State alleged several aggravating and sentence enhancement circumstances, including prior felony convictions and commission of the offenses with the intent to promote, further or assist criminal conduct by a criminal street gang. At the close of evidence at trial, the trial court entered judgment of acquittal on one of the counts of threatening or intimidating. The jury convicted Defendant on the other count of threatening or intimidating and the count of assisting a criminal street gang, and found with respect to each of the convictions that Defendant had intended to promote, further or assist criminal conduct of a criminal street gang.

¶14 At sentencing, the trial court found that Defendant had one prior historical felony conviction and sentenced him as a repetitive offender to concurrent, presumptive 11.5-year terms of imprisonment in accordance with Arizona Revised Statutes (A.R.S.) section 13-709.02 (Supp. 2011),¹ which subjects a defendant to mandatory terms of confinement and an enhanced sentencing range. Defendant timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 (2010) and -4033.A.1 (2010).

DISCUSSION

Sufficiency of the Evidence

¶15 Defendant argues that there was insufficient evidence to support his convictions. Specifically, Defendant claims that the evidence fails to establish that (1) he was a member of a criminal street gang and (2) he knowingly acted to promote or further a criminal objective of the criminal street gang. We review claims of insufficient evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶16 In considering claims of insufficient evidence, we review whether substantial evidence exists to support the verdicts. *State v. Scott*, 177 Ariz. 131, 138, 865 P.2d 792, 799 (1993); see also Ariz. R. Crim. P. 20(a) (stating court shall

¹ We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In reviewing claims of insufficient evidence, we construe the evidence in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted).

¶7 Evidence was presented at trial that Defendant made threatening comments while yelling and cursing at the arresting police officers, including mentioning the names of Lindo Park Crips gang members and associates, telling the officers that they "didn't know who [they were] dealing with," and informing them that they were "not going to live very much longer." In addressing the officers, Defendant repeatedly used the term "cuz." There was testimony that this term is often employed by members of the Crips to identify themselves as gang members and that the officers believed it was being used by Defendant to demonstrate his affiliation with the gang. Defendant also made

statements to the officers that he had a pistol and that they "only have two weeks." The officers testified that these statements led them to believe that Defendant or his gang associates would "try to injure or kill us." Furthermore, Defendant specifically warned the officer who was the victim on the count of threatening or intimidating for which Defendant was convicted that "when he sees [the officer] on the street he will knock [the officer's] teeth out and that's how it's done on the south side." This officer testified that Defendant's reference to the "south side" meant: "I am not only just dealing with him, I am dealing with the south side, I am dealing with his criminal street gang."

¶18 Defendant was convicted of threatening or intimidating in violation of A.R.S. § 13-1202.A.3 (2010) and assisting a criminal street gang in violation of A.R.S. § 13-2321.B (2010). A person commits the offense of threatening or intimidating in violation of § 13-1202.A.3 "if the person threatens or intimidates by word or conduct . . . [t]o cause physical injury to another person . . . to promote, further or assist in the interests of . . . a criminal street gang" A person commits assisting a criminal street gang "by committing any felony offense, whether completed or preparatory for the benefit of, at the direction of or in association with any criminal street gang." A.R.S. § 13-2321.B. A criminal street gang is

defined, in pertinent part, as an "association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member." A.R.S. § 13-105.8 (Supp. 2011). A "criminal street gang member," in turn, is defined as "an individual to whom at least two of the following seven criteria" indicating gang membership apply: (a) self proclamation, (b) witness testimony or official statement, (c) written or electronic correspondence, (d) paraphernalia or photographs, (e) tattoos, (f) clothing or colors, and (g) any other indicia of gang membership. A.R.S. § 13-105.9.

¶19 Defendant does not dispute that the Lindo Park Crips gang is a criminal street gang with multiple criminal street gang members. His challenge to the sufficiency of the evidence regarding gang membership is limited simply to claiming that the State failed to prove that *he* is a "criminal street gang member" as defined in A.R.S. § 13-105.9. The problem with Defendant's argument is that neither of the offenses for which he was convicted requires proof that he be a "criminal street gang member." A person can promote, further or assist in the interests of a criminal street gang or commit a felony for the benefit of a criminal street gang without being a member of the criminal street gang. The State did present evidence that

Defendant was a member or associate of the Lindo Park Crips, but this was not done to prove his membership as an essential element of the offenses, but rather to establish his motive and intent in threatening the officers, *i.e.*, that the purpose of his conduct was "to promote, further or assist in the interests of" or was performed "for the benefit of" the Lindo Park Crips criminal street gang. A.R.S. §§ 13-1202.A.3, -2321.B. Hence, this challenge by Defendant to the sufficiency of the evidence is without merit.

¶10 As part of his first claim of insufficient evidence, Defendant seeks to raise issues regarding the constitutionality of the statutory definition of a "criminal street gang member," A.R.S. § 13-105.9. Given that his sufficiency of evidence claim is directed solely at the adequacy of proof of whether he is a criminal street gang member, which the State was not required to establish to convict him of either offense, we need not address his constitutional challenges. We note, however, that in *State v. Ochoa*, 189 Ariz. 454, 461, 943 P.2d 814, 821 (App. 1997), this court considered and rejected the same First Amendment overbreadth and vagueness claims raised by Defendant in the instant appeal. Defendant fails to present any arguments or authorities to cause this court to believe *Ochoa* should be reconsidered.

¶11 We further find no merit to Defendant's claim that there was insufficient evidence to establish that his threats were intended to further the interests of the Lindo Park Crips. The State introduced expert testimony regarding the nature of criminal street gangs in general and the Lindo Park Crips in particular. A gang enforcement unit detective testified that the number one rival to any criminal street gang was the police and the first goal of a criminal street gang is to "instill fear" within the community. The detective explained how Defendant's references to the Lindo Park Crips bolstered his threats and how the context of the threats furthered the interests of the gang by instilling fear.

¶12 Moreover, some of Defendant's threats were made at the jail in front of another known gang member. Testimony was presented that by Defendant doing so, "He's advertising the gang and he's further promoting this other gang member. He's inciting him to do other things as well by the mere presence of him being deviant to police while using the terms 'cuz' and 'south side.' He's doing this all to gain more respect and to try and instill fear into the officers."

¶13 Although Defendant never explicitly uttered the words "Lindo" or "Crips" in threatening the officers, his reference to known Lindo Park Crips gang members and use of the terms "cuz" and "south side" in connection with the threats, which the

officers understood to be references to this gang, would permit a reasonable person to conclude that the threats were made "to promote, further or assist in the interests of" or "for the benefit of" the Lindo Park Crips. On this record, it cannot be said that there was a "complete absence of probative facts" to support the jury's finding that Defendant's threats were intended to further the interests of a criminal street gang. See *Soto-Fong*, 187 Ariz. at 200, 928 P.2d at 624.

Sentence Enhancement

¶14 Based on the jury's finding that Defendant committed the offenses with the intent to promote, further or assist criminal conduct by a criminal street gang, the trial court imposed enhanced sentences pursuant to A.R.S. § 13-709.02, which provides:

A person who is convicted of committing any felony offense with the intent to promote, further or assist any criminal conduct by a criminal street gang shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted. *The presumptive, minimum and maximum sentence for the offense shall be increased by three years if the offense is a class 4, 5 or 6 felony or shall be increased by five years if the offense is a class 2 or 3 felony. The additional sentence imposed pursuant to this section is in addition to any enhanced*

sentence that may be applicable. (Emphasis added.)

¶15 Defendant contends the enhanced sentences imposed by the trial court pursuant to this provision violates A.R.S. § 13-116 (2010), Arizona's double punishment statute. This statute states: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A.R.S. § 13-116. According to Defendant, because intent to assist a criminal street gang is an essential element of both of his offenses, our statutory bar against double punishment for the same act prohibits use of this same element to enhance his sentences under § 13-709.02. Defendant failed to raise this issue in the trial court, and therefore our review of this claim is limited to fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶16 Contrary to Defendant's contention, § 13-116 has no application to sentencing enhancements. *State v. Greene*, 182 Ariz. 576, 580, 898 P.2d 954, 958 (1995). In *Greene*, our supreme court rejected a challenge to use of a dangerousness finding that was a necessary element of an offense to enhance multiple offenses, reasoning in part that "[t]he prohibition against double punishment in § 13-116 was not designed to cover sentence enhancement." *Id.*; see also *State v. Lee*, 189 Ariz.

608, 620, 944 P.2d 1222, 1234 (1997) ("The legislature may establish a sentencing scheme in which an element of a crime could also be used for enhancement and aggravation purposes."); *State v. Garcia*, 176 Ariz. 231, 234, 860 P.2d 498, 501 (App. 1993) (rejecting claim that use of element of underlying offense to enhance punishment violates § 13-116 and guarantees against double jeopardy).

¶17 *Greene* relied on *State v. Rodriguez*, 126 Ariz. 104, 612 P.2d 1067 (App. 1980), for the proposition that § 13-116 does not apply to sentence enhancements. *Greene*, 182 Ariz. at 580, 898 P.2d at 958. In *Rodriguez*, we reasoned that the double punishment statute did not apply to sentencing enhancements increasing the punishment for aggravated assault when a gun was used because aggravated assault could be committed without use of a gun. 126 Ariz. at 107, 612 P.2d at 1070. Although *Rodriguez* could be read as limiting non-applicability of the double punishment statute only to sentencing enhancements that contain additional elements to the foundational crime, the later language from our supreme court in *Greene* is not limited in this fashion. See *Greene*, 182 Ariz. at 580, 898 P.2d at 958.

¶18 Even if our double punishment statute did generally apply to sentence enhancements, § 13-709.02 evinces the legislature's intent that the special sentencing enhancements provided by this statute be cumulative. "[W]here a special

statute deals with the same subject as a general statute, the special statute will control." *State v. Weiner*, 126 Ariz. 454, 456, 616 P.2d 914, 916 (App. 1980). Here, the sentence enhancement provision at issue specifically states: "The *additional* sentence imposed pursuant to this section *is in addition* to any enhanced sentence that may be applicable." A.R.S. § 13-709.02 (emphasis added). This language makes plain that the legislature was aware that an enhanced sentence would be applicable when a defendant was assisting a criminal street gang and chose to enhance those sentences further by imposing punishment "in addition to any enhanced sentence that may be applicable." *Id.* Given its specific nature, this enhancement provision overrides the more general double-punishment statute. See *Weiner*, 126 Ariz. at 456, 616 P.2d at 916. There was no error, fundamental or otherwise, in the imposition of enhanced sentences pursuant to A.R.S. § 13-709.02.

CONCLUSION

¶19 For the above reasons, we affirm the convictions and resulting sentences.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PHILIP HALL, Judge

/S/

JOHN C. GEMMILL, Judge