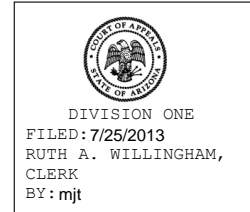


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0485
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
ABDIRAHMAN H. YUSUF,) Arizona Supreme Court)
)
Appellant.)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-117184-001

The Honorable Roger E. Brodman, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Joseph T. Maziarz, Acting Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Terry Adams, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant Abdirahman H. Yusuf, has advised us that, after searching the entire record, he has been unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. Defendant did not take the opportunity to file a supplemental brief.

FACTS¹

¶2 Yusuf drove his car into the parking lot of the Skyline Inn Hotel on April 6, 2011. When he was asked to leave because he did not reside there, Yusuf got out of the car and pointed a gun at the victim, a hotel employee, who was attempting to get the license plate number of the car. The victim fell down while backing up and threw a drill that was in his hand at the car. The front desk staff person, who was watching the confrontation, called 9-1-1 after the car left the parking lot.

¹ We view the facts "in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

¶13 After the police responded to the hotel and received the relevant information, the car Yusuf was driving was spotted and he was later arrested. The gun was sitting on the front seat of the car and turned out to be a pellet gun.

¶14 Yusuf was charged with aggravated assault, a class 3 dangerous felony. He challenged his competency to stand trial, was found competent and the case proceeded to trial. During trial, Yusuf claimed he acted in self defense. The jury heard that Yusuf told the arresting officer that he had been assaulted at the hotel after an argument and he never touched the gun. Yusuf, however, was convicted as charged. He was subsequently sentenced to a mitigated prison term of six and one-half years and given credit for 471 days of presentence incarceration.

¶15 We have jurisdiction over this appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1) (West 2013).

DISCUSSION

¶16 In determining that Yusuf was guilty of aggravated assault and after being properly instructed, the jury had to determine whether the pellet gun was a deadly weapon or dangerous instrument. See *State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984). At the close of the case, Yusuf unsuccessfully argued he was entitled to a judgment of acquittal

pursuant to Arizona Rule of Criminal Procedure ("Rule") 20. The next day, the court asked the parties to "submit simultaneous briefing" on the Rule 20 issue. After considering the briefing, the court again denied the Rule 20 motion in a thorough order.

¶7 We review the ruling on a motion for judgment of acquittal de novo and review the record to determine whether there is substantial evidence to warrant a conviction. *State v. West*, 226 Ariz. 559, 562, ¶¶ 14-15, 250 P.3d 1188, 1191 (2011). Substantial evidence is direct and circumstantial evidence that reasonable people could accept as adequate and sufficient to support the conclusion that defendant is guilty beyond a reasonable doubt. *Id.*

¶8 Here, the trial court found there was substantial evidence that the pellet gun was a dangerous instrument. Our de novo review substantiates the court's ruling. After a tussle, the parties separated, and Yusuf pulled the gun out of his waist band and pointed it at the victim. Upon seeing the gun, the victim was scared, backed up, lost his balance and fell, and then tried to crawl to a place of safety. The victim did not know that the gun was only a pellet gun or whether it was loaded, and there was no way for the victim to have that information. Moreover, and as the trial court noted, the jury had the opportunity to view and handle the pellet gun in coming to the conclusion that it was a dangerous instrument.

Consequently, based on our review of the record, the trial court did not err by denying the Rule 20 motion.

¶9 Yusuf also sought a new trial pursuant to Rule 24.1. Yusuf argued, despite not objecting during trial, that the State had committed prosecutorial misconduct during the closing argument by telling the jury that Defendant "can't have it both ways" in a manner that "shifted the burden," "implied [Yusuf] was not credible in a situation [where he] chose not to testify" and "confused the evidence received with the arguments of counsel." In denying the motion for new trial, the court found that Yusuf waived the issue by not objecting during the closing argument and also stated that the comments were not egregious enough to warrant a new trial.

¶10 We review the denial of a motion for new trial for an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). New trial motions are not favored and should only be granted with caution. *Id.* In fact, when ruling on a new trial motion, the court "sits as a thirteenth juror" and must affirm unless the court is convinced that the weight of the evidence cannot sustain the verdict. *State v. Thomas*, 104 Ariz. 408, 412, 454 P.2d 153, 157 (1969).

¶11 Here, the trial court sitting as the thirteenth juror found no prosecutorial misconduct sufficient to grant a new trial. We agree. The jury was properly instructed. In addition to the elements of the crime, the applicable definitions and an instruction on self defense, the jury was instructed that “[w]hat the lawyers said is not evidence, but it may help you to understand the law and the evidence.” The jury was also instructed that they had to determine “what the facts in the case are from the evidence produced in court” as well as reiterating that the “defendant is presumed by law to be innocent” and that the State had the burden of proof beyond a reasonable doubt. The jury was also told that the “defendant is not required to testify,” and that they could not use any statement he made to the police unless they found beyond a reasonable doubt that it was voluntary. We presume that the jury followed the instructions. *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

¶12 Moreover, the statements Yusuf complains about – Defendant “can’t have it both ways” – was rebuttal to the argument. The argument was not only not egregious but argued to the jury that they could not rely on Yusuf’s statement to the police in the light of other evidence. For example, although the jury heard that Yusuf told the police that he did not touch the gun found on his front car seat, the State highlighted the

fact that the victim and two other witnesses saw him point the gun at the victim. The argument was fair rebuttal comment. See *State v. Hernandez*, 170 Ariz. 301, 307-08, 823 P.2d 1309, 1405-06 (App. 1991). Consequently, the court did not abuse its discretion by denying the motion for new trial.

¶13 Having resolved the issues raised in the post-trial motion, we have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Yusuf was represented by counsel at all stages of the proceedings. The evidence supports the conviction despite the claim of self defense. And, the sentence is within the statutory range and presentence incarceration credit was properly calculated. Accordingly, we find no reversible error or fundamental error that would require a new trial.

¶14 After this decision is filed, counsel's obligation to represent Yusuf in this appeal has ended. Counsel must only inform him of the status of the appeal and his future options, unless counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Yusuf may, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

CONCLUSION

¶15 Accordingly, we affirm Yusuf's conviction and sentence.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

SAMUEL A. THUMMA, Judge

/s/

DONN KESSLER, Judge