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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

SCOTT BACKUS, *Appellant*.

No. 1 CA-CR 16-0019
FILED 4-11-2017

Appeal from the Superior Court in Yavapai County
No. V1300CR201480017
The Honorable Jennifer B. Campbell, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By Alice Jones
Counsel for Appellee

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By Antonio J. Gonzales
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 Scott Backus appeals his convictions and sentences for unlawful tattooing and threatening or intimidating. For the reasons that follow, we vacate the conviction and sentence for unlawful tattooing and affirm the conviction and sentence for threatening or intimidating.

FACTUAL AND PROCEDURAL HISTORY¹

¶2 Between October 3, 2013 and October 23, 2013, Backus shared a cell with M.M. and T.V. at Yavapai County Jail. On October 23, 2013, M.M. informed detention officers that Backus had repeatedly assaulted him. When detention officers separately interviewed T.V., he corroborated several of the assaults M.M. had reported and disclosed that he had been intimidated into allowing Backus to tattoo him. After interviewing M.M. and T.V., a detention officer searched their shared cell; they did not find any staples or other sharp instruments that could have been used in lieu of a tattoo needle, but did find a bottle cap with black residue that appeared to be “a homemade tattoo kit.”

¶3 When a detention officer interviewed Backus and confronted him with the allegation that he had given someone an “unwanted tattoo,” Backus denied giving anyone a tattoo and claimed he did not have the equipment to do so in jail. Later in the interview, however, Backus admitted to giving T.V. a tattoo, but claimed he had requested it.

¶4 The state charged Backus with three counts of sexual assault (counts 1-3), three counts of aggravated assault (counts 4-6), one count of unlawful tattooing (count 7), one count of threatening or intimidating (count 8), and nine counts of assault (counts 9-17). The state also alleged aggravating circumstances and that Backus had prior felony convictions and was on probation at the time of the current offenses.

¹ We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93, 314 P.3d 1239, 1264 (2013).

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¶5 At trial, M.M. testified that he overheard Backus tell T.V. that a tattoo would make him “look cool” when he went to prison. Although he was present when Backus gave T.V. the tattoo, M.M. testified that he did not watch, but he did observe that Backus used a filed-down staple or paper clip. M.M. also testified that Backus offered to give him a tattoo, but he declined.

¶6 T.V. testified that he did not want Backus to give him a tattoo, but submitted to it out of fear. Indeed, he explained that he believed receiving the tattoo would hurt less than the beating he would receive if he did not comply with Backus’s demands. Given the limited supplies in their cell, T.V. testified that Backus used a staple he removed from an article of mail and lead he extracted from a pencil. After Backus sharpened the staple on concrete, crushed the lead into a fine powder, and mixed the powder with soap and water in a bottle cap, he pressed the staple into T.V.’s skin to push the “ink” into his arm. T.V. testified that he did not know what Backus did with the staple after he used it on T.V.’s forearm.

¶7 Taking the stand in his own defense, Backus testified that he has given tattoos since he was twelve years of age. Explaining his process, Backus testified that, after “mak[ing]” a needle, he sanitizes it with bleach and then washes it with soap and water. He also stated that he cleans the tattoo site with a sanitizing towelette before penetrating the skin to prevent any bacterial infection. Rather than using lead, which is toxic, Backus testified that he uses graphite for his “ink.” Specific to T.V.’s tattoo, Backus acknowledged that he used a staple, but claimed T.V. supplied it. Although he testified T.V. initially wanted the tattoo, Backus explained that T.V. did not necessarily approve of the result because Backus had refused to finish it. While testifying, Backus admitted that he had four prior felony convictions.

¶8 After an eight-day trial, a jury convicted Backus on counts 7 and 8 (unlawful tattooing and threatening or intimidating), acquitted him on counts 4, 10, 11, and 12, and failed to reach a unanimous verdict on counts 1, 2, 3, 5, 6, 9, 13, 14, 15, 16, and 17. The trial court sentenced Backus to an aggravated term of four and one-half years’ imprisonment on the count of unlawful tattooing and a concurrent sentence of six months’ imprisonment on the count of threatening or intimidating, each to be served consecutively to the sentence imposed in an unrelated probation violation case. Backus timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2016), 13-4031 (2010), and -4033(A)(1) (2010).

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DISCUSSION

¶9 After the state rested on the sixth day of trial, defense counsel requested a judgment of acquittal pursuant to Arizona Rule of Criminal Procedure 20 (Rule 20). The trial court delayed argument on the Rule 20 motion until the next day of trial, however, and instructed defense counsel to proceed with his case. Defense counsel then called Backus to testify.

¶10 When the court heard argument on the Rule 20 motion the next day of trial, defense counsel argued before Backus resumed testifying that the state presented insufficient evidence to convict Backus of unlawful tattooing because Backus testified “he went out of his way to try to make this a sanitary tattooing.” The trial court denied the Rule 20 motion, finding the pictures of the “tattoo kit” as well as the pictures of the actual tattoo provided substantial evidence to sustain a conviction.

¶11 At that point, the court “ma[de] a record” regarding the delayed argument on the Rule 20 motion, explaining that the trial had already extended a day beyond its scheduled completion date, and the court decided to take “as much testimony” as possible before sending the jury home on the sixth day of trial rather than displacing witness testimony to hear argument on the motion. The court also explained that it “did not consider” any of Backus’s testimony in reaching its ruling. Defense counsel then likewise sought to clarify the record and noted that he had objected to delaying argument on the Rule 20 motion. He argued that the delay had harmed Backus because, had the Rule 20 motion “been successful on the counts of the tattoo,” Backus would not have testified regarding that charge.

¶12 On appeal, Backus challenges the denial of his motion for judgment of acquittal with respect to the unlawful tattooing charge. He contends the trial court erred by delaying argument on his Rule 20 motion until after he had completed a portion of his testimony, and then further erred by disregarding his testimony when considering the merits of the motion. In response, the state asserts we need not reach these issues because no evidence supports the conviction, given the manner in which the offense was framed in the trial court and presented to the jury.

¶13 We review de novo a trial court’s ruling on a Rule 20 motion. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.2d 1188, 1191 (2011) (citation omitted). “[T]he 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.”

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Id. at ¶ 16 (internal quotation omitted). Sufficient evidence upon which a reasonable jury can convict may be direct or circumstantial. *State v. Borquez*, 232 Ariz. 484, 487, ¶ 11, 307 P.3d 51, 54 (App. 2013) (citations omitted). A judgment of acquittal is appropriate only when “there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a).

¶14 We also interpret statutes de novo. *State v. Neese*, 239 Ariz. 84, 86, ¶ 8, 366 P.3d 561, 563 (App. 2016). “Our primary task in interpreting statutes is to give effect to the intent of the legislature.” *State v. Lee*, 236 Ariz. 377, 382, ¶ 16, 340 P.3d 1085, 1090 (App. 2014) (internal quotation omitted). When the language of a statute is clear, “we need not look further to determine the statute’s meaning and apply its terms as written.” *Id.* If statutory language is ambiguous, however, we consider the statute’s history, subject matter, and purpose. *Taylor v. Cruikshank*, 214 Ariz. 40, 43, ¶ 10, 148 P.3d 84, 87 (App. 2006).

¶15 As charged in this case and set forth in A.R.S. § 13-3721(A)(2) (2010), a person unlawfully tattoos or pierces “the body of another person” by using “a needle or any substance that will leave color under the skin more than once” or using “a needle that is not sterilized with equipment used by state licensed medical facilities pursuant to title 36, chapter 4.” [I. 1] Given a plain reading, subsection (A)(2) identifies two discrete forms of conduct that constitute unlawful tattooing: (1) use of a needle more than once, and (2) use of a needle that is not presterilized with statutorily approved equipment.

¶16 During the settling of jury instructions on the first day of trial, the court noted these distinct means of commission and asked whether the parties wished to include both forms of violating the statute in the instruction. Initially, defense counsel requested that the jury instruction include the “whole statute.” Moments later, when the court noted that the parties would then need to include an instruction regarding sterilization equipment, defense counsel withdrew his previous request and asked that the jury instruction only reference the use of a needle or instrument to “leave color under the skin more than once.” The court specifically asked the prosecutor whether he objected to limiting the instruction to “solely the color under the skin more than once,” and the prosecutor stated no objection.

¶17 Based on the parties’ agreement, the trial court’s preliminary instruction to the jury on unlawful tattooing stated:

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The crime of tattooing or piercing the body of another requires proof the defendant used an unsterilized needle to tattoo or pierce another person's body using a needle or any substance that will leave color under the skin more than once.

On its face, this instruction seemingly conflates the two distinct methods of committing unlawful tattooing, combining the use of an unsterilized substance with repeated use. The trial court's instruction primarily tracked the wording of the Revised Arizona Jury Instructions (RAJI) for this offense, however, which characterizes the crime of unlawful tattooing as the "use of an unsterilized needle to tattoo or pierce," and sets forth two methods by which a needle may be deemed unsterilized: (1) lack of sterilization with statutorily approved equipment, or (2) repeated use. *See* RAJI Stand. Crim. 37.21(A)(2). Consistent with the parties' discussion, the instructions to the jury did not refer to the commission of the offense through use of a needle not sterilized with statutorily approved equipment, and therefore the issue before the jury was whether Backus used the staple "more than once." *See* Ariz. R. Crim. P. 13.5(b) (allowing a charge to be substantively amended if the defendant consents to the amendment).

¶18 As the state conceded, the record is devoid of any evidence that Backus committed unlawful tattooing in the manner defined in the jury instructions, as agreed to by the parties. That is, the state failed to present any evidence that Backus used the sharpened staple "more than once," an essential element under the given instruction. Even if the phrase "more than once," as used within A.R.S. § 13-3721(A)(2), were deemed ambiguous and susceptible to a construction criminalizing successive needle penetrations of the skin of a single individual, such a reading is contrary to the legislative intent. In explaining the purpose of the statute, the legislature specifically noted that it was responding to a concern among "some members of the tattoo industry" that the use of unsanitary needles may place "clients at risk for contracting a disease such as hepatitis or HIV." Arizona State Senate, Fact Sheet for H.B. 2666, 44th Leg. (1999). The legislature's reference to communicable diseases, rather than, for example, a bacterial infection, demonstrates that the statute addresses the use of a single needle or instrument on multiple persons, not the repeated use of a needle on a single individual. Indeed, such a construction would be absurd, as it would be highly impractical for a person administering a tattoo to use a new needle for each successive penetration of skin while giving a single tattoo to one person. *See State v. Barragan-Sierra*, 219 Ariz. 276, 282, ¶ 17, 196 P.3d 879, 885 (App. 2008) (explaining courts "employ a common sense approach" to interpreting a statute, "reading the statute in terms of its stated purpose . . ., taking care to avoid absurd results"). Therefore, because

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no evidence showed that Backus used the staple “more than once” for purposes of A.R.S. § 13-3721(A)(2), a necessary element given the manner in which the case was presented to the jury, the trial court erred by denying Backus’s motion for judgment of acquittal, and we vacate that conviction.²

CONCLUSION

¶19 For the foregoing reasons, we vacate Backus’s conviction and sentence for unlawful tattooing and affirm his conviction and sentence for threatening and intimidating.



AMY M. WOOD • Clerk of the Court
FILED: AA

² Because we vacate Backus’s conviction and sentence for unlawful tattooing, we need not address his argument that the trial court improperly imposed an enhanced and aggravated sentence as to that count. We note that Backus’s sentence for threatening and intimidating was neither enhanced nor aggravated and fell within the range authorized by the jury’s verdict alone. *See* A.R.S. § 13-707(A)(1) (2010) (maximum term of imprisonment for a class one misdemeanor is six months).