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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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STATE OF ARIZONA, *Appellee*,

*v.*

LANCE MYRON DAVIS, *Appellant*.

No. 1 CA-CR 16-0366

1 CA-CR 16-0453

(Consolidated)

FILED 9-28-2017

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Appeal from the Superior Court in Mohave County

No. S8015CR201501115

The Honorable Billy K. Sipe, Judge *Pro Tempore*

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix

By Gracynthia Claw

*Counsel for Appellee*

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By Daniel J. DeRienzo

*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Maria Elena Cruz joined.

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**S W A N N**, Judge:

¶1 Lance Myron Davis appeals his convictions and sentences for aggravated assault and kidnapping. He contends that he was entitled to judgments of acquittal on several counts, and that the court should have instructed the jury on unlawful imprisonment as a lesser-included offense. We hold that the state presented substantial evidence with respect to each of the challenged counts, and that the evidence did not require an instruction on unlawful imprisonment. We therefore affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 Davis was indicted for one count of kidnapping S.S. and three counts of aggravated assault on S.S., all domestic violence offenses, related to events that occurred in November 2013.<sup>1</sup> The aggravated assault counts specified, respectively, that Davis had (1) assaulted S.S. with a lamp; (2) assaulted S.S. with a curtain rod; and (3) caused S.S. to sustain temporary but substantial disfigurement, temporary but substantial impairment of a body organ or part, or fracture of a body part.

¶3 At trial, the state presented evidence of the following facts. Davis, S.S., and two other individuals lived together in a house in Kingman. On the night of November 25, 2013, S.S. fell asleep on a couch at the home. She woke up when Davis entered the house. He was angry. When S.S. tried to move from the pair's shared master bedroom to the living room, Davis "pulled [her] by [her] shirt and ripped [her] shirt." Then, in the living room, he threw a lamp and a houseplant at her, and he began hitting her. He beat

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<sup>1</sup> In the same indictment, Davis was charged with ten additional counts of aggravated assault on S.S. that were alleged to have occurred on different occasions. Many of those charges eventually were dismissed, but Davis was separately tried and convicted of two counts related to October 2013 events. We consolidated Davis's timely appeal from that judgment with the instant appeal, but he does not challenge the separate convictions in his opening or reply briefs.

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her for hours, in various areas of the house, striking her “[e]verywhere” and using his fists, the lamp, a broom handle, and “I don’t know what else.” He also used a broken towel rack to stab holes in the wall of their bedroom. S.S. testified that at some point she “ran towards the door” but Davis “pulled [her] back,” and she “[c]url[ed] up in a ball” and did not fight back. She could not recall how many times she tried to escape, and she was unsure whether she ever lost consciousness.

¶4 Davis eventually drove S.S. to a hospital on the morning of November 26. He pulled her out of the vehicle, dragged her by the hair, and hit and kicked her. She then walked from the vehicle to the emergency department, where she encountered a nurse. The nurse observed that S.S. was bloodied, disheveled, and incoherent. Radiology revealed that S.S. had a fractured nose. The nurse also noted bruises on S.S.’s face, abrasions on her chest and leg, a laceration on her scalp, a deformity in one of her wrists, marks on her forearms, and long vertical marks, approximately one inch in width, spanning her back. The marks on S.S.’s back appeared, to the nurse, to have been made by a long cylindrical object.

¶5 Law enforcement attempted to interview S.S. at the hospital on November 26 and again at the police station the next day, but she was disoriented and unable to describe what had happened to her. When law enforcement executed a search warrant on S.S. and Davis’s shared residence on November 26, they found blood in the kitchen, in the master bathroom, and on a vehicle parked in the garage. They also found blood on a shadeless lamp in the living room and, in the master bedroom, on a two-to-three-foot long cylindrical shower curtain rod, approximately one inch in diameter, that was propped up against the wall. Testing confirmed that the blood on the lamp and the shower curtain rod was S.S.’s. Law enforcement also observed small holes in the bedroom wall, and, in the living room, a large pile of soil and leaves as well as soil on the wall. In trashbags in the garage, they found a planter, a broken handbroom, broken ceramic cups, a broken blacklight, and a broken towel rack that was consistent in size and shape with the holes in the bedroom wall.

¶6 When a detective interviewed Davis on November 26, he denied culpability. Davis had cuts on his chest and stomach as well as scrapes on his hands, which he explained were either from sparring or from playing with cats. Davis also told the detective that another housemate had knocked over the plant in the living room, that the holes in the master bedroom wall were old, and that cats had pulled down the shower curtain rod.

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¶7 At the close of the state’s case, Davis moved under Ariz. R. Crim. P. (“Rule”) 20 for a judgment of acquittal with respect to the aggravated assault count alleging use of a curtain rod, the kidnapping count, and the domestic-violence designations on all counts. The superior court granted Davis’s motion with respect to the domestic-violence designations, but otherwise denied relief.

¶8 Davis rested without presenting any evidence. The court denied his motion that the jury be instructed on unlawful imprisonment as a lesser-included offense of kidnapping.

¶9 The jury found Davis guilty on all counts, and found the presence of multiple aggravating circumstances with respect to each count. The court entered judgment on the verdicts and sentenced Davis to aggravated prison terms. Davis appeals.

**DISCUSSION**

I. THE SUPERIOR COURT COMMITTED NO ERROR WITH RESPECT TO DAVIS’S RULE 20 MOTION.

¶10 Davis contends that he was entitled to a judgment of acquittal with respect to the “curtain rod” aggravated assault count and the kidnapping count.

¶11 Under Rule 20, “the court shall enter a judgment of acquittal of one or more offenses charged in an indictment . . . after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction.” “Substantial evidence is more than a mere scintilla and is such proof that ‘reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a reasonable doubt.’” *State v. Mathers*, 165 Ariz. 64, 67 (1990) (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.” *Id.* at 66 (citation omitted). The trial court must consider both direct and circumstantial evidence, and the court may not re-weigh the evidence or disregard reasonable inferences that may be drawn from the evidence. *State v. West*, 226 Ariz. 562, 563, ¶¶ 16, 18 (2011).

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- A. The Superior Court Properly Denied Rule 20 Relief With Respect to the “Curtain Rod” Aggravated Assault Count.

¶12 We hold that the superior court did not err by denying Davis’s Rule 20 motion on the aggravated assault count. Citing A.R.S. §§ 13-1203(A)(1) and -1204(A)(2), the indictment alleged that Davis intentionally, knowingly, or recklessly caused physical injury to S.S. with a dangerous instrument, a “curtain rod.” Under A.R.S. § 13-105(12), “[d]angerous instrument” means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.” “‘Serious physical injury’ includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.” A.R.S. § 13-105(39).

¶13 The state presented evidence that Davis violently beat S.S. over a period of hours, using his hands and various objects to injure her. That evidence was sufficient to establish the elements of *mens rea* and physical injury. Davis contends, however, that no rational juror could have found beyond a reasonable doubt that a “curtain rod” was one of the objects used. He emphasizes that S.S. did not mention a “curtain rod” when she described the attack, and he argues that the broom she did mention could have caused her injuries. But though S.S. did not specifically testify that Davis used a curtain rod, she stated that she did not know everything he used. A rational trier of fact could have found that S.S. was not well-positioned to identify all of the objects used to attack her because she curled into a ball and some of the injuries were inflicted on the back side of her body. A rational trier of fact also could have found S.S.’s lack of recall reasonable in view of the severity and the duration of the attack and its effect on her, as evidenced by her injuries and severe disorientation afterwards. Further, law enforcement recovered a propped-up shower curtain rod with S.S.’s blood on it, and Davis’s injuries included long vertical back marks of similar diameter. Contrary to Davis’s suggestion, expert testimony matching the marks to the rod was not necessary. The jury was provided descriptive testimony and photographs of S.S.’s injuries and of the curtain rod, and was well capable of comparing the two. *Cf. State v. Dixon*, 153 Ariz. 151, 155 (1987) (holding that expert-tracker testimony would not have been necessary had jury been provided with defendant’s shoes and plaster casts of shoe imprints found at crime scene).

¶14 We have no difficulty concluding that a rational trier of fact could, based on the direct and circumstantial evidence, find beyond a

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reasonable doubt that Davis assaulted S.S. with the shower curtain rod. Further, in view of the circumstances of the attack and Davis's injuries, we hold that a rational trier of fact could find that the rod was a dangerous instrument. *Cf. State v. Williams*, 132 Ariz. 153, 157 (1982) (holding that three-foot-long pointed stick used by inmate opposing detention officers qualified as dangerous instrument). The superior court properly denied Rule 20 relief on the "curtain rod" aggravated assault count.

B. The Superior Court Properly Denied Rule 20 Relief With Respect to the Kidnapping Count.

¶15 We further hold that the superior court did not err by denying Davis's Rule 20 motion on the kidnapping count. Under A.R.S. § 13-1304(A)(3) and (4), a person commits kidnapping if he "knowingly restrain[s] another person with the intent to . . . [i]nflict . . . physical injury . . . on the victim . . . ; or [to p]lace the victim . . . in reasonable apprehension of imminent physical injury to the victim." To "[r]estrain" means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13-1301(2). "Restraint is without consent if it is accomplished by . . . [p]hysical force . . ." *Id.*

¶16 S.S. testified that when the attack began, Davis pulled her by the shirt when she tried to leave the bedroom. It is unclear whether the shirt-pulling actually restrained her. But she also testified that Davis pulled her back when she ran for the door. Davis contends that this statement lacks context and therefore could refer to an interaction unrelated to the assault, and therefore unrelated to any purpose of inflicting or threatening physical injury. But S.S.'s description of the foiled escape attempt was not made in a vacuum. In a series of responses to the prosecutor's consecutive questions, S.S. described being struck, trying to run to the door, being pulled back, and curling into a ball. The state presented sufficient evidence to allow a rational trier of fact to find beyond a reasonable doubt that Davis restrained S.S. during the course of the prolonged attack, and with the intent to physically injure her or to place her in reasonable apprehension of imminent physical injury. The superior court properly denied Rule 20 relief on the kidnapping count.

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II. THE SUPERIOR COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY ON UNLAWFUL IMPRISONMENT.

¶17 Davis next contends that he was entitled to a jury instruction on unlawful imprisonment as a lesser-included offense of kidnapping. We review the superior court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12 (2006).

¶18 Unlawful imprisonment, which A.R.S. § 13-1303(A) defines as "knowingly restraining another person," is a lesser-included offense of kidnapping. *State v. Bearup*, 221 Ariz. 163, 168, ¶ 24 (2009). Accordingly, the distinguishing element between the two offenses is that kidnapping requires that the knowing restraint be intended to cause one of the results specified in A.R.S. § 13-1304(A) – including, as relevant here, the infliction of physical injury on the victim or the placing of the victim in reasonable apprehension of imminent physical injury. *State v. Tschilar*, 200 Ariz. 427, 437, ¶ 40 (App. 2001). But the jury need not be instructed on unlawful imprisonment as a lesser-included offense in every kidnapping case. *See Bearup*, 221 Ariz. at 168, ¶ 23. "A lesser-included instruction . . . is appropriate only if the facts support giving the instruction." *Id.* That will be the case only if the jury rationally could find that the state proved every element of the greater offense except the element that distinguishes it from the lesser offense. *Id.*; *see also Tschilar*, 200 Ariz. at 437, ¶ 39.

¶19 We find no abuse of discretion in the superior court's conclusion that no rational jury could find that the state proved that Davis knowingly restrained S.S. but failed to prove that he did so with the intent to inflict physical injury on her or to place her in reasonable apprehension of imminent physical injury. As we previously discussed, the state presented evidence that Davis restrained S.S. during a violent and protracted beating. On these facts, the restraint necessarily implicates the distinguishing element of kidnapping. No rational juror could conclude that Davis knowingly restrained S.S. during the beating but did so for a purpose other than to continue to injure her or to cause her to fear further injury.

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**CONCLUSION**

¶20

We affirm Davis's convictions and sentences.



AMY M. WOOD • Clerk of the Court  
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