IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BENITO CORONADO FRANCO, *Appellant*.

No. 1 CA-CR 16-0464
FILED 2-27-2018

Appeal from the Superior Court in Maricopa County
No. CR2014-130371-001
The Honorable Dean M. Fink, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Adele G. Ponce
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Joel M. Glynn
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Peter B. Swann and James P. Beene joined.

T H O M P S O N, Judge:

¶1 Benito Coronado Franco (defendant) appeals from his conviction and sentence for aggravated assault. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Early on the morning of June 22, 2014 police responded to a call about a break-in at a house in Phoenix. Police saw defendant come out of the backyard of a neighboring house and ordered him to stop. Defendant started running and police pursued him. Officer Brent McElvain, who was wearing a police uniform, responded to a call for back up and started pursuing defendant on foot. Eventually McElvain caught up to defendant as he was climbing a wall and pulled him down. Defendant fell to the ground and attempted to kick and punch McElvain. Defendant struggled with McElvain for at least a minute. McElvain "wrestl[ed] defendant into custody," and with the help of more officers, defendant was placed in handcuffs. McElvain was not injured in the struggle with defendant. Defendant later attacked several officers at the jail and tried to bite two of the officers.

¶3 The state charged defendant with one count of second degree burglary, a class 3 felony (count 1), one count of resisting arrest, a class 6 felony (count 2), and three counts of aggravated assault, class 5 felonies (counts 3-5). At trial, the state moved to dismiss count 1 for lack of evidence, and the court granted the motion to dismiss. Defendant moved to dismiss counts 2-5 pursuant to Arizona Rule of Criminal Procedure 20 (Rule 20), and the trial court denied the motion. The jury convicted defendant of counts 2-5. The trial court sentenced defendant to a 3.75 year sentence for count 2 and five-year sentences for counts 3, 4, and 5. The court ordered the sentences for counts 2, 3, and 4 to run concurrently to one another and ordered the sentence for count 5 to run consecutive to counts 2, 3, and 4. Defendant timely appealed. We have jurisdiction pursuant to

Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2018), 13-4031 (2018), and -4033(A)(1) (2018).[1]

DISCUSSION

¶4 Defendant raises one issue on appeal: whether the trial court erred by denying his Rule 20 motion for judgment of acquittal as to count 4. While the motion before the trial court focused on an asserted lack of intent to injure, insult, or provoke Officer McElvain, the argument on appeal is that there was no proof that defendant touched Officer McElvain. We review the trial court's ruling on a Rule 20 motion for judgment of acquittal de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011) (citation omitted). "On all such motions, 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.* at ¶ 16 (internal quotation omitted). We do not reweigh the evidence. *State v. Tison*, 129 Ariz. 546, 552 (1981). We view the evidence in the light most favorable to sustaining the verdict. *State v. Girdler*, 138 Ariz. 482, 488 (1983). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusions reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987).

¶5 In this case, the state was required to show that defendant knowingly touched Officer McElvain, a peace officer engaged in official duties, "with the intent to injure, insult or provoke" Officer McElvain. *See* Ariz. Rev. Stat. §§ 13-1203(A)(3) (2018), -1204(A)(8)(a) (2010). "Intent may be inferred from the acts of the accused and the circumstances of the assault." *State v. Lester*, 11 Ariz. App. 408, 410 (1970). On appeal, defendant argues that "there was no evidence that [defendant] touched [Officer McElvain]," and that in fact the officer testified that he was not touched.

¶6 Substantial evidence warranted the guilty verdict. Officer McElvain testified that he and other officers pursued defendant on foot through a neighborhood. McElvain, who wore his police uniform, observed defendant get on top of a wall and continue running. He grabbed defendant by his pant leg and pulled him down from the wall. Defendant fell to the ground, rolled onto his back and attempted to punch McElvain with closed fists and kicked at him. McElvain hit defendant two or three

[1] We cite to the current version of any statute unless the statute was amended after the pertinent events and such amendment would affect the result of this appeal.

times, and other officers helped subdue defendant. The struggle with defendant lasted a "good full minute." Defendant resisted the entire time. McElvain was not injured in the struggle with defendant. When asked whether defendant touched McElvain *when defendant was punching at him*, McElvain testified that he did not. He could not recall if he had actually been kicked by defendant. However, McElvain testified that he struggled with defendant and defendant struggled with him, and that he "was down on [his] knees wrestling the defendant into custody." On this evidence, the jury could conclude that the contact defendant had with Officer McElvain during their struggle constituted touching with intent to injure, insult, or provoke. We find no error.

CONCLUSION

¶7 For the foregoing reasons, we affirm defendant's convictions and sentences.

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