

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

BRIT NICKLER, *Appellant*.

No. 1 CA-CR 17-0494
No. 1 CA-CR 17-0514
(Consolidated)
FILED 8-21-2018

Appeal from the Superior Court in Mohave County
No. S8015CR201601152
S8015CR201500921
The Honorable Lee Frank Jantzen, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By William Scott Simon
Counsel for Appellee

Law Offices of Harriette P. Levitt, Tucson
By Harriette P. Levitt
Counsel for Appellant

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MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge David D. Weinzweig and Judge Lawrence F. Winthrop joined.

M c M U R D I E, Judge:

¶1 Brit Nickler appeals his conviction and sentence for aggravated harassment, as well as the resulting revocation of his probation from a prior offense. For the following reasons, we affirm.

FACTS¹ AND PROCEDURAL BACKGROUND

¶2 Between August 3, 2015 and August 4, 2015, Nickler contacted his estranged wife, S.N., in violation of an order of protection. The State charged Nickler with one count of aggravated harassment, a class 6 felony and domestic violence offense, in Mohave County Superior Court cause number CR2015-00921 (“2015 case”). Nickler pled guilty as charged. On February 10, 2016, the court suspended Nickler’s sentence and imposed an 18-month term of supervised probation.

¶3 After the earlier offense, S.N. moved residences and changed jobs to avoid Nickler. On June 5, 2016, S.N. discovered a series of missed calls and voicemails from Nickler on her phone. In the voicemails, Nickler begged S.N. to call him, asked to retrieve his belongings from her home, spoke of rekindling their relationship, and expressed a desire to have children with her in the future.

¶4 After discovering the calls and voicemails, S.N. feared that Nickler “found [her] again” and believed her life was in danger. After S.N. contacted police officers, Nickler was interviewed and admitted to contacting S.N. Nickler admitted that he knew S.N. did not want any contact with him.

¹ We view the facts in the light most favorable to upholding the verdicts and resolve all reasonable inferences against the defendant. *State v. Harm*, 236 Ariz. 402, 404, ¶ 2, n.2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

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¶5 The State charged Nickler with one count of aggravated harassment, a class 5 felony and domestic violence offense, in Mohave County Superior Court cause number CR2016-01152 (“2016 case”). The State further alleged that the offense in the 2015 case constituted a prior felony conviction involving a domestic violence offense against the same victim.

¶6 The jury found Nickler guilty as charged. The court found Nickler had one prior felony conviction and imposed the presumptive sentence of 2.25 years’ imprisonment with 50 days of presentence incarceration credit. In the 2015 case, the court ordered the revocation of Nickler’s probation and imposed a mitigated sentence of nine months’ imprisonment with 52 days of presentence incarceration credit. The court ordered that the sentence in the 2015 case run concurrently to the sentence in the 2016 case.²

¶7 We have jurisdiction of Nickler’s timely appeal of both judgments pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

A. The State Presented Sufficient Evidence to Support the Verdicts.

¶8 Nickler argues the evidence was insufficient to support his conviction and the court erred by denying his motion for judgment of acquittal.

¶9 At trial, the parties stipulated that Nickler was previously convicted of a domestic violence offense involving S.N. in the 2015 case. The State presented testimony from S.N. and the officer, screenshots from S.N.’s phone, recordings of the voicemails, and the recording from Nickler’s interview. After the State’s case-in-chief, the court denied Nickler’s motion for judgment of acquittal.

² When a defendant commits a new offense while on probation, the court is required to impose a consecutive sentence on the new offense pursuant to A.R.S. § 13-708(C) and (E). The State did not raise the issue on appeal. Absent an appeal or cross-appeal from the State, we decline to correct a sentencing error that goes to Nickler’s benefit. *See State v. Kinslow*, 165 Ariz. 503, 507 (1990).

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¶10 We review the sufficiency of the evidence presented at trial to determine whether there was substantial evidence to support the jury's verdict. Ariz. R. Crim. P. 20(a)(1); *State v. Cox*, 217 Ariz. 353, 357, ¶ 22 (2007). "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419 (1980). We will reverse a court's denial of a motion for judgment of acquittal based on insufficiency of the evidence only if "there is a complete absence of probative facts to support the conviction." *State v. Mathers*, 165 Ariz. 64, 66 (1990). The trier of fact is in the best position to evaluate conflicts or issues with witness credibility. See *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996).

¶11 A defendant commits aggravated harassment if he commits harassment as defined in A.R.S. § 13-2921, he has a prior conviction for a domestic violence offense, and the prior offense involved the same victim. See A.R.S. §§ 13-2921.01(A)(2), (B), -3601(A). A defendant commits harassment if he intentionally or knowingly communicates with the victim in a manner "that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person." A.R.S. § 13-2921(A)(1), (E).

¶12 The State presented sufficient evidence to establish Nickler committed aggravated harassment. The parties stipulated that Nickler committed a prior domestic violence offense involving the same victim, S.N. For the remaining element of harassment, the evidence demonstrated that Nickler's behavior was targeted, repetitive, and part of a pattern of harassment. The State presented enough probative evidence to support the jury's verdict and the court did not err by denying Nickler's motion for judgment of acquittal.

B. The Court did not Abuse its Discretion by Denying Nickler's Motion for Mistrial Regarding the Victim's Statement Concerning Nickler's Probation Status.

¶13 Nickler argues the court erred by denying his motion for mistrial based on S.N.'s testimony regarding his probation status in the 2015 case.

¶14 The court denied the State's pretrial motion to present evidence regarding Nickler's probation status in the 2015 case. During the State's direct examination of S.N., the prosecutor asked if she was "aware of the outcome" of the 2015 case. S.N. responded, "from my understanding, he was on supervised probation." Nickler's counsel objected to the

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statement and the objection was sustained. S.N. went on to testify that Nickler was convicted in the 2015 case for harassing her and the case involved an order of protection. Outside the presence of the jury, Nickler's counsel moved for mistrial based upon S.N.'s statement. When denying the motion, the court stated that "the more important thing is that he has the prior conviction for aggravated harassment."

¶15 The court has broad discretion on motions for mistrial and we will affirm a court's ruling absent an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35 (1995). We reverse "only if it appears reasonably possible that error might have materially influenced the jury." *State v. Celaya*, 135 Ariz. 248, 256 (1983). In determining whether a witness' statement warranted a mistrial, we pay deference to the court's ability to evaluate "the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and the possible effect on the jury and the trial." *State v. Williams*, 209 Ariz. 228, 239, ¶ 47 (App. 2004); *State v. Laird*, 186 Ariz. 203, 207 (1996) (holding that a brief reference to the defendant's probation status did not warrant a mistrial).

¶16 S.N.'s statement, and the prosecutor's question that elicited the statement, though objectionable, did not materially influence the jury's consideration of the case. As the court noted, the effect of a single reference to Nickler's probation status was minimal given the evidence already presented regarding his prior conviction for aggravated harassment. Further, Nickler did not move for a curative instruction or an order striking the testimony. On this record, the court did not abuse its discretion by denying the motion for mistrial.

C. The Court Correctly Found a Probation Violation Based on Nickler's Conviction on the New Charge.

¶17 Nickler argues the court erred by finding that he committed a new criminal offense in violation of the conditions of his probation. Specifically, Nickler argues the State did not present sufficient evidence in the 2016 case to support the court's finding that he violated his probation in the 2015 case.

¶18 The State filed a petition to revoke Nickler's probation, which listed the offense in the 2016 case as a violation of the condition that he "maintain a crime-free lifestyle." The court found that Nickler violated his probation by committing a new criminal offense in the 2016 case and revoked his probation.

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¶19 We will uphold a court's findings regarding a probation violation "unless the finding is arbitrary or unsupported by any theory of evidence." *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3 (App. 1999). A probation violation is established by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3). This burden of proof is met if the court has "reason to believe that the individual is violating the conditions of his probation or engaging in criminal practices." *State v. Smith*, 112 Ariz. 416, 419 (1975) (internal quotation marks omitted) (quoting *State v. Bates*, 111 Ariz. 202, 204 (1974)).

¶20 Although not prohibited from contacting S.N. under the conditions of his probation, Nickler was prohibited from engaging in any new criminal activity. The State presented sufficient evidence that Nickler committed a new criminal offense in violation of the condition that he remain "crime-free" during the term of his probation. The court did not err.

CONCLUSION

¶21 For the foregoing reasons, we affirm the conviction and sentence in the 2016 case, as well as the resulting revocation of probation and disposition in the 2015 case.



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