

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

THOMAS YAZZIE, *Appellant*.

No. 1 CA-CR 18-0588  
FILED 6-27-2019

---

Appeal from the Superior Court in Navajo County  
No. S0900CR201800027  
The Honorable Dale P. Nielson, Judge

**AFFIRMED**

---

COUNSEL

Arizona Attorney General's Office, Phoenix  
By Jana Zinman  
*Counsel for Appellee*

Southwestern Law Center, Tucson  
By David Gurney  
*Counsel for Appellant*

STATE v. YAZZIE  
Decision of the Court

---

**MEMORANDUM DECISION**

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge David D. Weinzwieg joined.

---

**H O W E**, Judge:

¶1 Thomas Yazzie appeals the trial court’s denial of his Arizona Rule of Criminal Procedure (“Rule”) 20 motion for acquittal. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 This Court views the facts in the light most favorable to sustaining the jury’s verdicts and resolves any conflicts in evidence against the defendant. *State v. Pena*, 235 Ariz. 277, 279 ¶ 5 (2014). One evening in December 2017, Yazzie, wearing a black shirt and long black shorts, entered a convenience store. Yazzie picked up a case of Corona beer and brought it to the clerk, C.T., at the register. Yazzie asked C.T. for a pack of cigarettes, and C.T. retrieved a pack and placed it on the case of beer. No one else was in the store.

¶3 Yazzie then told C.T. to “give me all the cash in the cash registers.” C.T. initially thought Yazzie was joking because he seemed “kind of drunk.” After C.T. did not immediately give Yazzie the money, Yazzie stated, “I have a gun, I don’t want to hurt you.” He pulled up his shirt, turned around, and showed her a black BB gun on the right-hand side of his back pocket. He then took the gun from his pocket with his finger on the trigger and placed it on the case of beer with the barrel pointing at C.T. He told C.T. not to push any buttons or signal anyone. C.T. was “scared and confused,” fearing that Yazzie would shoot her, but she tried to remain calm and follow his instructions.

¶4 C.T. removed the cash from the register and placed it on the case of beer. Yazzie told her to “turn around and walk a little further towards the back, and don’t do anything stupid to where [I have] to hurt [you].” C.T. complied with Yazzie’s instructions, still worried that he would shoot her if she turned her back to him. At that point, a customer walked into the store, and Yazzie left the store with the cash, beer, and cigarettes. C.T. called 9-1-1.

STATE v. YAZZIE  
Decision of the Court

¶5 The store's owner was in her office about 50 feet away from the store when she saw on her security camera that the register drawer was wide open and that C.T. was reaching for a phone. The owner knew something was wrong because C.T. did not leave the register open and she did not make phone calls during the day. The owner immediately went to the store, and the police arrived about two minutes later. The owner found that \$24.85 in beer and cigarettes and \$492 in cash had been stolen.

¶6 Holbrook Police Officer Michael Kennedy arrived at the store and spoke with a distressed C.T. C.T. described the suspect as a Hispanic male, about five feet and seven inches tall, and possibly wearing black pants with a white shirt or a black jacket or black shirt over a white shirt. She had difficulty seeing the suspect's lower body because of where she was standing. She also reported that the suspect had a Phoenix bird tattoo on his neck, a tattoo on his ear, and tattoos on his arms. C.T. had focused on the suspect's face and his tattoos near his face because she thought he could not easily change those attributes; she subsequently identified pictures of the tattoos on Yazzie's neck and ear as accurately displaying the suspect the day of the robbery. C.T. would later identify Yazzie as the armed robber in court. C.T. admitted that after watching the convenience store's surveillance video, she incorrectly remembered that Yazzie was wearing a white shirt because the video showed him wearing a black shirt. She explained that she may have remembered the color incorrectly because she was scared and had a gun pointed at her.

¶7 Officer Kennedy reviewed surveillance video footage from a business across the street that had a view of the convenience store's entrance. At the time of the incident, the footage showed a silver sedan arrive at the store with two occupants. One man, dressed in a black shirt and long black shorts, entered the store while the other man waited outside. Then the man in all black ran out of the store and handed a case to the other man, and they escaped in the silver sedan.

¶8 Later that evening, Officer Kennedy saw a similar silver Chevrolet sedan driving by the store and he followed it. The silver sedan was driving faster than other cars on the road, and Officer Kennedy lost the sedan after getting stuck behind a train. A short while later, Officer Kennedy saw a silver Chevrolet sedan make an improper left turn into a gas station. He conducted a traffic stop and asked the driver, Yazzie, to exit the sedan. Officer Kennedy noted that Yazzie had the neck and ear tattoos that C.T. had described and had tattoos on both arms. Officer Kennedy also noted that Yazzie was wearing a black shirt and black shorts, which was consistent with the armed robber in the surveillance footage. Two women

STATE v. YAZZIE  
Decision of the Court

and another man were in the silver sedan. Officer Kennedy believed that the male passenger matched the description of the person who had waited outside the store when the perpetrator robbed it. Yazzie told Officer Kennedy that a gun might be in the passenger compartment of the sedan unless someone “took off with it and threw it.”

¶9 Holbrook Police Officer David Hall also participated in the traffic stop. He had seen versions of Phoenix bird tattoos before, but had not seen Yazzie’s design. Yazzie asked Officer Hall what he was being charged with, and Officer Hall said armed robbery and aggravated assault. Yazzie replied that he could be charged with only attempted armed robbery. Officer Hall explained that when a person uses a weapon to obtain goods, the person commits armed robbery. Yazzie then told Officer Hall that the gun had been in his back pocket. That night, Holbrook Police Officer Jebediah Koon obtained and executed a search warrant for Yazzie’s sedan, where he found a BB gun and an open bottle of Corona beer. The gun was black, had a detachable magazine, and looked similar to a Beretta 9mm firearm.

¶10 In January 2018, the State indicted Yazzie with one count of armed robbery, a class 2 felony; one count of aggravated assault, a class 3 felony; and two counts of shoplifting, class 1 misdemeanors. The State also alleged aggravating circumstances: (1) Yazzie committed the offense to receive something of pecuniary value; (2) the victim suffered physical, mental, emotional, or financial harm; and (3) Yazzie had a felony conviction within 10 years of the offense. Also, the State alleged that the current offenses were dangerous and that he had committed attempted aggravated assault in 2009. The State successfully moved to dismiss the shoplifting counts.

¶11 The State presented the above evidence at trial. After the State rested, Yazzie moved for a Rule 20 judgment of acquittal. He argued that the State did not provide sufficient evidence that the charges were dangerous offenses because the BB gun was a simulated deadly weapon, which was not included in the definition of deadly weapon or instrument. He also argued that insufficient evidence showed that he was the perpetrator in the store or that he was in the store with a gun. The State agreed with Yazzie on the dangerousness issue, and the court granted the motion that the charges were not dangerous offenses. The court, however, denied the remainder of Yazzie’s motion because it found that the State had presented substantial evidence of guilt.

STATE v. YAZZIE  
Decision of the Court

¶12 The jury found Yazzie guilty of armed robbery and aggravated assault. It also found two aggravating circumstances: (1) Yazzie committed the offense for pecuniary gain and (2) the victim suffered physical, mental, emotional, or financial harm. The court sentenced Yazzie to 15 years' imprisonment for armed robbery and a concurrent 10 years' imprisonment for aggravated assault, with 235 days' presentence incarceration credit. Yazzie timely appealed.

DISCUSSION

¶13 Yazzie argues that substantial evidence does not support his convictions for armed robbery and aggravated assault because the evidence was insufficient to identify him as the person who committed these acts. Sufficiency of the evidence is reviewed de novo. *State v. West*, 226 Ariz. 559, 562 ¶ 15 (2011). In reviewing a ruling on a Rule 20 motion, this Court views the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at ¶ 16. "[T]he controlling question is solely whether the record contains 'substantial evidence to warrant a conviction.'" *Id.* at ¶ 14 (quoting Ariz. R. Crim. P. 20(a)). Substantial evidence "is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.* at ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)). "Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction." *Id.* Evidence does not become "insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *State v. Sasak*, 178 Ariz. 182, 186 (App. 1993). The jury determines the weight of the evidence and the credibility of witnesses. *West*, 226 Ariz. at 563 ¶ 18 ("[W]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury[.]" (quoting *State v. Lee*, 189 Ariz. 590, 603 (1997))).

¶14 The State presented more than sufficient evidence that an armed robbery and aggravated assault occurred and that Yazzie committed them. A person commits armed robbery by "taking any property of another from his person or immediate presence and against his will" while "armed with a deadly weapon or a simulated deadly weapon" or "us[ing] or threaten[ing] to use a deadly weapon or dangerous instrument or a simulated deadly weapon." A.R.S. §§ 13-1902(A), -1904(A). A person commits aggravated assault by "intentionally placing another person in reasonable apprehension of imminent physical injury" while "us[ing] a simulated deadly weapon." A.R.S. §§ 13-1203(A)(2), -1204(A)(11).

STATE v. YAZZIE  
Decision of the Court

¶15 The evidence showed that a man having distinctive ear and neck tattoos entered the convenience store, got a case of Corona beer and brought it to the clerk, C.T. The man asked first for cigarettes, and then demanded that C.T. give him the money in the cash register. When she did not immediately do so, he told her he had a gun and lifted his shirt to show her a weapon that she believed was a firearm. He then placed the gun on the case of beer with his finger on the trigger and the gun barrel pointed at C.T., ordering her not to “push any buttons” or alert anyone. C.T. was scared and confused and believed that Yazzie would hurt her. She placed cash from the register on the case of beer, and the man told her to turn around and move toward the back, threatening to hurt her if she did “anything stupid.” The man left the store with the cash, beer, and cigarettes and drove away with another man in a silver sedan.

¶16 This evidence satisfies the elements of armed robbery: the man took the cash, beer, and cigarettes from C.T.’s immediate presence and against her will while using or threatening to use a deadly weapon or a simulated deadly weapon. The evidence also satisfies the elements of aggravated assault: the man intentionally placed C.T. in reasonable apprehension of imminent physical injury when he threatened to hurt her if she did not follow his instructions or did “anything stupid,” all while using a deadly weapon or a simulated deadly weapon.

¶17 The only real issue is whether the evidence was sufficient to show that Yazzie was the man who committed the crimes, and ample evidence indeed identifies Yazzie as the robber and assaulter. Surveillance video showed that the robber was wearing black clothing and fled in a silver sedan with another man. Police subsequently stopped a silver sedan that was driving by the store, and the driver was Yazzie who was wearing black clothing and had distinctive ear and neck tattoos that matched the robber’s characteristics. The passenger of the sedan matched the description of the man who had left the store with the robber. A search of the sedan revealed a bottle of Corona beer and a BB gun that looked like a Beretta pistol. When the police officer explained that he suspected that Yazzie committed armed robbery and aggravated assault, Yazzie said that he could be charged only with attempted armed robbery, noting that the gun had been in his back pocket.

¶18 In addition, C.T. identified Yazzie at trial as the robber, and testified that Yazzie’s neck and ear tattoos matched her description of the robber’s tattoos. Although her description of the color of the robber’s shirt to the police did not match the color of the robber’s shirt on the surveillance video, she explained that she had focused not on the color of the robber’s

STATE v. YAZZIE  
Decision of the Court

shirt, but on the robber's face and tattoos near his face to aid in later identification. This was more than enough evidence to withstand a motion for judgment of acquittal, and the trial court properly denied the motion.

**CONCLUSION**

¶19 For the foregoing reasons, we affirm.



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