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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

MATTHEW MORENO, *Appellant*.

No. 1 CA-CR 19-0636  
FILED 10-27-2020

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Appeal from the Superior Court in Maricopa County  
No. CR 2018-142640-001  
The Honorable Peter A. Thompson, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Jennifer L. Holder  
*Counsel for Appellee*

Bain & Lauritano PLC, Glendale  
By Sheri M. Lauritano  
*Counsel for Appellant*

**MEMORANDUM DECISION**

Judge Maurice Portley<sup>1</sup> delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Lawrence F. Winthrop joined.

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**P O R T L E Y**, Judge:

¶1 Matthew Moreno appeals his convictions and sentences for threatening or intimidating and assisting a criminal street gang. For the following reasons, we affirm.

**FACTS<sup>2</sup> AND PROCEDURAL HISTORY**

¶2 Phoenix Patrol Officer McElvain was investigating a matter in a residential neighborhood when Moreno drove “on the wrong side of the road” directly toward him. After passing McElvain by just two or three feet, Moreno parked his truck in a driveway and entered a house. McElvain then “ran the registration of the vehicle” Moreno was driving and learned Moreno, its owner, did not have a driver’s license. McElvain then arranged to have the vehicle towed.

¶3 Moreno left the house about ten minutes later, and McElvain confronted him about the traffic violations. Moreno became verbally aggressive and argumentative. He claimed he was a member of “MS-13,” a criminal street gang, and that he “r[an] this neighborhood.” He revealed large MS-13 tattoos on his torso, and while speaking with police on the side of the road, Moreno took off his shirt, “flipping off the cars and throwing up [MS-13] gang signs to the cars that [we]re passing by.”

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<sup>1</sup> The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

<sup>2</sup> “We view the facts in the light most favorable to sustaining the convictions with all reasonable inferences resolved 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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¶4 After Sergeant McKinney arrived, he asked Moreno why he was upset. As his vehicle was being towed, Moreno nodded towards McElvain and responded, “[C]uz he’s f----- with me. I chop mother f----- up that f--- with me.” Moreno specified that he “chopped people’s heads off, and chops people into pieces.”

¶5 The State charged Moreno with threatening or intimidating, by word or conduct, physical injury to Officer McElvain in order to promote, further, or assist in the interests of a criminal street gang and assisting a criminal street gang—through threat or intimidation of another—for the benefit of, at the direction of, or in association with a criminal street gang, both class 3 felonies. See A.R.S. §§ 13-1202(A)(3), (C), and -2321(B), (D). After the State presented its case at trial, the superior court denied Moreno’s motion for judgment of acquittal under Arizona Rule of Criminal Procedure (“Rule”) 20.<sup>3</sup> The jury ultimately found Moreno guilty as charged. Before a trial on priors, Moreno admitted to having at least two prior historical felony convictions, and, at sentencing, the court imposed minimum concurrent terms of 10 years’ imprisonment. Moreno timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

### DISCUSSION

¶6 Moreno argues the superior court erred by denying his Rule 20 motion, and he claims insufficient evidence supports his convictions. To the extent Moreno argues the issues separately, the analysis of both is the same. A judgment of acquittal is only appropriate “if there is no substantial evidence to support a conviction.” Rule 20(a)(1); *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24 (1999) (citation omitted). Likewise, our review of the sufficiency of the evidence underlying a conviction is limited to determining “whether substantial evidence supports the verdict.” *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7 (App. 2007) (citing *State v. Scott*, 177 Ariz. 131, 138 (1993), and Rule 20(a)); see also *State v. Young*, 223 Ariz. 447, 450, ¶ 12 (App. 2010) (“A conviction will not be reversed for insufficient evidence ‘unless there is no substantial evidence to support the jury’s verdict.’”) (citation omitted). Therefore, we treat Moreno’s arguments together.

¶7 “We review claims of insufficient evidence *de novo*.” *State v. Burgess*, 245 Ariz. 275, 278, ¶ 9 (App. 2018) (citing *State v. West*, 226 Ariz.

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<sup>3</sup> Absent material change, we cite the current version of rules and statutes.

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559, 562, ¶ 15 (2011)); *see State v. Montes Flores*, 245 Ariz. 303, 308, ¶ 23 (App. 2018) (“We review *de novo* a superior court’s ruling on a motion made under Arizona Rule of Criminal Procedure 20.”) (citation omitted). “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 [a] defendant’s guilt beyond a reasonable doubt.’” *State v. Borquez*, 232 Ariz. 484, 487, ¶ 9 (App. 2013) (citation omitted). And substantial evidence may be “circumstantial or direct . . . and, therefore, sufficient to support a conviction” so long as “reasonable jurors could find it permits the inference of the defendant’s guilt beyond a reasonable doubt.” *Id.* at ¶ 11 (citation omitted); *see Montes Flores*, 245 Ariz. at 308, ¶ 23. “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 conclusion reached by the jury.” *State v. Arredondo*, 155 Ariz. 314, 316 (1987). In evaluating the sufficiency of evidence, we test the evidence “against the statutorily required elements of the offense,” *State v. Pena*, 209 Ariz. 503, 505, ¶ 8 (App. 2005), and “do not reweigh the evidence to decide if we would reach the same conclusions as the trier of fact,” *Borquez*, 232 Ariz. at 487, ¶ 9 (citation omitted); *see Montes Flores*, 245 Ariz. at 308, ¶ 23.

**I. Threatening or Intimidating**

¶8 “A person commits threatening or intimidating if the person threatens or intimidates by word or conduct . . . [t]o cause physical injury to another person . . . in order to promote, further or assist in the interests of . . . a criminal street gang.” *See* A.R.S. § 13-1202(A)(3).

¶9 Moreno contends the evidence failed to establish that his behavior during the encounter with Officer McElvain promoted MS-13’s interests. According to Moreno, he “was simply agitated and venting his frustrations with his car being towed.” We are not persuaded.

¶10 At trial, the State’s gang expert testified about the history and criminal activity of MS-13, a criminal street gang that began in Los Angeles in the 1980s and subsequently spread its influence internationally, most notably in Central America. *See* A.R.S. § 13-105(8) (“‘Criminal street gang’ means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member.”). The expert explained that members generally expand a gang’s geographical influence and gain status within the gang by “putting in work,” including intimidating law enforcement and “throw[ing] the gang

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hand signs up to people on the street.” According to the expert, the most respected members are “the most violent ones.” For example, the expert testified that MS-13 had started employing increasingly brutal tactics, including dismembering victims with machetes, the gang’s “weapon of choice . . . a hallmark of theirs.” The expert also reviewed photographs of Moreno’s tattoos and opined Moreno was a member of the MS-13 “L[os] A[ngeles] program.”

¶11 Based on the trial evidence, reasonable jurors could infer Moreno publicly exhibited his MS-13 tattoos and hand signs while threatening to “chop up” Officer McElvain in order to increase the gang’s exclusive influence in the neighborhood and reduce law enforcement’s ability to counter the gang’s control there. Substantial evidence shows that Moreno threatened physical injury to McElvain by word or conduct “to promote, further or assist in the interests of . . . a criminal street gang.” *See* A.R.S. § 13-1202(A)(3). Therefore, sufficient evidence supports Moreno’s threatening or intimidating conviction.

## II. Assisting a Criminal Street Gang

¶12 “A person commits assisting a criminal street gang by committing any felony offense, whether completed or preparatory for the benefit of, at the direction of or in association with any criminal street gang.” A.R.S. § 13-2321(B).

¶13 Moreno argues that no evidence established he was a current MS-13 member at the time he allegedly threatened Officer McElvain. We disagree. During his encounter with McElvain, Moreno self-proclaimed his status as an MS-13 member. Additionally, the State’s gang expert testified it is a “no-no” according to MS-13 customs for someone who is not an active member to bear the gang’s tattoos and publicly display its hand signs. As the expert explained, “[O]nly the active gang members represent their hood. Exposing their tattoos, claiming the hood to that extent.” The jury could properly conclude Moreno was an active MS-13 member when he threatened McElvain.

¶14 Moreno further argues he was not “involved in gang activity at that time.” That argument fails both factually and legally. Moreno was flashing MS-13 hand signs and displaying his tattoos in public, which, according to the State’s expert, is indeed “gang activity.” Moreover, Moreno incorrectly infers that “involvement in gang activity” is an essential element of the offense. It is not. Rather, the State was required to prove Moreno committed the offense of assisting a criminal street gang, in this

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case threatening or intimidating physical injury to Officer McElvain, “for the benefit of, at the direction of or in association with any criminal street gang.” *See* A.R.S. § 13-2321(B). As noted, the evidence showed Moreno, at the time of his confrontation with Officer McElvain, was an active MS-13 member engaging in threatening or intimidating conduct that was, at least arguably, designed to benefit the gang or carried out in association with the gang, and thus reasonable jurors could determine Moreno was acting for the gang’s benefit when he threatened McElvain. *See* A.R.S. § 13-105(9) (“‘Criminal street gang member’ means an individual to whom . . . [certain] criteria that indicate criminal street gang membership apply,” including “[s]elf-proclamation” and “[t]attoos”). Consequently, substantial, sufficient evidence supports Moreno’s conviction for assisting a criminal street gang.

**CONCLUSION**

¶15 The superior court properly denied the motion for judgment of acquittal, and sufficient evidence supports Moreno’s convictions. Accordingly, the convictions and sentences are affirmed.



AMY M. WOOD • Clerk of the Court  
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