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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 08-1104
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
ELOY MEDINA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-129668-001 DT

The Honorable F. Pendleton Gaines, Judge

CONVICTION AFFIRMED, SENTENCE AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James Haas, Maricopa County Public Defender Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Eloy Juan Medina appeals his conviction and sentence for one count of aggravated robbery, a class 3 felony. Medina challenges the sufficiency of the evidence and argues the presentence incarceration credit was incorrectly calculated. For the following reasons, we affirm as modified herein.

BACKGROUND

¶2 On May 13, 2008, Medina and his stepson entered a music store, Raptor Guitars. There were no other patrons in the store and the owner was working on a computer in a back room. When the owner heard a noise that sounded like someone taking a guitar from a rack, he looked up at the video surveillance monitors and saw Medina and his stepson walking toward the exit with one of his guitars.

¶3 The owner quickly exited the back room and ran after Medina and his stepson. He caught up to them as they were walking out the front door. As they moved across the front sidewalk towards the parking lot, the owner grabbed the stepson, causing him to drop the guitar on the ground in the parking lot. As the owner and the stepson struggled, Medina approached the owner from behind and began to punch and kick him in the back, ribs, head, and legs. When the owner defended himself, Medina turned and ran. Immediately thereafter, the owner again gained control of the stepson and held him on the ground. Medina returned as if intending to rejoin the altercation. The store

owner threatened Medina as he advanced. Medina then picked up the guitar and fled to a waiting car. The stepson was unable to escape and the owner held him until police arrived.

¶4 The police obtained Medina's address from a trace of the getaway vehicle. When the police arrived at Medina's home, Medina told them the guitar was in his bedroom underneath his bed. The guitar was retrieved when the police searched Medina's room.

¶5 Medina was charged with aggravated robbery, in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1902 (2001), -1903 (2001).¹ Following a two-day jury trial, Medina was found guilty as charged. He admitted to two prior felony convictions and the trial court sentenced him to prison for a super-mitigated term of nine years. Medina filed a timely notice of appeal and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (Supp. 2009).

DISCUSSION

¶6 In determining whether sufficient evidence exists to support a conviction we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining

¹ We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008). We review the sufficiency of evidence presented at trial only to determine if "substantial evidence" exists to support the verdict. *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Evidence is sufficient when it is "more than a [mere] scintilla and is such proof" as could convince reasonable persons of a defendant's guilt beyond a reasonable doubt. *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981) (quoting *State v. Bearden*, 99 Ariz. 1, 4, 405 P.2d 885, 886-87 (1965)). The substantial evidence required to warrant a conviction may be either circumstantial or direct. *State v. Mosley*, 119 Ariz. 393, 402, 581 P.2d 238, 247 (1978).

¶17 To convict Medina of aggravated robbery,² the State was required to prove that in the course of taking property from another person against that person's will, he used threats or force (1) with the intent to coerce the surrender of the property or (2) with the intent to prevent resistance to him taking or retaining the property. A.R.S. § 13-1902(A) (2001).

¶18 Medina argues he did not commit a robbery because there was no force or threat of force that occurred "in the

² The aid of an accomplice elevates robbery to aggravated robbery. A.R.S. § 13-1903(A) (2001). Medina does not contend there was insufficient evidence to prove he was aided by an accomplice.

course of taking" the property. Relying upon *State v. Celaya*, he contends that possession of the guitar was made peaceably, making the crime a theft, not a robbery, and that the theft was "committed and completed when the stepson left the store." 135 Ariz. 248, 252, 660 P.2d 849, 853 (1983) ("[R]obbery is not committed when the thief has gained peaceable possession of the property and uses no violence except to resist arrest or effect his escape."). We disagree.

¶19 Medina confuses the involvement of the stepson with his own actions. Medina did not touch the guitar until after it was dropped on the ground. Before taking the guitar, he used physical force against the owner by punching and kicking him. Thus, Medina's actions in taking the guitar cannot reasonably be construed as "peaceable possession." Even if Medina was acting to protect his stepson, a reasonable juror could still find Medina's use of physical force allowed him to take the guitar from the owner or to prevent the owner from regaining physical possession. See *Celaya*, 135 Ariz. at 252, 660 P.2d at 853 (element of force may be used either to take the property or to resist the retaking of it). If Medina's sole concern had been the welfare of his stepson, he would not have picked up the guitar nor would he have fled from the scene without his stepson.

¶10 Furthermore, Medina's reliance on *Celaya* is misplaced. First, *Celaya* did not involve a challenge to the sufficiency of the evidence. The only relevant issue presented was whether a lesser-included instruction on theft should have been given. *Id.* at 251-53, 600 P.2d at 852-54. Second, it is factually distinguishable from the present case. *Celaya* involved a narcotics sale with an undercover officer posing as a drug buyer. *Id.* at 250, 660 P.2d at 851. In conducting the drug transaction, the officer voluntarily handed a bag of money to *Celaya* in anticipation of receiving drugs in return. *Id.* at 250, 252, 660 P.2d at 851, 853. *Celaya* took the money to his car, placed it in the front seat, and returned to deliver a bag of "drugs" to the undercover officer. *Id.* Upon inspection, the bag contained only old clothes and shoes. *Id.* at 250, 660 P.2d at 851. A scuffle ensued and the undercover officer was shot. *Id.* *Celaya* was convicted of robbery, among other things, and on appeal asserted that the trial court erred in rejecting his request for a lesser-included theft instruction. *Id.* at 252, 660 P.2d at 853. Our supreme court concluded that a lesser-included instruction was appropriate because based on the facts presented a reasonable jury could find that *Celaya* had gained control of the money without threat of force and that once the money was placed in *Celaya*'s car, the taking of the money was complete. *Id.*

¶11 Unlike the officer in *Celaya*, in this case the owner did not voluntarily hand over the guitar in anticipation of return consideration. He did not stand by and watch Medina and his stepson leave the store expecting them to return with payment for the guitar. On the contrary, the owner gave chase to Medina and his stepson as they were leaving the store. The owner was able to grab the stepson as he exited through the front door and keep him from fleeing. Medina secured possession of the guitar only after he punched and kicked the owner in an attempt to halt his resistance. Regardless of what happened in the few seconds between the time the guitar was removed from the shelf until the stepson dropped the guitar on the ground, Medina used physical force to obtain possession. Based on these facts, there was sufficient evidence for a jury to conclude that Medina committed aggravated robbery.

¶12 Medina also argues the court erred in calculating his presentence incarceration credit. He contends that he should have received fifty-five days of presentence incarceration credit, not forty-nine, because he was due presentence incarceration credit for time served in May and October through December 2008. The State concedes the presentence incarceration credit was incorrectly calculated and that Medina is entitled to fifty-five days of presentence incarceration credit. Pursuant to A.R.S. § 13-4037 (2001), we modify Medina's sentence to

reflect that he was entitled to fifty-five days of presentence incarceration credit. We also amend the sentencing minute entry, which incorrectly states that Medina has been convicted of aggravated assault, to reflect that Medina was convicted for the crime of aggravated robbery.

CONCLUSION

¶13 For the foregoing reasons, we affirm Medina's conviction and sentence as modified.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PATRICK IRVINE, Presiding Judge

/s/

DONN KESSLER, Judge