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Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0532
) 1 CA-CR 09-0637
 Appellee,) (Consolidated)
)
 v.) DEPARTMENT B
)
 GEORGE M. REED,) **MEMORANDUM DECISION**
)
 Appellant.) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)

Appeal from the Superior Court in La Paz County

Cause No. S1500CR20060332

The Honorable Michael J. Burke, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED FOR RESENTENCING

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J O H N S E N, Judge

¶1 George M. Reed appeals from his convictions and sentences on one count of armed robbery and two counts of conspiracy to commit armed robbery. For the reasons that follow, we vacate one of the conspiracy convictions, affirm the remaining convictions and remand for resentencing.

FACTS AND PROCEDURAL BACKGROUND

¶2 In the summer of 2005, a truck stop in Ehrenburg was robbed twice by a masked and armed intruder.¹ The first incident occurred around 5 a.m. on July 14 after the truck stop bookkeeper had collected money from the safe. She took the money to her office, then, while she was closing the office door, a robber confronted her from behind and demanded the money while pointing a gun at her. The second incident occurred in the early morning of September 15 as the backup bookkeeper was carrying money from the safe to the office. The robber came up behind her in the hallway, and they "kind of [fought] . . . for the bag that had the money in it." As the robber left, the backup bookkeeper saw he was armed with a gun. Immediately

¹ "[W]e view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant." *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009) (quoting *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984)).

after the second robbery, Diane Dutton, another truck stop employee, was seen driving a pickup truck from a nearby parking lot. The robbery suspect was the passenger in the truck. In total, more than \$122,000 was taken in the two robberies.

¶13 The State charged Reed with two counts of conspiracy to commit armed robbery and two counts of armed robbery, one count of each charge for each of the two incidents. All counts are Class 2 felonies. Reed eventually entered into a plea agreement in which he agreed to plea guilty to one charge of armed robbery and to cooperate with further investigations into the robberies. Specifically, he agreed to provide investigators "with all information he has concerning the armed robberies," and he agreed to "answer truly, fully and completely, without reservation, each and every question put to him" Also pursuant to the agreement, Reed agreed to "submit to a polygraph examination to determine the likely veracity of the information provided." In exchange, the State agreed to dismiss the remaining charges and agreed that Reed would be given probation. The superior court accepted the plea agreement and set the matter for sentencing.

¶14 Before sentencing, Reed underwent three polygraph examinations. The results of the first exam were inconclusive as to his answers to questions regarding his presence at the truck stop during the first robbery. After a second polygraph

"showed deception," the State moved to withdraw from the plea agreement. After records pertaining to the second exam were stolen, the parties agreed to a third examination to be conducted by a polygrapher selected by Reed. The third exam conclusively indicated deception, and the court granted the State's motion to withdraw from the plea agreement.

¶15 The matter proceeded to trial, and the jury acquitted Reed of the first armed robbery but found him guilty of the remaining counts. The superior court sentenced him to aggravated terms of 21 years' incarceration for the conspiracy convictions to be served concurrent to each other but consecutive to a presumptive term of 10.5 years for the armed robbery conviction. Reed timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(1) (2010).²

DISCUSSION

A. The State's Withdrawal from the Plea Agreement.

¶16 Reed first contends the superior court erred in allowing the State to withdraw from the plea agreement. He argues the court improperly construed the plea agreement as

² We cite a statute's current version absent material changes since the date of the offense.

requiring him to successfully pass a polygraph examination. Instead, he argues the plea agreement merely required he "submit" to a polygraph.³

¶7 Generally, we apply contract analysis to plea agreements. *Mejia v. Irwin*, 195 Ariz. 270, 272, ¶ 12, 987 P.2d 756, 758 (App. 1999). We review issues of contract interpretation *de novo*. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). In interpreting a contract, our purpose is to determine and enforce the parties' intent. *US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996). In determining the parties' intent, we "look to the plain meaning of the words as viewed in the context of the contract as a whole." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983); see also *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, 120, ¶ 13, 75 P.3d 1075, 1078 (App. 2003) (in interpreting a contract, we consider the context of the words and the purpose of the agreement).

³ Reed asserts he is entitled to summary relief on this issue because no transcripts are available of the hearing at which the polygrapher who administered the first two examinations testified. Our record, however, contains sufficient other transcripts, including the transcript from the post-trial hearing, and a copy of the plea agreement.

¶18 As noted, the plea agreement required Reed to furnish investigators with all information he had concerning the robberies, and that he answer under oath, "truly, fully and completely, without reservation" all of the questions put to him about the incidents. It further provided that after furnishing the information, he would submit to a polygraph examination "to determine the likely veracity of the information provided."

¶19 Considering these provisions together, we cannot conclude that Reed and the State intended that Reed would satisfy his obligation under the plea agreement by submitting to a polygraph but failing the examination. Although the plea agreement did not specify that Reed must successfully complete the polygraph examination, the purpose of the polygraph was "to determine the likely veracity of the information" he provided to investigators concerning the robberies. Reed's deceptive answers in the polygraph examination permitted the superior court to find that he had breached his obligation under the plea agreement to answer questions about the robberies "truly, fully and completely."

¶10 Reed argues the State failed to show he breached the plea agreement by providing an untruthful account of the robberies because it offered no evidence of what he told investigators about the robberies prior to the polygraph. Our review of the record reveals that the parties and the court

apparently all understood that when investigators interviewed Reed prior to his polygraph, he gave the same answers he gave during the second and third polygraph examinations (both of which indicated deception). For example, at oral argument on the State's motion to withdraw from the plea agreement, the prosecutor explained "that the plea agreement calls for the defendant to testify truthfully" and asserted that because Reed had failed a polygraph, "there's just no way I can put him on as a witness, so he can't live up to his part of the plea agreement." Reed offered no argument or facts to rebut the prosecutor's implication that the polygraph results called into question the account of the robberies he had provided under oath.⁴

¶11 In any event, even without direct evidence of the account that Reed had given investigators, we conclude the polygraph results constituted sufficient evidence on which the superior court could find that Reed had breached his obligation to testify truthfully and completely about the robberies. It belies common sense to conclude that, when asked similar

⁴ For example, the court noted that the third polygraph examination showed that Reed was being deceptive when he denied being present at the truck stop the day of the initial robbery and when he denied participating in that robbery. The court then concluded Reed violated the plea agreement because the polygraph examination showed "he wasn't being truthful and that he was being deceptive."

questions about the robberies in his interview and in the polygraphs, Reed chose to give truthful answers in the interview but different, deceptive answers during the polygraph.

¶12 Finally, Reed argues the court violated his double jeopardy rights by allowing trial to proceed on the charged offenses, and he claims the State acted in bad faith by imposing a requirement that he pass a polygraph exam. We disagree. First, no double jeopardy violation occurred because the court correctly determined Reed breached the plea agreement by not cooperating truthfully with the investigation into the robberies. See *Coy v. Fields*, 200 Ariz. 442, 444, ¶ 5, 27 P.3d 799, 801 (App. 2001) (defendant who breaches obligations under plea agreement waives double jeopardy protections). Second, the record does not indicate the State acted in bad faith in seeking to withdraw from the plea agreement.

¶13 For the foregoing reasons, the superior court did not err in granting the State's motion to withdraw from the plea agreement. See *id.* (defendant's breach of obligations under plea agreement permits State to withdraw from agreement).

B. Sufficiency of the Evidence.

1. Standard of review.

¶14 Reed argues the superior court abused its discretion in denying his motion for acquittal pursuant to Arizona Rule of

Criminal Procedure 20 because no substantial evidence supports his convictions.

¶15 This court reviews a "denial of a Rule 20 motion for an abuse of discretion and will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001). Substantial evidence is evidence that a reasonable jury can accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999). In determining whether the court abused its discretion in denying a Rule 20 motion, we view the evidence in the light most favorable to upholding the verdict. *State v. Gillies*, 135 Ariz. 500, 506, 662 P.2d 1007, 1013 (1983). If reasonable minds could differ on the inferences to be drawn from the evidence, the case must be submitted to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

2. Conspiracy.

¶16 A conspiracy to commit armed robbery requires that two or more persons agree to commit armed robbery and an overt act is taken in furtherance of the agreement. A.R.S. § 13-1003 (2010). Reed argues the court should have granted his motion for judgment of acquittal on the conspiracy charges because

there was no evidence that he and Dutton agreed that a weapon would be used in the September robbery.⁵

¶17 Dutton testified that in July 2005 she worked the graveyard shift at the truck stop and that she often would discuss "the overall layout of the store and how things operated" with Reed, who was a customer Dutton knew socially. The two also talked about "how much money was made a day, . . . and how they proceeded, you know, accounting and things like that." Indeed, Dutton testified that she knew Reed someday would rob the truck stop. He had asked Dutton how a robbery "could be done, and the amount of money that can be taken during the course of that robbery . . . surveillance information, things along that line." Many times prior to the July robbery, Reed had told Dutton that he was going to rob the truck stop on a particular day, but then no robbery would occur. When the truck stop was robbed on July 14, Dutton "automatically assumed that it was him." Prior to the July robbery, in return for the information she provided, Reed had agreed to give Dutton "pretty close to half" of the "loot" from the robbery. Dutton said the day after the July robbery, she was with Reed when he bought two

⁵ Due to double jeopardy concerns, we vacate the first of Reed's conspiracy convictions. See *infra* ¶ 26.

trucks for \$22,000 in cash that he said he "got . . . from the robbery at [the truck stop] the night before."

¶118 Dutton testified that after the July robbery, she talked with Reed about a second robbery of the truck stop. At Reed's request, she confirmed that the "setup was still the same" at the truck stop and she "arranged for an entrance." Reed told her "that he wanted to do it a second time And then the night of the robbery he said that we are going to do it tonight, and I just said, okay." At Reed's direction, Dutton dropped him off in front of the truck stop the morning of the robbery and then drove the getaway vehicle after the robbery was complete. Dutton testified that she saw Reed's firearm that morning.⁶

¶119 "Any action sufficient to corroborate the existence of an agreement to commit the unlawful act and to show that it is being put into effect supports a conspiracy conviction." *State v. Arredondo*, 155 Ariz. 314, 316-17, 746 P.2d 484, 486-87 (1987). "Criminal conspiracy need not be, and usually cannot be, proved by direct evidence. The common scheme or plan may be inferred from circumstantial evidence." *Id.* at 317, 746 P.2d at 487; see *State v. Avila*, 147 Ariz. 330, 336, 710 P.2d 440, 446

⁶ This testimony by Dutton evidences more than a mere "association" between Dutton and Reed, as Reed asserts. See *State v. Sullivan*, 68 Ariz. 81, 87, 200 P.2d 346, 350 (1948).

(1985) ("The existence of an unlawful agreement can be inferred from the overt conduct of the parties.").

¶20 Viewed in a light most favorable to sustaining the conspiracy convictions, Dutton's testimony and the testimony of the other truck stop employees, *supra* ¶ 2, supports an inference that Reed agreed with one or more persons that he or a fellow conspirator would commit the armed robberies at the truck stop. Reed argues there was insufficient evidence of an agreement between him and Dutton to commit an armed robbery of the truck stop in September. We conclude, however, that Dutton's testimony that she knew Reed had committed the first armed robbery and that he told her he "wanted to do it a second time" gives rise to a reasonable inference that the conspiracy(ies) involved armed robbery. See *Fulminante*, 193 Ariz. at 494, ¶ 27, 975 P.2d at 1194 (we "draw all reasonable inferences that support the verdict"); see also *Arredondo*, 155 Ariz. at 316-17, 746 P.2d at 486-87; *Avila*, 147 Ariz. at 336, 710 P.2d at 446 ("[P]roof of a criminal combination to do an unlawful act can rarely be made except by light reflected from its consequences or results.") (quoting *State v. Estrada*, 27 Ariz. App. 38, 40, 550 P.2d 1080, 1082 (1976)).

¶21 Because substantial evidence supports Reed's conspiracy convictions, the superior court did not abuse its discretion in denying the Rule 20 motion directed to those

charges. See *Arredondo*, 155 Ariz. at 316, 746 P.2d at 486 (to reverse on the basis of insufficient evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.").

3. Armed robbery.

¶22 Reed argues his armed robbery conviction should be vacated because the evidence was insufficient to show that he used or threatened to use a gun during the robbery or that he used or threatened to use force to get the money.

¶23 Use or threatened use of the gun is not an element of armed robbery; it is enough that one commits robbery while armed. See A.R.S. § 13-1904(A)(1) (2010). The truck stop employee testified she observed the suspect with a gun when he left the scene of the September robbery with the money. She also testified that she fought with the suspect for control of the bag containing the money. That testimony, when considered with Dutton's testimony that Reed committed the September robbery, *supra* ¶¶ 17-18, is substantial evidence to support Reed's armed robbery conviction. See *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996) (credibility determinations are for the jury); *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (jury determines weight of evidence); see also A.R.S. §§ 13-1901(1) (2010), -1902(A) (2010), -1904(A)(1) (elements of armed robbery).

C. Conspiracy Convictions: Double Jeopardy.

¶24 The verdict forms for both of the conspiracy charges directed that if the jury found Reed guilty of the alleged conspiracy, it should determine whether the object of the conspiracy was one or both of the armed robberies. The jury found Reed guilty of both charged conspiracies and also found the objects of the conspiracies were both of the robberies. The State concedes the dual convictions constitute error and requests we vacate Reed's conviction on the first of the two charged conspiracies.

¶25 Double jeopardy bars multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Even if concurrent sentences are imposed, double jeopardy concerns are implicated because the existence of an additional felony conviction by itself constitutes punishment. See *State v. Brown*, 217 Ariz. 617, 621, ¶ 13, 177 P.3d 878, 882 (App. 2008) (citing *Ball v. United States*, 470 U.S. 856, 864-65 (1985)).

¶26 "A person who conspires to commit a number of offenses is guilty of only one conspiracy if the multiple offenses are the object of the same agreement" A.R.S. § 13-1003(C) (2010). The jury in this case effectively found Reed guilty twice for participating in one conspiracy to commit two armed robberies. Because the convictions impermissibly amount to double punishment, we set aside Reed's conviction on the first

conspiracy charge. See *State v. Medina*, 172 Ariz. 287, 289, 836 P.2d 997, 999 (App. 1992) (where only a single conspiracy proved, one of two conspiracy convictions vacated).⁷

D. Sentencing.

¶127 As noted, the court sentenced Reed to an aggravated term of 21 years' imprisonment on the conspiracy charge.⁸ The sole aggravating factor the court identified at sentencing was the jury's finding that Reed conspired to commit two robberies. As the State concedes, the jury's finding that Reed conspired to commit two robberies is not a statutorily enumerated aggravating factor that the court properly could consider in determining Reed's sentence. See A.R.S. § 13-701(D) (1-23) (2010). Instead, the court treated the finding as a so-called "catch-

⁷ The second conspiracy count charged Reed with conspiring to commit the September armed robbery. We reject Reed's additional contention that the form of verdict presented to the jury for that charge impermissibly amended the indictment to add an additional object of the conspiracy. Reed argues that due to the form of verdict, "there is no way to tell whether the jury unanimously found that there was two or one actual conspiracy [sic]." We do not see how Reed could have been prejudiced because by completing the verdict form in the manner it did, the jury found he conspired to commit both of the armed robberies, not one or the other.

⁸ Because we vacate one of the conspiracy convictions, we refer in this section to a single aggravated sentence of 21 years for conspiracy.

all" aggravator currently found under A.R.S. § 13-701(D)(24).⁹ However, a defendant's due-process rights are violated when the court uses the "catch-all as the sole factor" to increase a sentence. *State v. Schmidt*, 220 Ariz. 563, 566, ¶ 10, 208 P.3d 214, 217 (2009).

¶28 Accordingly, because the court erred in sentencing Reed on the conspiracy conviction, we remand for resentencing on that conviction. See *id.* at 566, ¶ 12, 208 P.3d at 217.

CONCLUSION

¶29 We affirm Reed's armed robbery conviction and his conviction on the second conspiracy charge. We vacate the conviction on the first conspiracy charge and remand for resentencing on the remaining conspiracy conviction.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge

⁹ At the time Reed committed the July 2005 offense, the catch-all aggravator was located at A.R.S. § 13-702(C)(21), which was subsequently renumbered effective August 12, 2005 to A.R.S. § 13-702(C)(22). See 2004 Ariz. Sess. Laws, ch. 174, § 1 (2nd Reg. Sess.); 2005 Ariz. Sess. Laws, ch. 166, § 1 (1st Reg. Sess.).