IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 02/10/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0770
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
TODD RUSSELL GAGE MERSEREAU, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-172467-001 SE

The Honorable Connie Contes, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

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Attorneys for Appellant

N O R R I S, Judge

¶1 Todd Russell Gage Mersereau appeals from his convictions for three counts of aggravated assault, all class 3 dangerous felonies. Mersereau argues the superior court should

have granted his motion for a new trial because the State did not present sufficient evidence for the jury to find beyond a reasonable doubt he had not acted in self-defense or in defense of his premises or property ("justification defenses"). He also argues the superior court should have granted his motion for judgment of acquittal as to one of the counts because the victim did not testify at trial and the State presented no other evidence the victim reasonably feared for his life. Because the State presented more than ample evidence to meet its burden of proof as to Mersereau's justification defenses and as to guilt on all counts, we disagree with both arguments and affirm the convictions.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 Samantha S. testified she, her husband Justin S., and her brother, 15-year-old Anthony P., were looking for yard sales when they stopped near Mersereau's home, which had items in the driveway. Anthony P. testified he walked directly up to the door to ask if there was a yard sale, but Mersereau testified he watched Anthony P. pick up items in the yard before approaching the door. After he knocked, Anthony P. testified a voice said, "[W]ho are you, are you alone, and are you a cop?" Anthony P.

[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Mersereau. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

testified he stumbled over his words in responding and then ran away.

¶3 Mersereau chased after Anthony P., trailed by two other men who had been in the home, Eugene F. and James U. Anthony P. testified he never picked up any of Mersereau's property and never had anything in his hands. Samantha S. also testified Anthony P. had nothing in his hands when he ran to the car. Mersereau testified he saw something in Anthony P.'s hands as he chased him. A neighbor who was driving by, Vincent T., testified he saw a small black item, "that looked like a wallet of some sort" in Anthony P.'s hands. Eugene F. testified he saw nothing in Anthony P.'s hands, although Eugene F. said he "barely got a glimpse of him." James U. testified he watched Anthony P. pick up items in the yard before knocking on the door, but no one directly asked him whether he saw anything in Anthony P.'s hands as he ran to the car. Another neighbor, Cecilia M., testified she could not see whether Anthony P. had anything in his hands but said she could tell Anthony P. did not have a "bunch of stuff."

¶4 When he reached the car, Anthony P. got in and told Justin S. to drive away, but Justin S. waited because he did not know what was going on. When Mersereau reached the car, he yelled at Anthony P. to get out. Anthony P. and Samantha S. testified that when Anthony P. did not get out of the car,

Mersereau started striking the car's windshield with an expandable metal baton. Mersereau testified he never struck the vehicle until it "jumped" at him, which he saw as an attempt to run him over.[2] James U. testified the car "lunged forward" at Mersereau, but Eugene F. testified the vehicle did not try to run over Mersereau. Both Cecilia M. and Vincent T. testified the vehicle never lurched toward or drove at Mersereau.

¶5 After Mersereau had struck the vehicle a few times with the baton, shattering the windshield and spraying pieces of glass into the vehicle, Justin S. drove away in reverse. Justin S. drove to a restaurant where Samantha S. called 911. When police arrived at the restaurant, officers interviewed Anthony P., Samantha S., and Justin S. An officer testified that all three were visibly upset and shaken by the incident.

¶6 Justin S. did not testify at trial. The jury returned verdicts of guilty on all three counts, and the superior court sentenced Mersereau to a concurrent mitigated prison term of five and a half years on each count. Mersereau timely appealed,

[2]Mersereau also testified Justin S. was waving a bat at him during the incident. Samantha S. testified a bat was in the car at the time, but that Justin S. did not have the bat in his hands during the incident.

and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 13-4033 (2010).[3]

DISCUSSION

¶7 First, Mersereau argues the superior court should have granted his motion for a new trial because the verdicts were contrary to law and to the weight of the evidence pursuant to Arizona Rule of Criminal Procedure 24.1. Specifically, he argues the State failed to present sufficient evidence for the jury to find beyond a reasonable doubt that he did not act in self-defense or in defense of his property or premises.[4] We disagree. Mersereau presented evidence that he acted with justification, and the superior court properly instructed the jury as to self-defense, defense of property, and defense of premises. *See* A.R.S. § 13-205 (2010). Other witnesses provided accounts that differed from Mersereau's, and the issue became one of credibility -- an area within the province of the jury. The State presented sufficient evidence for the jury to find beyond a reasonable doubt Mersereau did not act with

[3]Although certain statutes cited in this decision were amended after the date of Mersereau's offenses, the revisions are immaterial. Thus, we cite to the current version of these statutes.

[4]We review the denial of a motion for a new trial for an abuse of discretion. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). "[A] new trial is required only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime." *Id.* (citation omitted).

justification, and thus the superior court did not abuse its discretion in denying his motion for a new trial.

¶8 Second, Mersereau argues the superior court should have granted his Arizona Rule of Criminal Procedure 20 motion for a judgment of acquittal as to the count involving Justin S. because Justin S. did not testify and the State presented no other evidence that he was placed in "reasonable apprehension of imminent physical injury." A.R.S. § 13-1203(A)(2) (2010). We disagree; the State presented sufficient evidence other than the direct testimony of the victim, and thus the superior court properly denied the motion.[5]

¶9 "When fear or apprehension are elements of an offense, testimony of the victim that he was actually afraid or apprehensive is not required; that element of the crime can be established by circumstantial evidence." *State v. Angle*, 149 Ariz. 499, 504, 720 P.2d 100, 105 (App. 1985), *vacated in part on other grounds*, 149 Ariz. 478, 720 P.2d 79 (1986). Here, other witnesses provided evidence Justin S. had been in reasonable apprehension of imminent physical injury. Police officers testified Justin S. was shaking and pacing around, had

[5]"If reasonable minds could differ as to whether the properly admitted evidence, and the inferences therefrom, prove all elements of the offense, a motion for acquittal should not be granted. We conduct a de novo review of the trial court's decision, viewing the evidence in a light most favorable to sustaining the verdict." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (citations omitted).

difficulty speaking, and was in "defense mode for his family." Samantha S. and Anthony P. testified to circumstantial evidence -- Justin S. had difficulty getting the car in gear during the incident and drove in reverse all the way out onto a busy road rather than stopping to turn around -- that the jury could use to infer Justin S. was in reasonable apprehension of imminent physical injury.

¶10 Additionally, the condition of the car made it reasonable for the jury to infer Justin S. had been in reasonable apprehension of imminent physical injury. Photographs of the car entered into evidence showed the strikes on the windshield occurred on the driver's side, where Justin S. was sitting, and showed shards of glass on the driver's seat. In light of this evidence showing Justin S. was in reasonable apprehension of imminent physical injury, reasonable minds could have differed as to whether the evidence proved all elements of the offense, and thus the superior court properly denied the motion for a judgment of acquittal.[6]

[6]Mersereau argues the superior court's denial of his motion for a new trial -- as well as the denial of his motion for a judgment of acquittal -- violated his due-process rights under both the United States and Arizona constitutions because the State failed to prove every element of his offenses beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970); *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. 1992) (Arizona due process clause congruent with federal due process clause). We disagree. As discussed, the State

CONCLUSION

¶11 For the foregoing reasons, we affirm Mersereau's convictions.

/s/
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PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
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JOHN C. GEMMILL, Judge

/s/
_____
PATRICIA A. OROZCO, Judge

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presented sufficient evidence for the jury to find each element of Mersereau's offenses beyond a reasonable doubt, and thus he was not denied due process.