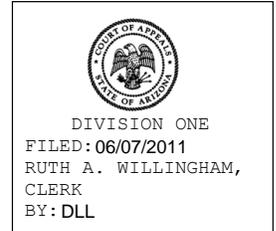


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0541
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MICHAEL CORDELL O'BRIEN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Mohave County

Cause No. CR 2009-00928

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman
Attorney for Appellant

N O R R I S, Judge

¶1 In September 2009, a grand jury indicted Michael Cordell O'Brien on one count of first-degree burglary, one count of robbery, one count of kidnapping by domestic violence, one count of endangerment by domestic violence, and two counts of

aggravated assault by domestic violence for his conduct on August 27, 2009. After three days of trial and after the superior court instructed on the charged offenses as well as certain lesser-included offenses, such as theft and second-degree burglary, a jury found O'Brien guilty of robbery, a class four felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-1902 (2010),¹ and second-degree burglary (a lesser-included offense of first-degree burglary), a class three felony in violation of A.R.S. § 13-1507 (2010).² O'Brien argues the evidence was insufficient to support his convictions for robbery and second-degree burglary. As we explain, we disagree.

DISCUSSION

I. Robbery

¶2 O'Brien first argues the State failed to present sufficient evidence he acted with "intent to deprive" the gun owner of his gun to support his robbery conviction. Although the robbery statute, A.R.S. § 13-1902(A), does not on its face require proof of "intent to deprive," O'Brien reasons such proof was required because (1) the court instructed the jury on theft

¹Although the Arizona Legislature amended certain statutes cited in this decision after the date of O'Brien's offenses, the revisions are immaterial. Thus, we cite to the current version of these statutes.

²The jury also found O'Brien guilty of one count of assault by domestic violence and one count of endangerment by domestic violence, but O'Brien does not challenge these convictions on appeal.

as a lesser-included offense of robbery, (2) theft requires proof of "intent to deprive," A.R.S. § 13-1802(A)(1) (2010), and (3) by definition, a "greater offense cannot be committed without necessarily committing the lesser offense." *State v. Wall*, 212 Ariz. 1, 3, ¶ 14, 126 P.3d 148, 150 (2006) (quoting *State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980)). Thus, he argues we must set aside his robbery conviction because the evidence demonstrated he only intended to "disarm" the owner, not deprive the owner of his gun.

¶3 We reject this argument; but even if we were to accept the argument and read "intent to deprive"³ into the robbery statute, the State presented substantial evidence O'Brien acted with the requisite intent. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (when reviewing challenges to sufficiency of the evidence, reviewing court does not reweigh evidence; rather, views it in light most favorable to sustaining jury's verdict, resolving all reasonable inferences against defendant); *State v. Alvarado*, 219 Ariz. 540, 542, ¶ 7, 200 P.3d

³Section 13-1801(A)(4) (2010) states deprive means:

to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold with the intent to restore it only on payment of any reward or other compensation or to transfer or dispose of it so that it is unlikely to be recovered.

1037, 1039 (App. 2008) ("Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction."); *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007) (appellate court review of sufficiency of evidence limited to whether substantial evidence supports verdict).

¶4 At trial, O'Brien admitted he "snatched the gun" out of the hands of the gun owner. The gun owner and three eyewitnesses testified O'Brien had then taken the gun into the room where his children were sleeping, had picked up his infant daughter with one hand while holding the gun in his other hand, and had carried his daughter and the gun outside the home. The only witness who followed O'Brien outside testified O'Brien threw the clip and the gun after going outside the home. Although O'Brien disputed this testimony, it nevertheless constituted sufficient evidence he had withheld the owner's gun for a time period such that the owner lost "a substantial portion of its . . . usefulness or enjoyment," as the gun owner was unable to use the gun to protect himself and his home. A.R.S. § 13-1801(A)(4) (2010).

¶5 Although O'Brien does not directly challenge the sufficiency of the evidence for his robbery conviction, the record reflects the State presented sufficient evidence to

demonstrate he committed each element of A.R.S. § 13-1902(A).⁴ O'Brien acknowledged he (1) "snatched the gun" (2) out of the gun owner's hand (3) against the owner's will after the owner pointed the gun at him. The owner and the only other witness to the confrontation testified O'Brien (4) "wrestl[ed]" with and "pushed" the owner to grab the gun. Moreover, O'Brien testified he "shrugged [the owner] off of [his] shoulder" when the owner tried to retrieve his gun, suggesting O'Brien (5) had used force against the owner "as a means of gaining control" of the gun. See A.R.S. § 13-1901(1) (2010). Although O'Brien disputed much of this evidence, credibility determinations are for the jury. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).

⁴The court's robbery instruction was as follows:

In order to determine that the Defendant committed the crime of Robbery, you must find that:

1. The Defendant took property of another person; AND
2. The Defendant took the property from the other's person or immediate presence; AND
3. The Defendant did so against the other person's will; AND
4. In the course of doing so, the Defendant threatened or used force against any person; AND
5. The Defendant threatened or used force with the intent either to coerce the surrender of the property or to prevent resistance to his taking or retaining the property.

