

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RANDY ALEN ZIMMER
Appellant.

Nos. 2 CA-2013-0124 and 2 CA-CR 2013-0125 (Consolidated)
Filed November 5, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Court 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Gila County
No. S0400CR201100522 and S0400CR201200306
The Honorable Peter J. Cahill, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
by Joseph T. Maziarz, Section Chief Counsel, Phoenix
and Alan L. Amann, Assistant Attorney General, Tucson

Counsel for Appellee

Emily Danies, Tucson

Counsel for Appellant

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

MILLER, Judge:

¶1 Randy Zimmer was charged with four counts of aggravated assault in Gila County Cause Number CR201100522 and one count of aggravated assault in Gila County Cause Number CR201200306. The cases were consolidated for trial, and a jury found Zimmer guilty of all counts alleged. The trial court sentenced him to concurrent prison terms, the longest of which was ten years.

¶2 Zimmer timely appealed from his convictions and sentences. On appeal, he argues that the trial court erred in denying his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., and that the evidence at trial was insufficient to support his convictions. We affirm.

Factual and Procedural Background

¶3 We view the evidence in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In January 2011, D.H. and J.R. helped S.C. move out of a house she had shared with Zimmer. Shortly after they arrived at a cottage owned by S.C.'s daughter, Zimmer showed up to talk to S.C. When S.C. answered the door, Zimmer forced his way into the home, shoving S.C. into the wall. D.H. tried to repel Zimmer with a frying pan, but Zimmer took the frying pan, hit D.H. in the head with it, and kicked D.H. after he had fallen to the ground. J.R. was also kicked by Zimmer after she placed her body over D.H. to shield him.

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Discussion

¶4 A motion for a judgment of acquittal under Rule 20 shall be granted where “there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a). When a trial court denies a Rule 20 motion, the reviewing court must determine de novo “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). “Substantial evidence,” as required under Rule 20, may be both direct and circumstantial. *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Further, “[w]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.” *Id.* ¶ 18, quoting *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶5 In reviewing a denial of a motion for a judgment of acquittal under Rule 20, “[t]he sufficiency of the evidence must be tested against the statutorily required elements of the offense.” *State v. Pena*, 209 Ariz. 503, ¶ 8, 104 P.3d 873, 875 (App. 2005). An assault is committed by “[i]ntentionally, knowingly or recklessly causing any physical injury to another person.” A.R.S. § 13-1203(A)(1). “Physical injury’ means the impairment of physical condition.” A.R.S. § 13-105(32)¹. An assault is aggravated, inter alia, “[i]f the person is eighteen years of age or older and commits the assault on a child who is fifteen years of age or under,” as provided in A.R.S. § 13-1204(A)(6), “[i]f the person uses a . . . dangerous instrument,” as provided in § 13-1204(A)(2), or “[i]f the person commits the assault after entering the private home of another with the intent to commit the assault,” as provided in § 13-1204(A)(5). Section 13-105(12),

¹Section 13-105, A.R.S., has been amended three times since the date of the offenses. See 2012 Ariz. Sess. Laws, ch. 190, § 1; 2011 Ariz. Sess. Laws, ch. 114, § 1 and ch. 90, § 1. We apply the version in effect at the time of the offenses. See 2008 Ariz. Sess. Laws, ch. 301, § 10.

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A.R.S., defines a “dangerous instrument” as “anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.” “‘Serious physical injury’ includes physical injury that creates a reasonable risk of death, or causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.” § 13-105(38).

¶6 Zimmer was charged with five counts of aggravated assault. Count four of cause number CR201100522 charged Zimmer with assault of D.H., aggravated pursuant to § 13-1204(A)(6)², because Zimmer was over eighteen years of age and D.H. was fifteen years of age or under. Count one of cause number CR201200306 charged Zimmer with committing an assault on D.H., aggravated pursuant to § 13-1204(A)(2) by Zimmer’s use of a dangerous instrument, to wit, a frying pan. The remaining charges, counts one through three of cause number CR201100522, charged Zimmer with assaults to D.H., J.R., and S.C., aggravated by Zimmer’s entry of a private home with the intent to commit the assault, pursuant to § 13-1204(A)(5).

¶7 Zimmer first argues there was insufficient evidence to convict him of count four because, during D.H.’s testimony, “D.H. pointed to a spot where he stated he was hit” and “[i]t was nowhere near the areas of the head the physician testified there was a bruise.” There was ample evidence presented, however, to support Zimmer’s conviction for count four. It is undisputed that D.H. was fourteen years old and that Zimmer was over eighteen years old at the time of the offense. D.H. testified that Zimmer hit him on the side of the head with a frying pan and proceeded to kick him after he fell to the ground. The emergency room physician who examined D.H. on the

²Section 13-1204, A.R.S., has been amended once since the date of the offenses. *See* 2011 Ariz. Sess. Laws, ch. 90, § 6. We apply the version in effect at the time of the offenses. *See* 2010 Ariz. Sess. Laws, ch. 276, § 2.

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night of the offense testified that D.H. was lethargic and that he had a hematoma on the back of his scalp along with “bruising and abrasions about his upper torso on the back up around the shoulder blades.” J.R. also testified that she saw Zimmer kicking D.H. as he was on the ground.

¶8 Zimmer essentially asks us to reweigh the evidence and reevaluate D.H.’s credibility. We decline to do so. *See State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997, 1019 (2000) (trial court in best position to evaluate witness credibility and weigh evidence); *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (appellate court does not reweigh evidence on review). To the extent that there were any conflicts about the location of D.H.’s head injury, we resolve “such conflicts in favor of sustaining the verdict and against [Zimmer].” *Guerra*, 161 Ariz. at 293, 778 P.2d at 1189. Thus, there was sufficient evidence to convict Zimmer of count four.

¶9 Zimmer next argues that there was insufficient evidence to convict him of aggravated assault against D.H. in CR201200306 because “the manner in which the dangerous instrument, to wit, a frying pan, was used was not readily capable of causing death or serious physical injury.” Zimmer argues the result of the assault, “merely a bump on the head,” was insufficient. Zimmer does not address the expert opinion of the treating physician that the beating with a frying pan resulted in a concussion to D.H., which could have lead to serious physical injury or death. The expert testimony was sufficient for a jury to find aggravated assault using a dangerous instrument. The jury could reasonably conclude from the physician’s testimony that when used to cause a concussion, the frying pan was readily capable of causing serious physical injury. *See State v. Molina*, 211 Ariz. 130, ¶¶ 11-12, 118 P.3d 1094, 1098 (App. 2005) (lighter fluid dangerous instrument readily capable of causing serious physical injury where it was used to burn victim and physician testified that second- and third-degree burns can be life-threatening if left untreated); *In re Pima Cnty. Juv. Action No. 97036-02*, 164 Ariz. 306, 312, 792 P.2d 769, 775 (App. 1990) (physician’s testimony that striking young child with belt could cause serious physical injury and possibly death sufficient to support aggravated

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assault adjudication). Moreover, to the extent Zimmer's argument suggests D.H.'s medical condition was insufficient under A.R.S. § 13-105(A)(12), it was not necessary for the state to prove actual serious physical injury. *See Molina*, 211 Ariz. 130, ¶ 10, 118 P.3d at 1097 ("Whether a victim actually suffered a serious physical injury is not an essential element of aggravated assault"; rather, the offense can be committed if the defendant used a dangerous instrument to inflict "any physical injury to another person."). Therefore, rational jurors could have found Zimmer guilty beyond a reasonable doubt.

¶10 Finally, Zimmer argues there was insufficient evidence to convict him of counts one, two, and three because the evidence did not establish that he entered the home with intent to commit an assault, and he never made it into the private home, precluding aggravation pursuant to § 13-1204(A)(5). The evidence showed that all three victims were physically injured. There was testimony that Zimmer forcibly entered the home and that he did so intending to assault someone. In addition, J.R. testified that Zimmer had both feet inside the house when he kicked her and D.H. The evidence established that Zimmer gained entry to the house as required by § 13-1204(A)(5) and therefore was sufficient to support Zimmer's convictions.

Disposition

¶11 For the foregoing reasons, we affirm Zimmer's convictions and sentences.