IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID WAYNE BROWN,
Appellant.

No. 2 CA-CR 2016-0018
Filed January 12, 2017

Appeal from the Superior Court in Pima County
No. CR20141321001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
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Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Judge:

¶1 After a jury trial, David Brown was convicted of three counts of armed robbery. The trial court sentenced him to concurrent prison terms of 9.25 years. On appeal, Brown argues the state presented insufficient evidence to support his convictions. He also contends the court erred by giving a jury instruction that commented on the evidence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Brown's convictions. *See State v. Almaguer*, 232 Ariz. 190, ¶ 2, 303 P.3d 84, 86 (App. 2013). One night in April 2013, Brown walked into a convenience store in east Tucson and asked the clerk, D.S., for cigarettes. As D.S. rang up the cigarettes, Brown demanded money from the cash register. D.S. noticed a bulge in Brown's pocket, which Brown was grabbing at as he told D.S. that he had a gun. After Brown threatened to shoot, D.S. gave Brown the cigarettes and approximately $100 cash.

¶3 The next night, Brown walked into another eastside convenience store, asked for cigarettes, and then demanded money. Brown told the clerk, K.L., that he had a gun, and he "put[] his hand in his pocket to indicate" as much. K.L. complied, and Brown left with the cigarettes and less than $30 cash.

¶4 The following night, Brown walked into another eastside convenience store, asked for a couple packs of cigarettes, and then told the clerk, Z.T., to "open up the register." Brown threatened to shoot, and Z.T. noticed a "gun shaped" bulge in Brown's waist area that he kept grabbing. After Z.T. pretended to

press a panic button to alert the police, Brown grabbed the cigarettes off the counter, along with some nearby candy, and left the store.

¶5 A grand jury indicted Brown for three counts of armed robbery. He was convicted as charged and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Sufficiency of the Evidence

¶6 Brown argues the state presented insufficient evidence to support his armed robbery convictions. We review de novo the sufficiency of the evidence. *State v. Snider*, 233 Ariz. 243, ¶ 4, 311 P.3d 656, 658 (App. 2013). "[T]he relevant question is 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). We will reverse only if no substantial evidence supports the conviction. *State v. Rivera*, 226 Ariz. 325, ¶ 3, 247 P.3d 560, 562 (App. 2011). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*, *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence may be direct or circumstantial. *State v. Fischer*, 219 Ariz. 408, ¶ 42, 199 P.3d 663, 674 (App. 2008).

¶7 A defendant commits robbery if, "in the course of taking any property of another from his person or immediate presence and against his will, such [defendant] threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." A.R.S. § 13-1902(A). The offense is elevated to armed robbery if,

> in the course of committing robbery as defined in § 13-1902, [the defendant] or an accomplice:

> 1. Is armed with a deadly weapon or a simulated deadly weapon; or
>
> 2. Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon.

A.R.S. § 13-1904(A).

¶8 As he did below, Brown maintains that his armed robbery convictions must be reduced to simple robbery convictions because the state failed to present substantial evidence of a deadly weapon or simulated deadly weapon. According to Brown, the issue is "whether a hand under clothing can be a 'simulated deadly weapon'" for purposes of § 13-1904(A). The parties agree that *State v. Garza Rodriguez*, 164 Ariz. 107, 791 P.2d 633 (1990), and *State v. Bousley*, 171 Ariz. 166, 829 P.2d 1212 (1992), are the key cases on this issue.

¶9 In *Garza Rodriguez*, the defendant was charged with two counts of armed robbery. 164 Ariz. at 108, 791 P.2d at 634. In the first incident, the defendant approached the counter at a gas station and, "keeping her right hand out of sight, told the cashier to give her all of his money." *Id.* After the defendant said she was serious and would "shoot the smile off" the cashier's face, he gave her about $40. *Id.* In the second incident, at a nearby convenience store, the defendant "approached the clerk and told him to give her his money." *Id.* The defendant stated she had a gun, and the clerk testified that the defendant was "moving her hands back and forth under the serape she was wearing." *Id.* The clerk gave the defendant about $30, and she left. *Id.* The jury found the defendant guilty of armed robbery for the first incident and simple robbery for the second. *Id.*

¶10 On appeal, the defendant argued the state had presented insufficient evidence to support the armed robbery conviction for the first incident. *Id.* Our supreme court agreed, reducing the conviction to simple robbery. *Id.* at 112-13, 791 P.2d at 638-39. In relevant part, the court explained that "a weapon, whether it be an actual deadly weapon, a dangerous instrument, or a

simulated deadly weapon, must actually be present and used in a threatening manner to satisfy the 'threatens to use' element of the armed robbery statute." *Id.* at 112, 791 P.2d at 638. The court observed, "Although the first victim testified that [the] defendant implied the existence of a gun by saying she would 'shoot the smile off his face,' he never saw a weapon." *Id.*

¶11 Two years later, in *Bousley*, our supreme court clarified its reasoning in *Garza Rodriguez*. There, two defendants—Bousley and Ellison—each entered plea agreements on two counts of armed robbery. *Bousley*, 171 Ariz. at 166-67, 829 P.2d at 1212-13. According to the factual bases for Bousley's pleas, he entered a convenience store, "held his hand under his clothing in such a way that he appeared to have a handgun in his pocket," and demanded money. *Id.* at 167, 829 P.2d at 1213. The clerk locked the register, and Bousley grabbed cigarettes as he left. *Id.* That same day, Bousley entered another convenience store, "positioned his hand under his clothing in a way that made it appear as if he had a handgun under his shirt," and demanded money from the clerk. *Id.* After Bousley threatened to "blast" the clerk, she opened the register. *Id.* Bousley took $100 and left in a car driven by Ellison. *Id.* According to the factual bases for Ellison's pleas, Ellison and Bousley entered a gas station, demanded money from the clerk, and took $74 from the register. *Id.* "During the course of the robbery, both Ellison and Bousley held their hands under their clothing in such a way that they appeared to have handguns in their pockets." *Id.* The factual basis for Ellison's second conviction matched that of Bousley's. *Id.*

¶12 On appeal, the supreme court evaluated "whether [the] defendants' conduct satisfie[d] the elements of § 13-1904." *Bousley*, 171 Ariz. at 168, 829 P.2d at 1214. The court recognized its prior holding in *Garza Rodriguez* but pointed out that "[t]he crucial fact" in that case was that "nothing resembling a weapon was actually present; the defendant simply implied that she had a gun when she threatened to 'shoot the smile off' the cashier's face." *Bousley*, 171 Ariz. at 168, 829 P.2d at 1214. The court noted, in contrast, the defendants in *Bousley* had done more—"they positioned their hands under their clothing in such a way that they appeared to have deadly weapons." *Id.* Thus, the court concluded that "simulated

deadly weapons were actually present" and affirmed the defendants' convictions. *Id.*

¶13 Brown attempts to distinguish this case from *Bousley*. He argues that, because *Bousley* involved plea agreements, "[t]he only proposition [that case] stands for is that it is *theoretically possible* for a hand under clothing to be a simulated deadly weapon." He further asserts that *Garza Rodriguez* "shows that this theoretical possibility is speculative in a jury trial setting."

¶14 Brown is correct that the factual basis needed to support a guilty plea is different from the state's burden of proof in a criminal trial. *See State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994) (factual basis for guilty plea "can be established by 'strong evidence' of guilt and does not require a finding of guilt beyond a reasonable doubt"), *quoting State v. Wallace*, 151 Ariz. 362, 365, 728 P.2d 232, 235 (1986); *see also State v. Edmisten*, 220 Ariz. 517, ¶ 6, 207 P.3d 770, 773 (App. 2009) (state's burden in criminal trial to prove defendant's guilt beyond reasonable doubt). However, Brown's reliance on this concept is misplaced because *Bousley* did not address, much less base its holding on, this distinction. Rather, it addressed the legal question of whether the statutory elements for the offense had been satisfied. *See State v. Ault*, 157 Ariz. 516, 520, 759 P.2d 1320, 1324 (1988) (legal question does not depend on merits of alternative versions of facts). Specifically, the supreme court held that "a defendant may be convicted of armed robbery under . . . § 13-1904 when he commits robbery while positioning a part of his body under his clothing in such a way that he appears to have a deadly weapon." *Bousley*, 171 Ariz. at 167, 829 P.2d at 1213. This holding applies equally in criminal trials.

¶15 Here, the state presented evidence of a simulated deadly weapon during each of the robberies. *See* § 13-1904(A); *cf. Bousley*, 171 Ariz. at 168, 829 P.2d at 1214 (finding "defendants did more than simply imply that they had guns" and describing conduct that falls under § 13-1904(A)(1) and (2)). Specifically, as to the first robbery, D.S. testified that Brown was "grabbing at his pocket" when he "said . . . he had a gun." D.S. further explained that Brown had a bulge in his pocket and threatened to shoot him. As to the second robbery, K.L. testified that Brown told her he had a gun and

"put his hand in his pocket to indicate" that he did. She confirmed that, when Brown "put [his hand] in a fist shape and put it in his pocket," she thought he "was trying to show [her] that he had a gun." And as to the third robbery, Z.T. testified that Brown threatened to shoot him, "put his hand in his pocket, and . . . was clearly tugging on something" that "looked like a handle." Z.T. also described a "gun shaped" bulge in Brown's clothing. He explained that Brown referred to a "banger . . . but his motion in general made [Z.T.] know . . . he was talking about" a gun.

¶16 Brown nevertheless contends that in *Garza Rodriguez* the clerks "did not believe the defendant had a gun, but in *Bousley* that information is not available." He reasons that this case is therefore akin to *Garza Rodriguez* because the clerks did not believe Brown had a gun. We disagree. Z.T. testified that, although he "never actually saw . . . a gun," he nonetheless thought Brown "had a gun." Admittedly, D.S.'s and K.L.'s testimony was not so clear. However, they both made numerous statements that Brown suggested he had a gun, and, when combined with Brown's hand gestures, the jury could infer that the clerks therefore believed he had a gun. *See Fischer*, 219 Ariz. 408, ¶ 42, 199 P.3d at 674; *cf. Snider*, 233 Ariz. 243, ¶ 10, 311 P.3d at 659 (jury could infer defendant used or threatened to use force during commission of offenses). Indeed, the jury also saw video recordings and photographs of the robberies to judge the situations for themselves. To the extent the clerks gave conflicting testimony, "it was for the jury to weigh the evidence and determine the credibility of the witnesses." *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004).

¶17 Simply put, Brown did more than the defendant in *Garza Rodriguez* to suggest to the victims that he had a deadly weapon. In *Garza Rodriguez*, in the first robbery, the defendant never made any movements indicating she had a gun and only threatened to "shoot the smile off" the cashier's face. 164 Ariz. at 108, 791 P.2d at 634. In the second robbery, the defendant only moved her hands back and forth. *Id.* The clerks did not describe a "bulge" in, or any "grabbing" of, the defendant's pocket. *See id.* Here, however, the clerks consistently described Brown as saying he

had a weapon and as physically placing his hand in or near his pocket in such a way to suggest he had one.

¶18 In sum, "[t]he fact that [Brown] . . . did not use an 'article'" to imitate a weapon "is immaterial." *State v. Ellison*, 169 Ariz. 424, 427, 819 P.2d 1010, 1013 (App. 1991), *approved by Bousley*, 171 Ariz. at 168, 829 P.2d at 1214. "The victim's perception is the same whether the weapon appears to be or is in fact real; the perpetrator has created 'a life endangering environment' with the same 'potential for increased danger to, or sudden and violent reaction by, the victim or bystanders.'" *Id.*, *quoting Garza Rodriguez*, 164 Ariz. at 111, 791 P.2d at 637. Viewing the evidence in the light most favorable to sustaining the verdicts, substantial evidence exists from which a reasonable jury could conclude that Brown was armed with, used, or threatened to use a simulated deadly weapon under § 13-1904(A). *See Snider*, 233 Ariz. 243, ¶ 4, 311 P.3d at 658.

¶19 As to the third robbery, Brown also contends that his conviction should be reduced to theft because Z.T. "bent down beneath the counter" and "any property taken on the way out the door by . . . Brown was not from . . . [Z.T.]'s 'immediate presence' as defined in the robbery statute." Because he did not make this argument below, Brown has forfeited review for all but fundamental, prejudicial error. *See State v. Rhome*, 235 Ariz. 459, ¶ 4, 333 P.3d 786, 787 (App. 2014); *see also State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005) (conviction based on insufficient evidence constitutes fundamental error). Brown therefore "must establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). However, Brown has cited no authority in support of his position, and we are aware of none. Moreover, the surveillance video shows that Z.T. did not bend down beneath the counter until Brown had exited the store. And even assuming Brown was not in Z.T.'s immediate presence when he took the candy on his way out of the store, the evidence nonetheless shows that Brown took the cigarettes from the counter while Brown was standing directly in front of Z.T. and threatening him. *See* §§ 13-1902(A), 13-1904(A); *cf. State v. Waller*, 235 Ariz. 479, ¶ 36, 333 P.3d 806, 817 (App. 2014) (facts amply supported jury finding that

defendant intentionally placed another in reasonable apprehension of imminent physical injury). Brown has therefore not met his burden of showing fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Jury Instruction

¶20 Brown next contends the trial court erred "by giving a jury instruction on armed robbery that commented on the evidence and by denying the motion for new trial based on that legal error." We review the decision to give a jury instruction for an abuse of discretion, but we review de novo whether it accurately states the law. *State v. Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d 786, 787 (App. 2008). We also review the denial of a motion for a new trial for an abuse of discretion. *State v. West*, 238 Ariz. 482, ¶ 12, 362 P.3d 1049, 1055 (App. 2015).

¶21 Relying on *Garza Rodriguez*, Brown asked the trial court to include the following as part of the armed robbery instruction: "The mere verbal threat to use a deadly weapon where the defendant does not possess or have within his immediate control a deadly weapon, dangerous instrument or simulated weapon is insufficient for a conviction of armed robbery." The court agreed to give the requested instruction but, based on *Bousley*, also indicated that it was going to add, "A 'simulated deadly weapon' can be a hand held under clothing giving the appearance of a handgun." Brown objected, arguing that the simulated deadly weapon instruction amounted to a comment on the evidence and violated his due process rights. The court overruled the objection, noting that "it's not a comment on the evidence, . . . it's the law." The final jury instructions included both statements.

¶22 Brown subsequently filed a motion for a new trial, arguing the simulated deadly weapon instruction based on *Bousley* "was an incorrect statement of the law and a comment on the evidence." He also argued it was improper to use language from an appellate decision as a jury instruction. After hearing oral argument, the trial court denied the motion.

¶23 On appeal, Brown again maintains the trial court erred by commenting on the evidence through the simulated deadly weapon instruction. Specifically, he contends the court "took language from *Bousley* to add to the standard jury instruction," which "drew the jury's attention directly to the specific facts of this case in a manner that essentially directed three guilty verdicts for the charged offenses."

¶24 The Arizona Constitution prohibits trial courts from commenting on the evidence to the jury. *See* Ariz. Const. art. VI, § 27 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."); *see also State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998) ("The constitution prohibits the sort of judicial comment upon the evidence that would interfere with the jury's independent evaluation of that evidence."). However, it does not forbid trial courts from "making reference to the evidence." *State v. Barnett*, 111 Ariz. 391, 393, 531 P.2d 148, 150 (1975).

¶25 Here, the simulated deadly weapon instruction was not a comment on the evidence. *See id.* The instruction did not express an opinion, *see State v. Hopkins*, 108 Ariz. 210, 211, 495 P.2d 440, 441 (1972) ("[T]he word 'comment' as used in the Constitution has the usual connotation of an expression of opinion."), or "suggest to the jury that the evidence should lead them to any particular result," *Rodriguez*, 192 Ariz. 58, ¶ 30, 961 P.2d at 1012. Although the instruction referred to the evidence generally, that was permissible. *See Barnett*, 111 Ariz. at 393, 531 P.2d at 150.

¶26 Brown also asserts that "[t]he error in commenting on the evidence was compounded" because the language was "not a correct statement of the law." Brown again argues, "*Bousley* merely holds that, under the circumstances of that case, the hands under clothing was a sufficient factual basis to support defendants' . . . pleas, because those defendants supplied evidence of such circumstances through their . . . pleas."

¶27 "[W]e have long discouraged jury instructions that quote verbatim from appellate opinions." *State v. Martinez*, 175 Ariz. 114, 120, 854 P.2d 147, 153 (App. 1993). However, so long as the

instructions properly reflect the law, we will find no error. *State v. Rutledge*, 197 Ariz. 389, ¶ 11, 4 P.3d 444, 447 (App. 2000).

¶28 The simulated deadly weapon instruction given by the trial court in this case properly reflected the law. As discussed above, the supreme court concluded in *Bousley* that a defendant may be convicted of armed robbery "when he commits robbery while positioning a part of his body under his clothing in such a way that he appears to have a deadly weapon." 171 Ariz. at 167, 829 P.2d at 1213. This is consistent with the instruction in this case, the language of which is included verbatim in the comment to Revised Arizona Jury Instructions ("RAJI") Statutory Criminal 19.04 (armed robbery) (4th ed. 2016).

¶29 Moreover, the trial court instructed the jury that a simulated deadly weapon "can be" a hand held under clothing appearing to be a handgun. And the court also instructed the jury that it had to determine "the facts from the evidence" and decide each offense "on the evidence with the law applicable to it." *See State v. Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d 91, 103 (2007) (we presume jurors follow their instructions). Thus, contrary to Brown's suggestion otherwise, the instruction did not necessarily require the jury to return a guilty verdict if it found Brown "put his hand in his pocket and claimed to have a gun."

¶30 Accordingly, the trial court did not err by giving the simulated deadly weapon instruction. *See Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d at 787. Nor did it abuse its discretion by denying the motion for a new trial. *See West*, 238 Ariz. 482, ¶ 12, 362 P.3d at 1055.

Disposition

¶31 We affirm Brown's convictions and sentences.