IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GEORGE GUESS DODSON II,
Appellant.

No. 2 CA-CR 2016-0192
Filed June 2, 2017

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NOT FOR PUBLICATION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. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Gila County
No. S0400CR201500257
The Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED

COUNSEL

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Joseph T. Maziarz, Chief Counsel, Phoenix
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Counsel for Appellee

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Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Miller and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, George Dodson was convicted of weapons misconduct and four counts of aggravated assault. On appeal, Dodson argues that the trial court erred by admitting certain evidence and that insufficient evidence supported the jury's verdicts on three of the aggravated assault counts. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In April 2015, Dodson entered J.B.'s home while J.B. was lying in his bed. Once in J.B.'s room, Dodson "grabbed [J.B.'s] knife" and "drug it across [J.B.'s] gut," leaving a "red mark." J.B. hit Dodson on the head with a "thumping stick," escorted him out of the house and called 9-1-1 to report a disturbance. Officers with the Payson Police Department (PPD) arrived shortly thereafter. Dodson was outside J.B.'s house when the officers arrived and, upon seeing them, ran back to his home less than a mile away.

¶3 After Dodson arrived home, approximately fifteen PPD officers surrounded his house. A standoff ensued that lasted about twelve hours, during which Dodson frequently shouted at the officers, threatened to shoot them, and stated they were "going to go out in a ball of flame." He also appeared at various times holding knives and a pellet gun. Crisis negotiators attempted, unsuccessfully, to persuade Dodson to leave the house "peacefully and unarmed."

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[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

Officers also deployed teargas at least twenty-seven times, but Dodson still refused to leave.

¶4 At one point, Dodson threw a Molotov cocktail[2] out of a window and toward three officers. It hit the ground near the officers, "erupted into [a] flame," and started a fire roughly six feet in diameter. Officers were able to extinguish the fire about twenty minutes later.

¶5 Eleven hours after the standoff began, officers with the Arizona Department of Public Safety (DPS) arrived at the residence. They deployed a canister of "pepper spray vapor" into the house, and, approximately four minutes later, Dodson threw the canister back outside. After DPS officers deployed a second, stronger canister of teargas, Dodson left the house, and officers arrested him.

¶6 A grand jury indicted Dodson on one count of aggravated assault with a knife, three counts of aggravated assault with a "makeshift incendiary bomb," and one count of misconduct involving weapons. A jury found Dodson guilty of all charges. The trial court sentenced him to consecutive and concurrent terms of imprisonment totaling sixty-four years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Admission of Evidence

¶7 Dodson first argues the trial court erred by admitting into evidence a pellet gun,[3] a photograph of that pellet gun, and four

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[2] An officer testified that a Molotov cocktail is "an item of flammable liquids that's been started on fire in a bottle." *See Molotov cocktail*, The American Heritage Dictionary (5th ed. 2011) ("Molotov cocktail" is "[a] makeshift bomb made of a breakable container filled with flammable liquid and provided with a usually rag wick that is lighted just before being hurled.").

[3] In his opening brief, Dodson describes exhibit 92 as "a photograph of a pellet gun." But that exhibit was the actual pellet gun found inside Dodson's home. Dodson also describes exhibit 67 as "a photograph of a black rifle with a scope." Exhibit 67, however, was a

other photographs depicting weapons[4] found inside his home. He contends the evidence was not relevant and was unfairly prejudicial. We review a court's ruling on the admission of evidence for an abuse of discretion, *State v. Payne*, 233 Ariz. 484, ¶ 56, 314 P.3d 1239, 1258 (2013), viewing "the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect,'" *State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998), *quoting State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989).

¶8 Evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Ariz. R. Evid. 401. Photographic evidence, in particular, may be relevant "to prove the corpus del[i]cti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, [or] to

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photograph of the pellet gun. Officers testified they had seen Dodson holding what they believed to be a rifle with an attached scope during the standoff but during the later search of Dodson's home discovered it was, in fact, a pellet gun with an attached scope. Despite these inaccuracies, we construe Dodson's arguments to be objections to the admission of the photograph of the pellet gun and the pellet gun itself.

[4] Dodson also argues the trial court erred by admitting a photograph of his "injured leg purportedly consistent with [the] deployment of 40mm rounds." He appears to contend the photograph was used to demonstrate he possessed that type of ammunition and was therefore irrelevant because "no count alleged the use or possession of . . . ammunition." The exhibit, however, was introduced during the testimony of an officer who had deployed several rounds of a non-lethal "40mm neoprene foam baton[]" at Dodson to show the "exact areas where he made the deployment." The state never argued that Dodson possessed this type of ammunition, and the testimony clearly shows the officer deployed this ammunition at Dodson. Because Dodson's argument on this issue is premised on a misstatement of what the evidence shows, we do not address it further.

illustrate or explain testimony." *State v. Anderson*, 210 Ariz. 327, ¶ 39, 111 P.3d 369, 381-82 (2005), *quoting State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983).

¶9 Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403. "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). The trial court "has considerable discretion in determining whether the probative value of the evidence is substantially outweighed by its unfairly prejudicial effect." *State v. Gilfillan*, 196 Ariz. 396, ¶ 29, 998 P.2d 1069, 1078 (App. 2000).

¶10 The photograph of the pellet gun and the pellet gun itself were clearly relevant, as they corroborated the testimony of the officers that had seen Dodson holding it while in the house. *See Anderson*, 210 Ariz. 327, ¶ 39, 111 P.3d at 381-82. In this context, the photographs did not "suggest decision on an improper basis, such as emotion, sympathy, or horror." *Mott*, 187 Ariz. at 545, 931 P.2d at 1055. The trial court therefore did not abuse its broad discretion in concluding that the probative value of the evidence was not "substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403; *see also Gilfillan*, 196 Ariz. 396, ¶ 29, 998 P.2d at 1078.

¶11 The other four photographs Dodson contends were erroneously admitted depict: (1) a knife lodged in a wall inside Dodson's house, (2) a buck knife—found inside Dodson's house—lying on a sidewalk, (3) a "spear," which consisted of a knife duct-taped to the end of a pipe, as found in Dodson's bathroom, and (4) a close-up of the spear in the bathroom. None of the officers testified they had seen Dodson with the two knives[5] or the spear depicted in

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[5]Officers testified they had seen Dodson with a "buck knife" and "long-bladed knife" during the standoff, one of which was admitted into evidence without objection by Dodson. None of the officers, however, positively identified the two knives depicted in these photographs as matching the knives they saw Dodson holding.

the photographs, but instead they explained they found those items during the search of Dodson's home after he was arrested.

¶12 Dodson contends these photographs were not probative of any of the charged offenses and "impermissibly cast [him] as a dangerous person," relying on *United States v. Hitt*, 981 F.2d 422 (9th Cir. 1992). At issue in *Hitt* was whether the defendant had internally modified a rifle in such a way that it became a machine gun. *Id.* at 423. The trial court admitted, over the defendant's objections, a photograph depicting the exterior of the rifle, as well as a dozen other weapons belonging to the defendant's roommate. *Id.* On appeal, the court found the probative value, if any, of the photograph was "exceedingly small" because it revealed nothing about the disputed issue: whether the internal parts of the gun were dirty, worn, or defective. *Id.* at 423-24. Furthermore, the photograph "was fraught with the twin dangers of unfairly prejudicing the defendant and misleading the jury" because the jury likely assumed that the additional weapons also belonged to the defendant. *Id.* at 424. "Once the jury was misled into thinking all the weapons were [the defendant's], they might well have concluded [he] was the sort of person who'd illegally own a machine gun, or was so dangerous he should be locked up regardless of whether or not he committed this offense." *Id.*

¶13 The state argues *Hitt* is distinguishable because the photographs here "were highly relevant to prove [Dodson's] intent to place the officers in reasonable apprehension and to corroborate the officers' versions of events." It also points out that the photographs provide evidence that Dodson had barricaded furniture inside his home during the standoff.

¶14 However, the photographs did not corroborate the officers' testimony because none of the officers testified that they saw Dodson holding the knives depicted in the photos. Additionally, the fact that Dodson had those weapons in his home is only marginally relevant, if at all, to whether he threw the Molotov cocktail towards the officers with the intent to place them in "reasonable apprehension of imminent physical injury." A.R.S. § 13-1203(A)(2). Moreover, only two of the photographs even remotely show that Dodson had barricaded himself inside—both depict a sign placed in front of a

window and one also appears to show a cabinet blocking access to the kitchen. We therefore find the state's attempts to distinguish *Hitt* on these grounds unavailing.

¶15 In any event, any potential error in admitting the photographs was harmless beyond a reasonable doubt. *See State v. Lizardi*, 234 Ariz. 501, ¶ 19, 323 P.3d 1152, 1157 (App. 2014). An error is considered harmless "if we can say, beyond a reasonable doubt, that [it] did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). This review involves a "case-specific factual inquiry," *id.*, and, unless overwhelming evidence supports the jury's verdicts, often involves considering a variety of factors, *State v. Romero*, 240 Ariz. 503, ¶¶ 8-9, 381 P.3d 297, 302 (App. 2016).

¶16 As to the three counts of aggravated assault against the officers, overwhelming evidence supported the jury's verdicts that Dodson "[i]ntentionally plac[ed]" the officers "in reasonable apprehension of imminent physical injury" by using something "designed for lethal use" or "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," here, a Molotov cocktail. A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2), 13-105(12), (15); *see also Romero*, 240 Ariz. 503, ¶¶ 9-10, 381 P.3d at 302 (overwhelming evidence "alone may be dispositive" in harmless error review). Similarly, overwhelming evidence established that Dodson "commit[ed] misconduct involving weapons by knowingly" possessing "[a] breakable container that contains a flammable liquid with a flash point of one hundred fifty degrees Fahrenheit or less and that has a wick or similar device capable of being ignited."[6] A.R.S. §§ 13-3101(A)(8)(vi), 13-3102(A)(3).

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[6] The jury initially was instructed that a prohibited weapon "means an item that is a bomb and an explosive incendiary," *see* § 13-3101(A)(8)(a)(i), and "a breakable container that contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less, and has a wick or similar device capable of being ignited," *see* § 13-3101(A)(8)(a)(vi). But before the jury received its final instructions, the state requested the trial court remove the "bomb and

¶17 Five hours into the standoff, Dodson, who was alone in the house, shouted, "I got something for you. I got a present," after which a "ball of flame" came flying from one of Dodson's windows towards Officer Witt, Sergeant Van Camp, and Detective Varga. Just before Dodson threw the Molotov cocktail, Varga, who had been sitting in an armored vehicle parked close to Dodson's house, saw an arm come out of a window holding onto the Molotov cocktail, swing it in his direction, and then "propel[]" it upward.

¶18 Based on the Molotov cocktail's trajectory after being thrown, Witt and Van Camp testified they believed that it would have landed "on [them]" or in their "immediate vicinity" had it not hit a tree branch. Varga was in "severe apprehension . . . of [his] own safety" because that particular armored vehicle had "flammability issues," and he was concerned he would be "burned alive" if it caught fire while he was inside.

¶19 Upon hitting the ground, the Molotov cocktail "erupted into flame," breaking the container. The Molotov cocktail was later determined to be a large "plastic water bottle" containing gasoline that had a piece of paper, which had been set on fire, stuck into the opening. A criminalist testified that gasoline ignites "well beneath 150 degrees Fahrenheit."

¶20 Throughout the night, Dodson continually threatened to shoot the officers and made statements that "he [was] going out in a blaze of glory," the officers were "going to go out in a ball of flame," and "he was ready to die tonight." Several different times, officers saw Dodson with different knives and a pellet gun. He also poured gasoline "all over the ground directly outside the back door." And at another point before throwing the Molotov cocktail, Dodson had yelled, "I got a present for you," opened a door and threw a punctured can of bug spray, which he had attempted to light on fire,

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an explosive incendiary" definition from the instruction, to which Dodson did not object, and the trial court modified the instruction accordingly.

directly towards several officers, one of whom had "to duck [his] head" so that it did not hit him "in the face."

¶21 Accordingly, aside from the four photographs at issue, the remaining evidence "points with unerring consistency to one inarguable conclusion:" that Dodson intentionally placed Witt, Van Camp, and Varga in reasonable apprehension of imminent physical injury with a deadly weapon or dangerous instrument, and knowingly possessed a prohibited weapon. *Bible*, 175 Ariz. at 588, 858 P.2d at 1191. Thus, even if the photographs had been improperly admitted, they did not "tip the scales in favor of the State." *State v. Rhodes*, 110 Ariz. 237, 238, 517 P.2d 507, 508 (1973).

¶22 Dodson argues, however, this evidence cannot be characterized as overwhelming as to the aggravated assault charges against the officers because it does not foreclose the possibility that he acted with a "lesser, uncharged and uninstructed mental state" such as recklessness or criminal negligence. *See Romero*, 240 Ariz. 503, ¶ 11, 381 P.3d at 302-03 (overwhelming evidence must "preclude[] alternative theories of criminal liability"). However, Dodson's statement that he had a "present" for the officers just prior to throwing the Molotov cocktail, Varga's testimony that he saw an arm "swinging" the item in his direction prior to it being thrown, the fact that it would have landed on or near the officers had it not hit the tree branch, Dodson's previous attempt to light an aerosol can on fire and throw it directly at officers, and his continued threats towards officers throughout the night, particularly that they would go "out in a ball of flame," all demonstrate Dodson's "objective" was to place the officers in "reasonable apprehension of imminent physical injury." §§ 13-105(10)(a), 13-1203(A)(2), 13-1204(A)(2); *see also State v. Hoskins*, 199 Ariz. 127, ¶ 58, 14 P.3d 997, 1013 (2000) ("strong circumstantial evidence of defendant's guilt" rendered improper admission of evidence harmless); *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) ("Arizona law makes no distinction between circumstantial and direct evidence."). "It is simply inconceivable," *Bible*, 175 Ariz. at 589, 858 P.2d at 1192, that Dodson was merely "aware of and consciously disregard[ed] a substantial and unjustifiable risk that the result [would] occur" or "fail[ed] to perceive a substantial and unjustifiable risk," § 13-105(10)(c), (d).

¶23 Dodson also argues the evidence does not foreclose the possibility that he possessed the Molotov cocktail "merely to distract," and not to "destroy, disfigure, terrify or harass" under § 13-3101(A)(5), (8)(a)(viii). The state, however, did not allege Dodson possessed an "improvised explosive device," § 13-3101(A)(8)(a)(viii), but instead proceeded on the theory that the weapon was "[a] breakable container that contains a flammable liquid with a flash point of one hundred fifty degrees Fahrenheit or less and that has a wick or similar device capable of being ignited," § 13-3101(A)(8)(a)(vi). To the extent Dodson is arguing that the various types of prohibited weapons constitute alternative theories of liability, we reject it.

¶24 Criminal liability, as relevant here, requires the "voluntary act," A.R.S. § 13-201, of "knowingly . . . possessing . . . a prohibited weapon," § 13-3102(A)(3). Section 13-3101(A)(8)(a) defines "[p]rohibited weapon" to include nine categories of weapons; one of which includes the type the state alleged Dodson possessed and upon which the jury was instructed.

¶25 As to the conviction for aggravated assault against J.B., the evidence consisted of J.B.'s version of the events, and the fact that officers had seen Dodson outside J.B.'s home shortly after J.B. called 9-1-1 to report the incident and had found J.B.'s knife in Dodson's front pocket when he was arrested. Although this evidence, viewed in isolation, may not be overwhelming, other factors lead us to similarly conclude any potential error was harmless. *See Romero*, 240 Ariz. 503, ¶ 8, 381 P.3d at 302.

¶26 Below, Dodson argued that J.B. was simply not credible and asked the jury to consider his testimony "absolutely worthless." The photographs at issue here would not have affected the jury's ability to assess J.B.'s credibility, did not prevent Dodson from presenting his full defense on this count, and were not discussed at all by either Dodson or the prosecution during their closing arguments. *See Romero*, 240 Ariz. 503, ¶¶ 8, 14-15, 20, 381 P.3d at 302-05. Additionally, the photographs constituted only four of the more than seventy exhibits admitted during the four-day trial and were minimally discussed, thus further diminishing any prejudicial impact. *Id.* ¶¶ 8, 21. Consequently, in light of the nature of the alleged

error and its impact on the evidence related to this charge, Dodson's ability to present his complete defense on this charge, both parties' arguments, and the overall evidence presented, we are "confident beyond a reasonable doubt that the [alleged] error had no influence on the jury's judgment." *Bible*, 175 Ariz. at 588, 858 P.2d at 1191.

Sufficiency of the Evidence

¶27 Dodson next argues the trial court erred by denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. He contends the state presented insufficient evidence that he acted intentionally and that he was "the individual who threw the Molotov cocktail." We review a court's ruling on a Rule 20 motion de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶28 In our review, we view the evidence in the light most favorable to affirming the jury's verdicts and "will reverse only if there is a complete absence of substantial evidence to support the conviction." *State v. Ramsey*, 211 Ariz. 529, ¶ 40, 124 P.3d 756, 769 (App. 2005), *quoting State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). Substantial evidence is evidence that reasonable jurors "could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). We do not distinguish between direct and circumstantial evidence. *State v. Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d 51, 54 (App. 2013).

¶29 Dodson argues the state "offered no evidence . . . that would signify his intent to put officers in apprehension of imminent physical injury." However, as discussed above, *supra* ¶ 22, Dodson's statements throughout the night and just before throwing the Molotov cocktail, his earlier attempt to throw a canister lit on fire at officers, and throwing it directly towards the officers all provide substantial evidence to support the jury's verdicts on these counts. *See Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d at 54; *see also State v. Anthony*, 218 Ariz. 439, ¶ 41, 189 P.3d 366, 373 (2008) (standard for overwhelming evidence considerably more stringent than whether sufficient evidence supports verdicts).

¶30 Dodson additionally argues the state offered insufficient evidence that he was "the individual who threw the Molotov cocktail." But Dodson was the only person in the house at the time and Varga saw a hand holding and throwing the Molotov cocktail. The jury could therefore readily have inferred that Dodson threw the Molotov cocktail. *See Borquez*, 232 Ariz. 484, ¶ 13, 307 P.3d at 54.

Disposition

¶31 For the foregoing reasons, we affirm Dodson's convictions and sentences.