IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

TODD RUSSELL FRIES,
*Appellant*.

No. 2 CA-CR 2016-0244
Filed December 22, 2017

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Appeal from the Superior Court in Pima County
No. CR20140556001
The Honorable Richard S. Fields, Judge

**AFFIRMED**

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COUNSEL

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

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E S P I N O S A, Judge:

**¶1** After a jury trial, Todd Fries was convicted of multiple offenses stemming from his involvement in a number of retaliatory attacks against former clients of his power washing and resurfacing business. On appeal, he challenges the sufficiency of the evidence, argues the trial court erred in admitting certain expert testimony, and contends his sentences and convictions do not accord with the law. For the reasons that follow, we affirm.

**Factual and Procedural Background**

**¶2** We view the facts in the light most favorable to upholding the jury's verdicts. *State v. O'Laughlin*, 239 Ariz. 398, ¶ 2 (App. 2016). In 2005, after contracting with Fries to make improvements to her driveway, K.L. was unhappy with his work. For an additional fee, Fries agreed to do the work again, and some months later when K.L. was still dissatisfied, agreed, again for an additional fee, to redo the driveway a third time. K.L.'s husband, M.L., was "upset with what was going on and the redoing and not doing it correctly" and gave Fries's foreman two checks for the third job, directing that "[o]ne check was going to be put in immediately" and the other check "was going to be good 30 days later" if he was satisfied with the job. M.L. subsequently stopped payment on the second check.

**¶3** On the morning of November 1, 2008, K.L. and M.L. awoke to find their home vandalized, including graffiti spray painted on the walls; paint, oil, and packing peanuts strewn on the driveway and yard; and "dead animals all over." They later discovered their garage door had been sealed shut. K.L. and M.L. had the damage repaired, and moved out of the home in December 2008. In August 2009, K.L. and M.L.'s new home was vandalized in a manner similar to the 2008 attack. This time, however, K.L. testified that after she awoke and saw the vandalism, she felt like "something . . . got in [her] lungs, and [she] just couldn't swallow and breathe." K.L. then found she could not open the front door and the garage

door too had been sealed shut. After calling 9-1-1, the couple was assisted through the back door and over a low patio wall by sheriff's deputies.

**¶4** Sheriff's deputies arriving at the scene reported a "haze" and a "strong chemical smell in the air" near K.L. and M.L.'s home. As they got closer, they saw a bucket with a "putty-like substance" and white smoke coming from it in the backyard, and a "large plume of smoke" rising in front of the house, where they found two more buckets. The officers described "some kind of chemical coming from those buckets," and after they helped K.L. and M.L. out of their home, they donned gas masks and evacuated people from at least ten neighboring houses. In addition to the chemical cloud, other responders—including firefighters, a bomb squad, a hazardous-materials crew, and Federal Bureau of Investigation (FBI) agents—observed oil, packing peanuts, and dead animals strewn across the front yard.

**¶5** FBI agents identified Fries as a suspect and conducted interviews with several current and former employees of Fries's company who implicated him in the attacks. Following a fourteen-day trial, Fries was convicted of twenty-one felony and misdemeanor offenses, and was sentenced to a combination of consecutive and concurrent sentences totaling 24.25 years.[1] We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

**Sufficiency of the Evidence**

**¶6** Fries first argues there was insufficient evidence to support his attempted murder, kidnapping, aggravated assault, and endangerment convictions. When reviewing sufficiency of the evidence claims, we review "only to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, ¶ 6 (2005). "Substantial evidence" is that which "'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *Id.*, *quoting State v. Hughes*, 189

[1] Several convictions not at issue in this appeal stem from two separate attacks on a different victim. In April or May 2010, after M.B. had complained about Fries's work on her garage floor and pavers in her backyard, she discovered that someone had "ruined" her cars by putting glue in the gas tanks, and had thrown motor oil on the garage door, which had been glued shut. M.B.'s home was attacked a second time almost a year later, with what she described as "a brown sea of what seemed to be motor oil" containing excrement and dead animals.

Ariz. 62, 73 (1997). When considering the sufficiency of evidence, we resolve all inferences against the appellant. *Id.* To warrant reversal, "it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987).

**Attempted First-Degree Murder**

**¶7** Counts one and two of the indictment charged Fries with attempted first-degree murder of K.L. and M.L. by way of creating a toxic chemical cloud outside their home. Under A.R.S. § 13-1105(A)(1), a person commits first-degree murder if, intending or knowing that his conduct will cause death, and with premeditation, he causes the death of another. Attempt is committed by "[i]ntentionally engag[ing] in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be," or intentionally committing any act that is a "step in a course of conduct planned to culminate in commission of an offense." A.R.S. § 13-1001(A)(1)-(2). On appeal, Fries contends there was no evidence of intent to kill. He argues the offensive graffiti and littering of the yard with packing peanuts and dead animals "indicate an intent for the inhabitants of the residence to get out of the house, observe the vandalism and be grossly offended," and "[f]or that result to happen, [he] could not have had the intent to kill [K.L. and M.L.]."

**¶8** Although the theory Fries argued below and posits on appeal may be a reasonable inference from the evidence presented, an equally reasonable inference, as the state points out, was that Fries had intended that the victims see their home again vandalized by him before succumbing to the effects of the toxic gas he created. And, because stolen property and identifications of third parties had been planted at the scenes of his crimes, another inference would have been that Fries vandalized the property in an attempt to mislead law enforcement as to the identity of the perpetrator(s). As previously noted, we view the evidence in the light most favorable to upholding the convictions and resolve all reasonable inferences against Fries. *See Stroud*, 209 Ariz. 410, ¶ 6.

**¶9** Fries additionally argues, however, there was no intent to kill because neither the victims "nor anyone associated with the immediate investigation into the chemical cloud suffered any ill effects other than a brief burning sensation to their eyes and throat." But he has provided no authority for the proposition that an intended victim must sustain a life-threatening injury for the state to prove attempted murder, nor are we aware of any. In fact, our supreme court has held that "factual impossibility

is not a defense to the crime of attempt." *State v. McElroy*, 128 Ariz. 315, 317 (1981).

**¶10** Regardless, there is sufficient evidence of an intent to kill here. The bomb squad supervisor testified that fire from one of the buckets "almost effectively penetrated the house causing a structure fire inside the residence," and chemists from the FBI testified that the chemical cloud apparently released from the buckets placed both in the front and back yards of K.L. and M.L.'s residence contained chlorine, a toxic and potentially lethal substance. A member of the hazardous-materials team measured a concentration of chlorine in the garage at a level which, according to published data from the Centers for Disease Control, would have caused "irreversible or other serious, long-lasting effects or impaired ability to escape" after ten minutes of exposure. A reasonable jury could accept this evidence as sufficient to find the attempted murder convictions proven beyond a reasonable doubt.

**Kidnapping**

**¶11** Fries also challenges the sufficiency of the evidence on his kidnapping convictions. Under A.R.S. § 13-1304(A)(3), a person commits kidnapping by "knowingly restraining another person with the intent to . . . [i]nflict death, physical injury . . . , or to otherwise aid in the commission of a felony." "Restrain" means the restriction of a person's movement "without consent, without legal authority, and in a manner which interferes substantially with such person's liberty." A.R.S. § 13-1301(2).

**¶12** The record shows that after K.L. and M.L. discovered their home had been vandalized and K.L. felt effects of the chemical gas inside the house, she attempted to leave through the front door, but could not because it had been glued shut. M.L. then attempted to open the garage door, which had also been sealed from the outside. Fries points out, however, "the back door was left untouched," and the victims "were able to leave through reasonable means." The jury implicitly disagreed, as do we.

**¶13** At trial, M.L. testified that one of the smoking buckets emitting the chemical cloud was placed about four feet from the sliding back door, which prevented them from leaving that way. Sheriff's deputies eventually entered the home through that door to rescue K.L., M.L., and their dog; then, due to a smoking and "sizzling" bucket blocking the gate leading out of the backyard, they had to evacuate over the backyard wall. The victims, who were elderly and in M.L.'s case in poor health and

wearing a "halo" neck brace, had to be helped over the wall, which was "a few feet" tall. K.L. testified she would have been unable to get her husband over the wall by herself.

**¶14** As this court has previously stated, "To satisfy the plain meaning of the kidnapping statute's restraint requirement, the defendant either must move the victim from place to place or confine the victim." *State v. Latham*, 223 Ariz. 70, ¶ 15 (App. 2009). "Kidnapping is accomplished when a defendant's threat or intimidation causes a victim to move from one place to another against her will." *Id.* ¶ 20. The record before us indicates Fries's act of sealing the front and garage doors forced the victims to their backyard where one of the buckets was emitting a chemical cloud. On these facts, a reasonable jury could have found that Fries restrained K.L. and M.L.'s liberty to such a degree that the state had met its burden of proving the elements of the kidnapping charge. *See State v. Williams*, 111 Ariz. 222, 224 (1974) ("The essence of kidnap is not the distance the victim is transported but the unlawful compulsion against the will to go somewhere.").

**Aggravated Assault**

**¶15** Fries next challenges the sufficiency of evidence supporting his aggravated assault conviction for injuring K.L. and M.L.'s neighbor, C.R., with the toxic chemical cloud during the attack on the victims' home. The state alleged Fries committed that offense by assaulting C.R. with a deadly weapon or dangerous instrument. *See* A.R.S. § 13-1204(A)(2). The jury was instructed that crime could be completed in one of two ways: "Intentionally, knowingly, or recklessly caus[ing] a physical injury to another person" or "[i]ntentionally put[ting] another person in reasonable apprehension of imminent physical injury." The jury was also instructed on transferred intent, and during closing arguments the prosecutor argued that the state had proven aggravated assault because "clearly [Fries] was directing something toward the [victims, h]e was either trying to kill them, or trying to scare them," and "the intent that was towards the [victims]" could be applied to C.R.

**¶16** On appeal, Fries does not challenge the use of a deadly weapon or dangerous instrument, arguing only that there was insufficient evidence of either a physical injury or an intent to place C.R. in reasonable apprehension of imminent physical harm.[2] Regarding physical injury,

[2]The state did not elect which form of assault it was pursuing, nor did the verdict form require the jury to select the theory it found proven

Fries acknowledges "C.R. experienced some burning sensation to his eyes and throat as he encountered the cloud," but argues there was no evidence of physical injury because the "sensation was temporary."

**¶17** Our legislature has defined "[p]hysical injury" as "the impairment of physical condition." A.R.S. § 13-105(33). We interpret that definition in accordance with its ordinary meaning. *See State v. Cox*, 217 Ariz. 353, ¶ 20 (2007); *see also* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). Impair means "[t]o cause to weaken, be damaged, or diminish, as in quality," physical means "[o]f or relating to the body," and a condition is "[a] mode or state of being" or "[a] state of health." *American Heritage Dictionary* 383, 880, 1331 (5th ed. 2011). None of those definitions includes a temporal restriction, and Fries has provided no authority for reading one into the statutory definition. Because our research has revealed no authority that supports his position, and because we find nothing in the ordinary meaning of the statutory definition that would prevent a temporary injury from being considered a physical injury, *cf. State v. Higgins*, 998 P.2d 222, 224 (Or. Ct. App. 2000) (defining "impairment of physical condition" as "harm to the body that results in a reduction in one's ability to use the body or a bodily organ"), Fries has established no error in the aggravated assault conviction.

**Endangerment**

**¶18** Fries lastly challenges the sufficiency of the endangerment convictions. Count six charged him with recklessly endangering the "neighbors," and counts seven and eight charged recklessly endangering the lives of the two responding sheriff's deputies. Under A.R.S. § 13-1201, a person commits misdemeanor endangerment by recklessly endangering another person with a substantial risk of physical injury. Although Fries acknowledges that both "deputies felt some burning to their eyes and throat," he contends the "minor effects of the gas do not fit the definition of physical injury," and "since no one in the area was actually injured, neither deputy was placed at risk of substantial physical injury." Again, we disagree.

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beyond a reasonable doubt. But because Fries has not alleged this to be reversible or fundamental error, we do not address the issue further. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (fundamental error argument waived on appeal).

**¶19** Endangerment requires only a substantial *risk* of injury, not that the persons endangered actually were injured. *See Campas v. Superior Court*, 159 Ariz. 343, 345 (App. 1989). Here, several people who contacted the chemical cloud suffered actual injuries: K.L. reported difficulty breathing; M.L. experienced tearing in his eyes, a runny nose, and an irritated throat; C.R. reported a "burning" in his lungs and throat that made him cough; and a sergeant not listed as a victim in the endangerment counts experienced burning of his face, eyes, and throat. Both victim deputies testified to putting on gas masks, and one stated it was because his eyes burned and he feared for his health. K.L., M.L., and C.R. all went to the hospital because of their exposure to the chemical cloud. As previously discussed, the injuries described, albeit temporary, fall within the statutory definition of a physical injury. Accordingly, the evidence was sufficient to sustain the endangerment convictions.

**Chemical Test Evidence**

**¶20** Fries next argues the trial court reversibly erred by allowing the state to introduce evidence of chemical tests that "did not replicate the chemical reaction which caused the gas cloud at the [victims]' residence." He contends this evidence was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Arizona Rule of Evidence 702. Under Rule 702, the trial judge acts as a "gatekeeper," allowing the introduction of relevant and reliable expert testimony only. *State v. Carlson*, 237 Ariz. 381, ¶ 25 (2015). We review a trial court's ruling on the admissibility of expert testimony for an abuse of discretion, viewing the evidence in the light most favorable to its proponent and maximizing its probative value while minimizing its potential prejudice. *State v. Ortiz*, 238 Ariz. 329, ¶ 5 (App. 2015).

**¶21** At trial, an FBI chemist testified he had been asked to test the interactions of chlorine tablets, which Fries used in his business, with a number of substances investigators had discovered in a garage owned by Fries. Fries objected, arguing that because a different expert would testify that the other chemicals mixed with the chlorine tablets to produce the chemical cloud were unknown, the FBI chemist's testimony and videotape of his experiments was "immaterial" and "prejudicial." The trial court overruled the objection, concluding that the testing went to the "completeness" of the state's investigation.

**¶22** The FBI chemist testified he had conducted controlled experiments by combining a common chlorine tablet used in swimming pools with several ounces of three substances found in Fries's garage and

thought capable of producing the chemical cloud Fries created at K.L.'s second home. The experiments were recorded, and a videotape played for the jury showed that the chlorine reacted quickly to two of the three substances. The chemist explained, however, that he was not attempting to recreate the chemical cloud, but rather had put the chemicals together "to show what could occur as a result of chemical incompatibility." He further explained that it would have been "unreasonable . . . to measure concentrations of any gases given off during [the] demonstrations" because "airborne releases are almost unique events" impacted by weather and terrain, thus any measurement would not have necessarily replicated the event in this case.

**¶23** A second FBI chemist testified about another experiment involving a mixture of two chemicals and a chlorine tablet, and noted that his "hazard[] assessment" determined the experiment would create a vaporized chlorine-containing compound, which would be toxic. Lastly, an FBI analyst acknowledged he did not know exactly what was used to react with the chlorine tablets Fries used in this case to create the chemical cloud.

**¶24** As noted above, Fries argues the experiments lacked relevancy because they did not exactly reproduce the chemical cloud observed at the victims' property in 2009. The state counters that the tests were relevant "as illustrations of likely possibilities." At trial, the chemist explained that any attempt to reproduce the exact reaction would have been speculative given the locational variables and exact amount of chemicals used. Instead, the experiments were conducted, recorded, and shown to the jury to show what could occur as a result of mixing chemicals found in Fries's possession or that he had access to.

**¶25** We are unpersuaded that the experiments became irrelevant because they did not reproduce exactly the reaction initiated at the victims' property in this case. The tests were helpful illustrations of chemical reactions similar to that observed at the crime scene, utilizing materials associated with Fries, which would have been outside the common knowledge of the jury. *Cf. State v. Salazar-Mercado*, 234 Ariz. 590, ¶¶ 7, 10 (2014) ("general, educative testimony" permitted under Ariz. R. Evid. 702). Viewing the evidence in a light that maximizes its probative value, as we must, we conclude the trial court did not abuse its discretion in allowing the experimental evidence at trial.

**Duplicitous Charges**

**¶26** Fries next argues that count six, charging him with endangerment of the "neighbors," is duplicitous and must be vacated because there were several groups of people who were either evacuated or forced to remain in their homes, and the jury could have found "endangerment o[f] any of these groups of individuals." Fries argues he thus "suffered prejudice by virtue of a possibly non-unanimous verdict."

**¶27** As this court has previously noted, the endangerment statute "does not require or imply that the name or exact identity of the victim is a necessary element of the offense." *State v. Villegas-Rojas*, 231 Ariz. 445, ¶ 8 (App. 2012). Moreover, the definition of a "[p]erson," as that term is used in the criminal code, can include "a society" "as the context requires." *See* § 13-105(30). Additionally, contrary to Fries's assertion that some members of the jury could have found endangerment of neighbors who had to stay inside while others found endangerment of those who were evacuated, during closing arguments the state elected the latter category: "There's another count for endangerment, and it has to do with the neighborhood, the people who were evacuated." *See State v. Waller*, 235 Ariz. 479, ¶ 33 (App. 2014) (duplicitous charge can be remedied through state's election of act constituting crime). Thus, the record indicates the jury was unanimous that Fries had endangered the nearby residents who were evacuated from their homes by creating the toxic chemical cloud that pervaded the neighborhood for a significant period of time. We see no error, and uphold the endangerment conviction in count six.

**Double Punishment**

**¶28** Finally, Fries argues his sentence on the aggravated assault charge against neighbor C.R. constitutes double punishment because he was already serving time on a related federal conviction for using chemical weapons. In support, he relies on A.R.S. § 13-116, which proscribes double punishment for acts or omissions that are "punishable in different ways by different sections of the laws." Previous decisions, however, have interpreted the statute to apply "only to multiple prosecutions under state law." *State v. Everhart*, 169 Ariz. 404, *supp. op.*, 169 Ariz. 408, 409 (App. 1991); *see also State v. Poland*, 132 Ariz. 269, 277 (1982) ("[T]he identical elements test applies only when the State seeks convictions for more than one crime arising out of the same criminal transaction."). Fries has offered no authority or compelling reason to revisit those holdings here, and we accordingly find no error in the trial court's decision to order that Fries's aggravated assault conviction be consecutive to his federal sentence.

**Disposition**

**¶29** For the foregoing reasons, Fries's convictions and sentences are affirmed.