IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LEONARD ZARATE,
Appellant.

No. 2 CA-CR 2022-0025
Filed November 10, 2022

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20211780001
The Honorable Catherine M. Woods, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Vice Chief Judge Staring and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 Leonard Zarate appeals from his convictions and sentences for two counts of theft. He asserts there was insufficient evidence to support the convictions and the trial court erred in denying his motion for acquittal pursuant to Rule 20, Ariz. R. Crim. P. For the following reasons, we affirm Zarate's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Allen*, 253 Ariz. 306, ¶ 69 (2022). In May 2021, L.D. and A.G. were walking home with their silver backpack and a suitcase. The bags contained a stereo, groceries, books, and clothes. L.D. and A.G. had briefly walked away from the items when a U-Haul truck pulled up. Zarate jumped out and yelled, "Whose stuff is this?" L.D. and A.G. responded that it belonged to them.

¶3 Zarate told L.D. that it belonged to him now. A.G. told Zarate that the items were all they had, and when L.D. asked Zarate not to take the items, he responded that he was "going to hurt [them] or shoot [them] with a gun." L.D. and A.G. both believed Zarate would harm them if they tried to keep the items.

¶4 Zarate took the silver backpack and suitcase. Approximately fifteen minutes later, Zarate, who still had the items, was identified by an officer based on L.D.'s and A.G.'s descriptions. Inside the suitcase the officer found personal items matching A.G.'s and L.D.'s descriptions of the contents. The officer frisked Zarate and searched the area, but no weapon was ever discovered.

¶5 L.D. and A.G. later identified Zarate as the man who had taken their items and identified the items as their belongings. Zarate later admitted that he had taken the belongings from two people, but denied that there was an altercation.

¶6 The jury acquitted Zarate of two counts of armed robbery, but found him guilty of the lesser-included offenses of theft. The trial court suspended the imposition of sentence and placed Zarate on concurrent terms of probation for a period of two years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶7 On appeal, Zarate asserts there was insufficient evidence supporting his convictions and the trial court erred in denying his Rule 20 motion. We review the denial of a Rule 20 motion de novo, *Allen*, 253 Ariz. 306, ¶ 69, examining the record to determine whether substantial evidence supports the verdicts, *State v. Chappell*, 225 Ariz. 229, ¶ 11 (2010).

¶8 After the state's close of evidence, Zarate moved for a judgment of acquittal pursuant to Rule 20. He asserted the testimony from L.D. and A.G. could not be considered credible evidence to prove the elements of the crime. In support, he argued their testimony was inconsistent: L.D. had asserted they were across the street from the bags when Zarate arrived, while A.G. stated they were right next to the bags; L.D. had told the 9-1-1 operator she never saw a gun, but testified that she saw something being held out; L.D. had stated that before the incident they were at a friend's house picking up the speakers, while A.G. stated they were at an administrative office getting identification; and neither witness could clearly identify how many people were present during the incident.

¶9 Zarate also voiced concerns with L.D.'s and A.G.'s ability to perceive and remember the incident. He asserted L.D. "clearly had some major memory issues," and highlighted testimony from A.G. that L.D. had not taken her medication for schizophrenia. He stated L.D. "couldn't stay focused" at trial, muttering under her breath that "evil people come from underground" as she was leaving the courtroom. L.D. and A.G. both admitted to having used heroin the day of the incident, and A.G. stated that it was hard for him to "remember things, but then [he] recall[s] things, like, differently" due to a prior brain surgery. A.G. further testified that he did not want to sound like "some loser" and when asked if that meant that he was "just saying things that people want to hear right now," he responded "pretty much." Zarate asserted this was an admission that A.G. was saying things "without regard to the truth" and the state had failed to sufficiently rehabilitate A.G. In conclusion, Zarate noted that the state had not asked either witness to identify him at trial, relying only on the officer's identification. He asserted the officer's identification showed that he had

the bags with him at the time of arrest, but was not evidence that he was the one responsible for taking them.

¶10 In response, the state argued a reasonable juror could find Zarate guilty beyond a reasonable doubt. It first pointed to Zarate's admission that he had taken the bags. The state further noted that both L.D. and A.G. had testified that they were near their bags as Zarate was taking them and that Zarate had made threatening statements to them regarding a gun. The state acknowledged, however, there were some inconsistencies in their testimonies and did not dispute that there were credibility issues with the witnesses.

¶11 The trial court denied the Rule 20 motion. It concluded that,

> While there may be some credibility issues with the two alleged victims, if I view the evidence in the light most favorable to the State, supposedly the jury could find both of their stories about Mr. Zarate being of a certain physical description, approaching them, threatening to shoot them, blast them, mess them up, and whatever other way they both described it consistently with each other, and they both consistently claimed that it all happened in the same vicinity. So there are a lot of consistencies that if the jury accepts their testimony, the elements of armed robbery could be found by beyond a reasonable doubt.

At the end of Zarate's presentation of evidence, he renewed his Rule 20 motion, and the court again denied the motion.

¶12 On appeal, Zarate asserts the trial court erred in denying his Rule 20 motion because the primary evidence supporting the theft convictions was ambiguous.[1] He asserts that the essential testimonies of

[1]Zarate contends the court erred in denying his Rule 20 motions "as to counts one and two of the indictment," which charged armed robbery. To the extent he asserts the court erred in denying his motions regarding the armed robbery and robbery charges of which he was acquitted, we need not address the argument. *See State v. LeMaster*, 137 Ariz. 159, 165 (App. 1983) (if jury acquits defendant of charge, no need to consider denial of Rule 20 motion on appeal). An indictment constitutes a charge of the offense and

A.G. and L.D. did not amount to substantial evidence and that they were unclear and so divergent that the jury did not have a "cogent narrative of the incident."[2] He argues that no reasonable juror could reconcile the two accounts, and thus the evidence was insufficient. The state counters that it presented substantial evidence to support the theft convictions, and that "a lack of clarity or inconsistency in the evidence does not render the evidence presented any less substantial."

¶13 A trial court must grant a Rule 20 motion and enter a judgment of acquittal if, after viewing the evidence in the light most favorable to the state and resolving all reasonable inferences against the defendant, the court determines there is no substantial evidence to support a conviction. Ariz. R. Crim. P. 20; *Allen*, 253 Ariz. 306, ¶¶ 69-70; *see also State v. West*, 226 Ariz. 559, ¶ 19 (2011) (appellate court applies same standards as trial court in Rule 20 review). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Rodriguez*, 251 Ariz. 90, ¶ 16 (App. 2021) (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)). If reasonable people may fairly disagree on inferences to be drawn from the facts, evidence is substantial, and the court has no discretion to enter an acquittal. *West*, 226 Ariz. 559, ¶¶ 14, 18. Direct and circumstantial evidence should be considered, *id.* ¶ 16, and a conviction will be reversed only if there is a complete absence of probative facts supporting it, *State v. Scott*, 113 Ariz. 423, 424-25 (1976).

¶14 As relevant here, a person "commits theft if, without lawful authority, the person knowingly . . . [c]ontrols property of another with the

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those lesser offenses necessarily included. Ariz. R. Crim. P. 13.1(e); *see State v. Erivez*, 236 Ariz. 472, ¶ 21 (App. 2015). Thus, we interpret Zarate's argument to concern the theft convictions.

[2]In addition to the arguments made below, on appeal Zarate asserts that A.G. was scared to give officers an accurate account of the incident, testified that "people were constantly pointing guns at [L.D.] and himself," testified that L.D. did not recall a truck being present, and first stated the gun was a Beretta and then stated it was a Glock. Although not argued by Zarate, A.G. also testified that the man who had approached them had a tattoo on his neck, which was the main way he identified the perpetrator. The state acknowledges on appeal, however, that Zarate did not have a neck tattoo.

intent to deprive the other person of such property." A.R.S. § 13-1802(A)(1). L.D. and A.G. were near each other throughout the incident, and both testified that they told Zarate that the items belonged to them. They also both testified that they were concerned Zarate would hurt them when he took the items against their wishes. Apart from A.G.'s inaccurate description of a neck tattoo,[3] Zarate matched L.D.'s and A.G.'s descriptions, and was associated with a U-Haul truck that officers searched for a weapon. After Zarate was stopped with the items, both L.D. and A.G. identified him as the man who had taken their belongings, and both identified the property he had in his possession as theirs. Moreover, Zarate admitted to an officer that "he [had taken] the suitcase and belongings from two people."

¶15 Despite the discrepancies in L.D.'s and A.G.'s testimony, the material parts of their accounts relating to theft were consistent. Moreover, conflicts in the evidence and credibility of the witnesses are questions for the jury to resolve and do not render evidence insufficient as a matter of law. *See State v. Cox*, 217 Ariz. 353, ¶ 27 (2007) ("No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." (quoting *State v. Clemons*, 110 Ariz. 555, 556-57 (1974))); *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013) (appellate court does not reassess witness credibility); *State v. Donahoe*, 118 Ariz. 37, 42 (App. 1977) ("Evidence is not insufficient simply because testimony is conflicting."). Zarate was given the opportunity to, and did, argue against L.D.'s and A.G.'s credibility during closing argument. Viewed in the light most favorable to sustaining the verdicts, substantial evidence supported Zarate's theft convictions, and we will not reverse. *See* § 13-1802(A)(1); *Allen*, 253 Ariz. 306, ¶ 69; *Rodriguez*, 251 Ariz. 90, ¶ 16; *Scott*, 113 Ariz. at 424-25.

Disposition

¶16 For the foregoing reasons, we affirm Zarate's convictions and sentences.

[3]Even if there is no identification or physical evidence, testimony and the reasonable inferences therefrom can provide sufficient evidence to support a conviction. *See State v. Goudeau*, 239 Ariz. 421, ¶ 179 (2016).