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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALFREDO J. GALAZ, Appellant.	2 CA-CR 2008-0168 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR 2007-00644

Honorable James L. Conlogue, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, Alfredo Galaz was convicted of one count of aggravated assault and one count of disorderly conduct. The trial court sentenced him to a 7.5-year prison term for the aggravated assault charge and a consecutive, one-year term for the disorderly conduct charge. On appeal, Galaz argues the court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., and his motion for new trial pursuant to Rule 24.1, Ariz. R. Crim. P. Because the trial court did not err, we affirm.

Facts

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Galaz was riding in the backseat of a truck while Daniel S., the victim of the aggravated assault, was driving and Rosal V., Galaz's fiancée, was sitting in the front passenger seat. Another passenger, Michael S. was also sitting in the backseat. Galaz and Rosal were having an argument when Galaz produced a gun and fired a bullet through the roof of the truck. At that point, the vehicle was driving by an elementary school. Daniel pulled over at the next block and Galaz got out of the truck with Rosal. Galaz fired the gun again, this time aiming at the ground.

¶3 The state charged Galaz with three counts of aggravated assault, one for each person in the car, and two counts of disorderly conduct. One count of disorderly conduct was for recklessly handling, displaying or discharging a deadly weapon inside a vehicle, and one count was for recklessly handling, displaying or discharging a deadly weapon near an elementary school.

¶4 At trial, Daniel testified that he had heard the gun go off, that it had temporarily deafened him, and that he had turned around and had seen Galaz waving the gun back and forth. Daniel said that he had felt threatened and thought that his "life was at risk." He also testified that he was "sure" Galaz had fired a second shot at the ground after getting out of the truck.

¶5 The jury found Galaz not guilty of aggravated assault against both Michael and Rosal, but guilty of the aggravated assault against Daniel. The jury also found Galaz guilty of both disorderly conduct charges. At a subsequent hearing, however, the trial court dismissed the disorderly conduct charge related to Galaz's use of the gun inside the truck as a lesser-included offense of the aggravated assault charge. The trial court denied Galaz's motions for judgment of acquittal on the remaining charges and for a new trial.

Rule 20 Motion on Aggravated Assault

¶6 Galaz first argues the state did not present sufficient evidence to support the aggravated assault charge, *see* A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2), and therefore the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. When considering claims of insufficient evidence, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence is that which "'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005), *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 469 (1997).

"Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted). "The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶7 Galaz contends the state "failed to present any substantial evidence on the element of reasonable apprehension of [imminent] physical injury." *See* § 13-1203(A)(2). But, as recounted above, Daniel specifically testified that when he had heard the gunshot and had seen Galaz waving the gun back and forth, he had felt threatened and feared for his life. Daniel further testified that when he had looked at Michael, who was sitting next to Galaz, he could see that Michael was "just as scared as [Daniel] was." Daniel also testified as follows: "Then I was thinking, what do I do, because if I try to make any remark on this guy, I might set him off and get shot myself." This constitutes substantial evidence from which the jurors could conclude beyond a reasonable doubt that Daniel was in reasonable apprehension of imminent physical injury. *See Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913-14.

¶8 Galaz argues that Daniel's behavior in reacting to the gunshot "did not comport with someone who was in apprehension of imminent physical injury" because he did not slam on the brakes or duck down and he continued to drive. Galaz compares the evidence in this case to that presented in *State v. Baldenegro*, 188 Ariz. 10, 932 P.2d 275 (App. 1996). But as the state correctly observes, in *Baldenegro*, this court merely determined that, in the

absence of testimony from the victim, circumstantial evidence from other witnesses regarding the victim's physical reaction to a shooting was substantial evidence that the victim had been in reasonable apprehension of imminent physical injury. *Id.* at 13, 932 P.2d at 278. Here, the victim actually testified about the fear he had felt.

¶9 Without acknowledging the testimony regarding Daniel's fear, Galaz points out other portions of Daniel's testimony that arguably conflict and suggest Daniel may not have realized he was in danger until after Galaz exited the vehicle. But it was for the jury to weigh the evidence and resolve any purported contradictions. *See Cid*, 181 Ariz. at 500, 892 P.2d at 220. And, as we previously stated, Daniel's unequivocal statements that he had felt threatened while Galaz was inside the truck constitute substantial evidence that Daniel was in reasonable apprehension of imminent physical injury. *See State v. Burrell*, 106 Ariz. 100, 101, 471 P.2d 712, 713 (1970) (verdict will not be disturbed when supported by substantial evidence, even when "there are substantial contradictions and discrepancies" in evidence).

¶10 Galaz further contends that because no evidence existed to show Daniel had been aware of the gun *before* Galaz had fired the first shot, Daniel could not have been in reasonable apprehension of imminent physical injury. We again reject Galaz's additional attempt to analogize *Baldenegro* with respect to a different victim in that case. There, this court merely concluded, again in the absence of testimony from the victim, that there was insufficient circumstantial evidence to support the element of reasonable apprehension, including a lack of evidence that the victim had seen a gun before the shooting or that the

victim had reacted in any way after the shooting had begun. *Baldenegro*, 188 Ariz. at 13-14, 932 P.2d at 278-79. Here, Daniel's testimony shows that although initially he was unaware of the presence of a gun, after the first shot, Daniel had feared Galaz would shoot again and believed his life was in danger. *See State v. Sands*, 145 Ariz. 269, 275, 700 P.2d 1369, 1375 (App. 1985) (reasonable apprehension shown where initial shot caused victims to fear defendant would shoot again). Thus, substantial evidence satisfies the elements of aggravated assault through use of a deadly weapon. *See* §§ 13-1203(A)(2), 13-1204(A)(2). The trial court did not err in refusing to grant judgment of acquittal with respect to this charge.

Rule 20 Motion on Disorderly Conduct

¶11 Galaz also challenges the sufficiency of the evidence with respect to the charge of disorderly conduct. The indictment alleged that, "with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, [Galaz] recklessly handled, displayed, or discharged a deadly weapon near [an] elementary school."[1] *See* A.R.S. § 13-2904(A)(6). Galaz argues that of the three witnesses who testified, only Daniel testified to the second shot taking place after Galaz had exited the vehicle. But Daniel's testimony constitutes substantial evidence. *See Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913-

[1]Galaz additionally argues the court should have granted him a judgment of acquittal on the disorderly conduct charge related to his handling of a weapon inside the truck, which was count IV in the indictment. He contends he "stands convicted on . . . two counts of disorderly conduct." But the record unambiguously reflects that the trial court dismissed count IV as a lesser-included offense of aggravated assault and only sentenced Galaz on one count of disorderly conduct and one count of aggravated assault. Galaz's argument on this issue is moot.

14. Again, the jury weighs the evidence and assesses the credibility of witnesses. *See Cid*, 181 Ariz. at 500, 892 P.2d at 220.

¶12 Galaz also contends that, because the second shot was fired after the truck had passed the school and because Daniel did not observe any reaction from children who were outside the school when the first shot was fired inside the truck, the state did not present sufficient evidence. But Daniel testified that he pulled the truck over at the "next block" past the school. The jury reasonably could conclude that this was "near" the elementary school. *See Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 914 (reasonable inferences resolved against defendant). And when a defendant is charged with disturbing the peace of a neighborhood, "the defendant's conduct may be measured against an objective standard, and the state need not prove that any particular person was disturbed." *State v. Burdick*, 211 Ariz. 583, ¶ 8, 125 P.3d 1039, 1041 (App. 2005). The evidence that Galaz had discharged a deadly weapon one block away from an elementary school is substantial, objective evidence that Galaz engaged in disorderly conduct, disturbing the peace of that neighborhood. The trial court did not err in refusing to enter a judgment of acquittal on this charge.

New Trial Motion

¶13 Galaz next argues the trial court erred when it denied his motion for a new trial pursuant to Rule 24.1, Ariz. R. Crim. P. In that motion, Galaz claimed the verdicts were contrary to the law and the weight of the evidence and the court had erred as a matter of law in ruling on his motion in limine, resulting in substantial prejudice. *See* Ariz. R. Crim. P. 24.1(c)(1), (4).

¶14 We review the trial court's decision on a motion for new trial for an abuse of discretion. *State v. Jeffrey*, 203 Ariz. 111, ¶ 17, 50 P.3d 861, 865 (App. 2002). A new trial "is required only if 'the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime.'" *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996), *quoting Landrigan*, 176 Ariz. at 4, 859 P.2d at 114. When considering a motion for new trial, the trial court may weigh the evidence and consider the credibility of the witnesses. *State v. Clifton*, 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982).

¶15 Galaz argues that Daniel's testimony showed that his fear of injury did not arise until after Galaz had exited the vehicle, that it was essentially an "afterthought." He further points out that Rosal's and Michael's testimony completely contradicted Daniel's. But, after oral argument at a hearing on the motion, the trial court found Rosal's and Michael's testimony was "completely incredible." The court stated, "based upon the evidence presented, I find no basis to overturn the jury's decision[s] regarding the verdict[s] in this case. They are based upon sufficient evidence beyond a reasonable doubt." It was within the trial court's discretion to make these credibility determinations and to weigh the evidence presented at trial, and we conclude the court's decision was not an abuse of that discretion. *See id.*

¶16 Galaz also argues, but without relevant citation to the record,[2] that the trial court erred in denying a pretrial motion in limine to preclude the evidence that, after firing the first shot, Galaz had waved or pointed the gun at the victims. Galaz maintains that in the grand jury proceeding, the state only presented evidence that he had fired a gun and therefore firing the gun was the only permissible factual basis for the aggravated assault charge in the indictment. He argues the evidence that he had subsequently waved or pointed the gun should have been precluded as undisclosed evidence of "other acts." Galaz contends that based on the trial court's erroneous ruling, a new trial is warranted.

¶17 First, the state is not required to present all of its evidence in the grand jury proceeding. *State v. Jessen*, 130 Ariz. 1, 5, 633 P.2d 410, 414 (1981). The purpose of the grand jury is only "to determine whether there is probable cause to believe the accused committed a crime." *Id.* Second, although it is true a defendant may not be convicted of crimes that were not presented to the grand jury, *see State v. Cummings*, 148 Ariz. 588, 590, 716 P.2d 45, 47 (App. 1985), we reject Galaz's argument that firing the gun and—immediately after—waving the gun back and forth are distinct acts that had to be charged as separate offenses. *Cf. State v. Solano*, 187 Ariz. 512, 520, 930 P.2d 1315, 1323 (App. 1996) (rule that state must elect which offense to pursue for conviction does not apply "'where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense.'"), *quoting State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96,

[2]Appellant's brief must provide "appropriate references to the record." Ariz. R. Crim. P. 31.13(c)(1)(iv). This argument is therefore waived as well as without merit. *See State v. Apelt*, 176 Ariz. 349, 358, 861 P.2d 634, 643 (1993).

101 (1968). That Galaz was waving the gun around constituted evidence that Galaz had just fired the first shot and had placed Daniel in fear of imminent physical injury using a deadly weapon, not that he was committing a second act of aggravated assault. *See Sands*, 145 Ariz. at 275, 700 P.2d at 1375 (firing weapon reasonably caused victims to fear defendant would fire again). Because the trial court did not abuse its discretion in denying the motion in limine, no error of law occurred that would warrant a new trial.

Conclusion

¶18 In light of the foregoing, we conclude the court did not err in refusing to grant Galaz's motion for judgment of acquittal or in denying his motion for new trial. We therefore affirm his convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge