

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RENEE JANINE BUNGE,
Appellant.

No. 2 CA-CR 2012-0416
Filed January 28, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County

No. S0200CR201200101

The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Gail Gianasi Natale, Phoenix
Counsel for Appellant

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MEMORANDUM DECISION

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

MILLER, Judge:

¶1 Renee Bunge was convicted after a jury trial of one count of aggravated assault and one count of assault. Bunge appeals from her convictions and sentences and claims that the trial court erred in denying her motion for a judgment of acquittal and that her sentences were excessive. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In December 2010, Bunge went next door to her neighbor E.J.'s house where they, along with a mutual friend, drank beer and whiskey and smoked marijuana over the course of several hours. When the friend left, Bunge attacked E.J. by biting his chest; she also bit off the top of his right ear.

¶3 The jury found Bunge guilty of aggravated assault and assault against E.J. The trial court sentenced her to a presumptive term of 7.5 years' imprisonment for the aggravated assault, consecutive to a seventy-one-day, time-served jail term for the assault.

Sufficiency of the Evidence

¶4 Bunge argues the trial court erred in denying her motion for a judgment of acquittal made at the close of the state's case. *See* Ariz. R. Crim. P. 20. Bunge does not make a specific argument but generally contends the state "presented insufficient evidence to convict and insufficient evidence to overcome her self-defense claims." A motion for a judgment of acquittal under Rule 20

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must be granted where “there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a). We review the trial court’s denial of a Rule 20 motion de novo, “viewing the evidence in a light most favorable to sustaining the verdict,” *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993), and determining whether “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). “Substantial evidence,” as required under Rule 20, may be both direct and circumstantial. *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Further, “[w]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.” *Id.* ¶ 18, quoting *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶5 Bunge was charged with aggravated assault under A.R.S. § 13-1204(A)(1) for “caus[ing] serious physical injury to another.” Serious physical injury is defined as that which “creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.” A.R.S. § 13-105(39).

¶6 Bunge concedes that she bit E.J.’s ear but asserts the state proved “little else.” She appears to argue the state failed to present sufficient evidence that the injury was “serious” pursuant to § 13-1204(A)(1). But Bunge has failed to support her claim with meaningful argument on appeal and thus it is waived. See Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant’s brief must contain “the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to authorities, statutes and parts of the record relied on”); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (arguments must be sufficiently developed to be preserved for appeal); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (“Failure to argue a claim usually constitutes abandonment and waiver of that claim.”).

¶7 In any event, there was substantial evidence to support the conviction. E.J. testified that Bunge bit the “top of [his] ear off.”

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He also testified that he and the sheriff's deputy "looked for the end of [his] ear" but neither could find it. At trial, E.J. showed the jurors his injured ear, revealing that a portion of the top was missing. Reasonable jurors could conclude from the evidence presented, including testimony and photographs, as well as from their own observations of E.J.'s ear in court, that E.J.'s injury was serious, as contemplated by § 13-1204(A)(1). *See State v. Greene*, 182 Ariz. 576, 579-80, 898 P.2d 954, 957-58 (1995) (finding injury causing change in appearance to victim's nose was a "serious physical injury"); *State v. Pena*, 209 Ariz. 503, ¶ 9, 104 P.3d 873, 875 (App. 2005) (finding injury causing permanent scar on victim's ear was a "serious physical injury").

¶8 Bunge also asserts that the state did not present sufficient evidence to overcome her self-defense claims, arguing the verdicts were against the weight of the evidence. Bunge contends, as she did below, that E.J. had been the aggressor: slamming her down on the concrete floor, punching her, and threatening her life. Bunge testified at trial that she had bitten E.J. in order to get out from underneath him. On appeal, she essentially asks us to reweigh the evidence and determine the credibility of the witnesses; we decline to do so. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995) ("finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses").

¶9 Additionally, the state presented substantial evidence to reject the self-defense claim and to support the jury's verdict. *See id.* (appellate court "will not disturb the jury's decision if there is substantial evidence to support its verdict"). E.J. testified that Bunge had made sexual advances on him and when he refused, she bit the top of E.J.'s ear off. E.J. also testified that when he tried to stand up after being bitten on the ear, Bunge also bit him on the chest. In addition, Deputy Jackson testified that when she arrived at the scene E.J. was covered in blood, and Bunge had blood on her face and appeared to be intoxicated. When a second deputy arrived, he asked Bunge why she had E.J.'s blood on her face, and Bunge advised the deputy that she bit E.J.'s ear in an attempt to eat him.

¶10 Reasonable jurors could conclude from this evidence that Bunge had been the aggressor and had not acted in self-defense.

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See State v. Soto-Fong, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (“Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.”), quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). Notwithstanding Bunge’s conflicting testimony, the evidence presented was sufficient to sustain Bunge’s convictions. *See State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004) (where record contained conflicting evidence, jury was responsible for weighing evidence and determining credibility of witnesses).

¶11 The trial court did not err in denying Bunge’s motion for judgment of acquittal.

Propriety of Bunge’s Sentences

¶12 Bunge next contends that the trial court erred in imposing consecutive sentences. She also argues the presumptive term of 7.5 years’ imprisonment for aggravated assault is excessive and urges us to reduce her sentence, relying on *State v. Montano*, 121 Ariz. 147, 589 P.2d 21 (App. 1978). We will not disturb a sentence that is within statutory limits, unless the court clearly abused its discretion. *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001); *see also State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). “Provided the trial court fully considers the factors relevant to imposing sentence, we will generally find no abuse of discretion.” *Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357.

¶13 At sentencing, Bunge urged the trial court to impose the minimum sentence possible, arguing the minimum sentence of five years in prison on the aggravated assault conviction would be excessive under A.R.S. § 13-603(L). Section 13-603(L) provides:

If at the time of sentencing the court is of the opinion that a sentence that the law requires the court to impose is clearly excessive, the court may enter a special order allowing the person sentenced to petition the board of executive clemency for commutation of sentence within ninety

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days after the person is committed to the custody of the state department of corrections.

The court “declined . . . to find the sentence clearly excessive.” Bunge appears to contend the court abused its discretion in making such a finding because although she “drinks too much,” she “otherwise . . . has no moral failings” and “no prior felony criminal record.” Bunge fails to adequately develop this argument on appeal and cites no authority to support her position. Thus, her argument is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶14 In any event, Bunge’s sentences were not clearly excessive. *See State v. Gillies*, 142 Ariz. 564, 573, 691 P.2d 655, 664 (1984) (appellate court will not modify or reduce sentence that is within statutory limits unless it is clearly excessive under circumstances). At the sentencing hearing, the trial court considered both mitigating and aggravating factors. The court heard testimony about Bunge’s relationship with her son as well as Bunge’s volunteer work in the community. Bunge submitted a letter to the court before sentencing, as well as letters from several other people on her behalf. The presentence report noted Bunge’s alcohol use and that she had three or more criminal convictions, although none for a felony.

¶15 In sentencing Bunge, the trial court stated it had reviewed the presentence report and noted it was “impressed with the support that [Bunge] [had] from [her] family and the community.” The record demonstrates the sentence fell within the prescribed statutory limits for the crime charged and that the court had before it and considered all relevant factors in determining the appropriate sentence. *See Cazares*, 205 Ariz. 425, ¶ 7, 72 P.3d at 357 (appellate court presumes sentencing court considered relevant evidence before it). Thus, given the nature of the offense and the information before the court, we conclude the court did not abuse its discretion in declining to find Bunge’s sentence clearly excessive and there is no ground to reduce the sentence. *See State v. Gannon*, 130 Ariz. 592, 594, 638 P.2d 206, 208 (1981) (no excessive sentence where review of record showed sentence fell within statutory limits and no evidence of abuse of discretion by trial court); *Montano*, 121 Ariz. at

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149, 589 P.2d at 23 (power to reduce sentence only exercised when clearly excessive).

¶16 Bunge also contends that the imposition of consecutive sentences resulted “in confinement that far exceeds the severity of the offenses.” But Bunge fails to sufficiently argue how her seventy-one-day jail term for misdemeanor assault rendered her consecutive sentences arbitrary and capricious. *State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996) (“[R]eviewing court may find abuse of discretion when the sentencing decision is arbitrary or capricious, or when the court fails to conduct an adequate investigation into the facts relevant to sentencing.”). Therefore, to the extent this argument is distinct from Bunge’s excessive sentence argument, it is also waived. See Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶17 Bunge also argues that she bit E.J.’s chest and ear “almost simultaneously as she was trying to get out from under him” and that, because “both bites were part of the same transaction and occurrence,” concurrent sentences were required, relying on *State v. Henry*, 152 Ariz. 608, 612, 734 P.2d 93, 97 (1975). In *Henry*, however, our supreme court did not address the propriety of consecutive sentences, but rather what constituted crimes committed on the same occasion for sentence enhancement purposes. 152 Ariz. at 610, 734 P.2d at 95. Thus, Bunge’s reliance on *Henry* is unavailing and as she has cited no other authority for her contention that concurrent sentences were required, her claim is waived. See Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶18 Bunge also asserts claims of ineffective assistance of counsel. But as Bunge correctly acknowledges, such claims may not be raised in a direct appeal. See *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (appellate courts will not address ineffective assistance of counsel claims in direct appeal). Consequently, we do not address the claim.

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Disposition

¶19 For the foregoing reasons, we affirm Bunge's convictions and sentences.