

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DONALD RAY SCHULTZ,
Appellant.

No. 2 CA-CR 2013-0521
Filed July 11, 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NOT FOR PUBLICATION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. CR201200677

The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

ESPINOSA, Judge:

¶1 Donald Ray Schultz appeals from his convictions of third-degree burglary, criminal damage, and possession of burglary tools. He asserts that the trial court erred in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., and that the evidence is insufficient to support his convictions. We affirm.

¶2 We view the evidence in the light most favorable to upholding Schultz's convictions. *State v. Pena*, 233 Ariz. 112, ¶ 2, 309 P.3d 936, 938 (App. 2013). In May 2012, a hotel clerk saw two men "trying to pry open" a water vending kiosk across the street from the hotel and called the police. She could not see the men's faces. The clerk testified that, when a police officer arrived, the same two men were sitting down by a nearby business and that one of the men fled. The police officer testified that he saw two men walking near the water kiosk and that they began walking faster when they saw his police vehicle, briefly going out of sight around a corner. One of the men ran as the officer approached on foot, but the officer apprehended the other individual, later identified as Schultz. Two pry bars were found near where the officer had lost sight of the two men, and the kiosk doors were "damaged beyond repair" due to someone "trying to pry them open." After a jury trial, Schultz was convicted as described above and sentenced to concurrent prison terms, the longest of which was ten years. This appeal followed.

¶3 As we noted above, Schultz argues both that the trial court abused its discretion in denying his Rule 20 motion and that insufficient evidence supported his convictions. He claims the arguments are "subtly different," apparently based on his belief that we review the denial of the Rule 20 motion for an abuse of discretion

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but review do novo the sufficiency of the evidence. But there is no difference in the standard applied; we evaluate the sufficiency of the evidence—and consequently the trial court’s ruling on a Rule 20 motion—de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶4 In evaluating the sufficiency of the evidence, “the controlling question is solely whether the record contains ‘substantial evidence to warrant a conviction.’” *West*, 226 Ariz. 559, ¶ 14, 250 P.3d at 1191, quoting Ariz. R. Crim. P. 20(a). Substantial evidence exists if, “‘after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* ¶ 16, quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). If “‘reasonable minds may differ on inferences drawn from the facts,’” the evidence is substantial and the conviction must be upheld. *Id.* ¶ 18, quoting *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). Moreover, “in reviewing the sufficiency of the evidence, we do not distinguish circumstantial from direct evidence.” *State v. Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d 51, 54 (App. 2013).

¶5 Schultz argues the evidence was insufficient to show he had committed any of the offenses¹ because the clerk was more than 140 feet away, did not see the men’s faces or identify their clothing, and could not identify him at trial as one of the men. He also points out several inconsistencies in the evidence, namely that the clerk stated the men appeared to be in their “[e]arly twenties” when he is forty-one years old, and that the police officer testified the men had been walking, not sitting as the clerk stated. Finally, he asserts that no “forensic evidence” connected him to the offenses because shoeprints found near the kiosk did not match his shoes and there was no fingerprint or other physical evidence connecting Schultz to the crimes.

¹Schultz argues only that the evidence was insufficient to conclude he was one of the men who had committed the offenses; he does not argue the evidence was insufficient to support any element of the offenses.

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¶6 Nonetheless, the state presented substantial evidence from which the jury could conclude Schultz committed the charged offenses. Although the clerk viewed the incident from a distance, she testified unequivocally that the men she had seen breaking into the kiosk were the same men who encountered the police officer. Given that Schultz is the man arrested by the officer as a result of that encounter, the jury readily could conclude that Schultz is one of the men the clerk had seen. The distance from which the clerk watched the incident and any perceived lack of detail in her testimony were relevant to her credibility but do not render her testimony insubstantial. “[T]he credibility of witnesses is a matter for the jury.” *State v. Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002). And any inconsistencies between the clerk’s testimony and the other evidence presented were for the jury to resolve. *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 39, 312 P.3d 123, 133 (App. 2013).

¶7 In light of the officer’s identification of Schultz as the man he arrested, Schultz has not explained why it was necessary for the clerk to identify him at trial. And, despite the lack of forensic evidence, physical evidence is not required “to sustain a conviction where the totality of the circumstances demonstrates guilt beyond a reasonable doubt,” as it does here. *Cañez*, 202 Ariz. 133, ¶ 42, 42 P.3d at 580.

¶8 Schultz’s convictions and sentences are affirmed.