

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 12 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHAEL S. LAMONGE,)	2 CA-SA 2010-0081
)	DEPARTMENT B
Petitioner,)	
)	<u>DECISION ORDER</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
HON. CHRISTOPHER C. BROWNING,)	Appellate Procedure
Judge of the Superior Court of the State of)	
Arizona, in and for the County of Pima,)	
)	
Respondent,)	
)	
and)	
)	
THE STATE OF ARIZONA,)	
)	
Real Party in Interest.)	
_____)	

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20102493001

JURISDICTION ACCEPTED; RELIEF GRANTED

The Law Office of Mark F. Willimann, LLC
By Mark F. Williman

Tucson
Attorney for Petitioner

Michael G. Rankin, Tucson City Attorney
By Laura Brynwood and William F. Mills

Tucson
Attorneys for Real Party in Interest

¶1 In this special action, petitioner Michael S. Lamonge challenges the respondent judge’s determination on appeal from the underlying criminal conviction in Tucson City Court, that he waived the right to challenge the sufficiency of the evidence to support that conviction. We accept jurisdiction of this special action because Lamonge has no “equally plain, speedy, and adequate remedy by appeal.” Ariz. R. P. Spec. Actions 1; *see also* A.R.S. § 22-375 (prescribing limited appeals that may be taken from case originating in court of limited jurisdiction and appealed to superior court); *State v. Noceo*, 223 Ariz. 222, ¶ 2, 221 P.2d 1036, 1038 (App. 2009) (accepting special action jurisdiction because petitioner, whose conviction was affirmed on appeal by superior court, had no right to appeal to court of appeals). Additionally, the issue raised is purely a question of law. *See State v. Nichols*, 224 Ariz. 569, ¶ 2, 233 P.3d 1148, 1149 (App. 2010). We grant relief because the respondent made an error of law and therefore abused his discretion. *See* Ariz. R. P. Spec. Actions 3(c) (providing abuse of discretion among bases for granting special action relief); *State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004) (trial court abuses discretion when commits error of law).

¶2 After a bench trial in Tucson City Court, Lamonge was convicted of interfering with judicial proceedings, in violation of A.R.S. §§ 13-2810 and 13-3601. On appeal to the superior court, Lamonge challenged the sufficiency of the evidence to support his conviction. Relying on *State v. Whalen*, 192 Ariz. 103, 111, 961 P.2d 1051, 1059 (App. 1997), the respondent judge ruled that “[b]ecause [Lamonge] never challenged the sufficiency of the State’s evidence at trial . . . the issue has been waived

for appeal.” The respondent added, “[t]herefore, [his] request for appellate relief raises no issues which the Court may properly consider.”

¶3 Although we can understand why the respondent viewed certain language in *Whalen* as requiring him to rule as he did, a close examination of that decision establishes it does not stand for the proposition that a defendant may not challenge the sufficiency of the evidence to support a conviction on appeal if he did not do so in the trial court. The appellant in *Whalen* asserted on appeal that the trial court should have granted a judgment of acquittal. 192 Ariz. at 110-11, 961 P.2d at 1058-59. Because he had not filed a motion, however, we concluded he was not entitled to a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. *Id.* at 111, 961 P.2d at 1059. We implicitly distinguished a challenge on appeal to the trial court’s denial of a defendant’s request for a judgment of acquittal pursuant to Rule 20 from a sufficiency challenge made for the first time on appeal. We stated, “to the extent [appellant’s] argument is based upon a claim of insufficient evidence to sustain the verdicts, we will address it,” and proceeded to do so. *Id.*

¶4 Thus, although there are similarities between the claim that the trial court should have entered a judgment of acquittal, whether sua sponte or in granting a defendant’s Rule 20 motion, and a challenge to the sufficiency of the evidence, they are distinct. *Compare State v. Mathers*, 165 Ariz. 64, 66-67, 796 P.2d 866, 868-69 (1990) (reviewing trial court’s denial of motion for judgment of acquittal and noting jury’s guilty verdict does not cure erroneous denial of Rule 20 motion), *with State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (addressing whether sufficient evidence existed

to sustain verdict on appeal); *see also Jackson v. Virginia*, 443 U.S. 307, 313, 318-19 (1979) (concluding due process clause requires that conviction be supported by sufficient evidence and setting forth standard for conducting that inquiry).

¶5 We note, moreover, that although Lamonge’s counsel did not invoke Rule 20, he argued vigorously during closing arguments that the state had not sustained its burden of proving the elements of the charged offenses beyond a reasonable doubt. Because Lamonge argued to the trial court that there was insufficient evidence to support his conviction, and because respondent misapplied *Whalen*, respondent abused his discretion in concluding this argument had been waived.

¶6 For the reasons stated, we grant the petition for special action relief and direct the respondent to address Lamonge’s argument that there was insufficient evidence to support his convictions.

VIRGINIA C. KELLY, Judge

Presiding Judge Vásquez and Judge Eckerstrom concurring.