IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEYSON ELIEL MONTUFAR-CUELLAR,
Appellant.

No. 2 CA-CR 2019-0037
Filed November 8, 2019

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NOT FOR PUBLICATION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. CR20175781002
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
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MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Jeyson Montufar-Cuellar appeals from his conviction and sentence for offering to transfer marijuana. We affirm.

Factual and Procedural Background

¶2 We review the facts in the light most favorable to sustaining the verdict and resolve all inferences against the defendant. *State v. Burns*, 237 Ariz. 1, ¶ 72 (2015). Montufar-Cuellar, a Honduran citizen, fled north. In December 2017, he was apprehended by federal law-enforcement officers some seven miles north of the U.S.-Mexico border. A motion-activated surveillance camera had captured an image of him walking northbound dressed in camouflage clothing, a hood, and shoes with carpet on the soles, carrying a large camouflage bundle wrapped in rope.[1] Montufar-Cuellar hid when the officers arrived, but they soon found him under a tree. He calmly and cooperatively followed their instructions, did not mention having been kidnapped or threatened, and exhibited no sign of injury. Officials found the large bundle he had been carrying approximately 400 feet away, hidden under broken branches. It contained large, compact bricks of marijuana weighing over forty pounds.

¶3 Montufar-Cuellar admitted, both to police and at trial, that he had carried the backpack into Arizona. But he claimed he had been forced to do so after being kidnapped and threatened with violence and had not known the bag contained marijuana.

¶4 A jury found Montufar-Cuellar guilty of offering to transfer over two pounds of marijuana, and the trial court sentenced him to a

[1] The image showed Montufar-Cuellar walking with two other individuals who were similarly dressed and carrying similar bundles. One of these individuals was apprehended along with Montufar-Cuellar, but police determined the two men did not know each other. The third man was not apprehended.

mitigated term of three years in prison. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Duress Jury Instruction

¶5 At trial, Montufar-Cuellar maintained he had been kidnapped in the Mexican border town of Sonoyta and forced to carry the backpack of narcotics into the United States under threat of death. He requested that the jury be instructed on duress. The trial court provided the then-current Revised Arizona Jury Instructions (RAJI) Statutory Criminal 4.12 (duress) (4th ed. 2018), which included all of the language Montufar-Cuellar had requested.[2]

¶6 Three days after the jury was excused to deliberate, Montufar-Cuellar filed a motion requesting that the jury be provided an additional instruction based on an Arizona Supreme Court decision that had been published the same day the original instruction had been read to the jury. Specifically, Montufar-Cuellar argued that *State v. Richter*, 245 Ariz. 1 (2018), clarified and expanded the scope of A.R.S. § 13-412(A), entitling him to have the jury instructed based on that expanded standard for evaluating a duress defense. He further requested that the trial court permit the parties to make brief argument to the jury on the "effect and application" of the requested instruction based on the *Richter* decision. He attached to his motion a requested jury instruction which included the following new language, much of which was taken verbatim from *Richter*:

> The inquiry for the jury is whether a reasonable person subjected to the same threats would have believed he/she was compelled to engage in the same illegal conduct.
>
> An ongoing threat of harm can be sufficiently immediate and present for purposes of a duress defense even when the threat precedes the illegal conduct by several days, the coercing party is physically removed from the defendant or the threat is initiated and then

[2] This case is therefore distinguishable from those cited by Montufar-Cuellar in which trial courts erroneously precluded criminal defendants from presenting duress defenses and refused to provide duress jury instructions on the ground that the threats in question were insufficiently immediate to support such a defense.

> repeated over several years. A continuing threat over a three-month period could also serve as the basis for the duress defense.

See id. ¶¶ 16-22, 24, 27-30.

¶7 The trial court immediately held a hearing on the matter, allowing each party to present its position. Then, finding "no good cause to modify any instructions to the jury or to allow any additional closing argument to the jury," the court denied the motion. Montufar-Cuellar re-urged the issue in a motion for a new trial under Rule 24.1, Ariz. R. Crim. P., which the court also denied.

¶8 On appeal, Montufar-Cuellar argues the trial court erred in refusing to additionally instruct on duress because this left the jury with an instruction that was "unnecessarily vague" and did not adequately state the law, in light of the "new and expansive interpretation of the duress statute" provided by our supreme court in *Richter*. We review a trial court's decision to withhold a particular jury instruction for an abuse of discretion, *Richter*, 245 Ariz. 1, ¶ 11 (duress instruction fully withheld), but "[w]e review de novo whether jury instructions adequately state the law," *State v. Tucker*, 215 Ariz. 298, ¶ 27 (2007). "We will not reverse a conviction unless the instructions, taken as a whole, misled the jurors." *State v. Kuhs*, 223 Ariz. 376, ¶ 37 (2010). That did not occur in this case.

¶9 In essence, Montufar-Cuellar argues that, without his requested instruction, the jury was forced to "speculate and attempt to interpret unnecessarily vague and inadequate instructions" that did not explain what qualifies as a threat of "immediate physical force." But we cannot agree that our supreme court's decision in *Richter* rendered the jury instruction provided in this case "inadequate." Notably, although the RAJI for duress was updated in 2019 in response to the *Richter* decision, none of the changes relate to the immediacy issues emphasized by Montufar-Cuellar in the additional instruction he requested but did not receive. *See* Rev. Ariz. Jury Instr. (RAJI) Stat. Crim. 4.12 (5th ed. 2019).

¶10 In addition to conforming to both the pre- and post-*Richter* RAJI on duress, the instruction given in this case was adequate given the particular context in which it was provided. The jury question presented was not whether Montufar-Cuellar's claims of kidnapping and threats of violence at the border were sufficient, if true, to constitute duress. At no point did the prosecution argue that those claims lacked the immediacy—whether temporal or physical—necessary to support a duress defense. To

the contrary, the prosecution conceded that, if the jury believed Montufar-Cuellar's testimony about having been kidnapped and threatened with violence to carry the backpack across the border, "then he's not guilty." Assuming, *arguendo*, that a defendant might be entitled to an instruction tailored to clarify more specifically that ongoing, past, or physically remote threats could serve as the basis for a duress defense, *see Richter*, 245 Ariz. 1, ¶¶ 20, 22, 30, this was simply not the issue presented here.

¶11 Rather, the verdict turned on whether the jury believed Montufar-Cuellar's explanation for why he had carried the backpack over the border. This was the "core" of the case, as the prosecution stated during summation, before asking the jury to agree that Montufar-Cuellar's "story of duress" was "absolutely not true" and "simply not credible." The jury's verdict demonstrates that it resolved this credibility issue against Montufar-Cuellar. "[I]t is not the role of this court to second-guess that assessment." *State v. Fierro*, 220 Ariz. 337, ¶ 9 (App. 2008).

¶12 Montufar-Cuellar further contends the revised instruction was necessary to clarify what qualifies as duress because the state had argued during summation that only the events immediately preceding his entry into and apprehension in the United States were relevant to the duress defense. But the state was correct to clarify for the jury that the suffering Montufar-Cuellar endured in Honduras and during his journey north to Sonoyta—while unfortunate—was legally irrelevant to his defense that he had carried narcotics into the United States under duress. As the state correctly explained during summation, a person's flight from and "travels through countries that have civil strife . . . cannot serve as a justification for carrying drugs across the border." Likewise, the abuse Montufar-Cuellar suffered on the way, at the hands of people unrelated to his claims of kidnapping and threats of violence, was legally irrelevant to his duress defense. Although such events could have been tangentially relevant to the broader case to the extent they may have provided an innocent explanation for why he arrived in Sonoyta, those facts neither increase nor decrease the likelihood that persons there coerced him into transporting the marijuana.

¶13 For these reasons, it was not an abuse of discretion for the trial court to deny Montufar-Cuellar's request for the altered duress instruction or the opportunity to provide further argument in light of *Richter*. Nor was it an abuse of discretion for the court to deny the motion for mistrial built on the same faulty premise. *See State v. West*, 238 Ariz. 482, ¶ 12 (App. 2015) ("[W]e review the denial of a motion for a new trial for an abuse of discretion.").

Sufficiency of the Evidence

¶14 After the state rested, Montufar-Cuellar moved for a directed verdict under Rule 20(a), Ariz. R. Crim. P., on the ground that the state had failed to disprove his duress defense. The trial court denied the motion, finding "substantial evidence to support a guilty verdict, if the evidence is viewed in the light most favorable to the prosecution as the law requires." After the jury returned its verdict, Montufar-Cuellar renewed his motion under Rule 20(b), requesting a judgment of acquittal on the grounds that his claims of duress were "undisputed" and that the state failed to carry its "heavy burden" of proving beyond a reasonable doubt that Montufar-Cuellar "did not act with such justification."[3] The court denied this motion as well.

¶15 On appeal, Montufar-Cuellar challenges those denials on the ground that the guilty verdict was "unsupported by substantial evidence." We review a trial court's denial of Rule 20 motions de novo, *State v. West*, 226 Ariz. 559, ¶ 15 (2015), "examin[ing] the facts in the light most favorable to sustaining the verdict and resolv[ing] all reasonable inferences against the defendant," *State v. Willoughby*, 181 Ariz. 530, 545 (1995).

¶16 Through his testimony, Montufar-Cuellar presented evidence supporting a duress defense. Thus, as the trial court instructed the jury, Montufar-Cuellar could not be found guilty unless the state had carried its "burden of proving beyond a reasonable doubt that [he] did not act with such justification." *See* A.R.S. § 13-205(A) (discussing burden of proof for "[j]ustification defenses under chapter 4 of this title," which include duress at § 13-412); *see also Richter*, 245 Ariz. 1, ¶ 14. In other words, once Montufar-Cuellar provided evidence of duress, the absence of such a justification became "an additional element the state [was required to] prove to convict." *State v. Carson*, 243 Ariz. 463, ¶ 11 (2018) (discussing § 13-205(A) in self-defense context).

¶17 However, Montufar-Cuellar misconstrues what was required for the state to satisfy this burden of proof.[4] Where, as here, the evidence

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[3]Montufar-Cuellar also argued the state had provided "absolutely no evidence" that he had "imported" the backpack of narcotics into Arizona or "offered" to transport it, as charged in the indictment, but he has abandoned that argument on appeal.

[4]In particular, Montufar-Cuellar argues the state could not carry its burden without presenting direct evidence, such as "eyewitness testimony" from the individual who was apprehended alongside him. But "[t]here is,

supporting a justification defense is provided by a testifying defendant, the state is permitted to attack the credibility of that evidence during cross-examination, as the state did in this case. If the credibility concerns raised during such cross-examination are sufficient to allow "*any* rational trier of fact" to conclude beyond a reasonable doubt that the defendant's claim of duress is not credible, then the state has met its burden and a Rule 20 motion must be denied. *West*, 226 Ariz. 559, ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)) (also explaining that the "substantial evidence" required to survive a Rule 20 motion is such proof—whether direct or circumstantial—"that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt" (quoting *Mathers*, 165 Ariz. at 67)).

¶18 Although cross-examination of a key witness may be sufficient for the state to carry its burden of proof on a particular element or elements of its case, the state did more here. In particular, it presented an agent with United States Immigration and Customs Enforcement, who testified that the Sinaloa drug cartel controls Sonoyta, uses it as a staging area for importing drugs into the United States, and controls the flow of narcotics and undocumented immigrants across the border. The agent further testified that the cartel recruits people to carry backpacks of marijuana in exchange for a waiver of the fee normally charged to smuggle undocumented people across. The agent explained that the cartel outfits its backpackers as Montufar-Cuellar was dressed when he was apprehended and coaches them to drop and move away from the drugs if they are discovered and to claim duress, just as Montufar-Cuellar did in this case. The agent testified that "there's no lack of people looking to be backpackers in Mexico," either to be smuggled into the United States or in exchange for money, and that the cartel intentionally avoids situations that will shrink its pool of recruits or draw increased law enforcement attention to its smuggling routes. Finally, he agreed that "putting guns to people's heads and forcing them to deliver [narcotics]" across the border is not "a good way to make money," the cartel's aim, and that he had never heard of such a situation. Based on this expert testimony, a reasonable juror could conclude that Montufar-Cuellar's story of duress was not consistent with the way the cartel is known to operate.[5]

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of course, no distinction between the probative value of direct and circumstantial evidence." *State v. Bible*, 175 Ariz. 549, 560 n.1 (1993).

[5]In his Rule 20(b) motion, Montufar-Cuellar argued that his own expert witness provided testimony that "cancel[ed] out" the testimony of

¶19 We, like the trial court, "may not re-weigh the facts or disregard inferences that might reasonably be drawn from the evidence." *West*, 226 Ariz. 559, ¶ 18. Because this is not a case in which "there is a complete absence of probative facts to support the conviction"—in particular, that Montufar-Cuellar did not act under duress—reversal based on insufficiency of the evidence is inappropriate. *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25 (1976)).

Weight of the Evidence

¶20 In his Rule 24.1 motion for a new trial, Montufar-Cuellar argued the verdict was "contrary to the weight of the evidence" for all the same reasons articulated in his Rule 20(b) motion. The trial court denied the motion, finding that the verdict "was not contrary to the law and was not contrary to the weight of the evidence."

¶21 Montufar-Cuellar argues he was entitled to a new trial "because it was not reasonable for the jury to conclude that the State had proved beyond a reasonable doubt that [he] did not act under duress." In reviewing a motion for a new trial under Rule 24.1, the trial court has "broad discretion" to "weigh the evidence, make credibility determinations, and set aside the verdict and grant a new trial even if there is sufficient evidence in the record to support the verdict." *State v. Fischer*, 242 Ariz. 44, ¶ 21 (2017). We, on the other hand, must "defer to the discretion of the trial judge who tried the case and who personally observed the proceedings," *id*. ¶ 21, and are prohibited from "independently reweighing the evidence," *id*. ¶ 30. We may only reverse if there is "an affirmative showing that the trial court abused its discretion and acted arbitrarily." *State v. Mincey*, 141 Ariz. 425, 432 (1984). Montufar-Cuellar has made no such showing here.

¶22 The record before us contains the minute entry outlining the trial court's decision on the motion for new trial, but not the transcript of the December 3 hearing where the parties argued the motion and the trial court explained its decision. Montufar-Cuellar had a "duty to prepare the record in such a manner as to enable [us] to pass upon the questions sought to be raised in the appeal." *State v. Rivera*, 168 Ariz. 102, 103 (App. 1990); *see also* Ariz. R. Crim. P. 31.8(b)(2)(A)(i) (appellant's duty to request

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the agent called by the state. This argument has been abandoned on appeal. To the extent a conflict existed between the testimonies of the two expert witnesses, we "must resolve such conflicts in favor of sustaining the verdict." *State v. Salman*, 182 Ariz. 359, 361 (App. 1994).

transcripts of proceedings not automatically included in record). Because he did not request the transcript of the motion hearing, we must presume the missing transcript would support the decision of the trial court. *State v. Zuck*, 134 Ariz. 509, 512-13 (1982).

Disposition

¶23 For the foregoing reasons, we affirm Montufar-Cuellar's conviction and sentence.