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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 08-0203
)
) DEPARTMENT D
 Appellee,)
) MEMORANDUM DECISION
 v.)
) (Not for Publication -
 ANTHONY WYNKOOP,) Rule 111, Rules of the
) Arizona Supreme Court)
 Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-031024-001SE

The Honorable David K. Udall, Judge

AFFIRMED

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By Kent E. Cattani, Chief Counsel
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J O H N S E N, Judge

¶1 Anthony Wynkoop appeals his conviction of attempted first degree murder. For the reasons stated below, we affirm the conviction and the resulting sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 The night of May 1, 2006, D.T. took the bus home from work.¹ While on the bus, he had a brief conversation with Wynkoop's girlfriend, C.D. After the two got off the bus at the same stop, D.T. stopped to buy beer and then walked home. On his way home he passed Wynkoop and C.D., waved, said hello and continued on his way.

¶3 Some time after D.T. got home, Jonathan Bagby knocked on his front door. Bagby asked if D.T.'s roommate was home, discovered D.T. was alone and then left. Shortly thereafter, Bagby returned and asked to use the restroom. D.T. let Bagby in and three other men followed - Todd Remine, Donald Roberts and Wynkoop. D.T. sat down on his sofa and the other men positioned themselves around the living room, with Wynkoop sitting near D.T.

¶4 Wynkoop was upset because C.D. said D.T. told her Wynkoop was cheating on her, so he asked D.T., "Why were you

¹ On appeal, we view the evidence in the light most favorable to sustaining the verdict and resolve all inferences against Wynkoop. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

messing with my girl, dog?" Although D.T. denied "messing" with C.D., Wynkoop began motioning toward D.T. with a butterfly knife as though he were going to stab him. In the meantime, Remine jumped out from behind Wynkoop and stabbed D.T. in the neck. D.T. got up, yelled, "I'm going to die," and ran to his bedroom in an attempt to escape through a back door. After he ran into the bedroom, the door from the living room was kicked off its hinges and hit him in the back of the head. The next thing D.T. could remember was standing in the darkened room and seeing two gun flashes and their reflection in the glasses of someone standing just in front of him. After being shot, D.T. saw Bagby in the doorway, and Bagby asked him where his phone was. D.T., who was yelling that his assailants should leave because he was "already dead," told Bagby he thought his phone was in his bag. Bagby grabbed the bag and left. D.T. then heard tires squeal, got up, walked outside and knocked on his neighbor's door for help.

¶15 After his neighbor called the police, D.T. was transported to a hospital, where he was treated for severe blood loss, injuries to his windpipe, lacerations on his neck, a wound to his upper abdomen and gunshot wounds to his right temple and left hand.

¶16 Wynkoop was charged with attempted first-degree murder and burglary as an accomplice, both Class 2 dangerous felonies, and was tried with his co-defendant Roberts.² D.T. testified to the facts recounted above. In addition, D.T.'s treating physician, several law enforcement officers, Remine, Roberts and other witnesses testified. The jury convicted Wynkoop on both counts and the superior court sentenced him on each count to ten and one-half years, the presumptive sentence for a Class 2 dangerous felony, to be served concurrently.

¶17 Wynkoop timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001) and -4033 (Supp. 2008).

DISCUSSION

¶18 Wynkoop argues the record contains insufficient evidence to support his conviction of attempted first degree murder.³ In particular, he argues he was "merely present during a surprise attempt at homicide" and did not have the requisite intent to be liable for attempted murder as an accomplice.

² Remine and Bagby entered guilty pleas.

³ Wynkoop concedes there is sufficient evidence to support the conviction for burglary and does not appeal from that conviction.

A. Standard of Review.

¶9 "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction. The credibility of witnesses is an issue to be resolved by the jury; as long as there is substantial supporting evidence, we will not disturb their determination." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). Substantial evidence to support a conviction is evidence that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). As noted above, we view all evidence in the light most favorable to sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

B. Sufficient Evidence Supported Wynkoop's Conviction of Attempted First-Degree Murder.

¶10 All that is necessary to sustain a conviction for attempted murder is "evidence of 'some overt act or steps taken toward the commission of . . . [murder] and an intent to commit the crime.'" *State v. Cleere*, 213 Ariz. 54, 57, ¶ 5, 138 P.3d 1181, 1184 (App. 2006) (citation omitted). A person commits first-degree murder if, intending or knowing that his conduct

will cause death, he causes the death of another person with premeditation. A.R.S. § 13-1105 (Supp. 2008).⁴

¶11 A person is criminally accountable for the conduct of another if he is an accomplice of the other person in the commission of the offense. A.R.S. § 13-303 (2001). An accomplice is one who "solicits or commands another person to commit the offense," "[a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense," or "provides means or opportunity to another person to commit the offense." A.R.S. § 13-301 (2001). Even "the most trivial of assistance is sufficient to impose accomplice liability." *State v. Noriega*, 187 Ariz. 282, 285 n.2, 928 P.2d 706, 709 n.2 (App. 1996).

¶12 For Wynkoop to be liable as an accomplice to attempted first-degree murder, the record must contain sufficient evidence from which the jury rationally could have concluded that Wynkoop intended to aid Remine in committing attempted first-degree murder. See *State v. Wall*, 212 Ariz. 1, 5, ¶ 20, 126 P.3d 148, 152 (2006). Rarely is a defendant's mental state provable by direct evidence; the jury usually will have to draw inferences from the defendant's behavior and other circumstances

⁴ Although this statute was amended after the date of Wynkoop's offense, the revisions are immaterial to the disposition of this appeal. Thus, we cite to the current published version of the statute.

surrounding the event. *Noriega*, 187 Ariz. at 286, 928 P.2d at 710.

¶13 Although D.T. testified Wynkoop did not stab him or shoot him, he also testified Wynkoop put on rubber gloves right before he took out his knife and was the only one who verbally confronted D.T. Although at the time of trial D.T. could not remember what had happened for a portion of the attack, he and law enforcement officers testified he had informed them shortly after the incident that after being stabbed and running toward the back door in his bedroom, he had a "small fight" with Wynkoop in the bedroom. He also informed the officers Wynkoop had "provoked it all."⁵

¶14 J.S., who lived near D.T., testified he had called the Tempe Police Department when he noticed "peculiar activities." He said he observed a dark SUV pull into a parking space backwards, with its lights out, and saw three men exit the vehicle. One of the men took his sweatshirt off and flipped it inside out, and another pulled a "hoodie" over his head. The three men then walked toward an alley and lurked around a

⁵ D.T. was interviewed numerous times by the Tempe Police Department. The interviews during which he provided this information occurred while he was still hospitalized and unable to speak. D.T. conveyed this information to the officers by making marks and writing comments on a diagram of his apartment. The diagram with D.T.'s comments was admitted in evidence.

dumpster, at which point J.S. decided they must be "up to something" and called the police. He testified that one of the men then came running back, started the vehicle with the lights out and went down the alley to pick up the other two men. J.S. then heard one of them say, "You just better do it." As he attempted to get closer to the car to get the license plate number, he heard shots fired. Shortly thereafter the police arrived.

¶15 After Remine was arrested, he gave police an account of what happened, but inserted into the story a fictional person named "Travis."⁶ He said Wynkoop had gone to D.T.'s with a gun and had handed it off to Travis, stating "I'm not going to do this." Roberts similarly told the police he had seen Wynkoop hand a gun to Remine and that on the drive to D.T.'s apartment, Remine had talked about "smash[ing]" D.T. Roberts also told the police he knew the others were planning to beat up D.T. and that "it was supposed to be [Wynkoop] beating him up and everybody was supposed to stand back because it was [Wynkoop's] deal or whatever," but then Remine intervened.

⁶ At trial, Remine testified he did the things he had attributed to Travis. He also claimed he had lied repeatedly during the interview with the police and that he was the only one who was armed on the night in question.

¶16 A great deal of conflicting evidence was presented at trial. Nonetheless, it is the province of the jury acting as the finder-of-fact to determine what of that evidence to believe. We will set aside a verdict on the grounds of insufficient evidence only if it is clear that "upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). The evidence presented at trial, as recounted above, was sufficient to support the jury's finding that Wynkoop, with the requisite intent, aided Remine in committing attempted first-degree murder.⁷ Wynkoop confronted D.T. because D.T. had spoken to Wynkoop's girlfriend on the bus. Accompanied by the others, Wynkoop entered D.T.'s apartment armed with a knife and, at least by some accounts, handed Remine a gun during the confrontation. As noted above, even the slightest assistance is sufficient to impose accomplice liability, and the jury could infer Wynkoop intended to help Remine kill D.T. when he handed him a gun. *See Noriega*, 187

⁷ Wynkoop additionally argues the superior court abused its discretion by denying his motion for new trial because the verdict was against the weight of the evidence. *See State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996) (on appeal, we "will not disturb a trial court's denial of a motion for new trial absent an abuse of discretion."). *See Ariz. R. Crim. P. 24.1*. We hold the verdict was supported by sufficient evidence; therefore, the superior court did not abuse its discretion in denying Wynkoop's motion for new trial.

Ariz. at 285 n.2, 928 P.2d at 709 n.2; *State v. Preis*, 89 Ariz. 336, 339-40, 362 P.2d 660, 662 (1961) (jury may infer intent to kill from the use of a deadly weapon).

CONCLUSION

¶17 For the reasons stated above, we affirm Wynkoop's conviction of attempted first-degree murder and the resulting sentence.

DIANE M. JOHNSEN, Judge

CONCURRING:

PETER B. SWANN, Presiding Judge

JOHN C. GEMMILL, Judge