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



DIVISION ONE
FILED: 09/06/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0062
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
REGINALDO NAVARRO SALINAS,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006022-001-DT

The Honorable Joseph C. Kreamer, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Linley Wilson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

T H U M M A, Judge

¶1 Reginaldo Navarro Salinas appeals from his conviction
of aggravated assault, a Class 3 dangerous felony. Defendant

argues the superior court committed (1) fundamental error when instructing the jury regarding aggravated assault, and (2) reversible error when imposing an aggravated sentence. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶2 Outside a party in Chandler, defendant, defendant's friend C. and the victim, J., argued over car keys belonging to J.'s friend. The argument ended in a brief fistfight between J. and C. When J. and his friend were then attempting to leave, defendant stabbed J. in the back three times with a large knife. J. bled profusely. As J.'s friends and bystanders worked to save J.'s life, defendant paced nearby while waving the bloody knife, taunting J. and threatening to "finish him off." Defendant then fled.

¶3 The State charged defendant with aggravated assault when, by "using a knife, a deadly weapon or dangerous instrument, [he] intentionally, knowingly, or recklessly caused physical injury" to J. Ariz. Rev. Stat. (A.R.S.) §§ 13-1203(A)(1), -1204(A)(2) (West 2012).² The State alleged the

¹ We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

² Absent material revisions after the date of an alleged offense, we cite a statute's current Westlaw version unless otherwise indicated.

offense was a dangerous offense because it "involved the discharge, use, or threatening exhibition of a knife, a deadly weapon or dangerous instrument." See A.R.S. § 13-105(13).

¶4 At the end of the trial, the court instructed the jury on the offense of "aggravated assault" as follows:

The crime of aggravated assault requires proof of the following:

1. The defendant committed an assault, and
2. The assault was aggravated by the following factor:
The defendant used a deadly weapon.

The court instructed the jury on assault (as opposed to aggravated assault) as follows:

The crime of assault requires proof that the defendant:

1. Intentionally, and/or knowingly, and/or recklessly caused a physical injury to another person; or
2. Intentionally put another person in reasonable apprehension of immediate physical injury; or
3. Knowingly touched another person with the intent to injure, insult, or provoke that person.

¶5 The court also instructed the jury on dangerousness as follows:

If you find the defendant guilty of Aggravated Assault, you must determine whether or not the offense was a dangerous offense. An offense is dangerous if it involved the intentional or knowingly infliction of serious physical injury, or the discharge, use or threatening exhibition

of a deadly weapon or dangerous instrument. The State has the burden of proving beyond a reasonable doubt that the offense was a dangerous offense. Your finding on this issue must be unanimous.

The court defined a "dangerous instrument" as "anything that is readily capable of causing death or serious physical injury under the circumstances in which it is used." Defendant did not object to any of these jury instructions.

¶16 The jury found defendant guilty as charged and found that the offense was a dangerous offense. The jury then found that the State had proven two aggravating factors: (1) the offense involved the infliction or threatened infliction of serious physical injury and (2) the offense caused physical, emotional or financial harm to the victim.

¶17 At sentencing, the court referenced the aggravating factors found by the jury and found additional aggravating factors, including defendant's prior violent felony conviction involving "stabbing someone . . . in the head," defendant's post-assault taunting and threatening of J. while J. lay bleeding on the floor demonstrated "no remorse" and the nature of the crime. After considering all information provided at sentencing, the court found "there are no mitigating factors." The court then found that "the aggravating factors greatly outweigh the mitigating factors and it's not even close." The court sentenced defendant to 15 years in prison, an aggravated

term, and defendant's timely appeal followed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. sections 12-120.21(A)(1) (1992), 13-4031 and -4033 (2010).

DISCUSSION

I. Jury Instructions

¶8 Defendant argues the jury instructions on "assault" and the "dangerous" allegation improperly deprived him of a unanimous verdict because they "instructed on various assaults and two ways to find dangerousness." Defendant did not raise this issue before the trial court, meaning our review on appeal is for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). The burden is on defendant to prove "both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20. Assuming without deciding that the jury instructions were erroneous, defendant fails to establish prejudice.

¶9 Defendant argues that, because the trial court included a definition of assault containing three alternative bases for a conviction, the jury's aggravated assault verdict might not be unanimous. Similarly, defendant argues the jury's "dangerous" finding may not have been unanimous because the jury was instructed, in the disjunctive, that they could find the offense was dangerous "if it involved the intentional or knowing

infliction of *serious physical injury*, or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." (Emphasis added.)

¶10 For both the aggravated assault charge (including a finding of assault) and the dangerous allegation, the jury was instructed that the verdict must be unanimous. The jury was told that, before a verdict form could be signed on the aggravated assault charge, each of the jurors "must agree on the verdict," which "must be unanimous." Similarly, for the dangerous allegation, the jurors were instructed that their "finding on this issue must be unanimous." Jury instructions are construed as a whole and defendant has cited nothing to suggest that the jurors did not follow these instructions requiring unanimity. *State v. Prince*, 226 Ariz. 516, 536, ¶ 77, 250 P.3d 1145, 1165 (2011); see also *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."); *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (same). For these reasons, defendant has not shown prejudice.

¶11 Quite apart from the unanimity required by the jury instructions, the record shows the State's evidence and argument at trial exclusively pressed the claim that defendant caused the victim physical injury. At no time did the State argue defendant simply caused J. reasonable apprehension or touched J. with the intent to injure, insult or provoke. Similarly, for the

dangerousness allegation, the record shows the State's evidence and argument at trial expressly pressed the claim that the offense was dangerous because it involved a knife. The State did not argue at trial that the offense was dangerous because defendant inflicted a serious physical injury. The exclusive theories advanced by the State further negate any claim of prejudice.

¶12 Defendant points to nothing in the record to support a finding that the jury's verdicts were not unanimous and we can find none. "Because prejudice will not be presumed but must appear affirmatively from the record," defendant has failed to show prejudice. *State v. Trostle*, 191 Ariz. 4, 13, 951 P.2d 869, 878 (1997). Because defendant has failed to make that showing, we affirm his conviction. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

II. Imposition of Aggravated Sentence

¶13 Defendant contends the court improperly considered his denial of the charge as a "failure to demonstrate remorse" when it imposed an aggravated sentence. In doing so, defendant takes the court's statement regarding "no remorse" out of context.

¶14 The court directly attributed the lack of remorse to defendant's post-stabbing taunts and threats towards his victim, not defendant's continued claim of innocence. The court stated: "I know you have maintained your innocence. . . . [B]ut for

today's purposes, what I see here is a crime . . . in which your actions afterwards suggest, not only no remorse but put other people in danger." Because the court explicitly removed the defendant's claim of innocence from the sentencing equation while factoring in defendant's post-stabbing taunts and threats, defendant has not demonstrated error of any kind. The court properly exercised its discretion in fully considering and weighing both the relevant aggravating factors and the lack of mitigating factors and then imposing the sentence. See *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003).

CONCLUSION

¶15 Defendant's conviction and sentence are affirmed.

/s/ _____
SAMUEL A. THUMMA, Judge

CONCURRING:

/s/ _____
JON W. THOMPSON, Presiding Judge

/s/ _____
PETER B. SWANN, Judge