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

DIVISION ONE
FILED: 6/13/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

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| STATE OF ARIZONA, | ) | 1 CA-CR 12-0094 |
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| Appellee, | ) | DEPARTMENT D |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| MANUEL ANGEL JARAMILLO, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-180277-001

The Honorable Robert L. Gottsfield, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General — Phoenix
By Joseph Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

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**G O U L D**, Judge

**¶1** In this appeal, we consider whether the trial court erred by failing to give a self-defense jury instruction during

the trial of Manuel Angel Jaramillo ("Defendant"). We find that any error was harmless and affirm for the reasons that follow.

***Facts and Procedural Background***

**¶2** In December 2006, two police officers in an unmarked car observed Defendant driving at approximately fifty miles per hour in an area where the posted speed limit was twenty-five miles per hour. The officers turned on their emergency blue and red flashing lights as well as a siren, and Defendant pulled over into the driveway of a nearby residence.

**¶3** As Defendant exited the vehicle, one of the police officers noticed that he had his hand in his pocket and ordered him to take his hand out of his pocket in order to prevent Defendant from possibly accessing a weapon. Defendant did not comply with this order, and when one of the officers approached Defendant, he began to walk towards the front of the house. The officer grabbed his right elbow and Defendant made a movement that made the officer believe that Defendant was attempting to strike the officer in the face. The other officer approached Defendant from the other side and was able to grab his left arm. They ordered Defendant to place his hands behind his back, not to move, and to take his hand out of his pocket. The officers were able to push Defendant against his vehicle while trying to contain him, and tried to pull his hand out of his pocket so that they could place handcuffs on him.

**¶4** Defendant responded by trying to get away, swinging his left and right elbows back towards the officers. He also dragged the officers towards the front of the house. While the officers were trying to get Defendant on the ground, they fell on top of Defendant. Defendant tried to head-butt the officers and to swing his elbows back towards the officers, and one of the officers began hitting Defendant in his arm and face. The other officer was able to get a handcuff on Defendant's left wrist. During the struggle, the officers continuously ordered Defendant to quit fighting and to give them his right and left arm. One of the officers testified that he yelled out, "Stop. Stop resisting. Police. Police." Eventually, Defendant flipped over on his back and the officers were able to get handcuffs on him.

**¶5** The fight, which lasted approximately four minutes, ended with the officers sitting on top of a handcuffed Defendant who was yelling and struggling, trying to get up. Eventually, Defendant's brother arrived at the scene and helped calm Defendant down.

**¶6** At no point during the struggle did Defendant ask the officers who they were or give any indication that he did not know that they were police officers. The officers were wearing their gang enforcement uniform, which included a black shirt and pants with a gun holster and "duty belt" containing mace and handcuffs, with the word "Police" emblazoned on the chest in

large yellow letters. They also wore a police badge on their upper left chest. As they approached Defendant, they left their vehicle's red and blue lights on, although they turned off the siren.

**¶7** As the police officers transported Defendant to the police station, Defendant apologized, said he did not want to get into any more trouble and that he had cocaine in his back pocket. After arriving at the precinct, one of the officers found the package of cocaine in Defendant's pocket, and it was impounded. Later tests showed that the item contained 530 milligrams of cocaine, a usable amount.

**¶8** At the police station, a third officer, Officer Boyle, interviewed Defendant after reading Defendant his rights. Officer Boyle testified that Defendant was "calm and polite," and that he spoke fluent English. During the interview, Defendant stated that he did not initially see the officers behind him until he was parking in the driveway. At that time he observed their patrol car, lights, and siren. He also said that it was his fault, that he took responsibility, and that he was upset that the officers would contact him on private property and that he did not want to be put in handcuffs until the officers explained why he was under arrest. When asked whether he attempted to strike the officers, Defendant stated, "I don't remember what I did. You do all kinds of shit when you're mad."

**¶9** During the interview, Defendant never suggested that he did not know that the men approaching him were police officers or that it was too dark to see who they were. Nor did he complain that excessive force was used.

**¶10** Defendant was charged with two counts of aggravated assault on a peace officer (both class five felonies) and one count of possession or use of narcotic drugs (a class four felony). Defendant failed to appear at trial and was tried in absentia. He was convicted on all counts, and timely appeals. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and -4033(A) (West 2013).[1]

***Discussion***

**¶11** Defendant argues that the trial court failed to properly instruct the jury regarding self-defense. However, the evidence in the record supports the finding that Defendant elected not to request a self-defense jury instruction. Moreover, even assuming that Defendant did request a self-defense instruction, any error in failing to give the instruction would be harmless.

**¶12** Defendant filed an amended notice of defenses that included self-defense on August 3, 2007. The State moved to preclude this defense on the ground that it was untimely

[1] Unless otherwise noted, we cite to the current version of the statute.

disclosed. However, the trial court denied the State's motion as premature and explained that whether Defendant could argue self-defense depended on the evidence presented at trial. The court stated that if the evidence supported such a defense, Defendant could argue for a self-defense instruction at trial.

**¶13** On the first day of trial, October 31, 2007, defense counsel explained that he intended to ask for a self-defense instruction, but that he had to wait to hear the police officer's testimony to determine whether the evidence supported this defense.[2] The court responded that if there was any evidence of self-defense, the jury would get a self-defense instruction, but because it was uncertain whether such evidence would come in, the court would have to wait to rule on this instruction.

**¶14** On November 5, after the jurors were excused, the court held a discussion with counsel regarding Defendant's motion for directed verdicts on the two aggravated assault counts. While the minute entry for this day states that "[r]espective counsel and the court discuss and finalize jury instructions as set forth on the record[,]" there is no evidence of any such discussion in the transcript.

**¶15** Defendant asserts that "Appellant requested a self-defense instruction" on November 5, but that "the transcript

[2] Because the police officers were victims, Defendant's counsel had not been able to interview them prior to trial.

failed to reflect this discussion." Defendant points out that the minute entry showed that the court discussed matters with counsel after the jury left for forty-five minutes, but only four pages of transcript exist during this time period. However, assuming without deciding that some portions of the transcript are missing, we would presume that the missing pages of transcript support the court's decision. *See State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995) (explaining that the defendant's failure to object to the lack of a transcript of the communications between a juror and the court-appointed interpreter below constituted a waiver of the issue on appeal); *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) (explaining that when "matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court").

**¶16** However, even assuming that the Defendant had orally requested a self-defense instruction the night before, the court the next morning told the parties that any additional instructions needed to be submitted in writing at that time, but nothing was submitted by Defendant. The court further stated that "[i]f the defense is asking for self-defense and excessive force, you better make a record on it[,]" but when the court specifically asked the parties whether they had any additional proposed instructions, defense counsel replied, "No, your Honor."

**¶17** Ordinarily, failing to object at trial to the lack of a particular instruction waives the issue on appeal.[3] *See State v. White*, 160 Ariz. 24, 31, 770 P.2d 328, 335 (1989); Arizona Rule of Criminal Procedure 21.3 (explaining that a party may not assign as error the failure to give a jury instruction unless the party makes an objection before the jury retires to consider the verdict).[4] However, errors that are fundamental may be addressed

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[3] Defendant argues that no waiver should occur despite the fact that there is no evidence that he requested a self-defense instruction based on *State v. Geeslin*, 223 Ariz. 553, 225 P.3d 1129 (2010). However, *Geeslin* merely stands for the principle that the lack of a factual record does not preclude the appellate court from reviewing issues of law. *Id.* at 554, ¶ 6, 225 P.3d at 1130. Thus, in that case, although the requested jury instruction for a lesser-included offense was not part of the record, it was error for the court of appeals not to consider the merits of whether the offense was in fact a lesser-included offense because this question was a question of law, and "the missing portion of the record was not necessary for full appellate review" of the claim that a particular instruction should have been given. *Id.* at 555, ¶¶ 10-11, 225 P.3d at 1131. Likewise inapplicable is *State v. Johnson*, 108 Ariz. 42, 492 P.2d 703 (1972), where the trial court told the defense that no self-defense instruction would be given and the defendant objected; we explained that appellant's failure to submit a written instruction under those circumstances was excused because, "it was obviously superfluous to submit a proposed instruction for the court's consideration." *Id.* at 44, 493 P.2d at 705. Here, there was no such analogous statement by the court, which appears to have made every effort to ensure that Defendant was able to request any desired instruction.

[4] Rule 21.3 provides as follows:

> No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof or to the submission or the failure to submit a form of verdict unless the party objects thereto

despite the failure to make such an objection below. *White*, 160 Ariz. at 31, 770 P.2d at 335; *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) ("Absent a finding of fundamental error, failure to raise an issue at trial, including failure to request a jury instruction, waives the right to raise the issue on appeal.").

**¶18** Fundamental error exists when the error goes to the foundation of the case, deprives the defendant of a right essential to his or her defense, and is of such magnitude that the defendant could not possibly have received a fair trial. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

**¶19** Here, no error occurred because there is not even the "slightest evidence" in the record showing that Defendant acted in self-defense. *State v. King*, 225 Ariz. 87, 90, ¶ 14, 235 P.3d 240, 243 (2010) (citing *State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983)). The "slightest evidence" has been defined in the self-defense context as "a hostile demonstration, which may be reasonably regarded as placing the accused in apparently imminent danger of losing her life or sustaining great bodily

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> before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of his or her objection.

harm." *State v. Wallace*, 83 Ariz. 220, 223, 319 P.2d 529, 531 (1957).

**¶20** Significantly, in other cases where we found error in the court's refusal to issue a self-defense instruction, the defendant testified or made some statement regarding the incident that gave rise to an inference of self-defense. *See, e.g.*, *State v. Johnson*, 108 Ariz. 42, 43, 492 P.2d 703, 705 (1972) (Johnson explained that he raised his shotgun after seeing the victim lean over and thought that the victim may have been trying to get a gun.); *State v. King*, 225 Ariz. 87, 88, 91, ¶¶ 2, 17, 235 P.3d 240, 241, 244 (2010) (King claimed that a homeless person threw a full two-liter bottle of water at his head, causing King to beat up the homeless person, who later died from his injuries.); *Everett v. State*, 88 Ariz. 293, 298-99, 356 P.2d 394, 397-98 (1960) (Everett testified that he struck another individual with a knife out of fear that he was in personal danger from that individual.).

**¶21** Here, Defendant did not testify or make any statement to support the conclusion that he was acting in self-defense. Rather, Defendant's alleged evidence of self-defense consisted of the following: (1) the pullover occurred at night time, (2) the unmarked police car looked like any other generic vehicle before it turned on its lights and sirens, (3) the police uniform was "dark[,]" (4) the neighborhood was "pretty dark" despite "sparse

streetlights[,]" (5) Defendant did not refer to the officers as "officers" until after he was taken to the police station, and (6) a former police officer testified that there had been instances of police impersonators in West Phoenix before, although he had no personal knowledge of the other events or the incidents that took place on the night of Defendant's arrest.

**¶22** However, even assuming that this evidence constituted the "slightest evidence," any error in failing to give a self-defense instruction would be harmless. A person is not entitled to use physical force in self-defense "[t]o resist an arrest that the person knows or should know is being made by a peace officer." A.R.S. § 13-404(B)(2). Defendant's statements to Officer Boyle show that he was upset not because he thought the officers were imposters, but because he was under the mistaken belief that the officers could not arrest him on private property. These statements also show that Defendant clearly knew the officers were police officers. This evidence, combined with the lights and sirens used by the officers, their uniforms, and the repeated statements of the officers at the scene that they were "police" lead to the conclusion that no reasonable jury could find Defendant acted in self-defense.

**¶23** Moreover, a consideration of the jury instructions as a whole supports that the jury was not misled. The elements of aggravated assault included the express condition that the

Defendant knew, or had reason to know, that the individual "was a peace officer engaged in the execution of any official duties." The instruction, in its entirety, was as follows:

> The crime of aggravated assault concerning [Police Officer's Name] requires proof of the following two things:
>
> 1. The defendant committed an assault, which requires proof that:
>
>    The defendant intentionally, knowingly, or recklessly caused physical injury to [Police Officer's Name]; *and*
>
> 2. The assault was aggravated by the following factor:
>
>    Whom the defendant knew, or had reason to know, was a peace officer engaged in the execution of any official duties.
>
>    "Peace officer" means any person vested by law with a duty to maintain public order and make arrests.
>
>    "Engaged in the execution of official duties" means acting within the scope of what the officer is employed to do.
>
>    "Physical injury means the impairment of physical condition."

Without finding that Defendant knew that the officers were peace officers, the jury could not have convicted him of the two counts of aggravated assault. We assume that juries follow the instructions they are given. *State v. McCurdy*, 216 Ariz. 567, 574, ¶ 17, 169 P.3d 931, 938 (App. 2007). We therefore conclude that any error in failing to give the self-defense instruction

would have been cured by the remaining instructions and was harmless.

***Conclusion***

**¶24** For the foregoing reasons, we affirm.

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
MARGARET H. DOWNIE, Judge

/S/
PATRICIA A. OROZCO, Judge