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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/30/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0151  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
)  
MELVYN DENNIS SWEET, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
)  
)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201100344

The Honorable Tina R. Ainley, Judge

**AFFIRMED IN PART; VACATED AND REMANDED IN PART**

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by Kent E. Cattani, Chief Counsel  
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**P O R T L E Y**, Judge

¶1 Melvyn Dennis Sweet appeals his conviction and sentence for aggravated assault. He argues the trial court

erred when it refused to instruct the jury on self defense and when it sentenced him to an aggravated term of imprisonment. For the reasons that follow, we affirm Sweet's conviction, but vacate his sentence and remand for resentencing.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶12 After he slashed the victim's throat, Sweet was charged with attempted first-degree murder and two counts of aggravated assault. A jury acquitted him of attempted murder but convicted him of aggravated assault.<sup>1</sup> Sweet was subsequently sentenced to an aggravated ten-year term of imprisonment. We have jurisdiction over Sweet's appeal pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A), 13-4031 and -4033 (West 2012).

#### **DISCUSSION**

##### **I**

¶13 Sweet does not challenge the sufficiency of the evidence supporting his conviction for aggravated assault. He argues, however, that the trial court erred when it refused to instruct the jury regarding self defense, despite the fact that the court found no evidence to support the instruction. He argues he was entitled to the instruction because he presented the "slightest evidence" of self defense.

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<sup>1</sup> Sweet's motion for judgment of acquittal on a second count of aggravated assault was granted.

¶14 We review the decision to refuse a jury instruction for abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). A defendant is entitled to a self defense instruction if there is the "slightest evidence" the defendant acted in self defense. *State v. King*, 225 Ariz. 87, 90, ¶ 14, 235 P.3d 240, 243 (2010). The "slightest evidence" could be "a hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing her life or sustaining great bodily harm." *Id.* (quoting *State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983)). The question is "whether a reasonable person in the defendant's circumstances would have believed that physical force was 'immediately necessary to protect himself.'" *Id.* at ¶ 12 (quoting A.R.S. § 13-404(A)).

¶15 The trial evidence reveals that on the night of the incident, Sweet entered the bar where the victim was sitting, told the victim, "You're a dead motherfucker" and went back outside. The victim left the bar later and walked to his truck. After entering his truck, the victim looked out the open driver's side window and saw Sweet approach. Although the victim thought Sweet was coming to talk, Sweet again said, "You're a dead motherfucker" and struck the victim through the open window. The victim put his hand to his neck and realized he was bleeding. The victim backed his truck away from Sweet,

and as he did, Sweet swung at him again but missed. The victim drove to a nearby convenience store where he sought help.

¶16 There was no evidence of a "hostile demonstration" by the victim. There was no evidence the victim did anything to place Sweet in imminent danger of losing his life or sustaining bodily harm, nor any evidence the victim did anything to create a circumstance in which a reasonable person would believe physical force was "immediately necessary" to protect his or herself.

¶17 Despite Sweet's arguments to the contrary, we find no abuse of discretion. He first argues evidence of an earlier incident was evidence he acted in self defense hours later. Hours earlier, Sweet and the victim had an altercation in the bar parking lot and the victim struck Sweet several times. The parties separated and the victim went home. No reasonable person would find that the earlier separate and distinct incident placed Sweet "in imminent danger of losing [his] life or sustaining great bodily harm" hours later. See A.R.S. § 13-404(A). The victim sitting in his truck did nothing more that made it "immediately necessary" for Sweet to aggressively use force to protect himself.

¶18 Sweet further argues statements made by the victim and/or a sheriff's deputy supported his theory that he acted in self defense. Although the victim later told a detective in

anger that Sweet "brought a knife to a gunfight" and that he wanted to shoot Sweet in the head, the statements cannot be used to demonstrate that Sweet acted in self defense. There was no evidence that the victim was armed or brandishing a weapon at the time he was attacked. Similarly, even though a sheriff's deputy asked Sweet about self defense during an interview after the slashing attack in an effort to persuade Sweet to "come clean," the deputy's statement was designed to get Sweet to talk and could not be considered evidence that Sweet acted in self defense. Consequently, we find no abuse of discretion.

## II

¶19 Sweet argues the trial court erred when it sentenced him to prison for an aggravated ten-year term. He argues the court could not impose an aggravated sentence because the jury did not determine the existence of any of the aggravating factors the court considered in its determination of the appropriate sentence.

¶10 The jury found Sweet guilty of aggravated assault for intentionally, knowingly or recklessly causing physical injury to the victim with a deadly weapon or dangerous instrument, and that it was a dangerous offense.<sup>2</sup> See A.R.S. § 13-1204(A)(2) (West 2012). Although the court provided instructions which

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<sup>2</sup> Despite alleging several aggravating factors for sentencing purposes, the State never sought to have the jury determine the existence of any those factors.

defined both "dangerous offense" and "serious physical injury," the verdict form did not indicate whether the jury found that the offense was dangerous based on the use of a dangerous instrument, the infliction of serious physical injury, or both. The presumptive prison term for an aggravated assault, as a dangerous offense, a class 3 felony, A.R.S. § 13-1204(D), (with no historical prior felonies) is 7.5 years, though the range is anywhere from five to fifteen years. A.R.S. § 13-704(A) (West 2012).

¶11 At the beginning of the sentencing hearing, the court asked the parties if the jury found the offense was dangerous based on the use of a deadly weapon, or the existence of serious physical injury. The State responded that the jury found the offense was a dangerous offense based on the use of a deadly weapon. Sweet did not object or respond to the State's assertion. As a result, the court accepted the State's representation and held that because of the alleged finding it could consider additional sentencing factors without submitting the determination of the existence of those additional factors to the jury. See A.R.S. § 13-701(D)(2) (identifying use of a deadly weapon or dangerous instrument as an aggravating factor). Again, Sweet did not object.

¶12 The court found two aggravating factors. The first was "physical injury" because the court found that "risk of harm

was great; it could have been much worse." The second factor was that Sweet was a risk to the community because his alcohol use was a factor contributing to his misdemeanor criminal history.<sup>3</sup> The court then found three mitigating factors – the victim's "views" on the matter, Sweet's age, and his lack of "criminal history." The court, however, found the aggravating factors outweighed the mitigating factors, and sentenced Sweet to an aggravated ten-year prison term.

¶13 For more than a decade courts have been instructed that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). But, as acknowledged by the trial court, once a single aggravating factor has been properly established by any means, the sentencing judge may find and consider additional aggravating factors in its determination of the appropriate sentence to impose, even if the existence of those additional

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<sup>3</sup>The court's reference to Sweet's misdemeanor criminal history indicates the court did not find his misdemeanors were a separate and distinct aggravating factor as alleged by the parties. Instead, the court found Sweet was a risk to the community because of his use of alcohol as evidenced by his misdemeanors, not because of his misdemeanors themselves. The court's reference becomes apparent when the court found that Sweet's lack of criminal history was a mitigating factor.

factors was not determined by the jury. *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005). A court may not, however, impose an aggravated sentence based solely on the existence of aggravating factors encompassed by the "catch-all" provision found in A.R.S. § 13-701(D)(24) until at least one specific, statutorily enumerated aggravating factor has been properly established. *State v. Schmidt*, 220 Ariz. 563, 566, ¶¶ 10-11, 208 P.3d 214, 217 (2009).

¶14 Sweet did not object to the court's use of aggravating factors. As a result, we only review for fundamental error. See *State v. Munninger*, 213 Ariz. 393, 396, ¶ 10, 142 P.3d 701, 704 (App. 2006). Even if fundamental error exists, however, Sweet must prove he was prejudiced by the use of the improper factor. *Id.* at 397, ¶ 14, 142 P.3d at 705. Further, sentencing error is harmless when we can say beyond a reasonable doubt the error did not contribute to or affect the sentence. *State v. Armstrong*, 218 Ariz. 451, 458, ¶ 20, 189 P.3d 378, 385 (2008).

¶15 Here, the jury did not find any aggravating factors, and Sweet did not admit to any prior felony conviction. As a result, there was no basis for the court to consider or use the two "catch-all" aggravating factors. In fact, despite agreeing with the State that the knife could be considered as an aggravating factor, A.R.S. § 13-701(D)(2) provides that the use of a deadly weapon or dangerous instrument may not be considered



as an aggravating factor if that circumstance was a necessary element of the offense or was used to enhance the range of sentence. And, the parties have correctly conceded on appeal that the court could not consider the use of the weapon as an aggravating sentencing factor because the use of a deadly weapon or dangerous instrument was a necessary element of the offense.

¶16 The other possible aggravating factor that the court could have considered was the infliction of serious physical injury. See A.R.S. § 13-701(D)(1). There was, however, no evidence that the jury found that the offense was dangerous based on the injury. If, however, the jury did find that the offense was dangerous based on the injury, then the injury could not be used as an aggravating sentencing factor because it was used to enhance the range of punishment. A.R.S. § 13-701(D)(1). If, on the other hand, the jury did not find that the offense was dangerous based on the injury, the injury cannot be used because the jury did not find that the injury was an aggravating factor for sentencing purposes in order for the court to consider other aggravating factors not found by the jury.

¶17 Because the jury did not find any aggravating factor and Sweet did not have any prior felony convictions to admit, the court could not consider any other factors encompassed within the "catch-all" provision of A.R.S. § 13-701(D)(24). As a result, there were no aggravating factors of any sort the

court could consider. Under such circumstances, the court could not impose an aggravated sentence. Consequently, the aggravated sentence constitutes fundamental, prejudicial error.

**CONCLUSION**

¶18 We affirm Sweet's conviction. We vacate his sentence and remand for resentencing.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Judge

/s/

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RANDALL M. HOWE, Judge