DIVISION ONE
FILED: 08/27/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0318
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
FRANCISCO TURREY, JR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-117188-001

The Honorable Paul J. McMurdie, Judge

AFFRIMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
And Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Mikel P. Steinfeld, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Appellant Francisco Turrey, Jr. appeals his convictions and sentences for shoplifting, a class 1 misdemeanor, and two counts of aggravated assault, both class 3

felonies. Ariz. Rev. Stat. ("A.R.S.") §§ 13-1805 (2010), -1204 (Supp. 2012), -704 (Supp. 2012).[1] The convictions arise from a single incident when Turrey stole less than fifty dollars' worth of cigarettes from a Circle K gas station. Turrey argues that the court fundamentally erred by incorrectly instructing the jury regarding a private person's authority to arrest, and failing to provide an in-depth description of reasonable force. For the reasons that follow, we affirm his convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY[2]

¶2 JB and RM, employees for Valley Protective Services, were providing loss prevention to Circle K. RM was stationed in the manager's office watching the surveillance camera feeds when he saw Turrey go behind the counter and steal cigarettes. JB was standing outside of the store, so RM notified JB of the theft and provided a description of the suspect. JB stopped Turrey as he exited the store, informed him that he was store security, and asked if he had forgotten to pay for something. Turrey said yes and began to reach into his pocket, at which point RM emerged from the store, placed a handcuff on Turrey's

[1] We cite to the current version of the applicable statute because no revisions material to this decision have since occurred.

[2] "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

left hand, and informed him that he was under arrest. RM could not properly handcuff Turrey because his own glove got in the way and Turrey struggled free. In an attempt to prevent Turrey from escaping, JB sprayed him with pepper spray and RM struck him twice with his baton as Turrey was getting into his truck. When Turrey managed to get into his truck, he said, "I have got something for you mother fuckers," and aimed a semi-automatic gun at JB. JB and RM retreated towards the store and called for back-up as Turrey drove away.

¶3 Officer DR responded to the call and spoke with JB and RM. He watched the surveillance video, made a copy, and impounded it as evidence. Officer DR testified that he did not see any gun on the video recording.

¶4 A jury convicted Turrey of one count of shoplifting and two counts of aggravated assault. For the shoplifting conviction, the trial court sentenced Turrey to 180 days' incarceration with 180 days' credit for time served. For both counts of aggravated assault, the trial court sentenced Turrey to mitigated, concurrent terms of 10 years' incarceration with 236 days of presentence credit. Turrey filed a timely notice of appeal. We have jurisdiction under Arizona Constitution Article VI, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

ISSUES AND STANDARD OF REVIEW

¶5 Turrey argues that the trial court erred when it (1) "incorrectly instructed the jury regarding a private person's authority to arrest," and (2) failed to instruct the jury on the amount of force which the security agents could use in trying to restrain Turrey. Because Turrey failed to object to the proposed instructions, we review for fundamental error only. *See State v. Ulin*, 113 Ariz. 141, 144, 548 P.2d 19, 22 (1976) ("Absent fundamental error, the failure to object to [jury] instructions waives any defects."); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Accordingly, Turrey has the burden to show error, that the error was fundamental, and that he was prejudiced thereby. *See id.* at 567, ¶ 20, 115 P.3d at 607.

I. Jury Instruction – Authority to Arrest

¶6 The trial court instructed the jury that "[a] private person has the right to make a private person arrest for an offense committed in their presence."

¶7 On this record, the instruction was not error. A private person may make an arrest only if "the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony," or if "he has reasonable ground to believe that the person to be arrested has committed it." A.R.S. § 13-3884 (2010). We disagree with Turrey that the

only crime here was a misdemeanor without a breach of the peace. Turrey's argument is premised on the count with which Turrey was charged - shoplifting property less than one thousand dollars, a class 1 misdemeanor, A.R.S. § 13-1805(H), and that shoplifting is not a misdemeanor amounting to a breach of the peace. *See Gortarez v. Smitty's Super Valu, Inc.*, 140 Ariz. 97, 102, 680 P.2d 807, 812 (1984). Turrey's argument ignores that his underlying conduct amounted to burglary, which is a felony.[3] Accordingly, the instruction given was not error, let alone fundamental, prejudicial error.

¶8 Moreover, even if the instruction was erroneous, there was no prejudice. Turrey argues that because the court misstated when a private person may make an arrest, the jury was under the incorrect impression that the victims had the authority to arrest Turrey. He argues this was prejudicial because the instruction "bolstered the credibility of the victims by incorrectly confirming that they had the authority to

[3] Burglary in the third degree is defined as follows: "Entering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or felony therein." A.R.S. § 13-1506 (2010). This is a class 4 felony. *Id.; see also State v. Embree*, 130 Ariz. 64, 66, 633 P.2d 1057, 1059 (App. 1981) (finding "that the Arizona legislature clearly intended to include within the burglary statute those who form the intent to commit theft or a felony while inside [of a] nonresidential structure.").

arrest and by not clearly articulating the standards for reasonable force."

¶9 Whether the victims had the authority to arrest Turrey had nothing to do with whether Turrey committed an aggravated assault by putting the victims in reasonable apprehension of imminent physical injury with a deadly weapon. *See* A.R.S. §§ 13-1203(A)(2) (2010), -1204(A)(2). There is no evidence that this unrelated authority instruction caused the jury to view the victims' testimony that Turrey had a gun as more credible than the testimony that he did not have a gun. The trial court properly instructed the jurors that they were to use the testimony and exhibits introduced in court to determine what actually happened. It also instructed the jury to evaluate all testimony the same, including that of Turrey and of law enforcement officers. Even if the trial court did not correctly describe the authority that the victims had to arrest Turrey, there is no evidence that this instruction influenced the jury's decision that Turrey committed aggravated assault.

¶10 Turrey also argues that, "had the private person arrest instruction been legally accurate, the strength of a possible self-defense instruction would have been more appealing." By not requesting a self-defense instruction, Turrey waived that defense. *See Ulin*, 113 Ariz. at 144, 548 P.2d at 22; Ariz. R. Crim. P. 21.3(c). Moreover, the transcript

shows that Turrey did not request a self-defense instruction because of the arrest instruction, but because he claimed he never used a gun and did not want to present alternative defenses. The court specifically asked, "And then with respect to the issue of self-defense, it is true that you have made a tactical decision not to request it and stay with singular defense rather than inconsistent defense?" And Turrey answered "Correct." There was no error in giving the authority to arrest jury instruction.

II. Jury Instruction – Force

¶11 The trial court instructed the jury that:

> No unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than necessary for his detention.

Turrey contends this instruction was insufficient because A.R.S. § 13-3889 (2010) does not define reasonable force.[4] He argues that an individual may use force "likely to cause serious bodily harm" in detaining another for investigation only if it is necessary for self-defense. *Gortarez*, 140 Ariz. at 104-05, 680

[4] "A private person when making an arrest shall inform the person to be arrested of the intention to arrest him and the cause of the arrest, unless he is then engaged in the commission of an offense, or is pursued immediately after its commission . . . or forcibly resists before the person making the arrest has opportunity so to inform him." A.R.S. § 13-3889.

P.2d at 814-15 (quoting Restatement (Second) of Torts § 120A, cmt. h (1965)).

¶12 The instruction was not erroneous. Arizona Revised Statutes § 13-3889 does not address the use of reasonable force in making a citizen arrest. However, A.R.S. § 13-3881(B) (2010) provides that "[n]o unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than necessary for his detention." The instruction the trial court gave tracks the language of section 13-3881(B).

¶13 Turrey's reliance on *Gortarez* is misplaced for two reasons. First, *Gortarez* dealt with the use of force in detaining a person for investigation. *See Gortarez*, 140 Ariz. at 104, 680 P.2d at 814. Here, the security officers attempted to arrest Turrey and were not simply detaining him for investigation. Second, even if *Gortarez* did apply, the instruction complied with *Gortarez*'s definition of reasonable force because it prohibited unnecessary or unreasonable force; *Gortarez* prohibits possibly deadly force unless necessary for self-defense. The limitations on force when arresting and/or detaining a person that are set forth by A.R.S. § 13-3881(B), the jury instruction, and *Gortarez*, are essentially all the same. Turrey resisted arrest and when he attempted to reach into his pocket, the officers feared that Turrey had a weapon.

The instructions allowed the jury to determine if the officers employed reasonable force in light of Turrey's actions in resisting arrest.

¶14 Even if the instruction might have been erroneous, we fail to see how it caused any prejudice. "[P]rejudice will not be presumed but must appear affirmatively from the record." *State v. Trostle*, 191 Ariz. 4, 13, 951 P.2d 869, 878 (1997).

¶15 Turrey argues that the reasonable force instruction bolstered the credibility of the two security officers. He further argues that if the correct instructions had been given on the authority to arrest and use of reasonable force, he would have asked for a self-defense instruction and the jury would have been able to determine whether his conduct was justified given the force used by the officers. As we explain above, the authority to arrest instruction was not erroneous and did not bolster the officers' credibility. Moreover, there is no indication in the record that Turrey waived a self-defense instruction because of the instructions on privilege to arrest and reasonable force. And this court cannot, on this record, speculate about what the jury "would have been able to determine" from the hypothetical record Turrey suggests on appeal. Thus, even if erroneous, the use of the reasonable force instruction did not prejudice Turrey.

CONCLUSION

¶16 For the foregoing reasons, we affirm Turrey's convictions and sentences.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
ANDREW W. GOULD, Judge

/s/
SAMUEL A. THUMMA, Judge