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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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STATE OF ARIZONA, *Appellee*,

*v.*

KAMAL JAMEEL MOSLEY, *Appellant*.

No. 1 CA-CR 15-0588  
FILED 6-22-2017

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Appeal from the Superior Court in Maricopa County  
No. CR2013-002136-001  
The Honorable Michael W. Kemp, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Jillian Francis  
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix  
By Nicholaus Podsiadlik  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

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**C A T T A N I**, Judge:

¶1 Kamal Jameel Mosley appeals his conviction and sentence for misconduct involving weapons. For reasons that follow, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 In July 2012, the victim, a utility company employee, went to a residence in Phoenix to collect the amount owed on the resident's utility account or, alternatively, disconnect the gas for nonpayment. The utility's logo was displayed on the victim's vehicle as well as on the victim's clothing and badge. The property was fenced and the gate locked, so the victim banged on the fence and threw small pebbles at the front security door to attract the resident's attention. No one came to the door, but the victim saw someone peer out through window blinds.

¶3 After waiting a few more minutes with no response, the victim climbed over the fence with his tool bag, walked directly to the gas meter, and crouched down to access the valves. Almost immediately, a male voice from behind the security door asked the victim what he was doing, and the victim explained that he worked for the utility company and was turning off the gas for nonpayment. The man did not respond, but moments later, the security door burst open and a man holding a gun came out and walked toward the victim. The man cocked the gun and pointed it directly at the victim, only an arm's length from the victim's face. The man ordered the victim to read a posted "no trespassing" sign aloud and, after the victim complied and repeatedly apologized in an attempt to deescalate the situation, the man then ordered the victim to leave. The victim drove a short distance away, then called the police.

¶4 The victim gave responding officers a description of the gun, and the officers went to the residence to investigate. A woman, D.A., answered the door, told the officers that no one else was in the house, told them to leave, and closed the door. D.A. came back out a few minutes later, however, and told the officers that a man named "Monty Jenkins" had

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confronted the victim. D.A. became agitated and, while she remained outside, Mosley also came outside a few minutes later and was arrested.

¶5 The victim identified Mosley as the man who had pointed a gun at him. In a police interview, D.A. again claimed that a man named “Monty Jenkins” had confronted the victim, but later revised her story and claimed that she had confronted the victim with a stick wrapped in black tape, not a gun. Later that evening, officers searched the residence pursuant to a warrant. Officers found a handgun in a small box inside a wooden chest, located in a room containing primarily men’s shoes and clothing, under a bag of men’s clothing.

¶6 The State charged Mosley with one count of aggravated assault and one count of misconduct involving weapons (prohibited possessor), and further alleged prior felony convictions. The charges were severed for trial, and the trial on the aggravated assault charge commenced, but ended in a mistrial.

¶7 During trial on the misconduct involving weapons charge, the victim again identified Mosley as the man who confronted him with a gun, and further testified that the weapon found in the residence looked like the gun Mosley had pointed at him, but that he was unable to say for certain.

¶8 D.A. testified for the defense, stating that Mosley did not live at the residence, but rather was related to the landlord and was just there to make some repairs. She recounted that, as he was working on the house, Mosley heard a noise outside and poked his head through the security door to ask the victim what he was doing on the property, and then ordered the victim to leave. D.A. testified that Mosley was holding only a small stick wrapped in black tape, not a gun. She claimed that she owned the gun found in the residence and that the men’s clothing found near the gun belonged to her “ex,” not Mosley. D.A. also testified that she was not aware the gun was in the house, never told Mosley about it, and that neither she nor Mosley touched it that day.

¶9 The jury found Mosley guilty of misconduct involving weapons,<sup>1</sup> and the superior court sentenced him as a category 3 repetitive

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<sup>1</sup> Mosley later pleaded guilty to the aggravated assault charge, but that conviction and the resulting sentence are not at issue in this appeal.

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offender to 10 years' imprisonment. Mosley timely appealed, and we have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 13-4033(A).<sup>2</sup>

DISCUSSION

I. Justification Jury Instructions.

¶10 Mosley argues that the superior court improperly denied his request for jury instructions on the justification defenses of necessity and defense of premises. We review the denial of a requested jury instruction for an abuse of discretion and will only reverse a conviction on this basis if the court erred and the error resulted in prejudice. *State v. Johnson*, 212 Ariz. 425, 431, ¶ 15 (2006); *State v. Garfield*, 208 Ariz. 275, 278, ¶ 11 (App. 2004).

¶11 "A party is entitled to an instruction on any theory reasonably supported by the evidence," but the superior court need not give an instruction that does not fit the facts of the case. *State v. Rodriguez*, 192 Ariz. 58, 61, ¶ 16 (1998); *see also State v. Hussain*, 189 Ariz. 336, 337 (App. 1997). A justification instruction is proper if, viewed in the light most favorable to its proponent, even the "slightest evidence" supports it. *State v. Almeida*, 238 Ariz. 77, 79, ¶ 9 (App. 2015). The court does not weigh or resolve conflicting evidence, but rather "merely decides whether the record provides evidence upon which the jury could rationally sustain the defense." *Id.* (citation omitted).

¶12 Before trial, Mosley requested jury instructions for necessity and defense of premises. While settling final jury instructions, the court observed that "the defense is pretty clear that [Mosley] didn't have the gun; he didn't know about the gun; he never possessed the gun; he never had the gun in his hand," and the court inquired whether defense counsel still wanted the justification instructions to support an argument that Mosley possessed the gun in order to defend the premises. Defense counsel acknowledged presenting evidence that Mosley only had a stick (never a gun), but argued that Mosley had a right to possess either a stick or a gun to defend himself and the premises. Counsel also argued that the instruction was warranted based on the evidence of the stick wrapped in black tape, because use of a stick could constitute an assault. The court noted that assault was not at issue, only whether Mosley possessed a gun, and declined to give Mosley's requested instructions on the basis that the trial evidence did not support either necessity or defense of premises.

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<sup>2</sup> Absent material revisions after the relevant date, we cite a statute's current version.

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¶13 Mosley contends the denial of his requested jury instructions hampered his defense to the misconduct involving weapons charge and relieved the State of its burden of proving his conduct was not legally justified. As relevant here, a person commits misconduct involving weapons by “possessing a deadly weapon or prohibited weapon if such person is a prohibited possessor,” which is defined as any person who “has been convicted . . . of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored.” A.R.S. §§ 13-3102(A)(4), -3101(A)(7)(b). Mosley did not and does not dispute his status as a prohibited possessor; the only contested element was whether Mosley possessed a gun.

¶14 The necessity justification renders conduct that would otherwise constitute a criminal offense lawful “if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person’s own conduct.” A.R.S. § 13-417(A). Even assuming this defense applies to an offense involving simply possessing a weapon rather than using one, Mosley’s claim fails. Nothing in the record suggests that Mosley was compelled to confront the victim with a gun to prevent an imminent public or private injury. Although Mosley suggests he satisfied this standard with evidence that the residence is in a high crime area where scrap metal theft is common, the record reflects that he had other reasonable and legal alternatives to possessing a firearm, including remaining inside the home behind a bolted security door, contacting the utility company to verify the victim’s claims, or calling the police for assistance. Thus, the superior court properly denied Mosley’s request for a necessity instruction.

¶15 The defense of premises justification allows a person to “threaten[] to use deadly physical force . . . against another when and to the extent that a reasonable person would believe it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises.” A.R.S. § 13-407(A). But Mosley was charged with possessing the gun, not with “threatening to use deadly force,” the conduct to which the defense of premises justification applies. Moreover, the uncontroverted evidence established that the victim identified himself (wearing clothing reflecting his job with the utility company and telling Mosley he worked for the utility company) and stated the lawful reason for handling the gas lines on the property (to cap the gas valves due to nonpayment). Accordingly, the superior court did not abuse its discretion by finding there was no basis for a defense of premises instruction.

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**II. Speedy Trial.**

¶16 Mosley challenges the superior court's denial of his motion to dismiss based on an alleged violation of his speedy trial rights. Specifically, he argues that the court miscalculated the last day for trial and erroneously concluded extraordinary circumstances warranted a continuance in contravention of Rule 8 of the Arizona Rules of Criminal Procedure.

¶17 To establish a speedy trial violation, the defendant must first show a prima facie violation of Rule 8 time limits; the burden then shifts to the State to prove excludable time. *See Humble v. Superior Court*, 179 Ariz. 409, 413 (App. 1993). We review the superior court's Rule 8 ruling for an abuse of discretion, and we will not reverse absent resulting prejudice to the defendant. *State v. Wassenaar*, 215 Ariz. 565, 571, ¶ 16 (App. 2007). We review de novo the superior court's interpretation of a court rule, considering the rule in the context of surrounding and related provisions. *State v. Hegyi*, 240 Ariz. 251, 254, ¶ 9 (App. 2016); *State v. McCurdy*, 216 Ariz. 567, 576, ¶ 24 (App. 2007).

¶18 The State filed both charges—aggravated assault and misconduct involving weapons—on April 30, 2013. The parties agree that, after a change in defense counsel, the conclusion of Rule 11 proceedings, and Mosley's waiver of time to accommodate a scheduling conflict, the Rule 8 last day to try the two charges was March 23, 2015. Immediately before beginning the trial set for March 19, 2015, however, the court granted Mosley's motion to sever the charges for trial.

¶19 The aggravated assault charge was tried first, but the court declared a mistrial on the fourth day of trial due to juror misconduct. The parties agreed that, under Rule 8.2(c), retrial on the aggravated assault charge would have to begin within 60 days (May 26, 2015), but they did not reach a consensus regarding the last day for the misconduct involving weapons trial. After considering various calculations, the master calendar judge eventually concluded the severed counts should retain the same last day, and recalculated the last day for the misconduct involving weapons charge to be May 26, 2015 as well. Mosley argued this recalculation violated his Rule 8 speedy trial rights and provided a basis to dismiss the misconduct involving weapons charge, but the superior court denied his request to dismiss.

¶20 Mosley contends the superior court erred by concluding that the aggravated assault count and the misconduct involving weapons count retained the same last day for Rule 8 purposes, notwithstanding their

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severance for trial.<sup>3</sup> Rule 8.2(a)(2) requires that out-of-custody defendants be tried within 180 days from arraignment, subject to excludable periods under Rule 8.4.

¶21 As the parties acknowledge, Rule 8 does not specify how to calculate a defendant's last day for trial on newly severed charges. Citing *State v. Hopper*, 25 Ariz. App. 65 (App. 1975), the State contends that the superior court need only reset trial on severed charges within a reasonable timeframe. But *Hopper* involved only the initial delay required to accommodate a first trial before setting a newly severed second trial. 25 Ariz. App. at 65–66. Mosley is not claiming that the initial 13-day delay occasioned by severing the charges violated Rule 8 or his speedy trial rights, but rather challenges the superior court's subsequent determination that the same last day (60 days after mistrial, *see* Ariz. R. Crim. P. 8.2(c)) applied to both charges, even though there had only been a mistrial in the aggravated assault trial.

¶22 Rule 8.4 does not provide for any period of exclusion related to severance of charges. The rule provides only that a delay resulting from *joinder* for trial with another defendant as to whom the time limits have not run is excluded "when there is good cause for denying severance. In all other cases, severance should be granted to preserve the applicable time limits." Ariz. R. Crim. P. 8.4(f). Thus, as contemplated by the rule, severance operates to preserve existing time limits, not to extend them. Here, however, the superior court applied the same last day to both severed counts even though Rule 8.2(c) (which extends the time limit by 60 days following a mistrial) does not expressly extend the timeframe for previously joined but presently severed counts. And Rule 8.4 does not expressly designate the 60-day period following mistrial on one count as excludable vis-à-vis a severed count. Accordingly, the 60-day extension of time with respect to the misconduct involving weapons charge arguably violated Rule 8.

¶23 Nevertheless, we will not reverse absent a showing of prejudice, including harm to the defense attributable to the delay or some other deprivation of a fair trial. *Wassenaar*, 215 Ariz. at 571, ¶ 16. Mosley does not assert, much less demonstrate, prejudice. He was released from

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<sup>3</sup> To the extent Mosley also contends that the superior court improperly failed to notify the Arizona Supreme Court of court congestion under Rule 8.4(d), we note that the court vacated its initial ruling predicated on court congestion. Accordingly, we decline to address this argument.

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custody, so the delay did not subject him to prolonged confinement. Nor has he asserted that evidence was destroyed, a witness became unavailable, or his trial defense was otherwise hampered in any way. *See State v. Vasko*, 193 Ariz. 142, 147, ¶ 22 (App. 1998). Instead, he contends only that his right to a speedy trial was “systemically” violated, and therefore “corrective” action is needed. Although Mosley vigorously asserted his right to a speedy trial and sought special action relief, he has not demonstrated prejudice from the alleged Rule 8 violation.

¶24 In addition to the last-day-calculation issue, Mosley asserts the court erred by granting the State’s requests for two continuances based on the prosecutor’s scheduling conflicts due to another trial and a prepaid vacation. Because the superior court is best positioned to assess whether extraordinary circumstances warrant a continuance and whether delay is indispensable to the interests of justice, we review for an abuse of discretion and will only reverse upon a showing of resulting prejudice. *State v. Dixon*, 226 Ariz. 545, 555, ¶ 53 (2011); *Vasko*, 193 Ariz. at 144, ¶ 8.

¶25 Over Mosley’s objection, the court found extraordinary circumstances justified a continuance, set a new trial date, and extended the last day for trial to June 12, 2015. Noting Mosley was not in custody, the trial court excluded time from May 18, 2015 (the scheduled trial date) through June 4, 2015 (the reset date). Mosley sought special action review of this ruling, which this court summarily declined. Mosley again moved to dismiss the misconduct involving weapons charge, arguing that the prosecutor’s vacation did not qualify as an extraordinary circumstance and that the continuance thus violated Rule 8. The superior court denied the motion on the basis that Mosley had failed to demonstrate prejudice. Mosely eventually went to trial on the misconduct involving weapons charge on June 10, 2015.

¶26 The superior court had a reasonable basis to conclude that the prosecutor’s trial conflict and prepaid vacation amounted to extraordinary circumstances justifying a continuance under Rule 8.5(b). Although Mosley suggests the trial conflict was not unforeseen and that a different prosecutor could have proceeded with the case, the court did not abuse its discretion by reaching a different conclusion. *See State v. Mendoza*, 170 Ariz. 184, 194 (1992). Accordingly, Mosely has not established grounds for reversal based on alleged Rule 8 violations.



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**CONCLUSION**

¶27

Mosley's conviction and sentence are affirmed.



AMY M. WOOD • Clerk of the Court  
FILED: AA