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

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-0759
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JOSE ORLANDO BROWN-VASQUEZ, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-171611-001 DT

The Honorable Larry Grant, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Joseph T. Maziarz, Assistant Attorney General,
Attorneys for Appellee

Eric W. Kessler — Mesa
Attorney for Appellant

I R V I N E, Judge

¶1 Jose Orlando Brown-Vasquez ("Brown-Vasquez") appeals his conviction and sentence for aggravated assault. Brown-

Vasquez argues that the trial court erred when it refused to instruct the jury pursuant to Arizona Revised Statutes ("A.R.S.") section 13-411 (Supp. 2009).[1] For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the conviction. *See State v. Riley*, 196 Ariz. 40, 42, ¶ 2, 992 P.2d 1135, 1137 (App. 1999).

¶3 In November 2006, Victim was renting a room on the second floor in Beverly Stephens' ("Stephens") house. On the early morning of November 21, 2006, Stephens and Brown-Vasquez were relaxing in the master bedroom when Stephens realized that $300 was missing.[2] Stephens immediately accused Victim of stealing the money. Stephens, followed by Brown-Vasquez, walked down the hall, aggressively knocked on Victim's bedroom door, and yelled at him to return the money. As Stephens confronted Victim, Brown-Vasquez went downstairs and retrieved his bayonet. Brown-Vasquez then requested Stephens to retrieve the gun in the closet. According to Stephens, when she returned with the gun,

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

[2] Stephens had left half of her winnings from a lottery ticket in a basket for Brown-Vasquez. She later found the money in a small box in the bedroom closet.

Brown-Vasquez forced Victim against the wall. Brown-Vasquez and Victim began pushing each other as they each struggled to gain control of the bayonet. At some point during this struggle, Victim was stabbed and ultimately fell down the stairs.

¶4 As Victim laid at the bottom of the stairs bleeding, Stephens called 911. Detective D.H. responded to the 911 call. He observed large amounts of blood upstairs and downstairs. At the hospital, doctors treated Victim for a stab wound that also injured his lung.

¶5 Brown-Vasquez was arrested and indicted for one count of aggravated assault, a class three dangerous felony. At trial, Brown-Vasquez's, Stephens', and Victim's testimony substantially contradicted each other. After closing arguments, Brown-Vasquez requested a crime prevention jury instruction pursuant to A.R.S. § 13-411. The court refused to give Brown-Vasquez's proposed instruction and stated:

> It is clear that the victim didn't have anything in his hands, nothing. It was equally clear that Ms. Stephens did not suffer serious physical injury at all. There may have been some dispute in the testimony about whether or not there was even contact between the victim and Ms. Stephens. That would, if there was contact, and there is some dispute about that, that would be a simple assault.
>
> Based upon the arguments of counsel, the Court's reading of the relevant case law, and the statute involved, the Court is not inclined to give the use of force crime

> prevention as that crime, the activity described at the event that occurred in this case, arguably, if anything, is a simple assault. The court is not going to give that instruction.

The jury found Brown-Vasquez guilty as charged. The court sentenced Brown-Vasquez to a mitigated term of six years' imprisonment in ADOC.

¶6 Brown-Vasquez timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A) (2003), 13-4031 (2001), and 13-4033 (Supp. 2009).

DISCUSSION

¶7 Brown-Vasquez argues that the trial court erred by refusing to give his requested jury instruction pursuant to A.R.S. § 13-411. Section 13-411 provides in relevant part that a person is justified in using physical and deadly force against another if and to the extent the person reasonably believes that physical or deadly force is immediately necessary to prevent the commission of an aggravated assault. A.R.S. § 13-411(A).

¶8 We review the trial court's denial of a requested jury instruction for an abuse of discretion. *State v. Gomez*, 211 Ariz. 111, 114, ¶ 14, 118 P.3d 626, 629 (App. 2005). As Brown-Vasquez correctly argues, "a defendant is entitled to a justification instruction if it is supported by 'the slightest evidence.'" *State v. Ruggiero*, 211 Ariz. 262, 264, ¶ 10, 120 P.3d 690, 692 (App. 2005) (quoting *State v. Hussain*, 189 Ariz.

336, 337, 942 P.2d 1168, 1169 (App. 1997)). Nevertheless, an instruction should not be given "unless it is reasonably necessary and clearly supported by the evidence." *Ruggiero*, 211 Ariz. at 264-65, ¶ 10, 120 P.3d at 692-93 (quoting *State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987)).

¶9 Brown-Vasquez contends that his testimony at trial "provided the 'scintilla' of evidence necessary to justify the instruction." In his brief, Brown-Vasquez asserts that *State v. Korzep*, 165 Ariz. 490, 799 P.2d 831 (1990), is controlling. In *Korzep*, the trial court refused to give the defendant's justification instruction pursuant to A.R.S. § 13-411 because it thought that the justification defense was covered adequately by the self-defense instructions. *Id*. at 492, 799 P.2d at 833. Despite expressly finding sufficient evidence from which the jury could believe that defendant's husband was about to commit aggravated assault, the court refused to give the instruction because it thought the statute did not apply. *Id*. On appeal, a panel of this court affirmed, and concluded that § 13-411 does not apply when one resident uses deadly force to prevent the commission of a crime by another resident of the same household. *Id*.

¶10 The Arizona Supreme Court disagreed with the court of appeals and stated that § 13-411 applies to residents of the same household as well as an intruder or invitee. *Id*. at 494,

799 P.2d at 835. Additionally, the court concluded that the trial judge erred by failing to instruct the jury on § 13-411. The court noted that "[a] criminal defendant is entitled to have the jury instructed on self defense 'whenever there is the slightest evidence of justification for the defensive act.'" *Id*. (citations omitted). Because the court found sufficient evidence for the jury to believe that the husband was about to commit aggravated assault, this constituted the slightest evidence of justification. *Id*.

¶11 As the State correctly notes, the defendant in *Korzep* presented evidence from which a juror could find that the defendant's actions were reasonable and immediately necessary. Here, unlike *Korzep*, the trial court stated that there was no dispute that Victim was unarmed and that Stephens did not suffer any serious physical injury. The court also noted that there was a dispute as to whether there was any contact between Victim and Stephens. Nevertheless, the court concluded that even if there was contact, "that would be a simple assault."

¶12 Contrary to Brown-Vasquez's assertions that he believed he and/or Stephens were going to be killed, the evidence at trial did not support his crime prevention defense. Brown-Vasquez's testimony did not provide "the slightest evidence" in support of the theory that he was justified in using deadly or physical force against Victim to prevent the

commission of an aggravated assault. Brown-Vasquez testified that Victim violently grabbed and shook Stephens. Victim pushed Brown-Vasquez to the side as he attempted to intervene. Because of Victim's size, Brown-Vasquez then retrieved his bayonet. Victim then "lunge[d]" toward Brown-Vasquez and reached for the bayonet. As Brown-Vasquez and Victim struggled, Brown-Vasquez regained control of the bayonet. Afterwards, Victim unexpectedly collapsed and stumbled down the stairs.[3] Brown-Vasquez acknowledged that he never told police that he thought Victim was going to kill him and/or Stephens.

¶13 The evidence at trial did not show that Brown-Vasquez's actions were "immediately necessary" or that Brown-Vasquez reasonably believed that to be so. As the trial court noted, it was undisputed that Victim was unarmed. Victim testified that he had no weapons on him and that he never touched Stephens. Stephens testified that she was not afraid of Victim and that Victim never pushed her. Stephens admitted that she wanted "to go stir it up with [Victim]," that Victim never pushed her, and that she did not fear Victim. Stephens also testified that Brown-Vasquez forced Victim to stand against the wall and pointed the bayonet towards Victim.

[3] Brown-Vasquez testified that he defended himself by only using the handle-end of the bayonet and that he had no memory of stabbing Victim.

¶14 Because Brown-Vasquez's testimony raising the crime prevention justification did not provide the "slightest evidence" to justify an instruction consistent with A.R.S. § 13-411, the trial court properly refused to instruct the jury accordingly. Therefore, the trial court did not abuse its discretion in refusing to give a crime prevention justification instruction.

¶15 Even assuming the trial court erred in failing to instruct the jury in accordance with A.R.S. § 13-411, any error would be harmless. *See State v. Dann*, 205 Ariz. 557, 565, ¶ 18, 74 P.3d 231, 239 (2003) ("Erroneous jury instructions are subject to a harmless error analysis." (citation omitted)); *see also State v. Garfield*, 208 Ariz. 275, 279, ¶ 15, 92 P.3d 905, 909 (App. 2004) (applying harmless error analysis where the trial court refused to give crime prevention instruction under A.R.S. § 13-411). "If no rational jury could find otherwise even if properly instructed, 'the interest in fairness has been satisfied and the judgment should be affirmed. . . .'" *Dann*, 205 Ariz. at 565, ¶ 18, 74 P.3d at 239 (citation omitted). In this case, other than Brown-Vasquez's conclusory statement that he thought that Victim was going to kill him and/or Stephens, Brown-Vasquez presented no additional evidence that he "reasonably believe[d]" that such force was "immediately necessary" to prevent Victim from assaulting anyone with a

deadly weapon or dangerous instrument. A.R.S. § 13-411(A). Further, no additional evidence was presented to corroborate Brown-Vasquez's testimony. Because the jury rejected Brown-Vasquez's argument, we conclude that no rational jury could have found that Brown-Vasquez acted to prevent the commission of an aggravated assault. Accordingly, the trial court's failure to give the crime prevention justification instruction did not affect the verdict.

CONCLUSION

¶16 For the foregoing reasons, we affirm.

/s/
_____
PATRICK IRVINE, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge