DIVISION ONE
FILED: 03/11/2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0058
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOHNATHON ALLEN STERKESON,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-156796-001-DT

The Honorable Steven P. Lynch, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

The Ferragut Law Firm, P.C. — Phoenix
By Ulises A. Ferragut, Jr.
Attorneys for Appellant

D O W N I E, Judge

¶1 Johnathon Allen Sterkeson ("Defendant") appeals from his convictions for aggravated assault and unlawful discharge of

a firearm. He contends the jury was insufficiently instructed regarding self-defense, and he challenges various evidentiary rulings. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Defendant and his girlfriend, J.C., ended their relationship, and Defendant was in the process of moving from their shared apartment. During the evening of August 29, 2007, J.C. went to the apartment, though she and her more recent love interest, victim J.H., planned to get together later that night.

¶3 At one point, J.H. and J.C. were speaking by telephone, when Defendant took the phone, and he and J.H. taunted and threatened each other. Around 4:00 a.m. on August 30, J.H. arrived at the apartment and found J.C. and Defendant in the parking lot. A struggle ensued, with the two men "wrestling," "rolling around," and trying to punch each other. Defendant bit J.H. J.H. "sucker-punched" Defendant in the face; Defendant threw a large rock at J.H.'s vehicle.

¶4 During the final phase of the skirmish, when J.C. and J.H. believed the fighting had ceased, and J.H. was walking away, Defendant began taunting J.H. J.H. came toward Defendant. Defendant retrieved a semi-automatic assault rifle from his

[1] We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against Defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

locked truck and pointed the weapon at J.H. J.C. grabbed the gun's barrel, pointed it to her chest, and told Defendant if he was going to shoot J.H., he would have to shoot her first. J.H. approached Defendant for J.C.'s "safety." J.H. also thought it would be safer to be near Defendant, rather than some distance away, where Defendant could aim and fire the rifle. Defendant and J.H. struggled for control of the weapon. As J.H. pushed J.C. out of the way, Defendant pointed the gun at J.H., who ducked and turned. Defendant shot J.H. in the back. Defendant fired another shot "because [J.H.] started running away--right away," but that shot missed. J.H. ran a short distance and collapsed, bleeding profusely.

¶5 J.H. survived the shooting, but suffered serious injuries and was hospitalized for twenty days. In a videotaped interview with police, Defendant admitted shooting J.H., but claimed he did so in self-defense.

¶6 The State charged Defendant with aggravated assault, a class three dangerous felony, and unlawful discharge of a firearm, a class six dangerous felony. Trial commenced, and the court instructed the jury on self-defense. The jury found Defendant guilty as charged. The court sentenced Defendant to a mitigated term of five years' imprisonment for the aggravated assault, to be served concurrently with one-and-a-half years' imprisonment for unlawful discharge of a firearm.

¶7 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (Supp. 2008).

DISCUSSION

1. Self-Defense Instructions

¶8 Defendant contends the trial court erred in instructing the jury on self-defense without giving further instruction about the meaning of "unlawful force" or "deadly force."[2] Specifically, Defendant contends the court should have instructed the jury on the elements of endangerment, threatening or intimidation, and aggravated assault--crimes J.H. purportedly committed and against which Defendant was defending himself.

¶9 As Defendant concedes, we review only for fundamental error because the defense did not request these instructions at

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[2] In relevant part, the court instructed the jury as follows:

> A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:
>
> 1. A reasonable person in the situation would have believed that physical force was immediately necessary to protect against another's use or apparent attempted or threatened use of unlawful physical force[.]
>
> 2. . . .
>
> A defendant may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force.

trial. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (when a defendant fails to request a jury instruction, we review the failure to give the instruction for fundamental error only). To obtain relief under fundamental error review, Defendant has the burden of establishing that error occurred, the error was fundamental, and he was prejudiced thereby. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 20-22, 115 P.3d 601, 607-08 (2005). Fundamental error is error that "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id*. at 568, ¶ 24, 115 P.3d at 608. To show prejudice, Defendant must demonstrate that, absent the error, a reasonable jury could have reached a different result. *See id.* at 569, ¶ 27, 115 P.3d at 609.

¶10 The purpose of instructions is to inform the jury of the applicable law. *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996) (citation omitted). Instructions need not be faultless, but they must not mislead the jury, and they must give the jury an understanding of the issues. *See id.* (citation omitted). Only when the instructions, taken as a whole, are such that it is reasonable to suppose the jury was misled will we reverse for error in the instructions. *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986).

¶11 We agree with the State that "the unrequested instructions shed no light on the key issue before the jury, *i.e.,* how [Defendant] was possibly justified in using 'deadly force.'" Defendant did not claim, and there was no evidence that J.H. used or attempted to use deadly physical force during the altercation. *See* A.R.S. § 13-405 (a person is justified in using deadly physical force against another only "when and to the degree a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force.") (2001).

¶12 Defendant's reliance on *State v. Fish*, 222 Ariz. 109, 213 P.3d 258 (App. 2009), is unavailing. Fish was hiking in a remote wooded area when the victim's two barking and growling dogs ran toward him. *Id.* at 112-13, ¶ 2, 213 P.3d at 261-62. Fish fired a warning shot into the ground to disperse the dogs, and the victim responded by yelling threats while running at Fish "with his eyes crossed and looking crazy and enraged . . . ." *Id*. at 113, ¶¶ 2-3, 213 P.3d at 262. Fearing for his life, Fish shot and killed the victim. *Id*. at ¶ 3. Fish argued that he acted in self-defense, but the jury found him guilty of second degree murder. *Id*. at 113-14, ¶ 5, 213 P.3d at 262-63.

¶13 On appeal, we held the trial court should have granted Fish's request to instruct the jury that, for purposes of self-

defense, the term "unlawful physical force" included the statutory elements of endangerment, threatening or intimidating, and aggravated assault. *Id*. at 129, ¶ 66, 213 P.3d at 278. We found the requested instructions were supported by the evidence and stated: "The jury could have concluded that the Victim's advances toward [Fish] did not rise to the level of unlawful conduct, not realizing that the Victim could have committed an aggravated assault without ever making contact with the Defendant." *Id*.

¶14 *Fish* is not controlling here, where it is undisputed J.H. and Defendant physically fought with each other. Unlike in *Fish,* where there was no physical contact between the victim and the defendant, the instructions here could not be interpreted in a manner causing the jury to disregard the self-defense evidence. Additionally, *Fish* engaged in harmless error review because the defense requested the missing instructions. *Id*. at 126-30, ¶¶ 55-68, 213 P.3d at 275-79. Thus, it was the *State's* burden to show that the instructions did not affect the verdict. *Id*. at 279, ¶ 68, 213 P.3d at 279. In the case at bar, Defendant bears the burden of proof. As we have already noted, there was no evidence J.H. used or threatened to use deadly force against Defendant. Additionally, Defendant neither characterized J.H.'s conduct as the crimes of threatening or intimidating and aggravated assault nor argued he was "defending

himself against aggravated assault." Nor has Defendant established the requisite prejudice. He merely speculates that "an instruction defining crimes potentially attributable to [J.H.] would have been helpful to the jury to determine an element of the offense."

¶15 We find no fundamental error in the trial court's failure to *sua sponte* instruct the jury as Defendant now suggests. *See also State v. Barraza,* 209 Ariz. 441, 104 P.3d 172 (App. 2005) (rejecting contention that the failure to define "unlawful physical force" constituted fundamental error).

2. Evidence of Alcohol and Drug Use

¶16 Defendant sought to admit evidence that, at the time J.H. received emergency treatment for shooting-related injuries, his blood alcohol concentration was .082, and blood tests showed the presence of benzodiazepines, opiates, and cannabinoids. This evidence was contained in J.H.'s medical records, and Defendant expected J.H.'s treating physician to similarly testify. In a pretrial ruling, the court precluded admission of the medical records, but allowed Defendant to question J.H. about any alcohol and drug usage the night of the shooting.[3] The court further ruled that, if J.H.'s testimony contradicted his

[3] The court also ruled that Defendant could testify he smelled alcohol on J.H.'s breath, and it allowed him to question the police officers and trauma surgeon about smelling alcohol.

medical records, the records would be admissible for impeachment under Arizona Rule of Evidence 608(b).

¶17 We review the trial court's evidentiary ruling for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, 156, ¶ 40, 140 P.3d 930, 939 (2006); *State v. Sucharew*, 205 Ariz. 16, 21, ¶ 9, 66 P.3d 59, 64 (App. 2003). As a preliminary matter, we note that, although J.H.'s medical records were apparently redacted in an attempt to comply with the court's order, they nevertheless specifically disclose that, at 5:30 a.m. on August 30, 2007, J.H.'s blood alcohol concentration was 82 MG/DL. The same page of the exhibit includes a "NOTE" about "ALCOHOL TOXICITY LEVELS," stating, ">80 MG/DL LEGAL TOXICATION LEVEL IN ARIZONA." Thus, evidence of J.H.'s alcohol concentration *was* before the jury.

¶18 We also find no abuse of discretion in the ruling regarding J.H.'s purported drug use. Had the jury been presented with medical records reflecting the presence of benzodiazepines and opiates, it could have concluded their presence was due to illicit use by J.H. However, the record reflects several drugs were administered by paramedics who treated J.H. As J.H. testified, "On the scene I was treated with morphine, and the tranquilizer did knock me out." J.H.'s trauma surgeon confirmed that paramedics gave J.H. medication to "help him relax and to chemically paralyze him to put in a

breathing tube." With respect to the presence of cannabinoids, the medical records did not indicate when J.H. may have ingested marijuana.[4]

¶19 Finally, the trial court specifically authorized Defendant to cross-examine J.H. and his surgeon about any drug usage. The defense did not avail itself of this opportunity.

¶20 We find no error in the court's orders. Defendant's Confrontation Clause arguments are without merit. The Confrontation Clause is generally satisfied by the opportunity to cross-examine. *Delaware v. Fensterer,* 474 U.S. 15, 22 (1985); *United States v. Owens,* 484 U.S. 554, 559 (1988). This line of cases survives the decision in *Crawford v. Washington,* 541 U.S. 36, 68 (2004). *See State v. Real,* 214 Ariz. 232, 150 P.3d 805 (App. 2007). The alcohol-related evidence was before the jury, and Defendant was provided an adequate opportunity to explore whether the victim was under the influence of drugs.

3. J.H.'s Presence During Argument

¶21 J.H. was present in the courtroom during argument regarding admissibility of the drug and alcohol evidence. Defense counsel sought J.H.'s exclusion, stating: "I don't want [J.H.] listening to what's going on here and I have some things that I need to say without his being here." In response, the

[4] As the State pointed out, "marijuana stays in your system for a very long time, up to 30 days."

State noted "the victim rights statute is pretty clear, the victim can be in the courtroom at every proceeding." The court declined to remove J.H. from the courtroom.

¶22 Defendant contends a victim's right to be present cannot "override, supersede, limit, hinder, or impair" a criminal defendant's federal constitutional rights to a fair trial, due process, and confrontation. According to Defendant, J.H.'s presence afforded him the opportunity to "manipulate, control, and limit the jury's exposure to evidence . . . [of J.H.'s alcohol use]."

¶23 If J.H. had been excused from the courtroom, nothing prevented the State from explaining to him the court's *in limine* ruling relating to his testimony. Moreover, even assuming the trial court erred, the error would be harmless as a matter of law. *See State v. Moody,* 208 Ariz. 424, 457, ¶ 132, 94 P.3d 1119, 1152 (2004) (holding that an error is harmless if the appellate court can say, beyond a reasonable doubt, that the error did not contribute to or affect the guilty verdict). J.H. admitted drinking "a couple of beers," and the admitted medical records included his blood alcohol concentration, along with a notation that it was greater than the "legal toxication level in Arizona."

4. Text Messages Regarding Drug Usage

¶24 In his opening brief, Defendant challenged the preclusion of certain text messages, notwithstanding the fact he agreed below that such evidence was inadmissible. In his reply brief, Defendant withdraws this claim for purposes of direct appeal. We thus do not address it.

5. J.H.'s Statements to Third Parties

¶25 Defendant next challenges a ruling that precluded him from asking J.H. whether he had spoken to anyone about the shooting incident. Defendant does not cite supporting authority or relevant portions of the record in support of this claim. We thus decline to address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Carver*, 160 Ariz. at 175, 771 P.2d at 1390; *Moody,* 208 Ariz. at 452 n.9, ¶ 101, 94 P.3d at 1147 n.9; *State v. Jaeger,* 973 P.2d 404, ¶ 31 (Utah 1999) ("[T]his court is not 'a depository in which the appealing party may dump the burden of argument and research.'") (citation omitted).

¶26 We also cannot properly address this issue because Defendant does not now, and did not at trial, explain the substance of the precluded testimony. Absent an offer of proof, we cannot determine whether error occurred, and if it did, whether Defendant was prejudiced. *See* Ariz. R. Evid. 103(a)(2) (error may not be predicated on ruling excluding evidence unless substance of evidence shown by offer of proof or apparent from

context); *State v. Towery,* 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) ("[The] proponent of the precluded evidence must . . . make the offer of proof so that the reviewing court can determine whether the trial judge erred in precluding the evidence.") (citations omitted).

6. Defendant's Medical Records

¶27 Again without citing authority or the record, Defendant argues the trial court should have admitted unredacted copies of his medical records. The record reflects that seventeen pages of Defendant's medical records were admitted as exhibit 120, two lines of which were redacted. The record also shows Defendant moved for admission of exhibit 120. Consequently, Defendant invited any purported error. *See State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001) ("If an error is invited, we do not consider whether the alleged error is fundamental, for doing so would run counter to the purposes of the invited error doctrine. Instead, as we repeatedly have held, we will not find reversible error when the party complaining of it invited the error.") (citation omitted); *State v. Lucero*, 223 Ariz. 129, 138, ¶ 31, 220 P.3d 249, 258 (App. 2009) ("[I]f the party complaining on appeal affirmatively and independently initiated the error, he should be barred from raising the error on appeal."). Nothing in the

record establishes what information was redacted from the medical records, and Defendant made no offer of proof.

CONCLUSION

¶28 Defendant's convictions and sentences are affirmed.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge