IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 08-10-2010
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,	)	1 CA-CR 09-0589
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ADRIAN RYAN LEWIS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-176237-001 DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED AS MODIFIED

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

James J. Syme, Jr. — Goodyear
Attorney for Appellant

W I N T H R O P, Judge

¶1 Adrian Ryan Lewis ("Appellant") appeals his conviction for aggravated assault. He argues that the trial court erred by not instructing the jury on endangerment as a lesser-included

offense of aggravated assault. For the following reasons, we affirm the conviction but modify the court's sentencing minute entry to reflect that Appellant was not convicted of a dangerous felony.

FACTS AND PROCEDURAL HISTORY

¶2 On December 16, 2008, a grand jury issued an indictment, charging Appellant with aggravated assault, a class three felony in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1203 (2010)[1] and 13-1204 (2010) for "using a glass and/or glass bottle and/or shot glass, a deadly weapon or dangerous instrument" to "intentionally, knowingly or recklessly cause[] a physical injury to [the victim]."[2] The indictment further alleged that the offense was "a dangerous felony because the offense involved the discharge, use, or threatening exhibition of a glass and/or glass bottle and/or shot glass, a deadly weapon or dangerous instrument and/or

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

[2] Pursuant to A.R.S. § 13-1203(A), "[a] person commits assault by: 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or 3. Knowingly touching another person with the intent to injure, insult or provoke such person." Under A.R.S. § 13-1204(A), "[a] person commits aggravated assault if the person commits assault as prescribed by § 13-1203 under any of the following circumstances: 1. If the person causes serious physical injury to another. 2. If the person uses a deadly weapon or dangerous instrument. . . ." Although the indictment did not specify which subsections of A.R.S. §§ 13-1203 and 13-1204 Appellant had allegedly violated, the indictment's language tracked subsection (A)(1) of § 13-1203 and subsection (A)(2) of § 13-1204.

the intentional or knowing infliction of serious physical injury upon [the victim]." *See* A.R.S. § 13-704(L) (2010).

¶3 Appellant's trial began on April 27, 2009. The version of the evidence presented by the State at trial showed that in the late evening of December 7, 2008, Appellant went to a bar in Phoenix. While there, he sat at a table with two other people, including a woman named Andrea. At some point, Appellant asked Andrea, "If I do this, and I get arrested, will you put money on my books[?]" Appellant and Andrea appeared to argue before Appellant got up and walked toward the victim, who was purchasing drinks for other people. Andrea, who appeared upset, began to follow Appellant toward the bar. Appellant came from behind the victim, poked the victim in the back with his elbow, and said, "What's up, homie, I know you." The victim indicated he did not know Appellant, but Appellant put his arm around the victim's neck and asked the victim to buy him a drink. The victim bought Appellant a drink, but after Appellant received it, he took the shot glass that had contained the drink and slammed the glass repeatedly into the victim's head, shattering the glass. After being "clocked in the head," the victim became dizzy, fell backward, and "passed out," while bleeding profusely.

¶4 Several men pulled Appellant off the victim, and Appellant left the bar, ostensibly escorted by a bouncer. Andrea, still visibly upset, followed him outside. Appellant entered his

car, said good-bye to Andrea, started the engine, put the car in reverse, and ran into a truck parked behind him, while nearly running over Andrea. Meanwhile, a crowd of people had come out of the bar and, in an effort to prevent him from leaving, began yelling at Appellant and attempted to pull Appellant from his car, while a woman from the crowd opened the car's passenger door, reached in, and took out the keys.

¶5 At approximately that time, Phoenix police officers arrived, and paramedics arrived shortly thereafter. Appellant, who had blood on his hands and clothing and appeared intoxicated, was detained, handcuffed, and eventually transported to jail after he provided the police with several inconsistent versions of what had happened that night.

¶6 The victim sustained lacerations on his right forehead and the right side of his head, including a full thickness laceration to his skull, and a cut on his right ear. He also suffered a concussion and lost consciousness, was hospitalized overnight, and suffered from lost memory.

¶7 Appellant testified at trial that, while in the bar, he approached the victim, who attacked him after he recognized the victim as a bar employee who had thrown his mother out of the bar years earlier. He admitted that he hit the victim twice with his fist, but claimed he did so in self-defense. He also stated that he was intoxicated at the time of the incident.

¶8 Appellant's trial counsel requested that the court instruct the jury regarding endangerment, *see* A.R.S. § 13-1201 (2010), as a lesser-included offense of aggravated assault. The court declined to give the instruction, although the court did instruct the jury regarding assault as a lesser-included offense.

¶9 The jury found Appellant guilty as charged of aggravated assault, a class three felony, but found that the State had not proven beyond a reasonable doubt that the crime was a dangerous offense.[3] The trial court sentenced Appellant to a mitigated term of two years' incarceration in the Arizona Department of Corrections, and credited him with forty-one days of pre-sentence incarceration.[4]

---

[3] We recognize that the jury's findings were inconsistent because it was impossible for Appellant to have committed aggravated assault with a deadly weapon or dangerous instrument under A.R.S. § 13-1204 without the offense also being dangerous as alleged. As Appellant acknowledges, however, the inconsistent findings do not warrant reversal of the guilty verdict. *See State v. Garza*, 196 Ariz. 210, 212-13, ¶¶ 6-8, 994 P.2d 1025, 1027-28 (App. 1999).

[4] We note that the court's August 3, 2009 sentencing minute entry states that Appellant was convicted of a class three *dangerous* felony. However, the record indicates that the jury did *not* find that the offense was dangerous. On August 26, 2009, Appellant's counsel filed a motion for a nunc pro tunc order correcting the August 3, 2009 sentencing minute entry to reflect that Appellant was not convicted of a dangerous felony. The record, however, does not reflect that this motion was ever ruled upon. Because the record confirms that Appellant is correct, we modify the sentencing minute entry to reflect that Appellant was not convicted of a dangerous offense. *See* A.R.S. § 13-4036 (2010); *State v. Ochoa*, 189 Ariz. 454, 462, 943 P.2d 814, 822 (App. 1997).

¶10 We have jurisdiction over Appellant's timely appeal. *See* Ariz. Const. art. 6, § 9; A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), -4033(A)(1) (2010).

ANALYSIS

¶11 Appellant argues that the trial court erred by not instructing the jury on endangerment because endangerment should be treated as a lesser-included offense of aggravated assault committed in violation of A.R.S. §§ 13-1203(A)(1) and 13-1204(A)(2). We disagree.

¶12 We review *de novo* questions of law, such as whether an offense is a lesser-included offense of another crime. *See State v. Cheramie*, 218 Ariz. 447, 448, ¶ 8, 189 P.3d 374, 375 (2008). The trial court's denial of a requested jury instruction is, however, reviewed for an abuse of discretion. *See State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006). An error of law committed in reaching a discretionary conclusion may constitute an abuse of discretion. *Id*. Additionally, we will affirm the trial court if it reaches the correct result, even for the wrong reason. *See State v. Saiers*, 196 Ariz. 20, 24, ¶ 15, 992 P.2d 612, 616 (App. 1999) (citing *State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994)).

¶13 A defendant is entitled to a jury instruction on all "necessarily included" offenses if such an instruction is requested and supported by the evidence. *Wall*, 212 Ariz. at 3, ¶ 13, 126

P.3d at 150; *State v. Robles*, 213 Ariz. 268, 270, ¶ 5, 141 P.3d 748, 750 (App. 2006); *State v. Govan*, 154 Ariz. 611, 615, 744 P.2d 712, 716 (App. 1987). In determining whether an instruction on a "necessarily included" offense is proper, a court must conduct a two-part test to determine whether (1) the offense is a lesser-included offense of the crime charged, and (2) the evidence otherwise supports the giving of the instruction. *Wall*, 212 Ariz. at 3, ¶ 14, 126 P.3d at 150; *State v. Kinkade*, 147 Ariz. 250, 253, 709 P.2d 884, 887 (1985) (citing *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983)).

¶14 An offense is a lesser-included offense "when the 'greater offense cannot be committed without necessarily committing the lesser offense.'" *Wall*, 212 Ariz. at 3, ¶ 14, 126 P.3d at 150 (citation omitted). In other words, "[t]o constitute a lesser-included offense, the offense must be composed solely of some, but not all, of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *Kinkade*, 147 Ariz. at 253, 709 P.2d at 887 (citing *Celaya*, 135 Ariz. at 251, 660 P.2d at 852). "The test for whether an offense is 'lesser-included' is whether it is, by its very nature, always a constituent part of the greater offense, or whether the charging document describes the lesser offense even though it does not always make up a constituent part of the greater

offense." *Robles*, 213 Ariz. at 270-71, ¶ 5, 141 P.3d at 750-51 (citations omitted).

¶15 Endangerment is committed "by recklessly endangering another person with a substantial risk of imminent death or physical injury." A.R.S. § 13-1201(A). Relying on the language of A.R.S. § 13-1203(A)(1), the indictment charged Appellant with committing assault by intentionally, knowingly, or recklessly causing physical injury to the victim. Appellant contends that he must have recklessly endangered the victim with a substantial risk of physical injury in order for him to have intentionally, knowingly, or recklessly caused physical injury to the victim, and therefore, endangerment is a lesser-included offense of aggravated assault as charged in this case.

¶16 Even assuming *arguendo* that Appellant is correct and endangerment is a lesser-included offense of aggravated assault as charged in this case and defined in A.R.S. §§ 13-1203(A)(1) and 13-1204(A)(2), and even viewing the evidence in the light most favorable to Appellant's argument, *see State v. King*, CR-09-0333-PR, 2010 WL 2670928, at *3, ¶ 13 (Ariz. July 7, 2010), we find no abuse of the trial court's discretion because the evidence did not support the giving of the instruction. *See Wall*, 212 Ariz. at 3, ¶ 14, 126 P.3d at 150; *Kinkade*, 147 Ariz. at 253, 709 P.2d at 887; *Celaya*, 135 Ariz. at 251, 660 P.2d at 852.

¶17 For the evidence to support the giving of a lesser-included offense instruction, "[t]he jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Wall*, 212 Ariz. at 4, ¶ 18, 126 P.3d at 151 (citation omitted); *see also State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996) (noting that a lesser-included instruction is only required if "the jury could rationally fail to find the distinguishing element of the greater offense" (citations omitted)). In other words, "[i]t is not enough that, as a theoretical matter, 'the jury might simply disbelieve the state's evidence on one element of the crime' because this 'would require instructions on all offenses theoretically included' in every charged offense." *Wall*, 212 Ariz. at 4, ¶ 18, 126 P.3d at 151 (citations omitted). Instead, for a lesser-included offense to be considered "necessarily included," "the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Id*. (citation omitted).

¶18 In this case, the evidence did not support an instruction on the offense of endangerment because no rational juror could have concluded that Appellant merely endangered the victim with a substantial risk of physical injury and did not actually cause physical injury to the victim. The overwhelming and uncontested evidence presented by the State left no question that Appellant hit

the victim, causing the victim to suffer physical injuries. In fact, Appellant himself admitted at trial that he hit the victim in the head at least twice, and he did not contest that the victim suffered consequential injuries. Further, no evidence was presented or reasonably suggested that another person could have caused the victim's injuries. Appellant's contention was not that he did not hit and injure the victim, but that he had done so in self-defense.[5] Accordingly, it was impossible for the jury to find that Appellant recklessly created a substantial risk of imminent death or physical injury to the victim but did not injure the victim. Because Appellant admitted that he caused the victim's physical injury, and the evidence presented by the State overwhelmingly supported that admission, the jury could not possibly have found that Appellant committed the offense of endangerment without also committing assault pursuant to A.R.S. § 13-1203(A)(1). Thus, the evidence did not support an endangerment instruction, and we find no abuse of the trial court's discretion in denying Appellant's request for such an instruction.

[5] Although through his testimony Appellant questioned whether he had hit the victim with the shot glass instead of just his fist, that question went to the issue whether the State had proved Appellant had committed aggravated assault rather than simple assault. By its verdict, the jury obviously concluded that Appellant used the shot glass to injure the victim.

CONCLUSION

¶19 We affirm Appellant's conviction for aggravated assault. However, we modify the trial court's August 3, 2009 sentencing minute entry to reflect that Appellant was not convicted of a dangerous felony.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PETER B. SWANN, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge