DIVISION ONE
FILED: 05/15/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0317
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
LISA ANN SCHMITGAL,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-007630-001DT

The Honorable Pamela Hearn Svoboda, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Lisa Ann Schmitgal ("Defendant") was convicted of assault, a class 1 misdemeanor. She argues that the court erred in allowing the prosecutor to raise an argument based on

A.R.S. § 13-407 during the closing argument at the bench trial. We find no error and affirm Defendant's conviction and probation.

FACTS AND PROCEDURAL HISTORY

¶2 C.B. boarded horses at a ranch she owned with her husband, D.B., in Laveen, Arizona. Defendant boarded her horse at C.B.'s ranch. C.B. required Defendant to board her horse away from the other boarders because, in C.B.'s words, Defendant had "a lot of conflict" with them. C.B. and D.B. allowed Defendant to store her tack in an office in their house. They permitted her to enter the house to retrieve the tack whenever she came to the ranch to ride her horse. She was also permitted to "hang out" in the house when there was no one other than C.B. and D.B. there.

¶3 On the weekend of January 16, 2010, C.B. and D.B. allowed Defendant to spend the night at the ranch and stay in the guest room. D.B. later testified, however, that C.B. was "not okay with" the decision to let Defendant stay. On Sunday, January 17, after both C.B. and Defendant had been drinking, C.B. asked Defendant "several times" to leave the ranch.[1] At

[1] Defendant testified that C.B.'s reason for making her leave was that "Gail is coming over and you can't be around Gail." According to Defendant, "[D.B.] intervened and said, ['C.B.], we told her she could stay.[']" Defendant testified that D.B. told C.B., "[Y]ou can go meet Gail somewhere else."

about 3:00 p.m., C.B. told D.B. to drive Defendant home.[2] D.B. and Defendant left in D.B.'s truck, and C.B. assumed he had taken Defendant home.

¶4 At about 7:30 p.m. that night, C.B. walked into her kitchen. Defendant was sitting at the kitchen table. C.B. asked her, "[W]hat are you doing back here[?] I told you to go home[.] I thought you went home." Defendant said she wanted to talk to C.B. C.B. replied, "[T]here's nothing to talk about, I simply wanted you out of the house." She asked Defendant several times to leave. Defendant refused, saying, "I don't have to leave[,] your husband said I could be in th[is] house." C.B. replied, "I don't care who gave you permission[,] I'm telling you right now you've been here long enough[,] you need to go home. I don't want you in the house." Defendant replied, "[D.B.] said I can be in this house."

¶5 Following this exchange, C.B. "tilted" the chair in which Defendant was sitting, and Defendant fell onto the floor. Defendant stood up, and C.B. "pushed her on the shoulder a little bit[,] trying to prod her to go out the door." Defendant then grabbed C.B., and they both fell to the floor. On the floor, Defendant "started punching and wailing [sic] on" C.B. Defendant "scratched" C.B., punched her, and pulled "gobs" of

[2] Defendant needed D.B. to drive her because she had been drinking alcohol, and her car had an "ignition interlock device."

her hair out. D.B. heard C.B. screaming, ran into the kitchen, and pulled Defendant off of her. C.B. told D.B. to "get [Defendant] off the property now."

¶6 On October 20, 2010, the state filed an indictment charging Defendant with one count of criminal trespass in the first degree, a class 6 felony (Count 1), and one count of assault, a class 1 misdemeanor (Count 2). On March 28, 2011, Count 1 was redesignated a misdemeanor, and Defendant waived her right to a trial by jury.

¶7 A bench trial, at which Defendant testified, was held on March 28 and 29. During the state's closing argument, the prosecutor argued that C.B.'s tilting of the chair was an attempt to get Defendant off of the property and that it was justifiable under A.R.S. § 13-407. Defendant objected to the argument as improper, explaining that "a justification defense is a defense for the defendant." The court read the relevant portion of the statute, A.R.S. § 13-407(A):

> A person or his agent in lawful possession or control of premises is justified in threatening to use deadly physical force or in threatening or using 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.

The court interpreted the statute's use of the term "person" to mean that A.R.S. § 13-407 was not restricted to criminal defendants, and it overruled Defendant's objection.

¶8 At close of arguments, the court found Defendant not guilty on the criminal trespass charge, but it convicted Defendant of assault. The court found that although Defendant was justified in using some physical force to defend herself against C.B., she "used more force than appeared reasonably necessary under the circumstances." On April 15, 2011, the trial court suspended imposition of sentence and placed Defendant on 18 months of supervised probation. Defendant timely appeals.

¶9 On appeal, Defendant argues that "the court erred in allowing the state to present evidence and argument that the victim in this matter was justified under statute to use force against the appellant." We have jurisdiction under A.R.S. §§ 12–120.21(A)(1), 13–4031, and 13-4033(A).

DISCUSSION

¶10 In her opening brief, Defendant claims that the court erred in allowing the state "to present evidence" that C.B. was justified in using force. Her discussion, though, focuses only on the objection that was raised to the state's reference to A.R.S. § 13-407 during the closing argument. The issue before us on appeal, therefore, is not an evidentiary issue, but an

issue regarding the trial court's ruling on the scope of the closing argument. Because Defendant objected to the prosecutor's reference to the statute, we review the court's decision for an abuse of discretion. *State v. Pandeli*, 215 Ariz. 514, 525, ¶ 30, 161 P.3d 557, 568 (2007) (*in banc*).

¶11 After Defendant's objection, the court heard argument from counsel, read the disputed statute's text, and interpreted it according to its plain meaning. Defendant argues that *State v. Abdi*, 226 Ariz. 361, 248 P.3d 209 (App. 2011), shows that the court's reading of A.R.S. § 13-407 and its decision to allow the state to argue that C.B. was justified in using force were errors amounting to an abuse of discretion. But *Abdi* was decided under A.R.S. § 13–419, and the trial court in that case erred because it instructed the *jury* "to presume the victim had acted reasonably in defense of his residence." *Id.* at 363, ¶ 1, 248 P.3d at 211.

¶12 Here, the record reflects that the court made no improper inferences in reaching its conclusions about Defendant's guilt. With the court's permission, the state developed its argument that because C.B. had asked Defendant to leave, Defendant was criminally trespassing and therefore that "under 13-407 [C.B.] was fully justified in using physical force to try to get [Defendant] off the property." Yet the court ultimately found that Defendant was "not given much opportunity

to leave" and concluded that she was not guilty of criminal trespass. It also found that because it was C.B. that "began the physical interaction by pushing [Defendant]," Defendant was justified in using some force to defend herself. But the court, noting the "gash" in C.B.'s face and the "large clump of hair" that Defendant had torn out, found that Defendant "used more force than appeared reasonably necessary under the circumstances" and was guilty of assault. On this record, even assuming that it was error to allow the state to mention the statute, we discern no prejudice.

CONCLUSION

¶13 We conclude that the court did not commit prejudicial error in overruling Defendant's objection to the state's reference to A.R.S. § 13-407 during the closing argument. Defendant's conviction and probation are affirmed.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge