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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBIN PAT WILL, Appellant.	)	2 CA-CR 2011-0097 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000248

Honorable Charles A. Irwin, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Diane Leigh Hunt — Tucson
Attorneys for Appellee

John William Lovell — Tucson
Attorney for Appellant

K E L L Y, Judge.

¶1 Following a jury trial, appellant Robin Will was convicted of aggravated assault with a dangerous weapon and misconduct involving weapons as a prohibited possessor. The trial court sentenced him to concurrent prison terms, the longer of which

is ten years. On appeal, Will argues his convictions and sentences must be vacated because the trial court erred by not instructing the jury on the justification defense of crime prevention and because there was insufficient evidence to support his conviction for weapons misconduct. For the reasons that follow, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In March 2010, the victim, T., was living with his girlfriend S. Following an argument with S., T. left in S.'s car. While T. was away from the residence, S. telephoned Will and asked him to come over. T. returned home later that evening and attempted to enter. Will opened the door, put a knife to T.'s throat and ordered him to "drop the keys." Will kept the knife at T.'s throat and, when T. sat down on the couch, Will cut his throat. T. began to struggle with Will and suffered additional cuts to his hand. S., who witnessed the attack, dialed 9-1-1 and told Will to leave. T. sought treatment for his injuries, which were not life-threatening. Will was convicted and sentenced as stated above, and this appeal followed.

Discussion

Jury Instruction

¶3 Will argues the trial court erred by refusing to give an instruction on the justification defense of crime prevention pursuant to A.R.S. § 13-411. He maintains he reasonably believed T. intended to commit either aggravated assault or murder of S. In support of his argument, he relies on S.'s testimony that T. had taken her car without

permission and threatened to kill her if she called the police or "touched any of his stuff."[1]

¶4 The trial court denied the instruction on the ground there was insufficient evidence T. was in the process of committing a crime when Will used the knife and that T.'s earlier threats were too remote in time to provide a basis for Will to reasonably believe that force was immediately necessary.[2] We review a court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004). A defendant is entitled to a jury instruction "on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). Nevertheless, an instruction should not be given "unless it is reasonably necessary and clearly supported by the evidence." *State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692-93 (App. 2005), *quoting State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987).

¶5 Section 13-411(A) 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 it is immediately necessary to prevent the commission of, inter alia, an

[1]T. denied making the threats and claimed S. had given him permission to take the car.

[2]The trial court did instruct the jury on defense of a third party, pursuant to A.R.S. § 13-406, which also requires a reasonable belief that force was immediately necessary, apparently concluding that under that section the jury should decide "whether or not a reasonable person in [Will]'s position would believe he should be able to use physical force." The court appears to have drawn a distinction between the instructions on the ground that, unlike § 13-411, § 13-406 does not require that the defendant act to prevent specific enumerated crimes.

aggravated assault or a murder.[3] Will contends the trial court's refusal to give the instruction was error because, based on T.'s "past acts and his threats that morning," "there was every reason to believe that [he] would at the very least assault [S.] . . . upon his return home." But, although S. testified that T. had threatened her earlier that day, there was no evidence she had communicated those specific threats to Will. Rather she stated she had asked Will "to come over initially to bring [her] a cigarette . . . [t]hen it worked into . . . him just being there because [she] was scared of [T.]"

¶6 Moreover, although § 13-411(A**)** allows the use of force "to prevent a non-imminent aggravated assault," *State v. Barraza*, 209 Ariz. 441, ¶ 12, 104 P.3d 172, 176 (App. 2005), it still requires a reasonable belief that force is "immediately necessary" to prevent a crime. No evidence indicated that Will, at the time he put the knife to T.'s throat, had reason to believe force was immediately necessary to prevent T.'s commission of aggravated assault or murder of S. Instead, the evidence indicated T. was unarmed when he arrived and, according to T.'s testimony, when he had knocked on the locked door, "Will opened [it] and put a knife to [his] throat."[4] T. also stated he had been sitting on the couch with the knife to his throat when Will cut him and he had not retaliated until

[3]Although § 13-411(C) lists multiple crimes which one could justifiably act to prevent, on appeal Will only argues he reasonably believed T. had intended to commit an aggravated assault against S. or to murder her.

[4]S.'s testimony contradicted T.'s. She stated that T. had entered the residence before Will used the knife. But, even assuming that Will used the knife after T. had entered the house, T. was living at the residence and S. testified she did not ask Will to prevent him from entering. Rather, she said, "We were supposed to be retrieving my car, not cutting people with knives."

after he was cut. Furthermore, even though trial testimony revealed Will had "seen [S.] with bruises" a week earlier and had told a police detective after the offense that he was concerned for S.'s "physical safety," this evidence supports only a general concern for S.'s safety, or perhaps a belief that T. might someday hurt her, but does not provide a reasonable basis for Will to believe immediate action was necessary to prevent an enumerated crime. Thus, we cannot say the trial court abused its discretion in finding there was insufficient evidence that Will reasonably believed he was acting to prevent an aggravated assault[5] or murder, and that an instruction pursuant to § 13-411 therefore was not warranted.[6] *See Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d at 1162; *Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d at 692-93.

Sufficiency of the evidence

¶7 Will next argues "[t]he evidence was insufficient to support [his] conviction for weapons misconduct as a prohibited possessor because there was no evidence the knife was designed for lethal use." Because Will failed to raise this argument at trial, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561,

[5]The crime of aggravated assault is an enumerated crime under § 13-411(A) only if the person commits assault under A.R.S. § 13-1204(A)(1), (2), causing "serious physical injury to another" or using "a deadly weapon or dangerous instrument."

[6]Will cites *State v. Garfield*, 208 Ariz. 275, 92 P.3d 905 (App. 2004), in support of his argument that the trial court should have given a crime prevention instruction. But *Garfield* is inapposite. In that case, we concluded the trial court erred by refusing to give a crime prevention instruction because evidence was presented that force was immediately necessary to prevent a crime. *Garfield*, 208 Ariz. 275, ¶ 15, 92 P.3d 905, 909. Here, T. was unarmed, and the evidence presented was not sufficient to establish that Will reasonably believed force was immediately necessary to prevent aggravated assault or murder.

¶¶ 19-20, 115 P.3d 601, 607 (2005). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶8 Will was charged with misconduct involving weapons pursuant to A.R.S. § 13-3102(A)(4), which provides, in relevant part, that a person commits that offense by knowingly possessing a deadly weapon while being a prohibited possessor. Will does not dispute that he was a prohibited possessor, but claims the knife he possessed was not a deadly weapon.

¶9 Section 13-3101(A)(1), A.R.S., defines a "[d]eadly weapon" as "anything that is designed for lethal use." Our supreme court has held that "[a] knife is a deadly weapon." *State v. Williams*, 110 Ariz. 104, 105, 515 P.2d 849, 850 (1973).[7] And, although Will claims there was "no evidence from which the jury could infer that the knife was designed for lethal use," the knife itself was admitted into evidence. Additionally, the state presented photographs of the weapon at the time it had been seized and testimony that the total length of the knife was approximately eight-and-a-half inches with a folding blade that was approximately three-and-a-half inches long. This was sufficient evidence from which the jury could conclude the knife was designed for lethal use. *State v. Clevidence*, 153 Ariz. 295, 300-01, 736 P.2d 379, 384-85 (App. 1987)

[7]Will contends that *Williams* is overly broad and conflicts with the intent of the legislature because some knives may not be "designed for lethal use," as required by § 13-3101(A)(1). But "we are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *City of Phx. v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).

(concluding knife approximately six inches in length "clearly qualifies" as a deadly weapon). We therefore find no error, much less fundamental error. *See Arredondo*, 155 Ariz. at 316, 746 P.2d at 486.

Disposition

¶10 Will's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge