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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. ALEJANDRO RUIZ, Appellant.	)	2 CA-CR 2011-0158 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR 20102045001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 Appellant Alejandro Ruiz was charged with first-degree burglary, four counts of aggravated assault, and two counts of attempted first-degree murder. A jury acquitted him of the murder charges and found him guilty of burglary, three counts of aggravated assault, and one count of simple assault, a lesser-included offense of aggravated assault. On appeal he contends the trial court erred when it denied his request for a jury instruction on self-defense.

¶2 Viewed in the light most favorable to affirming the verdicts, *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence established that Ruiz went to I.'s home after Ruiz's daughter told him I. had raped her. When Ruiz arrived he asked I.'s cousin Alex, who had answered the door, to see I. Alex told Ruiz repeatedly I. was asleep, and told Ruiz to leave. But later, after Alex left the house, Ruiz walked in with a neighbor who had arrived at the house to visit. J., I.'s uncle, was sleeping on the couch. Ruiz immediately began stabbing J. with a knife. J. called out to I., who came out of his bedroom and tried to help J. I. began to struggle with Ruiz; Ruiz repeatedly stabbed I. I. tried to drag Ruiz out of the house while J. called 9-1-1. The struggle continued outside, down a walkway in the front of the house. J. testified he "believe[d]" Ruiz continued to stab I. and J. hit Ruiz in the arm with a garden hoe to stop him. The struggle continued and J. picked up a plastic chair and hit Ruiz in the face with it, after which Ruiz walked away.

¶3 "A party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). Thus, an instruction on self-defense should be given if "'the slightest evidence'" supports it. *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997), *quoting State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989). The

"'slightest evidence'" is a "'hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing [his] life or sustaining great bodily harm.'" *State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983), *quoting State v. Wallace*, 83 Ariz. 220, 223, 319 P.2d 529, 531 (1957). It is for the trial court to decide, in the exercise of its discretion, whether to give an instruction on self-defense and absent an abuse of that discretion we will not disturb its ruling. *See Bolton*, 182 Ariz. at 309, 896 P.2d at 849; *see also State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010). Its decision must be based on the evidence presented at trial. *See State v. Sierra-Cervantes*, 201 Ariz. 459, ¶ 13, 37 P.3d 432, 434 (App. 2001). We defer to the court with respect to its "assessment of the evidence." *State v. Wall*, 212 Ariz. 1, ¶ 23, 126 P.3d 148, 152 (2006).

¶4 Section 13-404(A), A.R.S., provides that "a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force." And a person is only entitled to use deadly force against another "[w]hen 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 of unlawful deadly physical force." A.R.S. § 13-405(A)(2). A person who "provoked the other's use or attempted use of unlawful physical force" is not entitled to the defense unless "[t]he person withdraws from the encounter or clearly communicates to the other his intent to do so reasonably believing he cannot safely withdraw from the encounter" and the other person nevertheless persists in using or attempting to use such force. §§ 13-404(B), 13-405(A)(1). "'[T]he privilege of self-defense is not available to one who is at fault in provoking an encounter or difficulty

that results in a homicide.'" *King*, 225 Ariz. 87, ¶ 17, 235 P.3d at 244, *quoting Lujan*, 136 Ariz. at 104, 664 P.2d at 648.

¶5 As the state points out, Ruiz did not timely disclose his intent to assert the defense of self-defense in accordance with Rule 15.2(b), Ariz. R. Crim. P. Additionally, at the beginning of the trial, Ruiz advised the court he would not be asserting self-defense. Ruiz's counsel commented, "I don't think that [the defense] properly . . . applies under the facts of this situation" because the altercation between Ruiz and the victims had taken place inside the victims' home. During the settling of instructions at the end of trial, Ruiz again did not request a self-defense instruction. But when the trial commenced the following Monday, Ruiz asked for the instruction based primarily on the testimony of one of the witnesses. He argued the jury could find that, although Ruiz was unlawfully in the home and the victims were justified in using force to try to get him out of it, "once he has been removed from the home, the amount of force that is then being used is not warranted under the circumstances, and that once that occurred, he is entitled to use self-defense to repel the assault that is then occurring once it moves down the sidewalk and into the street."

¶6 As the state points out, the trial court could have refused the instruction on the ground that the defense of self-defense had not been disclosed in a timely manner. *See* Ariz. R. Crim. P. 15.7(a). But the court denied the instruction because it found insufficient evidence to support it, noting the witness whose testimony Ruiz was relying on saw only the end of the fight, "a fragment and a segment of a series of events that was much longer than what he observed." The witness did not "see everything," the court said, adding, the witness "didn't see much of anything, and what he did see was in segments," and his testimony about "who was getting the better of whom" was based on

speculation. The court concluded there was insufficient evidence to support the instruction and that Ruiz was not entitled to it for the additional reason that he had provoked the altercation.

¶7 On appeal Ruiz contends there was sufficient evidence from which jurors could have found he had "entered the house with a neighbor, and tried to wake up" J. as he slept on the couch, that J. "then began fighting him," and "[s]oon [I.] joined him." He argues, "the jury could have drawn the reasonable inference that [he] was justified in defending himself with his pocket knife," insisting the evidence here was "at least as strong" as the evidence in *King*. He asserts the jury was not permitted to presume J. and I. had acted reasonably in defending themselves while in I.'s home. Anticipating the state's argument that he had trespassed into the home, Ruiz argues that despite this fact, it nevertheless was for the jury to decide whether he had acted reasonably.

¶8 Giving the trial court the deference to which it is entitled with respect to the assessment of the evidence, we have no basis for finding it abused its discretion. The record supports the court's conclusion that not even the slightest amount of evidence supported the instruction. Ruiz's argument was based primarily on the testimony of the individual who had seen a limited portion of the altercation when the men were outside the home. The evidence established Ruiz had entered the home without permission; indeed, after having been told to leave he had provoked the encounter by stabbing J. as J. slept on the couch, then stabbing I. as he tried to help J. Although Ruiz testified at trial he did not know when he had begun stabbing J., J. testified Ruiz had started stabbing him as he was trying to wake up and Ruiz admitted he tried to hold J. down so he could not get up. Ruiz admitted neither J. nor I. had a weapon and J. was lying down on the couch when Ruiz approached him. And to the extent a jury could have found he had withdrawn

or had communicated to the victims he intended to withdraw, that only could have occurred outside, after he had already stabbed both victims.

¶9 Moreover, Ruiz's reliance on this court's decision in *State v. Abdi*, 226 Ariz. 361, 248 P.3d 209 (App. 2011), for the proposition that the jury was not entitled to presume J. and I. had acted reasonably is misplaced. In that case the jury had been instructed pursuant to A.R.S. § 13-419 that a person is presumed to have acted reasonably when defending his or her residence. *Abdi*, 226 Ariz. 361, ¶¶ 6-7, 248 P.3d at 211-12. We concluded that, because this instruction under the facts of the case necessarily applied to the victim and the statute was intended to be applied to defendants and not victims, the state's burden of proving the elements of the offense effectively had been reduced and the defendant was entitled to a reversal of his conviction. *Id*. ¶¶ 7-13, 17. No such instruction was given here.

¶10 Nor does *King* compel us to find the instruction was required here. In *King* our supreme court held that a defendant need not establish he had acted solely based on the belief that self-defense had been necessary to prevent immediate physical harm. 225 Ariz 87, ¶ 12, 235 P.2d at 243. The situation here is not like the situation in *King*. There, a homeless person had thrown a water bottle at the defendant, hitting him in the head. *Id*. ¶ 2. The defendant had reacted by hitting and kicking the person. *Id*. The supreme court concluded that the throwing of a two-liter bottle of water at the defendant was a "'hostile demonstration'" and provided the slightest evidence in support of the instruction. *Id*. ¶¶ 15-16, *quoting Lujan*, 136 Ariz. at 104, 664 P.2d at 648. The facts in *King* are not analogous to the circumstances here. Ruiz unlawfully entered I.'s home and approached a sleeping, unarmed victim and immediately, without provocation, began stabbing him.

¶11 The case before us is more like *Lujan*, where the defendant was the one who had provoked the "hostile demonstration" that the defendant had argued required him to defend himself. 136 Ariz. at 104, 664 P.2d at 648. The supreme court concluded the trial court correctly had denied the defendant's request for a self-defense instruction in that case. *Id*. at 105, 664 P.2d at 649. We reach the same conclusion here.

¶12 The trial court did not abuse its discretion by refusing to give the jury an instruction on self-defense. Therefore, we affirm the convictions and the sentences imposed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge