IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSEPH EDWARD LERCH,
Appellant.

No. 2 CA-CR 2014-0225
Filed February 25, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20131489001
The Honorable Christopher Browning, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Lerch was convicted of two counts of aggravated assault with a deadly weapon or dangerous instrument, and one count each of criminal damage and unlawful discharge of a firearm within city limits. The trial court imposed concurrent, minimum five-year prison terms for the aggravated assault convictions, followed by a three-year, consecutive probation term for the unlawful discharge conviction, and forty-eight days' credit for "time served" on the criminal damage conviction. On appeal, Lerch contends the trial court submitted duplicitous charges to the jury, provided inadequate instructions related to his justification defense, and abused its discretion in denying his motion for new trial. He also raises two sentencing errors. For the following reasons, we reverse Lerch's aggravated assault convictions, vacate all of his sentences, and remand the case for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdicts." *State v. Forde*, 233 Ariz. 543, n.2, 315 P.3d 1200, 1209 n.2 (2014). In April 2013, E.M. and K.M. were working for a towing company when they were "call[ed] out" to an apartment complex to remove some improperly parked vehicles. When they arrived, they observed a Ford Explorer parked outside Lerch's carport, in violation of homeowner's association rules. While K.M. was hooking the Explorer up to the tow truck, a neighbor, who was outside, alerted Lerch that his vehicle was being towed. Lerch "came out to the edge of [his] balcony" and yelled at the men to stop, but E.M. and K.M. proceeded to pull away. Lerch went back inside, and then returned to the balcony with a gun and

fired towards the tow truck.[1] E.M. and K.M. later testified they were "in shock" and afraid they could have been injured—and after leaving the complex with the Explorer in tow, they called 9-1-1.

¶3 Lerch meanwhile ran to his pickup truck and pursued the tow truck. Once he caught up, Lerch "pulled in front . . . and slammed on [his] brakes," causing the tow truck to hit the rear end of his pickup truck. Lerch got out of his truck with his gun, which prompted K.M., who had gotten his own firearm "ready," to raise his weapon and exclaim, "don't shoot." The men then put their guns down and "talked it out" while they waited for police to arrive.

¶4 Lerch told a detective during an interview that he was visiting with his fiancée when he heard a neighbor say someone was towing the Explorer. He further said he "didn't know it was a tow truck at first," because he "saw no lights or marking" on it, which led him to "th[ink] somebody was stealing" the Explorer. He grabbed his gun and went out to the balcony, where he fired one round. Lerch originally told the detective he "shot one round into the air," but later admitted he actually had aimed at the tow truck but said he was trying to hit the tires.

¶5 Lerch was charged with two counts of aggravated assault with a deadly weapon or dangerous instrument, one count of unlawful discharge of a firearm in city limits, and one count of criminal damage. The aggravated assault charges were identical, except one count named K.M. as the victim and the other count named E.M., and alleged: "On or about the 2nd day of April, 2013, . . . Lerch assaulted [K.M./E.M.] with a deadly weapon or dangerous instrument, to wit: a firearm, in violation of A.R.S. § 13-1204(A)(2)."

¶6 Before trial, Lerch filed a motion in limine, informing the trial court he had "discovered a duplicity issue" with respect to the aggravated assault charges. He argued that two events—firing the handgun from the balcony and later brandishing the handgun

[1]The bullet struck another car parked in the complex, breaking a window.

after causing the accident—could have formed the "actus reus for . . . the criminal charges," and requested clarification as to which act the indictment was based on. He also moved to preclude any evidence of the roadway incident in the event that the source of the charge was the balcony incident, claiming it was irrelevant and unfairly prejudicial. The state responded that it was prosecuting Lerch's act of "shooting at the victim's tow truck from his balcony," but that it considered both acts to be part of "one continuous chain of events." The court determined there was no duplicity issue because "[i]t [wa]s clear . . . this was one continuous act" involving "the same participants," arising "out of the same circumstances," and without any "significant intervening time period" between what Lerch characterized as "Incident 1" and "Incident 2."

¶7 At trial, Lerch testified he was justified in using deadly force during the balcony incident because he believed the victims had stolen the Explorer and feared they also had stolen his expensive "professional [mechanic] tools" from his garage. As for the roadway incident, Lerch denied brandishing his weapon at the victims and claimed he had left it unloaded on the passenger seat of his truck.

¶8 Lerch continued to raise the "duplicity issue" throughout trial, requesting "clarification . . . for the jury" as to which incident constituted the charged assault, which the trial court repeatedly denied. During the settling of jury instructions, Lerch also requested a limiting instruction to "inform the jury how to handle [the aggravated assault] evidence." The court denied that motion too, stating, "the [s]tate isn't criminalizing [the roadway] behavior," and "will not argue" the aggravated assault was based on the roadway incident during closing arguments.

¶9 After the prosecutor discussed both incidents during closing argument without clarifying which one the aggravated assault charges were based upon, Lerch moved for mistrial. The trial court denied his motion, stating it had made no assurance that the state would clarify its position and that Lerch could bring it up during his own closing argument. The jury found Lerch guilty on all counts, and he was sentenced as described above.

Duplicitous Charges

¶10 Lerch argues his aggravated assault charges were duplicitous because each count alleged one aggravated assault as to each victim, but the state presented evidence of two assaults—one arising from the balcony incident and the other from the roadway incident—creating the possibility of non-unanimous verdicts. And, he contends, the trial court abused its discretion by not requiring "the [s]tate to elect a theory of aggravated assault, in permitting evidence of the [roadway] incident without a limiting instruction, and in failing to declare a mistrial" after the prosecutor's closing argument. In response, the state argues "there was no duplicity issue because the course of Lerch's conduct [was] 'part of the same criminal transaction,'" and even if there was, it was remedied when the state voluntarily "elected one theory of the case."

¶11 A duplicitous charge arises when a charge in an indictment refers only to one criminal act, but multiple criminal acts are introduced to prove that charge. *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). Depending on the context, a duplicitous charge can "deprive the defendant of 'adequate notice of the charge to be defended,' create the 'hazard of a non-unanimous jury verdict,' or make it impossible to precisely plead 'prior jeopardy [] in the event of a later prosecution.'" *Id.*, *quoting State v. Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003) (alteration in *Klokic*).

¶12 Ordinarily, if the state introduces evidence of multiple criminal acts to prove a single charge, the trial court must employ one of two remedial measures to insure "the defendant receives a unanimous jury verdict[:] . . . either require 'the state to elect the act which it alleges constitutes the crime, or instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty.'" *Id.* ¶ 14, *quoting State v. Schroeder*, 167 Ariz. 47, 54, 804 P.2d 776, 783 (App. 1990) (Kleinschmidt, J., concurring). Such curative measures, however, are not required if "all the separate acts that the [s]tate intends to introduce into evidence are part of a single criminal transaction." *Id.* ¶ 15; *see also State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96, 101 (1968).

¶13 Here, the state presented evidence of two aggravated assaults against K.M. and E.M. under § 13-1204(A)(2). *See* § 13-1204(A)(2) (person commits aggravated assault by using a deadly weapon or dangerous instrument to intentionally place another in reasonable apprehension of imminent physical injury, incorporating A.R.S. § 13-1203(A)(2)). The state alleged Lerch intentionally used his handgun, a deadly weapon, during both the balcony incident and the roadway incident to prevent the victims from taking the Explorer. Moreover, the jury heard evidence from the victims that both incidents caused them to fear for their physical safety. Thus, the jury reasonably could have based the guilty verdicts for aggravated assault on either incident.

¶14 As noted above, however, evidence of multiple acts creates no duplicity problem when the acts "'form part of one and the same transaction, and as a whole constitute but one and the same offense.'" *State v. Solano*, 187 Ariz. 512, 520, 930 P.2d 1315, 1323 (App. 1996), *quoting Counterman*, 8 Ariz. App. at 531, 448 P.2d at 101. In considering whether separate acts are part of the same criminal transaction, we may examine the defenses presented by the defendant to ascertain whether different defenses were urged as to the separate acts such that the jury might have applied a defense to one act but not the other. *Klokic*, 219 Ariz. 241, ¶¶ 24-30, 196 P.3d at 850-51. If the defendant "offers different defenses to each act or there is otherwise a reasonable basis for distinguishing between them," the acts may not be considered part of the same criminal transaction. *Id.* ¶ 32.

¶15 Here, as the trial court noted, both alleged acts involved the same participants, arose "out of the same circumstances," and occurred without any "significant intervening time period." But, as in *Klokic*, "the separate facts surrounding the two alleged acts of assault . . . gave rise to different defenses" and provided a reasonable basis for distinguishing between them. 219 Ariz. 241, ¶¶ 29, 32, 196 P.3d at 850-51. Regarding the balcony incident, Lerch presented a legal defense, arguing his actions were justified under A.R.S. § 13-411 because he had believed the victims burglarized his carport. *See* § 13-411 (person justified in threatening or using

physical and deadly force if reasonable belief necessary to prevent first- or second-degree burglary). But, he asserted a factual defense to the roadway incident, claiming he never brandished the weapon. Thus, the incidents were distinguishable and it was incumbent on the trial court to "take curative measures before admitting evidence of both to prove a single assault," *Klokic*, 219 Ariz. 241, ¶ 29, 196 P.3d at 850, which it failed to do.

¶16 The state, however, contends it "ultimately elected one theory of the case," and made it "abundantly clear" it was "criminalizing" only the balcony incident. We disagree. The jury received evidence related to the roadway incident from multiple witnesses, and the state referred to it in its opening statement and closing arguments. During closings, the prosecutor stated: "On April 2nd, 2013, . . . Lerch[] got his gun, got on the balcony. He fired a shot in a crowded apartment complex towards [K.M. and E.M.]." The prosecutor then related: "He peeled out, chased after [them]. He cut in front of them. He stopped his car, slammed on his brakes. Then he got out of that vehicle with a gun."

¶17 Although the state never explicitly argued that the jury could find Lerch guilty of aggravated assault based on either act, it never clarified or explained that the assault charges were based only on the balcony incident. Nor was that point even mentioned during jury instructions. And while the state may be correct that the parties and the court were aware that the state was only "criminalizing" the balcony incident, the record reflects that point was never communicated to the jury, let alone made "abundantly clear."[2]

¶18 Thus, as in *Klokic*, "although some jurors might have dismissed [Lerch]'s claims across the board, it is entirely possible

[2]In its answering brief, the state relies upon statements made by the trial court to support its argument that it "elected one theory of the case," noting that the court "found, multiple times, that the [s]tate was not criminalizing the conduct that followed the shot." But the court's statements and the conversations the state relies upon all occurred out of the presence of the jury.

that different jurors believed different facts with respect to each of the acts," and therefore "there is a distinct possibility that the jury was not unanimous as to the act . . . that gave rise to [his] criminal liability." *Id.* ¶ 30. "'Because we cannot be certain which offense served as the predicate for [Lerch's] conviction, we conclude that the real possibility of a non-unanimous jury verdict exists.'" *Id.* ¶ 38, *quoting Davis*, 206 Ariz. 377, ¶ 59, 79 P.3d at 77. Lerch was entitled to either a prosecutorial election of a single act or a jury instruction requiring unanimity; in providing neither, the trial court erred.[3] *See id.* Because the duplicitous indictment here was prejudicial, we must reverse Lerch's aggravated assault convictions and remand for a new trial. *See State v. Delgado*, 232 Ariz. 182, ¶ 19, 303 P.3d 76, 82 (App. 2013) (defendant establishes prejudice by demonstrating jury may have reached non-unanimous verdict).

Jury Instructions

¶19 Lerch next argues the trial court erred in refusing his requests to instruct the jury "that a garage is a residential structure and that, if the [s]tate failed to meet its burden of disproving [Lerch]'s justification defense of crime prevention, it must find [him] not guilty." The state contends the instructions the court gave "adequately covered the applicable law." Although we have determined Lerch's aggravated assault convictions must be reversed, we address his challenges to the jury instructions because they relate to his justification defense, which, if believed, would have also required acquittal on the conviction for unlawful discharge of a firearm. *See* A.R.S. § 13-3107(C)(1) (firearm discharged within or into municipality limits "[a]s allowed pursuant to [justification defense]" not unlawful).

¶20 We review a trial court's refusal to give a jury instruction for an abuse of discretion, *State v. Martinez*, 218 Ariz. 421,

[3]In view of our resolution of this issue, we need not address Lerch's contentions that the roadway incident was "not admissible as 'other act' evidence under Rule 404(b)" or that the trial court erred in denying his motion for new trial based on those issues.

¶ 49, 189 P.3d 348, 359 (2008), viewing the evidence in the light most favorable to the requesting party, *Cotterhill v. Bafile*, 177 Ariz. 76, 79, 865 P.2d 120, 123 (App. 1993). But we review de novo whether the instructions that were given correctly state the law. *See State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). And in doing so, we review the instructions as a whole; we will not reverse "because some isolated portion of an instruction might be misleading." *State v. Guerra*, 161 Ariz. 289, 294, 778 P.2d 1185, 1190 (1989); *see also State v. Sucharew*, 205 Ariz. 16, ¶ 33, 66 P.3d 59, 69 (App. 2003). In evaluating the adequacy of instructions, we may take into consideration counsel's arguments to the jury. *See State v. Rojo-Valenzuela*, 235 Ariz. 617, ¶ 20, 334 P.3d 1276, 1282 (App. 2014).

Residential Structure

¶21 Lerch argues the trial court should have instructed the jury that a "residential structure" includes an attached garage or storage space because it accurately stated the law and "supported his theory of defense that he was justified in using deadly force to prevent the burglary of his residential structure." *See State v. Ekmanis*, 183 Ariz. 180, 183, 901 P.2d 1210, 1213 (App. 1995) ("lesser included structure[s]" such as attached garage, basement, or storage room are part of residential structure for purposes of burglary statutes). But the trial court was not required to instruct that those "lesser included structure[s]" were part of a residential structure if doing so would have merely "reiterate[d] or enlarge[d] the instructions in [Lerch]'s language." *State v. Morales*, 198 Ariz. 372, ¶ 4, 10 P.3d 630, 632 (App. 2000) (when jury properly instructed, court not required to provide additional instruction that reiterates or enlarges instructions in defendant's language), *quoting State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

¶22 The trial court instructed the jury that "'residential structure' means any structure, movable or immovable, permanent or temporary, that is adapted for both human residence and lodging, whether occupied or not." This language was identical to that of the statute, *see* A.R.S. § 13-1501(11), and the Revised Arizona Jury Instructions (RAJI), *see* State Bar of Arizona, *Revised Arizona Jury*

Instructions (Criminal) Std. 15.01(11) (2015). Thus, the court's instruction did not misstate the law.

¶23 Lerch argues, however, that without the requested definitional instruction, some jurors might have found "there was no second-degree burglary" because "no one resided in [Lerch]'s garage, [and therefore] it was *not* a residential structure." But the record establishes that the nature of the attached carport was not in dispute, rendering Lerch's instruction unnecessary. *See State v. Gomez*, 211 Ariz. 111, ¶ 14, 118 P.3d 626, 629 (App. 2005) (no abuse of discretion in refusing proposed instruction where evidence and arguments of counsel rendered instruction unnecessary). While settling instructions, the prosecutor informed the court she "d[id]n't intend on arguing that the garage is a nonresidential structure." Moreover, if there was any ambiguity in the instruction, it was mitigated during closing arguments. *See Morales*, 198 Ariz. 372, ¶ 5, 10 P.3d at 632. The prosecutor stated:

> [W]hen the defendant gets up here and he says well, I thought they were burglarizing the car and I associated that with then . . . stealing the tools . . . , that's not one [and] the same thing. That car was located outside the carport. That's not part of this burglary. You have to believe what the defendant said, which is that he thought that they were stealing the tools [out of the carport].

¶24 Additionally, defense counsel argued: "Nonetheless, the[victims] were in the garage. A burglary was in process in his mind." "And under the statutes, [A.R.S. §] 13-411, you have the right to defend your property." *See Rojo-Valenzuela*, 235 Ariz. 617, ¶ 20, 334 P.3d at 1282 ("In evaluating the impact of an allegedly erroneous jury instruction, we will, along with other factors, consider the statements of counsel.").

¶25 Although we agree with Lerch that an instruction clarifying that the definition of a residential structure includes a

garage would not have been inappropriate here, because the instruction the trial court gave did not misstate the law and in light of the lack of dispute over the nature of the carport, we cannot say the court abused its discretion in rejecting Lerch's requested addition to its instruction. *See Gomez*, 211 Ariz. 111, ¶ 14, 118 P.3d at 629; *see also State v. Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d 997, 1015 (2000) (no error in omitting requested instruction that "could have [been] given," but "would have been surplusage").

Justification Instruction

¶26 Lerch also claims the trial court erred by not concluding its crime-prevention justification instruction with the language, "[i]f the [s]tate fails to carry [its] burden [of proving beyond a reasonable doubt that the defendant did not act with justification], then you must find the defendant not guilty of the charge." Citing *State v. Duarte*, 165 Ariz. 230, 798 P.2d 368 (1990), he contends our supreme court "has expressly and repeatedly directed that trial courts conclude justification defense instructions" with that language, and that the court's failure to do so was reversible error because "[o]ne or more jurors may have found [his] conduct . . . to be 'justified,' but still felt obligated to find him guilty . . . , because they were not instructed how the justification instruction related to the guilt instruction."

¶27 In *Duarte*, our supreme court directed that trial courts "should" include the language at issue when instructing on a justification defense, reasoning that it "reflects the original purpose of the instruction—to inform the jury that acquittal is *mandatory* if the state fails to disprove beyond a reasonable doubt" a properly raised justification defense. 165 Ariz. at 232, 798 P.2d at 370 (emphasis in original). But the court found no reversible error when it reviewed the instructions as a whole. *See id.* at 232-33, 798 P.2d at 370-71.

¶28 Here, the crime-prevention instruction given did not contain misleading language—it merely lacked the additional language recommended in *Duarte*. *See id.*; *see also State v. Abdi*, 226 Ariz. 361, ¶ 15, 248 P.3d 209, 213 (App. 2011) (jury instructions must

not mislead jury in any way and must provide understanding of issues, but need not be faultless). Although the trial court should have further instructed the jury that the state's failure to sustain that burden required it to find him not guilty, the provided instruction did not inaccurately describe the state's burden of proof.

¶29 Moreover, the court instructed the jury generally that it must acquit him if the state did not sustain its burden as to each offense, and Lerch expressly emphasized to the jury during closing arguments that the state's burden of proof applied equally to his justification defense.[4] *Cf. State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003) (jury instructions considered in context and in conjunction with closing arguments of counsel). Lerch also told the jury that defendants "are never convicted under . . . justification . . . . If you use a firearm in a lawful manner to stop a crime, you are not going to be convicted of discharging a firearm. Or disorderly conduct with a firearm." And he further urged the prosecutor "has to prove that justification did not exist beyond that same [reasonable doubt] standard." When considered with counsel's closing arguments and the instructions as a whole, the trial court's instruction was not misleading as to the state's burden of proof regarding Lerch's justification defense. *See Duarte*, 165 Ariz. at 232-33, 798 P.2d at 370-71. Accordingly, any error in the instruction was harmless. *See State v. Solis*, 236 Ariz. 285, ¶ 13, 339 P.3d 668, 670 (App. 2014) (error harmless if, after reviewing evidence, we are convinced beyond reasonable doubt error did not contribute to or affect verdict).[5]

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[4]Lerch argued: "Being that the burden of proof is on the Prosecutor, and that's a strong burden of proof, beyond a reasonable doubt, . . . [s]he has to prove each and every one of the elements and she has to prove that justification did not exist beyond that same standard." The state did not dispute this burden.

[5]We note, however, that in any retrial in which the same defense is raised, the more prudent course would be to include the recommended language.

Sentencing Issues

¶30 Lerch challenges his sentences in two respects. He first argues the trial court fundamentally erred by imposing a sentence for unlawful discharge of a firearm to be served consecutively with the sentences for the aggravated assault convictions. Claiming those convictions were all based upon a single act, he argues the consecutive sentence "violates constitutional double jeopardy protections, A.R.S. § 13-116, and the requirements of *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989)." The state "concedes fundamental and prejudicial error under § 13-116" and agrees Lerch should be resentenced on the unlawful discharge conviction. We agree and vacate Lerch's unlawful discharge sentence. The state further argues that the trial court "should be granted leave to reconsider the sentences imposed on the aggravated assault charges as well." Because we reverse Lerch's aggravated assault convictions, we need not consider whether "leave to reconsider th[ose] sentences" is appropriate.

¶31 Finally, Lerch contends, and the state concedes, his criminal damage conviction should be reduced from a class one to a class two misdemeanor because the jury found the amount of damage was less than $250. *Compare* A.R.S. § 13-1602(B)(5) (criminal damage is a class one misdemeanor if property is damaged in an amount more than $250 but less than $1,000), *with* A.R.S. § 13-1602(B)(6) (in all other cases, criminal damage is a class two misdemeanor). Because the jury found the damage to be less than $250, Lerch's criminal damage charge must be reduced to a class two misdemeanor.

Disposition

¶32 For the foregoing reasons, Lerch's aggravated assault convictions are reversed and remanded. His criminal damage and unlawful discharge convictions are affirmed, but are remanded for resentencing.