IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

ERNESTO ALON HERNANDEZ REYES, *Petitioner*,

v.

THE HONORABLE SUZANNE E. COHEN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge*,

STATE OF ARIZONA, *Real Party in Interest*.

No. 1 CA-SA 20-0109
FILED 8-24-2021
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Petition for Special Action from the Superior Court in Maricopa County
No. CR2019-151937-001
The Honorable Suzanne E. Cohen, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

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OPINION

Chief Judge Kent E. Cattani delivered the opinion of the Court, in which Presiding Judge Randall M. Howe and Judge Cynthia J. Bailey joined.

C A T T A N I, Chief Judge:

¶1 Ernesto Alon Hernandez Reyes seeks special action review of the superior court's denial of his motion to remand to the grand jury for a redetermination of probable cause. Reyes argues that the superior court erred by failing to remand in light of the prosecutor's failure to instruct the grand jurors regarding the State's burden under A.R.S. § 13-205 to disprove (if relevant) a defendant's justification defense at trial. Reyes characterizes § 13-205 as "the key justification statute," and he asserts that failing to instruct the jurors regarding the statute denied him a substantial procedural right and required remand. But § 13-205 addresses the burdens of proof applicable to justification defenses at trial. It does not apply during grand jury proceedings in which the issue before the grand jury is whether the State has established probable cause to charge an offense. Accordingly, and because instructing the grand jury regarding the trial burden of proof risks substantial confusion of the issues, we hold that the State is not obligated to instruct the grand jury regarding § 13-205.

¶2 Reyes also asserts that the State improperly "deflected the grand jury from its inquiry" by failing to adequately convey his offer to appear and testify to specific matters and by failing to present clearly exculpatory evidence. As described below, however, the State's presentation was fair and did not deprive Reyes of a substantial procedural right. Thus, the superior court did not err by rejecting Reyes's remand request. Accordingly, we accept jurisdiction but deny relief.

FACTS AND PROCEDURAL BACKGROUND

¶3 In late 2019, the State charged Reyes by direct complaint with several felony offenses related to an incident in which he shot his ex-wife Marianna's boyfriend, John M. Anticipating a grand jury proceeding, Reyes's counsel sent the State a *Trebus*[1] letter asserting that Reyes's actions were justified by the need to defend himself and his daughter and

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1 *Trebus v. Davis*, 189 Ariz. 621 (1997).

conveying Reyes's offer to testify before the grand jury. The letter outlined evidence Reyes asserted was clearly exculpatory and to which he would testify, including:

> (1) prior threats by John M. (including one in mid-2018, when he followed Reyes in a vehicle, screamed that he would "f***ing kill" him, and jumped out at a red light to pound on Reyes's door; and an instance when he conveyed threats against Reyes and his family to Reyes's brother) and by Marianna (who threatened to kill Reyes while pointing a loaded pistol at him while they still lived together);
>
> (2) Reyes's contention that John M. had started the confrontation on the night of the shooting by "charg[ing] out of the darkness from behind cover . . . screaming obscenities" and again threatening to "f***ing kill" Reyes; and
>
> (3) the fact that Reyes called 9-1-1 (twice) immediately after the shooting.

The letter also requested that the State instruct the grand jury on all relevant justification defenses, specifically citing A.R.S. §§ 13-404 (self-defense), -405 (use of deadly physical force), -406 (defense of another), -411 (crime prevention), -418 (defense of an occupied vehicle), and -419 (presumptions). The letter did not cite § 13-205.

¶4 During the grand jury proceeding, the State provided the grand jury a list of relevant substantive criminal statutes as well as all of the justification statutes specified in Reyes's *Trebus* letter. The State then presented testimony from the investigating detective, who explained that, on the evening of November 9, 2019, Reyes was scheduled to meet Marianna to exchange custody of their son. Reyes and Marianna had been divorced for a few years, and Reyes was designated as the primary residential parent for their 13-year-old daughter and 9-year-old son, with Marianna having parenting time each week. Marianna and her son waited for Reyes for 20 minutes at the agreed location, then returned to the home she shared with John M. Reyes then emailed to tell her he would pick up their son from John M.'s house, and Marianna replied that Reyes was not welcome there.

¶5 The detective stated that Reyes and his daughter nevertheless drove to John M.'s house shortly thereafter, and Marianna and John M. were waiting for him outside. Marianna waved Reyes off, and he turned the car around and began to drive slowly away. As he was doing so, John

M. ran toward the car shouting at Reyes to "get the f*** out of here" and "I'm going to f***ing kill you." As John M. was yelling and chasing the car (with Marianna chasing after John M.), Reyes drew a handgun and fired three shots at John M.; two missed, but one struck and injured him.

¶6 The detective further explained that Marianna and other witnesses called the police, as did Reyes (twice) immediately after the shooting. John M. later told investigating officers that he was not carrying a weapon when Reyes shot him, and there was no evidence to the contrary. The detective also noted Reyes's prior reports that John M. had threatened him, specifically citing the 2018 incident involving John M. threatening him in his car.

¶7 The prosecutor then informed the grand jury that Reyes "ha[d] made a written request to appear before you and testify" and summarized the subject of his proposed testimony by noting that Reyes "ha[d] provided information that he -- he shot at [John M.] that night because he felt in fear for his own life as well as his daughter's life." The grand jury considered Reyes's request to testify but declined to hear from him. After deliberating, the grand jury returned a true bill by unanimous vote.

¶8 Reyes moved to remand to the grand jury for a redetermination of probable cause, arguing in pertinent part that the State failed to adequately inform the grand jury of the topics on which Reyes wished to testify, failed to present clearly exculpatory evidence noted in his *Trebus* letter supporting his justification defense, and failed to adequately advise the grand jury of applicable law on justification by omitting instruction on § 13-205. After a hearing, the superior court denied the motion, specifically finding that the State was not required to read § 13-205 to the grand jury. This special action followed.

DISCUSSION

I. Jurisdiction.

¶9 Although our special action jurisdiction is discretionary, *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323, ¶ 4 (2001), special action is the only means by which Reyes may obtain appellate review of the denial of his motion to remand for a redetermination of probable cause. *See State v. Moody*, 208 Ariz. 424, 439–40, ¶ 31 (2004); *see also* Ariz. R.P. Spec. Act. 1(a) (limiting special action jurisdiction to situations in which the petitioner lacks "an equally plain, speedy, and adequate remedy by appeal"). Additionally, Reyes's petition raises a legal issue of statewide importance

involving proper instruction of grand juries on justification defenses on which different divisions of the superior court have reached different conclusions. *See Cespedes v. Lee*, 243 Ariz. 46, 48, ¶ 4 (2017); *Fields*, 201 Ariz. at 323, ¶ 4. Accordingly, we exercise our discretion to accept special action jurisdiction.

II. Motion to Remand.

¶10 The State has a duty to provide the grand jury with a fair and impartial presentation of the evidence and to properly instruct the grand jury on the applicable law, including legal instructions "on justification defenses that, based on the evidence presented to the grand jury, are relevant to the jurors determining whether probable cause exists to indict the defendant." *Cespedes*, 243 Ariz. at 49, ¶ 9; *Maretick v. Jarrett*, 204 Ariz. 194, 197, ¶ 8 (2003); *Trebus v. Davis*, 189 Ariz. 621, 623 (1997); *Crimmins v. Superior Court*, 137 Ariz. 39, 41–42 (1983); *Bashir v. Pineda*, 226 Ariz. 351, 355, ¶ 13 (App. 2011). The State need not present all exculpatory evidence, but it must provide the grand jury with all "clearly exculpatory" evidence: "evidence of such weight that it would deter the grand jury from finding the existence of probable cause." *State v. Superior Court (Mauro)*, 139 Ariz. 422, 425 (1984); *see also Bashir*, 226 Ariz. at 355, ¶¶ 12–13. Clearly exculpatory evidence includes evidence that would support an applicable justification defense. *See Herrell v. Sargeant*, 189 Ariz. 627, 631 (1997). Additionally, although the grand jury is not obligated to hear from the defendant, *see* A.R.S. § 21-412, if the defendant has requested to appear or has submitted exculpatory evidence for the grand jury's consideration, "the State must inform the grand jury of the existence and content of a defendant's request," *Trinh v. Garcia*, 251 Ariz. 147, 155, ¶ 29 (App. 2021); *see also Trebus*, 189 Ariz. at 623, 625.

¶11 Remand for a redetermination of probable cause is appropriate if the State failed to fulfill these obligations, thereby denying the defendant a substantial procedural right. *Maretick*, 204 Ariz. at 197, ¶ 11; *see also* Ariz. R. Crim. P. 12.9(a). We review the superior court's denial of a motion to remand for an abuse of discretion. *Cespedes*, 243 Ariz. at 48, ¶ 5; *see also* Ariz. R.P. Spec. Act. 3(c).

A. Instruction on Applicable Law: A.R.S. § 13-205.

¶12 Reyes argues that the State breached its duty to instruct the grand jury on all applicable principles of law governing justification because, although it advised the grand jury on the specific justification defenses the evidence potentially implicated, it failed to instruct on A.R.S.

§ 13-205(A). *See Cespedes*, 243 Ariz. at 49, ¶ 9; *Trebus*, 189 Ariz. at 623. Section 13-205 describes the distinction between justification defenses and affirmative defenses and, importantly, delineates the State's burden at trial to disprove justification (beyond a reasonable doubt) once a justification defense is in play:

> Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence. Justification defenses under chapter 4 of this title [§§ 13-401 to -421] are not affirmative defenses. Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. If evidence of justification pursuant to chapter 4 of this title is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.

A.R.S. § 13-205(A).

¶13 Reyes argues with some force that one portion of the statute provides a useful gloss on what "justified" means—i.e., that a justified action is not a crime. But his argument that § 13-205 must be read to the grand jury ignores the potential confusion thereby introduced: § 13-205 highlights the State's *trial* burden to disprove justification beyond a reasonable doubt, whereas the burden in a *grand jury* proceeding is simply to show probable cause that a crime occurred. *See* A.R.S. § 21-413; *see also Cespedes*, 243 Ariz. at 49, ¶ 11 (characterizing as correct a prosecutor's statements that the standard stated in § 13-205 "applies 'when you go to trial'" and that the grand jury "would not have to 'mak[e] those decisions'") (alteration in original). While Reyes suggests that adding one additional statute would not meaningfully increase confusion given the sheer volume of statutes presented to the grand jury at the beginning of its term, the distinction here is qualitative. For purposes of the grand jury, instruction on § 13-205 would not just add an additional statute to consider, it would affirmatively misdirect the grand jury to a standard that is inapplicable to its role. Injecting an extraneous and irrelevant burden of proof does not fall within the State's duty to instruct "on all the law *applicable* to the facts of the case." *See Trebus*, 189 Ariz. at 623 (emphasis added); *see also Dominguez v. Foster*, 243 Ariz. 499, 502–03, ¶¶ 8–13 (App. 2018) (requiring the grand jury be instructed consistent with the "expanded and clarified" definition of an element of an offense—even though the definition had been judicially developed for purposes of petit jury instructions—because the clarified

definition was germane to the grand jury's determination of probable cause).

¶14 Reyes asserts that the Arizona Supreme Court's decision in *Cespedes* implicitly endorses a requirement that the State advise the grand jury on § 13-205 when justification is implicated. In *Cespedes*, the prosecutor did in fact read § 13-205 to the grand jury. 243 Ariz. at 48, ¶ 7. But that is precisely what caused the problem addressed in the *Cespedes* opinion. Instruction on § 13-205's trial burden meant the prosecutor had to clarify how that burden applied (or rather did not apply) in grand jury proceedings, and the defendant argued that the prosecutor's explanation wrongly suggested that the grand jury did not need to consider justification at all. *Id.* at 48–49, ¶¶ 7, 11–13. The majority and the dissent agreed on the premise that the grand jury "had to consider justification where relevant, but ultimately could decide, based on the facts of the case, whether a defendant's conduct was justified." *Compare id.* at 49, ¶¶ 12–13, *with id.* at 50, 52, ¶¶ 21, 28 (Lopez, J., dissenting). They disagreed on whether, reading the instructions as a whole, the prosecutor's explanation of the relative roles (and relevant burdens of proof) for trial juries and grand juries—prompted by the confusion introduced by § 13-205—misstated the law by suggesting that the grand jury need not consider justification. *Compare id.* at 49, ¶¶ 10–13, *with id.* at 51–53, ¶¶ 26, 31 (Lopez, J., dissenting).

¶15 *Cespedes* does not, as Reyes posits, reflect an implicit acknowledgement that § 13-205 must be read to the grand jury. To the contrary, it was the State's reading of § 13-205 to the grand jury that created the potential for confusion at the core of that dispute. *See id.* at 49, ¶¶ 11–12; *see also id.* at 51–52, ¶ 26 (noting the prosecutor's "perhaps unnecessar[y]" attempt to distinguish between grand jury and trial jury roles with regard to justification defenses, which yielded an "ambiguous and confusing" instruction on the law). And Reyes's assertion that instruction on § 13-205 must be necessary, else the *Cespedes* court could simply have held the § 13-205 instruction to be harmless error, is similarly unavailing. Including an unnecessary instruction is not harmless if it confuses the jurors or otherwise misstates the applicable law. *See id.* at 49, ¶ 10 (noting that instructions are considered "as a whole" to determine whether "the prosecutor correctly instructed the grand jury on the defense of justification"); *see also id.* at 51, ¶ 26 (Lopez, J., dissenting).

¶16 To be sure, the third sentence of § 13-205(A)—"Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct."—provides general information about justification defenses, not the State's

trial burden. But the instructions given in this case gave the grand jury that information. The State directed the grand jury to all the substantive justification statutes plausibly implicated by the evidence (and, we note, all the justification statutes Reyes requested in his *Trebus* letter). These statutes state that a person is "justified" in using physical or deadly physical force under certain circumstances, a term that necessarily and inherently means that the conduct is not wrongful. *See, e.g.*, Justification, Black's Law Dictionary (11th ed. 2019) ("any fact that prevents an act from being wrongful"); Justify, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/justify (last visited Aug. 12, 2021) ("to prove or show to be just, right, or reasonable" or "to show to have had a sufficient legal reason"); *see also* A.R.S. §§ 13-404(A), -405(A), -406, -411(A), -418(A), -419. And while Reyes suggests that, without instruction on § 13-205, the grand jury might wrongly assume that the defendant bears the burden to prove justification, nothing in the record shows any misunderstanding of the State's burden or the grand jury's role to indict only upon probable cause. *See* A.R.S. § 21-413.

¶17 Accordingly, the State provided proper instruction on justification and was not required to instruct the grand jury on the trial burden of proof as set forth in § 13-205.

B. *Trebus* Letter and State's Presentation of Evidence.

1. Reyes's Offer to Testify.

¶18 Reyes argues that the State improperly "deflected the grand jury from its inquiry" by failing to fairly present the substance of his offer to testify. Citing the details in his *Trebus* letter about John M.'s prior threats and John M.'s conduct on the night of the shooting, *see supra* ¶ 5, Reyes asserts that the State's advisement to the grand jury that Reyes "ha[d] made a written request to appear before [them] and testify" and "ha[d] provided information that he -- he shot at [John M.] that night because he felt in fear for his own life as well as his daughter's life" was inadequate.

¶19 When a defendant requests to appear before the grand jury and provides "the subject and outline of proposed evidence," the State must convey that information in sufficient detail to allow the grand jury to make an informed decision on whether to hear from the defendant. *Trebus*, 189 Ariz. at 626; *Bashir*, 226 Ariz. at 355, ¶¶ 15–16; *see also* A.R.S. § 21-412. And although the State's summary here did not lay out Reyes's proposed testimony in the detail he would have preferred, it captured the crux of the matter by specifically noting his request to testify and his assertion that his

use of force was appropriate in the face of a perceived immediate deadly threat to himself and his daughter. *Cf. Trinh*, 251 Ariz. at 155, ¶ 27 ("The grand jury was not required to review [the defendant's] letter, but it was entitled to hear it existed."). Moreover, the detective testified to the "documented history of [Reyes] calling police to say that [John M.] has threatened him in the past," which put the grand jury on notice of Reyes's alleged frame of mind on the night of the shooting. The grand jury could have explored this issue by questioning the detective or by calling Reyes to testify but chose not to do so. In light of the "considerable deference" accorded the superior court on this issue, *Bashir*, 226 Ariz. at 355, ¶ 17, the court did not err by concluding that the State had fairly presented Reyes's offer to testify.

2. Clearly Exculpatory Evidence.

¶20 Last, Reyes argues that the State improperly "deflected the grand jury from its inquiry" by failing to present evidence noted in his *Trebus* letter that he deemed clearly exculpatory. Reyes specifically cites John M.'s prior threats against him (both the threat conveyed to Reyes's brother and the 2018 incident in which John M. chased Reyes in his car), the threat Marianna made while pointing a gun at Reyes several years before, and Reyes's actions the night of the shooting attempting to drive away from the situation and cooperating with police afterward.

¶21 But none of this proposed evidence is clearly exculpatory. *See Herrell*, 189 Ariz. at 631. The detective testified (in addition to describing John M. screaming obscenities and death threats while he charged at Reyes's car on the night of the shooting) that Reyes had reported prior threats from John M. The fact that John M. may have conveyed a similar threat against Reyes to another person (or additional detail about the 2018 incident) would not add measurably to the grand jury's consideration of whether Reyes reasonably feared for his life on the night of the shooting. Nor would Marianna's threat, given that she made it three years before the shooting. And the detective in fact testified that Reyes was driving away while John M. ran toward him in the lead-up to the shooting and that Reyes called the police immediately thereafter.

¶22 In sum, the superior court reasonably determined that the State provided a fair and impartial presentation of evidence, and thus, the court did not err by denying Reyes's motion to remand.

CONCLUSION

¶23 We accept jurisdiction but deny relief.

AMY M. WOOD • Clerk of the Court
FILED: JT