NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 12/18/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0908
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RONALD RAY DEMERY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR200900878

The Honorable Rick A. Williams, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
by Diane S. McCoy, Deputy Appellate Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Ronald Ray Demery appeals his convictions and sentences for aggravated assault and unlawful discharge of a firearm. For the following reasons, we affirm.

BACKGROUND

¶2 At trial, the victim and Demery presented divergent accounts of the underlying incident, though both agreed the ultimate result was that Demery shot the victim in the buttocks. According to the victim, he and Demery engaged in a verbal altercation after Demery saw the victim walking across a vacant lot near Demery's home. After the two exchanged words, the victim began walking down the street while Demery went back into his home. Demery came back out of his house with a rifle and fired three shots at the victim, striking him once. Witnesses confirmed that they saw Demery follow the victim down the street accusing him of disrespect, and then fire a shot, causing the victim to start running.

¶3 According to Demery, he witnessed the victim using a flashlight to peer at items in his and his neighbor's yards. Demery then went outside to confront the victim, and in doing so, grabbed a rifle from the victim. The victim then stood outside of Demery's home and demanded return of the rifle. After Demery refused, the victim began "rocking" Demery's girlfriend's vehicle back and forth, prompting Demery to follow the victim out to the street and to repeatedly urge him to keep moving along. While in the street, the victim took an aggressive stance, placed his hands in his pockets, and made a threatening move towards Demery. As a result, Demery fired two

warning shots. When the victim made another aggressive move towards Demery, however, Demery shot the victim.

¶4 Following the incident, Demery was indicted for aggravated assault (Count 1), misconduct involving weapons (Count 2), and unlawful discharge of firearms (Count 3). A jury convicted Demery was convicted on Counts 1 and 3.[1] The trial court sentenced Demery to six years' imprisonment for Count 1 and six months' imprisonment for Count 3, with the sentences to be served concurrently. Demery timely appealed.

DISCUSSION

A. Defense of Property Instruction

¶5 Demery argues the trial court erred by failing to include in its defense of property instruction any language indicating that a defendant may use force to prevent a theft or to prevent criminal damage or attempted criminal damage. Specifically, Demery argues his testimony that he observed the victim "rocking" his girlfriend's car before he shot the victim was sufficient to support the criminal damage portion of the instruction.

¶6 In his written request for jury instructions, Demery asked the court to instruct the jury on various justification defenses, including an instruction that a defendant may be

[1] Count 2 was dismissed prior to trial.

justified in using force to prevent theft or criminal damage of his property. During argument on the final instructions, however, Demery did not object to the court's failure to include a reference to prevention of criminal damage. Demery also failed to object when the court gave its final instructions, including instructions on self-defense, defense of third person, defense of premises, use of force in crime prevention, and defense of property.

¶7 Ordinarily, we review a trial court's decision not to give jury instructions for an abuse of discretion. *State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471, 123 P.3d 662, 665 (2005). Where, as here, a party failed to raise the issue to the trial court, however, we review for fundamental error. *See State v. Henderson,* 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005*).* "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at 567, ¶ 20, 115 P.3d at 607. Error is fundamental when it goes to the foundation of the case, takes away an essential right from the defendant, and is "of such magnitude that the defendant could not possibly have received a fair trial." *Id.* at ¶ 19 (citation omitted).

¶8 We find no error, fundamental or otherwise, in the court's failure to instruct the jury that Demery might be

justified in using force to prevent criminal damage. A defendant is entitled to a particular self-defense instruction if it is supported by the "slightest evidence." *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997). Demery argues that the trial court should have instructed the jury in accordance with Arizona Revised Statutes ("A.R.S.") section 13-408 (2012), which states as follows:

> A person is justified in using physical force against another when and to the extent that a reasonable person would believe it necessary to prevent what a reasonable person would believe is an attempt or commission by the other person of . . . criminal damage involving tangible movable property under his possession or control, but such person may use deadly physical force under these circumstances as provided in §§ 13-405, 13-406 and 13-411.

Based on Demery's own testimony, however, the record indicates that both he and the victim were in the street at the time Demery fired the injurious shot. Further, when Demery shot the victim, any alleged criminal damage resulting from the victim touching Demery's girlfriend's vehicle had already occurred. Accordingly, it does not appear that Demery fired the shots as a preventative measure; he did so instead to either intimidate or retaliate. Because such conduct is not contemplated by § 13-408, the trial court did not err in refusing to give an instruction based on the statutory language.

¶9 Furthermore, even if we assume Demery fired the shots at the victim as a preventative measure, because Demery used deadly physical force, the court's failure to include criminal damage in this justification instruction was not erroneous. Demery's act of shooting the victim constituted "deadly physical force" because it was "capable of creating a substantial risk of causing death or serious physical injury." *See* A.R.S. § 13-105(14) (2012). As already indicated, § 13-408 permits the use of deadly force only to the extent provided in §§ 13-405, -406, and -411. Under those statutes, a defendant is justified in using deadly physical force in defense of property only when a reasonable person would believe it is immediately necessary to protect against another's use, threatened use, or attempted use of deadly physical force, or to prevent certain crimes, not including criminal damage. *See* A.R.S. §§ 13-408, 13-405(2) (2010), 13-406 (2012), 13-411(A) (2012). A thorough reading of those statutes clarifies the fact that a person may never use deadly physical force simply to protect property or prevent criminal damage.

B. Definition of "Unlawful Physical Force"

¶10 Demery argues the trial court erred in failing to include in the jury instructions on self-defense and defense of a third person a definition of "unlawful physical force" that included "threatening and intimidation," "aggravated assault,"

and "assault." Relying on *State v. Fish*, 222 Ariz. 109, 213 P.3d 258 (App. 2009), Demery argues that in failing to adequately define "unlawful physical force," the court fundamentally erred by omitting an element essential to his claim of self-defense. He argues that absent the definition he now urges, the jury might not have realized that his testimony that the victim threw a rock at him and threatened to blow up his house and "stuff like that," demonstrated that the victim had used or was threatening "unlawful physical force" against which he was justified in defending himself or his girlfriend and her daughter, who were in the house. Because Demery failed to request any additional definition of "unlawful physical force" at trial, he again bears the burden of demonstrating that the alleged error is fundamental. *Henderson,* 210 Ariz. at 568, ¶¶ 23, 26, 115 P.3d at 608.

¶11 We find no error in the court's failure to define "unlawful physical force" as Demery urges on appeal. We review the adequacy of jury instructions in their entirety to determine if they accurately reflect the law. *State v. Hoskins,* 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). When a jury is properly instructed, "the trial court is not required to provide additional instructions that do nothing more than reiterate or enlarge the instructions in defendant's language." *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). In this

case, the court instructed the jury that a defendant is justified in using physical force in self-defense or in defense of a third person if "[a] reasonable person in the situation would have believed that physical force was immediately necessary to protect against another's use, attempted use, or threatened use of unlawful physical force." The court tracked the statutory definitions of "unlawful" and "physical force" in further instructing the jury that "[p]hysical force means force used upon or directed toward the body of another person" and "[u]nlawful means contrary to law or, where the context so requires, not permitted by law." *See* A.R.S. § 13-105(32) and (40). The court also specifically defined the crimes of aggravated assault and simple assault. These instructions adequately and correctly informed the jury.

¶12 We further conclude that the court's failure to define "unlawful physical force" as including "threatening and intimidation" was not erroneous. The relevant instruction provided that a defendant might be justified in defending against another person's "use, attempted use, or threatened use of unlawful physical force." This instruction's reference to the "threatened use of unlawful physical force" and the court's definition of "physical force" not only distinguishes these

instructions from the instructions found inadequate in *Fish*,[2] but also adequately addresses the concern raised on appeal that a jury might not have understood that Demery could have been justified in using physical force to defend against the victim's threat to blow up Demery's occupied house. 222 Ariz. at 126-27, 129, ¶¶ 56, 66, 213 P.3d at 275-76, 278; *see also* A.R.S. § 13-1202(A)(1) (2010) ("A person commits threatening or intimidating if the person threatens or intimidates by word or conduct: 1. To cause . . . serious damage to the property of another[.]"). In short, we are not persuaded by Demery that the jury might not have understood, absent specific reference to the crime of "threatening and intimidation," that the victim's threat to blow up an occupied house was a threatened use of "unlawful physical force."

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[2] In *Fish*, the defendant requested that the trial court's instruction on self-defense include the statutory definition of "threatening or intimidating." 222 Ariz. at 126, 213 P.3d at 275. Notwithstanding that request, the court's instruction simply stated, "[a] defendant is justified in using or threatening physical force in self-defense if . . . [a] reasonable person in the defendant's situation would have believed that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force." *Id*. at 127, 213 P.3d at 276. Noting that the court should have granted the defendant's request because the flawed jury instruction would have "allowed the jury to disregard [the] evidence," we found the trial court's refusal to further define "unlawful physical force," was not harmless error. *Id.* at 130, 213 P.3d at 279. Unlike the instructions in *Fish*, however, those given here referenced the 'threatened use' of unlawful force in relation to the self-defense instruction.

¶13 Even if we assume the trial court erred in failing to further instruct the jury *sua sponte* on "unlawful physical force," Demery has not established he was prejudiced by the error. *See Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608. As noted, Demery used deadly physical force against the victim by firing the rifle. And, deadly physical force may only be used when a reasonable person would believe it is *immediately* necessary to protect against another's use, threatened use, or attempted use of deadly physical force, or to prevent certain crimes. *See* A.R.S. §§ 13-408, 13-405(2), 13-406, 13-411(A). Nothing in the record indicates that the victim's alleged statement about "blowing up" Demery's house satisfies the immediacy requirement for the use of deadly force. *See id.* Assuming the victim did make that statement, it would only constitute a threat of action at some indefinite time in the future; not immediately. Accordingly, even if the trial court should have given further instructions on "unlawful physical force," Demery could not show that the victim's threatening statements warranted the use of deadly physical force.

C. Evidentiary Rulings and Vouching

¶14 Demery argues the trial court abused its discretion in allowing introduction of (1) evidence from one of the witnesses that his grandfather was a former police chief and (2) evidence that this witness was not affiliated with a gang. Demery also

asserts that the prosecutor's questions related to such evidence, as well as questions about the victim's lack of gang affiliation, constituted improper vouching. We ordinarily review the trial court's rulings on the admissibility of evidence for an abuse of discretion. *State v. Rutledge,* 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003). We review claims of error that were not raised below for fundamental error only. *Henderson,* 210 Ariz. at 568, ¶ 22, 115 P.3d at 608.

¶15 Demery argues first that the trial court allowed the jury to hear improper character evidence from one of its witnesses that his grandfather was a former Kingman police chief. Demery also argues that the prosecutor's decision to elicit that testimony constituted improper vouching. Although Demery objected to the relevance of this evidence at trial, he did not object on grounds it was vouching. We view challenged evidence on appeal in the "light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Harrison,* 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998), *aff'd,* 195 Ariz. 1, 985 P.2d 486 (1999). The evidence regarding the witness' relationship to a former chief of police was of no relevance to the issues at trial. By the same token, however, we are hard-pressed to find that this irrelevant evidence would have unfairly prejudiced Demery. Accordingly, we find beyond a reasonable doubt that the

error was harmless. *See State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (recognizing that error is harmless if the State can "establish beyond a reasonable doubt that the error did not contribute to or affect the verdict.").

¶16 Nor do we view the evidence as the result of impermissible prosecutorial vouching. In context, although we are mystified as to why the prosecutor elicited this testimony, we do not view the evidence as an attempt to "place[] the prestige of the government behind its witness." *State v. King,* 180 Ariz. 268, 276-77, 883 P.2d 1024, 1032-33 (1994). Thus, Demery has not established that any fundamental error occurred as a result of the prosecutor's irrelevant question about the witness's grandfather.

¶17 Demery next argues that the evidence that neither this witness nor the victim were affiliated with a gang constituted vouching. We disagree. Demery noted in his opening statement that the victim had threatened to come back with "my boys" and blow up Demery's house or otherwise "get back" at Demery. Evidence that the victim and the friend he was going to see were not gang members was not offered to bolster these witnesses' credibility, but rather as substantive evidence, relevant to a material issue in this case: whether the friend was in fact one of the victim's "boys," whether the victim had "boys," and by extension, whether the victim had actually made this statement

about his "boys." Moreover, Demery did not object to this testimony, limiting us to review for fundamental error only. *See Henderson,* 210 Ariz. at 568, ¶ 22, 115 P.3d at 608. Demery has failed to persuade us that the evidence was unfairly prejudicial under the circumstances, and therefore we find that the judge did not err, much less fundamentally err, in admitting it.

¶18 Regarding the victim, Demery argues the prosecutor engaged in improper vouching when he commented that the videotaped interrogation would show that the detective had told Demery that he was one hundred percent sure that the victim was not a gang member, a statement the detective did not remember making. Demery argues this comment both placed the prestige of the government behind the victim, and suggested that information not presented to the jury supported the victim. Demery did not object to this testimony, limiting us to review for fundamental error only. *Id*. Although the prosecutor's comment arguably constituted improper vouching, under the circumstances we find that the comment did not prejudice Demery. The videotaped interrogation the prosecutor referred to was shown to the jury, and did not contain the statement the prosecutor had thought was in it. The prosecutor's remark, accordingly, was rebutted by the very evidence the prosecutor suggested supported his remark. Moreover, the court instructed the jury before and after trial

that statements made by the attorneys were not evidence. The jury is presumed to have followed that instruction. *State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

D. *Willits* Instruction

¶19 Demery argues the court abused its discretion by refusing to give a *Willits*[3] instruction regarding a diagram showing measurements that depicted where various pieces of evidence were found at the scene of the shooting, including a beer bottle dropped by the victim and spent shells. Demery argues the diagram might have cast doubt on the victim's testimony that he started running after the first shot was fired, and supported Demery's testimony that he never saw the victim holding a beer bottle.

¶20 A defendant is entitled to a *Willits* instruction upon proving that (1) the State failed to preserve accessible, material evidence that "might tend to exonerate him" and (2) he suffered prejudice as a result of the loss of this evidence. *State v. Fulminante,* 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). In this case, the court noted that had the encounter "occurred within someone's home or outside of the home," he could see that the measurements and diagrams "might really be significant." But he denied the *Willits* instruction on the ground that it was undisputed that the "shots were fired out in

[3] *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

the street," and Demery had failed to meet his burden to show that the measurements were relevant, or that the failure to preserve them prejudiced him.

¶21 We review a trial court's decision to forego *a Willits* instruction for abuse of discretion. *State v. Perez,* 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). We find no such abuse in this case. In light of the undisputed evidence that Demery shot the victim in the buttocks while the victim was walking down the street, we are not persuaded that the precise location of the bullet casings or cartridges or the open beer bottle dropped by the victim might have tended to exonerate Demery, or that the loss of the measurements actually prejudiced him. *See id*. at 464, 687 P.2d at 1219. The court did not abuse its discretion in ruling that Demery had failed to meet his burden to justify a *Willits* instruction. *See id*.

CONCLUSION

¶22 For the foregoing reasons, we affirm Demery's convictions and sentences.

/s/
_____
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
_____
ANDREW W. GOULD, Judge

/s/
_____
DONN KESSLER, Judge