DIVISION ONE
FILED: 7/9/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0619
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ROBB GARY EVANS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300CR201100785

The Honorable Jacqueline Hatch, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender — Flagstaff
Attorney for Appellant

S W A N N, Judge

¶1 Robb Gary Evans appeals from his conviction and probation term for sexual abuse. Evans contends that his conviction must be vacated because the superior court failed *sua*

sponte to instruct the jury on the burden of proof applicable to his defense under A.R.S. § 13-1407(E). We affirm the conviction because Evans has not shown that the omitted instruction caused him prejudice.

FACTS AND PROCEDURAL HISTORY

¶2 In November 2011, a grand jury indicted Evans for sexual abuse, a class 5 felony under A.R.S. § 13-1404. Evans pled not guilty and the matter proceeded to a jury trial.

¶3 At trial, the state presented evidence of the following facts. On the evening of July 30, 2011, G.M., an adult woman, was standing in a bar when she felt someone's hand come underneath her skirt, grab the front of her vagina, and swipe back to her anus, touching both her underwear and her skin. G.M. exclaimed, turned around quickly, and saw Evans (whom she vaguely remembered having met the night before) standing behind her.

¶4 G.M. promptly reported the incident to the bar's bouncers and pointed Evans out to them. The bouncers escorted Evans out of the bar and called the police. Police responded and Evans agreed to an interview with a detective. Evans, who smelled of alcohol and had bloodshot eyes and impaired speech, told the detective that he had "just rubbed [G.M.] kind of on the butt" with his knee, "no hands [were] involved," and "everything that happened . . . was totally innocent." For his

defense at trial, Evans similarly testified that he had approached G.M. and touched his knee to her left hamstring and buttock as a form of greeting.

¶5 Pursuant to Evans's request and without objection by the state, the final jury instructions included the following: "It is a defense to sexual abuse if the defendant was not motivated by a sexual interest." Evans did not request and the court did not give any instruction concerning the burden of proof for that defense. But the court did instruct the jury that it was the state's burden to prove Evans's guilt beyond a reasonable doubt, and both the state and Evans emphasized that burden in their closing arguments. In the state's closing argument, the prosecutor stated: "[T]he legal standard puts the burden of proof always on the State. It never changes. The defendant need not prove anything in this trial. So it's our burden. The State's burden to prove beyond a reasonable doubt." In Evans's closing argument, defense counsel explained the reasonable doubt standard, reiterated that the burden was on the state, and further suggested that the state's burden applied to the "sexual interest" defense:

> It is a Defense to sexual abuse if the defendant was not motivated by a sexual interest. There's nobody here arguing that if he went up, bumped her with his knee that he was motivated by sexual interest. And I don't think there's anybody that argues that if somebody purposefully sticks their hand underneath a skirt and gropes genitals, that the

> opposite isn't true. That they aren't motivated by sexual interest.
>
> So if you find reason to believe that there's doubt about his motivation because there's reason to doubt whether he used his hand as opposed to bump[ed] her, then this instruction applies.
>
> So if there's a reason to doubt about that, this instruction says it's only if you find that he was not motivated by a sexual interest. That's a Defense. That's what this whole case has been about, that he wasn't motivated because that's not what he did. And if that isn't what he did, then he's not guilty.

¶6 After considering the evidence, the jury found Evans guilty of sexual abuse. The court entered judgment on the jury's verdict, suspended the imposition of sentence, and placed Evans on standard probation for two years. Evans timely appeals. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶7 Evans contends that his conviction must be vacated because the superior court failed to instruct the jury on the burden of proof for his defense that he was not motivated by a sexual interest. Because Evans did not request an instruction on the burden of proof, we review for fundamental error. *State v. Valverde*, 220 Ariz. 582, 584, ¶ 5, 208 P.3d 233, 235 (2009). To prevail under this standard of review, Evans must show both fundamental error and prejudice. *Id.* at 585, ¶ 12, 208 P.3d at 236.

¶8 In a prosecution for sexual abuse, the state must prove that the defendant "intentionally or knowingly engag[ed] in sexual contact with any person who is fifteen or more years of age without consent of that person . . . ." A.R.S. § 13-1404(A). The state is not required to prove that the defendant was motivated by a sexual interest. A.R.S. § 13-1407(E) provides that "[i]t is a defense to a prosecution pursuant to § 13-1404 [for sexual abuse] or 13-1410 [for child molestation] that the defendant was not motivated by a sexual interest." *See also State v. Simpson*, 217 Ariz. 326, 329, ¶ 19, 173 P.3d 1027, 1030 (App. 2007) ("The 'sexual interest' provision of § 13-1407(E) is not an element of the offense of child molestation, but rather 'create[s] an affirmative defense regarding motive.'") (citation omitted). Unless otherwise provided by law, it is the defendant's burden to prove an affirmative defense by a preponderance of the evidence. A.R.S. § 13-205(A).

¶9 In *Valverde*, the superior court instructed the jury on the elements of self-defense but did not explain that it was the defendant's burden to prove the defense by a preponderance of the evidence.[1] 220 Ariz. at 583-84, ¶ 3, 208 P.2d at 234-35.

[1] Under current law, defendants no longer have the burden to prove justification defenses such as self-defense: if a defendant presents evidence of justification, "the state must act to prove beyond a reasonable doubt that the defendant did not act with justification." A.R.S. § 13-205(A). But at the time that the defendant in *Valverde* committed his offense, it

Our supreme court held that the defendant could not show prejudice because the superior court had instructed the jury on the state's burden to prove guilt beyond a reasonable doubt, and defense counsel had argued in closing that the state could not meet that burden because self-defense applied. *Id.* at 586, ¶¶ 15-17, 208 P.3d at 237. The court explained that the omission of an instruction on the burden for the defense "would most likely have led the jury to conclude that the State was required to prove beyond a reasonable doubt that [the defendant] did not act in self defense, an interpretation that would have helped rather than harmed [the defendant]." *Id.* at ¶ 17.

¶10 For the same reasons, Evans is not entitled to relief here. Even if we assume that the court committed fundamental error by failing to instruct the jury on the burden of proof for the "sexual interest" defense prescribed by § 13-1407(E), Evans cannot show prejudice. The court instructed the jury that it was the state's burden to prove Evans's guilt beyond a reasonable doubt, and defense counsel argued in closing that the state had not met that burden with respect to the "sexual interest" defense.[2] Defense counsel's argument actually

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was the defendant's burden to prove self-defense by a preponderance of the evidence. *Valverde*, 220 Ariz. at 583, ¶ 2 & n.1, 208 P.3d at 234 & n.1.

[2] Evans contends that we must also take into consideration the prosecutor's statements to the jury. In particular, Evans

misstated the law in a manner that disfavored the state, and we cannot say that such an argument was prejudicial to Evans. And like *Valverde*, the court's failure to instruct the jury that it was Evans's burden to prove the defense actually benefitted him.

¶11 Evans points out that the court also instructed the jury that "[t]he State need not prove motive but you may consider motive or lack of motive in reaching your verdict." The court's statement was not legally incorrect, and it did not place upon Evans any inappropriate burden. Nor did it serve to diminish the state's burden. We discern nothing in this comment that prejudiced Evans.

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contends that the prosecutor vouched for the evidence when he stated in rebuttal: "Let me be perfectly clear. The State is saying that Robb Evans took the stand, swore to tell the truth, and did not tell the truth." We agree that a prosecutor's statements to the jury can be relevant to determining the impact of an erroneous instruction. *See Valverde*, 220 Ariz. at 586, ¶ 16, 208 P.3d at 237. But the statements to which Evans objects do not misstate the burden of proof or rise to the level of prosecutorial misconduct.

CONCLUSION

¶12 The superior court's failure to instruct the jury on Evans's burden of proof to show a defense under A.R.S. § 13-1407(E) did not prejudice him. We therefore affirm his conviction and the order imposing probation.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Judge

/s/
_____
RANDALL M. HOWE, Judge