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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MICHAEL ALLEN CHANNEL, SR., *Appellant*.

No. 1 CA-CR 15-0813
FILED 4-27-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-432357-001
The Honorable Virginia L. Richter, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jana Zinman
Counsel for Appellee

The Hopkins Law Office, PC, Tucson
By Cedric Martin Hopkins
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 Michael Allen Channel, Sr. appeals from his conviction and sentence for one count of misconduct involving weapons, a class 4 felony. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Channel. *See State v. Lizardi*, 234 Ariz. 501, 502, ¶ 2 (App. 2014).

¶3 On July 10, 2013, Phoenix police responded to a 911 call involving a disturbance at Channel's apartment complex. When asked by police officers, Channel, who was outside his apartment, admitted he had a weapon inside and told them where to find it, specifically on a couch under a stuffed animal. Channel's wife allowed them to enter the apartment to retrieve the loaded gun, which did not have a safety latch.

¶4 Channel was arrested for being a prohibited possessor. He admitted to police that he: (1) had a gun; (2) had a felony conviction; and (3) was prohibited from legally possessing a firearm. He was indicted on one count of misconduct involving weapons. The state alleged prior historical convictions as well as two aggravating circumstances: (1) the offense involved the use, threatened use or possession of a deadly weapon or dangerous instrument – specifically a gun – during the commission of the crime; and (2) Channel was previously convicted of a felony within the 10 years immediately preceding the date of the offense.

¶5 Channel filed notices that he intended to assert defenses of self-defense, defense of others, defense of property, justification or duress. The state filed a motion to preclude his use of these defenses. The court denied the motion, stating that Channel was not "legal[ly] preclud[ed]" from asserting the defenses and that "the trial Judge must address [the issue] following the presentation of evidence."

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¶6 At trial, the parties stipulated that Channel had a prior felony conviction, CR2011-142958-001, which disqualified him from legally possessing a gun.

¶7 Channel attempted to elicit testimony from witnesses about threats and an assault that his wife and adult daughter had received at the apartment complex shortly before July 10, but rested his case after the court ruled that such questioning did not establish imminent public or private injury, and that Channel failed to demonstrate any evidence of imminent harm necessary to support his affirmative defenses. The jury found Channel guilty as charged.

¶8 Channel moved for a new trial. At an evidentiary hearing on that motion, Channel and his wife testified to the events leading up to his arrest: they had moved into the apartment on June 3, 2013; on July 4, 2013, his wife found 20 individuals outside their apartment confronting their daughter, with “dirt and rocks being thrown” and one person having hit their daughter in the face; from July 5 through July 8, some of the same people “constantly” made threats; on July 9, a person gave Channel a gun so he could protect himself and his family; that same day, a person threatened to shoot Channel; and on July 10, the person who hit the adult daughter in the face walked by their apartment, leaving Channel’s wife “[i]n fear.” These circumstances, Channel argued, justified him possessing the firearm because “[i]f I don’t protect them who else is?”

¶9 The court denied Channel’s request for a new trial, stating:

The defense of necessity is available if a reasonable person in the defendant’s situation would be compelled to engage in the conduct and the defendant had no reasonable alternative to avoid imminent public or private injury greater than the injury resulting from the offense. A.R.S. § 13-417. Defendant’s proffered evidence failed to present even the slightest evidence that he acted out of necessity. See *State v. King*[,] 225 Ariz. 87, 235 P.2d 240 (2010). The slightest evidence is a low standard that can be satisfied by evidence of a hostile demonstration, but it must be reasonably regarded as placing the accused in imminent danger of death or great bodily harm. *Id.* at 90, 243. The defendant failed to present any evidence of an imminent danger. His daughter’s assault

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had occurred ten days¹ earlier, [a man's] vague and unspecified threat was made at some unknown time prior to the defendant's arrest and there had been no other altercations involving the defendant or any member of his family. Most telling is the location of the gun, inside the defendant's apartment, on a couch, under a stuffed animal, while the defendant was outside of his apartment. If the threat had indeed been imminent it would be natural to assume that the weapon would have been more readily accessible.

¶10 The court sentenced Channel to 10 years in prison with 530 days of presentence-incarceration credit.

¶11 Channel filed a timely notice of appeal from the conviction and sentence.

DISCUSSION

¶12 On appeal, Channel contends the court abused its discretion when it failed to instruct the jury on a justification defense and when it later denied his motion for a new trial. Both claims arise out of his position that although he was prohibited from possessing a firearm, he was justified in doing so because of "continuing threats to him and his family."

¶13 We review a court's refusal to give a party's requested jury instruction or to grant a motion for a new trial for abuse of discretion. *State v. Anderson*, 210 Ariz. 327, 343, ¶ 60 (2005); *State v. Fisher*, 141 Ariz. 227, 251 (1984), *superseded on other grounds as recognized in State v. Wilson*, 237 Ariz. 296, 299, ¶ 12 (2015). A court abuses its discretion if "a decision is manifestly unreasonable or is based on untenable grounds, . . . or if the reasons given for its action are legally incorrect." *State v. Taylor*, 216 Ariz. 327, 331, ¶ 12 (App. 2007) (internal quotations, modifications, and citations omitted).

¶14 We conclude the court did not abuse its discretion when it declined to instruct the jury on a justification defense. "A party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Shumway*, 137 Ariz. 585, 588 (1983). But it is improper to

¹ The assault had occurred on July 4, which would have been six days before Channel's arrest or five days before he was given the gun. The court's error of fact, however, does not change the analysis that the events in question were not "imminent," as discussed below.

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give an instruction not “reasonably and clearly supported by the evidence.” *State v. Ruggiero*, 211 Ariz. 262, 264–65, ¶ 10 (App. 2005).

¶15 In arguing that he was entitled to a justification instruction, Channel briefly discusses A.R.S. § 13-205, which addresses the burden of proving and rebutting affirmative defenses. And while he refers generally to a “justification/necessity” defense or instruction, he does not identify, cite to, or analyze any specific affirmative defense among the many provided by law. *See generally, e.g.*, A.R.S. §§ 13-402 to -412. Whichever statutory justification he is relying on, however, requires imminency. Absent argument that the evidence at trial met the elements of a statutory defense, we cannot find error.

¶16 Channel’s reliance on *State v. King*, 225 Ariz. 87 (2010), is unavailing. He argues that *King* supports his argument that the court denied him a justification instruction because it inappropriately “focused solely on the fear of an imminent harm and no other circumstance.” But *King* construed A.R.S. § 13-404(A), which allows a person to threaten or use “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.” The court concluded in that case that the statute, as revised, no longer requires that fear of imminent harm be the sole motivation for employing self-defense, as previous cases had suggested. 225 Ariz. at 90, ¶ 12. A.R.S. § 13-404(A) is not at issue in this case, because there is no allegation that Channel *used* or *threatened* physical force, only that he possessed a gun in anticipation of using it or threatening to use it.

¶17 The most closely applicable statute in this case is A.R.S. § 13-417(A), which allows “conduct that would otherwise constitute an offense . . . if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person’s own conduct.” But here, the court, both during trial and in ruling on the motion for a new trial, concluded that Channel had not met the statute’s threshold requirement that Channel possessed the gun to avoid “imminent” injury. For example, at trial, when Channel attempted to offer evidence about the events leading up to him obtaining the gun, the court clearly and repeatedly stated its conclusion that he had not established the defense:

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THE COURT: We've beaten this to death already. Unless you can establish an imminent public or private injury -- the facts do not justify a necessity defense.

[DEFENSE COUNSEL]: Which I can, judge. What the Court . . . is doing is preventing me from establishing those facts.

THE COURT: Establish an imminent public or private injury.

[DEFENSE COUNSEL]: Judge, I'm trying to do that. What the Court is saying is . . . establish those facts, so that I can then give you an instruction. Then I'm trying to do so.

THE COURT: And nothing I've heard talked about imminency.

[DEFENSE COUNSEL]: Judge, the Court is focused on simply that. There are additional elements of the offense more than simply what the Court has been referring to.

THE COURT: Correct. And if you can provide imminency, we can discuss the other ones. But that is what I see as the issue in this case. I've already ruled on this . . . I understand you disagree with me, but that's my ruling.

[DEFENSE COUNSEL]: Well, what I'm saying, Judge, is that I'm trying to establish an incident that happened on the 10th that also goes back into the 9th, the 4th, the 5th, the 6th, all that conflict -

THE COURT: Those are irrelevant.

¶18 We agree with the court's interpretation of "imminent" in applying A.R.S. § 13-417(A). The word "imminent" means "about to occur" or "impending." *State v. Dominguez*, 236 Ariz. 226, 229, ¶¶ 4, 7 (App. 2014) (construing "imminent" in finding that felony endangerment is not a lesser-included crime of manslaughter). The anticipated injury Channel claimed justified his possession of a gun was not "imminent." We find particularly compelling the court's finding that the gun's location — inside the apartment, on a couch, under a stuffed animal — belied the imminency of the injury. Therefore, because the injury to be avoided was not imminent, Channel could not avail himself of a defense under A.R.S. § 13-417(A).

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¶19 In addition, we agree with the state that Channel had other viable, reasonable alternatives if he felt threatened instead of possessing a gun, such as: (1) calling the police; (2) leaving the property; (3) staying inside his apartment; or (4) attempting to resolve any problem through discussion as opposed to illegally possessing a loaded gun. The existence of reasonable alternatives also means he could not use A.R.S. § 13-417(A) as a defense. We cannot agree with Channel that a prohibited possessor who feels unsafe in his neighborhood thereby becomes a permitted possessor.

¶20 Based on *Ruggiero*, 211 Ariz. 262, it would have been improper for the court to instruct the jury on a necessity defense. Channel did not present evidence that reasonably and clearly supported its application.

¶21 We also conclude that the court did not abuse its discretion by denying Channel's motion for a new trial. "Motions for new trial . . . are not looked on with favor and should be granted with great caution, and in the sound discretion of the court." *State v. Schantz*, 102 Ariz. 212, 214 (1967). The evidence offered for a new trial did not show that Channel was entitled to possess the weapon.

CONCLUSION

¶22 For the foregoing reasons, Channel's conviction and sentence are affirmed.²



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

² Channel, acting *pro se*, filed two documents: "§4 Misprision of Felony" and "Notice to the Court Fabricated August 18, 2015 Testimonies." Our decision on his appeal disposes of all matters, including Channel's *pro se* filings.