IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ERIC NATHANIEL LEE, *Appellant*.

Nos. 1 CA-CR 16-0090, 1 CA-CR 16-0544
(Consolidated)
FILED 7-11-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-125292-001
No. CR2015-105201-001
The Honorable David O. Cunanan, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Tennie B. Martin
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Randall M. Howe joined.

T H U M M A, Judge:

¶1 Eric Lee appeals from his convictions and resulting sentences for disorderly conduct and assault, which also resulted in the revocation of his probation for a prior felony conviction, claiming the superior court erred in rejecting his request for a self-defense justification instruction. Because the superior court did not err, his convictions and resulting sentences are affirmed as modified to correct an error in the sentencing minute entry on the disorderly conduct conviction.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Early one morning in June 2015, when Lee was on probation for a prior felony, he approached WV and threatened to punch WV in the face. The trial evidence indicated Lee's threat, which occurred in Tempe, was unprovoked and unexplained. WV testified that he "stood [his] ground" and Lee then walked away.

¶3 Lee then approached NP and TH who were riding their bicycles home from a bar. Lee shoved TH, causing him to fall off his bike, and punched him in the face. Again, this action apparently was unprovoked and unexplained. NP saw Lee brandishing a knife, with a black handle and three-inch silver blade. Lee then began making gestures towards TH and NP, suggesting Lee wanted to fight. When NP and TH did not engage in a physical altercation, Lee left and TH called 9-1-1.

¶4 When questioned by police officers, Lee admitted to his involvement with NP and TH. During a subsequent search of Lee, officers

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[1] On appeal, this court views the evidence in the light most favorable to sustaining the conviction and resolves all reasonable inferences against defendant. *State v. Karr*, 221 Ariz. 319, 320 ¶ 2 (App. 2008).

found a knife matching the description provided by NP. The State charged Lee with aggravated assault, a Class 3 dangerous felony (Count 1) and assault, a Class 1 misdemeanor (Count 2). *See* Ariz. Rev. Stat. (A.R.S.) §§ 13-1204(A)(2); 13-1203(A)(1)(2017).[2]

¶5 Lee's pretrial disclosures did not state or suggest he would claim self-defense. *See* A.R.S. § 13-404. At trial, among others, WV, NP, TH and various police officers testified in the State's case in chief. After the State rested, Lee unsuccessfully moved for a judgment of acquittal. *See* Ariz. R. Crim. P. 20(a).

¶6 Lee elected not to testify, as was his right. Lee did, however, request a self-defense jury instruction, claiming it was justified based on TH's testimony that he "operated his bicycle" in a manner that "could have placed a reasonable person in fear that they might be injured or insulted . . . by the headlight." Lee argued that such an instruction was appropriate because TH testified that he had a "bandolier . . . bike chain" that he removed after falling, which he claimed "presents the jury with reasonable basis from which . . . they could find that [Lee] having a knife in his hand was there purely for his own self protection and not any illegal purpose." The State objected, noting Lee had not disclosed self-defense. The court denied Lee's requested instruction, finding he had not disclosed self-defense and that the trial record did not support such an instruction.

¶7 After deliberations, the jury found Lee guilty of the lesser-included offense of disorderly conduct, a Class 6 dangerous felony, on Count 1 and guilty as charged on Count 2. Lee was later sentenced to a presumptive prison term of 2.25 years on Count 1, consecutive to a prison term imposed on the prior felony conviction after his probation grant was revoked, and credit for time served on Count 2.[3] This court has jurisdiction

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[2] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

[3] The sentencing transcript shows the court correctly stated the conviction for Count 1 was a Class 6 dangerous non-repetitive offense, for which Lee was given a presumptive prison term as a first-time offender. The sentencing minute entry states Count 1 was a Class 6 non-dangerous but repetitive offense. Because the oral pronouncement controls in this circumstance, the minute entry is modified to reflect that the Count 1 conviction was for a Class 6 dangerous non-repetitive offense. *See State v. Leon*, 197 Ariz. 48, 49 n.3 ¶ 5 (App. 1999).

over Lee's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A).

DISCUSSION

¶8 Lee argues the superior court committed reversible error in failing to give his requested self-defense jury instruction. Lee concedes, however, that he failed to disclose this defense in a timely manner. *See* Ariz. R. Crim. P. 15.2(d)(2). Indeed, it is undisputed that Lee did not attempt to disclose such a defense or request a self-defense jury instruction until after the State rested in its case in chief at trial. Given this failure to timely disclose, Lee has not shown the superior court abused its discretion in rejecting his reliance on self-defense, made for the first time after the close of the State's case in chief. *See* Ariz. R. Crim. P. 15.7(a); *e.g., State v. Reinhardt*, 190 Ariz. 579, 586 (1997) ("The choice of [a disclosure] sanction is within the discretion of the [superior] court, and will not be reversed on appeal absent a showing of prejudice."); *State v. Meza*, 203 Ariz. 50, 55 ¶ 19 (App. 2002) ("The [superior] court has great discretion in deciding whether to sanction a party and how severe a sanction to impose. [This court] review[s] such a decision for an abuse of discretion and grant[s] considerable deference to the [superior] court's perspective and judgment.") (citations omitted).

¶9 Nor has Lee shown that the trial evidence compels a different conclusion, even if proper, timely disclosure had been made. "A defendant is entitled to a justification instruction if it is supported by 'the slightest evidence.'" *State v. Ruggiero*, 211 Ariz. 262, 264 ¶ 10 (App. 2005) (citation omitted). However, the court need not give the instruction "unless it is reasonably and clearly supported by the evidence." *Id. (citing State v. Walters,* 155 Ariz. 548, 553 (App. 1987)).

¶10 By statute, with exceptions apparently not applicable here, "a person is justified in threatening or using 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." A.R.S. § 13-404(A). Given this standard, Lee has not shown how the existence of TH's bicycle light, or his adjusting that light, would justify giving a self-defense instruction.

¶11 Similarly, Lee has not shown the superior court, which heard the testimony in the first instance, misconstrued how TH's bicycle lock or chain were involved. In rejecting Lee's claim to the contrary, the superior court observed that TH "had a chain around his belt, which he then took off when he got off the bike. There was no testimony that he threatened

anybody with it, that he used it as a weapon, that he swung it, that he did anything else". The court also noted there was no evidence that the chain was used in a threatening manner or "any type of situation like that." Nor was there any evidence that TH used his bicycle lock in his defense. Because the superior court properly concluded there was no evidence supporting a self-defense instruction, Lee has shown no error in the failure to give a self-defense jury instruction, even if timely disclosure of the defense had been made.

CONCLUSION

¶12 Because Lee has shown no error, his convictions and resulting sentences are affirmed as modified to correct the sentencing minute entry on the disorderly conduct conviction.

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