IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOHNSON EDWARD GEORGE, *Appellant*.

No. 1 CA-CR 16-0303
FILED 9-21-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-101584-001
The Honorable Dean M. Fink, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael Valenzuela
Counsel for Appellee

The Stavris Law Firm, PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Patricia K. Norris[1] joined.

J O N E S, Judge:

¶1 Johnson George appeals his convictions and sentences for one count each of aggravated assault and false reporting. For the following reasons, we affirm.

FACTS[2] AND PROCEDURAL HISTORY

¶2 The victim and George, along with their girlfriends, spent the night and early morning hours of January 10 and 11, 2015, drinking alcohol in a vacant lot. Around 5 a.m., the victim started yelling at George, and the two began fighting. In the course of the fight, George stabbed the victim in the back three times. The victim wrested the knife away from George, and George fled the scene. The victim subsequently underwent surgery for a punctured lung and was hospitalized for eight days.

¶3 The police found George walking down the road shortly after the stabbing was reported. When asked for identification, George provided multiple false names and birthdates. George eventually told the police he had been knocked out by an unknown black male in a hoodie and denied stabbing anyone. The victim had advised police "J.J." stabbed him, and when asked whether he had any nicknames, George told the police he was called "J.J." The police arrested George for stabbing the victim.

¶4 Before trial, in recorded jail calls, George asked an unknown female whether the victim would testify and warned her the victim would be labeled a snitch if he did. The caller repeatedly advised George she had

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[1] The Honorable Patricia K. Norris, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

[2] We view the evidence in the light most favorable to upholding the convictions. *See State v. Boozer*, 221 Ariz. 601, 601, ¶ 2 (App. 2009) (quoting *State v. Powers*, 200 Ariz. 123, 124, ¶ 2 (App. 2001)).

spoken with the victim, and, over the course of those conversations, advised the victim had changed his mind and decided not to press charges. She initially reported to George the victim was going to "push" the charges. Later, George told the female caller the victim would forever be known on the prison yard as a "rat" if he testified against George. The female caller then told George the victim texted her advising he was going to "drop the case." George advised her as to what steps the victim needed to take to get the case dropped.

¶5 At trial, a fellow inmate testified George told him he had stabbed the victim and thought the victim "should have died" because George had "tried to kill that fool." George also told him that if the victim showed up to testify at trial, "his people were going to get him, that he had put a hit on him." The inmate further testified George told him he buried the knife as soon as he heard sirens that morning. Although the police attempted to locate the knife based upon this information, they were unsuccessful.

¶6 The jury convicted George of false reporting and aggravated assault and additionally found the aggravated assault was a dangerous offense that caused physical, emotional, or financial harm to the victim. The trial court found George had been convicted of two prior felonies and imposed an aggravated sentence of twelve years' imprisonment for the aggravated assault and a concurrent sentence of sixty days for the false reporting. The court also credited George with 474 days of presentence incarceration credit. George timely appealed. This Court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1),[3] 13-4031, and -4033(A).

DISCUSSION

I. Nature of Prior Convictions

¶7 George argues the trial court erred in allowing the State to ask a witness — the fellow inmate — about the nature of that witness's prior convictions in the absence of any motion or determination of admissibility under Arizona Rule of Evidence 609 ("Impeachment by Evidence of a Criminal Conviction"). George failed to object during trial to this testimony on the grounds he now raises on appeal, thereby limiting this Court's review to fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 568,

[3] Absent material changes from the relevant date, we cite a statute's current version.

¶ 22 (2005). In fundamental error review, the defendant has the burden of proving the court erred, the error was fundamental in nature, and he was prejudiced thereby. *See id.* at 567, ¶¶ 19-20 (citations omitted).

¶8 George has failed to meet his burden to prove fundamental error. At trial, the State called the inmate to testify to statements made by George. In the course of its examination, the State sought to introduce the inmate's criminal history and explained it sought the testimony to show "why inmates c[a]me to him and how he became a jailhouse attorney." George objected on the basis of relevancy, but the trial court permitted the testimony, subject to the limitation that the State would not elicit the witness's full criminal history.

¶9 The inmate ultimately testified he became acquainted with George through his role as a "jailhouse lawyer." He further testified he was fifty-five years old and had been in and out of prison since he was eighteen, with most of his convictions relating to drug offenses. The inmate also explained he had performed paralegal work for an attorney for four years while the two were in prison together and had been assisting inmates with legal work for more than thirty years.

¶10 Because the testimony was elicited neither to impeach the credibility of the fellow inmate or "draw the sting" of such an attack, the trial court did not err in failing to evaluate its admissibility under Rule 609. This rule applies, by its terms, "to attacking a witness's character for truthfulness by evidence of a criminal conviction." Ariz. R. Evid. 609(a). The length of the time the inmate had been imprisoned and an explanation for why he had been imprisoned that long was offered by the State and appropriately allowed by the trial court to show how the inmate had become trusted by other inmates for legal advice. His background was relevant to bolster the inmate's credibility and show why George confided to the inmate the details of his case when those details contradicted George's defenses and showed his consciousness of guilt. Under these circumstances, the court did not err, much less fundamentally err, in allowing limited evidence of the nature of the inmate's prior convictions.

II. Jury Instructions

A. Concealment of Evidence

¶11 George argues the trial court abused its discretion in instructing the jury it could consider facts suggesting George concealed evidence in determining his guilt, even though the only evidence supporting this instruction was the fellow inmate's testimony regarding the

buried knife, which was never found. The court found the inmate's testimony was sufficient to support the instruction. Using Arizona Revised Jury Instruction (RAJI) Standard Criminal 9, the court instructed the jury:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reasons for concealing evidence. Concealing evidence after a crime has been committed does not by itself prove guilt.

We review a decision to give a jury instruction for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10 (App. 2003) (citing *State v. Hurley*, 197 Ariz. 400, 402, ¶ 9 (App. 2000)).

¶12 A flight or concealment instruction is proper "only when the defendant's conduct manifests a consciousness of guilt." *State v. Speers*, 209 Ariz. 125, 132-33, ¶¶ 27, 31 (App. 2004) (holding the presence of a passport and printout of a flight itinerary in a defendant's backpack did not warrant a flight instruction) (citation omitted). "The decision whether such an instruction should be given 'is determined by the facts in the particular case.'" *Id.* at 132, ¶ 27 (quoting *State v. Cutright*, 196 Ariz. 567, 570, ¶ 12 (App. 1999)). However, the trial court abuses its discretion "when it instructs on an issue or theory that is not supported by evidence." *Id.* (citing *Herman v. Sedor*, 168 Ariz. 156, 158 (App. 1991)).

¶13 We find no abuse of discretion here. The State presented testimony that George concealed evidence — the knife — when he heard sirens approach, and such conduct manifested a consciousness of guilt. This evidence was sufficient to warrant the concealment instruction, notwithstanding the inability of police to locate the knife a year later based upon this new information. *Cf. State v. Campos*, 134 Ariz. 254, 155 (App. 1982) ("If there is evidence tending to establish the underlying theory of the instruction, the instruction must be given and any conflict between that and other evidence must be resolved by the jury.") (citation omitted).

B. Defendant's Threats to Witness

¶14 George also argues the trial court abused its discretion by giving a jury instruction over his objection regarding defendant's threats to the victim. "A party is entitled to a jury instruction on any theory reasonably supported by the evidence." *State v. Tschilar*, 200 Ariz. 427, 436, ¶ 36 (App. 2001). Evidence of a threat against a witness "is relevant in a

criminal case to show that the defendant sought to suppress evidence adversely affecting him and it is therefore admissible to offer proof of conduct indicating a consciousness of guilt." *State v. Settle*, 111 Ariz. 394, 396 (1975) (citing *State v. Adair*, 106 Ariz. 4, 6 (1970)). When a trial court admits evidence of consciousness of guilt, it may give appropriate instructions. *State v. Van Alcorn*, 136 Ariz. 215, 218 (App. 1983). We review a court's decision to give a particular jury instruction for an abuse of discretion. *See supra* ¶ 11.

¶15 George argues the victim testified he did not receive such threats and that no other evidence showed any threats were conveyed to the victim. This argument is not supported by the facts. George fails to cite to any portion of the record where the victim specifically denied receiving threats, and in fact, the only testimony presented in this regard indicates the victim denied being threatened by George *at the time of the attack*. However, even if the victim denied receiving threats before trial, the trial court was justified in giving the instruction based upon the recorded jail calls, the testimony of the fellow inmate, and the victim's testimony suggesting the victim was the aggressor. And, George's argument that there was no evidence the female caller ever spoke to the victim, much less relayed threats to the victim, is contradicted by information passed during the jail calls, during which the caller repeatedly advised George she had spoken with the victim, and, over the course of those conversations, the victim had changed his mind and decided not to press charges.

¶16 On this record, we find no abuse of discretion.

C. Justification Instruction

¶17 George argues the trial court abused its discretion by denying his request for an instruction on the justification for use of physical force, *see* RAJI 4.04, in addition to, or instead of, the instruction on justification for use of deadly physical force, *see* RAJI 4.05. "We generally review a trial court's denial of a requested jury instruction for an abuse of discretion." *State v. Barraza*, 209 Ariz. 441, 444, ¶ 8 (App. 2005) (citing *State v. Rosas-Hernandez*, 202 Ariz. 212, 220, ¶ 31 (App. 2002), and then *State v. Orendain*, 188 Ariz. 54, 56 (1997)). Furthermore, "we independently assess whether the evidence supported a justification instruction, because that is a question of law and involves no discretionary factual determination." *State v. Almeida*, 238 Ariz. 77, 80, ¶ 9 (App. 2015) (citation omitted).

¶18 "A defendant is entitled to a self-defense instruction if the record contains the 'slightest evidence' that he acted in self[-]defense." *Id.*

at ¶ 14 (quoting *State v. Lujan*, 136 Ariz. 102, 104 (1983)). Under this standard, the trial court "merely decides whether the record provides evidence 'upon which the jury could rationally sustain the defense.'" *Id.* at ¶ 9 (quoting *State v. Strayhand*, 184 Ariz. 571, 587-88 (App. 1995)). Moreover, we view the evidence on appeal in the light most favorable to the proponent of a jury instruction when the trial court refused that instruction. *Id.* at 78-79, ¶ 2 (citing *State v. Nottingham*, 231 Ariz. 21, 26, ¶ 14 (App. 2012)). However, courts may not substitute inferences for the slightest evidence, "and a justification instruction must rest upon something more than 'speculation.'" *State v. Carson*, ___ Ariz. ___, ___, ¶ 19, 391 P.3d 1198, 1203 (App. 2017) (quoting *State v. Vassell*, 238 Ariz. 281, 284, ¶ 9 (App. 2015)).

¶19 We cannot say the instruction for use of mere physical force was supported by the evidence. The undisputed evidence shows George introduced deadly force into the altercation when he stabbed the victim in the back three times, thereby puncturing his lung and requiring surgery and hospitalization. The trial court reasoned that George's introduction of the knife fit the definition of "deadly physical force," or force "that is used with the purpose of causing death or serious physical injury or in the manner of its use or intended use is capable of creating a substantial risk of causing death or serious physical injury." A.R.S. § 13-105(14), (39). This conclusion was appropriate; even absent consideration of George's comment that "he had tried to kill that fool," the jury could not have reasonably concluded George's introduction of a knife into a fist fight constituted anything less than the introduction and use of deadly physical force against the victim. *See State v. Hussain*, 189 Ariz. 336, 339 (App. 1997) (declaring where "[t]he undisputed evidence established that defendant stabbed the victim four times in the chest," the jury "could not have reasonably concluded that defendant used anything less than deadly physical force against the victim"). Accordingly, the court did not err in denying George's request for a justification instruction for use of mere physical force.

¶20 George also argues the trial court erred when it added the following language to RAJI 4.05:

> The threat or use of deadly physical force is not justified:
>
> 1. In response to verbal provocation alone;
>
> 2. If the defendant provoked the other's use of unlawful physical force, unless:

a. The defendant withdrew from the encounter or clearly communicated to the other person the defendant's intent to withdraw, reasonably believing that the defendant could not withdraw from the encounter; and

b. The other person nevertheless continued or attempted to use unlawful physical force against the defendant.

George argues on appeal, as he did below, that the added language misstated the law. We disagree.

¶21 The court did not misstate the law when it instructed the jury on unlawful force. The added language comes from A.R.S. § 13-404, which is incorporated by the statute providing for justification for use of deadly physical force in self-defense. *See* A.R.S. § 13-405(A)(1) ("A person is justified in threatening or using deadly physical force against another . . . if such person would be justified in threatening or using physical force against the other under [A.R.S.] § 13-404."). Any use of physical force not justified under A.R.S. § 13-404 would inherently not be justified under A.R.S. § 13-405. Accordingly, the trial court did not err by adding the language from RAJI 4.04 to the deadly physical force instruction.

¶22 Finally, George argues the trial court abused its discretion in denying his request for an instruction on the use of force in crime prevention, specifically to prevent an assault against him. Pursuant to A.R.S. § 13-411(A), "[a] person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of . . . aggravated assault." Ignoring that he was the only participant to introduce a weapon into what was otherwise a fist fight, George argues he could have believed that deadly physical force was immediately necessary to prevent aggravated assault, or "serious physical injury." *See* A.R.S. § 13-1204(A)(1). Serious physical injury includes "physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(39).

¶23 The record contains no evidence that George believed, reasonably or otherwise, that he needed to prevent imminent serious physical injury to himself. George did not testify to such at trial, and no other evidence was presented to show what he believed or that such was

the case. *See Vassell*, 238 Ariz. at 285, ¶ 17 (holding a justification instruction was not warranted because there was no evidence the defendant did not know the intruders were police officers). That the victim might have thrown the first punch and caused some swelling, discoloration, and a cut to George's face also failed to justify the crime prevention instruction. George's argument that the victim's punches to his face could have conceivably broken facial bones, and thus resulted in imminent serious physical injury, is speculative, and cannot form the basis for an instruction where those things did not occur. *See Carson*, 391 P.3d at 1203, ¶ 19. The evidence failed to support a crime prevention instruction, and we find no abuse of discretion.

CONCLUSION

¶30 George's convictions and sentences are affirmed.