

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

IVAN RUIZ-POLVO, *Appellant*.

No. 1 CA-CR 16-0608
FILED 8-31-2017

Appeal from the Superior Court in Mohave County
No. S8015CR201501083
The Honorable Steven F. Conn, Judge (Retired)

AFFIRMED

COUNSEL

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

Mohave County Legal Advocate's Office, Kingman
By Jill L. Evans
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in
which Presiding Judge Diane M. Johnsen and Judge James P. Beene joined.

STATE v. RUIZ-POLVO
Decision of the Court

T H U M M A, Judge:

¶1 Ivan Ruiz-Polvo appeals his conviction and resulting sentence for sexual assault. Because he has shown no reversible error, the conviction and sentence are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 In September 2015, Ruiz-Polvo and Y.O.² attended a party at a Bullhead City apartment. After several hours of drinking, Y.O. felt she was “past her limit,” and went to sleep, fully clothed, in a guest bedroom. A few hours later, she woke up to pain caused by “hands inside her vagina;” her leggings and underwear were “down to her knees” and her shirt was “bunched up.” When Y.O. realized a man was “on top of” her, she yelled “no,” pushed him away and left the room. Y.O. told the hosts a man in the bedroom was “hurting her” and “touching her when [she] was sleeping.” Y.O. then drove home, and Ruiz-Polvo left the apartment.

¶3 When she returned home, Y.O. woke her mother and asked her to call the police. Y.O. met with officers, and received medical treatment a few days later. Y.O. also identified Ruiz-Polvo as the man in the bedroom.

¶4 The day after the party, after learning the police wanted to speak with him, Ruiz-Polvo went to the police station and agreed to a recorded interview. During the interview, Ruiz-Polvo said he tried to move Y.O., and when doing so, his “hand may have accidentally slipped underneath her pants and underwear,” and that he “may have accidentally penetrated her vagina” with his fingers.

¶5 Ruiz-Polvo was charged with sexual assault, a Class 2 felony. At a two-day trial, the State called eight witnesses, including Y.O. Ruiz-Polvo, as was his right, elected not to testify and did not call any witnesses. Ruiz-Polvo unsuccessfully requested a lesser-included offense jury instruction on assault by “[k]nowingly touching another person with the

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

² Initials are used to protect the privacy of the victim. *State v. Maldonado*, 206 Ariz. 339, 341 n.1 (App. 2003).

STATE v. RUIZ-POLVO
Decision of the Court

intent to injure, insult or provoke such person.” Ariz. Rev. Stat. (A.R.S.) § 13-1203(A)(3)(2017).³

¶6 The jury found Ruiz-Polvo guilty as charged, and found Y.O. suffered resulting physical, emotional or financial harm. The court sentenced Ruiz-Polvo to an aggravated sentence of eight years in prison, with 349 days of presentence incarceration credit. This court has jurisdiction over his 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)(1).

DISCUSSION

¶7 Ruiz-Polvo argues the superior court (1) erred by denying his request for a simple assault lesser-included offense jury instruction and (2) fundamentally erred by failing to sua sponte instruct the jury on attempted sexual assault. The court addresses the arguments in turn.

¶8 This court reviews the “denial of a requested jury instruction for an abuse of discretion.” *State v. Wall*, 212 Ariz. 1, 3 ¶ 12 (2006). Whether an offense is a lesser-included offense is a legal issue subject to de novo review. *State v. Garcia*, 235 Ariz. 627, 628 ¶ 4 (App. 2014). When requested, a party is entitled to a lesser-included offense jury instruction if (1) the offense is, legally, a lesser-included offense of the charged offense *and* (2) the evidence at trial supports giving the lesser-included offense instruction. *Wall*, 212 Ariz. at 3 ¶ 13-14. Even assuming simple assault under A.R.S. § 13-1203(A)(3) is a lesser-included offense of sexual assault, an issue this court does not address or resolve, Ruiz-Polvo has failed to show the evidence at trial would require such an instruction.

¶9 Ruiz-Polvo’s defense was that he accidentally penetrated Y.O. This did not implicate a defense that he committed simple assault but not sexual assault. Indeed, at the close of trial, the superior court concluded “I don’t think that” a lesser-included offense instruction on simple assault “would be justified under the facts of this case.” Ruiz-Polvo’s defense and the trial evidence are not “such that a jury could reasonably find that only the elements of [the claimed] lesser offense have been proved.” *Wall*, 212 Ariz. at 3 ¶ 14. Accordingly, Ruiz-Polvo has shown no error in the superior court denying his request for a simple assault lesser-included offense jury instruction.

³ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

STATE v. RUIZ-POLVO
Decision of the Court

¶10 Ruiz-Polvo's argument that the superior court erred in failing to sua sponte give an attempted sexual assault instruction fails for somewhat different reasons. Because he did not request this instruction at trial, review on appeal is for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567 ¶¶ 19–20 (2005); Ariz. R. Crim. P. 21.3(c) cmt. "Accordingly, [Ruiz-Polvo] bears the burden to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citations and quotations omitted).

¶11 A formal charge for a specific offense "constitute[s] a charge of that offense and of all offenses necessarily included therein." Ariz. R. Crim. P. 13.2(c). Similarly, verdict forms "shall be submitted to the jury for all offenses necessarily included in the offense charged," including "an attempt to commit the offense charged." Ariz. R. Crim. P. 23.3. These rules ensure that "the defendant is on notice from the beginning of the proceedings . . . that the jury may be asked to consider any lesser included offenses supported by the trial evidence." *State v. Gipson*, 229 Ariz. 484, 486–87 ¶ 14 (2012). These rules do not, however, require a superior court, sua sponte, to instruct the jury on the elements of attempt and every lesser-included offense for every offense charged in every case.

¶12 In a non-capital case, a superior court should "withhold charging on lesser included offense[s] unless one of the parties requests it, since that charge is not inevitably required in our trials, but is an issue best resolved, in our adversary system, by permitting counsel to decide on tactics." *Gipson*, 229 Ariz. at 487 ¶ 15 (citations omitted). Although "a 'lesser included' offense is not always a 'necessarily included' offense," *Wall*, 212 Ariz. at 3 ¶ 14, "[a]n offense is necessarily included 'when it is lesser included' and 'the facts of the case as presented at trial are such that a jury could reasonably find that *only* the elements of a lesser offense have been proved,'" *Gipson*, 229 Ariz. at 486 ¶ 14 n.2 (quoting *Wall*, 202 Ariz. at 3 ¶ 14) (emphasis added).

¶13 In arguing that the court should have given an attempt instruction, Ruiz-Polvo states that a medical examination three days after the incident revealed "no sign of injury" to Y.O. and no DNA was recovered. But, as discussed above, Ruiz-Polvo's defense was that he accidentally penetrated Y.O., not that he attempted to sexually assault her. Given the explanation Ruiz-Polvo told police during his interview, the facts were not such that a jury could reasonably find that only attempted sexual assault had been proven. Accordingly, the superior court did not err in failing to sua sponte instruct the jury on attempted sexual assault.

STATE v. RUIZ-POLVO
Decision of the Court

CONCLUSION

¶14 Because Ruiz-Polvo has shown no reversible error, his sexual assault conviction and resulting sentence are affirmed.



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