IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DOUGLAS BRYCE BROWN, *Appellant*.

No. 1 CA-CR 16-0815
FILED 9-26-2017

Appeal from the Superior Court in Maricopa County
No. CR 2014-126610-001
The Honorable Peter C. Reinstein, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza C. Ybarra
Counsel for Appellee

Law Office of Nicole Farnum, Phoenix
By Nicole T. Farnum
Counsel for Appellant

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Michael J. Brown joined.

H O W E, Judge:

¶1 Douglas Bryce Brown appeals his convictions and sentences for aggravated assault, a class three felony, and disorderly conduct, a class one misdemeanor. He argues that the trial court abused its discretion by denying his request to include disorderly conduct as a lesser-included offense of aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 One day in June 2014, Brown stood on his apartment balcony overlooking the apartment grounds. At the same time, Esteban B., his wife, and their two children were walking to their car. When Brown saw the family, he reached his arms in the air as if trying to grab the children and started growling. Brown had never met the family before and his face indicated that he was not being playful. The children ran behind their parents in fear, and the family continued walking to the car. Brown then yelled down to Esteban's wife, "Oh, I like your pussy." The family ignored Brown and left in their car.

¶3 Later that day, while Esteban was out by his storage unit, he noticed Brown walking towards him. Brown had a tool belt around his waist and was carrying beers in a plastic bag. When Brown noticed Esteban, he threw his bag to the ground and reached for the hatchet hanging from his tool belt. Although Esteban was afraid, he did not have enough time to run away. Within seconds, Brown was right in front of Esteban and placed his hatchet about a foot away from Esteban's neck. Esteban slowly backed away, removed his cell phone from his pocket, and started recording Brown's actions. In response, Brown turned around, retrieved his beers from the ground, and walked toward his apartment as if nothing had happened.

¶4 The State charged Brown with one count of aggravated assault for his actions with the hatchet and one count of disorderly conduct for his actions towards the family earlier that day. At a comprehensive

pretrial conference, the court ordered that requested jury instructions be delivered to the court five days before the final trial management conference. Over the next year and a half, Brown moved several times to represent himself, which the trial court granted at a status conference in June 2016. At that status conference, the court set the final trial management conference for July 13, 2016. Brown did not request jury instructions at any time before the July 2016 trial.

¶5 At the July 2016 trial, Brown represented himself but had the assistance of advisory counsel. After the trial's second day, the court discussed the final jury instructions and suggested to Brown that he review the instructions. The next day, after the State rested, the court asked Brown whether he had looked at the final jury instructions. Brown responded that he had looked over the instructions but that he had left them in his cell. Brown's advisory counsel supplied Brown with a copy of the final jury instructions. The court then went over a few corrections that the State suggested before asking Brown whether he had any objections to the instructions. Brown responded that he had no objections to the jury instructions and that he agreed with the forms of verdict.

¶6 Before closing arguments, Brown moved to have his advisory counsel represent him for the remainder of the proceedings. The court granted Brown's request and then asked whether the jury instructions "are still okay for both sides?" Both sides indicated that they had no objections. The court subsequently read the final jury instructions to the jury.

¶7 During closing arguments, defense counsel suggested that Brown's actions that day in June 2014 constituted disorderly conduct, not aggravated assault. The State objected and asked to approach. During the discussion, the court informed defense counsel that "[a] lesser-included [offense] was not requested. We only have two charges. There are two incidents. . . . When [Esteban] was present the first time with his wife, that is the disorderly conduct that is charged." Defense counsel initially stated that he was not arguing for a lesser-included offense for the aggravated assault charge. But when the State informed the court that if defense counsel "wants to argue that disorderly conduct should be a lesser of aggravated assault, then I would ask that the jurors be given the instruction for disorderly conduct," defense counsel then requested the lesser-included offense instruction. The court denied the request.

¶8 After the court excused the jury to deliberate, defense counsel asked to make a record of the jury instruction issue. He stated that although Brown "okayed the jury instructions," he "belie[ved] that that first count

with aggravated assault should have had a lesser-included of disorderly conduct." The court observed that Brown had advisory counsel when he approved the jury instructions and that whether disorderly conduct should have been a lesser-included for aggravated assault, "it was too late" regardless.

¶9 The jury found Brown guilty of both charged counts. At the end of the trial, the court issued its minute entry. In that minute entry, the court again addressed its jury instruction ruling. The court noted that throughout the course of the trial, Brown maintained that Esteban was lying about the incident and that he never approached or threatened Esteban with a hatchet. Consequently, the court declined to give the lesser-included instruction because the record indicated that Brown was either guilty of the charged crime or not guilty. At the subsequent sentencing hearing, the court sentenced Brown to nine years' imprisonment on the aggravated assault count and six months' imprisonment on the disorderly conduct count. Brown timely appealed.

DISCUSSION

¶10 Brown argues that the trial court erred by denying his request for a jury instruction for disorderly conduct as a lesser-included offense of aggravated assault because disorderly conduct is a necessarily included offense pursuant to Arizona Rule of Criminal Procedure ("Rule") 23.3. Although Brown did not timely request a lesser-included offense instruction pursuant to Rule 21.2, he did request the instruction "before the jury retire[d] to consider its verdict." *See* Ariz. R. Crim. P. 21.3(c). We assume, without deciding, that Brown's request during closing argument preserved this argument on appeal. When a defendant requests an instruction during trial, the trial court's refusal to give the instruction is reviewed for an abuse of discretion. *State v. Hargrave*, 225 Ariz. 1, 11–12 ¶ 33 (2010). Because the evidence at trial did not support the lesser-included instruction, the trial court did not err.

¶11 As charged here, aggravated assault requires proof that the defendant intentionally placed the victim in reasonable apprehension of imminent physical injury by using a deadly weapon or dangerous instrument. *See* A.R.S. §§ 13–1203(A)(2); –1204(A)(2). A charge for disorderly conduct would require proof that the defendant intended to disturb the peace or quiet of a person with knowledge of doing so while recklessly handling, displaying, or discharging a deadly weapon or dangerous instrument. A.R.S. § 13–2904(A)(6). Disorderly conduct is a lesser-included offense of aggravated assault "because one cannot place

one in reasonable apprehension of imminent physical danger without in fact also disturbing her peace," and therefore "all elements of disorderly conduct by reckless display of a [dangerous weapon] are in fact elements of aggravated assault." *State v. Miranda*, 200 Ariz. 67, 68 ¶ 3 (2001).

¶12 Under Rule 23.3, however, the trial court is required to instruct and provide verdict forms to the jury only for necessarily included offenses. Ariz. R. Crim. P. 23.3. To determine whether the uncharged offense is necessarily included within the charged offense involves a two-step inquiry. *State v. Geeslin*, 223 Ariz. 553, 554 ¶ 7 (2010). An offense is necessarily included when (1) it is a lesser-included offense and (2) "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." *State v. Gipson*, 229 Ariz. 484, 486 n.2 ¶ 14 (2012). Only when both steps are satisfied must the trial court give the instruction to the jury.

¶13 Here, the second step is not satisfied. The record supports the trial court's ruling that the evidence at trial did not support the lesser-included offense instruction. The State provided evidence through Esteban's testimony that Brown walked up to him, pulled a hatchet from his toolbelt, and placed it about a foot away from Esteban's neck. The record also shows that throughout the course of the trial, Brown contended that Esteban had been lying about the entire incident and denied that he ever approached or threatened Esteban with a hatchet. No evidence at trial suggested that although Brown had recklessly displayed a hatchet, that only Esteban's peace was disturbed. Instead, Brown suggested at trial that he never had a hatchet at all. As such, no reasonable jury could have found the elements required for disorderly conduct. Thus, the trial court did not err by failing to provide the lesser-included offense instruction. *See State v. Sprang*, 227 Ariz. 10, 13 ¶ 8 (2011) (holding that a lesser-included offense instruction should not be given when the defendant denies all involvement in the crime and no evidence provides a basis for the lesser-included offense).

CONCLUSION

¶14 For the foregoing reasons, we affirm.

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