

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

ROBIN SCOTT BALLARD, *Appellant*.

No. 1 CA-CR 17-0010
FILED 12-12-2017

Appeal from the Superior Court in Maricopa County
No. CR2016-124219-001
The Honorable David O. Cunanan, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

Maricopa County Legal Defender's Office, Phoenix
By Cynthia D. Beck
Counsel for Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 Robin Scott Ballard appeals his conviction and sentence for aggravated assault, arguing that the superior court abused its discretion by refusing to instruct the jury on the crime prevention justification defense under Arizona Revised Statutes (“A.R.S.”) § 13-411. For reasons that follow, we conclude that Ballard was arguably entitled to the requested instruction but that any resulting error was harmless. Accordingly, we affirm Ballard’s conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND

¶2 On May 20, 2016, after an argument, Ballard shot his younger brother in the hip and then hit him on the head repeatedly. Ballard’s brother was taken to the hospital with a fractured pelvis and deep lacerations to his head.

¶3 A grand jury indicted Ballard on one count of disorderly conduct and three counts of aggravated assault, all dangerous offenses, for (1) shooting his brother in the hip, (2) beating him on the head with a handgun, and (3) intentionally placing him in reasonable apprehension of imminent physical injury with a hammer.

¶4 At trial, Ballard testified that he and his brother started arguing, and, in a rage, his brother picked up an item from the kitchen counter, threatened to “smash” Ballard with it, and said, “I can kill you right now.” Ballard asserted that his brother then swung a mallet at his jawbone, causing him to nearly pass out. Ballard claimed that he was afraid for his life and thus shot his brother with a handgun he kept in his pocket. When his brother tried to wrest the handgun from his grasp, Ballard used it to “hit him on the top of the head probably two -- two or three times to get him to stop.” He denied threatening his brother with a hammer.

¶5 The jury convicted Ballard of one count of aggravated assault for beating his brother on the head with a handgun and acquitted him of the other charges. The court found that the offense was inherently

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dangerous and sentenced Ballard to the minimum term of five years in prison.

¶6 Ballard timely appealed, and we have jurisdiction under A.R.S. § 13-4033.

DISCUSSION

¶7 Ballard argues that the superior court erred by denying his request for an instruction on the crime prevention justification defense under A.R.S. § 13-411. We review the superior court's denial of a requested instruction for abuse of discretion, deferring to the court's assessment of the evidence. *State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471 (2005); *State v. Wall*, 212 Ariz. 1, 5, ¶ 23 (2006).

¶8 The crime prevention defense under A.R.S. § 13-411 provides justification for use of "both physical force and deadly physical force against another if and to the extent the person reasonably believes physical force or deadly physical force is immediately necessary to prevent the other's commission of" certain enumerated offenses, including assault with a deadly weapon. A.R.S. § 13-411(A). The statute establishes a presumption that a person is acting reasonably for these purposes if the person acted to "prevent what the person reasonably believes is the imminent or actual commission" of the specified crimes, including aggravated assault. A.R.S. § 13-411(C). A defendant is entitled to a crime prevention instruction if it is supported by the "slightest evidence." *State v. Korzep*, 165 Ariz. 490, 494 (1990).

¶9 Here, the court instructed the jury on use of physical force and deadly physical force in self-defense: that a person "may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force," if and to the extent that a reasonable person in his situation would have believed that such force was immediately necessary for self-defense. See A.R.S. §§ 13-404, -405. The court declined, however, to instruct the jury on the crime prevention defense, reasoning that the crime prevention defense did not fit the "factual scenario" presented, that is, an "actual assault" leading to "secondary contact." The court also found that the instruction would "confuse the jury in giving them options that are really in essence the same set of facts."

¶10 Ballard's testimony that he shot his brother because his brother had attacked him with a mallet, and he feared his brother would hit him again, arguably supplied the slightest evidence necessary to support a

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crime prevention instruction as justification for the shooting. But the jury acquitted Ballard of the aggravated assault based on the shooting, so he necessarily suffered no cognizable prejudice with regard to the shooting offense.

¶11 With regard to the only offense of which Ballard was convicted—aggravated assault for hitting his brother on the head with the gun—any conceivable error in refusing to give a crime prevention instruction in that context was harmless. Although he testified that he hit his brother on the head with his gun to stop his brother’s attempts to wrest the gun from him, Ballard conceded that his brother had already collapsed to the floor before Ballard struck him on the head. And Ballard acknowledged telling a police officer that he pistol-whipped his brother because he was angry at being hit in the face with the mallet. Ballard’s own testimony thus belied his claim that he was acting to prevent his brother from committing a crime. Accordingly, even assuming the court erred by failing to give a crime prevention instruction, any such error was harmless.

CONCLUSION

¶12 We affirm Ballard’s conviction and sentence.



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