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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

TREVOR JOHN UGALDE, *Petitioner,*

v.

THE HONORABLE RONDA FISK, Judge of the SUPERIOR COURT OF
THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge,

STATE OF ARIZONA, *Real Party in Interest.*

No. 1 CA-SA 17-0254
FILED 12-28-2017

Petition for Special Action from the Superior Court in Maricopa County
No. CR2016-150582-001
The Honorable Ronda R. Fisk, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

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By Donald W. Harris

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By Rachelle S. Ferraro
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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 Trevor Ugalde was indicted for three felonies and two misdemeanors stemming from an incident in which he discharged a firearm. Ugalde seeks special action review of the superior court's denial of his motion to remand to the grand jury for a new determination of probable cause. We accept special action jurisdiction because challenges to the denial of a motion for remand generally must be made by special action before trial and are not reviewable on appeal. *State v. Moody*, 208 Ariz. 424, 439-40, ¶ 31 (2004). Nevertheless, for reasons that follow, we deny relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 The victim, a cab driver, stopped Ugalde and his friends to ask if any of them had called for a cab. One of Ugalde's friends told the cab driver that they only call Uber. The cab driver and Ugalde then exchanged words. The victim originally drove away but then quickly reversed, parked, and got out of the cab. By that time Ugalde had pulled a firearm out of his back pocket. Ugalde fired one round at the cab before running away.

¶3 The grand jury indicted Ugalde on charges of aggravated assault, unlawful discharge of a firearm, discharge of a firearm at a non-residential structure, criminal damage, and misconduct involving weapons. Ugalde moved to remand the indictment, arguing that the State presented false or misleading testimony, failed to present exculpatory evidence, and failed to properly advise the grand jurors on self-defense. The superior court denied the motion, and this special action followed.

DISCUSSION

¶4 Ugalde argues that the superior court erred by denying his motion to remand because the State's presentation to the grand jury was not fair and impartial, thereby denying him a substantial procedural right. We review denial of a motion to remand an indictment for an abuse of discretion. *Francis v. Sanders*, 222 Ariz. 423, 426, ¶ 10 (App. 2009).

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I. Failure to Correct Misleading Information.

¶5 A grand jury's probable cause finding can be challenged if the defendant was denied a substantial procedural right. *Maretick v. Jarrett*, 204 Ariz. 194, 197, ¶ 11 (2003). These substantial procedural rights include the right to a fair and impartial presentation of the evidence. *Crimmins v. Superior Court*, 137 Ariz. 39, 41 (1983). Thus, if a prosecutor fails to correct misstatements or misleading information, the defendant is entitled to a remand for a new determination of probable cause. *See Maretick*, 204 Ariz. at 198, ¶ 14.

¶6 Ugalde argues that the prosecutor failed to correct misleading testimony by the detective assigned to the case, who responded "No" when he was asked whether Ugalde's friends he interviewed had indicated that the victim "was doing anything that would precipitate a self-defense situation."

¶7 Ugalde argues that the detective's testimony was misleading because Ugalde's friends indicated that the victim drove his cab aggressively before getting out and approaching Ugalde. But the use of deadly force for self-defense must be "immediately necessary to protect [] against the other's use or attempted use of unlawful deadly physical force." Ariz. Rev. Stat. ("A.R.S.") § 13-405. Ugalde's friends never indicated that Ugalde acted in self-defense or that the victim attempted to use deadly force. To the contrary, one of Ugalde's friends stated that he was not sure why Ugalde felt the need to pull out the firearm and shoot at the cab. Moreover, Ugalde's friend's full statement indicated that Ugalde pulled out the firearm before the aggressive driving:

[Ugalde] pulled out the gun says, "hey asshole look over here." And then because of saying that the guy immediately spins the car around, screeching and everything, and gets out of his car. And I guess [Ugalde] must have been spooked by that because as soon as he gets out of his car he shoots.

Although the driving may have "spooked" Ugalde, he brandished the firearm before the aggressive driving occurred, and by the time the shot was fired, the victim was no longer in the cab and there was no threat based on aggressive driving. Accordingly, the statement that nothing "precipitate[d] a self-defense situation" is not misleading.

¶8 Ugalde next argues that the detective's testimony that the victim feared being shot was misleading. The detective responded affirmatively when asked whether the victim "indicate[d] . . . that he was

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concerned that he was going to get shot.” Ugalde argues that this testimony was misleading because at one point the victim told the police he originally thought Ugalde’s firearm was a cap gun. But, when the victim spoke with the detective, he specifically stated that he feared for his life during the incident. Thus, Ugalde’s claim fails.

¶9 Ugalde also argues the prosecutor misled the grand jury by suggesting that his self-defense claim was fabricated. During the proceedings, the prosecutor asked the detective if it was “[f]air to say that Mr. Ugalde, after admitting to doing all of these, came up with reasons in his mind as to why he did it,” and the detective responded, “Yes.” But the detective then, at the prosecutor’s request, elaborated on Ugalde’s justifications, stating that Ugalde “believed he was in a physical altercation . . . though there was no physical contact” and “that he had no way of running away from the area, although . . . everybody else had.” Accordingly, even if the first statement was arguably misleading, the subsequent elaboration correctly described Ugalde’s alleged view of the situation. Thus, the superior court did not abuse its discretion by finding that the statements were not misleading.

II. Failure to Present Exculpatory Evidence.

¶10 As part of the requirement of a fair and impartial presentation of the evidence, the prosecutor must present all “clearly exculpatory evidence.” *Francis*, 222 Ariz. at 426–27, ¶ 12. Clearly exculpatory evidence is evidence that “would deter the grand jury from finding the existence of probable cause.” *Herrell v. Sargeant*, 189 Ariz. 627, 631 (1997). Thus, the prosecutor must present evidence that would support an affirmative defense. *See id.*

¶11 Ugalde argues the prosecutor failed to present the following allegedly exculpatory evidence: (1) two of Ugalde’s friends described the victim as “screeching” the tires of the cab, (2) the victim flipped off Ugalde and his friends, (3) the victim and Ugalde were within feet of each other, (4) the victim was 50 to 70 pounds heavier than Ugalde, (5) the victim originally believed Ugalde’s firearm was a cap gun, and (6) the victim was “pissed off” after the shooting and walked towards Ugalde while calling him a “dumbass.” But this evidence is not clearly exculpatory. Use of deadly physical force is justified only “[w]hen and to the degree a reasonable person would believe [it] is immediately necessary to protect himself against the other’s use or attempted use of unlawful deadly physical force.” A.R.S. § 13-405. None of the evidence Ugalde claims to be clearly exculpatory establishes that the victim was using or attempting to

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use deadly force against Ugalde. Thus, the superior court did not err by finding that the evidence was not clearly exculpatory.

III. Failure to Present Uncontested Facts that Support the Defense.

¶12 Ugalde argues that, under *Crimmins* and *Herrell*, the superior court erred by denying his motion to remand because the prosecutor did not present uncontested facts that would have supported the affirmative defense. Neither *Crimmins* nor *Herrell* stands for that proposition. The *Crimmins* court held that “the omission of significant facts, coupled with the omission of instruction on statutes which give the omitted facts their legal significance, rendered the presentation of the case against *Crimmins* less than fair and impartial.” 137 Ariz. at 43. And *Herrell* dealt with evidence that was “very clearly exculpatory.” 189 Ariz. at 631. Here, the prosecutor instructed the jury on the self-defense statutes and did not fail to present any evidence that was clearly exculpatory. Accordingly, the superior court did not err.

CONCLUSION

¶13 For the foregoing reasons, we accept jurisdiction but deny relief.



AMY M. WOOD • Clerk of the Court
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