IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JEREMIAS JOEL PIÑA, *Appellant*.

No. 1 CA-CR 16-0310
FILED 7-31-2018

Appeal from the Superior Court in Maricopa County
No. CR2015-130580-001
The Honorable Gregory Como, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By William Scott Simon
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Peter B. Swann and Judge James P. Beene joined.

T H O M P S O N, Presiding Judge:

¶1 Jeremias Joel Piña appeals his convictions and sentences for two counts of aggravated assault and one count of shoplifting. Piña argues the trial court erred when it failed to properly instruct the jury regarding the merchant privilege to detain shoplifting suspects and when it considered improper aggravating circumstances at sentencing. Piña further argues the case must be remanded to resolve inconsistencies between the trial court's oral pronouncement of sentence and the minute entry. For the following reasons, we affirm the convictions and sentences and correct the sentencing minute entry.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 At approximately 12:00 p.m. on June 30, 2015, Piña walked into a Target store in Phoenix, Arizona. At that Target location, N.H. worked as a "plainclothes" asset protection specialist and E.R. worked as a uniformed loss prevention officer. E.R. wore a security badge on the front of his uniform and N.H. wore a security badge attached to his belt. While monitoring the store for possible shoplifters, N.H. and E.R. saw Piña place jewelry in his pocket.

¶3 When Piña walked toward the exit, N.H. ran up to Piña, identified himself as security, and grabbed Piña by the left arm**.** Shortly after, E.R. ran up and grabbed Piña's right wrist. E.R. heard N.H. identify himself as security. Piña immediately tried to pull his arms away and yelled, "[y]ou're breaking the law."[2] N.H. and E.R. attempted to hold

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[1] We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

[2] N.H. and E.R. testified that shoplifting suspects regularly claim loss prevention officers are not permitted to physically contact them.

Piña's arms, shoulders, and torso. On multiple occasions, N.H. and E.R told Piña to "calm down" and come with them to the security office.

¶4 Piña pulled a knife from his pocket and waved it around. N.H. and E.R. backed away. Piña took E.R.'s radio and ran out of the store. Piña claimed he did not hear N.H. or E.R. make any statements or see their badges.

¶5 Police officers arrived and found Piña hiding in the bathroom of a nearby restaurant. Officers found the stolen jewelry in the bathroom trashcan. Officers did not find E.R.'s radio or the knife, but they found a knife clip in Piña's pocket. N.H. identified Piña as the suspect. Officers recovered video from Target that showed both the shoplifting offense and the attempted detention.

¶6 After officers arrested Piña, he complained of eye and head pain. Officers took Piña to the hospital where he would eventually undergo eye removal surgery. Piña claimed the injury occurred during his struggle with N.H. and E.R.

¶7 The state charged Piña with two counts of aggravated assault and one count of shoplifting. A jury found Piña guilty, found dangerousness as to the aggravated assault counts, and found aggravating factors existed. On the aggravated assault counts, the trial court sentenced Piña to concurrent presumptive terms of 11.25 years' imprisonment. On the shoplifting count, the trial court sentenced Piña to six months of jail with six months of presentence incarceration credit.

¶8 Piña filed a timely appeal and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2018), 13-4031 (2018), and -4033(A)(1) (2018).[3]

DISCUSSION

A. Jury Instructions

¶9 Piña argues the trial court erred when it failed to properly instruct the jury regarding the merchant's privilege to detain suspected shoplifters as described in *Gortarez By & Through Gortarez v. Smitty's Super*

[3] We cite to the current version of any statute unless the statue was amended after the pertinent events and such amendment would affect the result of this appeal.

Valu, Inc., 140 Ariz. 97, 104-05 (1984). Piña contends this error prejudiced his justification defense.

¶10 When discussing final jury instructions, the state requested a justification instruction pertaining to N.H. and E.R.'s use of physical force. The trial court stated, "the shoplifting statute actually has different language about what a merchant or their employee can do and . . . that would seem to me to be more applicable to this situation." Piña agreed and objected only to the state's requested instruction. The trial court denied the state's request and added the merchant privilege instruction to the final jury instructions. The trial court noted it would craft an instruction that "tracks" the shoplifting statute. *See* A.R.S. § 13-1805(C) (2018). Piña did not object or suggest specific language be used.

¶11 The trial court provided the following instruction to the jury, titled "Authority of Merchant to Detain Shoplifter":

> A merchant, or a merchant's employee, with reasonable cause, may detain on the premises in a reasonable manner and for a reasonable time any person who is suspected of shoplifting for questioning or summoning a law enforcement officer.

¶12 Additionally, the trial court read a use of force in crime prevention instruction requested by Piña, which stated, he "acted reasonably if [he] reasonably believed he was acting to prevent the imminent or actual commission of aggravated assault." The trial court instructed the jury as to the state's burden of proof, credibility of witness testimony, direct and circumstantial evidence, duty not to speculate about any fact, and weight given to lawyers' comments.

¶13 In closing argument, Piña repeatedly argued N.H. and E.R.'s excessive conduct justified Piña's use of a knife. Piña described his detention as an "attack" more than thirty times. In rebuttal, the state argued N.H. and E.R. acted reasonably and "force is allowed in the detention of a shoplifter caught stealing merchandise." Piña objected, arguing the state's mention of force mischaracterized the merchant privilege instruction. The trial court overruled the objection, interpreting the merchant privilege to permit force if deemed ultimately reasonable. Per the trial court's request, the state attempted to clarify that if store employees "deem physical force necessary, reasonable, then they can do that." Again, Piña objected, the trial court overruled the objection, and told the jurors they must make their "own conclusion as to what constitutes detention in a reasonable manner."

Piña made no further objections and did not request supplemental jury instructions of any kind.

¶14 We review a trial court's decision to provide a requested jury instruction for abuse of discretion. *State v. Dann*, 220 Ariz. 351, 363–64, ¶ 51 (2009). We review whether a jury instruction adequately states the law de novo. *State v. McCray*, 218 Ariz. 252, 258, ¶ 25 (2008). If a defendant fails to object at trial, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005).

¶15 Piña argues objections made during the state's rebuttal argument adequately preserved the issue for review. Although Piña objected to the state's characterization of the merchant privilege instruction in closing argument, Piña did not object to the language in the merchant privilege instruction or request a supplemental instruction. Given Piña's failure to make a particularized objection, we review for fundamental error. Ariz. R. Crim. P. 21.3(b); *State v. Finch*, 202 Ariz. 410, 415, ¶ 19 (2002); *State v. Valenzuela*, 194 Ariz. 404, 405, ¶ 2 (1999).

¶16 To establish fundamental error, Piña must show the trial court's error struck at the foundation of the case, the error obstructed a right essential to his defense, and the error was of such magnitude Piña could not possibly receive a fair trial. *State v. Hunter*, 142 Ariz. 88, 90 (1984); *State v. Libberton*, 141 Ariz. 132, 138 (1984). If error exists, Piña must show the error caused prejudice. Under fundamental error review, prejudice is not presumed and must appear affirmatively from the record. *State v. Trostle*, 191 Ariz. 4, 13 (1997); *State v. Fimbres*, 222 Ariz. 293, 303, ¶ 37 (App. 2009). This is a fact-intensive inquiry and varies from case to case. *Henderson*, 210 Ariz. at 568, ¶ 26. Prejudicial error is established when the jury instructions improperly shift the burden of proof, erroneously define the applicable mental state, or list inapplicable theories of criminal liability. *See, e.g., Hunter*, 142 Ariz. at 90; *State v. James*, 231 Ariz. 490, 494-95, ¶ 18 (App. 2013); *State v. Ontiveros*, 206 Ariz. 539, 542-43, ¶¶ 16-19 (App. 2003).

¶17 Given the fact-intensive nature of this inquiry, we consider the instructions in their entirety, along with the evidence presented at trial. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75 (2000). The trial court is not required to provide every requested instruction, define every phrase, or give supplemental instructions that merely elaborate upon an instruction already provided. *State v. Miller*, 186 Ariz. 314, 323 (1996); *State v. Salazar*, 173 Ariz. 399, 409 (1992). In cases where terms are "used in their ordinary sense and commonly understood by those familiar with the English

language, the court need not define these terms." *State v. Barnett*, 142 Ariz. 592, 594 (1984); *see also State v. Valles*, 162 Ariz. 1, 6-7 (1989).

¶18 Piña argues the trial court should have provided an instruction specifically defining the permissible use of force under the "reasonable manner" clause of the merchant privilege. In *Gortarez*, 140 Ariz. at 104-05, our supreme court held that the merchant privilege recognized in the shoplifting statute, A.R.S. § 13-1805(C), is a codification of the common law shopkeeper's privilege. As noted in the Restatement (Second) of Torts § 120A cmt. h (1965), the common law shopkeeper's privilege provides "the use of any force at all will not be privileged until the other has been requested to remain; and it is only where there is not time for such a request, or it would obviously be futile, that force is justified." *Gortarez*, 140 Ariz. at 104-05. The court further held that "[w]here the facts are in dispute or where different inferences may be drawn from undisputed facts, it is for the jury, under proper instructions from the court, to determine the reasonableness of the detention." *Id*. at 104.

¶19 Based on the foregoing principles, the trial court did not abuse its discretion in providing the merchant privilege instruction. Although the trial court did not formally apply the inquiry established in *Gortarez*, 140 Ariz. at 104-05, the evidence presented at trial merited the instruction, the instruction did not shift or alter the state's burden of proof, and the language of the instruction came directly from A.R.S. § 13-1805(C). Moreover, considering the jury instructions in their entirety, the trial court instructed the jury to use their common sense and experience in judging the credibility of the witnesses and the evidence presented. *See Hoskins*, 199 Ariz. at 145, ¶ 75; *Barnett*, 142 Ariz. at 594. Thus, whether N.H. and E.R. attempted to detain Piña in a "reasonable manner" was properly before the jury as a question of fact. *See Gortarez*, 140 Ariz. at 104.

¶20 Even if we were to find the state's comments in closing argument improperly characterized the use of force permitted under the merchant's privilege, the state's misstatement of the law was not prejudicial, the state provided clarification, and the jury instructions stated comments made in closing argument are not evidence. *See State v. Daymus*, 90 Ariz. 294, 303 (1961) (holding misstatement of the law in closing argument did not amount to prejudicial error).

B. Aggravating Factors

¶21 Piña next argues the trial court erred in considering his use of a deadly weapon and threatened infliction of serious physical injury as aggravating factors in violation of A.R.S. § 13-701(D)(1)-(2) because "both are essential elements of the jury's aggravated assault verdicts in counts 1 and 2."

¶22 After the jury found Piña guilty of the charged offenses, the parties proceeded to the aggravation phase on the aggravated assault counts. The final aggravation phase jury instructions asked the jury to determine whether the offenses involved victim harm, pecuniary gain, infliction or threatened infliction of serious physical injury, use or threatened use of a deadly weapon, and dangerousness. With the exception of the aggravator involving pecuniary gain, the jury found all allegations proven beyond a reasonable doubt.

¶23 At sentencing, Piña admitted to having four prior felony convictions. The state argued for an aggravated term, focusing primarily on the escalation in criminal behavior and harm to multiple victims. Piña asked for a mitigated term, arguing that N.H. and E.R. "jumped" him, he "lost an eye" as a result, and he did not have prior violent offenses. In determining Piña's sentence, the trial court did not "discount" the aggravating factors present in the case, but ultimately agreed with Piña's "position that this started out as a shoplift." The trial court noted this was Piña's "first violent offense. It didn't start out as a violent offense . . . I think [he] did in a sense use the knife to end the situation." The court imposed presumptive, concurrent sentences of 11.25 years for counts 1 and 2.

¶24 Piña never objected to the state's allegations of aggravating circumstances or the final aggravation phase jury instructions. Therefore, we review for fundamental error. *Henderson*, 210 Ariz. at 568, ¶ 19. A trial court's imposition of an illegal sentence typically constitutes fundamental error. *State v. Thues*, 203 Ariz. 339, 340, ¶ 4 (App. 2002); *State v. Cox*, 201 Ariz. 464, 468, ¶ 13 (App. 2002).

¶25 A trial court is not required to find a specified number of aggravating or mitigating factors when imposing a presumptive sentence. *State v. Marquez*, 127 Ariz. 3, 7 (App. 1980). We have established "even when only mitigating factors are found, the presumptive term remains the presumptive term unless the court, in its discretion, determines that the amount and nature of the mitigating circumstances justifies a lesser term." *State v. Olmstead*, 213 Ariz. 534, 535, ¶ 5 (App. 2006) (upholding a

presumptive sentence where no aggravating factors found); *see also State v. Willcoxson*, 156 Ariz. 343, 347 (App. 1987) (upholding a presumptive sentence where three mitigating factors and one aggravating factor found).

¶26 In this case, the state proved the allegation of dangerousness and three aggravating factors, and Piña admitted to four prior felony convictions. In balancing the factors presented by both Piña and the state, the trial court expressly agreed with Piña's position regarding the facts and circumstances of the case. Rejecting the state's characterization of Piña as a violent individual, the trial court noted Piña did not intend to inflict injury and he pulled the knife as a means of ending the struggle. The trial court did not rely on the A.R.S. § 13-701(D)(1) (infliction or threatened infliction of serious physical injury) and (D)(2) (knife) aggravators in making its ultimate sentencing decision. Furthermore, Piña's use of the knife was the essential element of the underlying aggravated assaults, so the trial court could have properly used threatened infliction of serious injury in addition to victim harm, and defendant's prior felony convictions as aggravators. *See* A.R.S. § 13-701(D); *State v. Ritacca*, 169 Ariz. 401, 403 (App. 1991) (holding a prior felony conviction may be used to both enhance and aggravate sentence). We find no error, fundamental or otherwise.

C. Sentencing Minute Entry

¶27 Piña next contends the case must be remanded to resolve inconsistencies regarding the intended sentencing range in the trial court's oral pronouncement of sentence and the minute entry.

¶28 In its oral pronouncement of sentence, the trial court sentenced Piña as a "Category 3 repetitive offender." The trial court made findings as to Piña's four prior felony convictions and sentenced him to presumptive terms for the aggravated assault offenses. The trial court noted the current case represents Piña's "first violent offense."

¶29 In its sentencing minute entry, under each of the aggravated assault counts, the trial court added the language, "Dangerous pursuant to A.R.S. § 13-704 – Repetitive." Under the shoplifting count, the trial court added the language, "Non-Dangerous – Non Repetitive [sic]." It appears the trial court used a center dash to separate the dangerous designation from the repetitive designation. The minute entry lists the sentences as presumptive terms of 11.25 years and states that the trial court made findings as to each of Piña's prior felony convictions under "A.R.S. § 13-703 or 13-704."

¶30 When imposing a sentence, the trial court must state "the offense for which the defendant was convicted, and whether the offense falls in the categories of dangerous, non-dangerous, repetitive, or non-repetitive offenses." Ariz. R. Crim. P. 26.10(a). If a discrepancy between the oral pronouncement of the sentence and the minute entry can be resolved by reviewing the record, the oral pronouncement controls. *State v. Ovante*, 231 Ariz. 180, 188, ¶ 38 (2013); *State v. Bowles*, 173 Ariz. 214, 216 (App. 1992). We have the authority to correct the minute entry to consistently reflect the intended sentence. *State v. Gutierrez*, 130 Ariz. 148, 150 (1981).

¶31 Looking to the trial court's oral pronouncement and minute entry, the record shows the trial court intended to sentence Piña to presumptive terms of 11.25 years pursuant to the category three repetitive offender statute. *See* A.R.S. § 13-703(J) (2018) (presumptive term for a class 3 felony is 11.25 years of imprisonment). The trial court had the authority to sentence Piña under the repetitive offender or the dangerous offender statute. *See State v. Laughter*, 128 Ariz. 264, 268–69 (App. 1980). Moreover, the trial court did not have to void the dangerousness finding to impose sentences under the repetitive offender statute. *See State v. Trujillo*, 227 Ariz. 314, 321-22, ¶ 37 (App. 2011). Thus, the trial court's imposition of sentence was lawful and clearly reflected by the record.

¶32 Without viewing the transcript of the oral pronouncement, however, the minute entry's description of the aggravated assault counts as "Dangerous pursuant to A.R.S. § 13-704 – Repetitive" is ambiguous. We modify the minute entry to reflect the following: 1) the aggravated assault counts are dangerous offenses pursuant to A.R.S. § 13-704; and, 2) the trial court sentenced Piña to presumptive terms within the category three repetitive offender sentencing range pursuant to A.R.S. § 13-703(J). Because the ambiguity can be resolved by correcting technical errors in the minute entry, we do not remand for clarification of sentence.

CONCLUSION

¶33 For the foregoing reasons, we affirm the convictions and sentences.

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