IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

GINA JEANNETTE DUMONT, *Appellant*.

No. 1 CA-CR 18-0021
FILED 3-14-2019

Appeal from the Superior Court in Mohave County
No. S8015CR201700053
The Honorable Billy K. Sipe Jr., Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eric Knobloch
Counsel for Appellee

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

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge James B. Morse Jr. and Vice Chief Judge Peter B. Swann joined.

T H O M P S O N, Judge:

¶1 Gina Jeannette Dumont (defendant) appeals from her convictions and sentences for aggravated assault with a dangerous instrument and aggravated assault causing substantial but temporary disfigurement in violation of Arizona Revised Statutes (A.R.S.) § 13–1204(A)(2), (3) (2019).[1] For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[2]

¶2 The victim, C.C., went to defendant's home to discuss a small amount of "gas money" defendant owed her. Defendant allowed C.C. to go inside, but she appeared to be erratic and upset. After a brief conversation, defendant directed her dog to bite C.C., retrieved a baseball bat, and swung it at C.C.'s head. In an effort to shield herself, C.C. raised her right hand and the bat struck her right arm. C.C.'s husband, who was waiting outside, helped C.C. leave the home. As they fled, defendant threw rocks and continued ordering her dog to bite C.C. C.C. hit the dog with a nearby broomstick and left in her vehicle.

¶3 C.C. contacted police officers. The responding officer observed that C.C. was distressed and had injuries consistent with dog bites and "blunt force trauma" to her right arm. C.C. declined medical support, opting to treat her injuries at home.

¶4 When the officer went to defendant's home with an animal control representative, defendant screamed derogatory statements and

---

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

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

refused to provide a statement. The officer spoke with defendant through a screen door and did not observe any injuries.

¶5 The next morning, C.C. woke to discover she lost blood flow to her right hand and went to the emergency room. C.C. suffered a severe injury to her right arm and doctors nearly amputated her hand. C.C. underwent a total of three surgeries and has "over a hundred staples holding [her] arm together." Photographs were taken of her injuries.

¶6 C.C. obtained an order of protection against defendant. Before it could be served, defendant left voicemails for C.C., asking her to tell officials she was mistaken regarding the dog bites.

¶7 Defendant later testified that C.C. came into her home uninvited and attacked her. She claimed that she used the baseball bat to defend herself and also testified that C.C. rummaged through her drawers and briefly removed a knife from the silverware drawer. Defendant acknowledged, however, that she did not call police officers or provide them with her complete version of the incident.

¶8 The state charged defendant with one count of aggravated assault with a deadly weapon or dangerous instrument, one count of aggravated assault causing substantial but temporary disfigurement, and one count of tampering with a witness. A jury found defendant guilty of both aggravated assault counts but not guilty of witness tampering. The trial court sentenced defendant to the aggregate term of 8.5 years' imprisonment.

¶9 Defendant filed a timely appeal. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2019), 13-4031 (2019), and -4033(A)(1) (2019).

DISCUSSION

I. Sufficiency of the Evidence.

¶10 Defendant argues her convictions for aggravated assault are not supported by sufficient evidence. She further contends the officer's testimony regarding C.C.'s injuries cannot be used to support her convictions.

¶11 In reviewing the sufficiency of the evidence, we resolve all conflicts in the evidence against a defendant. *State v. Bustamante*, 229 Ariz. 256, 258, ¶ 5 (App. 2012). "To set aside a jury verdict for insufficient

evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987).

¶12 In relevant part, a person commits aggravated assault by committing assault, as defined in A.R.S. § 13–1203 (2019), and either uses a dangerous instrument or causes temporary but substantial disfigurement. A.R.S. § 13–1204(A)(2), (3). A "dangerous instrument" is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. § 13–105(12) (2019). Whether a temporary disfigurement is substantial is a fact-intensive inquiry, "taking into account multiple factors—such as the injury's seriousness, location, duration, and visibility to others." *State v. Pena*, 235 Ariz. 277, 280, ¶ 11 (2014).

¶13 Through testimony and photographic evidence, the state showed that defendant swung a baseball bat at C.C., hit her on the arm, and caused severe injury. This was sufficient to prove both counts of aggravated assault. *See* A.R.S. §§ 13–105(12), -1203(A)(1), -1204(A)(1), (3). Contrary to defendant's claim, we need not discount the officer's testimony regarding C.C.'s injuries in reaching this conclusion. First, defendant did not object to the testimony below and has not argued fundamental error on appeal. Therefore, she has waived this argument on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶ 17 (App. 2008). Second, the officer need not be qualified as an expert to provide the challenged testimony because it was not based on scientific, technical, or specialized knowledge, and was simply "rationally based" on the officer's observations of C.C.'s injuries. *See* Ariz. R. Evid. 701; *State v. Peltz*, 241 Ariz. 792, 798, ¶ 18 (App. 2017). On this record, we find sufficient evidence to support the convictions.

II. Jury Instructions.

¶14 Defendant argues the superior court fundamentally erred in failing to *sua sponte* instruct the jury on (1) the use of force in preventing others from committing enumerated crimes under A.R.S. § 13–411 (2019); (2) the lack of duty to retreat afforded by A.R.S. § 13-405(B) (2019) and A.R.S. § 13-411(B); and (3) the presumption of reasonableness afforded by A.R.S. § 13–419 (2019).

¶15 Because defendant did not request the instructions at trial, we limit our review to fundamental error. *See State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018) (clarifying fundamental error review). To establish fundamental error, a defendant bears the burden of proving fundamental

error occurred and such error caused her prejudice. *Id*. at 142, ¶ 21. We consider jury instructions in their entirety in determining whether they are supported by the evidence and accurately reflect the law. *State v. Rodriguez*, 192 Ariz. 58, 61-62, ¶ 16 (1998). The superior court does not err in failing to provide an instruction that "does not fit the facts of the particular case, or is adequately covered by the other instructions." *State v. Hussain*, 189 Ariz. 336, 337 (App. 1997).

¶16 At trial, defendant and C.C. provided widely differing versions of the incident and, aside from their testimony, the only other evidence presented at trial corroborated C.C.'s account. Defendant claimed both self-defense and defense of premises, and the court provided the correlating instructions. *See* A.R.S. §§ 13-404 (2019) (use of physical force in defense of oneself), -407 (2019) (use of force to terminate criminal trespass of a residential structure). As to each defense, the jury was told the State must prove beyond a reasonable doubt that defendant was not justified in her actions.

¶17 Given the facts and circumstances of the case, the court's failure to provide the additional instructions did not amount to fundamental, prejudicial error. *See State v. Gendron*, 168 Ariz. 153, 155 (1991) (no fundamental error in failing to give self-defense instruction based on totality of the circumstances).

III. Prosecutorial Misconduct.

¶18 Defendant argues the prosecutor committed misconduct during closing argument.

¶19 To secure reversal for prosecutorial misconduct, a defendant must show the prosecutor's actions were improper and "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145 (2004) (internal quotation omitted). Counsel is provided "wide latitude in presenting their closing arguments to the jury." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37 (2000).

¶20 In closing argument, defense counsel argued that the jury could consider the fact that the prosecutor failed to call C.C.'s husband in its deliberations. In rebuttal, the prosecutor argued defense counsel asked them to consider facts not in evidence, contrary to the law provided in their instructions. Defense counsel objected to the prosecutor "commenting on opposing counsel," but the objection was overruled.

¶21 Here, the prosecutor's comments were not misleading or improper. The prosecutor simply responded to defense counsel's argument, reiterated the law provided in the jury instructions, and asked the jury not to make any inferences based on evidence not presented at trial. *See State v. Alvarez*, 145 Ariz. 370, 373 (1985) (holding prosecutor's comments were proper rebuttal to areas opened by defense counsel). Moreover, the superior court instructed the jury that statements made in closing argument were not evidence. Without any indication otherwise, we presume the jury followed these instructions. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006). As such, there is no reasonable likelihood the prosecutor's argument impacted the jury's verdict.

CONCLUSION

¶22 For the foregoing reasons, we affirm defendant's convictions and sentences.

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