DIVISION ONE
FILED: 12/15/09
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-0767
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
SAMUEL RUDOLPH ROTONDO, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR-20061145

The Honorable Dale P. Nielson, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Katia Méhu, Assistant Attorney General
Attorneys for Appellee

Law Office of Marsha Gregory, P.C. — Springerville
By Marsha A. Gregory
Attorney for Appellant

G E M M I L L, Judge

¶1 Samuel Rudolph Rotondo appeals his convictions for attempted first-degree murder and aggravated assault. Rotondo argues that the trial court erred by: 1) denying his motion to

dismiss for violation of right to counsel; 2) permitting an inmate to testify without validation of credibility; and 3) denying his request for a self-defense or defense of other instruction. For reasons that follow, we affirm.

¶2 Rotondo was indicted for attempted first-degree murder and aggravated assault, each a class 2 felony. The charges stemmed from an incident in which an inmate was stabbed more than seventy times while on the recreation yard at the Department of Corrections (DOC) Winslow complex. The victim identified Rotondo as one of three fellow inmates who attacked him.

¶3 Upon trial to a jury, Rotondo was found guilty as charged. The trial court sentenced Rotondo as a repetitive offender to concurrent, aggravated prison terms of thirty-five years on the attempted murder charge and twenty-five years on the aggravated assault charge. Rotondo timely appealed.

¶4 Prior to trial, Rotondo moved to dismiss the charges, arguing that DOC officials violated his right to counsel by confiscating legal materials and attorney work product from his cell. Following an evidentiary hearing, the trial court denied the motion. The trial court ruled that Rotondo failed to establish that communication between counsel and client had been breached or that the State had interfered with his ability to have legal materials or to review them sufficiently to assist in

preparing for trial. We review alleged violations of constitutional rights de novo, but review a ruling on a motion to dismiss for abuse of discretion. *State v. Boggs*, 218 Ariz. 325, 336, ¶ 50, 185 P.3d 111, 122 (2008).

¶5 The right to counsel is guaranteed to a criminal defendant by both the federal and state constitutions. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24. The right to counsel includes protection against improper intrusions by the State or its agents into the confidential relationship between a defendant and his attorney. *State v. Warner*, 150 Ariz. 123, 127, 722 P.2d 291, 295 (1986). Not every intrusion into the attorney-client relationship, however, results in a denial of the right to effective assistance of counsel. *Boggs*, 218 Ariz. at 337, ¶ 51, 185 P.3d at 123. The factors to be considered in determining whether there has been an improper intrusion include motive behind the search or seizure, use made of the materials, whether the intrusion was deliberate, whether the prosecution benefitted, and whether the defendant established prejudice. *Warner*, 150 Ariz. at 129, 722 P.2d at 297.

¶6 Furthermore, even when a violation is found to have occurred, "dismissal of the indictment is neither automatic nor favored as the primary remedy." *State v. Pecard*, 196 Ariz. 371, 379, ¶ 39, 998 P.2d 453, 461 (App. 1999). Dismissal is only required when the conduct is so prejudicial that no other remedy

will protect the right to a fair trial. *Id.* at 381, ¶ 49, 998 P.2d at 463.

¶7 At the evidentiary hearing on his motion, Rotondo testified that on three occasions when he was transported to Navajo County for court proceedings, prison officials seized items from legal materials he had left in his cell, including disclosure documents sent to him by his attorney. When Rotondo inquired about the missing items after returning to the prison, he was informed that the materials were seized because they contained contraband, specifically crime scene photographs and a list of names that included suspected prison gang members. Rotondo concedes these items were properly subject to seizure because they were not permitted in his cell, but claims the inspection of his legal materials by DOC officers violated his right to confidential attorney–client communication.

¶8 DOC policy provides for all property left in a cell when the inmate is gone overnight to be inventoried and secured in the property room. The property, other than legal material, is searched prior to being stored. Legal material is not searched, but is randomly looked through to ensure that it does not contain any contraband. Any items deemed contraband are confiscated and a notice of seizure is issued to the inmate. Crime scene photographs and material related to prison gangs are designated as contraband under the DOC policy and are not

permitted to be kept by an inmate in his cell.

¶9 We find no error by the trial court in ruling that the conduct of the DOC officials did not impermissibly intrude on private communications between Rotondo and his counsel. DOC screened Rotondo's legal materials and seized contraband to maintain security in the prison pursuant to its policy. Prison officials may check material from counsel for contraband without depriving inmates of their constitutional rights. *Wolff v. McDonnell*, 418 U.S. 539, 575-77 (1974). The deputy warden who testified at the evidentiary hearing explained the screening process employed by DOC with respect to legal materials and stated that it does not involve reading the materials. No evidence was presented by Rotondo that his legal materials were in fact read by DOC officers or that the prosecution obtained any advantage from the screening of his legal materials. Thus, Rotondo failed to meet his burden of proving any impermissible intrusion on his confidential relationship with counsel. *See Boggs*, 218 Ariz. at 337, ¶ 54, 185 P.3d at 123; *see also State v. Moody*, 208 Ariz. 424, 448, ¶ 77, 94 P.3d 1119, 1143 (2004) ("The defendant bears the initial burden to establish an interference in the attorney-client relationship.").

¶10 We likewise find no merit to Rotondo's argument that he was deprived of meaningful access to the courts due to the seizure of his legal materials. Rotondo complains that on one

occasion the balance of the disclosure documents, minus the contraband, was not returned to him for a period of one week to ten days. "The temporary deprivation of an inmate's legal materials does not, in all cases, rise to a constitutional deprivation." V*igliotto v. Terry*, 873 F.2d 1201, 1202-03 (9th Cir. 1989). Here, the relatively brief period of deprivation occurred months in advance of trial and no showing was made of any prejudice to trial preparation. Absent proof of prejudice, there was no abuse of discretion by the trial court in ruling that dismissal was not warranted.

¶11 Rotondo next argues that his right to due process was violated because the reliability of an inmate who testified at trial was never verified through a reliability assessment in accordance with DOC policy. Rotondo's reliance on *Cato v. Rushen*, 824 F.2d 703 (9th Cir. 1987), as support for this argument is misplaced. The holding in *Cato* is limited to requiring that there be a showing of reliability when hearsay evidence is presented in a prison disciplinary matter from a confidential informant. *Id.* at 705. Here, there was no hearsay presented from a confidential informant; the inmate in question testified at trial.

¶12 There is no requirement that an inmate be tested for reliability before being permitted to testify. *See* Ariz. R. Evid. 601 ("Every person is competent to be a witness except as

otherwise provided in these rules or by statute."); *State v. Hull*, 60 Ariz. 124, 129, 132 P.2d 436, 438 (1942) (holding neither conviction nor bad character precludes witness from testifying). Credibility of witnesses is a matter solely for the trier of fact. *State v. Jeffers*, 135 Ariz. 404, 420, 661 P.2d 1105, 1121 (1983).

¶13 Finally, Rotondo argues that the trial court erred in refusing to instruct the jury on self-defense or defense of other. The trial court denied the request on the grounds there was no evidence to support the instruction. Whether to instruct on justification "is for the trial judge to determine, based on the evidence presented at trial." *State v. Sierra-Cervantes*, 201 Ariz. 459, 461, ¶ 13, 37 P.3d 432, 434 (App. 2001). The decision to refuse a jury instruction is within the trial court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

¶14 A defendant is entitled to a self-defense or defense of other instruction "if there is the slightest evidence of justification for his act." *State v. Gilfillan*, 196 Ariz. 396, 406, ¶ 39, 998 P.2d 1069, 1079 (App. 2000). Our supreme court has defined "slightest evidence" as that "tending to prove a hostile demonstration, which may reasonably be regarded as placing the accused [or other person] apparently in imminent

danger of losing [his or] her life or sustaining great bodily harm." *State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989) (quoting *State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983)). "This 'hostile demonstration' must be some overt act which the defendant perceives as immediately life threatening." *Dumaine*, 162 Ariz. at 404, 783 P.2d at 1196. The trial court, however, should give a justification instruction "only if the defendant can demonstrate the following three elements: (1) he *reasonably believed* he [or a third person] was in immediate physical danger; (2) he acted solely because of this belief; and (3) he used no more force than *appeared reasonably necessary* under the circumstance." *State v. Grannis*, 183 Ariz. 52, 60, 900 P.2d 1, 9 (1995) (quoting *Dumaine*, 162 Ariz. at 404, 783 P.2d at 1196). When determining whether a justification instruction is required, we examine the defendant's evidence and any other evidence that might support the claim of self-defense or defense of other, even if the evidence is in conflict on this issue. *Gilfillan*, 196 Ariz. at 406, ¶ 39, 998 P.2d at 1079.

¶15 The State presented evidence that Rotondo and two other inmates, Steve Dorsch and Joshua Freemon, attacked and stabbed the victim as he sat on a curb. The victim testified that Dorsch and Freeman broke off the attack before the guards responded, but Rotondo continued to stab him as he lay on the

ground even after the guards used pepper spray to stop the assault.

¶16 Dorsch pled guilty to facilitation for his role in the assault and was called as a witness for the defense. Dorsch testified that he attacked the victim because he became filled with rage after learning the victim was a child killer. Dorsch further testified that Freemon, who was tried as a co-defendant with Rotondo, had been sitting next to the victim and was accidently stabbed by Dorsch during the attack. Dorsch denied seeing Rotondo.

¶17 Rotondo testified in his own defense and stated that he was "hanging out" when he heard yelling and saw his friend Freemon walking towards him bleeding profusely. As Freemon walked past him, Rotondo saw the victim ten to fifteen feet away. The victim was covered in blood and holding his hands together with blood spurting out. Rotondo testified:

> He was standing there, and he was covered in blood himself. I couldn't tell if he was cut on his hand or not, but I just saw the look in his eyes. It looked like he was coming towards me. That's when I jumped on him and started beating on him.

When asked about the "look in his eyes," Rotondo stated that the victim did not have a "friendly look." After further stating that the victim was a "hard ass" and known for carrying a weapon, his testimony continued as follows:

> A. And he had blood on him, and I just saw one of my friends bleeding. I assumed he was the assailant.
>
> Q. Why not turn and walk away?
>
> A. I wasn't going to turn my back on a friend. I ain't going to let that go unpunished.
>
> Q. What happened then?
>
> A. I jumped on him, started beating on him, took him to the ground and kept going. After that, I really don't remember much after that.

Rotondo never testified that he believed that either he or Freemon were in imminent danger at the time he attacked the victim. Instead, Rotondo acknowledged that after seeing the victim walking towards him holding his hands bleeding, he simply lost control and went into a rage. When asked what was on his mind at the time, Rotondo stated, "I wanted to beat the crap out of him." Under these circumstances, there was no error by the trial court in refusing to give a justification instruction.

¶18 We affirm Rotondo's convictions and sentences.

/s/
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/
JON W. THOMPSON, Judge

/s/
PATRICK IRVINE, Judge