DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-0853
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
EDWARD LOUIS NICKEL, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-152269-001 DT

The Honorable George H. Foster Jr., Judge

REVERSED AND REMANDED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Eleanor L. Miller — Phoenix
Attorney for Appellant

S W A N N, Judge

¶1 Edward Louis Nickel ("Appellant") appeals his convictions of one count of Aggravated Assault in violation of A.R.S. § 13-1204(A)(2) and (C), a class 2 dangerous felony, and a second count of Aggravated Assault in violation of A.R.S. § 13-1204(A)(5)[1], a class 6 felony. His appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

¶2 Former appellate counsel for Appellant searched the record and maintained that he could find no arguable question of law that was not frivolous. Appellant was given an opportunity to file a supplemental brief *in propria persona* and did not do so. Counsel requested that we search the record for fundamental error. After reviewing the record, we ordered additional briefing pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988).[2] For the reasons that follow, we reverse Appellant's convictions and sentences.

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[1] The relevant subsection has since been renumbered as A.R.S. § 13-1204(8)(a). 2007 Ariz. Sess. Laws, ch. 47, § 1 (1st Reg. Sess.). No changes material to this decision have been made.

[2] The deadline to submit the additional briefing was set for September 15, 2009. Appellant's first appellate counsel failed to submit a brief, and on September 22, 2009, we granted Appellant's motion for new counsel. Briefing was completed on January 28, 2010, and oral arguments were heard on March 3, 2010.

FACTS AND PROCEDURAL HISTORY

¶3 On the evening of August 6, 2007, Appellant and his wife ("Mrs. Nickel") argued. At approximately 7:15 p.m. Mrs. Nickel left the house, leaving Appellant lying on the floor holding a black handgun to his head.

¶4 Nearly two hours later, Mrs. Nickel called 911. She was instructed by the police to drive back home and meet the officers down the street from her house.

¶5 Officer Webbe of the Phoenix Police Department responded to what was initially a "hot call, which is in progress or an emergency call," and began to drive toward the Nickel residence. En route, Officer Webbe received information that correctly stated the "incident where the subject had a gun to his head" had "actually happened hours earlier." He arrived before Mrs. Nickel did, and was met by Officer Recker and Officer Reed. Lieutenant Zeiner was the last of the initial officers to arrive.

¶6 After Mrs. Nickel arrived, the officers asked about the argument earlier in the evening and inquired into Appellant's mental state. Officer Reed tried multiple times to contact Appellant by phone, but he did not leave a message. Mrs. Nickel telephoned Appellant "because [she] was very frightened that he might have pulled the trigger." Appellant did not answer any of the phone calls.

¶7 Because they could not contact Appellant by telephone, the officers decided to contact him at the residence "to see if he was okay." The officers told Mrs. Nickel that they needed to enter the house, and she provided Lieutenant Zeiner with her house keys and her garage door opener. The purpose for the visit was to determine whether Appellant was alive, and if so, what his mental state was.

¶8 Lieutenant Zeiner opened the garage door and unlocked the interior door leading into the laundry room inside the house. After he opened the door, the security alarm began beeping. As the alarm sounded, Lieutenant Zeiner called into the house announcing, "Phoenix police . . . come to the door, we need to talk to you." Lieutenant Zeiner was armed and at "low ready . . . just in case [Appellant] came around the corner in an aggressive manner with a handgun."

¶9 Unarmed and wearing only boxer shorts, Appellant, who appeared to have been sleeping, approached the doorway to the laundry room and asked, "What the hell's going on?" Lieutenant Ziener re-holstered his weapon, having determined that "this was the perfect scenario" because Appellant was "unarmed [and] he was within six, seven feet" of him. Lieutenant Zeiner explained to Appellant that his wife had called the police, and that they were concerned about his welfare and wanted to talk with him. Appellant then disengaged the alarm and told Lieutenant Zeiner

and Officer Webbe to "get the F--- out of his house, and [that] he didn't want to talk to [them]." Appellant turned around and walked farther into his house.

¶10 Believing he "didn't have the luxury of leaving," Lieutenant Zeiner felt compelled to enter the house because he had to "detain [Appellant]" for the safety of both Appellant and himself. Lieutenant Zeiner "grabbed onto the back of [Appellant's] boxer shorts in an attempt to keep him from going back further into the house." Appellant continued to walk with Lieutenant Zeiner holding on to his boxer shorts. After several steps, Appellant "swung around and struck Lieutenant Zeiner in the torso." Lieutenant Zeiner stumbled back and Officer Webbe attempted to grab Appellant, but Appellant eluded his grasp. Appellant then started to "trot" to the back bedroom, and Officer Webbe attempted to disable Appellant with his Taser. Because the probes from the Taser did not land on Appellant, the Taser was ineffective and Appellant continued running toward the back bedroom.[3]

¶11 Appellant entered his bedroom and went to the far side of the bed where the officers could not see and reached down and picked up a rifle. Appellant pointed the rifle at the officers, who were standing near the doorway of the bedroom. The officers

[3] While trying to reload the Taser, Officer Webbe shocked himself, which caused him to drop the weapon.

responded by firing a total of nine rounds at Appellant -- none of which hit him. Soon thereafter, the officers exited the Nickel residence. A SWAT team was called in to resolve the incident, and eventually Appellant exited the house and was taken into custody.

¶12 On August 20, 2007, Appellant was indicted on two counts of Aggravated Assault. One count was later amended to include an allegation of dangerousness.

¶13 On the third day of trial, after Officer Webbe finished testifying, a juror submitted the following question: "Was it illegal for Mr. [Nickel] to turn his back to the officers and walk away?" The following exchange occurred between the court, the prosecutor, and defense counsel:

> THE COURT: My inclination is not to give that because the witness isn't qualified to answer it.
>
> DEFENSE COUNSEL: I think it's more appropriate for an instruction.
>
> THE COURT: You mean a jury instruction?
>
> THE STATE: I don't think so.
>
> DEFENSE COUNSEL: Terry Stops, Miranda.
>
> THE COURT: But that's not the situation.
>
> THE STATE: That's not going on at all.
>
> DEFENSE COUNSEL: He's not required to – the person is not required to talk to police officers unless, you know, they're under arrest. He doesn't have to talk to them.

THE COURT: But that's not what the question is. Read the question. It's not relevant. It's not – hang on. Listen. It's not relevant and it's confusing to the issue, as far as I'm concerned.

This isn't a Terry Stop situation where that's an instruction. We can talk about that later, but this question is saying the defendant did something wrong. It only becomes relevant by turning his back.

DEFENSE COUNSEL: Well, I agree that this witness is not qualified to answer that question, but I'll probably be requesting – I'll put it in writing, but I'll request a jury instruction on that.

¶14 On the fifth day of trial, during the cross-examination of an Officer Thackeray -- an officer with 27 years of experience -- a bench conference was held and the following exchange occurred:

DEFENSE COUNSEL: The jury asked a question earlier if a defendant is obligated to speak to the police.

THE COURT: Why is that relevant?

DEFENSE COUNSEL: Because the jury asked about it.

THE COURT: But that doesn't mean it's relevant.

THE STATE: I agree.

. . . .

THE COURT: Why is it relevant? Just because a juror asks, it doesn't make it relevant.

DEFENSE COUNSEL: I think the jury is entitled to know the law on whether or not an individual is required to talk to the police, and that when Mr. Nickel didn't talk to the police, he wasn't violating any law. There was no wrongdoing in not talking to the police officer.

. . . .

> DEFENSE COUNSEL: . . . It was a jury question, and we didn't answer it at the time because [the witness] was not qualified to answer that question, so I'm attempting to answer that question with this witness so that the jury knows that Mr. Nickel was under no legal obligation to talk to police officers.
>
> I think they were referring to police officers that were coming into his home, but I think they're entitled to know the law. I'm just going to answer that question with him and move on.
>
> THE COURT: I still don't understand why that's relevant here. . . .

¶15 A jury found Appellant guilty of both counts of Aggravated Assault, and made a special finding of dangerousness as to count 1. Appellant was sentenced to 10.5 years imprisonment as to count 1, with a concurrent one year sentence of imprisonment as to count 2. The court denied Appellant's motion for clemency.

¶16 Appellant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010) and 13-4033(A)(1).

DISCUSSION

¶17 In our view, this case presents a single issue for review: did the trial court err when it failed to address the juror's question -- whether it was legal for Appellant to turn and walk away from the officers? Perceiving a colorable question, we ordered and the parties filed additional briefs.

Because such an instruction was relevant to Appellant's self-defense theory (on which the jury was instructed), we conclude there was error.

1. Standard of Review

¶18 Generally, appeals that are filed in accordance with *Anders* and *Leon* are reviewed for fundamental error. But when, as here, we order and receive additional briefing and an adversarial presentation after the submission of a "no-merit" brief, we review issues raised before the superior court for trial error. *See State v. Reimer*, 189 Ariz. 239, 239-40, 941 P.2d 912, 912-13 (App. 1997) (reviewing for trial error after ordering additional briefing). Because the issue whether the trial court erred in failing to address the juror question was raised below, and because it was fully briefed by the parties pursuant to our *Penson* order, we review this issue for abuse of discretion.[4] *See State v. Anderson*, 210 Ariz. 327, 343, ¶ 60, 111 P.3d 369, 385 (2005) ("A trial court's refusal to give a

[4] As required by Ariz. R. Crim. P. 21.3(c), defense counsel requested that the jury receive an answer to the question whether Appellant legally turned away from the officers -- either from the court itself or through the expert witness testimony of a veteran police officer. While counsel did not subsequently provide a written request for a jury instruction, as he indicated he would, the issue whether the jury should be informed of Appellant's right to refrain from speaking to the officers was squarely before the trial court on multiple occasions. *See, e.g., State v. Romanosky*, 176 Ariz. 118, 120, 859 P.2d 741, 743 (1993).

jury instruction is reviewed for abuse of discretion."); *see also State v. Taylor*, 25 Ariz. App. 497, 499, 544 P.2d 714, 716 (1976) (whether to permit questioning by jurors is left to the discretion of the trial court and will not be reversed absent clear abuse of that discretion).

2. Jury Instructions

¶19 The question whether it was permissible for Appellant to walk away from the officers is answered by black letter law: absent reasonable suspicion of criminal conduct or probable cause that criminal activity is afoot, a person is free to walk away from the police.[5] *See Brown v. Texas*, 443 U.S. 47, 53 (1979); *State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997). There is no suggestion that the officers had the suspicion necessary to detain Appellant, and it is clear as a matter of law that Appellant was free to walk back into his house and decline further contact with the officers.

¶20 The trial court could have succinctly instructed the jury that it was legal for Appellant to turn and walk away from the officers -- either at the time the question was asked,

[5] In his brief submitted in response to our *Penson* order, Appellant contends that the court erred by failing to instruct the jury on the legality of the officers' entry and continued presence in the Nickel residence after Appellant withdrew his consent. We see no error. Under the "emergency aid" exception to the warrant requirement and pursuant to A.R.S. § 13-403(4), a warrantless entry is permissible if an officer is acting under the reasonable belief that another is about to commit suicide.

during defense counsel's cross-examination of Officer Thackeray, or when the court provided its final jury instructions before the jury began its deliberations. *See State v. Ramirez*, 178 Ariz. 116, 126, 871 P.2d 237, 247 (1994) ("[W]hen the jury appears to be confused about a legal issue, and the resolution of the question is not apparent from an earlier instruction, the trial judge has a responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (internal quotation marks omitted)). That the answer to the juror's question was readily apparent, however, does not address the trial court's concern regarding its relevance.

¶21 Pursuant to Ariz. R. Evid. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[6] Appellant argues that the answer to the question whether it was legal for him to turn away from the officers is a fact of consequence to the jury's evaluation of the self-defense instruction. We agree.

¶22 Under Arizona law, the question whether a person lawfully refuses contact with police is clearly "of consequence"

[6] We recognize that an answer to a jury question is not necessarily "evidence." The definition of relevance contained in Rule 401, however, provides a useful measure of the importance of a jury question in the context of the legal framework of the case.

to the issue of self-defense. Pursuant to A.R.S. § 13-404(B)(2), "[T]he threat or use of physical force against another is *not* justified . . . [t]o resist an arrest that the person knows or should know is being made by a peace officer. . . ." (emphasis added). This statutory provision reflects the commonsense understanding that one may properly be subject to physical coercion when lawfully detained by a police officer, and that the use of force in "self-defense" in such a situation would be improper. From the question presented to the court, it appears that the jury was concerned with this very issue.

¶23 By refusing to answer the jury question or to permit defense counsel to question Officer Thackeray concerning Appellant's freedom to retreat unaccompanied into his home, the court deprived the jury of information critical to Appellant's defense. Absent an instruction that expressly explained to the jury that Appellant acted lawfully when he turned from the officers and unambiguously told them to leave, the jury may well have been misled into concluding that Appellant's conduct was unlawful and been understandably loath to find that Appellant acted in self-defense.

¶24 Because the court erred in its refusal to give the requested instruction, we consider whether the error was harmless. *State v. Johnson*, 205 Ariz. 413, 421, ¶ 27, 72 P.3d

343, 351 (App. 2003). Harmless error exists when "we can conclude beyond a reasonable doubt that [the error] did not influence the verdict." *State v. McKeon*, 201 Ariz. 571, 573, ¶ 9, 38 P.3d 1236, 1238 (App. 2002). Because we cannot conclude beyond a reasonable doubt that the verdict was not based on an incorrect conclusion that Appellant unlawfully turned away from the officers, we must reverse. *See Johnson*, 205 Ariz. at 420-21, ¶¶ 26-27, 72 P.3d at 350-51 (reversing a conviction for aggravated assault of a police officer when a jury was improperly instructed on transferred intent).

CONCLUSION

¶25 For the foregoing reasons, we reverse Appellant's convictions and sentences and remand to the trial court for proceedings consistent with this decision.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Judge

/s/
_____
MARGARET H. DOWNIE, Judge