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

STATE OF ARIZONA, Appellee, v. GERALD MCCARD, Appellant.	)	No. 1 CA-CR 08-1005 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-165288-001 DT

The Honorable Janet E. Barton, Judge

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS MODIFIED

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B R O W N, Judge

¶1 Gerald McCard appeals his convictions and sentences for two counts of aggravated assault. For the following reasons, we affirm as modified.

BACKGROUND

¶2 In October 2007, McCard was indicted on three counts of aggravated assault relating to injuries caused to the victim, McCard's wife ("Wife"). The following evidence was presented at trial. On September 29, 2007, after a heated argument, McCard stormed into the living room, where Wife was on the couch. McCard grabbed Wife's leg, pulled her off the couch, and kicked her. She ran into the bedroom and McCard ran after her and pulled a sheet over her head. Wife asked, "What are you doing? I'm your wife." McCard proceeded to hit her, but she was able to get out from under the sheet. She ran to a second bedroom, but McCard followed her and punched her. She then ran into the hallway, and McCard charged after her and kicked her in the stomach. Wife, unsure as to how she "got back in there," managed to make her way back into the second bedroom. McCard slapped her and stated, "I'm going to kill you." McCard threw Wife across the room against a wall, and Wife slid down the wall and landed on their granddaughter's toys. Wife crawled on her hands and knees to get up, but McCard kicked her again causing Wife to fall back down. McCard picked Wife up by her arms and threw her back down onto the ground. McCard also hit Wife over

the head with a picture, and continued to hit her using the picture's wood frame. Wife told McCard to "get out," and McCard started to pack his bags. McCard left the apartment and Wife locked the door behind him.

¶3 Later that evening, police responded to a 9-1-1 call from a neighbor and found McCard "walking back and forth on the sidewalk located in front of the apartment." McCard told police that he and his wife were "just arguing" and that he had been locked out of the house. Wife opened the door to the apartment and police noticed she had "what appeared to be blood all over [her t-shirt]." Wife later informed police that her "husband beat [her] up." She suffered injuries to her face, legs, breasts, head, ears, back, hands, and feet.

¶4 A five-day jury trial commenced in September 2008. On the first day of trial, McCard moved to sever counts one and two from count three. The court granted the motion.[1] The jury ultimately found McCard guilty on count one and guilty of the lesser included offense of simple assault on count two. McCard later pled guilty to count three.

¶5 The court sentenced McCard to a term of 15 years of incarceration on count one, and 395 days on count two, to be

[1] Counts one and two were related to the incident that occurred September 29, 2007, and count three related to an incident that occurred on September 16, 2007.

served concurrently. The court further imposed a six-year sentence as to count three, also to be served concurrently with count one. The court gave McCard credit for 395 days of presentence incarceration for each count.[2]

DISCUSSION

¶6 McCard argues that the trial court's failure to *sua sponte* instruct the jury on self-defense denied him the right to a fair trial and therefore constituted fundamental error. We disagree because McCard invited the alleged error.

¶7 The purpose of the invited error doctrine is to "prevent a party from injecting error into the record and then profiting from it on appeal." *State v. Logan*, 200 Ariz. 564, 566, ¶ 11, 30 P.3d 631, 633 (2001) (internal quotations and citation omitted). Given that purpose, we look to the source of the error, which must be the party who urges the error on appeal. *Id.* When an error is invited, "we do not consider whether the alleged error is fundamental, for doing so would run counter to the purposes of the invited error doctrine." *Id.* at ¶ 9.

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[2] In November 2008, the court corrected the sentencing minute entry to reflect a sentence of 365 days of incarceration on count two, with 365 days of presentence incarceration credit. On this record, and consistent with the position of both parties on appeal, we find that the trial court's original calculation of 395 days was correct. *See* Arizona Revised Statutes ("A.R.S.") section 13-4037 (2010).

¶8 Here, we first note that McCard did not list justification as a defense; rather, he merely asserted insufficiency of the State's evidence as to all elements of the alleged offense. At the beginning of trial, McCard's counsel stated that there were no objections to the proposed jury instructions. Defense counsel also did not request that a self-defense instruction be added to the final jury instructions, nor did she object to the instructions as written. Those facts alone may not constitute invited error; however, the record also indicates that McCard's counsel specifically informed the trial court she was not asserting a self-defense claim. During cross-examination of Wife, McCard's counsel asked if she had chased her husband around with a knife. Wife denied that she had a knife "[o]n September 29th." At the end of that day of trial, the State suggested that defense counsel was trying to give the jury the impression that this was a self-defense case. In response, McCard's counsel stated that she had "not in[dicated] in any way, shape or form that this is a self-defense claim. In fact, *it isn't a self-defense claim*." (Emphasis added.) She further emphasized that "I'm not intimating that this is a self-defense claim."

¶9 On this record, the alleged error relating to the trial court's failure to *sua sponte* give a self-defense instruction was affirmatively invited by McCard and therefore he

is precluded from raising the issue on appeal. *See State v. Musgrove,* 223 Ariz. 164, 167, ¶ 9, 221 P.3d 43, 46 (App. 2009) (finding the invited error doctrine applied when defendant expressly informed the court that he did not want a jury instruction on a lesser included offense, and he agreed with the prosecution that the evidence did not support such an instruction); *see also State v. Islas*, 132 Ariz. 590, 591, 647 P.2d 1188, 1189 (App. 1982) (recognizing that a party who contributes to an error at trial cannot complain of it on appeal); *U.S. v. Frank*, 599 F.3d 1221, 1240 (11th Cir. 2010) ("[W]hen a party agrees with a court's proposed instructions, the doctrine of invited error applies, meaning that review is waived even if plain error would result.").

¶10 McCard also argues that the sentencing minute entry should be corrected as to count two to reflect the maximum sentencing allowed under the law. On that count, the jury found McCard guilty of a class 2 misdemeanor, for which the maximum sentence is four months. *See* A.R.S. § 13-707(A)(2) (2010). At sentencing, the court stated, "[w]ith respect to count 2, which was the simple assault, a Class 2 misdemeanor, I will give him credit for time served. He does have 395 days of presentence incarceration." The sentencing minute entry, however, indicates that the sentence for count two is 395 days. The State concedes this is an illegal sentence because it exceeds four months. We

are obligated to correct an illegal sentence, A.R.S. § 13-4037(A) (2010), and therefore we amend the sentencing minute entry to reflect a four-month sentence, with credit given for an equal amount of presentence incarceration.

CONCLUSION

¶11 For the foregoing reasons, we affirm McCard's convictions and his sentence on count one. We also affirm his sentence on count two as modified herein.

/s/
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
JON W. THOMPSON, Judge

/s/
SHELDON H. WEISBERG, Judge