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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24**



DIVISION ONE
FILED: 02/24/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

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

STATE OF ARIZONA,)
) No. 1 CA-CR 10-0121
)
 Appellee,) DEPARTMENT A
)
 v.) **MEMORANDUM DECISION**
)
 RAYMOND GOLDEN HARRISON,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
)
 _____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-129914-001DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and
Joseph T. Maziarz
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Kathryn Petroff, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Defendant, Raymond Golden Harrison, appeals from his conviction for one count of aggravated assault, a class three felony. For reasons set forth more fully below, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 On May 11, 2009, defendant was indicted on one count of aggravated assault, a class three dangerous felony. The State also alleged that defendant had seven historical prior felony convictions. The following relevant facts were presented at trial.

¶3 On May 1, 2009, A.J. was at the Trunk Space, a music venue for local musicians, playing the piano and singing. At approximately nine o'clock that evening, A.J. walked outside into the parking lot and saw defendant "confronting" one of the Trunk Space owners, A.J.'s friend S.C. A.J. observed that defendant was talking to S.C. in an "aggressive tone" and standing very close to her in a "confrontational manner." A.J. also noticed that S.C. appeared apprehensive.

¶4 A.J. approached defendant and asked "What is going on?" Although defendant responded, A.J. was unable to determine what he said and A.J. noticed that defendant smelled of alcohol. After defendant continued speaking indiscernibly, A.J. suggested

¹ We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

that defendant leave the premises. Indeed, A.J. asked defendant to leave repeatedly. After numerous verbal requests, A.J. placed his arm on defendant's shoulder and started to move defendant toward the street. Defendant responded by slapping A.J.'s arm away and saying "Don't touch me."

¶15 A.J. again asked defendant to leave and again tried to physically move him and a struggle ensued. Defendant pushed A.J. and A.J. pushed defendant. A.J. attempted to push defendant away from Trunk Space toward the street. The "scuffle" continued and defendant pulled out a knife and began waving it around. At some point, another person intervened and walked defendant over to a nearby bar.

¶16 After the struggle ended, A.J. looked down and saw that his shirt was cut and his arm was bleeding. S.C. called for emergency assistance and a few moments later police officers and other emergency personnel responded to the scene. Although a paramedic informed A.J. that he could go to the hospital to have his wound stitched, A.J. opted to just have it treated and bandaged on-site.

¶17 After A.J.'s wound was treated, a police officer approached him and showed him a knife. A.J. identified the knife as the weapon defendant was wielding.

¶18 A.J. testified that he had lingering pain and was not able to play some musical instruments for about a month after

the incident, but otherwise his wound healed fine. A.J. also testified that he had no weapons the night of the incident.

¶9 A jury found defendant guilty as charged. At the January 22, 2010 sentencing hearing, the trial court found the state had proven that defendant has five historical prior felony convictions and sentenced defendant to a presumptive term of 11.25 years imprisonment.

¶10 Defendant timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033 (2010).

DISCUSSION

I. Denial of Access to a Pen

¶11 Defendant contends that the trial court erred by denying him access to a pen. Specifically, defendant argues that "the restraint of being forced to use a markedly short pencil, sans eraser, impinged on [defendant's] due process right to be presumed innocent, possibly more so than the wearing of prison garb, because [defendant] was the only person in the courtroom not permitted to use a pen (including not only the judge, staff, counsel, gallery, but the jurors themselves)."

¶12 On the first day of trial, before voir dire proceedings had commenced, defense counsel informed the court that defendant's detention officers had requested that defendant

be permitted to write only with a miniature pencil. Defense counsel argued that limiting defendant to such a writing instrument "highlights to a jury that [defendant] is in custody." The trial court asked Sergeant D.P. whether he believed allowing defendant to have a pen presented a security issue and he responded in the affirmative. The trial court then stated that it would defer to the Maricopa County Sheriff's Office determination that a pen presented a security issue and ordered that defendant only use a short pencil in the courtroom. Defense counsel filed a motion for reconsideration, again asserting that limiting defendant to a miniature pencil "essentially placed [defendant] in the position of announcing his custody to the jury." The trial court denied the motion for reconsideration, reaffirming that it was deferring to the courtroom deputies' assessment that a pen presented a "safety issue . . . especially given the charge with regard to the defendant."

¶13 "Matters of courtroom security are left to the discretion of the trial court." *State v. Davolt*, 207 Ariz. 191, 211, ¶ 84, 84 P.3d 456, 476 (2004). "We will uphold a trial court's decision concerning security measures when the decision is supported by the record." *Id.*

¶14 Citing *Deck v. Missouri*, 544 U.S. 622 (2005), defendant argues that the court's order limiting defendant to

the use of a shortened pencil violated his rights under the Due Process Clause of the Fourteenth Amendment. We are not persuaded. In *Deck*, in the course of determining whether the Due Process Clause prohibits the routine use of physical restraints visible to a jury during the penalty phase of a capital case, the Court discussed the reasons that underlie the rule that a criminal defendant has a right to remain free of physical restraints that are visible to a jury absent "essential state interests such as physical security, escape prevention, or courtroom decorum." *Id.* at 628. In surveying its previous opinions, the Court noted that it had previously held that the deployment of four uniformed state troopers as security in the first row of the courtroom's spectator section is not "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Id.* (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)). Neither do we perceive that requiring a defendant to use a pencil to take notes during trial has an obvious tendency to single him out as a particularly dangerous individual in the minds of reasonable jurors such that the court would be required to articulate "essential state interests" before prohibiting his use of a pen. We further note that a defendant's ability to communicate with counsel is not

appreciably lessened when he is required to use a shortened pencil rather than a pen.

¶15 Here, the trial court specifically questioned a detention officer about permitting defendant to use a pen and was told that the detention officers believed that use of such an implement presented a significant security risk. In view of the officers' assessment, and taking into account defendant's charged conduct of stabbing the victim with a knife, as did the trial court, we cannot say that the court abused its discretion in finding that allowing defendant to use a pen presented a reasonable security concern.

II. Jury Instruction

¶16 Defendant argues that the trial court erred in instructing the jury on self-defense. Specifically, defendant asserts that the given instruction misstated the "amount of evidence necessary to find self-defense."

¶17 During settlement of the jury instructions, the prosecutor objected to an instruction on self-defense, arguing that the evidence at trial did not support the instruction because defendant used a deadly weapon, that is deadly force, in response to mere pushing. Defense counsel countered that the evidence that A.J., not defendant, first used force was sufficient to warrant the instruction. In deciding to give the

instruction, the trial court noted that there was evidence that A.J. "was the primary instigat[or]."

¶18 The trial court gave the following instruction on justification for self-defense:

A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:

1. A reasonable person in the situation would have believed that physical force was immediately necessary to protect against another's use or apparent attempted or threatened use of unlawful physical force; *and*
2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the situation.

A defendant may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force. Self-defense justifies the use or threat of physical force or deadly physical force only while the apparent danger continues, and it ends when the apparent danger ends. The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of physical force or deadly physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present. Actual danger is not necessary to justify the use of physical force or deadly physical force in self-defense.

You must decide whether a reasonable person in a similar situation would believe that:

1. Physical force was immediately necessary to protect against another's use, attempted use, threatened use, apparent attempted use,

or apparent threatened use of unlawful physical force; or

2. Deadly physical force was immediately necessary to protect against another's use, attempted use, threatened use, apparent attempted use, or apparent threatened use of unlawful deadly force.

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

If evidence was presented that raises the defense of self-defense for Count One aggravated assault or the lesser included offense of assault, then the State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. (Emphasis added).

¶19 We review a trial court's decision to give a particular instruction for an abuse of discretion, *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003), but review de novo whether the jury instructions properly state the law. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). In determining whether an instruction correctly states the law, we review the instructions given by the court as a whole. *State v. Cox*, 217 Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007). Thus, "[a] case will not be reversed because some isolated portion of an instruction might be misleading." *State v. Guerra*, 161 Ariz. 289, 294, 778 P.2d 1185, 1190 (1989).

¶20 Defendant objected to the inclusion of the "If evidence was presented that raises the defense of self-defense"

language in the trial court, claiming that "it would lead to . . . confusion and . . . impermissible burden-shifting," and he raises the same claim on appeal. We find this claim without merit.

¶21 The defense instruction, as given, clearly states the circumstances in which a person is justified in using force. As the trial court instructed, it was the province of the jury, as the fact-finder, to determine whether the evidence presented at trial demonstrated that the circumstances defendant encountered warranted his level of force. Contrary to defendant's claim, the instruction, read as whole, does not suggest that the defendant bears the burden of proving beyond a reasonable doubt that he legally acted in self-defense. Instead, the jury was correctly instructed to determine whether they believed defendant acted reasonably and, if so, then defendant was presumed to have acted lawfully unless the State presented evidence beyond a reasonable doubt that his conduct was not justified. See *State v. Duarte*, 165 Ariz. 230, 232, 798 P.2d 368, 370 (1990) (instructing trial courts to provide the following instruction for self-defense: "If evidence was presented that raises the issue of self-defense, then the state has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. If the state fails to carry this burden, then you must find the defendant not guilty

of the charge"). We find no error in the self-defense instruction provided to the jury.

III. Prosecutorial Misconduct

¶22 Defendant contends that the State engaged in prosecutorial misconduct during its closing argument by misstating the law governing self-defense. He characterizes the State's explanation of the law as improperly informing jurors that "deadly physical force in defense of oneself [i]s never available to someone being pushed (toward a busy street, the edge of a rooftop, a cliff), as long as the aggressor did not have any weapons, hidden or otherwise."

¶23 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process,'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)), and was "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *State v. Rosas-Hernandez*, 202 Ariz. 212, 218-19, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002) (quoting *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)). Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby

denying defendant a fair trial." *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 382 (2005) (citation omitted).

¶24 During closing, the prosecutor argued, in relevant part:

Let's talk about self-defense. And that's on Page 6 of your jury instructions. And it's a long instruction. It requires a lot of careful attention. And the State has to prove beyond a reasonable doubt that the Defendant, in fact, was not acting in self-defense. Well, if you look at this instruction and if you look at the first paragraph, I'm going to start with that, under prongs one and two, a Defendant may use deadly, physical force in self-defense only to protect against another's use or apparent attempted use or threatened use of deadly physical force. In other words, you cannot bring a knife to a fist fight and you cannot bring a knife to a shove match. The law does not provide for that.

. . . .

Pushing this knife against someone is capable of creating substantial risk of death or serious physical injury. When someone is pushing you and they don't have any weapons, you're not permitted, under the law, to use deadly, physical force or threaten to use deadly, physical force with a weapon like this.

¶25 Defendant did not object to these arguments in the trial court, so we review for fundamental error only. *State v. Roque*, 213 Ariz. 193, 224, ¶ 127, 141 P.3d 368, 399 (2006). Prosecutorial misconduct constitutes fundamental error only when it is "so egregious as to deprive the defendant of a fair trial." *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991).

¶126 "Wide latitude is given in closing arguments and counsel may comment on the evidence and argue all reasonable inferences therefrom." *State v. Amaya-Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990). Here, the prosecutor directed the jury to the instruction on self-defense and then, arguing the evidence presented at trial, stated that defendant was not justified in using deadly physical force in a fistfight or shoving match. Although defense counsel, on appeal, has noted certain circumstances in which use of deadly physical force may be justified against a person who does not possess a weapon, such as when being pushed off a cliff, no such circumstance was presented at trial. A.J. admittedly attempted to move defendant from the Trunk Space entrance toward the street, but defendant has not cited, and our review of the record has not revealed, any evidence to suggest that A.J. was attempting to push defendant into traffic. Moreover, as noted above, the trial court correctly instructed the jury. Even if the prosecutor's statement could reasonably be characterized as an improper statement of the law, we presume the jury followed the trial court's instructions in reaching its verdict. See *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Therefore, defendant's claim of prosecutorial misconduct is without merit.

CONCLUSION

¶27 For the reasons stated above, we affirm defendant's conviction and sentence.

_/s/ PHILIP HALL, Presiding Judge

CONCURRING:

_/s/ JON W. THOMPSON, Judge

_/s/ LAWRENCE F. WINTHROP, Judge