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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 09/27/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

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

STATE OF ARIZONA,

Appellee,

v.

ROGER NORMAN GARFIELD,

Appellant.

1 CA-CR 10-0323

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(Not for Publication -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. CR2007-006317-001 DT

The Honorable Cari A. Harrison, Judge

VACATED AND REMANDED

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I R V I N E, Presiding Judge

¶1 Roger N. Garfield appeals his conviction and sentence
for manslaughter, a dangerous felony. For the following reasons,

we vacate the denial of Garfield's motion for new trial and remand to the superior court for redetermination of the motion.

FACTS AND PROCEDURAL HISTORY

¶2 Garfield was charged with one count of second degree murder, a class 1 dangerous felony, for shooting a homeless man who entered his antique shop and accosted him. Garfield claimed he felt threatened and shot the victim in self-defense.

¶3 At the close of the evidence, Garfield requested a jury instruction stating that he had no duty to retreat before using deadly force to prevent a crime pursuant to Arizona Revised Statutes ("A.R.S.") Section 13-411 (2010). At the time, it was unclear whether A.R.S. § 13-411 applied only to residences, so the State objected on this ground. The trial court did not give this instruction and instead instructed the jury on self-defense under A.R.S. § 13-404 (2010) and -405 (Supp. 2010) (use of deadly force), and defense of a third person, § 13-406 (2010). The jury convicted Garfield of manslaughter and found it to be a dangerous offense.

¶4 Garfield filed a motion for new trial, arguing the trial court failed to instruct the jury under § 13-411 because proposed Senate Bill ("SB") 1449 would make it applicable to his case, and it was warranted under the evidence and theory presented. He further argued that the jury should also have been given instructions (1) on the definition of "unlawful physical

force"; (2) on "sudden quarrel" manslaughter under A.R.S. § 13-1103(A)(2) (2010); and (3) on "dangerous [offense]" as used in the verdict forms. The State responded arguing only that Garfield's motion for a new trial was untimely, and there was sufficient evidence to support the conviction.

¶15 Meanwhile, SB 1449 passed, making the 2006 amendments of certain self-defense statutes in SB 1144 retroactively applicable to Garfield's case. 2009 Ariz. Sess. Laws, ch. 190 (1st Reg. Sess.). In addition to de-classifying self-defense as an affirmative defense, A.R.S. § 13-103 (2010), and shifting the burden to the State to disprove a self-defense claim, A.R.S. § 13-205 (2010), SB 1144 amended § 13-411 to justify the use of force to prevent certain crimes at a person's place of business. 2006 Ariz. Sess. Laws, ch. 199 (2nd Reg. Sess.).

¶16 At a hearing in August 2009, the prosecutor conceded that Garfield was entitled to a new trial, stating: "Your Honor, the law is pretty clear. I think it's retroactive to that day. I don't think the Court has any other choice but to reset it for a new trial." The trial court replied,

I will go ahead and grant the motion for new trial based on the subsequent change in the law, and *there may be some other issues that I should have addressed at trial and given some different jury instructions. We can obviously deal with that at the time of the next trial.*

(Emphasis added.)

¶17 Prior to the date of the new trial, a different panel of this Court declared in *State v. Montes*, ("Montes I"), 223 Ariz. 337, 223 P.3d 681 (App. 2009) that SB 1449 was unconstitutional. Based on this, the State moved to vacate the new trial, reinstate the conviction and proceed with sentencing. Garfield objected arguing that *Montes I* was incorrect and would soon be overturned on appeal. Garfield also reminded the court that there were other issues in his motion that the court chose not to address because of the understanding that there would be a new trial. The State responded that the time for Garfield to raise those issues had passed, "a lot" of his motion was based on the retroactivity of the amendment, and the change in law disposed of those issues. The trial court stated, "[T]hat's also my recollection of what the arguments went to and the issue that was involved there." Stating, "[A]s before, I think, I am bound by the law as it stands," it reinstated the conviction.

¶18 Garfield was sentenced to a mitigated term of seven years imprisonment. He timely appeals. Subsequently, the Arizona Supreme Court overruled *Montes I* and held that SB 1449 was constitutional. *State v. Montes* ("Montes II"), 226 Ariz. 194, 245 P.3d 879 (2011). Based on this, Garfield filed a motion requesting an expedited ruling for immediate remand to the trial court. We accepted this as a motion for an accelerated appeal.

DISCUSSION

¶9 Garfield argues that *Montes II* is dispositive of this case and requires, at minimum, this Court to grant him a new trial. We disagree. In *Montes II*, the Arizona Supreme Court only addressed the constitutionality of SB 1449. 226 Ariz. at 195, ¶ 1, 245 P.3d at 880. Concluding that it was constitutional, the Court expressly overruled *Montes I*, vacated the convictions and sentences, and remanded to the superior court for further proceedings. *Id.* at 198, ¶ 19, 245 P.3d at 883.

¶10 Because it did so summarily, however, we do not read *Montes II* as creating an entitlement to a new trial or any other form of post-conviction relief simply because of a change in the law made retroactively applicable to Garfield's case. In *Montes II*, the Arizona Supreme Court specifically noted that it was not addressing "how SB 1145, as amended by SB 1449, might apply to post-conviction proceedings under Rule 32, Arizona Rules of Criminal Procedure." *Id.* at 197 n.3, ¶ 16, 245 P.3d at 882 n.3.

¶11 Nor does *Montes II* require, as the State argues, fundamental error and resulting prejudice before a conviction may be vacated and remanded for further proceedings. We agree with Garfield that such an approach ignores the crucial fact that the trial court initially granted a motion for new trial because everyone, including the prosecutor, believed that Garfield was entitled to a new trial. The new trial was vacated

only because the State later pointed out that *Montes I* held SB 1449 to be unconstitutional. Because that decision has been reversed, the question is what the trial court would have done absent all the perceived changes in the law.

¶12 Garfield argues the trial court believed his use of deadly force was justified under A.R.S. § 13-411. Nothing in the record supports this contention. Although all the parties agreed that Garfield was entitled to a new trial due to a "change in the law," there is no indication that it was because of the evidence Garfield presented. Rather, it appears from the statements of the prosecutor and the trial court that they simply believed there was no discretion to act otherwise. In agreeing to a new trial, the prosecutor stated, "I don't think the Court has any other choice but to reset it for a new trial." When the trial court later vacated the new trial, it explained: "[A]s before, I think, I am bound by the law as it stands." Under these circumstances, it appears the trial court relied on *Montes I* to conclude it had no discretion.

¶13 The decision to grant or deny a motion for new trial is within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *Matos v. City of Phoenix*, 176 Ariz. 125, 130, 859 P.2d 748, 753 (App. 1993). When the trial court "'in effect refuses to exercise its discretion,' there is no reason for the appeals court to defer to the trial

court's judgment." *State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996) (citation omitted) (vacating sentence and remanding because the trial court refused to exercise its discretion). "[I]f the record is unclear whether the judge knew he had discretion to act otherwise, the case should be remanded" *State v. Garza*, 192 Ariz. 171, 176, ¶ 17, 962 P.2d 898, 903 (1998) (remanding for sentencing where the sentence was within the appropriate range, but the trial court mistakenly believed it had no discretion).

¶14 Here, the positions adopted by the prosecutor and the changes in the law appear to have caused confusion about the trial court's discretion. Because the State had conceded to a new trial without appealing, this Court is inclined to reinstate that order. We decline to do so, however, because it is unclear from the record why the motion was granted in the first place. Under these circumstances, the more appropriate remedy is to remand for further proceedings. *Id.* In its discretion, the trial court may consider the State's initial concession to a new trial.

¶15 A remand is also appropriate because other issues raised in Garfield's motion for new trial remain unresolved. At the hearing on Garfield's motion, the trial court expressly acknowledged: "[T]here may be some other issues that I should have addressed at trial and given some different jury

instructions." Because the trial court was granting a new trial, it never addressed those issues.

CONCLUSION

¶16 For these reasons, we vacate the denial of Garfield's motion for new trial and remand to the trial court for a redetermination of the motion.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Judge

/s/

PHILIP HALL, Judge