

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 05-27-2010
PHILIP G. URRY, CLERK
BY: GH

LYDIA CAUDILLO, personal) 1 CA-CV 09-0467
representative of ALFONSO CELAYA,)
for and on behalf of herself,) DEPARTMENT E
)
Plaintiff/Appellant,) **MEMORANDUM DECISION**

v.) (Not for Publication -
) Rule 28, Arizona Rules
) Of Civil Appellate
CITY OF PHOENIX, an Arizona) Procedure)

municipality; LOWELL SPALLA and)
JANE DOE SPALLA, husband and wife)
in their individual capacities,)
HAROLD HURTT and JANE DOE HURTT,)
husband and wife in their)
individual capacities,)
)
Defendants/Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. CV2002-004519

The Honorable A. Craig Blakey, Judge

AFFIRMED

Law Office of David J. Don, PLLC Phoenix
By David J. Don
And

Robbins & Curtin, PLLC Phoenix
By Joel B. Robbins
Attorneys for Plaintiff/Appellant

The Cavanagh Law Firm Phoenix
By Richard J. Woods
Scott A. Salmon

H A L L, Judge

¶1 In this wrongful death case, plaintiff Lydia Caudillo (Caudillo) appeals from the judgment entered after a jury found in favor of defendants City of Phoenix and Lowell Spalla (Spalla). Caudillo contends the trial court committed reversible error in instructing the jury on defendants' justification defense. For the reasons that follow, we find no error and therefore affirm.

BACKGROUND¹

¶2 On or about March 11, 2001, Spalla, a Phoenix police officer, was working off-duty security detail with three other officers outside of a nightclub on 16th Street and Monroe in downtown Phoenix. The four officers were in full police uniform. Sometime around 1:00 a.m., Spalla noticed two women fighting across the street. The fight proceeded westward on Monroe attracting onlookers and additional participants. The fight had a "beehive [kind of] effect"

¶3 Spalla and the other officers followed the fight on foot without announcing their presence because there was "lots

¹ On appeal from a jury verdict, "we view the evidence in the light most favorable to sustaining the verdict." *Gonzales v. City of Phoenix*, 203 Ariz. 152, 153, ¶ 2, 52 P.3d 184, 185 (2002).

of vehicle traffic, . . . lots of people yelling and screaming." As the officers proceeded to follow the fight, they heard a gunshot, "which changed everything." The officers took cover, and Spalla saw Alfonso Celaya (Celaya) "slide" across the hood of a parked car. Immediately after Celaya touched ground on the side of the car away from the fighting, Spalla observed Celaya catch a handgun that was tossed over the car. When Celaya pointed the weapon in the direction of the fight, Spalla, who was about ten yards away, shot and killed him without warning² in order to protect the individuals in the crowd. Eight to ten seconds elapsed from when the officers heard the first gunshot until Spalla shot Celaya.

¶14 Caudillo, Celaya's mother, filed this wrongful death action on March 11, 2002.³ The jury returned a defense verdict, Caudillo appealed, and we vacated and remanded. *Caudillo v. City of Phoenix*, 1 CA-CV 05-0561 (Ariz. App. July 27, 2006) (mem. decision). A second jury trial again resulted in a defense verdict. Caudillo moved for a new trial arguing the

² Expert testimony at trial explained Spalla and the other officers properly did not identify themselves during the incident. Further, Spalla testified that Celaya committed aggravated assault by pointing the gun at the crowd.

³ The complaint also raised allegations of civil rights violations and named additional parties as defendants. These claims were disposed of so that only a negligence claim against Spalla and his employer, the City of Phoenix, remained for trial.

court erred in its instruction to the jury regarding Spalla's justification in using deadly force against Celaya. The trial court denied the motion and this timely appeal followed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION

¶15 Over Caudillo's objection, the trial court instructed the jury pursuant to A.R.S. § 13-410(C)(1) (2010) as follows:

The use of deadly force by a peace officer against another is justified when the peace officer reasonably believes that it is necessary to defend himself or a third person from what the peace officer reasonably believed to be the use or imminent use of deadly physical force. (Instruction No. 11).

¶16 As she did at trial, Caudillo contends that Instruction No. 11 should not have been given because it does not correctly reflect Arizona law regarding a justification defense in a police use-of-force case. Alternatively, Caudillo argues that Instruction No. 11 should have been amended to include a requirement that an officer is only justified in using deadly force in response to "unlawful use or imminent use of deadly physical force."⁴

¶17 We review de novo a challenge to the legal accuracy of jury instructions. *State v. Orendain*, 188 Ariz. 54, 56, 932

⁴ Caudillo argued at trial that Celaya pointed the gun to defend his friend, R.A.

P.2d 1325, 1327 (1997). An instruction will warrant reversal only if it was both harmful to the complaining party and directly contrary to the rule of law. *AMERCO v. Shoen*, 184 Ariz. 150, 159, 907 P.2d 536, 545 (App. 1995).

¶18 Caudillo claims that Instruction No. 11 failed to include the following four elements necessary under Arizona law to find a defendant police officer's use of deadly force was justified: (1) the officer's use of force occurred in the context of making an arrest, detention or preventing an escape; (2) the use of force was necessary to meet those ends; (3) the person subject to the use of force knew police were present; and (4) the arrest or detention was lawful. We find these elements are not applicable to this case.

¶19 When elements (2) through (4) are present, A.R.S. § 13-409 provides a justification defense to a "person" who uses "physical force against another if in making or assisting in making an arrest or detention or in preventing or assisting in preventing the escape after arrest or detention of that other person, such person uses or threatens to use physical force" A.R.S. § 13-409; see A.R.S. § 13-413 (2010). Section 13-409 thus applies to "persons" generally who use physical force in making or assisting in arrests/detentions or preventing escapes.

¶10 Here, Spalla presented evidence that he was a *peace officer* who used *deadly force* in defense of *third persons*. Thus, A.R.S. § 13-410(C)(1) is the more applicable justification statute to this case.⁵ It provides:

The use of deadly force by a peace officer against another is justified pursuant to section 13-409 only when the peace officer reasonably believes that it is necessary . . . [t]o defend himself or a third person from what the peace officer reasonably believes to be the use or imminent use of deadly physical force. A.R.S. § 13-410(C)(1).

Because the court's instruction, *supra* ¶ 5, mirrored § 13-410(C)(1), and Caudillo does not challenge the evidentiary support for the instruction, we discern no error.⁶ See *AMERCO*,

⁵ It is for this reason that Caudillo's reliance on *Weekly v. City of Mesa*, 181 Ariz. 159, 888 P.2d 1346 (App. 1994) is misplaced. That case addressed an issue related to a police officer's use of a canine unit in effectuating an arrest. *Id.* at 161, 888 P.2d at 1348. *Weekly* did not involve an officer's use of deadly force in defense of a third person; thus, any reference to § 13-409 in that case has no applicability here.

Similarly, to the extent Caudillo contends that the jury should have been instructed pursuant to Revised Arizona Jury Instructions (RAJI) (Intentional Torts), at 8 or 10 (4th ed. 2005), she is mistaken. Those instructions also justify a person's use of force or deadly force in preventing another from engaging in certain kinds of conduct or committing enumerated offenses; they say nothing of a peace officer's use of force in defending third persons. RAJI (Intentional Torts), at 8 and 10.

⁶ At trial, Caudillo also argued that the reference to § 13-409 in § 13-410(C) rendered Instruction No. 11 inapplicable because Spalla was not "effectuating an arrest" She does not raise this argument on appeal, thus we do not address it. *Torrez v. Knowlton*, 205 Ariz. 550, 552 n.1, ¶ 3, 73 P.3d 1285, 1287 n.1 (App. 2003) (issue not raised on appeal deemed abandoned). It appears, however, that Spalla was "effectuating an arrest" because his use of deadly force against Celaya

himself (A.R.S. § 13-405) or a third person (A.R.S. § 13-406), it did not include that requirement in A.R.S. § 13-410(C)(1). See *White v. State*, 144 Ariz. 39, 42, 695 P.2d 288, 291 (App. 1985) (noting a court may not make unnecessary additions to a statute); *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) (court cannot enlarge the meaning of words or rewrite a statute that is clear and unambiguous even if its interpretation is harsh or uncompassionate). Accordingly, we find no error in Instruction No. 11 as given by the trial court.

¶13 In any event, the record does not affirmatively reveal that Caudillo was prejudiced by the court's instruction. See *Walters v. First Fed. Sav. & Loan Ass'n*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982) (reversal on basis of error in jury instructions not proper unless prejudice to appellant's substantial rights is affirmatively apparent in the record). We consider closing arguments of trial counsel when determining whether a jury was properly instructed. See *State v. Russell*, 175 Ariz. 529, 533, 858 P.2d 674, 678 (App. 1993). Here, the record on appeal does not contain the transcripts of closing arguments, see ARCAP 11(b), and the record does not otherwise indicate that the trial court prohibited Caudillo's counsel from arguing Spalla unreasonably shot Celaya because Celaya was pointing the gun at the crowd in a lawful manner to defend R.A.

