DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	) No. 1 CA-JV 10-0052
	)
	) DEPARTMENT B
	)
IN RE CARLOS P.	) **MEMORANDUM DECISION**
	)
	) (Not for Publication –
	) Ariz. R.P. Juv. Ct. 103(G);
	) ARCAP 28)
	)
	)
	)

Appeal from the Superior Court in Maricopa County

Cause No. JV175167

The Honorable Jo Lynn Gentry-Lewis, Judge

AFFIRMED

Richard M. Romley, Acting Maricopa County Attorney — Phoenix
By Linda Van Brakel, Deputy County Attorney
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Mesa
By Suzanne Sanchez, Deputy Juvenile Public Defender
Attorneys for Appellant

T I M M E R, Chief Judge

¶1 The juvenile court adjudicated Carlos P. delinquent for threatening or intimidating, in violation of Arizona Revised

Statutes ("A.R.S.") section 13-1202 (2010),[1] and placed him on standard probation. Carlos appeals and argues the court erred in finding him delinquent because his actions were legally justified.

BACKGROUND[2]

¶2 At approximately 11:00 p.m. on October 24, 2009, R.S. saw his godson, Carlos, and other boys knock on a neighbor's door and run away. R.S. went to Carlos's apartment, which he shared with his mother, and knocked on the door. When Carlos opened the door and stepped outside, R.S. confronted him about his behavior. Carlos denied he was involved, spoke harshly to R.S., and then stepped back into the apartment. R.S. followed, words were exchanged, and a physical altercation ensued. Eventually, R.S. "moved out of [Carlos's] way," and Carlos left the apartment. Once Carlos was outside, he yelled that someone needed to call 9-1-1 and then threatened to kill R.S. Although Carlos denied threatening to kill R.S., he admitted threatening to have his friends "mess [R.S.] up" "with punches and stuff."

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[1] We cite to the current versions of the statutes discussed herein as no substantive changes have occurred.

[2] We view the facts in the light most favorable to upholding the juvenile court's order and resolve all reasonable inferences against Carlos. *In re John M.*, 201 Ariz. 424, 426, ¶ 7, 36 P.3d 772, 774 (App. 2001); *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

¶3 The State alleged Carlos committed four delinquent acts, including one count of assault and three counts of threatening or intimidating. After an adjudication hearing, the juvenile court found Carlos delinquent of one count of threatening or intimidating in violation of A.R.S. § 13-1202. The court reasoned that while there were different versions of what transpired between Carlos and R.S., it was "clear" that Carlos threatened R.S. and went "beyond the circumstances that were happening on this particular evening." After the court placed Carlos on probation, this timely appeal followed.

DISCUSSION

¶4 Carlos argues the juvenile court erred by adjudicating him delinquent because his actions were legally justified and therefore did not constitute threatening or intimidating. We review a juvenile court's disposition order for an abuse of discretion but review de novo statutory and legal challenges to the court's disposition. *In re Hillary C.*, 221 Ariz. 78, 79, ¶ 2, 210 P.3d 1249, 1250 (App. 2009); *State v. Martinez*, 218 Ariz. 421, 434, ¶ 59, 189 P.3d 348, 361 (2008).

¶5 Section 13-1202(A)(1), provides, in relevant part, that "[a] person commits threatening or intimidating if the person threatens or intimidates by word or conduct: 1. To cause physical injury to another person or serious damage to the property of another." Carlos does not dispute that his actions

fit this definition. Instead, he maintains that justification defenses set forth in A.R.S. §§ 13-404(A) (2010), -407 (2010), and -411 (2010) immunized him from culpability. "Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. If evidence of justification . . . is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification." A.R.S. § 13-205 (2010). Sections 13-404(A),[3] -407(A),[4] and -411(A)[5] state that a person is justified in threatening to use physical force to the extent that a reasonable person would believe it to be "immediately necessary"

[3] "Except as provided in subsection B of this section, a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force." A.R.S. § 13-404(A).

[4] "A person or his agent in lawful possession or control of premises is justified in threatening to use deadly physical force or in threatening or using physical force against another when and to the extent that a reasonable person would believe it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises." A.R.S. § 13-407(A).

[5] "A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of . . . burglary . . . or aggravated assault." A.R.S. § 13-411(A).

to protect against physical force, criminal trespass, or burglary.

¶6 The juvenile court was warranted in rejecting Carlos's justification defenses. The evidence supports a finding that Carlos's threat was not "immediately necessary" to either prevent R.S. from physically harming Carlos or to compel R.S. to leave the apartment. Carlos threatened R.S. with physical harm after R.S. had "moved out of the way" and Carlos had left the apartment. The record does not reflect that R.S. pursued Carlos or refused to leave the apartment peaceably. Additionally, Carlos admitted that at the time he threatened R.S., someone was restraining R.S. In sum, once Carlos broke contact with R.S., Carlos was not justified in threatening to physically harm R.S. *See State v. Powers,* 117 Ariz. 220, 222, 226-27, 571 P.2d 1016, 1018, 1022-23 (1977) (holding defendant could not use justification defense after fight with the victim ended and "contact ha[d] been broken"); *State v. Buggs,* 167 Ariz. 333, 335, 337, 806 P.2d 1381, 1383, 1385 (App. 1990) (concluding defendant not entitled to self-defense instruction because "after a fight has broken off, one cannot pursue" a person several seconds or minutes later and use physical force "merely because he once feared for his life"). The juvenile court therefore did not err by rejecting Carlos's justification

defenses alleged pursuant to A.R.S. §§ 13-404(A), -407, and -411.

¶7 Carlos also argues the juvenile court erred by failing to find his actions were justified as set forth in A.R.S. §§ 13-417 (2010) and -418 (2010). Because Carlos raises this argument for the first time on appeal, he has waived it absent fundamental error. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To gain relief under a fundamental-error standard of review, an appellant must prove error occurred, the error was fundamental, and the appellant was prejudiced by the error. *Id.* at 568, ¶¶ 23-24, 26, 115 P.3d at 608. Error is fundamental if it reaches the foundation of the appellant's case or removes an essential right to the defense. *State v. McGann*, 132 Ariz. 296, 298, 645 P.2d 811, 813 (1982) (citation omitted).

¶8 Section 13-417(A) provides that "[c]onduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct." Although this provision uses the term "imminent" and the previously described justification statutes use the term "immediate," "the difference . . . does not seem to result in any practical distinction in

the application of the law." *Buggs*, 167 Ariz. at 336, 806 P.2d at 1384. The evidence does not support a conclusion that Carlos was "compelled" to engage in threatening or intimidating and "had no reasonable alternative to avoid imminent public or private injury." A.R.S. § 13-417(A). As stated earlier, Carlos had already left the situation when he issued the threats, and he therefore had the reasonable alternative of continuing to walk away or call for help. We do not discern any error by the juvenile court in failing to apply A.R.S. § 13-417 sua sponte.

¶9 Section 13-418(A), provides, in relevant part, as follows:

> Notwithstanding any other provision of this chapter, a person is justified in threatening to use . . . physical force or deadly physical force against another person if the person reasonably believes himself or another person to be in imminent peril of death or serious physical injury and the person against whom the physical force or deadly physical force is threatened . . . was in the process of unlawfully or forcefully entering, or had unlawfully or forcefully entered, a residential structure . . . .

Although Carlos and R.S. had engaged in a physical altercation, it is unclear who instigated the contact and the nature of the circumstances surrounding the incident. Regardless, no evidence suggests that Carlos reasonably believed himself or his mother to be in "imminent peril of death or serious physical injury." Carlos and his mother both testified that Carlos sustained only

minor injuries to his ear as a result of the altercation, and a police officer testified he did not see any injuries to Carlos that evening. Further, because R.S. is Carlos's godfather and resided in a neighboring apartment, the officer indicated he did not consider that R.S. had trespassed. Additionally, no evidence suggests R.S. forcefully entered the apartment. In short, the evidence did not support a defense under A.R.S. § 13-418(A), and the juvenile court did not err by failing to apply it sua sponte.

CONCLUSION

¶10 For the foregoing reasons, we affirm the juvenile court's adjudication of delinquency and resulting disposition.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Jon W. Thompson, Presiding Judge

/s/
Patricia K. Norris, Judge