DIVISION ONE
FILED: 11/03/2011
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0335
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
ISABEL QUINTERO RODRIGUEZ, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-006502-0001 DT

The Honorable Paul J. McMurdie, Judge

REVERSED AND REMANDED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
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and Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

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Attorneys for Appellant

N O R R I S, Judge

¶1 This timely appeal arises out of appellant/defendant Isabel Quintero Rodriguez'[1] conviction of second-degree murder. Rodriguez argues the superior court incorrectly instructed the jury he, not the State, bore the burden of proving he acted in self-defense. We agree, and because the court's instruction constituted fundamental, prejudicial error, we reverse his conviction and sentence, and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

¶2 On the evening of June 7, 2003, Rodriguez was drinking with friends at the home of J.P.'s cousin, A.G. Around midnight, J.P. arrived, and began arguing with Rodriguez. Rodriguez testified J.P. started the argument. Consistent with Rodriguez' testimony, A.G.'s wife testified J.P. made a comment to Rodriguez about fighting "with metal."

¶3 At trial, Rodriguez and other witnesses -– who all, with the exception of law enforcement and experts, were J.P.'s family members –- presented conflicting and inconsistent versions of what happened next.

¶4 Rodriguez testified J.P. said "let's fight with guns." Although he did not want to fight,[2] he was afraid J.P. would

[1]Although witnesses repeatedly identified Rodriguez by his preferred name, "Chavez," his given name is Rodriguez.

[2]Rodriguez stated he wanted to leave, but could not, because J.P. had parked his truck directly behind Rodriguez' car in the carport.

shoot him. He stated, "[J.P.] went to his truck, and I went to my . . . vehicle and got my weapon . . . . [J.P.] shot at me . . . one time; I shot back like four times; and then I ran." Somewhat inconsistently, Rodriguez also testified he may have started to retrieve his gun before knowing whether J.P. actually had a gun. Rodriguez was clear, however, on one point -– J.P. fired first.

¶5 J.P.'s family, on the other hand, testified J.P. never had a gun. Based on testimony from the State's witnesses, *see infra* ¶¶ 6-9, the jury could have reasonably accepted or rejected either story.

¶6 First, a forensics expert testified J.P.'s right hand tested positive for gunshot residue, while his left hand did not. Second, although the detective who processed the scene found only three shell casings and the expert testified he had no reason to believe they were from any gun besides Rodriguez', he also testified revolvers (the gun Rodriguez claimed J.P. used) do not eject shell casings automatically, potentially explaining why the detective did not find other casings.

¶7 Third, with the exception of A.G., the other witnesses all denied seeing the shooting. At trial, A.G. testified he was inside when he heard the first shot, then ran outside where he saw Rodriguez fire two shots at J.P., two shots at J.P.'s cousin, A.P., then two more shots at J.P. A.G. never mentioned

to police he was inside when the first shot was fired, however, nor did he tell police A.P. had been present, and A.P. denied being at A.G.'s home at the time of the shooting.

¶8 Fourth, the other witnesses told conflicting stories about the total number of shots they heard. Although A.P. testified the shots he heard were all from the same gun, he also testified he was inside, two houses away, and an expert testified only a trained ear could tell the difference between Rodriguez' gun and a revolver of the same caliber.

¶9 Finally, Rodriguez testified he fled because he believed A.G. was picking up J.P.'s gun to chase him with it. This testimony, coupled with A.G.'s conflicting accounts about which family member joined him in chasing after Rodriguez, and the evidence suggesting neither of those family members stayed at the scene or spoke to police, could give rise to many reasonable inferences about where J.P.'s gun, if he indeed had one, went.

¶10 Before and during trial, Rodriguez asserted he had acted in self-defense. The superior court instructed the jury Rodriguez bore the burden of proving self-defense by a preponderance of the evidence. Although this instruction was correct at the time, the legislature later amended Arizona's self-defense statute to place the burden on the State, and then enacted a statute requiring this change to operate

retroactively. *See* SB 1449, 2009 Ariz. Sess. Laws, ch. 190, §§ 1-2 (1st Reg. Sess.). The Arizona Supreme Court upheld these changes. *See State v. Montes*, 226 Ariz. 194, 245 P.3d 879 (2011).

DISCUSSION

¶11 Because Rodriguez did not object to the superior court's instruction at trial, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶12 As the State concedes, the court erroneously instructed the jury on the self-defense burden. As Rodriguez argues and the State also concedes, the improper instruction constituted fundamental error. *See State v. Rios*, 225 Ariz. 292, 297, ¶ 15, 237 P.3d 1052, 1057 (App. 2010) (citing *Henderson*, 210 Ariz. at 568, ¶ 25, 115 P.3d at 608).

¶13 The remaining question, then, is whether this error prejudiced Rodriguez. *See id.* at 297, ¶ 16, 237 P.3d at 1057 (citing *Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609). To prove prejudice, Rodriguez must show a reasonable jury could have reached a different result absent the improper instruction. *See Henderson,* 210 Ariz. at 568-69, ¶¶ 26-27, 115 P.3d at 608-09.

¶14 A defendant is entitled to an instruction on self-defense when there is the "slightest evidence" of justification,

which "tends to prove a hostile demonstration which might be reasonably regarded as placing the accused in imminent danger of losing his life or sustaining great bodily harm." *State v. Buggs*, 167 Ariz. 333, 335, 806 P.2d 1381, 1383 (App. 1990) (internal citation omitted). A defendant's direct testimony can sufficiently raise this inference, and once it is raised, self-defense is a question of fact the court must submit to the jury. *State v. Johnson*, 108 Ariz. 42, 43, 492 P.2d 703, 704 (1972).

¶15 We recognize not every case in which the court incorrectly instructs the jury on the self-defense burden presents fundamental, prejudicial error. *See Buggs*, 167 Ariz. at 337, 806 P.2d at 1385. And, we also recognize a defendant may not use the self-defense justification when he provokes an encounter that ends in homicide. *See State v. Lujan*, 136 Ariz. 102, 664 P.2d 646 (1983).

¶16 Here, however, a fair reading of the evidence shows Rodriguez presented the "slightest evidence," sufficient to suggest he acted in self-defense. *See State v. King,* 225 Ariz. 87, 90-91, ¶¶ 14-17, 235 P.3d 240, 243-44 (2010). As described in more detail above, based on the testimony -– including J.P.'s statement about fighting with "metal," the gunshot residue on his hands, and the lack of any consistent story from any witness who actually saw the entire event -– a reasonable jury could have concluded J.P. threatened Rodriguez, J.P. had a gun, J.P

shot at Rodriguez, and Rodriguez shot back to protect himself. Further, although Rodriguez did not present completely consistent testimony, he also described a sequence of events consistent with self-defense.

¶17 Depending on how the jury assessed the evidence, it could have reasonably found Rodriguez did not provoke the encounter and justifiably defended himself, *see State v. Karr*, 221 Ariz. 319, 322, ¶ 14, 212 P.3d 11, 14 (App. 2008), and could have reached a different result if the superior court had instructed it the State bore the burden of proving Rodriguez did not act in self-defense.

CONCLUSION

¶18 For the foregoing reasons, we reverse Rodriguez' conviction and sentence, and remand for a new trial.

/s/
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
PHILIP HALL, Judge