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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ISAAC CECIL EVANS, Appellant.	)	2 CA-CR 2012-0310 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20110183001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Amy M. Thorson
Tucson
Attorneys for Appellee

Emily Danies
Tucson
Attorney for Appellant

M I L L E R , Judge.

¶1 Isaac Evans appeals from his convictions for aggravated driving under the influence (DUI) while his license was suspended and aggravated driving with an alcohol concentration (AC) of .08 or more while his license was suspended. He maintains the trial court should have allowed him to present a necessity defense and should have instructed the jury on that defense. Finding no error, we affirm.

¶2 Before trial, Evans filed a supplement to his disclosure stating his intent to raise a necessity defense pursuant to A.R.S. § 13-417. The state filed a motion in limine to preclude the defense, relying on this court's decision in *State v. Fell*, 203 Ariz. 186, ¶ 1, 52 P.3d 218, 219 (App. 2002), in which we concluded "the necessity defense does not apply to criminal offenses defined outside Title 13" of the Arizona Revised Statutes, including DUI offenses. In his opposition to the state's motion, Evans asserted he had been "left stranded in the back seat of a vehicle which was driven into a tree. For his safety, he had to move the vehicle" and tried to start it. He argued that amendments to A.R.S. § 13-103 made in 2006 undermined our ruling in *Fell*. The court rejected his argument and granted the state's motion.

¶3 In his testimony at trial, Evans claimed he had been riding in the backseat of his vehicle, which was being driven by someone else, when the driver lost control of the vehicle and went off the road. He testified he had seen the keys in the vehicle's ignition, was unsure if the vehicle was running, and had decided he needed to "secure the car so that it didn't move" back into the road by taking the keys out. During cross-examination, Evans asserted the vehicle could not have moved and said he had gone to retrieve the keys to make sure the driver had not taken them. Evans requested a jury

instruction on the necessity defense, and the trial court refused to give it. Evans was convicted as noted above, and the court imposed an enhanced, minimum term of 4.5 years' imprisonment on each count, to be served concurrently.

¶4 As the sole issue raised on appeal, Evans argues the trial court erred in refusing his requests to present a necessity defense and for a jury instruction on that defense. Evans asserts that "public policy and due process," as well as a 2006 legislative change to § 13-103, require us to "re-evaluate and re-interpret the law to allow[]" the necessity defense in DUI cases. We review a court's ruling denying a jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006). But "[t]he interpretation of statutes is a question of law subject to our de novo review." *Fell*, 203 Ariz. 186, ¶ 6, 52 P.3d at 220.

¶5 Section 13-417, A.R.S., sets forth the necessity defense and 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." Section 13-401(B) provides that justification defenses, including necessity, are available as "a defense in any prosecution for an offense pursuant to" Title 13. In *Fell*, we concluded that although the language of § 13-401 did not "expressly state that justification defenses apply *only* to" Title 13 offenses, the statute necessarily implied that limitation. 203 Ariz. 186, ¶¶ 7, 11, 52 P.3d at 220, 221. In reaching that conclusion we also relied on § 13-103, which abolishes

"'[a]ll common law offenses and affirmative defenses'" in Arizona. *Id.* ¶ 13, *quoting* § 13-103(A).

¶6 In 2006, after *Fell* was decided, the legislature amended § 13-103(B) to state that "affirmative defense does not include any justification defense." 2006 Ariz. Sess. Laws, ch. 199, § 1. As part of the same amendment, the legislature added language to A.R.S. § 13-205, stating, "Justification defenses . . . are not affirmative defenses. . . . 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." 2006 Ariz. Sess. Laws, ch. 199, § 1. The legislature also added language clarifying that the justification defenses were not limited to a person's home or other place he had a right to be, extended to defense of a vehicle, and did not include a duty to retreat. *Id.* It also set forth a presumption of reasonable action when a person acts against someone unlawfully or forcefully entering the person's home or vehicle and amended the "Declaration of policy" set forth in the note to A.R.S. § 13-411, removing language suggesting the justification defense related solely to the home. *Id.*

¶7 Evans argues these amendments, particularly the amendment to § 13-103, "create[d] an ambiguity" and, as a result, the legislature, "by implication, . . . le[ft] the common law doctrine of necessity-justification available for any offense if its elements are met." He maintains that by expressly excluding justification defenses from the definition of affirmative defense in § 13-103(B), the legislature removed it from the category of common-law defenses abolished by § 13-103(A), intending to revive the previously abolished common-law necessity defense. Although § 13-103 can be

plausibly read in the way Evans suggests, other interpretations are possible and the language of the statue is, as Evans concedes, ambiguous.

¶8 "Our primary purpose in interpreting a statute is to give effect to the legislature's intent." *State v. Hinden*, 224 Ariz. 508, ¶ 9, 233 P.3d 621, 623 (App. 2010). "If a statute is ambiguous, we consider 'the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose.'" *State v. Fikes*, 228 Ariz. 389, ¶ 6, 267 P.3d 1181, 1182-83 (App. 2011), *quoting Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). "Statutes that are in *pari materia*—those that relate to the same subject matter or have the same general purpose as one another—should be construed together as though they constitute one law." *State v. Gamez*, 227 Ariz. 445, ¶ 27, 258 P.3d 263, 267 (App. 2011).

¶9 To provide context to the 2006 amendments, a brief history of the necessity defense in Arizona is required. "In 1977, the Arizona Legislature revised the entire criminal code," "abolish[ing] all common law crimes." *Vo v. Superior Court*, 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992), *citing* 1977 Ariz. Sess. Laws, ch. 142, § 39. It also added Chapter 4, setting forth the availability of justification defenses. 1977 Ariz. Sess. Laws, ch. 142, § 44. Thereafter, in 1997, the legislature amended § 13-103 to also abolish the common law "affirmative defenses" and to provide that "a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under Chapter 4 of this title." 1997 Ariz. Sess. Laws, ch. 136, §§ 3, 4. At the same time, the legislature added a section setting forth the necessity defense. 1997 Ariz. Sess. Laws, ch. 136, § 5. We have not found, nor has Evans cited, any

reported decision recognizing the necessity defense in Arizona before that time. *See State v. Belcher*, 146 Ariz. 380, 382, 706 P.2d 392, 394 (App. 1985) ("[A]ppellant has not cited any reported Arizona decision which recognized the defense of necessity.").

¶10 Even assuming for the purposes of argument that Arizona would have recognized a common law necessity defense prior to 1977, the legislative history above demonstrates the legislature's intent to supplant it. Pursuant to A.R.S. § 1-201, Arizona has adopted the common law, "only so far as it is . . . not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state." "A statutory provision authorized by the Constitution always supersedes the common law." *State ex rel. Conway v. Glenn*, 60 Ariz. 22, 30, 131 P.2d 363, 367 (1942). But, "if the common law is to be changed or abrogated by statute, the legislature must do so expressly or by necessary implication." *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, ¶ 12, 87 P.3d 831, 835 (2004). "Where a statute revises the common law and is clearly designed as a substitute therefor, the common law is repealed." *Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 515, 428 P.2d 686, 690 (1967).

¶11 In *Fell*, we indicated that because § 13-401(B) specified the necessity defense would apply to offenses under Title 13, it necessarily implied the defense would not apply elsewhere. 203 Ariz. 186, ¶¶ 7-8, 11, 52 P.3d at 220, 221. By adding a provision for a necessity defense that mirrors the common law defense to the justification statutes in 1997 and specifically outlining the circumstances in which it would apply, the legislature evinced its intent to substitute the statute for the common law. And because § 13-401(B) more specifically addresses the types of case in which justification and

necessity defenses may be raised, it controls over the more general provisions of § 13-103. *See State v. Jackson*, 210 Ariz. 466, ¶ 26, 113 P.3d 112, 118 (App. 2005) ("[W]e give preference to specific statutory provisions over general ones.").

¶12 Evans argues, however, that our conclusions in *Fell* are undermined by the legislature's 2006 amendments to the justification statutes because we relied in *Fell* on § 13-103(A) for the principle that "Arizona has no common law defense of necessity." 203 Ariz. 186, ¶ 13, 52 P.3d at 221. In support of his argument that the 2006 amendments revived a common law necessity defense he maintains, "An interpretation that would not allow necessity as a defense to non-Title 13 offenses leads to absurd consequences because it renders the legislative changes in A.R.S. § 13-103(B) and A.R.S. § 13-205(A) devoid of any meaningful effect."

¶13 Contrary to Evans's argument, "the legislature amended th[ese] provision[s] to provide that, for th[e] justification defenses, the State must prove beyond a reasonable doubt that the defendant did not act with justification." *State v. Bayardi*, 230 Ariz. 195, ¶ 16, 281 P.3d 1063, 1067-68 (App. 2012). Likewise the amendments clarified that the justification defenses extend beyond the home. Final Amended Fact Sheet, S.B. 1145, 47th Leg., 2nd Reg. Sess. (Ariz. 2006). In view of the multiple changes to the justification statutes and declaration of policy, we cannot agree with Evans that the legislature intended to revive or recognize a common law necessity defense. *Cf. Bayardi*, 230 Ariz. 195, ¶ 13, 281 P.3d at 1066 ("Defenses to criminal charges under Arizona law are statutory."). This is particularly so in light of the legislature's failure to amend § 13-401(B), on which we heavily relied for our conclusion in *Fell*, to remove the language

limiting the necessity defense to Title 13 offenses. Because the legislature reenacted the statute without change, we presume it adopted our interpretation. *See Hause v. City of Tucson*, 199 Ariz. 499, ¶ 10, 19 P.3d 640, 643 (App. 2001). For all these reasons, we conclude our decision in *Fell* was not changed by the 2006 amendment to § 13-103.

¶14 Evans's convictions and sentences are affirmed.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge