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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. MARK LYLE BARRICKLOW, Appellant.	)	2 CA-CR 2012-0515 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20122386001

Honorable Scott Rash, Judge

AFFIRMED

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K E L L Y, Presiding Judge.

¶1 Mark Barricklow appeals from his convictions and sentences for disorderly conduct and attempted aggravated assault with a deadly weapon or dangerous instrument. He argues the trial court erred by denying his requested jury instruction on defensive

display of a weapon; permitting certain impeachment testimony; denying his motion for mistrial; and giving a jury instruction on the lesser-included offense of attempted aggravated assault. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Barricklow's convictions and sentences. *See State v. Delgado*, 232 Ariz. 182, ¶ 2, 303 P.3d 76, 79 (App. 2013). Barricklow and P.O. had been living together in an apartment complex. By June 2012, P.O. had removed Barricklow's name from the renewed lease and had asked him to move out. On June 16, P.O. called Barricklow and told him she had packed up his belongings and was putting them outside. Barricklow threatened to slash P.O.'s tires and kill her if she did not put his belongings back in the apartment. After P.O. finished talking with Barricklow on the phone, she called her neighbor D.H. and told him about Barricklow's threats. She then left and drove to the next block, where she could see the entrance to her apartment.

¶3 Barricklow rode to the complex on his bicycle and went up to P.O.'s fourth-floor apartment. He kicked in a window, entered the apartment, and began putting his belongings back inside. Neighbors D.H. and S.R. called the police when Barricklow arrived. When D.H., S.R., and others confronted Barricklow in front of P.O.'s apartment, he drew a foot-long knife, told them to "[s]tay back," and threatened to kill anybody who tried to stop him. S.R. went back to her apartment to call the police again. After Barricklow was told the police were on their way, he ran to the ground floor. There, D.H.

threw a cinder block at Barricklow's bicycle, and Barricklow cut D.H.'s arm with the knife.

¶4 Barricklow was charged with one count of aggravated assault of S.R. with a deadly weapon or dangerous instrument, two counts of aggravated assault of D.H. with a deadly weapon or dangerous instrument, and one count of aggravated assault of D.H. causing temporary but substantial disfigurement. Two counts were based on incidents on the fourth floor, and two were based on incidents on the ground floor. As to the first two counts, the jury found Barricklow guilty of the lesser-included offense of attempted aggravated assault against S.R. and guilty of the lesser-included offense of disorderly conduct by the reckless display of a deadly weapon or dangerous instrument. It found both were dangerous offenses. The jury found Barricklow not guilty of the final two charges. He was sentenced to an enhanced, slightly aggravated prison term of twelve years for attempted aggravated assault and a presumptive, concurrent term of 3.75 years for disorderly conduct. This appeal followed.

Discussion

Requested Jury Instruction on A.R.S. § 13-421

¶5 Barricklow first argues the trial court erred by denying his request for a jury instruction based on A.R.S. § 13-421. He initially requested an instruction that consisted of language taken directly from the statute, which refers to the defensive display of a firearm, but later requested the trial court substitute "deadly weapon" or "knife" for firearm. We review a court's refusal to give a requested jury instruction for an abuse of discretion, *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004), but interpret

statutory language de novo, *State v. Francis*, 224 Ariz. 369, ¶ 9, 231 P.3d 373, 375 (App. 2010). A defendant is entitled to a jury instruction "on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). Nevertheless, the court is not required to give instructions that "are not correct statements of the law or . . . do not fit the facts of the case." *State v. Rivera*, 177 Ariz. 476, 479, 868 P.2d 1059, 1062 (App. 1994).

¶6 Section 13-421(A) provides: "The defensive display of a firearm by a person against another is justified when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the use or attempted use of unlawful physical force or deadly physical force." And A.R.S. § 13-105(19) provides, in relevant part: "In this title, unless the context otherwise requires: . . . . 'Firearm' means any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon that will or is designed to or may readily be converted to expel a projectile by the action of expanding gases."

¶7 "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). The best and most reliable indicator of legislative intent is the statute's language; if it is plain and unambiguous, we will "look no further." *Id.*; *see also State v. Dixon*, 231 Ariz. 319, ¶ 4, 294 P.3d 157, 158 (App. 2013); *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 6, 181 P.3d 219, 225 (App. 2008) (when statutory language unambiguous "court should not look beyond the language but rather 'simply apply it

without using other means of construction, assuming that the legislature has said what it means'"), *quoting Hughes v. Jorgenson*, 203 Ariz. 71, ¶ 11, 50 P.3d 821, 823 (2002).

¶8 The trial court properly declined to instruct the jury pursuant to § 13-421 because that statute does not apply to the facts of this case. Nothing in the statute's plain language suggests it applies to weapons other than firearms, and there was no evidence Barricklow had displayed a firearm. *See Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009 (defendant entitled to instruction on theory reasonably supported by evidence).

¶9 Nor was the trial court required to give the amended instruction Barricklow requested, which would have referred to a "deadly weapon" or "knife" instead of a firearm, because the amended instruction was not a correct statement of the law. On appeal, Barricklow discusses the statute's legislative history; he concedes legislators referred exclusively to firearms in their discussions and responded to concerns about the scope of the statute by emphasizing that it applied only to firearms. Nonetheless, he urges that "displaying a knife has the same [desired policy] effect of discouraging unlawful force," and "[t]here is no clear policy reason that displaying a firearm should be justified but displaying a knife . . . should not."

¶10 First, we need not examine the legislative history of § 13-421 because we conclude its use of the term "firearm" clearly and unambiguously does not include the display of a knife. Moreover, Barricklow's argument asks this court to expand the statute's scope for policy reasons—an act that would be legislative in nature and outside the proper scope of the judicial branch. *See League of Ariz. Cities and Towns v. Brewer*, 213 Ariz. 557, ¶ 8, 146 P.3d 58, 60 (2006) (judiciary must not interfere with

constitutionally granted legislative powers). And "[w]e will not question the wisdom, necessity, or soundness of policy of legislative enactments." *In re Estate of Winn*, 225 Ariz. 275, ¶ 12, 237 P.3d 628, 630 (App. 2010). The trial court did not err in denying Barricklow's requested instruction. *See Rivera*, 177 Ariz. at 479, 868 P.2d at 1062.

Impeachment

¶11 Barricklow next argues the trial court abused its discretion by allowing the state to (1) impeach Barricklow "by questioning him about specific allegedly violent incidents against [P.O.], (2) present rebuttal testimony by [P.O.] about the alleged violent incidents, and (3) present testimony from "police officers to impeach [P.O.]'s denials."[1] Barricklow argues that, even if this court concludes he did not preserve his objection to these errors below, the court committed fundamental error by permitting the state to "diver[t] . . . the trial to the issue of [Barricklow]'s treatment of P.O." He contends this "diversion" rose to the level of fundamental error because "a large amount of evidence and court time was spent on the issue of whether [Barricklow] had been violent to [P.O.]"

¶12 Barricklow has failed to establish reversible error. At trial, he failed to object to any of the questions or testimony he challenges on appeal. He filed a motion in limine to preclude evidence he "had previously assaulted [P.O.]," pursuant to Rule 403, Ariz. R. Evid. But Barricklow did not object to the admission of such evidence after he testified he had "never got[ten] violent with [P.O.]" Once he had given testimony that

[1]In his reply brief, Barricklow also argues the state's impeachment of Barricklow improperly suggested that the incidents had occurred, rather than that they were merely reported. Because it was raised for the first time in the reply brief, we do not address this issue. *See State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005).

contradicted the evidence, he no longer was entitled to rely on the court's earlier exclusion of that evidence pursuant to Rule 403. *See State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980). And although he expressed concern during a bench conference that the state's intended questions would constitute hearsay, he did not object to any particular question on that ground, and, in any event, a hearsay objection would not have preserved his non-hearsay arguments on appeal. *See State v. Salazar-Mercado*, 232 Ariz. 256, ¶ 20, 304 P.3d 543, 549 (App. 2013) (objection on one ground does not preserve objection on another ground); Ariz. R. Evid. 103(a)(1) (to preserve error, party must timely object stating specific ground).

¶13 Because Barricklow failed to object below, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is limited to "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail under fundamental error review, the defendant must establish both that fundamental error occurred and that the error caused him prejudice. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶14 Barricklow has not established any error caused him prejudice. *See id.* He argues "the jury may well have found that [Barricklow] had legitimately exercised self-defense" against D.H. and S.R. if the state had not presented testimony "implying that [Barricklow] was a violent man." He relies solely on the fact that the jury had acquitted

him of two charges and found him guilty of lesser-included offenses on the other two, arguing the jury must have been "skeptical" of the victims' testimony. Far from establishing prejudice, the jury's acquittals are some evidence it was not unduly prejudiced against Barricklow. *See State v. Anderson*, 199 Ariz. 187, ¶ 33, 16 P.3d 214, 220 (App. 2000) (acquittal on some charges "undermined" argument of jury prejudice). We also note that the testimony regarding the previous incidents was equivocal. Barricklow and P.O. denied the incidents had occurred, and the detective who was called to impeach P.O.'s denials testified only that P.O. had made two previous police reports "involving her[] and Mr. Barricklow" without describing the content of those reports. Because Barricklow has failed to establish any alleged error caused him prejudice, we need not determine whether fundamental error occurred.[2] *See id.*

Motion for Mistrial

¶15 Barricklow next argues the trial court erred by denying his motion for mistrial after P.O. twice testified he had been incarcerated.[3] We review the court's denial for an abuse of discretion. *See State v. Speer*, 221 Ariz. 449, ¶ 72, 212 P.3d 787, 800

[2]For the same reason, we need not determine whether it would have been sufficient for Barricklow to establish that the cumulative effect of these errors rose to the level of fundamental error, rather than establishing that at least one of them individually constituted reversible error. *See State v. Hughes*, 193 Ariz. 72, ¶¶ 25-26, 969 P.2d 1184, 1190-91 (1998) (Arizona does not recognize cumulative error doctrine outside context of prosecutorial misconduct claim).

[3]Barricklow also mentions in his opening brief that one of the jurors had seen him in handcuffs. However, that juror was chosen as an alternate and did not discuss what he had seen with other jurors; the incident therefore could not have affected Barricklow's convictions. *See State v. Moore*, 222 Ariz. 1, ¶ 67, 213 P.3d 150, 163 (2009) (error harmless if did not contribute to verdict).

(2009). "Mistrial is the 'most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *Id.*, *quoting State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003).

¶16 The state asked P.O. during her testimony whether she and Barricklow were "still in a relationship," and she responded: "I don't know. He's incarcerated." A short time later, the state asked whether P.O. had put Barricklow's name on the new apartment lease and she replied: "I did not. He was incarcerated." Barricklow requested a mistrial based on the remarks. The trial court denied the motion. It also found, and Barricklow conceded, that the state had not attempted to solicit P.O.'s remarks about incarceration. Toward the end of P.O.'s testimony, the court instructed the jury as follows:

> [L]adies and gentlemen, you've heard references that have been made the Defendant was being—was incarcerated. That testimony is stricken from the record and you are not to consider it.
>
> You are to disregard this testimony, and you must not consider it as proof or evidence that the Defendant is a bad character and, therefore, likely to have committed the crimes for which he is charged.
>
> Does everybody understand that? Thank you.

¶17 When a witness "unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error." *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). The court has broad discretion in making the determination, and is in the best position to determine whether the evidence actually will affect the outcome of the trial. *Id.* In *Jones*, the court concluded that "vague references

to other unproven crimes and incarcerations" did not create undue prejudice where the statements were unsolicited remarks of a witness and the court had given a limiting instruction. *Id.* ¶¶ 32-35.

¶18 In this case, as in *Jones*, P.O.'s references to incarceration were vague and unsolicited. And the trial court instructed the jury to disregard the testimony and clarified that it could not be used as evidence of Barricklow's character. *See State v. Eddington*, 226 Ariz. 72, ¶ 31, 244 P.3d 76, 85 (App. 2010) ("[W]e presume juries follow instructions."). Barricklow has not provided any support for his contention that the jury "w[as] influenced by the impression that [he] was dangerous." He argues references to his incarceration "made it less likely [the jury] would accept his defense" of self-defense, but acknowledges the jury acquitted him of two charges. The court did not abuse its discretion by concluding a mistrial was not required. *Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d at 359.

Jury Instruction on Attempted Aggravated Assault

¶19 Barricklow also contends the trial court erred by instructing the jury on the lesser-included offense of attempted aggravated assault of S.R. He argues that, in order to conclude he was guilty of attempt, the jury would have been required to find S.R. was not placed in reasonable apprehension of imminent physical injury or a deadly weapon was not used. *See* A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2). He maintains that, because S.R. provided "undisputed" testimony that she "was in fear of physical injury when [Barricklow] came toward her with his knife drawn," the evidence could not support an attempt instruction. Barricklow concedes he did not object to the instruction below.

Therefore, we review for fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶20 A trial court must instruct the jury on a lesser-included offense if the evidence supports giving the instruction. *State v. Brown*, 204 Ariz. 405, ¶ 7, 64 P.3d 847, 850 (App. 2003); *see also* Ariz. R. Crim. P. 23.3 (verdict forms must include lesser-included offenses and attempt, if attempt is an offense). The facts support an instruction when "'the jury could rationally fail to find the distinguishing element of the greater offense.'" *State v. Sprang*, 227 Ariz. 10, ¶ 7, 251 P.3d 389, 391 (App. 2011), *quoting State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996). "A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person . . . [i]ntentionally does or omits to do anything which . . . is any step in a course of conduct planned to culminate in commission of an offense." A.R.S. § 13-1001(A)(2).

¶21 The evidence supported the jury instruction on attempted aggravated assault. Even assuming, without deciding, that S.R.'s testimony was uncontradicted—a claim the state disputes based on Barricklow's testimony suggesting S.R. and D.H. were the aggressors—Barricklow's argument depends on his inaccurate assumption that the jury was required to accept S.R.'s testimony regarding her state of mind. But "[b]ecause a jury is free to credit or discredit testimony, we cannot guess what they believed, nor can we determine what a reasonable jury should have believed." *State v. Bass*, 198 Ariz. 571, ¶ 46, 12 P.3d 796, 807 (2000). Therefore, the court did not commit error—fundamental or otherwise—by instructing the jury on the lesser-included offense of attempt.

Disposition

¶22 For the foregoing reasons, Barricklow's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge