IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BIANCA YVETTE RODRIGUEZ,
Appellant.

No. 2 CA-CR 2015-0474
Filed June 30, 2017

Appeal from the Superior Court in Pima County
No. CR20151591001
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Rebecca A. McLean, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 After a two-day jury trial, Bianca Rodriguez was convicted of disorderly conduct and misdemeanor criminal damage. The trial court sentenced her to concurrent prison terms the longer of which was 2.25 years. Rodriguez challenges her conviction for disorderly conduct, arguing it is a lesser-included offense of a crime for which she was tried without sufficient notice. For the following reasons, we affirm the convictions and sentences.

Factual and Procedural Background

¶2 Rodriguez was indicted on one count of aggravated assault with a deadly weapon or dangerous instrument, a "bat," in violation of A.R.S. § 13-1204(A)(2), and criminal damage. The state alleged that, in April 2015, Rodriguez had met the father of her child in a convenience store parking lot to give him the child. When he arrived in a car driven by a woman, J.B., Rodriguez ran past him and "smashed" the driver's side window, "shatter[ing]" it and "striking [J.B.] in the face." When J.B. got out of the car, Rodriguez hit her again in the arm. The state also filed an allegation of dangerousness, stating the offense was "a felony involving the use and/or discharge and/or threatening exhibition of a deadly weapon and/or dangerous instrument, or the intentional knowing infliction on another of serious physical injury."

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

¶3 Underlying the indictment was a detective's testimony before the grand jury that, when the father had exited the car,

> [Rodriguez] at that point jumped out of her car carrying a red and black aluminum baseball bat . . . [,] ran past [the father] directly to [J.B.]'s car and swung at the driver's side window. [Rodriguez] swung so hard, enough to break the window and have the bat graze the victim's head inside of the vehicle. [J.B.] then got out of the car and [Rodriguez] hit her in the arm with the bat, causing some redness. . . . [Rodriguez] was [later] interviewed, and told detectives that . . . [J.B.] . . . had gotten out of the car and threatened her. That's why [Rodriguez] got the bat, to scare [her] off.

¶4 The morning of trial, Rodriguez objected to the trial court's intended preliminary jury instruction defining aggravated assault based on reasonable apprehension because "[t]here was only one theory presented to the grand jury, which was an aggravated assault with injury to someone else." The court decided not to give preliminary jury instructions on the elements of the crime but to permit the state to proceed at trial under both injury assault and reasonable apprehension assault.

¶5 In so ruling, the trial court reasoned, "[C]ommon sense dictate[s] that if you're in a car and someone breaks your window, even though they don't touch you and they don't injure you, that places you in reasonable apprehension of injury." After reviewing the grand jury transcript, the court further stated, "The grand jury transcript speaks for itself in that it indicates that there was a swinging of a baseball bat towards the car. There was also swinging towards the victim . . . . Certainly, from the grand jury transcript, notice was provided that it could have been either theory."

¶6 At the close of the state's case, Rodriguez moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. The state in response withdrew its injury assault argument and the trial

court granted Rodriguez's motion with regard to that argument but denied it as to reasonable apprehension. At that time, the state informed the court that it would be requesting an instruction on disorderly conduct as a lesser-included offense of aggravated assault. Rodriguez objected to the disorderly conduct instruction on the ground disorderly conduct was not a proper lesser-included offense.

¶7 At the close of the evidence, the trial court instructed the jury on aggravated assault based solely on reasonable apprehension, along with disorderly conduct as a lesser-included offense. The jury convicted Rodriguez of the lesser offense, and the court sentenced her as described above. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Assault and Disorderly Conduct

¶8 Rodriguez argues she received constitutionally insufficient pretrial notice that the state would pursue the aggravated assault charge based on reasonable apprehension, citing the Sixth Amendment and the Arizona Constitution.[2] The Sixth Amendment gives criminal defendants the right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. Similarly, under Article II of the Arizona Constitution, criminal defendants have the right "to demand the nature and cause of the accusation against [them]," Ariz. Const. art. II, § 24, and cannot "be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment," Ariz. Const. art. II, § 30. Arizona's constitutional provisions regarding notice are coextensive with the Sixth Amendment's protection of that right. *See State v. Rivera*, 207 Ariz. 69, ¶ 8, 83 P.3d 69, 72 (App. 2004). We review Rodriguez's constitutional claims de novo. *See id.* ¶ 7.

[2]Rodriguez also cites Rule 13.5(b), Ariz. R. Crim. P., but because there was no amendment to the indictment in this case, Rule 13.5(b) is not at issue.

¶9 Section 13-1204(A)(2), A.R.S., provides, "A person commits aggravated assault if the person commits assault as prescribed by § 13-1203 . . . [and] uses a deadly weapon or dangerous instrument." Section 13-1203(A), A.R.S., states:

> A person commits assault by:
>
> 1. Intentionally, knowingly, or recklessly causing any physical injury to another person; or
>
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury.

Our supreme court has recognized "the elements required to prove a violation of § 13-1203(A)(2) differ from those required to prove a violation of § 13-1203(A)(1)." *State v. Freeney*, 223 Ariz. 110, ¶ 17, 219 P.3d 1039, 1042 (2009). And "[w]hen the elements of one offense materially differ from those of another—even if the two are defined in subsections of the same statute—they are distinct and separate crimes." *Id.* ¶ 16. Furthermore, "disorderly conduct is a lesser-included offense of aggravated assault under [§] 13-1203(A)(2)" but "not a lesser-included offense of aggravated assault under [§] 13-1203(A)(1)." *State v. Foster*, 191 Ariz. 355, ¶¶ 9-10, 955 P.2d 993, 995 (App. 1998).

¶10 Rodriguez contends the state's failure to provide notice that she could be convicted of aggravated assault under reasonable apprehension requires reversal of her disorderly conduct conviction, citing *Foster*. In that case, we held, "Because disorderly conduct is not a lesser-included offense of aggravated assault under [§] 13-1203(A)(1) as charged in count II, we conclude that the trial court lacked subject-matter jurisdiction to convict defendant of disorderly conduct in count II." *Id.* ¶ 12; *see also State v. Blakely*, 204 Ariz. 429, ¶¶ 1-2, 53, 58, 65 P.3d 77, 80, 88-89 (2003) (reversing felony murder conviction when "nothing in the proceedings up to the eve of closing arguments gave [defendant] notice that the predicate felony would be child abuse") (emphasis omitted).

¶11 The state counters that the indictment's failure to "specify which type of assault [Rodriguez] had allegedly committed[,] either via its language or a citation to a particular subsection of § 13-1203, necessarily put [her] on notice that she was charged with all three types of assault." But we decline to endorse such a blanket rule. We have previously stated:

> [T]o pass muster under the Sixth Amendment, the prosecution, when charging either assault or a greater crime that contains assault as a component must provide more notice than simply "assault." The prosecution must also allege facts and circumstances that will alert the accused specifically to the type of assault [s]he must prepare to defend against; *i.e.*, "the specific offence, coming under the general description, with which [s]he is charged."

State v. Sanders, 205 Ariz. 208, ¶ 48, 68 P.3d 434, 445 (App. 2003), *quoting United States v. Hess*, 124 U.S. 483, 487 (1888), *overruled on other grounds by Freeney*, 223 Ariz. 110, 219 P.3d 1039.

¶12 "[T]he touchstone of the Sixth Amendment notice requirement is whether the defendant had actual notice of the charge, from either the indictment or other sources." *Freeney*, 223 Ariz. 110, ¶ 29, 219 P.3d at 1044. Thus, in determining whether Rodriguez received sufficient notice of reasonable apprehension assault, we consider not only the indictment but the state's pretrial factual allegations. *See State v. Arnett*, 158 Ariz. 15, 19, 760 P.2d 1064, 1068 (1988) ("We find that the evidence before the grand jury, the defendant's confession, and other matters disclosed to defendant made it apparent that robbery felony murder was a probable theory of prosecution in this case."). "In considering whether an indictment provides sufficient notice, the indictment 'must be read in the light of the facts known by both parties.'" *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, ¶ 36, 228 P.3d 909, 923 (App. 2010), *quoting State v. Magana*, 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994). It is not axiomatic that an allegation of assault through physical injury implies an allegation of assault through reasonable

apprehension. *Cf. State v. Baldenegro*, 188 Ariz. 10, 13-14, 932 P.2d 275, 278-79 (App. 1996) (reversing aggravated assault conviction because "[n]o evidence was presented that [the victim] saw a gun pointed at him or at the car before the shooting").

¶13 In this case, however, the indictment, when viewed together with the interim complaint and grand jury testimony, supports the trial court's "common sense" conclusion that Rodriguez had notice the state could argue she placed J.B. in reasonable apprehension by running up to her with a baseball bat, "shatter[ing]" the window next to her, "striking [her] in the face," and then hitting her in the arm. The grand jury testimony reflected Rodriguez's own statement to police that she "got the bat . . . to scare [J.B.] off." The state also asserted in its dangerousness allegation that the crime was "a felony involving the use and/or discharge and/or *threatening exhibition* of a deadly weapon and/or dangerous instrument" (emphasis added).

¶14 Under these facts, we cannot say the trial court erred in concluding Rodriguez had sufficient notice of the reasonable apprehension form of aggravated assault. Accordingly, Rodriguez could properly be convicted of disorderly conduct. We note, however, that we found this a close question and we remind the state of its duty to exercise care in providing adequate notice of its charges.

Disposition

¶15 For the foregoing reasons, Rodriguez's convictions and sentences are affirmed.