IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JORDAN CHRISTOPHER EWER,
Appellant.

No. 2 CA-CR 2019-0162
Filed January 26, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20173539001
The Honorable Teresa Godoy, Judge Pro Tempore

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Vice Chief Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Jordan Ewer was convicted of second-degree murder involving a firearm, disorderly conduct involving a firearm, and discharge of a firearm in or into the city limits. The trial court sentenced him to concurrent prison terms, the longest of which is thirteen years. On appeal, Ewer argues the court erred by modifying the justification jury instructions and in permitting the state to "argue justification from the perspective of the victim." He also contends the court improperly instructed the jury regarding flight to show consciousness of guilt because the evidence did not support it and the court had modified the instruction, which removed necessary context. For the following reasons, we vacate and remand.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to affirming Ewer's convictions. *See State v. Molina*, 211 Ariz. 130, ¶ 2 (App. 2005). One morning in July 2017, Emily and one of her roommates went to Jeffrey Ferri's apartment to buy heroin. Emily gave Ferri twenty dollars, and he told her that he would provide the drugs later.[1] After a couple of hours, Emily informed Gilbert, her fiancé, about her drug transaction with Ferri.

¶3 Gilbert, Emily, and a roommate then went to Ferri's apartment to retrieve either the promised heroin or the twenty dollars. Gilbert and Ferri had a contentious relationship as they had both been dating or "spending time" with Emily. Ferri was not home, but his roommate Eric and Eric's wife were. Eric allowed Gilbert to take Ferri's Bluetooth speaker as collateral.

[1]For ease of reference and to protect the anonymity of the victim, the victim's fiancée, and another witness, we use pseudonyms for each of them. *See* Ariz. R. Sup. Ct. 111(i).

¶4 Around midnight, Eric's wife drove Ferri, Ewer, and Eric to Gilbert's house because Ferri wanted to retrieve the speaker. Gilbert and Emily met Ferri and Ewer as they approached Gilbert's door. Ferri and Gilbert argued, and someone threw a rock, hitting Gilbert's car. When Ewer and the others got in the car to leave, Gilbert "socked [Ferri] in the mouth through the [car's] window" and slammed a boulder on the car. Ewer and Ferri got out of the car and, at some point, Ewer pulled out a firearm, and Ferri told him to shoot Gilbert. Gilbert and Emily retreated into the house and Ewer and the others drove away.

¶5 Later, Gilbert and Ferri talked on the phone about the speaker and Ferri decided to return to Gilbert's house. Just before sunrise, Ferri, Ewer, and Ewer's stepbrother drove back to Gilbert's house. As they walked toward the house, Gilbert met them outside. Emily joined Gilbert outside and from her vantage point could see Ferri standing in the street, Ewer on the sidewalk behind Ferri, and Ewer's stepbrother in the distance. When Emily saw that Ewer had his firearm drawn, she told him to put it away or she would "smack him in the face with a golf club." Ewer's stepbrother threw a rock toward the house, and someone responded by throwing rocks toward Ferri, Ewer, and Ewer's stepbrother from the yard. As they began "backing up" to leave, Gilbert, with Emily walking behind him, started to follow. After Gilbert had walked through the gate, Ewer shot three times in his direction, hitting Gilbert once in the back.

¶6 Ferri, Ewer, and Ewer's stepbrother ran to the vehicle and drove away. They dropped the vehicle off near Ferri's apartment and returned to Ewer's home. Paramedics responded to Gilbert's house and determined Gilbert had no "signs of life," "heartbeat[,] or breathing." He was pronounced dead at the scene.

¶7 A grand jury indicted Ewer, and he was convicted as charged and sentenced as described above. This appeal followed. We have jurisdiction over Ewer's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Self-Defense Jury Instruction

¶8 Ewer argues that by modifying the standard jury instructions on justification, and permitting the state to "argue justification from the victim[, Gilbert]'s standpoint," the trial court "unconstitutionally shifted the burden of proof to the defense, confused the issues to be decided by the jury, and invited the jury to speculate as to matters not properly before it." We review for an abuse of discretion a court's decision to give a requested

jury instruction. *State v. Larin*, 233 Ariz. 202, ¶ 29 (App. 2013). In reviewing jury instructions, we consider them "as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision." *State v. Dann*, 220 Ariz. 351, ¶ 51 (2009). However, we review de novo constitutional issues, *State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007), whether the jury instructions accurately stated the law, *State v. Bocharski*, 218 Ariz. 476, ¶ 47 (2008), and the statutory construction that provided the basis for jury instructions, *see State v. Vogel*, 207 Ariz. 280, ¶ 25 (App. 2004). And we consider state and federal due process claims together as both due process clauses "contain nearly identical language and protect the same interests." *Vong v. Aune*, 235 Ariz. 116, ¶ 21 (App. 2014) (quoting *State v. Casey*, 205 Ariz. 359, ¶ 11 (2003)).

¶9 Before trial, Ewer requested standard jury instructions for justified use of deadly force in self-defense, defense of a third person, and crime prevention. The standard instructions provided for conditions in which "[a] defendant is justified" in using force in those circumstances, and elsewhere employ the word "defendant." The standard crime-prevention instruction, for example, provided in part that "[t]he defendant is presumed to be acting reasonably if the defendant is acting to prevent the commission of . . . aggravated assault."

¶10 The state requested an instruction for non-deadly force and proposed that the word "defendant" be replaced by "person" throughout these instructions, arguing the jury needed to understand that it could apply the justification instructions to the victim's conduct as well as Ewer's. For example, its proposed self-defense instruction provided:

> A *person* is justified in using or threatening physical force in self-defense if the following two conditions existed:
>
> 1. A reasonable person would have believed that physical force was immediately necessary to protect against another's use or apparent attempted or threatened use of unlawful physical force, and
>
> 2. The person used or threatened no more physical force than would have appeared necessary to a reasonable person in the situation.

(Emphases added and omitted.) Over Ewer's objection, the trial court granted the requested modifications and ruled the state could argue that Gilbert's actions were legally justified. With additional minor modification, the jury was instructed as the state had proposed.

¶11 In closing, the state argued that the jury should apply the justification instructions to Gilbert as well as Ewer, asserting that

> if [Gilbert]'s conduct was lawful, then this defendant is not justified. Right there. Right then and there. If you find that everything that [Gilbert] did in terms of his use of force [was lawful], then you don't have to even get to the reasonableness of this defendant's actions.

And in the context of subsequently reviewing the facts of both incidents, the state again asserted that "[i]f [Gilbert] was using lawful force, then [Ewer] is not justified." Accordingly, the state urged the jury to first consider:

> [W]as [Gilbert]'s conduct reasonable under the circumstances, and was he justified in doing the things that he did in his own yard at his own home that le[]d to this defendant pulling a firearm in the first instance, right, pulling out the gun, and in the second instance, firing the gun and killing [Gilbert]? Was what [Gilbert] was doing at those two separate moments reasonable?

¶12 In a criminal prosecution, the state must prove every element of a criminal offense, and "this burden never shifts." *State v. Seyrafi*, 201 Ariz. 147, ¶ 7 (App. 2001). Shifting the state's burden to the defendant violates due process. *Id.* ¶ 8. Although the defendant, not the state, generally has the burden of proof for affirmative defenses, *State v. Jeffrey*, 203 Ariz. 111, ¶ 7 (App. 2002) (citing *Patterson v. New York*, 432 U.S. 197, 207 (1977)), justification is not an affirmative defense, *State v. Almaguer*, 232 Ariz. 190, ¶ 6 (App. 2013). "[I]nstead, if a defendant presents evidence of self-defense, the state must prove 'beyond a reasonable doubt that the defendant did not act with justification.'" *Id.* (quoting *State v. King*, 225 Ariz. 87, ¶ 6 (2010) (quoting A.R.S. § 13-205(A))). Trial courts may instruct the jury on permissive inferences, *see State v. Abdi*, 226 Ariz. 361, ¶ 10 (App. 2011), but they may not instruct the jury that an inference is required or a

presumption is mandatory, s*ee Sandstrom v. Montana*, 442 U.S. 510, 514-15 (1979).

¶13 In Arizona, "[j]ustification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct." § 13-205(A). "[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 [one]self against the other's use or attempted use of unlawful physical force." A.R.S. § 13-404(A). However, a person is not justified in threatening or using physical force "[i]f the person provoked the other's use or attempted use of unlawful physical force" absent the person withdrawing or clearly communicating intent to withdraw and "[t]he other nevertheless continues or attempts to use unlawful physical force against the person." § 13-404(B)(3).

¶14 The statutes permitting the use of deadly force, defense of a third party, and use of force to prevent a crime use the term "person," A.R.S. §§ 13-405, 13-406, 13-411, including that "[a] person is presumed to be acting reasonably for the purposes of [use of force as crime prevention] if the person is acting to prevent what the person reasonably believes is the imminent or actual commission of" an aggravated assault. § 13-411(C).

¶15 Ewer claims that by modifying the jury instructions to refer to "person" instead of "defendant," the trial court improperly shifted the burden of proof to Ewer. He maintains the state compounded the error by arguing that if it proved Gilbert's use of force was reasonable, Ewer's actions could not be justified. He argues the state benefited from an unconstitutional mandatory presumption by applying § 13-411(C) to Gilbert's actions.

¶16 The state contends that Ewer did not raise this issue until his motion for new trial and it is therefore waived for all but fundamental, prejudicial error. But Ewer objected to the jury instructions at trial, reasoning that Gilbert "was not on trial" and that an instruction to justify Gilbert's actions would "mudd[y] the waters and confuse[] the issues about . . . who is on trial . . . and what the applicable defenses are." The trial court denied Ewer's objection and permitted the state to argue they applied to the victim's conduct, and it provided the modified jury instructions. The court thus was provided an opportunity to correct the error, and the state was able to address the objection. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) (objection must provide court "opportunity to correct any error and allow[] opposing counsel a chance to 'obviate the objection.'" (quoting *State*

v. Rutledge, 205 Ariz. 7, ¶ 30 (2003))). Therefore, Ewer did not waive this issue.

¶17 Ewer relies on *Abdi* to support his argument that the instructions and the manner in which the state applied them improperly shifted the burden of proof to the defense. 226 Ariz. 361. In *Abdi*, the defendant had previously threatened the victim at the victim's residence. *Id.* ¶ 3. Abdi returned a few days later, they struggled, and Abdi stabbed the victim multiple times. *Id.* The trial court instructed the jury on self-defense including that "[t]he person is presumed to have acted reasonably if the person acted against another person who unlawfully or forcefully entered the person's residential structure," tracking language from A.R.S. § 13-419. *Id.* ¶¶ 6, 7 (alteration in *Abdi*) (quoting trial court). We concluded that § 13-419 was intended to apply only to a defendant charged with using force against someone unlawfully entering their home. *Id.* ¶ 8. We noted that although the statute utilizes generic terms such as "person," its history and language are such that it is "meant to apply in favor of a defendant in a criminal action who raises a justification defense." *Id.* By giving the instruction in the context of the victim's actions rather than the defendant's, the instruction became mandatory, not permissive, and "a reasonable jury could only have understood the presumption to apply in favor of [the victim], rather than [the defendant]." *Id.* ¶¶ 11, 12.

¶18 The same reasoning applies in this case. Justification presumptions are not intended to apply to the victim's conduct. *See id.* ¶ 8. The modified jury instructions and the state's argument applying them to the victim, including the presumption of reasonableness, were therefore improper. It makes no difference that here, unlike in *Abdi*, the instructions could be applied to both Ewer and Gilbert and not just the victim's conduct. *See id.* The instruction permitting the jury to presume Gilbert's behavior was reasonable improperly shifted the burden of proof to Ewer to establish that his own conduct was justified.

¶19 Notably, before 2006, defendants had the burden to prove justification defenses as they did with other affirmative defenses. *See Casey*, 205 Ariz. 359, ¶ 9, *superseded by statute*, 2006 Ariz. Sess. Laws, ch. 199, § 2 (amending § 13-205(A)). However, our legislature has since redefined justification defenses, providing that "[j]ustification defenses . . . are not affirmative defenses." § 13-205(A); *see also* A.R.S. § 13-103(B) ("[a]ffirmative defense does not include any justification defense" including self-defense); *Almaguer*, 232 Ariz. 190, ¶ 6 (stating "[j]ustification is not an affirmative defense"). And in doing so, it also shifted the burden from the defendant to the state. "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." § 13-205(A). We defer to the legislature's broad authority to define criminal conduct. *See State v. Holle*, 240 Ariz. 300, ¶ 40 (2016).

¶20 If a defendant provides evidence that could lead a reasonable person to believe the defendant's use of physical force was necessary and, thus, justified, then the absence of justification "becomes an additional element the state must prove." *State v. Carson*, 243 Ariz. 463, ¶ 11 (2018). And the state is not permitted to shift the burden to the defendant. It was the state's burden to show that a reasonable person in Ewer's position would not have believed Gilbert's actions constituted the use or attempted use of unlawful force requiring immediate physical force. *See* §§ 13-404, 13-405, 13-406, 13-411; *see also Carson*, 243 Ariz. 463, ¶ 9 (stating that use of force is justified "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" (quoting § 13-404(A))); *King*, 225 Ariz. 87, ¶ 11 ("Section 13-404(A) . . . adopts a purely objective standard, permitting the use of force only if a 'reasonable person would believe that physical force is immediately necessary to protect himself.'" (quoting *State v. Eddington*, 95 Ariz. 10, 13 (1963))). And contrary to the state's argument to the jury, a showing that Gilbert's actions were justified does not satisfy the state's burden of proving Ewer's conduct was not justified. We can conceive of situations in which a jury could reasonably find that the defendant was justified in believing the victim's actions constituted use or attempted use of unlawful force, even if those actions were also justified. The modified jury instructions and the state's argument were improper.

¶21 We must nevertheless "consider the jury instructions as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision." *Dann*, 220 Ariz. 351, ¶ 51; *see Abdi*, 226 Ariz. 361, ¶ 14. Here, the trial court also instructed the jury that the state had the burden of proving Ewer guilty beyond a reasonable doubt, that the state had the burden to show that Ewer's actions were not justified, and that Ewer was presumed innocent. Under the circumstances, we conclude these instructions were not sufficient to overcome the error arising from the modified instructions. *See Abdi*, 226 Ariz. 361, ¶ 15. The jury reasonably could have believed that the state met its burden of proving Ewer was not justified merely by showing that the victim was justified.

Harmless Error

¶22 We must next consider if the error was harmless. *See Abdi*, 226 Ariz. 361, ¶ 17. An error is harmless if we can conclude beyond a reasonable doubt that it "did not contribute to or affect the verdict." *State v. Anthony*, 218 Ariz. 439, ¶ 39 (2008). Error is harmless if the evidence was "so overwhelming that any reasonable jury could only have reached one conclusion." *Id.*¶ 41. It is the state's burden to show that the error was harmless. *Id.* ¶ 39.

¶23 The state's closing argument, together with the improper instructions, had a strong likelihood of misleading the jury, and we cannot say beyond a reasonable doubt that its verdicts were not affected by the error. Ewer's sole defense was that his actions had been justified. But buttressed by the improper instructions, the state argued that if Gilbert's conduct was justified then the jury need not consider the reasonableness of Ewer's actions. This is not the correct standard, and by applying it to each charge, the state infected all of Ewer's convictions.

¶24 As to the shooting, the state contends the evidence that Ewer did not act in self-defense was overwhelming, noting that "[o]nly Ewer testified that [Gilbert] might have had a gun, and [that] Ewer lied throughout his interview with the police." But this ignores other evidence that would support a reasonable belief of imminent danger from Gilbert's use or attempted use of unlawful force. Multiple witnesses testified that Gilbert had exhibited violent tendencies, toxicology reports showed that Gilbert had methamphetamine in his system, and an expert witness explained that the amount of methamphetamine in Gilbert's system could have made him violent and unpredictable. It also diminishes the importance that the jury could have placed on Ewer's testimony that he saw shell casings and a gun safe in Gilbert's yard, which was reinforced by pictures of those items admitted at trial. To the extent there was evidence that Ewer and his group were the initial aggressors, both Ferri and Ewer testified that they were leaving just before the shooting and Gilbert started to follow them. A reasonable jury could have found Ewer and the others had withdrawn, and by following them, Gilbert was the aggressor. We cannot say that the evidence was overwhelming.

¶25 Turning to the disorderly conduct charge, as noted above, the state also relied on the improper jury instructions as to that charge. Additionally, the state does not argue the evidence was overwhelming. And indeed, it was not. Several witnesses described how Gilbert had followed the group to the car during its attempt to withdraw, had slammed

a boulder on the car, and had punched Ferri in the face, and other testimony suggested that Ewer had displayed his firearm in response to Gilbert's actions. The error was not harmless and therefore we must vacate Ewer's convictions.

Flight Jury Instruction

¶26 Ewer argues the trial court erred by instructing the jury on flight to show consciousness of guilt when the instruction "was unsupported by the evidence." He also contends that the court erroneously modified the standard flight instruction "in a way that removed necessary context for the jury to properly apply" it. We review the court's decision to give a flight instruction for an abuse of discretion and review de novo whether it correctly states the law. *See State v. Solis*, 236 Ariz. 285, ¶ 6 (App. 2014). As noted above, we consider the instructions as a whole. *Id.*

¶27 After Ewer shot Gilbert, he ran back to the truck with Ferri and his stepbrother and eventually returned to his house. Later, as Ewer and Ferri were preparing to leave, officers arrested Ewer. The officers recovered Ewer's firearm from his waistband, a backpack he was wearing, and another backpack that was with him. The backpacks contained items including clothing and ammunition. Ferri saw the police arrest Ewer and hid in the attic of Ewer's house until the next day when the police had gone. He was taken into custody a few days later.

¶28 During the trial, the state requested the standard flight or concealment instruction:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding, or concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reasons for running away, hiding, or concealing evidence. Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.

Ewer objected, claiming the record did not support a flight instruction because there was "no indication that [Ewer had] tried to destroy evidence, hide anything, [or] interfere with the investigation." The trial court agreed "there [wa]s no evidence of hiding, concealing, et cetera," so it removed that language from the instruction. Ewer did not object to the modification.

¶29 A flight jury instruction is appropriate if there is evidence of flight after an offense is committed "from which jurors can infer a defendant's consciousness of guilt." *Solis*, 236 Ariz. 285, ¶ 7; *see State v. Speers*, 209 Ariz. 125, ¶ 27 (App. 2004) ("Instructing the jury regarding evidence of flight is proper only when the defendant's conduct manifests a consciousness of guilt."). Such an instruction is appropriate if there is evidence supporting a reasonable inference that: (1) "the flight or attempted flight was open, such as the result of an immediate pursuit," or (2) "the accused utilized the element of concealment or attempted concealment." *State v. Smith*, 113 Ariz. 298, 300 (1976) (citing *State v. Rodgers*, 103 Ariz. 393, 394-95 (1968)). Stated differently, in determining whether to give the instruction, a trial court must "be able to reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *Speers*, 209 Ariz. 125, ¶ 28 (quoting *State v. Weible*, 142 Ariz. 113, 116 (1984)); *see also Smith*, 113 Ariz. at 300 (merely leaving scene not sufficient to support flight instruction). Additionally, an alternate explanation for the defendant's actions "d[oes] not preclude the trial court from giving a flight instruction." *State v. Parker*, 231 Ariz. 391, ¶ 50 (2013) (alternative explanation creates fact question for jury).

¶30 Ewer argues there was insufficient evidence to warrant the flight instruction. He contends that, while he did run to the truck, the evidence did not show he had "engage[d] in behavior that was otherwise elusive." We disagree.

¶31 The jury could reasonably infer that Ewer had packed two backpacks filled with clothing and other items to leave his home and conceal his whereabouts. *See Smith*, 113 Ariz. at 300. And Ewer's testimony that he had only run because he was afraid of Gilbert does not prohibit the trial court from giving the flight instruction as it merely creates a fact question for the jury to resolve. *See Parker*, 231 Ariz. 391, ¶ 50. Accordingly, the court did not abuse its discretion by giving the flight instruction. *See Larin*, 233 Ariz. 202, ¶ 29.

¶32 Ewer additionally argues the modified flight instruction "erroneously deprived the jury of necessary context" by omitting any reference to hiding and concealing. He explains that without this context "the jury may not understand the intended meaning of the phrase" "running away." Because this argument is raised for the first time on appeal, we review it for fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). Under this standard, a defendant must show error and, if it exists, that it is fundamental. *Id.* ¶ 21. Further, "[a]

defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *Id.* Additionally, the defendant must make a showing of prejudice if alleging error under factors one and two. *Id.*

¶33 Here, the modified instruction in combination with the closing arguments provided sufficient information for the jury to appropriately apply the law. *See State v. Johnson*, 205 Ariz. 413, ¶ 11 (App. 2003) (considering jury instructions "in context and in conjunction with the closing arguments of counsel"). During closing argument, the state asserted that Ewer failed to call 9-1-1 and that when he was arrested Ewer had the gun and a backpack with clothing in it. Additionally, Ewer argued that it had been reasonable under the circumstances to be "terrified" and run, and that he had not destroyed any evidence. The jury was properly instructed that "running away" did not by itself prove guilt and that there is no legal requirement that a person remain at the scene of a shooting. It therefore possessed "the information necessary to arrive at a legally correct decision." *See Dann*, 220 Ariz. 351, ¶ 51. In addition to the flight instruction, the court told the jurors that they were "the sole judges of the facts" and that "after you have determined the facts, you may find that some instructions no longer apply." It also instructed the jury that it must "consider the instructions that do apply, together with the facts as you have determined them," which we presume it followed. *See State v. Prince*, 226 Ariz. 516, ¶ 80 (2011). Accordingly, we find no error, much less fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 21.

Disposition

¶34 For the reasons stated above, we vacate Ewer's convictions and remand for a new trial.