IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

VAMBA MAMADEE DONZO,
Appellant.

No. 2 CA-CR 2020-0116
Filed October 8, 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NOT FOR PUBLICATION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. CR20194134001
The Honorable Howard Fell, Judge Pro Tempore

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Vamba Donzo was tried on two counts of aggravated assault on a peace officer. The jury found him guilty of one count, and the trial court suspended the imposition of sentence and placed him on two years' probation. Donzo appeals his conviction, contending that the court erred by refusing to give a requested jury instruction on self-defense. We reverse and remand.

Factual and Procedural Background

¶2 In cases evaluating the denial of a jury instruction, we view the evidence in the light most favorable to the proponent of the instruction. *State v. King*, 225 Ariz. 87, ¶ 13 (2010). In August 2019, Deputy Daniel Copeland with the Pima County Sheriff's Department assisted officers from the Phoenix Police Department in detaining Donzo. Copeland responded to a call at a retail store parking lot in Pima County. When he arrived, he saw Donzo was in handcuffs in Phoenix Police Department custody. Copeland was asked by the other officers to put Donzo in the back of his marked SUV because no other vehicle had a "caged" rear seat. Copeland placed Donzo, who was cooperative, in the back of his SUV, with Donzo's legs across the seat due to his height. The officers waited in the parking lot for approximately one hour, with Donzo handcuffed in the backseat, until Copeland transported Donzo to a substation for questioning. Donzo was "completely calm" during the transport to, and while at, the substation.

¶3 Donzo waited for one and a half to two hours in an interview room. Ultimately, Phoenix Police Department detectives decided to transport Donzo to a Tucson Police Department station, where they would be able to record the interview. Donzo, whose hands were again cuffed behind his back, was returned to Deputy Copeland's SUV and was "completely cooperative again." Copeland drove with Donzo in the backseat; Phoenix Police Department Detective Rose and two Glendale Police Department plainclothes detectives followed him in their cars. Copeland and Rose agreed that, if Copeland had any problems, he was to pull over and turn on his overhead lights as a signal for Rose to pull over also.

¶4 Deputy Copeland testified that shortly after leaving the substation, Donzo had started yelling and kicking the back left window of the SUV "extremely hard." Copeland said he had yelled at Donzo to stop kicking, which Donzo did, but Donzo had kept yelling, saying if Copeland "didn't pullover, that he was going to continue to kick the window." Copeland testified that because he was concerned Donzo would break the window if he kicked it too hard, he had pulled over onto the dirt shoulder next to the road, turned on his lights, and radioed for additional officers to respond to his location.

¶5 Donzo, however, testified he had not kicked the window or shouted at Deputy Copeland. He stated he had only asked why he was arrested and what was going on because he was "[v]ery confused at the moment." Donzo admitted he had moved his handcuffs in front of him while he was in the SUV because "it was very uncomfortable" to have his hands cuffed behind his back. But he testified that, despite the long wait and lack of information, he had been cooperative at all times. After he moved his handcuffs, Donzo said "[t]he car stopped." Donzo did not know where they were, and it was too dark to see outside.

¶6 Detective Rose pulled over when Deputy Copeland did, then he walked up to the SUV and opened the door to talk to Donzo. Copeland saw that Donzo's handcuffs were now in front of him instead of behind his back, and, Copeland testified, when Rose had opened the door Donzo "immediately scooted forward" and "had his feet hang down to where they were outside of the door . . . resting on the floorboard on the outside of the vehicle." Copeland said he had gone to the other side of the SUV to open the door and pull Donzo back in so Rose could shut the other door. But, when Copeland opened the door, he testified that he had seen Donzo standing outside the SUV on the other side, with Rose blocking Donzo into the corner between the SUV and the door. Donzo testified that Rose had unbuckled Donzo's seatbelt and Donzo had stepped out of the SUV because he believed officers were moving him to another vehicle. According to Donzo, as soon as he stepped out of the SUV, Rose "pinned [him]" against the vehicle.

¶7 Deputy Copeland ran back around the SUV to see Donzo and Rose "struggling." Copeland "went hands on" with Donzo and tried to help Rose "get him into the patrol car or up against the patrol car." Copeland testified that, when Rose and Copeland began "pushing" Donzo against the SUV, Donzo had not fought them. After fifteen to twenty seconds, the other two detectives joined Copeland and Rose to get Donzo

"into the car or against the car or onto the ground." Donzo and Copeland both testified that Copeland, Rose, and the two detectives had been pushing and pulling Donzo in different directions. Donzo testified that he had not known what each officer was doing and the situation "just got chaotic." Copeland characterized Donzo as "being passively resistant" because he was "not following commands."

¶8 Donzo further testified that, after he and the officers fell on the ground, one of the officers had his "head . . . almost yoked back." Although he did not identify Deputy Copeland as the officer pulling his head back, Donzo bit Copeland's arm "[b]ecause [he] felt as though [his] neck was about to break." Copeland testified that Donzo had bit him when, at some point during this altercation, his arm "linked" with Donzo's arm and that Copeland had tried to use this as "leverage to gain control" over Donzo. Copeland stated he had been trying "to put pressure against [Donzo's] chest to keep him against the patrol car," when he felt a "sharp pain on [his] front right forearm," and saw Donzo's "face on [his] arm."

¶9 Donzo was charged with two counts of aggravated assault on a peace officer and one count of second-degree escape, but the trial court dismissed the latter on the state's motion. Before trial, Donzo disclosed that he intended to assert several defenses, including self-defense, lack of justification for use of force by law enforcement, and excessive force by law enforcement. During trial, Donzo requested a jury instruction on self-defense, but, as more fully discussed below, the court denied that request. Following a three-day jury trial, Donzo was found guilty of one count of aggravated assault of a peace officer as to Deputy Copeland. The court sentenced Donzo as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Analysis

Propriety of the Self-Defense Instruction

¶10 During trial, Donzo requested the "4.04, justification for self-defense" instruction. In relevant part, that instruction states:

> A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:

> 1. A reasonable person in the situation 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 defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the situation.
>
> . . . .
>
> The use of physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present. Actual danger is not necessary to justify the use of physical force in self-defense.
>
> You must decide whether a reasonable person in a similar situation would believe that: physical force was immediately necessary to protect against another's [use] [attempted use] [threatened use] [apparent attempted use] [apparent threatened use] of unlawful physical force; *or*
>
> You must measure the defendant's belief against what a reasonable person in the situation would have believed.

Rev. Ariz. Jury Instr. (RAJI) Stat. Crim. 4.04 (4th ed. 2016). It further provides that threatening or using physical force is not justified:

> [t]o resist an arrest that the defendant knew or should have known was being made by a peace officer or by a person acting in a peace officer's presence and at the peace officer's direction, whether the arrest was lawful or unlawful, unless the physical force used by

> the peace officer exceeded that allowed by law.

Id. And finally, it places the burden on the state to prove "beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then [the jury] must find the defendant not guilty of the charge." *Id.*

¶11 In response to the request for the instruction, the trial court stated that Donzo had not "provide[d] any evidence whatsoever that physical force used by the peace officer exceeded that allowed by law." Donzo asserted, however, that such a question was for the jury. The court responded that the jury would "need some guidance" on excessive force, but that there was none.

¶12 Donzo then suggested that a modified instruction on "justification for use of physical force in law enforcement"[1]—which generally details when a law enforcement officer may use or threaten physical force in performing his duties—could serve as "guidance." Donzo acknowledged, however, that such an instruction is typically given when the law enforcement officer is the defendant. The trial court ultimately determined that the instruction did not apply to the circumstances of the case, presumably because a law enforcement officer was not the defendant. Consequently, seemingly due to the lack of proper guidance as to what constituted excessive force, the court refused to give the self-defense instruction. Donzo argues on appeal that the court erred.

¶13 "We review the superior court's refusal to include a jury instruction for an abuse of discretion." *State v. Matthews*, 245 Ariz. 281, ¶ 14 (App. 2018). However, we independently determine if the evidence supported the instruction "because that is a question of law and involves no discretionary factual determination." *State v. Almeida*, 238 Ariz. 77, ¶ 9 (App. 2015). Overall, as stated above, we view the evidence in the light most favorable to the proponent of the instruction. *See King*, 225 Ariz. 87, ¶ 13.

¶14 Generally, a defendant is entitled to a jury instruction on self-defense "if there is the slightest evidence of justification for the defensive act." *State v. Lujan*, 136 Ariz. 102, 104 (1983). A defensive act is justified if

[1]Rev. Ariz. Jury Instr. (RAJI) Stat. Crim. 4.09 (4th ed. 2016).

"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." *State v. Carson*, 243 Ariz. 463, ¶ 9 (2018) (quoting A.R.S. §§ 13-205(A)-404(A)). This is an objective standard depending on "the beliefs of a 'reasonable person' in the defendant's circumstances rather than the defendant's subjective beliefs." *Id.*

¶15 To show the slightest evidence that his biting of Deputy Copeland was justified, Donzo only needed "some evidence of 'a hostile demonstration, which may be reasonably regarded as placing [him] apparently in imminent danger of losing [his] life or sustaining great bodily harm.'" *Id.* ¶ 19 (quoting *King*, 225 Ariz. 87, ¶ 15). A hostile demonstration "must be some outward act which the defendant perceives to be immediately life-threatening." *Lujan*, 136 Ariz. at 104; *see, e.g.*, *Carson*, 243 Ariz. 463, ¶ 20 (several people hitting and kicking defendant was hostile demonstration); *King*, 225 Ariz. 87, ¶¶ 15-16 (victim throwing two-liter bottle of water at defendant's head was hostile demonstration); *Everett v. State*, 88 Ariz. 293, 298 (1960) (victim following defendant closely, while victim had his hand in his pocket, and victim threatening defendant was hostile demonstration). In the law enforcement context, when subduing an arrestee, an officer's use of force is only unlawful—as provided by A.R.S. § 13-404(B)(2)—if it "exceeds that allowed by law." The state argues that the trial court did not err "because there was no evidence of excessive force" by the officers involved here.

¶16 Donzo testified that he had bit Deputy Copeland's arm because his head was being pulled backward in such a way that he was "afraid" and thought his neck "was about to break." Although there was conflicting testimony as to the events leading up to the biting—whether Donzo was yelling and kicking in the back of Copeland's SUV, or whether Detective Rose unbuckled Donzo's seatbelt—the court does not weigh the evidence or resolve conflicts, it "merely decides whether the record provides evidence 'upon which the jury could rationally sustain the defense.'" *Almeida*, 238 Ariz. 77, ¶¶ 9, 11 (quoting *State v. Strayhand*, 184 Ariz. 571, 587-88 (App. 1995)).

¶17 Ultimately, whether the force used by law enforcement here was excessive is left to a jury. *See King*, 225 Ariz. 87, ¶ 18 (when jury is given justification instruction, state can "attempt to persuade the factfinder" that defendant's actions were not justified); *see also State v. Almaguer*, 232 Ariz. 190, ¶¶ 13-14 (App. 2013) (jury determined defendant was not justified by finding him guilty of manslaughter). Had the instruction been given as

requested, Donzo would have needed to persuade the jury that the officers used excessive force and that a reasonable person in his circumstances would have believed his resistance to be necessary. And the state would have needed to persuade the jury that the use of force was proper and that Donzo's use of force was therefore not justified.

¶18 The key evidence in this case was the testimony both of the officers and of Donzo characterizing the nature of Donzo's resistance, and Donzo's testimony characterizing the force exerted on him. In viewing that evidence in the light most favorable to Donzo, we conclude that he was entitled to the justification instruction. If Donzo was not resisting, as he asserted, or was merely "passively resist[ing]," as an officer explained, a rational jury could find that an officer breaking Donzo's neck in response, as Donzo thought was about to occur, exceeded the amount of force permitted by law. And further, that same jury could determine that a reasonable person in Donzo's position, believing that his neck might break, could reasonably believe physical force necessary to forestall such a "hostile demonstration."

¶19 This decision should not, of course, be read as requiring the justification instruction in every case of resisting arrest. There must be some factual basis, if believed, from which a jury reasonably could conclude that the force exerted by the officers was excessive under the circumstances in addition to evidence, if credited, supporting the claim of the need for resistance by a reasonable person. Here, we had both. Although the trial court was properly cautious about giving this instruction, under these circumstances, Donzo was entitled to the justification instruction, and the court abused its discretion in refusing to give it.

Harmless Error

¶20 Because Donzo preserved this issue for appeal, the burden is on the state to prove the error was harmless. *See State v. Peraza*, 239 Ariz. 140, ¶ 18 (App. 2016). The state, however, does not contend that failing to give the instruction was harmless. Even if the state had made such an argument, we could not say this error was harmless.

¶21 Under the harmless error standard, "the question 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *State v. Leteve*, 237 Ariz. 516, ¶ 25 (2015) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

Once a defendant has shown the slightest evidence of justification for his defensive act, "'the state must prove beyond a reasonable doubt that the defendant did not act with justification.' In effect, once sufficient self-defense evidence is admitted, the absence of self-defense becomes an additional element the state must prove to convict." *Carson*, 243 Ariz. 463, ¶ 11 (citation omitted) (quoting A.R.S. § 13-205(A)). The state cannot shift this burden to the defendant. *State v. Ewer*, 250 Ariz. 561, ¶ 20 (App. 2021). By omitting the self-defense instruction here, despite the slightest evidence that Donzo's action was justified, the trial court relieved the state of its burden of proving an element of the offense, namely, that the act was not justified. *See Carson*, 243 Ariz. 463, ¶ 11. Therefore, we cannot conclude the error here was harmless.

Disposition

¶22 For the foregoing reasons, we reverse Donzo's conviction and sentence and remand for a new trial. Although we determine that a self-defense instruction was proper here, we leave it to the trial court to determine whether any additional accompanying instruction defining excessive or unlawful use of force is necessary or advisable.