FILED BY CLERK
JUL 29 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAUL VALENTE PALOMO YESCAS, Appellant.	)	2 CA-CR 2010-0022 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20033244

Honorable Christopher C. Browning, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 Following a jury trial in 2004, appellant Raul Yescas[1] was convicted in absentia of one count of disorderly conduct with a deadly weapon.[2] At a sentencing hearing after his arrest in 2009, the trial court suspended imposition of sentence, placed him on probation for three years, and ordered him to serve ninety days in jail as a condition of his probation. On appeal, Yescas argues the court erred either by failing to instruct the jury on disorderly conduct without a deadly weapon or by not requiring it to make an express finding that he had used a deadly weapon in committing the offense. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the conviction. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On the morning of September 24, 2003, Yescas drove to the home where Joe and Mary Ann M. lived with their two sons, Joey and Jesus. Before pulling into their driveway, Yescas was "[d]riving like crazy down the street, burning rubber." When Joey went to investigate, Yescas was standing outside holding a black nine-millimeter handgun. Joey fled back into the house, pulling the door shut behind him and calling to his parents that "there was

[1]Although he was charged and convicted under the alias Adolfo Suarez, we refer to him in this decision by his true name, Raul Yescas.

[2]Neither the verdict nor the sentencing minute entry specifies that the conviction was for disorderly conduct with a deadly weapon pursuant to A.R.S. § 13-2904(A)(6). However, as noted below, this was the only form of disorderly conduct on which the jury was instructed. Moreover, it is the only form that is a class six felony, and both the sentencing transcript and minute entry refer to the offense as such.

a crazy guy out there with a gun." Joey and Mary Ann called 9-1-1 and told the operator there was a man outside their home who "had a gun."

¶3 Joe went outside and confronted Yescas, who had returned to his truck. Joe asked, "What are you doing here at our house with a gun?" Yescas stated he was "going to kill somebody" there because they had been "bothering" his son or his brother Hondo. Joe recalled having confronted Hondo after he had "tr[ied] to beat up" Joe's younger son about a year earlier. Meanwhile, Mary Ann had gone to the rear of the truck and made a note of the license plate number. When Yescas noticed this, he backed the truck out of the driveway and drove it to the house across the street. He got out of the truck with the gun in his hand and walked around to the side of that house. When he reappeared, he was no longer holding the gun. He then walked into the street and repeated to the victims that he was "going to kill" them. Police officers arrived, handcuffed Yescas, and placed him in the back of a police van. They retrieved Yescas's gun from the property across the street, near where he had parked his truck.

¶4 Yescas was charged with two counts of aggravated assault with a deadly weapon, based on having pointed the gun at both Joey and Mary Ann. He failed to appear for trial and was tried in absentia. The court instructed the jury on aggravated assault with a deadly weapon and the lesser included offense of disorderly conduct with a deadly weapon with respect to both victims. In his closing argument, defense counsel argued that, at most, the evidence showed Yescas had "wav[ed] a gun." Counsel urged the jury that, if they "fe[lt] something happened . . . [but were] not . . . firmly convinced that [Yescas had] pointed a gun," they should find him guilty of the lesser included

offense of disorderly conduct. The jury found Yescas not guilty of the aggravated assault of Mary Ann and guilty of the lesser included offense of disorderly conduct with a deadly weapon with respect to Joey. The court issued a bench warrant, and Yescas ultimately was arrested in 2009. At sentencing, the court placed him on probation as noted above. This timely appeal followed.

Discussion

Jurisdiction

¶5 Preliminarily, the state argues this appeal should be dismissed for lack of jurisdiction under A.R.S. § 13-4033(C). That statute precludes a nonpleading defendant from filing a direct appeal when "the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary." § 13-4033(C). The state contends that, because Yescas "was missing" for "several years" and "presented no evidence at sentencing regarding his whereabouts," he caused his sentencing to occur more than ninety days after his conviction and failed to establish his absence was involuntary.

¶6 However, the state acknowledges this court has held § 13-4033(C) unconstitutional except in those cases where the state can "establish[] that a defendant's voluntary failure to appear timely for a sentencing hearing demonstrates a knowing, voluntary, and intelligent waiver of his constitutional right to appeal." *State v. Soto*, 223 Ariz. 407, ¶ 14, 224 P.3d 223, 228 (App. 2010). Such a showing can be made when a defendant has been advised that "his failure to appear at sentencing would result in a

waiver of his appeal rights." *Id*. ¶¶ 14, 18-19. Because Yescas was convicted in 2004, four years before § 13-4033(C) was enacted, presumably he was not so advised, nor has the state shown otherwise. *See* 2008 Ariz. Sess. Laws, ch. 25, § 1. We therefore address the merits of his appeal.

Jury Instructions

¶7 Yescas contends he was "entitled to an instruction on all lesser offenses, which included disorderly conduct without a firearm." Because he did not object to the trial court's instructions or request any such lesser-included-offense instruction, we review only for fundamental, prejudicial error.[3] *See State v. Fiihr*, 221 Ariz. 135, ¶ 1, 211 P.3d 13, 14 (App. 2008); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, "[u]nder some circumstances, a trial court's failure to sua sponte instruct the jury on a lesser-included offense may constitute fundamental, prejudicial error." *Fiihr*, 221 Ariz. 135, ¶ 9, 211 P.3d at 15.

¶8 It is proper to instruct the jury on a lesser included offense "only if the lesser offense is composed of some but not all of the elements of the greater crime so that it is impossible to commit the greater, without committing the lesser offense, and if the

[3]We are not persuaded by the state's argument that any error was invited. After the trial court had read the final instructions and forms of verdict to the jury, the state asked that a special interrogatory on whether Yescas was armed with a deadly weapon be added to the verdict for disorderly conduct. Both the court and defense counsel were apparently unsure whether this was necessary, and the court denied the request as untimely. However, Yescas did not "expressly request[] the superior court not to give a lesser-included offense instruction," nor did he affirmatively request the instructions that were given, which were apparently drafted by the court. *See State v. Lucero*, 223 Ariz. 129, ¶¶ 19-20, 220 P.3d 249, 256 (App. 2009) (distinguishing "affirmative invitation of error" from "passive acquiescence").

evidence supports an instruction on the lesser offense." *State v. Angle*, 149 Ariz. 499, 507, 720 P.2d 100, 108 (App. 1985) (Kleinschmidt, J., dissenting). On review of *Angle*, our supreme court adopted Judge Kleinschmidt's dissenting opinion that disorderly conduct by reckless display of a deadly weapon pursuant to A.R.S. § 13-2904(A)(6) is a lesser included offense of aggravated assault. *State v. Angle*, 149 Ariz. 478, 720 P.2d 79 (1986). Noting that "[t]he two elements of aggravated assault as charged were 1) intentionally placing a person in reasonable apprehension of imminent bodily injury by 2) use of a deadly weapon," Judge Kleinschmidt concluded that "it is impossible to put a person in reasonable apprehension of imminent bodily injury without also disturbing that person's peace or quiet." *Angle*, 149 Ariz. at 508, 720 P.2d at 109. But the offenses of disorderly conduct without a deadly weapon pursuant to § 13-2904(A)(1) through (5) do not necessarily require that a person be put in reasonable apprehension of imminent bodily injury.[4] It is therefore possible to commit aggravated assault without also committing those forms of disorderly conduct, and Yescas was not entitled to an instruction on them based on the theory that they were lesser included offenses of aggravated assault.[5] *See Angle*, 149 Ariz. at 507, 720 P.2d at 108.

[4]Specifically, a defendant could be convicted under these subsections for engaging in "seriously disruptive behavior," making "unreasonable noise," using "offensive language . . . in a manner likely to provoke immediate physical retaliation," making a "protracted commotion" to disrupt a lawful gathering, and refusing "to obey a lawful order to disperse issued to maintain public safety." § 13-2904(1)-(5).

[5]Yescas does not argue that disorderly conduct without a deadly weapon is a lesser included offense of disorderly conduct with a deadly weapon; we therefore do not address that issue.

¶9 Moreover, where "[t]he extra element distinguishing the lesser included offense from the greater . . . is not in dispute or there was no evidence presented during the trial contesting it, . . . [a] defendant is not entitled to the lesser included instruction." *State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985). Thus, "[i]f the use of a gun is not disputed, the defendant is not entitled to a lesser included instruction" for an offense that does not involve the use of a deadly weapon. *State v. Torres*, 156 Ariz. 150, 152, 750 P.2d 908, 910 (App. 1988). And here, Yescas did not dispute that he had a gun but argued he merely had waved it rather than pointing it at Joey. Furthermore, no evidence was presented to contest witness testimony that Yescas had been armed with a black nine-millimeter handgun, that he had disposed of it at the property across the street, and that a police officer had found the weapon at that location. There was thus no error, much less fundamental error, in the trial court's failing to give the instruction. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607 (requiring showing of prejudice before granting defendant relief on claim of fundamental error).

¶10 In a related argument, Yescas suggests the trial court erred in failing to provide the jury with a special interrogatory requiring it to make a specific finding that the disorderly conduct offense was committed with a deadly weapon. Because he made no such request below, we also review this argument for fundamental error. *See Fiihr*, 221 Ariz. 135, ¶ 1, 211 P.3d at 14. "We evaluate jury instructions and verdict forms as a whole to determine whether they correctly stated the law, allowed the jury to understand the issues, and provided the jury with the correct rules for reaching a decision." *Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 13, 148 P.3d 101, 105 (App. 2006). A trial court's

failure to provide a special verdict form is not reversible error unless the omission prejudiced the defendant. *State v. Garcia*, 102 Ariz. 468, 471, 433 P.2d 18, 21 (1967).

¶11 Disorderly conduct with a deadly weapon under § 13-2904(A)(6) is a class six felony, whereas disorderly conduct pursuant to the remaining five subsections, which do not require evidence of a weapon, is a class one misdemeanor. § 13-2904(B). Yescas asserts "disorderly conduct, of which [he] stands convicted, does not necessarily include reckless display of a firearm." On that basis, he contends that, had the jury been required to make a specific finding that a weapon had been involved in the offense and instructed on disorderly conduct without a weapon, it could "have acquitted [him] . . . on disorderly conduct with a firearm and instead convicted him of disorderly conduct without a firearm." Therefore, he argues, he "is entitled to have his disorderly conduct conviction reduced to a misdemeanor."

¶12 However, as noted above, there was no dispute that Yescas had displayed a gun during the incident from which the charges arose, and he was not otherwise entitled to an instruction on the forms of disorderly conduct not involving the use of a deadly weapon. Moreover, the trial court's instructions unambiguously referred to "[t]he crime of disorderly conduct with a deadly weapon" and stated that a conviction "requires proof that the defendant with the intent to disturb the peace and quiet of another or with knowledge of doing so . . . recklessly handled or displayed a deadly weapon." Thus, the instructions as a whole were adequate. *See State v. Doerr*, 193 Ariz. 56, ¶ 35, 969 P.2d 1168, 1177 (1998) ("Where the law is adequately covered by [the] instructions as a whole, no reversible error has occurred."); *see also State v. Prasertphong*, 206 Ariz. 70,

¶ 89, 75 P.3d 675, 696-97 (2003) (error in verdict form cured by jury instructions when, "[a]s a whole, the jury instructions sufficiently explained the crime . . . to the jury to assure [the defendant] a fair trial"), *judgment vacated and case remanded on other grounds*, 541 U.S. 1039 (2004).

Disposition

¶13 For the reasons stated above, we affirm Yescas's conviction and the probationary term imposed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

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

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