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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THE STATE OF ARIZONA, Appellee, v. TIMOTHY CHARLES MONK, Appellant.	2 CA-CR 2008-0106 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064250

Honorable Richard Fields, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Timothy Monk was convicted of aggravated assault with a deadly weapon/dangerous instrument, kidnapping, promoting prison contraband, and sexual abuse. After finding Monk had a prior dangerous felony conviction, the trial court sentenced him to enhanced, aggravated prison terms on the aggravated assault and kidnapping convictions and to substantially aggravated terms on the other two convictions. Monk's sentences were ordered to be served concurrently, but consecutive to the prison terms he was already serving at the time he committed these offenses. On appeal, Monk argues the court erred in refusing to give his requested jury instructions on duress and necessity and in enhancing his sentences for aggravated assault and kidnapping. We affirm.

Factual Background and Procedural History

¶2 "We view the evidence in the light most favorable to sustaining the convictions." *State v. Sarullo*, 219 Ariz. 431, ¶ 2, 199 P.3d 686, 688 (App. 2008). In May 2006, while incarcerated in a protective segregation unit of the Arizona State Prison located in Tucson, Monk grabbed a corrections officer, L., and pulled her inside his cell and shut the door. He restrained L. from behind and held a weapon made from a razor blade against her neck. Shortly thereafter, additional corrections officers arrived to assist L. Monk demanded to be transferred to a prison in Montana and continued to hold L. hostage for over five hours. While prison officials made preparations to transfer him, Monk demanded the door to his cell stay closed and all other officers to stay away from his cell. During this time, Monk fondled L. both over and under her clothing and rubbed his penis against the back of

her neck. After prison officials provided him with transfer paperwork, Monk released L. Monk was then transferred to another Arizona prison facility.

¶3 At trial, Monk testified that, in the days leading up to the kidnapping, he felt he was in imminent danger because he had conflicting obligations to rival drug dealers within the prison. He believed if he kidnapped a corrections officer, he would be able to force the prison to transfer him. The trial court granted the state's motion to preclude Monk's defenses of necessity and duress and did not instruct the jury on those theories.

¶4 During cross-examination at trial, Monk admitted he had been convicted of a felony in Maricopa County in cause number CR-8800438. The prosecutor did not inquire about the nature of that conviction because Monk's counsel previously had argued such evidence would be "highly prejudicial," which led the court to require "a sanitized version during cross [examination], that simply establishes the felony conviction, and we'll deal with the prior and the dangerous nature of the prior at a later proceeding and/or immediately after any verdict, if necessary."

¶5 Monk's prior conviction was next discussed at his sentencing hearing. At the beginning of the hearing, the prosecutor said the presentence report, which provided sentencing ranges for nonrepetitive offenses, was incorrect because Monk previously had been convicted of a dangerous felony. The prosecutor then provided the trial court what he represented were "the certified priorities [sic] documents"—evidently a certified copy of

Monk's convictions in CR-8800438—without any objection from Monk's counsel.[1] Later in the hearing, Monk's counsel stated he believed the nonrepetitive sentencing ranges contained in the presentence report were correct because no "priors trial" had been conducted.[2]

¶6 At the conclusion of the sentencing hearing, the trial court stated it had "considered the admission at trial of the prior dangerous felony; I've also reviewed the documents in CR-8800438, and find a historical prior dangerous felony." The court then imposed aggravated sentences for both the aggravated assault and kidnapping convictions as dangerous nature offenses enhanced by a prior felony conviction that was of a dangerous nature. Without objection from Monk's counsel, the court also granted the prosecutor's request to include the submitted documents in the record. These documents, however, are now missing from the record.

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[1]The prosecutor earlier had referred to these documents as the "certified sentencing documents on the prior conviction."

[2]Although the presentence report provided sentencing ranges for nonrepetitive offenses, it also stated it did not address allegations of prior convictions, dangerous nature prior convictions, or serious offense convictions, and that such allegations "may enhance the sentencing range." Additionally, the report listed Monk's offenses from CR-8800438: "Armed Robbery, a Class Two Dangerous Felony"; "Sexual Assault, a Class Two Dangerous Felony"; "Kidnapping, a Class Two Dangerous Felony"; "Aggravated Assault, a Class Three Dangerous Felony"; "Sexual Abuse, a Class Five Dangerous Felony"; "Burglary in the First Degree, [a] Class Two Dangerous Felony"; and "Burglary in the Second Degree, a Class Three Felony."

Discussion

Jury Instructions

¶7 Monk first argues the trial court erred by refusing to instruct the jury on the justification defenses of duress and necessity.[3] We review a trial court's refusal to give requested jury instructions for abuse of discretion. *State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005) (involving denial of justification instruction); *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995) (absent clear abuse of discretion, trial court's decision to refuse jury instructions not reversible). "A trial court is not obligated to instruct on a theory of the case that finds no support in the evidence." *State v. Belcher*, 146 Ariz. 380, 382, 706 P.2d 392, 394 (App. 1985). Rather, a defendant is entitled to a jury instruction on any defense theory that is reasonably supported by the evidence. *Bolton*, 182 Ariz. at 309, 896 P.2d at 849.

¶8 Monk sought to have the trial court instruct the jury on the defenses of duress and necessity because he claimed his life had been in imminent danger and he had kidnapped L. so he could demand to be transferred out of his prison unit and away from the danger. The defense of duress is available only if "a reasonable person would believe that he was

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[3]Monk also claims he was denied the opportunity to present evidence in support of these defenses, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article II, §§ 4 and 24 of the Arizona Constitution. However, Monk testified not only in his offer of proof, but also before the jury. The record demonstrates he explained at length his claim that he was forced to assault and kidnap L. Accordingly, we only address the portion of Monk's appeal directed at the trial court's failure to instruct the jury on these defenses.

compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person." A.R.S. § 13-412(A).[4] The duress "'must be *present, imminent, and impending*.'" *State v. Kinslow*, 165 Ariz. 503, 505, 799 P.2d 844, 846 (1990), *quoting State v. Jones*, 119 Ariz. 555, 558, 582 P.2d 645, 648 (App. 1978) (alteration in *Kinslow*). Essentially, the defense of duress is applicable where a third person compels another by threat of immediate violence to commit a crime against a victim. *State v. Lamar*, 144 Ariz. 490, 497, 698 P.2d 735, 742 (App. 1984). Similarly, the defense of necessity is available only if a reasonable person "was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent . . . injury." A.R.S. § 13-417(A).[5] The defense of necessity is applicable when a defendant is forced to commit a crime as the "'lesser of two evils.'" *Belcher*, 146 Ariz. at 382, 706 P.2d at 394, *quoting United States v. Bailey*, 444 U.S. 394, 410 (1980). Significantly, this defense is not available "'if there was a reasonable, legal alternative to violating the law.'" *Id.*, *quoting Bailey*, 444 U.S. at 410.

¶9 Even Monk's own account of events does not show he reasonably faced the threat of "immediate physical force" or "imminent" injury with no "reasonable, legal

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[4]"Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person . . . which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted." § 13-412(A).

[5]"Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct." § 13-417(A).

alterative[s]" to violating the law. Monk testified that for seven months he had been able to handle his conflicting obligations to rival drug dealers without being hurt before deciding he needed to kidnap L., and the last time he claimed to have been threatened was several days before the kidnapping. Monk even found time to conduct legal research on offenses he could commit and what their penalties were. Finally, although Monk knew and had used the proper procedures for requesting a transfer in the past, he did not do so in this case, claiming disillusionment with the prison's previous administration. In light of this testimony, the trial court did not abuse its discretion in refusing to instruct the jury on the defenses of duress and necessity. *See Kinslow*, 165 Ariz. at 505-06, 799 P.2d at 846-47 (no error in precluding duress defense where evidence showed defendant who escaped from prison did not face imminent physical injury despite "shoot-to-kill" order); *State v. Reed*, 196 Ariz. 37, ¶ 10, 992 P.2d 1132, 1135 (App. 1999) (duress instruction properly refused when evidence did not show defendant faced immediate harm); *State v. Belyeu*, 164 Ariz. 586, 590, 795 P.2d 229, 233 (App. 1990) (defendant not entitled to a duress instruction when, even assuming his account was true, evidence showed he was not in imminent danger); *Belcher*, 146 Ariz. at 381-82, 706 P.2d at 393-94 (absence of necessity instruction not fundamental error where defendant had other reasonable and legal options apart from committing criminal act).

¶10 Moreover, the defenses of duress and necessity are not available if a person "intentionally, knowingly or recklessly placed himself in a situation in which it was probable he would be subjected to duress," § 13-412(B), or "would have to engage in the proscribed

conduct," § 13-417(B). It was only Monk's willing participation in the prison's drug trade that led to his subsequent conflicting obligations to rival drug dealers. As Monk himself explains in his appellate brief, "the penalty for not performing satisfactorily for those running the black market drug trade was to be ganged up on and beaten and stabbed." Because Monk "intentionally, knowingly or recklessly" placed himself in this dangerous situation, he cannot rely on the defenses of duress or necessity. *See, e.g.*, *Kinslow*, 165 Ariz. at 506, 799 P.2d at 847 (duress defense unavailable where defendant placed himself in stressful situation by escaping from prison).

Sentence Enhancement

¶11 Monk next argues the trial court erred by enhancing two of his sentences because his admission on the stand was insufficient to prove his prior convictions were of a dangerous nature and the state failed to otherwise meet its burden of establishing the dangerous nature of his prior convictions. Because Monk did not object on these grounds below, we review only for fundamental error. *See State v. Miller*, 215 Ariz. 40, ¶ 10, 156 P.3d 1145, 1148 (App. 2007).[6] To demonstrate fundamental error, Monk must show: "1) the error

[6]We reject Monk's argument that his request for a jury trial on the issue of whether his prior convictions were dangerous was sufficient to alert the trial court to the grounds he now raises on appeal. At the outset, Monk admits he "made the strategic decision" to abandon his objection based on the court's failure to hold a jury trial on the issue. In addition, Monk did not object when the state presented the trial court with documents pertaining to his prior convictions, when the state requested the court include this information in the record, or when the court found Monk had a dangerous nature prior felony conviction. *See State v. Avila*, 217 Ariz. 97, ¶ 8, 170 P.3d 706, 708 (App. 2007) (because defendant objected to use of his prior felony convictions on a different basis than one raised in appeal,

occurred; 2) the error 'goes to the foundation of the case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial,' and 3) the error caused him prejudice." *Id.*, *quoting State v. Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d 601, 608 (2005).

¶12 Here, because Monk admitted on the stand he was convicted of a felony in cause number CR-8800438, there is no question he is the same person who committed those offenses. And the record is clear the only reason Monk was not asked about the dangerous nature of his prior convictions on the stand was because his counsel argued this information could unfairly prejudice the jury against him. Moreover, we presume the state provided documentation concerning this cause number that was sufficient for the trial court to conclude that Monk had been convicted of a dangerous nature prior felony. *See State v. Miller*, 120 Ariz. 224, 226, 585 P.2d 244, 246 (1978) (appellate court presumes matters not included in record on appeal support trial court's actions). Monk's claim of error rests solely on the fortuitous circumstance of these documents having disappeared from the record.[7]

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claim was forfeited and reviewed only for fundamental error); *State v. Robles*, 213 Ariz. 268, ¶¶ 11-12 & n.2, 141 P.3d 748, 752 & n.2 (App. 2006) (same). We likewise reject Monk's contention that he did not need to object "to preserve a claim that the State did not prove the dangerous nature of a prior conviction" because "[s]uch a claim is tantamount to claiming a specific objection is required to preserve a claim of the sufficiency of the evidence." Monk's argument ignores well-settled case law establishing that a defendant's failure to object to the sufficiency of the state's evidence concerning prior convictions forfeits the right to obtain appellate relief absent fundamental error. *See, e.g.*, *Robles*, 213 Ariz. 268, ¶¶ 11-12, 141 P.3d at 752.

[7]In addition, as noted above, the presentence report lists Monk's convictions from CR-8800438, and it is well-established a trial court may rely on unobjected-to information

¶13 However, even assuming the absence of these documents would amount to an error in the proceedings below, Monk cannot demonstrate such error was fundamental because he has failed to establish prejudice. Rather, his only claim of prejudice is that he received enhanced sentences "when the State did not prove [the] same." Like the defendant in *Miller*, Monk "does not suggest that he was not convicted of the felonies at issue." *Miller*, 215 Ariz. 40, ¶ 13, 156 P.3d at 1149 (holding defendant could not demonstrate prejudice necessary for fundamental error review); *see also Robles*, 213 Ariz. 268, ¶¶ 15-17 & n.4, 141 P.3d at 753 & n.4 (finding no fundamental error and noting defendant "has not claimed, either below or on appeal, that he is not the person convicted" of prior offenses).[8] Thus, because Monk has failed to establish fundamental error, we conclude his two sentences were properly enhanced.

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contained in a duly disclosed presentence report. *See State v. Molina*, 211 Ariz. 130, ¶ 29, 118 P.3d 1094, 1101-02 (App. 2005).

[8]Monk's reliance on *State v. Joyner*, 215 Ariz. 134, 158 P.3d 263 (App. 2007), and *State v. Little*, 104 Ariz. 479, 455 P.2d 453 (1969), is unavailing. In *Joyner*, this court found fundamental error where the state failed to establish the defendant's prior conviction for a violent crime pursuant to A.R.S. § 13-901.01(B). *Joyner*, 215 Ariz. 134, ¶ 29. However, the issue there concerned whether the defendant had used a gun during a previous armed robbery because that offense could have been accomplished with a simulated deadly weapon. *Id.* ¶¶ 8, 26-29. Here, Monk himself admits "whether a prior conviction is of [a] dangerous nature will be shown by the proof of the prior conviction itself and requires no extra evidence." Likewise, *Little* is entirely distinguishable and therefore unhelpful. There, the defendant did not testify that he had committed the prior offenses, the state's fingerprint expert never testified and thus never confirmed that the defendant was the same person who previously had been convicted, and the name on the prior conviction records differed from the defendant's name. 104 Ariz. at 483-84, 455 P.2d at 457-58.

Disposition

¶14 For the foregoing reasons, Monk's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge