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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THE STATE OF ARIZONA, Appellee, v. BRIAN LEE KANANEN, Appellant.	2 CA-CR 2009-0011 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800419

Honorable James L. Conlogue, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, Brian Kananen was convicted of two counts of aggravated assault on a police officer. The trial court sentenced him to consecutive, enhanced, presumptive prison terms of 1.75 and 2.25 years. On appeal, he contends the court abused its discretion in denying his request to preclude the testimony of officer Conrad Luna as a sanction for three of the state's witnesses having violated Rule 9.3(a), Ariz. R. Crim. P., by discussing one of the witness's testimony during trial. He also contends the court erred by denying his motion for judgment of acquittal and by improperly instructing the jury on self-defense. For the following reasons, we affirm.

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005). Arizona Department of Public Safety highway patrolman Samuel Long testified he had stopped Kananen on State Route 90 for speeding and "driving left o[f] center on a curve." When Long issued Kananen a citation, Kananen began swearing and calling Long names. He then "squared up with [Long] face-to-face." When Long saw "the muscles in [Kananen's] neck and chest tighten up," Long attempted to "perform an impact push" to keep Kananen away from him. Before he could do so, however, Kananen swung his right fist, striking Long just below the left eye. After a brief scuffle, Kananen complied with Long's direction to get down on his knees. When Long attempted to take Kananen into custody however, Kananen punched Long again in the mouth and nose. Long suffered a bloody nose and chipped tooth.

¶3 Border Patrol agent Michael Estrada testified he had been on his way to work when he saw Long and Kananen on the side of the road "in each other's space" and "struggling." He stopped and assisted Long in taking Kananen into custody. He also wrote a statement of his observations at the scene.

¶4 The rule excluding witnesses was invoked on the first day of trial. *See* Ariz. R. Crim. P. 9.3(a). In the morning on the second day of trial, defense counsel told the trial court it had come to his attention that the previous afternoon agent Estrada had discussed his testimony with two other state witnesses, officers Robby Craig and Conrad Luna, who had yet to testify. Outside the presence of the jury, the court heard testimony from Craig and Luna separately about the content of their conversation with Estrada. Both acknowledged Estrada had described at least some of his testimony to them, and Luna testified Estrada had told them he had felt attacked by defense counsel, particularly on the subject of his written report. The witnesses also explained their involvement in the case. Luna had been at the scene, but his only involvement with Estrada had been to hand him a piece of paper on which to write a report; he had also observed Kananen at the jail. Craig had interviewed Kananen at the jail. Long's and Estrada's testimony the previous day had established that neither Craig nor Luna had witnessed the events underlying the charges against Kananen.

¶5 Following the officers' testimony, the trial court stated: "From what I've seen so far in the proof on the issue we've had up to this point, is that [O]fficer Luna and Officer Craig will testify on areas completely different than the area that Agent Estrada testified to."

Kananen conceded there was likely no prejudice regarding Craig's testimony, but he moved to preclude Luna from testifying. The court denied Kananen's motion without further comment.

¶6 "The decision whether to impose sanctions for a Rule 9.3 violation is within the sound discretion of the trial judge." *State v. Roberts*, 138 Ariz. 230, 234, 673 P.2d 974, 978 (App. 1983). A witness's violation of an exclusionary order "does not in and of itself render the witness incompetent to testify." *State v. Christensen*, 19 Ariz. App. 479, 482, 508 P.2d 366, 369 (1973). A trial court's ruling admitting the witness's testimony will not be reversed absent an abuse of discretion and resulting prejudice. *State v. Perkins*, 141 Ariz. 278, 294, 686 P.2d 1248, 1264 (1984), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987). Kananen has shown neither. The trial court reasonably concluded Kananen would suffer no prejudice from Estrada's conversation with Luna, and none appears on the record. We find no abuse of discretion in the court's denial of Kananen's motion.

¶7 Following the state's presentation of evidence, Kananen moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. He contends on appeal that the trial court erred by denying his motion. We review the denial of a Rule 20 motion for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *State v. McCurdy*, 216 Ariz. 567,

¶ 14, 169 P.3d 931, 937 (App. 2007); *see also* Ariz. R. Crim. P. 20(a). Substantial evidence is proof that reasonable persons could find adequate and sufficient to support a finding of the defendant's guilt beyond a reasonable doubt. *State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). If reasonable people "could differ as to whether the evidence establishes a fact in issue, then the evidence is substantial." *McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d at 937.

¶8 Kananen was charged with two counts of aggravated assault based on his having punched Long in the eye with the intent to injure or provoke him (count one) and having injured Long by punching him the second time in the nose and mouth (count two). Kananen moved for a judgment of acquittal on both counts, arguing that, under "any reasonable view of the evidence" he had acted in self-defense when he punched Long the first time and that the state had failed to present substantial evidence establishing Long had been injured. On appeal, he challenges the trial court's ruling regarding count one on the same ground he raised below. As to count two, however, he contends that reasonable doubt must exist "as to Officer Long's account of the events" because, he claims, Long's testimony was "completely at odds" with that of agent Estrada and, therefore, incredible.

¶9 We disagree with Kananen's assertion that the evidence conclusively proved he had acted in self-defense. On the contrary, the evidence, as stated above, permitted a conclusion that Long reasonably had perceived a physical threat from Kananen, that he justifiably had raised his hands in a defensive manner to push Kananen away, and that

Kananen had punched Long in the eye without justification. Moreover, Kananen's contention that Long had "plac[ed] his hands" on him before he punched Long is unsupported by the record. The only evidence before the jury regarding the timing of the punch was Long's testimony that Kananen had punched him after Long had raised his hands but before he had touched Kananen. The jury reasonably could have concluded that Long's action had not caused Kananen to fear injury, reasonably or otherwise. The trial court did not err in denying Kananen's motion for judgment of acquittal on count one.

¶10 Because Kananen failed to raise below the argument he now asserts as to count two, we review the trial court's denial of the Rule 20 motion as to this count for fundamental error only. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) ("Absent a finding of fundamental error, failure to raise an issue at trial . . . waives the right to raise the issue on appeal."). To be entitled to relief under this standard of review, Kananen must first prove error. *See State v. Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d 601, 608 (2005). It is the province of the jury, not the court, to "'resolve conflicting testimony and to weigh the credibility of witnesses.'" *State v. Lee*, 217 Ariz. 514, ¶ 10, 176 P.3d 712, 714 (App. 2008), *quoting State v. Alvarado*, 158 Ariz. 89, 92, 761 P.2d 163, 166 (App. 1988). Here, the jury was entitled to accept Long's version of events, *see id.*, and his testimony supplied substantial evidence of Kananen's guilt. Accordingly, the court did not err, let alone commit fundamental error, in denying the motion for judgment of acquittal.

¶11 Finally, Kananen contends the trial court erroneously instructed the jury on the issue of self-defense. Specifically, he challenges the court's inclusion of the term "sufficient" in the following sentence of the court's instruction: "If you find the defendant has submitted evidence sufficient to raise the issue of self-defense with respect to the crime of aggravated assault, the State must then pro[ve] beyond a reasonable doubt, that the defendant did not act in self-defense." He contends the instruction improperly "shifted the initial burden of proving self-defense to [him]," arguing that "[b]y adding the word 'sufficient' to its instructions, the court misled the jury to believe that [Kananen] had an evidentiary burden to surmount before the state's obligation [to prove he had not acted in self-defense] began."

¶12 But as the state points out in its answering brief, during settlement of final jury instructions, Kananen repeatedly adopted the position that he bore the initial burden of proving self-defense by a preponderance of the evidence. And, upon Kananen's request, the court included the following language in a separate instruction on burden of proof, which he has not challenged on appeal: "A preponderance of the evidence is a standard to be used in determining whether Mr. Kananen has presented sufficient evidence to raise the issue of self-defense." The state contends, therefore, that Kananen invited any error in the court's instruction, a claim Kananen does not dispute in his reply brief. He requests, however, that we review the instruction for fundamental or structural error.

¶13 Our supreme court has "long held that when a party requests an erroneous instruction, any resulting error is invited and the party waives his right to challenge the instruction on appeal." *State v. Logan*, 200 Ariz. 564, ¶ 8, 30 P.3d 631, 632 (2001). Further, "[i]f an error is invited, we do not consider whether the alleged error is fundamental, for doing so would run counter to the purposes of the invited error doctrine." *Id.* ¶ 9. To the extent Kananen asks this court to disregard the holding in *Logan*, we cannot do so. *See State v. Bejarano*, 219 Ariz. 518, ¶ 6, 200 P.3d 1015, 1017 (App. 2008) ("[W]e may not disregard or modify the law as articulated by the Arizona Supreme Court . . . .").

¶14 Here, Kananen complains that the word "sufficiently" implied to the jury he had an evidentiary burden to surmount in order to raise the issue of self-defense. Not only did Kananen fail to object to the court's instruction, he asserted he had a "burden of proof . . . on the issue of self-defense," and he identified the preponderance standard as the one he had to meet to discharge that burden. Under these circumstances, even if Kananen did not invite the alleged error by requesting the specific instruction at issue here, he waived the right to complain on appeal by requesting the burden of proof instruction given. Even assuming the existence of fundamental error, Kananen cannot show prejudice resulting from the self-defense instruction in light of the unchallenged instruction on burden of proof.

¶15 Finally, any error in the challenged instruction did not rise to the level of structural error. "Structural errors are defined as those errors which affect the 'entire conduct of the trial from beginning to end.'" *State v. Le Noble*, 216 Ariz. 180, ¶ 19, 164 P.3d 686,

690 (App. 2007), *quoting Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Few errors that occur during trial are structural. *See State v. Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d 915, 933-34 (2003) (identifying errors United States Supreme Court has designated as structural). Again, even assuming some error in the self-defense instruction here, any such error cannot be deemed to have deprived Kananen of a structurally sound trial, especially in light of the reasonable doubt instruction Kananen has not challenged on appeal. *Cf. Neder v. United States*, 527 U.S. 1, 8-9 (1999) (instructional error on element of offense not structural); *State v. Duarte*, 165 Ariz. 230, 231, 232, 798 P.2d 368, 369, 370 (1990) (cautioning trial court against use of substantially similar self-defense instruction, but finding no reversible error considering instruction as a whole).

¶16 Kananen's convictions and sentences are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge