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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STATE OF ARIZONA, Appellee, v. VERNON LEE BULLOCK, JR., Appellant.	2 CA-CR 2009-0396 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054292

Honorable Charles S. Sabalos, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Vernon Bullock was convicted of second-degree murder and sentenced to a presumptive term of twenty years' imprisonment. On appeal, he contends the trial court committed fundamental, reversible error when it failed to sua sponte preclude the admission of a video-recorded statement he had made and to give a certain jury instruction. Finding no such error, we affirm.

Factual and Procedural History

¶2 We view the facts in the light most favorable to upholding Bullock's convictions, drawing all reasonable inferences in favor of the jury's verdict. *See State v. Pierce*, 223 Ariz. 570, n.2, 225 P.3d 1146, 1146 n.2 (App. 2010). One day in June 2005, F. was talking on a cellular telephone in the parking lot of a Tucson nightclub at the club's 2:00 a.m. closing time. Over 150 people had crowded into the lot when some type of altercation erupted. During the melee, Bullock fired a nine-millimeter handgun, hitting F. twice and killing him. Bullock then threw his gun away and fled. Analysis later confirmed that at least one bullet removed from F.'s body had come from a nine-millimeter handgun recovered at the scene. Several months later, Bullock was interviewed by a detective. In a video-recorded statement, he admitted he had been present in the parking lot, had fired a gun, and then had discarded it. Criminalists subsequently established that the DNA[1] profile of material taken from the slide and grip of the gun found at the scene matched Bullock's. He was later convicted and sentenced

[1]Deoxyribonucleic acid.

as outlined above.[2] We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Video-Recorded Statement

¶3 Bullock contends the trial court should have sua sponte precluded or otherwise altered his video-recorded interview because it showed him wearing handcuffs. He concedes he did not object on this basis at trial, but nevertheless contends the portrayal of him handcuffed was so prejudicial as to constitute fundamental error. To warrant reversal under a fundamental error standard, Bullock is required to demonstrate that permitting the jury to view the interview constituted error that went to the foundation of his case, taking from him an essential right and denying him a fair trial. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). He has failed to meet this burden.

¶4 Relying on *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992), *disapproved of on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001), Bullock maintains the video prejudicially made him "appear to be a bad or dangerous individual" in the jury's eyes. *Atwood* indeed stands for the proposition that a previously recorded depiction of a defendant wearing handcuffs may prejudice the defendant, *id*. at 645, 832 P.2d at 662, but we cannot conclude that it supports a finding of fundamental, prejudicial error here. In *Gates v. Zant*, 863 F.2d 1492, 1501 (11th Cir.

[2]This court reversed Bullock's initial conviction. *See State v. Bullock*, No. 2 CA-CR 2007-0002 (memorandum decision filed Oct. 2, 2008). He was retried and here appeals from his conviction following his second trial for this offense.

1989), on which our supreme court relied in *Atwood*, *see* 171 Ariz. at 644, 832 P.2d at 661, the Eleventh Circuit likened a videotape in which a defendant was shackled to "a brief or incidental viewing . . . of the defendant in handcuffs." And "brief and inadvertent exposure of a handcuffed or shackled defendant to members of the jury outside the courtroom is not inherently prejudicial, and the defendant is not entitled to a new trial absent a showing of actual prejudice." *State v. Apelt*, 176 Ariz. 349, 361, 861 P.2d 634, 646 (1993); *see also State v. Johnson*, 147 Ariz. 395, 399, 710 P.2d 1050, 1054 (1985) ("The question is whether the defendant was prejudiced by what the jury saw, not the mere fact that it was seen.").

¶5 Having failed to poll the jury or otherwise preserve a record of any prejudice, Bullock's claim rests on his bare assertion that the video caused the jury to see him as "bad or dangerous." Accordingly, he has failed to demonstrate actual prejudice, and we do not find error, much less fundamental error requiring reversal. *See Apelt*, 176 Ariz. at 361, 861 P.2d at 646 (defendant must preserve record showing actual prejudice even should court refuse to question jurors during trial); *see also Gates*, 863 F.2d at 1502 (defendant's failure to object, request limiting instruction, or poll jury weighed against finding of actual prejudice).[3]

[3]We find no merit in Bullock's contention that a "trial court should be required to conduct some type of balancing analysis in determining" whether a video-recorded interview is more probative than it is prejudicial. Our rules of evidence already require just this sort of analysis for the admission of any evidence. *See* Ariz. R. Evid. 403 (relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"), and we presume trial courts know and apply the law, *see State v. Henry*, 224 Ariz. 164, n.5, 228 P.3d 900, 902 n.5 (App. 2010). To the extent

Jury Instruction

¶6 Bullock also contends the trial court committed fundamental, prejudicial error by failing to sua sponte instruct the jury that he would be justified in using deadly force in order to prevent a crime. *See* A.R.S. § 13-411(A). Because he did not request this instruction at trial and raises this issue for the first time on appeal, we review only for fundamental error. *See Nordstrom*, 200 Ariz. 229, ¶ 81, 25 P.3d at 741. It is fundamental error for the trial court to fail to instruct on vital matters "'even if not requested by the defense.'" *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003), *quoting State v. Avila*, 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985). But, "[i]t is a rare case where the omission of an instruction without objection constitutes fundamental error." *State v. Marchesano*, 162 Ariz. 308, 316, 783 P.2d 247, 255 (App. 1989) (lack of sua sponte instruction on duress not fundamental error), *disapproved of on other grounds by State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002).

¶7 Although "'a defendant is entitled to a justification instruction if it is supported by "the slightest evidence,"'" *State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692 (App. 2005), *quoting State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997), one should not be given unless the instruction is "'reasonably and clearly supported by the evidence.'" *Id.*, *quoting State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987). At trial, Bullock testified that, as he was leaving the nightclub, the fight broke out, somebody hit him in the head, and a bullet went through the leg of his

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Bullock may be asking us to craft a test specifically for video-recorded evidence, we see no justification for doing so.

pants. One of his friends told him to "get the gun" because people were shooting at them. He then grabbed his weapon and fired two or three shots towards "a group," in the direction from which the alleged first shots had come. He argues, therefore, the jury should have been instructed on crime prevention as a justification for his actions because he was attempting to prevent an aggravated assault or murder by shooting at the initial shooter.

¶8 Even assuming this evidence would have supported a justification instruction, the trial court did not fundamentally err because it instructed the jury on self-defense to largely the same effect. As the state correctly points out, a defendant is not "entitled to [a particular] instruction when it is adequately covered by other instructions." *State v. Martinez*, 196 Ariz. 451, ¶ 36, 999 P.2d 795, 804 (2000). The trial court's self-defense instruction stated that Bullock would be justified in using deadly force if "[a] reasonable person in [his] situation would have believed that physical force was immediately necessary to protect against another's use or attempted use or apparent use of unlawful physical force." Under § 13-411(A), a crime-prevention instruction would inform the jury that deadly force would be justified "if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of . . . second or first degree murder . . . or aggravated assault." Because the murder or aggravated assault Bullock would have been privileged to prevent under § 13-411(A) was the same action the jury was instructed he could

defend against, the self-defense instruction adequately covered this justification.[4] Bullock therefore has failed to show fundamental, prejudicial error.

Disposition

¶9 Bullock's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

[4]In his reply brief, Bullock argues the self-defense instruction did not sufficiently cover crime prevention because he was not alone and the jury could have concluded he was acting to prevent the assault or murder of one of his friends. However, the instruction only required the jury to find that force was "necessary to protect against another's use" of unlawful force; it did not specify that the defendant be the object of that force. We presume a jury follows the court's instructions. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Moreover, to find crime prevention but not self-defense under these facts, the jury would have to reach the illogical conclusion that, when bullets threatened him and his friends, Bullock shot to prevent a crime against his friends, but not against himself.