State v. Chavez-Molina, 2012 Ariz. App. Unpub. LEXIS 1312 (AZ Ct. App. 2012)
State: Arizona
Date: October 25, 2012
Defendant: Chavez-Molina
State v. Chavez-Molina, 2012 Ariz. App. Unpub. LEXIS 1312 (AZ Ct. App. 2012)
STATE OF ARIZONA, Appellee, v. JAIME CHAVEZ-MOLINA, Appellant.
No. 1 CA-CR 11-0848
COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT D
2012 Ariz. App. Unpub. LEXIS 1312
October 25, 2012, Filed
COUNSEL:
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Bruce Peterson, Maricopa County Legal Advocate, By Frances J. Gray, Deputy Legal Advocate, Phoenix, Attorneys for Appellant.
JUDGES:
DONN KESSLER, Judge. MICHAEL J. BROWN, Presiding Judge, ANDREW W. GOULD, Judge, concurring.
MEMORANDUM DECISION
KESSLER, Judge
Jaime Chavez-Molina ("Defendant") appeals from his convictions and sentences of one count of kidnapping, three counts of aggravated assault, one count of disorderly conduct, and one count of simple assault. The convictions stemmed from an incident in which Defendant forcibly removed his pregnant girlfriend from a bar and later confronted a man who his girlfriend had asked to call the police ("W.Y."). Defendant argues that the trial court erred by admitting testimonial hearsay evidence, denying his request for jury instructions on justification defenses, denying his motion for judgment of acquittal on two counts, and imposing enhanced sentences. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 13-4033(A)(1) (2010). For reasons that follow, we affirm the convictions, but remand for resentencing on the convictions for kidnapping and one count of aggravated assault.
DISCUSSION
A. Admissibility of 911 Call
Prior to trial, the State moved to introduce a recording of a 911 call. The recording consisted of an unknown woman informing the 911 operator that police officers were needed because there was a man with a gun pulling a girl out of the bar. The woman remained on the phone and shortly thereafter told the 911 operator that the man had the girl in a truck and was leaving with her. During the first minute and forty-five seconds of the call, the caller described to the 911 operator that she observed the girl being placed in a vehicle immediately before she made the 911 call. The State argued that "stress and nervous excitement" was discernible in the caller's voice, which clearly demonstrated her concern for the girl's safety. The State conceded that the portion of the call that followed the first minute and forty-five seconds was "more narrative and investigatory," and therefore, the State only sought to introduce the portion of

the call that it argued was admissible as an excited utterance. Defendant opposed the motion, arguing that the recording was inadmissible because the 911 call was testimonial hearsay. Following a hearing, the trial court granted the motion and permitted the State to introduce the first minute and forty-five seconds of the 911 call, ruling that this portion of the call was non-testimonial and admissible as an excited utterance.

On appeal, Defendant contends the trial court erred in admitting the recording of the 911 call, arguing that the caller's statements were testimonial and that he was denied his Sixth Amendment confrontation rights because he did not have the opportunity to cross-examine the caller. See Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (holding Confrontation Clause precludes admission of testimonial out-of-court statements unless the witness is subject to cross-examination at trial or is unavailable and the defendant had a prior opportunity to cross-examine the witness). Although we generally review a trial court's ruling on the admissibility of evidence for abuse of discretion, we review challenges to admissibility based on the Confrontation Clause de novo. State v. Armstrong, 218 Ariz. 451, 458, ¶ 20, 189 P.3d 378, 385 (2008).

The Confrontation Clause only precludes the admission of testimonial statements. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The Supreme Court defines "testimony" as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51 (citation omitted). Thus, statements made to the police, including those in 911 calls, are testimonial for purposes of the Confrontation Clause when "there is no . . . ongoing emergency, and . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822. On the other hand, a statement is non-testimonial when the "circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id.

Here, the trial court properly found the statements by the caller in the first minute and forty-five seconds of the 911 call were non-testimonial because they were not made for "the purpose of establishing or proving some fact," but rather to describe "current circumstances requiring police assistance." Id. at 826-27. Accordingly, there was no violation of Defendant's confrontation rights in the admission of the recording of the 911 call. See Williams v. Illinois, 132 S.Ct. 2221, 183 L. Ed. 2d 89 (2012) ("In identifying the primary purpose of an out-of-court statement, we apply an objective test. We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances." (citation omitted)); see also State v. Damper, 223 Ariz. 572, 575-76, ¶ 12, 225 P.3d 1148, 1151-52 (App. 2010).

B. Denial of Justification Instructions

Defendant also contends the trial court erred by denying his request for jury instructions on the justification defenses of self-defense and defense of a third person. "[A] defendant is entitled to a justification instruction if it is supported by 'the slightest evidence.'" State v. Hussain, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997) (citation omitted). However, an instruction should not be given "unless it is reasonably and clearly supported by the evidence." State v. Walters, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987). We review a trial court's refusal to give a requested instruction for abuse of discretion. State v. Bolton, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

Defendant argues that he was entitled to the justification instruction of defense of a third person in regards to the charge of kidnapping his girlfriend (Count 1) . See A.R.S. § 13-406 (Supp. 2011). 1 According to Defendant, an instruction on this defense was appropriate with respect to the kidnapping charge because there was evidence that he was acting to protect his unborn child in removing his girlfriend from the bar where she was drinking alcohol.
Pursuant to A.R.S. § 13-406, a person is justified in threatening or using physical or deadly physical force to the same degree available in self-defense "to protect . . . against the unlawful physical force or deadly physical force a reasonable person would believe is threatening the third person he seeks to protect." In denying Defendant's request for this instruction, the trial court ruled that this statutory defense does not include the defense of unborn children. We need not reach the issue of whether the trial court's interpretation is correct because even if A.R.S. § 13-406 were construed to justify the defense of unborn children, Defendant has not cited to any authority, and we are aware of none, that a pregnant woman's ingestion of alcohol constitutes use or threatened use of unlawful physical force against her unborn child. Because Defendant's claimed defense of a third person was not supported by even the "slightest evidence," we hold there was no error by the trial court in refusing to instruct on this defense. See State v. Cañez, 202 Ariz. 133, 151, ¶ 51, 42 P.3d 564, 582 (2002) (reviewing court may affirm trial court's ruling on any basis if correct result reached).
Defendant further argues that the trial court erred by refusing his request for an instruction on self-defense in regards to the four assault charges (Counts 2-4 and 7). Pursuant to A.R.S. §§ 13-404 (2010) and 13-405 (Supp. 2011), a person is justified in using or threatening to use deadly physical force only when a reasonable person would believe that it is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force. With respect to the charge that Defendant committed aggravated assault by threatening his girlfriend with his gun (Count 2), there was no evidence presented that his girlfriend used or attempted to use deadly physical force against Defendant. On this record, there was no error by the trial court in declining to instruct on self-defense with respect to this charge. See State v. Andersen, 177 Ariz. 381, 386, 868 P.2d 964, 969 (App. 1993) ("Given that there was no evidence that [the victim] was attempting to use deadly force against the defendant, a self-defense instruction was not available to him.").
We further find no reversible error with respect to the trial court's refusal to instruct the jury on self-defense in regards to the charge that Defendant committed assault by injuring his girlfriend while they were in the truck (Count 7) . There was evidence that after Defendant forced his girlfriend into the front seat of the truck, she began hitting him with her fists because she did not want to go with him. The use of force in self-defense is not justified if the defendant provokes the other person's use or attempted use of unlawful force and does not withdraw from the encounter. A.R.S. § 13-404(B)(3) ; see also State v. Myers, 59 Ariz. 200, 206, 125 P.2d 441, 444 (1942) ("Accused cannot avail himself of, or shield himself on the ground of, a necessity which he has brought on by his own fault or wrongful act." (citation omitted)). Here, the jury found Defendant guilty of committing kidnapping by forcing his girlfriend to leave the bar and get in the truck. Accordingly, even if the trial court erred by not instructing on self-defense in regards to Defendant's use of force against his girlfriend while they were in the truck, the jury's verdict on the kidnapping charge rendered any error harmless because it establishes that defendant provoked the altercation. State v. Noriega, 142 Ariz. 474, 482, 690

P.2d 775, 783 (1984), overruled on other grounds by State v. Burge, 167 Ariz. 25, 28 n.7, 804 P.2d 754, 757 n.7 (1990) (holding that because defendant was found guilty of burglary, it can be inferred he provoked the altercation and was, therefore, not entitled to the self-defense instruction); State v. Kelly, 149 Ariz. 115, 117-18, 716 P.2d 1052, 1054-55 (App. 1986) (holding defendant was not entitled to self-defense instruction because his conviction for trespass showed he provoked the altercation).

There was also no reversible error by the trial court in denying the request for instructions on self-defense with respect to the two charges of aggravated assault stemming from Defendant's encounter with W.Y. after Defendant and his girlfriend had exited the truck (Counts 2 and 3). W.Y. testified that Defendant approached him while W.Y. was in the front yard of his home. Because Defendant was acting erratically, W.Y. told Defendant that he was trespassing and ordered him off his property. W.Y. then noticed Defendant's girlfriend lying on the sidewalk. When W.Y. asked her if she was alright, she said she was not and requested that W.Y. call the police. As W.Y. turned around, Defendant drew his gun and told W.Y. to get down on his knees. W.Y. fought with Defendant over the gun. W.Y. was able to get control of the gun during the struggle and tried to fire it, but it did not fire. Defendant pulled out a knife and W.Y gave up the gun because he feared he would be stabbed. Defendant then struck W.Y. in the head and face several times with the gun before fleeing the scene.

Contrary to Defendant's contention, there was no evidence that W.Y. engaged in any conduct that would justify Defendant threatening W.Y. with his gun. Defendant's girlfriend testified that she did not see how the fight between Defendant and W.Y started, and because Defendant did not testify, the only testimony regarding the circumstances surrounding Defendant's conduct in threatening W.Y. with the gun came from W.Y. Given W.Y.'s testimony that he did not engage in any conduct that would justify Defendant's use of the gun, the trial court did not abuse its discretion in ruling that the evidence did not support an instruction on self-defense with respect to Count 3.

There is also no merit in Defendant's argument that he was entitled to an instruction on self-defense in regards to the charge of aggravated assault with the knife (Count 4) . Defendant asserts he was justified in using his knife after W.Y. took his gun away from him and attempted to fire it. The jury's guilty verdict on the charge of aggravated assault with the gun, however, shows that Defendant was at fault in provoking the altercation, and because there was no evidence that he attempted to withdraw from the encounter before using the knife, he was not entitled to claim self-defense in regards to his conduct. A.R.S. § 13-404(B)(3); Noriega, 142 Ariz. at 482, 690 P.2d at 783; Kelly, 149 Ariz. at 117-18, 716 P.2d at 1054-55.

C. Sufficiency of Evidence

Defendant next contends the trial court erred by denying his motion for judgment of acquittal with respect to the charges of kidnapping and aggravated assault in Counts 1 and 2. Specifically, Defendant argues that there was no evidence that he restrained his girlfriend as required for the offense of kidnapping, A.R.S. § 13-1304(A) (2010), or that he placed her in reasonable apprehension of imminent physical injury as required for the charge of aggravated assault, A.R.S. § 13-1203(A)(2) (2010) . We review claims of insufficient evidence de novo. State v. Bible, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

In considering claims of insufficient evidence, our review is limited to whether substantial evidence exists to support the verdicts. State v. Scott, 177 Ariz. 131, 138, 865 P.2d 792, 799

(1993); see also Ariz. R. Crim. P. 20(a) (stating court shall enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). Substantial evidence is such proof that "reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." State v. Spears, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In reviewing claims of insufficient evidence, we construe the evidence in the light most favorable to sustaining the jury's verdicts, and resolve all reasonable inferences against Defendant. State v. Greene, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." State v. Soto-Fong, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting State v. Scott, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

As charged in the instant case, "[a] person commits kidnapping by knowingly restraining another person with the intent to . . . [p]lace the victim . . . in reasonable apprehension of imminent physical injury . . . ." A.R.S. § 13-1304(A)(4). "'Restrain' means to restrict a person's movements without consent, without legal authority, and in a manner [that] interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by . . . [p]hysical force, intimidation or deception." A.R.S. § 13-1301(2) (2010).

Defendant argues that there was insufficient evidence to establish the element of restraint on the kidnapping charge because his girlfriend testified that she consented to leaving the bar and getting in the truck with him. Defendant is correct that his girlfriend testified that she called him to come to the bar and take her home. She further testified, however, that after Defendant arrived at the bar and she observed how he was acting, she did not want to leave with him. Given the additional evidence provided by the 911 call that Defendant had a gun visible as he pulled her out of the bar, the jury could reasonably find that his act of removing his girlfriend from the bar and placing her in the truck was done without her consent through force and intimidation and in a manner that substantially interfered with her liberty. Viewed in the light most favorable to sustaining the verdict, the record reflects sufficient evidence to support the conviction for kidnapping.

We also hold that there was sufficient evidence to support the conviction for the offense of aggravated assault against Defendant's girlfriend (Count 2). The challenge raised by Defendant to the sufficiency of the evidence on this charge is based on his girlfriend's testimony that she did not see the gun until she was in the truck and was not afraid of the gun because she had seen it many times and knew it did not work. Thus, he argues there is no evidence that he placed her in reasonable apprehension of imminent physical injury.

The record reflects that Defendant's girlfriend was a reluctant witness at trial, and the jury was free to disregard her testimony that she was not afraid of the gun. See State v. Cox, 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007) ("credibility of witnesses and the weight and value to be given to their testimony are questions exclusively for the jury") (quoting State v. Clemons, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974)). The jury could reasonably find from the other evidence presented that Defendant displayed the gun as he pulled his girlfriend out of the bar and that she went with him despite not wanting to leave because she was in reasonable apprehension of imminent physical injury from the gun.

D. Imposition of Enhanced Sentence

Finally, Defendant argues that the trial court erred by increasing the sentences imposed for

Counts 1 and 2 by two years pursuant to A.R.S. § 13-3601(L) (2010) based on his admission that he knew his girlfriend was pregnant. In its answering brief, the State concedes error and we agree. Although Defendant did not raise this issue in the trial court, relief is available because the imposition of an illegal sentence is fundamental error. State v. Cox, 201 Ariz. 464, 468, ¶ 13, 37 P.3d 437, 441 (App. 2002).

Prior to trial, the State alleged Defendant was subject to sentencing under A.R.S. § 13-3601(L) with respect to the offenses committed against his girlfriend because they were domestic violence offenses and Defendant knew his girlfriend was pregnant when he committed the offenses. In finding Defendant guilty of kidnapping (Count 1) and aggravated assault (Count 2), the jury also found the offenses to be domestic violence offenses. As part of an agreement to avoid having a trial on aggravating circumstances, Defendant admitted the State's allegation that he knew his girlfriend was pregnant when he committed the offenses. At sentencing, the trial court imposed a mitigated eight-year prison term for Count 1 and a mitigated six-year prison term for Count 2, but further added two years to each of these sentences based on the admission to the domestic violence enhancement allegation, increasing the sentences to ten and eight years, respectively.

Pursuant to A.R.S. § 13-3601(L), if a defendant commits certain enumerated domestic violence offenses, including kidnapping and aggravated assault, against a pregnant woman and knew that the woman was pregnant, A.R.S. § 13-709.04(B) (2010) applies to the sentence. Section 13-709.04(B), in turn, provides in pertinent part: "The maximum sentence otherwise authorized . . . shall be increased by up to two years if the defendant committed a felony offense against a pregnant victim and knew that the victim was pregnant . . . ."

The trial court's comments while accepting Defendant's post-trial admission and at sentencing indicate the trial court was operating under the belief that A.R.S. § 13-709.04(B) required that two years be added to the sentences imposed on Defendant's domestic violence offenses. This statute, however, merely grants the trial court discretion to impose an aggravated sentence of up to two years longer than the otherwise statutory maximum for the offenses; it does not mandate that all sentences imposed on such offenses be increased by two years. Because we are unable to determine whether the same sentences would have been imposed for Counts 1 and 2 if the trial court had not believed that two years were required to be added to the sentences, we vacate the sentences on these counts and remand for resentencing. State v. Garza, 192 Ariz. 171, 175-76, ¶¶ 16-17, 962 P.2d 898, 902-03 (1998) (holding that "[e]ven when the sentence imposed is within the trial judge's authority, if the record is unclear whether the judge knew he had discretion to act otherwise, the case should be remanded for resentencing").

For the foregoing reasons, we affirm Defendant's convictions, but vacate the sentences for Counts 1 and 2 and remand for resentencing consistent with this decision.

/s/ DONN KESSLER, Judge

CONCURRING:

/s/ MICHAEL J. BROWN, Presiding Judge

/s/ ANDREW W. GOULD, Judge

FOOTNOTES:

1 We cite to the most recent version of the applicable statute where there are no relevant substantive changes.