

State v. Ricci, 2012 Ariz. App. Unpub. LEXIS 426 (AZ Ct. App. 2012)

State: Arizona

Date: April 3, 2012

Defendant: Ricci

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STATE OF ARIZONA, Appellee, v. TRAVIS RICCI, Appellant.

No. 1 CA-CR 11-0386

COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT E

2012 Ariz. App. Unpub. LEXIS 426

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COUNSEL:

For Appellee: Kent E. Cattani, Chief, Counsel, Criminal Appeals/Capital Litigation Division And Liza-Jane Capatos, Assistant Attorney General, Thomas C. Horne, Arizona Attorney General, Phoenix.

For Appellant: Janelle A. McEachern, Chandler.

JUDGES:

PHILIP HALL, Judge. CONCURRING: PATRICIA A. OROZCO, Presiding Judge, JOHN C. GEMMILL, Judge.

MEMORANDUM DECISION

HALL, Judge

Travis Ricci appeals his convictions for aggravated assault and two counts of misconduct involving weapons, arguing that the trial court erred in denying his motion to sever and his motion for judgment of acquittal and that insufficient evidence supported the verdicts. For the reasons that follow, we find no error and affirm.

A grand jury indicted Ricci on assault, attempted murder, and two counts of aggravated assault stemming from an alleged assault to his girlfriend and stabbing of two males at a party in February 2010. The grand jury also indicted Ricci, a convicted felon, on two counts of misconduct involving weapons, one for possession of the knife on the date of the stabbings, and the other for possession of the knife found on him when he was arrested three days later. Before trial, Ricci moved to sever trial of the misconduct charge for the knife seized during his arrest from trial of the remaining counts. He argued that the State had no evidence to prove that this knife was the knife used in the stabbings. Furthermore, the evidence on the type of knife seized from him when he was arrested would deprive him of a fair determination of his innocence or guilt on the other charges. The trial court denied the motion to sever, and Ricci did not renew it during trial.

Charged offenses may be joined when they “[a]re of the same or similar character,” “[a]re based on the same conduct or are otherwise connected together in their commission,” or “[a]re alleged to have been a part of a common scheme or plan.” Ariz. R. Crim. P. 13.3(a)(1), (2), and (3). Arizona Criminal Procedure Rule (Rule) 13.4(b) provides for severance as of right when offenses are: (1) joined only because they are of the same or similar character, and (2) evidence of the other offense or offenses would not be admissible if the counts were tried separately.

Otherwise, the court must sever offenses only when “necessary to promote a fair determination of the guilt or innocence” of the defendant. Ariz. R. Crim. P. 13.4(a).

Because Ricci failed to renew his motion to sever at trial, Rule 13.4(c), we review his claim of

error for fundamental error only. See *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996). Ricci thus bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005).

Ricci has failed to demonstrate that the court erred, much less fundamentally erred to his prejudice, in refusing to sever trial of the misconduct charge involving the knife seized from him the day of his arrest from the trial of the counts arising from his conduct at the party three days earlier. The State's theory was that the knife seized from Ricci when he was arrested was the same one he had used to stab the victims at the party. The State accordingly could have introduced evidence regarding his possession of this knife at trial of the other charges, even if this count had been tried separately. Moreover, a reasonable jury could have inferred from the witnesses' general description of the knife used in the stabbing that it was the knife that was seized from him when he was arrested, notwithstanding Ricci's testimony that the knife he used in the stabbing was a "bit smaller" and had slightly different features.¹ On this record, we cannot say that the trial court erred, much less fundamentally erred, by refusing to sever the second misconduct count from the remaining counts for trial.

Ricci has also failed to show that the denial of severance prejudiced him, as necessary for reversal on fundamental error review. "When a defendant challenges a denial of severance on appeal, he must demonstrate compelling prejudice against which the trial court was unable to protect." *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003). (citation and internal punctuation omitted). "[A] defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *State v. Johnson*, 212 Ariz. 425, 430, ¶ 13, 133 P.3d 735, 740 (2006) (citation omitted). Such was the case here. Our supreme court has repeatedly stated that we will presume that jurors follow their instructions. See, e.g., *State v. Kuhs*, 223 Ariz. 376, 387, ¶ 55, 224 P.3d 192, 203 (2010); *State v. Velazquez*, 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007); *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). Moreover, Ricci conceded in his own testimony that he was a convicted felon and possessed a knife on the two separate occasions, and he concedes on appeal that the evidence was sufficient to prove that the knife he used in the stabbing was a deadly weapon. Under these circumstances, he has failed to persuade us that the testimony of the detective regarding the specialized and deadly nature of the knife seized from him the date of his arrest so prejudiced him that severance was required.

Ricci also argues that the court erred in denying his motion for judgment of acquittal, and that the evidence was insufficient to support his convictions for aggravated assault of Michael A. and two counts of misconduct involving weapons. He argues that evidence was insufficient to prove the aggravated assault because the State failed to disprove his claim of self-defense, and it was insufficient to prove the misconduct involving weapons because the State failed to prove that he knew that the knives fit the "prohibited category" of deadly weapons.

We find no merit in either argument. We review de novo the trial court's denial of a motion for judgment of acquittal and the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). We do not

distinguish between direct and circumstantial evidence. See *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). Credibility determinations are exclusively the province of the jury. See *State v. Just*, 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983). “When reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.” West, 226 Ariz. at 563, ¶ 18, 250 P.3d at 1192 (quoting *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997)).

In the State’s case-in-chief, Ricci’s girlfriend testified that Ricci was arguing with her at a party when he slammed her head into the wall. Greg H. testified that he told Ricci to leave her alone, and when Ricci told him to mind his own business, he and Ricci exchanged punches. Michael A. testified that after he got in between Ricci and Greg H. to separate them, Ricci took out a pocket knife and slashed Greg H.’s neck and shoulder and Michael A.’s hand, which was on Greg H.’s shoulder. Michael A. testified that at no time did he punch Ricci or attempt to tackle him. Both Michael A. and Greg H. underwent surgery for their wounds and were hospitalized. Ricci fled the party after the stabbing. When he was arrested three days later, he had a folding knife with a three and one-half inch blade in his pocket.

In his defense, Ricci admitted that he had swung his knife twice, cutting Greg H.’s neck and shoulder and Michael A.’s hand, but testified that he believed he had no other choice. He conceded that no one threatened him with a knife or other weapon before he cut Greg H. and Michael A. He testified, however, that Greg H., Michael A., and Chuck M. had him surrounded and he was fielding punches from Greg H. and Chuck M., both of whom he knew had spent time in prison. He also testified he was afraid they would “start stomping on me” if he fell. Ricci also testified that he believed that it was necessary to use the knife to create an escape route out of the house, through the crowd surrounding him.

The jury convicted Ricci solely of the aggravated assault of Michael A. It acquitted him of the assault of his girlfriend and the attempted murder of Greg H., and was unable to reach a verdict on the aggravated assault of Greg H.

On this record, we find that the State offered more than sufficient evidence to disprove Ricci’s claim that he was justified in stabbing Michael A. in self-defense.² If a defendant presents evidence of self-defense, “the state must prove beyond a reasonable doubt that defendant did not act with justification.” A.R.S. § 13-205(A) (2010).³ A person is justified in using physical force against another, however, only “when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other’s use or attempted use of unlawful physical force.” A.R.S. § 13-404(A) (2010) (emphasis added). A person is justified in threatening or using deadly physical force only when and to the degree a reasonable person would believe it “is immediately necessary to protect himself against the other’s use or attempted use of unlawful deadly physical force.” A.R.S. § 13-405(A)(2) (Supp. 2011). Finally, a defendant may not assert a justification defense if he recklessly injures an innocent third person, even if he is justified in defending against the attack of another person. A.R.S. § 13-401(A) (2010).

Michael A. testified that he never used or attempted to use physical force against Ricci. Rather, he testified that he was trying to separate Greg H. from Ricci. Although Ricci indicated that he believed he was being attacked by Greg H., Chuck M., and Michael A., the jury was free to believe Michael A. and the other witnesses who testified that Michael A. was simply trying to hold Greg H. back. See *Just*, 138 Ariz. at 545, 675 P.2d at 1364; *Girdler*, 138 Ariz. at 488, 675

P.2d at 1307. On this record, the State offered sufficient evidence to disprove Ricci's claim that he was defending himself when he cut Michael A. See A.R.S. §§ 13-401(A), -404(B).

Ricci also argues that the State failed to offer sufficient evidence to support his convictions for misconduct involving weapons because it did not prove that he knew his status as a convicted felon prohibited him from carrying pocket knives. We find no merit in Ricci's argument. A person commits misconduct involving weapons "by knowingly . . . possessing a deadly weapon . . . if such person is a prohibited possessor." A.R.S. § 13-3102(A)(4) (Supp. 2011).⁴ A "deadly weapon" is "anything that is designed for lethal use . . . includ[ing] a firearm." A.R.S. § 13-3101(A)(1) (Supp. 2011). Our supreme court has held that "[a] knife is a deadly weapon." *State v. Williams*, 110 Ariz. 104, 105, 515 P.2d 849, 850 (1973).

Ricci does not argue that his knives were not in fact designed for lethal use; rather, he argues that he did not know that his status as a convicted felon prohibited him from possessing them. Ricci testified at trial that he knew he was not allowed to possess a firearm, but no one had told him that he was not allowed to possess a pocket knife, explaining: "The entire reason I carry a knife is because I'm not allowed to carry a pistol." Ricci's professed ignorance of the law prohibiting him from possessing knives, however, does not relieve him from liability for the prohibited conduct. See A.R.S. § 13-105(10)(b) (Supp. 2011) (defining "knowingly" as not requiring "any knowledge of the unlawfulness of the act or omission"); A.R.S. § 13-204(B) (2010) ("Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility"); see also *State v. Harmon*, 25 Ariz.App. 137, 139, 541 P.2d 600, 602 (1975) (holding that defendant's claim that he thought his full status as citizen had been restored was a mistake of law, and accordingly, not a cognizable defense to the crime of misconduct involving weapons). Moreover, we have expressly interpreted the language in different subsections of A.R.S. § 13-3101 as evidencing "a legislative intent to relieve the State from proving the actor's knowledge that the weapon in possession was of a forbidden type except where proof of such knowledge is explicitly required." *State v. Young*, 192 Ariz. 303, 309, ¶ 21, 965 P.2d 37, 43 (App. 1998). Because the subsection governing this case does not explicitly require proof that Ricci knew that the knife or knives he possessed were of a prohibited category, see A.R.S. § 13-3102(A)(4), the State was not required to prove his knowledge. Accordingly, the evidence was sufficient to support the convictions.

For the foregoing reasons, we affirm Ricci's convictions and sentences.

/s/

PHILIP HALL, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

JOHN C. GEMMILL, Judge

FOOTNOTES:

1 Ricci did not offer the smaller pocket knife as evidence at trial, claiming that he had left it somewhere in the house where he was staying when he was arrested, and he was unable to retrieve it because he was in jail.

2 We find no merit in Ricci's claim that the evidence failed to show that he "intended to hurt Michael A. in the first place." Aggravated assault causing physical injury requires a mens rea

only of recklessness. A.R.S. §§ 13-1203(A)(1) (2010), – 1204(A)(2)(Supp. 2011).

3 We cite to the current version of the statutes throughout, as any amendments after the date of this offense did not affect the issues raised on appeal.

4 The State charged Ricci under subsection (A)(4), and accordingly, the exemption for pocket knives from the prohibition of possession of deadly weapons under specified circumstances in subsection (A)(1), on which Ricci relies in part, has no applicability. Nor does Subsection (A)(8), on which Ricci also relies, have any applicability.