

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

MICHAEL EDWARD FINCK,  
*Appellant.*

No. 2 CA-CR 2013-0039  
Filed September 2, 2014

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.*

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Appeal from the Superior Court in Pima County

No. CR20110480001

The Honorable Richard D. Nichols, Judge

The Honorable Jose H. Robles, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Thomas C. Horne, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Joseph L. Parkhurst, Assistant Attorney General, Tucson  
*Counsel for Appellee*

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West, Elsberry, Longenbaugh & Zickerman, PLLC, Tucson  
By Anne Elsberry  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

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ECKERSTROM, Chief Judge:

¶1 After a jury trial, appellant Michael Finck was convicted of three counts of possession of a deadly weapon by a prohibited possessor, all while he was on release status. The trial court imposed enhanced, maximum, concurrent prison terms totaling fourteen years' imprisonment. Finck appeals from his convictions and sentences.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she has reviewed the record and has found no "arguable, meritorious issues" to raise on appeal. Counsel has asked us to search the record for fundamental error.

¶3 In a pro se supplemental brief, Finck argues (1) he was deprived of his right to assistance of counsel at his initial appearance and arraignment, (2) his waiver of the right to counsel was not knowing and intelligent, (3) the trial court improperly refused his requested jury instructions concerning justification, (4) his Fourth Amendment right against unlawful search and seizure was violated, and (5) the prosecutor committed misconduct. Concluding Finck's arguments relating to his right to counsel were not frivolous, this court ordered briefing on those issues and Rule 4.2, Ariz. R. Crim. P., as it applies in this case.

¶4 As Finck argues, Rule 4.2 requires a trial court to advise a defendant at arraignment of the charges against him and of his right to counsel. A defendant's decision to waive his right to

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counsel and represent himself “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *State v. Dann*, 220 Ariz. 351, ¶ 16, 207 P.3d 604, 612 (2009), quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). We review for an abuse of discretion a trial court’s determination that a defendant has validly waived the right to counsel. *State v. Gunches*, 225 Ariz. 22, ¶ 8, 234 P.3d 590, 592 (2010).

¶5 In this case, Finck was initially indicted on one count of possession of a firearm by a prohibited possessor in February 2011 and was appointed counsel. Thereafter, he filed a motion to represent himself, and the trial court held a hearing on that motion. In accordance with Rule 6.1(c), Ariz. R. Crim. P., Finck filed a document indicating he was making a “knowing, intelligent, and voluntary” waiver of his right to counsel, and the court allowed Finck to represent himself. The court also appointed advisory counsel, who also represented Finck in other, separate matters. The state later sought a new indictment, and a second “initial appearance and arraignment” was held on March 26, 2012.

¶6 At that arraignment the trial court asked Finck if he had received “a copy of the new indictment,” entered a not guilty plea, and affirmed the trial date. Finck indicated he had received a copy of the indictment and proceeded to discuss witness interviews with the court. As the state concedes, the court did not specifically inform Finck of the new charges against him or advise him of his right to counsel.

¶7 The court’s failure to properly advise Finck was error, but it does not justify reversal in this case. See Ariz. Const. art. VI, § 27; cf. *State v. Cornell*, 179 Ariz. 314, 324, 878 P.2d 1352, 1362 (1994) (“not reversible error to fail to warn of every possible strategic consideration” in self-representation); *Miranda v. State*, 42 Ariz. 358, 363, 26 P.2d 241, 242 (1933) (failure to read complaint to defendant nonreversible, technical error when no prejudice resulted because complaint had been read previously and defendant was represented by counsel). As detailed above, the record before us demonstrates

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that Finck made a knowing, intelligent, and voluntary waiver of his right to counsel and decided to represent himself.

¶8 Finck argues that because the circumstances of the case changed substantially after the new indictment issued, the trial court should have made a new inquiry relating to his self-representation at that point. And, citing *Faretta v. California*, 422 U.S. 806 (1975), he maintains his waiver of his right to counsel was no longer knowing, intelligent, and voluntary under the new circumstances of the case. But a majority of the federal circuit courts have concluded, and we agree, that although specific findings relating to the waiver of the right to counsel are preferable, *Faretta* requires only a “nonformalistic approach to determining sufficiency of the waiver from the record as a whole.” *United States v. McDowell*, 814 F.2d 245, 249 (6th Cir. 1987).

¶9 In this case, as outlined above, Finck clearly and expressly had waived his right to counsel in a detailed writing. When the court reappointed counsel in January 2012, Finck again clarified that he wanted to represent himself. Furthermore, the additional charges filed against Finck were not different from the charge originally filed; rather they were additional counts of the same charge of prohibited possession, relating to guns which had all been seized on the same occasion and were the only guns at issue in the case. And Finck makes no claim that either the nature of the weapons-misconduct charge or the consequences related to a single conviction for that charge were not properly explained to him at his original arraignment. Nor did he indicate any uncertainty as to the charges at the second arraignment, stating he had received the new indictment and wished to proceed to interviewing witnesses.

¶10 Additionally, as the state points out, this is not Finck’s first criminal proceeding and he has represented himself in other proceedings. At the hearing on his motion to represent himself in this proceeding, Finck informed the court he has “a diploma in paralegal studies” and had represented himself “all the way up to the [Ninth C]ircuit in one criminal appeal” and in some civil matters. In view of Finck’s experience, his statements on the record regarding his desire to represent himself, and the nature of the charges, we cannot say that Finck was prejudiced by the trial court’s

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failure to properly advise him pursuant to Rule 4.2 or that the court abused its discretion in concluding Finck had validly waived his right to counsel. *See United States v. Lopez-Osuna*, 242 F.3d 1191, 1199 (9th Cir. 2000) (in assessing validity of waiver, “the focus should be on what the defendant understood, rather than on what the court said or understood”).

¶11 Finck also contends the trial court erred in failing to instruct the jury, as he requested below, on justification or necessity pursuant to A.R.S. §§ 13-417 and 13-401(B) and duress pursuant to A.R.S. § 13-412(A). He argues that these instructions were mandated based on his “theory of defense,” specifically that he had “innocent[ly] and momentar[ily] handl[ed] . . . a weapon to prevent bodily injury,” and one witness’s testimony that he had felt “threatened or afraid” when another man in Finck’s home was handling a weapon.

¶12 We review a trial court’s refusal to give a requested jury instruction for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004). A defendant is entitled to a jury instruction “on any theory reasonably supported by the evidence.” *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). Nevertheless, an instruction should not be given “‘unless it is reasonably and clearly supported by the evidence.’” *State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692-93 (App. 2005), quoting *State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987).

¶13 At trial, the witness testified he had come to Finck’s home to give an estimate concerning a hot tub. After he entered the house with Finck, he noticed “ammo boxes” on the floor and Finck’s roommate, J., in the kitchen. J. was “talking about . . . want[ing] to go shooting” while holding what “looked like an assault rifle” and “turn[ing] it kind of like a Rambo, look what I got.” A woman who was also present with a child became upset by J.’s behavior. Finck and J. “got into a confrontation over the gun,” and Finck “took the gun away from him.” J. also tried to pick up “a handgun or something.” When Finck and J. were “done arguing,” the woman left, J. “went into the bedroom,” and the witness left. The witness

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testified he had been “freaked . . . out” and felt “threatened or afraid.”

¶14 The defense of duress only applies when a person is “compelled to engage” in an otherwise criminal act “by the threat or use of immediate physical force.” § 13-412(A). It “is not available as a substitute for self-defense,” as Finck essentially attempts to use it here. *State v. Lamar*, 144 Ariz. 490, 497, 698 P.2d 735, 742 (App. 1984).

¶15 The defense of necessity, in contrast, applies when “a reasonable person was compelled to engage in [otherwise] 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.” A.R.S. § 13-417(A). Necessity is not a defense “if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct.” § 13-417(B).

¶16 In this case, ample, uncontradicted evidence, including Finck’s own statements, showed he had been living in a home with several other people in which drugs were being used and in which weapons were present. Even accepting *arguendo* that there was some evidence Finck was reasonably compelled to take the guns from his roommate and that his doing so avoided a greater injury than might result from his own handling of the weapons, Finck could not assert necessity as a defense. The above evidence established Finck had knowingly or recklessly placed himself in a situation in which it was probable that he “would have to engage in” conduct similar to that described by the witness, *id.*, and Finck presented no evidence suggesting that he lacked reasonable legal alternatives to remaining in the residence in the presence of the guns. Thus, the evidence did not reasonably support the giving of the instruction. *See Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d at 692-93; *see also* § 13-417(B). The trial court did not abuse its discretion in so concluding. *See Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d at 1162.

¶17 Finck also contends the warrant obtained to search his home “was overly broad in scope and thereby” violated his Fourth Amendment right to be free from unlawful search and seizure. And

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he asserts the prosecutor committed misconduct. Finck's argument on these points, however, is insufficient. He relies primarily on his motions below, stating he "incorporates" those motions "as though set forth herein in full." But Rule 31.13(c)(i), requires an appellant to include in his brief citations to the record, relevant authority, and a meaningfully developed argument on each point presented. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim."). Reliance on motions below is insufficient, and Finck has failed otherwise to adequately argue these points on appeal; therefore, we decline to address them. *See State v. Barraza*, 209 Ariz. 441, ¶ 20, 104 P.3d 172, 178 (App. 2005).

¶18 For all these reasons, Finck's convictions and sentences are affirmed.