

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GUILLERMO IGLESIA PULGARON,
Appellant.

No. 2 CA-CR 2014-0278
Filed September 2, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20122945001

The Honorable Howard Hantman, Judge

The Honorable John Davis, Judge

AFFIRMED AS CORRECTED

COUNSEL

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Counsel for Appellant

MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Guillermo Pulgaron appeals from his convictions and sentences for two counts of aggravated assault. He contends the trial court erred in refusing to give the jury instruction on criminal negligence that he requested and in using certain facts to both enhance and aggravate his sentences. For the following reasons, we affirm the convictions and sentences but correct the sentencing minute entry.

Factual and Procedural Background

¶2 In July 2012, Pulgaron argued with R.T. at a grocery store. Pulgaron left the store, still screaming angrily. Shortly thereafter, he returned to the store and beckoned to R.T. Thinking Pulgaron wanted to apologize, R.T. walked towards him. Pulgaron threw sulfuric acid in R.T.'s face, causing chemical burns to his face and neck.

¶3 After a jury trial, Pulgaron was convicted of aggravated assault with a deadly weapon or dangerous instrument and aggravated assault causing serious physical injury, both dangerous nature crimes. He was sentenced to enhanced, aggravated, concurrent prison terms of ten years, and this appeal followed.¹

¹ The sentencing minute entry incorrectly states that Pulgaron's offenses were "nondangerous." We therefore correct the

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Jury Instruction

¶4 Pulgaron first asserts the trial court erred in refusing a jury instruction defining criminal negligence. Pulgaron claims this instruction was essential to his theory of defense—that he did not know the bottle contained sulfuric acid and therefore acted with criminal negligence rather than with the “reckless” mens rea necessary to commit aggravated assault. In particular, Pulgaron argues this definition would have helped the jury distinguish between reckless conduct and negligent conduct.

¶5 We will not disturb a jury’s verdict when a trial court’s instructions, viewed in their entirety, adequately set forth the law applicable to the case. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009-10 (1998). As the trial court correctly observed here, aggravated assault does not involve the mental state of criminal negligence. See A.R.S. §§ 13-1203, 13-1204.² The instructions given here thus adequately reflected the law. See *Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009-10.

¶6 We acknowledge that an instruction on criminal negligence could have been useful here to clarify the mental state of recklessness that the state was required to prove and to give the jury a better understanding of Pulgaron’s defense. Cf. *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995) (defining proof “beyond a reasonable doubt,” in part, by contrasting it with preponderance-of-evidence standard). But a trial court is not required to give every instruction requested by a defendant. *Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009; cf. *State v. Lopez*, 209 Ariz. 58, ¶¶ 11-13, 97 P.3d 883, 886 (App. 2004) (defendant’s proposed instruction that ““passing control”” is not possession adequately covered by instructions defining actual and constructive

minute entry to reflect that Pulgaron was convicted of dangerous offenses.

²We cite the current versions of all statutes referred to in this decision, as they have not changed in relevant part since Pulgaron’s offenses.

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possession); *State v. Witwer*, 175 Ariz. 305, 308-09, 856 P.2d 1183, 1186-87 (App. 1993) (instruction defining “knowingly” adequately described mental state necessary to commit sexual abuse). And, the trial court properly instructed the jury on recklessness, the pertinent mental state at issue with respect to the charged offenses. Accordingly, the court did not err in refusing to give the requested instruction.

Sentencing

¶7 Pulgaron next claims he was sentenced illegally because the trial court used “dangerous instrument and infliction of serious physical injury as aggravators when each factor constituted an essential element for each of the offenses and both were used to enhance [his] sentence.” Whether an aggravating factor is also an element of an offense and whether a factor may be used by a sentencing judge in imposing an aggravated prison term are questions of law, which this court reviews de novo. *State v. Virgo*, 190 Ariz. 349, 352, 947 P.2d 923, 926 (App. 1997).

¶8 As noted above, Pulgaron was convicted of count one, aggravated assault with a deadly weapon or dangerous instrument, § 13-1204(A)(2), and count two, aggravated assault causing serious physical injury, § 13-1204(A)(1). The jury also found that the offenses were dangerous offenses because the victim sustained serious physical injury and because Pulgaron had used a deadly weapon or dangerous instrument. The trial court then found additional aggravating factors of physical and emotional harm to the victim.

¶9 Under A.R.S. § 13-701(D)(1) and (2), if serious physical injury or use of a deadly weapon or dangerous instrument is either an essential element of an offense or has been used to enhance punishment under A.R.S. § 13-704, the trial court may not use the factor to impose an aggravated prison term. At least one aggravator must be found by the trier of fact beyond a reasonable doubt to impose an aggravated sentence. § 13-701(F); *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

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¶10 Here, as to count one, aggravated assault with a deadly weapon or dangerous instrument, Pulgaron is correct that because the use of the weapon was both an element of the offense and used to enhance his sentencing range, it may not be used to aggravate his sentence. However, the jury also found beyond a reasonable doubt that, as to this charge, the victim sustained serious physical injury. That finding therefore constituted an aggravating factor that was neither an element of the crime nor used to enhance his sentence. *See* § 13-701(D)(1). Likewise, as to count two, aggravated assault causing serious physical injury, the sentence could not be aggravated based on the serious physical injury to the victim. But the jury also found use of a deadly weapon or dangerous instrument to be proven beyond a reasonable doubt as to this count.³ The use of a weapon was not an element of this count, nor was it used to enhance his sentence; the trial court could, therefore, regard it as an aggravating circumstance in determining the sentence. *See* § 13-701(D)(2). Accordingly, we conclude that the same factor was not used to both enhance and aggravate Pulgaron's sentence on either count, and no error occurred.

Disposition

¶11 For the foregoing reasons, the sentencing minute entry is corrected to reflect that the trial court imposed enhanced prison terms based on the dangerous nature of Pulgaron's offenses. The convictions and sentences are otherwise affirmed.

³To the extent this may present some sort of multiplicity issue, Pulgaron has not provided any such argument, and we therefore do not consider it. *See State v. Lindner*, 227 Ariz. 69, n.1, 252 P.3d 1033, 1034 n.1 (App. 2010).