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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0730
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MICHAEL LEWIS BROTHERS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-117257-001DT

The Honorable Julie P. Newell, Judge *Pro Tem*

REVERSED AND REMANDED

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H A L L, Judge

¶1 Michael Lewis Brothers (defendant) appeals from his conviction and sentence for second degree murder, a class 1 felony. Defendant contends the trial court erred by denying his request for jury instructions on the justification defense of crime prevention and the lack of duty to retreat and by precluding evidence of alleged prior acts of violence by the victim. For reasons that follow, we reverse and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant killed his roommate during a fight inside their apartment. As a result, the State charged defendant with second degree murder in violation of Arizona Revised Statutes (A.R.S.) section 13-1104(A) (2010).

¶3 At trial, defendant testified that his conduct was justified as he acted in self-defense. He explained he and his roommate had been drinking all day and, at one point in the evening, his roommate became fixated on death. A short time later, his roommate inexplicably became angry and told defendant that he was going to kill him. Defendant testified that he did not initially believe him, but then his roommate walked to the front door, locked it, and stated, "I'm going to cut your fucking throat." His roommate then kicked him in the leg, which caused defendant to fall to the floor, and headed into the

kitchen. As his roommate reached the kitchen, he repeated his threat to cut defendant's throat.

¶14 Defendant knew that there was a knife in one of the kitchen cabinets. While still on his knees and believing his life to be in danger, defendant grabbed the back of his roommate's pants as his roommate opened the cabinet door and pulled him away from the cabinet.

¶15 Defendant further testified the two exchanged blows and that he was able to pull his roommate to the ground. His roommate struck a table as he fell, but then sat up and continued to punch and kick defendant. Defendant fought back, and after eventually being able to land three straight blows, he saw blood coming from his roommate's nose. After noticing his roommate was not breathing, defendant went outside to a nearby payphone and called 9-1-1 to obtain help.

¶16 The trial court instructed the jury on self-defense, but refused defendant's request for an instruction on the justification defense of crime prevention. The jury found defendant guilty of second degree murder as charged, and the trial court sentenced him to a presumptive sixteen-year prison term. Defendant timely appealed.

DISCUSSION

A. Justification Defense Instructions

¶17 During settlement of instructions, defendant requested instructions on the justification defenses of self-defense and crime prevention and also requested that the jury be instructed that he had no duty to retreat before exercising his right to self-defense. The State agreed that the evidence supported instructions on self-defense, but opposed the requests for instructions on use of force in crime prevention and no duty to retreat. The trial court ruled that the evidence did not support instructions on the defense of crime prevention and no duty to retreat and refused to give them. We review a trial court's refusal to give requested jury instructions for abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

¶18 "[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) (quoting *State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989)).

¶19 We conclude that the trial court abused its discretion in rejecting the requested instruction on the defense of crime prevention. The justification defense of use of force in crime

prevention is set forth in A.R.S. § 13-411 (Supp. 2011) as follows:

A. A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent . . . second or first degree murder under § 13-1104 or 13-1105. . . .

B. There is no duty to retreat before threatening or using physical force or deadly physical force justified by subsection A of this section.

C. A person is presumed to be acting reasonably for the purposes of this section if the person is acting to prevent what the person reasonably believes is the imminent or actual commission of any of the offenses listed in subsection A of this section.

D. This section includes the use or threatened use of physical force or deadly physical force in a person's home, residence, place of business, land the person owns or leases, conveyance of any kind, or any other place in this state where a person has a right to be.

¶10 Contrary to the trial court's ruling, the evidence was sufficient to support the requested instruction on the defense of crime prevention. Defendant's version of the circumstances surrounding the death of his roommate provided "the slightest evidence" in support of the theory that he was justified in using deadly physical force against his roommate to defend himself in his home from the commission of either first or

second degree murder or aggravated assault under § 13-1204, subsection A, paragraphs 1 and 2. See *State v. Taylor*, 169 Ariz. 121, 123-24, 817 P.2d 488, 490-91 (1991) ("All that is required for § 13-411 to apply is that a reasonable relationship exist between the criminal acts being prevented and the home, its contents, or its residents."); *State v. Korzep*, 165 Ariz. 490, 493-94, 799 P.2d 831, 834-35 (1990) (holding A.R.S. § 13-411(A) contemplates a situation in which resident of household uses force against another resident of the same household to prevent commission of an enumerated crime).

¶11 We disagree with the trial court's conclusion that the fact the roommate never obtained possession of the knife in the cabinet precluded a finding that defendant was acting to prevent one of the enumerated offenses in A.R.S. § 13-411. Defendant testified that he first used force against his roommate just as his roommate opened the door to the cabinet where the knife was kept. Whether a person would reasonably believe use of force was "immediately necessary" to prevent the "imminent or actual commission" of either aggravated assault or murder under these circumstances was an issue for the jury. A.R.S. § 13-411(A), (C). Indeed, the trial court's ruling that there was insufficient evidence to go to the jury on whether defendant's actions were immediately and reasonably necessary to prevent aggravated assault or murder is directly contradicted by the

trial court's other finding that the evidence was sufficient to support instructions on the use of both physical force and deadly physical force in self-defense pursuant to A.R.S. §§ 13-404 and -405 (2010).

¶12 Although the trial court instructed on self-defense, the failure to instruct on the defense of crime prevention cannot be upheld on the grounds that the requested instruction was covered by the self-defense instructions. See *Hussain*, 189 Ariz. at 339, 942 P.2d at 1171; see also *Korzep*, 165 Ariz. at 494 n.1, 799 P.2d at 835 n.1 (noting § 13-411 "differs in several respects from the other justification defenses" and thus is not covered adequately by self-defense instructions). First, A.R.S. § 13-411(C) provides for a presumption that a person is acting reasonably if he or she is acting to prevent the commission of any of the offenses listed in A.R.S. § 13-411(A). *Korzep*, 165 Ariz. at 492, 799 P.2d at 833. Second, and equally as important, A.R.S. § 13-411(B) expressly provides that there is no duty to retreat when acting pursuant to this justification defense. *Id.*; see also *State v. Barraza*, 209 Ariz. 441, 446 n.5, 104 P.3d 172, 177 (App. 2005) (recognizing right to "stand ground" under A.R.S. § 13-411 when unlawfully attacked in one's home). The need for the jury to be instructed on this right of no retreat in crime prevention is of particular significance in the instant case given that the prosecutor brought out on cross-

examination of defendant that the door to the apartment was in the opposite direction from the kitchen and that defendant knew how to work the lock, implying that defendant had an available alternative of leaving rather than engaging his roommate. In light of this evidence, the jury may have improperly concluded that defendant's decision to use force against his roommate was unreasonable because he could have avoided the fight by fleeing his apartment. For these reasons, the trial court's refusal to instruct on the defense of crime prevention cannot be considered harmless. Accordingly, we hold there was reversible error in denying the requested defense of the crime prevention instruction. *Taylor*, 169 Ariz. at 124, 817 P.2d at 491; *Hussain*, 189 Ariz. at 339, 942 P.2d at 1171.

¶13 There was no error by the trial court, however, in not giving a "no duty to retreat" instruction in connection with the self-defense instructions. At the time of the incident at issue, although a person had *no duty to withdraw* before exercising the right of self-defense, the fact that retreat may have been a possibility and not used was a circumstance to be considered with all others in determining whether "a reasonable person would believe that deadly physical force is *immediately necessary*" in evaluating a claim of self-defense. *State v. Jessen*, 130 Ariz. 1, 9, 633 P.2d 410, 418 (1981) (quoting A.R.S. § 13-405). Thus, the trial court did not abuse its discretion

in refusing to separately instruct that Arizona law did not require retreat before engaging in self-defense as this is “adequately covered” by the standard self-defense instructions.¹
Id.

B. Evidence of Victim’s Violent Character

¶14 Defendant also argues that the trial court erred in limiting the evidence he could present with respect to his roommate’s violent character. Although we have concluded that defendant’s conviction must be reversed, we address the issues raised by defendant regarding the admissibility of this evidence because they are likely to recur upon retrial. We review a trial court’s rulings on the admissibility of evidence for abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 29, 97 P.3d 865, 874 (2004).

¶15 We agree with defendant that the trial court erred by limiting his testimony regarding his knowledge of his roommate’s violent character to only those acts he actually observed. “Arizona courts have long held that a homicide defendant who offers a defense of justification ‘should be permitted to introduce evidence of specific acts of violence by the deceased if the defendant either [personally] observed the acts himself

¹ We note that defendant appears to rely on A.R.S. § 13-405(B) (Supp. 2011) as support. That statute has no application here, however, because the amendment took place after both the March 2009 incident and the May 2010 trial.

or was informed of the acts before the homicide.'" *State v. Connor*, 215 Ariz. 553, 559, ¶¶ 14-15, 161 P.3d 596, 602 (App. 2007) (emphasis added) (quoting *Taylor*, 169 Ariz. at 124, 817 P.2d at 491). This evidence is relevant, regardless of how the knowledge was obtained, "'to show that the defendant was justifiably apprehensive of the decedent and knew that the decedent had a violent disposition,' . . . and that this may have affected the defendant's thinking about the need to respond with deadly physical force." *Id.* Because reversal is required due to error in the jury instructions, we need not determine whether the trial court's error in limiting the evidence defendant could present regarding his state of mind would likewise necessitate reversal under the circumstances of this case.

¶16 We reject, however, defendant's argument that the trial court erred in refusing to allow evidence of specific prior acts of aggression by his roommate of which defendant had no knowledge to prove his roommate was the aggressor. Contrary to defendant's contention, it is well established that a victim's character is not an element of a justification defense. *State v. Williams*, 141 Ariz. 127, 129, 685 P.2d 764, 766 (App. 1984). Thus, while we agree with defendant that evidence of his roommate's character for violence would be admissible to show that his roommate was the aggressor, pursuant to the Arizona

Rules of Evidence (Rule) 404(a)(2) and 405, defendant was properly limited to only reputation and opinion evidence to prove his roommate's character for violence. *State v. Fish*, 222 Ariz. 109, 118, ¶ 28, 213 P.3d 258, 267 (App. 2009).

¶17 Finally, we also reject defendant's argument that the trial court erred in precluding specific prior act evidence of his roommate's character for violence offered for the purpose of corroborating defendant's version of the events. As support for his argument, defendant relies on our decision in *Fish* in which we concluded that evidence of specific prior acts of violence by the deceased might be admissible under Rule 404(b) subject to Rule 403 balancing. *Id.* at 124, ¶ 46, 213 P.3d at 273. Here, the trial court precluded the proffered specific act evidence pursuant to Rule 403, finding that the relevance of the evidence was substantially outweighed by the danger of unfair prejudice.

¶18 In *Fish*, because the specific prior act evidence was virtually identical to the manner in which the defendant described the victim's conduct, we viewed the evidence as "highly probative of the veracity of Defendant's description of what he faced on the day of the shooting." 222 Ariz. at 126, ¶ 53, 213 P.3d at 275. The precluded specific act evidence in the instant case is simply not comparable to that at issue in *Fish*. Further, we made clear we were addressing a unique set of facts in *Fish* and that our holding "does not mean that in any self-

defense claim prior acts of a victim unknown to the defendant at the time of the alleged crime are always admissible to corroborate the defendant's claim." *Id.* at 125, ¶ 49, 213 P.3d at 274. On this record, we hold that there was no abuse of discretion by the trial court in ruling that the specific act evidence offered by defendant regarding his roommate's character for violence was not admissible as corroborating evidence under Rule 404(b).

CONCLUSION

¶19 Because we conclude that the trial court erred in denying defendant's request for an instruction on the defense of crime prevention under A.R.S. § 13-411, we reverse defendant's conviction and remand for further proceedings consistent with this decision.

_ /s/ _____
PHILIP HALL, Presiding Judge

CONCURRING:

_ /s/ _____
PETER B. SWANN, Judge

_ /s/ _____
LAWRENCE F. WINTHROP, Judge