DIVISION ONE
FILED: 8/13/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 12-0575
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
ANTHONY MATTHEW PENA, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-117226-001

The Honorable Robert E. Miles, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Section Chief Counsel
Criminal Appeals
Attorneys for Appellee

Law Office of Nicole Farnum — Phoenix
By Nicole T. Farnum
Attorneys for Appellant

H O W E, Judge

¶1 Anthony Matthew Pena appeals his convictions and sentences for first degree murder, aggravated assault and

discharge of a firearm at a structure. He asserts the trial court erred in not suppressing evidence of a handgun that police discovered in violation of his Fourth Amendment rights and in not suppressing evidence of a prior act. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On January 26, 2006, Pena was involved in a physical altercation at a sports bar. The fight erupted outside the entrance after security personnel prohibited Pena from bringing a handgun into the bar. Once allowed inside, Pena "started talking smack" and "mean-mugged" the bar manager. After being physical beaten and bloodied by the manager outside the bar, Pena threatened the bar's staff: "[You're] dead. . . . You don't know who you're messing with. I'll be back."

¶3 The next evening, an unknown assailant fired gunshots at the bar's entrance. One of the shots struck and seriously wounded a customer who had momentarily stepped outside. The shooter then fled on foot. Security personnel working for an establishment across the street, including a security guard and off-duty police officers, ran after the gunman. While pursuing the suspect, the security guard passed the officers and confronted the suspect in an alley behind the sports bar. The suspect fatally shot the guard and fled. Responding on-duty police officers located seven spent nine-millimeter shell

casings grouped in front of the sports bar and three similar casings in the alley where the second victim was shot. They did not, however, locate the shooter or the gun.

¶4 Nearly a year later, on January 25, 2007, an officer responded to an emergency call regarding a fight between Pena and a woman on the corner of Third Street and Thomas Road. When he arrived at the scene, the officer observed Pena walking away from the area with a woman throwing gravel at him and yelling, "Just stay away from me." The officer called out to Pena to stop and return. Noticing Pena was wearing baggy clothes and his hands were in his coat pockets, the officer told him to take his hands out to ensure "he couldn't get to anything inside of his pockets that he could harm me with." Pena complied, and as he was walking towards the officer, the officer asked more than once whether he was carrying any weapons. Pena did not respond, but "just stared at [him]." The officer became very suspicious and proceeded to pat down Pena. As the officer began searching the waistband, Pena turned to face the officer and dropped his right hand from his head to the area around his front waist. The officer became "immediately concerned" for his safety, and as he attempted to physically prevent Pena from fully turning, another officer arrived. The other officer assisted with the pat down, and, as a matter of officer safety, he lifted up Pena's untucked

shirt and noticed a gun in the right side of his waistband. The officers then arrested Pena and impounded the weapon.

¶5 At the time, police did not suspect that Pena committed the crimes at the sports bar the year before. Forensic testing showed the gun that Pena was carrying was the same weapon that fired the casings and projectiles discovered in front of the sports bar and the nearby alley where the second victim was killed. The police also learned that, at the time of the shootings, Pena lived in a townhome less than a block from the sports bar and adjacent to the alley.

¶6 Regarding the shooting incidents, the State charged Pena with one count each of first degree premeditated murder, aggravated assault and discharge of a firearm at a structure, all dangerous felonies. Pena moved before trial to suppress evidence of the handgun and the forensic testing results that tied the weapon to the charged crimes, arguing the officers violated his Fourth Amendment rights when they searched him on January 25, 2007, and seized the weapon. On September 27, 2011, the court held a hearing to consider the issue and denied Pena's motion.

¶7 Pena also sought to preclude evidence of the incident the evening before the alleged shootings as a prior act under Arizona Rule of Evidence 404(b). On November 30, 2011, the court held a hearing on the motion. The State argued the prior act was

admissible because it was intrinsic to the crimes charged and was relevant to prove Pena's motive and identity as the shooter. The State also provided testimony from the sports bar's security guard, who initially discovered the gun in Pena's possession on January 26, 2006. The guard testified that he noticed markings on the gun that identified it as a Ruger, the same brand that police found on Pena a year later and that was used in the shootings. Thus, the court found the evidence was admissible as intrinsic evidence.

¶8 At the close of trial, the jury found Pena guilty as charged. The court sentenced Pena to a natural life sentence for the first-degree murder conviction to be served consecutively to concurrent prison terms for the remaining counts.

¶9 Pena timely appeals. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes § 12-120.21(A)(1), 13-4031, and 13-4033(A) (West 2013).[1]

DISCUSSION

I. Gun Evidence

¶10 Pena argues that the trial court should have suppressed evidence of the gun and the test results tying the gun to the sports bar shootings because the pat-down search and

[1] We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

the seizure of the handgun violated his Fourth Amendment rights. In reviewing a trial court's denial of a motion to suppress, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, 76 ¶ 8, 179 P.3d 954, 956 (App. 2008) (citing *In re Ilono H.*, 210 Ariz. 473 ¶ 2, 113 P.3d 696, 697 (App. 2005)). This Court will not disturb the trial court's factual findings absent an abuse of discretion; however, the issue of "whether the police had a reasonable suspicion of criminal activity that justified conducting an investigatory stop is a mixed question of law and fact which we review *de novo*." *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

¶11 The Fourth Amendment prohibits the police from making unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). But an investigatory stop is a seizure that is justified if it is "[s]upported by reasonable suspicion that criminal activity is afoot." *Rogers*, 186 Ariz. at 510, 924 P.2d at 1029 (quoting *Ornelas*, 517 U.S. at 693).

¶12 Pena contends the officers lacked the requisite justification to conduct the investigatory stop "because there was no evidence that a crime had occurred or was about to occur." According to Pena, the officers' concern for safety did

not justify the subsequent pat-down search.[2] The record, however, is to the contrary. The officer testified that he responded to an emergency call regarding a physical altercation, thus he reasonably suspected that a crime was occurring. *See State v. Kinney*, 225 Ariz. 550, 555 ¶ 14, 241 P.3d 914, 919 (App. 2010) ("A citizen's report of unusual activity is sufficient to give rise to reasonable suspicion."). The officer's initial observation at the scene of a woman on the ground at around 4:00 a.m. throwing gravel at Pena and telling him to get away bolstered this suspicion. The officers also repeatedly testified that Pena's behavior was suspicious and aroused serious escalating concerns for their safety. *State v. Ramsey*, 223 Ariz. 480, 484 ¶ 17, 224 P.3d 977, 981 (App. 2010) ("An officer may

[2] For the purposes of this decision, we assume, but do not decide, that the officer "seized" Pena for Fourth Amendment purposes when he ordered Pena to stop and return. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16. The Fourth Amendment is not violated when law enforcement officers approach and question people, *State v. Wyman*, 197 Ariz. 10, 13 ¶ 7, 3 P.3d 392, 395 (App. 2000) (citation omitted), provided that "the police do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 435 (1991). A consensual encounter may become a detention when, based on the totality of the circumstances, a reasonable person would not have felt free to leave or otherwise terminate the encounter. *United States v. Mendenhall*, 446 U.S. 544, 544 (1980); *United States v. Drayton*, 536 U.S. 194, 201 (2002); *State v. Childress*, 222 Ariz. 334, 338 ¶ 11, 214 P.3d 422, 426 (App. 2009) (citation omitted).

conduct a weapons frisk if, based on specific, articulable facts, the officer has any reasonable fear for his safety."); *State v. Kaiser*, 204 Ariz. 514, 517 ¶ 6, 65 P.3d 463, 466 (App. 2003) (citing *United States v. Hensley*, 469 U.S. 221, 235 (1985)). On this record, the investigatory detention of Pena and the seizure of the gun was reasonable and justified and therefore admissible under the Fourth Amendment. Accordingly, the court did not err in denying Pena's motion to suppress on this basis.[3]

II. Prior Act Evidence

¶13 Pena argues the court committed reversible error by allowing the State to introduce evidence of the January 26, 2006, incident at the sports bar. Specifically, he asserts the State offered the evidence that he possessed a handgun and engaged in a physical altercation that night to show his propensity to commit the charged offenses and therefore was

[3] Although Pena cites case law discussing the propriety of anonymous tips in providing a reasonable suspicion for law enforcement to conduct warrantless searches and seizures, he does not separately argue, as he did in his motion, that the 9-1-1 call to police reporting the incident on the street was from an "anonymous tip" and therefore did not give the responding officers a constitutional basis to search Pena and seize his gun. We therefore do not address this specific issue. *See State v. Sanchez*, 200 Ariz. 163, 166 ¶ 8, 24 P.3d 610, 613 (App. 2001) (issue waived because defendant failed to develop argument in his brief). We also note that Pena appears to have waived this argument when his counsel specifically stated to the court at the hearing: "The police had every right to respond to that call. They had every right to go out there and talk to these two people that they found on the side of the road."

inadmissible under Arizona Rule of Evidence 404(b).[4] "We review the admission of prior act evidence under Rule 404(b) for abuse of discretion." *State v. Beasley*, 205 Ariz. 334, 337 ¶ 14, 70 P.3d 463, 466 (App. 2003). A superior court's ruling will be affirmed on appeal "if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶14 Under Rule 404(b), "[e]vidence of prior acts is admissible if relevant and admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Beasley,* 205 Ariz. at 337 ¶ 14, 70 P.3d at 466. It is not admissible "to prove the defendant's propensity to commit the crime." *State v. Van Adams*, 194 Ariz. 408, 415 ¶ 20, 984 P.2d 16, 23 (1999). To be admissible, "the profferer must prove by clear and convincing evidence that the prior bad acts were committed and that the defendant committed the acts."[5] *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (emphasis omitted). In addition, under Rule 403 "the trial court

[4] Although the trial court admitted the prior act as intrinsic evidence, the State now concedes that the evidence does not meet the narrow standard for intrinsic evidence under *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). The State nevertheless argues the evidence was clearly admissible pursuant to Rule 404(b).

[5] Pena does not argue that the State failed to satisfy these evidentiary requirements.

must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice and must, if requested, give a proper limiting instruction." *State v. Mills*, 196 Ariz. 269, 274-75 ¶ 24, 995 P.2d 705, 710-11 (App. 1999). Unfair prejudice under Rule 403 "'means an undue tendency to suggest decision on an improper basis,' . . . such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (quoting Fed. R. Evid. 403 advisory committee's note).

¶15 The evidence regarding Pena's attempt to enter the sports bar with a handgun the night before the shootings was probative of Pena's identity as the shooter. The sports bar's security guard observed markings on the gun, matching it to the gun found on Pena a year later and used in the shootings. The evidence that Pena fought with the bar's manager and then threatened to return and kill the bar's employees was relevant to show Pena's motive in shooting at the bar's entrance the following evening. Accordingly, as evidence of Pena's identity and motive, the evidence was admissible under Rule 404(b). *See State v. Hardy*, 230 Ariz. 281, 289 ¶ 38, 283 P.3d 12, 20 (2012) ("Evidence of prior argument with or violence toward a victim is . . . admissible to show motive or intent."); *State v. Nordstrom*, 200 Ariz. 229, 249 ¶ 65, 25 P.3d 717, 737 (2001) (concluding defendant's possession of type of weapon used in

murders a few hours before the killings was relevant to prove defendant, not someone else, was involved in the murders) (*abrogated on other grounds by Ferrero*, 229 Ariz. 239, 274 P.3d 509.)

¶16 Furthermore, despite Pena's argument to the contrary, the evidence was not unduly prejudicial. Establishing the shooter's identity was an important, if not the most important, issue at trial. And the court's instructions to the jury attenuated whatever unfair prejudice existed. The court instructed the jury that they may consider the other acts if it finds the State has proven them by clear and convincing evidence and only under one of the permissible exceptions under Rule 404(b). The court further instructed the jury that it could not consider those other acts "to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense." Thus, the court properly found the prior act evidence admissible under Rule 404(b).

CONCLUSION

¶17 For the foregoing reasons, Pena's convictions and sentences are affirmed.

___/s/_____
RANDALL M. HOWE, Judge

CONCURRING:

_/s/_____
DIANE M. JOHNSEN, Presiding Judge

_/s/_____
LAWRENCE F. WINTHROP, Judge