IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MARTY ALLAN MARTINEZ, *Appellant*.

No. 1 CA-CR 15-0792
FILED 8-3-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-457828-001
The Honorable Teresa A. Sanders, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Elizabeth B. N. Garcia
Counsel for Appellee

Maricopa County Office of the Legal Advocate, Phoenix
By Kerri L. Chamberlin
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Randall M. Howe and Judge Samuel A. Thumma joined.

T H O M P S O N, Judge:

¶1 Marty Allen Martinez appeals from his convictions and sentences on three counts of aggravated assault. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Martinez's ex-brother-in-law was delivering chicken soup to Martinez's mother when Martinez drove up behind him in the driveway and yelled, "You better move your f'ing truck out of the way."[1] Martinez got out of his car, and after removing his jewelry, approached his ex-brother-in-law with an "angry, fighting look." Martinez asked the victim why he was "talking shit" about Martinez, an apparent reference to a confrontation Martinez had had the week before with the victim's ex-son-in-law. Martinez then punched the victim repeatedly in the face. Martinez stopped punching his ex-brother-in-law only after Martinez's girlfriend ran out of the house yelling that his sister was calling police. Martinez fled the scene. When he was arrested two weeks later, Martinez had no visible injuries and complained of none.

¶3 The victim sustained fractures to the floor of the left orbital or eye bone, and to his left and right nasal bones. His eye remained swollen for three weeks to a month, and it took more than a year for the fractures to heal.

¶4 Martinez's sister testified in support of his claim of self-defense that the victim (her ex-husband) started the fight by head-butting Martinez, and Martinez yelled, "[S]top . . . I don't want to do this." The police officer who interviewed her immediately after the incident, however, testified that she had said Martinez approached the victim and started

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[1] We view the evidence in the light most favorable to supporting the conviction. *State v. Boozer*, 221 Ariz. 601, 601, ¶2, 212 P.3d 939, 939 (App. 2009).

swinging "wildly" at the victim, and the victim did not fight back. She told the officer Martinez had been picking fights with other family members, and she was afraid of Martinez because he had assaulted her.

¶5 The jury convicted Martinez of three counts of aggravated assault. Martinez admitted that he was on felony probation at the time of the offenses, and that he had two historical prior felony convictions. The superior court sentenced him as a repetitive offender to concurrent presumptive terms of 10 years in prison on each count, and to a consecutive term of 2.5 years in prison for the probation violation, all with appropriate presentence incarceration credit. Martinez filed a delayed notice of appeal after the superior court granted his petition for post-conviction relief requesting permission to do so. This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2016), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

¶6 Martinez argues that the superior court abused its discretion under Arizona Evidence Rule 404(b) in admitting other act evidence from the victim and from the officer who questioned Martinez's sister immediately after the incident. Specifically, he argues the court erred in allowing the victim to testify during cross-examination that he had heard Martinez had "sucker-punched" a relative a week earlier and allowing a police officer to testify that Martinez's sister said Martinez had picked fights with other family members and she was afraid of him because he had assaulted her. Martinez argues that the superior court abused its discretion in allowing this testimony because it was inadmissible under Rule 404(b) as the other assaults were not supported by clear and convincing evidence, not relevant for a proper purpose, and unfairly prejudicial; the court failed to make the necessary findings for its admissibility; and the state had failed to provide notice before trial it would offer other acts evidence.

A. Sucker punch

¶7 Martinez's argument that the victim's testimony that Martinez "sucker-punched" a relative the week before this incident was inadmissible under Rule 404(b) is not well-taken. The first day of trial, Martinez stated he had no objection to the prosecutor eliciting "brief" testimony from the victim about an "argument" Martinez had had the week before as relevant to Martinez's motive in assaulting the victim, based on the prosecutor's avowal he had no intention of describing the incident as a "fight." The victim volunteered during defense counsel's cross-

examination without objection, however, that he had heard Martinez had "sucker punched" the victim's relative in the incident a week earlier. On defense counsel's further questioning, the victim conceded that the incident made him angry, and the defense used this evidence in closing to support his claim of self-defense.

¶8 We decline to address Martinez's claim of error under the invited error doctrine, which prevents a party who causes an error from profiting from it on appeal. *See State v. Lucero*, 223 Ariz. 129, 135, ¶ 17, 136, ¶ 20, 220 P.3d 249, 255, 256 (App. 2009); *State v. Fish*, 109 Ariz. 219, 220, 508 P.2d 49, 50 (1973) ("The defense cannot complain when the objectionable material was actually introduced by the defense."). Even if we assume that Martinez initially inadvertently elicited this detail of the "argument," that is, it involved a "sucker punch," he failed to object to the answer as nonresponsive or ask that it be stricken, and instead followed up by asking if learning about the "sucker punch" had not made the victim angry. He later revisited the "sucker punch" incident at length, asking, "So you weren't angry with [Martinez] . . . Even though he got into a fight, and punched your son-in-law?" Finally, he argued in closing that the victim started the fight because he was angry at Martinez for this incident. Under these circumstances, Martinez invited any error, and we will not address it on appeal.

B. Prior Assault, Picking Fights

¶9 Martinez argues that the court abused its discretion in admitting the police officer's testimony in the state's rebuttal case that Martinez's sister told him that Martinez had been picking fights with other family members and had assaulted her, and as a consequence, she was afraid of him.

¶10 The first day of trial, the superior court deferred ruling on Martinez's oral objection on hearsay grounds to any such testimony. The court advised, "Well, I think what we have to do is see what happens, and then before you would go into something like that, you can approach, and we can rule [on] it . . . . Well, she could—I think we need to cross that bridge when we come to it, and see what—what evidence is presented." The prosecutor failed to seek the court's approval before eliciting this testimony, but had extensively cross-examined Martinez's sister without objection about her prior inconsistent statements to the officer, and announced after she testified and the defense rested that he would be calling the officer in rebuttal the following day. When the officer testified that Martinez's sister had described the incident differently, and said Martinez had been picking

fights with other family members and she was afraid of Martinez because he had assaulted her, Martinez failed to object or seek an order striking the testimony or a mistrial.

¶11 Because Martinez failed to object on Rule 404(b) grounds to this testimony, he waived all but fundamental error review. *See State v. Henderson,* 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005); *State v. Bolton,* 182 Ariz. 290, 304, 896 P.2d 830, 844 (1995) (holding that an objection on one ground does not preserve an issue on another ground). On fundamental error review, defendant has the burden of proving that the court erred, that the error was fundamental in nature, and that he was prejudiced thereby. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶12 We are not persuaded by Martinez's argument that the officer's rebuttal testimony about the prior fights and assault was inadmissible under Arizona Rule of Evidence 404(b). Other act evidence requires proof by clear and convincing evidence that the defendant committed the other act, that the evidence was relevant to a proper purpose under Rule 404(b), and that the probative value of the evidence was not substantially outweighed by danger of unfair prejudice. *State v. Hargrave*, 225 Ariz. 1, 8, ¶ 10, 234 P.3d 569, 576 (2010). A party is also entitled to a limiting instruction if requested. *Id.*

¶13 Under Rule 404(b), other acts may be admissible for purposes other than to show a person acted in conformity with his character, such as impeachment of a witness. *See State v. Burns*, 237 Ariz. 1, 17-18, ¶¶49-52, 344 P.3d 303, 319-20 (2015). "Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible, even if it refers to a defendant's prior bad acts." *State v. Williams,* 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) (internal punctuation and citation omitted). This was such a case. The testimony was not offered in the state's case in chief to show the prior fights or assault had actually occurred, or that Martinez acted in conformity therewith during the fight at issue. *See State v. Cannon*, 148 Ariz. 72, 75, 713 P.2d 273, 276 (1985) ("Rule 404 only applies when evidence of a prior bad act or crime is introduced in the state's case in chief for substantive purposes and to show that the alleged crime or bad act actually occurred.").[2] Rather, it was offered in the state's rebuttal case as

[2] The superior court effectively acknowledged this use of the prior statements would not fall under the category of improper Rule 404(b) evidence by its comment that it would withhold any ruling until the testimony was offered, notwithstanding its prior comment that the state

the sister's explanation to police immediately after this incident about why she was afraid of Martinez, to demonstrate that she was not credible when she testified at trial inconsistent with her prior statements. The court could have reasonably concluded that this witness's statements to the officer as to why she was afraid of Martinez supplied clear and convincing evidence that these other acts actually occurred, at least in her mind at that time. *Cf. State v. Vega*, 228 Ariz. 24, 29, ¶ 19, n. 4, 262 P.3d 628, 633, n. 4 (App. 2011) ("The testimony of the victim is a sufficient basis on which to conclude by clear and convincing evidence that the incident occurred.")

¶14 Moreover, as statements inconsistent with this witness's testimony at trial, the testimony was admissible as non-hearsay. *See* Ariz. R. Evid. 801(d)(1)(A) (defining a witness's prior inconsistent statement as "not hearsay"); *State v. Joe*, 234 Ariz. 26, 29, ¶ 14, 316 P.3d 615, 618 ("[A] claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements.") (citation and internal punctuation omitted).

¶15 And because the state could not be certain that this witness would change her story at trial, it was not required to provide notice of this rebuttal testimony, and its reference to other acts, in advance of trial. *See State v. Sullivan*, 130 Ariz. 213, 216-17, 635 P.2d 501, 504-05 (1981) ("[I]t is obviously unreasonable to require the State to list in advance of trial and prior to the presentation of the defendant's case the names of all potential rebuttal witnesses, since the prosecution can rarely anticipate what course the defense will pursue."); *cf.* Ariz. R. Crim. P. 15.1(h) (requiring state to disclose rebuttal witnesses and relevant written statements upon receipt of notice of defenses); Ariz. R. Crim. P. 15.1(b)(7) (requiring state to disclose "[a] list of all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge or otherwise use at trial.").

¶16 Nor was the superior court required to *sua sponte* make Rule 404(b) findings on the record mid-trial, when the defense made no request that it do so. See *State v. Serrano*, 234 Ariz. 491, 494, ¶ 8, 323 P.3d 774, 777 (App. 2014) ("We do not require trial judges sua sponte to rule on issues not raised before them.") (internal punctuation and citation omitted).

¶17 Finally, the probative value of this brief testimony was not substantially outweighed by any unfairly prejudicial effect. *See State v.*

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could not offer Rule 404(b) evidence because it had not noticed any other acts evidence before trial.

Martinez, 230 Ariz. 208, 213, ¶ 21, 282 P.3d 409, 414 (2012) (noting that only evidence that suggests a decision based on an improper basis such as emotion, sympathy, or horror is unfairly prejudicial). For all of these reasons, the court did not err, much less fundamentally err, in failing to *sua sponte* strike this testimony.

C. Improper Argument

¶18 Martinez finally argues that he was prejudiced by the prosecutor's repeated references to the prior assaults during closing argument as substantive evidence of Martinez's angry predisposition. Martinez failed to object to any of the argument at issue, limiting this court to review for fundamental error only. *See Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608.

¶19 As a general rule, "prosecutors have wide latitude in presenting their closing arguments to the jury: excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (internal punctuation and citation omitted). Most of the prosecutor's use of the cited testimony in closing argument fell within that wide latitude. *See id.*

¶20 It was improper, however, for the prosecutor to argue in rebuttal closing that the sister's testimony that Martinez had assaulted her and "had been causing lots of problems with other people" was "circumstantial evidence that Defendant's anger came into play and drove his assault that day." It was also arguably improper for the prosecutor to argue, "The assault was unprovoked. The Defendant was angry. The Defendant's been harassing people." The use of other act evidence to show propensity is improper under Arizona Rule of Evidence 404(b). Although a limiting instruction would have minimized any potential prejudice from the improper use of this testimony, Martinez did not ask for a limiting instruction, and our supreme court has repeatedly held that a court's failure to give a limiting instruction on other act evidence *sua sponte* is not fundamental error. *See State v. Roscoe,* 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996); *State v. Taylor,* 127 Ariz. 527, 531, 622 P.2d 474, 478 (1980). The court instructed the jury, moreover, that the arguments of counsel were not evidence, that it was the judge of the credibility of witnesses, and that the state was required to prove beyond a reasonable doubt that the defendant did not act in self-defense. In light of these instructions and the

overwhelming evidence supporting Martinez's guilt — including the victim's testimony, and the evidence that Martinez inflicted serious injuries on the victim but suffered no apparent injuries himself and immediately fled the scene — Martinez has not shown that the prosecutor's use of the impeachment evidence in closing arguments deprived him of a fair trial or prejudiced him. *See State v. Naranjo*, 234 Ariz. 233, 247, ¶ 64, 321 P.3d 398, 412 (2014) (finding no fundamental error in admission and improper use of other act evidence in light of substantial other evidence of guilt). On this record, in short, we are not persuaded that the court fundamentally erred in allowing the argument.

CONCLUSION

¶21 For the foregoing reasons, we affirm Martinez's convictions and sentences.

AMY M. WOOD • Clerk of the Court
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