DIVISION ONE
FILED: 07-13-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0552
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ROBERT ANTHONY DOWNING,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-130925-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and W. Scott Simon, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Robert Anthony Downing was convicted of aggravated assault after he struck the victim with his car during an altercation at a gas station. On appeal, Downing argues the trial court erred when it precluded the admission of evidence of prior acts of aggression by the victim and when it admitted the hearsay statements of Downing's passenger. For the reasons that follow, we affirm Downing's conviction.

I. Factual and Procedural History

¶2 We are required, on appeal, to "construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). In our review of the record, we resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not weigh the evidence, however; that is the function of the jury. *Id*.

¶3 At approximately noon on the date of the incident, the victim and his girlfriend drove to a gas station to buy a newspaper and cigarettes. On their way to the station, the victim was "cut off" by a car driven by Downing. Downing and the victim both eventually pulled into the same gas station.

Downing parked his car near the station air pump so his passenger could fill a bicycle tire. As the victim drove past Downing's car, Downing's passenger opened the passenger door and nearly struck the victim's car. The victim yelled at the passenger, who apologized. The victim then parked his car nearby. The victim's girlfriend went inside the gas station while the victim stood outside his car, smoked a cigarette and petted his dog through the open window.

¶4 The victim claimed Downing glared at him from inside his vehicle while the victim waited by his car. The victim testified he laughed at Downing, who then got out of his vehicle and yelled at the victim. The two exchanged insults and argued at a distance, with each telling the other they would "kick his ass." Downing eventually yelled he would run over the victim, to which the victim responded with something to the effect of "run me over" or "go ahead, hit me." Downing then got back in his car, drove at the victim and struck him. Downing immediately fled the scene, leaving his passenger behind. The victim suffered a fractured right tibia and a fractured finger. When Downing's car was located later that day, the victim's sunglasses were found wedged at the back of the hood at the base of the windshield. Additional details are discussed in the context of the issues addressed below.

¶5 Downing was convicted of aggravated assault after a five-day jury trial and was sentenced to five years in prison. Downing filed a timely appeal. We have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2003), 13-4031 (2010) and 13-4033 (2010).

II. The Preclusion of Prior Acts of the Victim

¶6 As the first issue on appeal, Downing argues the trial court erred when it granted the State's oral motion in limine to preclude the admission of evidence of prior acts of aggression by the victim. The record contains virtually no information regarding these prior incidents. The State only mentioned "fights" or "altercations" at some unidentified point in the past and with no information regarding the circumstances. Downing's only description of the prior acts was that there was evidence the victim had "done this before with people he didn't know, once in a park and once at the apartment buildings, both with strangers he did not know, and the last one occurring about two weeks before the alleged incident with [Downing]," again without any additional information regarding the circumstances.

¶7 The State argued evidence of prior acts by the victim was not admissible to prove self-defense because Downing and the victim did not know each other and Downing was not aware of any prior acts. *See State v. Taylor*, 169 Ariz. 121, 124, 817 P.2d

488, 491 (1991) (a defendant may introduce evidence of specific acts of violence by the victim only if the defendant defends on the basis of self-defense and only if the defendant had knowledge of the prior acts). Downing conceded he and the victim did not know each other, but he argued the evidence was relevant to show the victim's character, to show the victim was the initial aggressor, and because "it strengthens my case that this is something that he does." The trial court granted the motion in limine without explanation.

¶8 On appeal, Downing argues the victim's prior acts of aggression were admissible to show Downing acted in self-defense, to show the victim intended to harm Downing, and to corroborate Downing's version of events. "In criminal cases, a motion in limine is treated as a motion to suppress, and the ruling of the trial court will not be disturbed on appeal absent a clear abuse of discretion." *State v. Superior Court (Gretzler)*, 128 Ariz. 583, 585, 627 P.2d 1081, 1083 (1981).

¶9 We find no error. It has long been the settled law in Arizona that a defendant may introduce evidence of specific acts of violence by a victim only if the defendant defends on the basis of self-defense and only if the defendant had knowledge of the prior acts. *Taylor*, 169 Ariz. at 124, 817 P.2d at 491; *State v. Williams*, 141 Ariz. 127, 130, 685 P.2d 764, 767 (App. 1984); *State v. Connor*, 215 Ariz. 553, 559, ¶ 14, 161 P.3d 596,

602 (App. 2007). Downing and the victim did not know each other and had never seen each other before the date of the incident. Downing does not argue he was aware of any prior acts of the victim at any time. Because Downing was not aware of these other acts, the evidence was properly excluded.[1]

¶10 Downing further argues the evidence was admissible pursuant to our decision in *State v. Fish*, 222 Ariz. 109, 213 P.3d 258 (App. 2009).[2] In *Fish*, we reiterated the long-standing law that "a defendant may not introduce evidence of specific acts unknown to the defendant at the time of the alleged crime to show that the victim was the initial aggressor." *Id*. at 121, ¶ 35, 213 P.3d at 270. We further held that when a defendant claims self-defense, specific acts of violence or aggression by the victim are not admissible to prove the defendant's state of mind or the reasonableness of the defendant's actions if the defendant was not aware of those prior acts. *Id*. at 121-122, ¶¶ 37-40, 213 P.3d at 270-271.

---

[1] We do not find in the record an avowal or offer of proof by Downing describing the details of the victim's prior acts. We ordinarily will not reverse a trial court ruling excluding evidence based on speculation about what the precluded evidence would have been. *See State v. Dickens*, 187 Ariz. 1, 13, 926 P.2d 468, 480 (1996) ("Because Defendant did not provide the judge with a specific offer of proof regarding Amaral's other acts, this court cannot determine the relevance of those acts.").

[2] *Fish* was decided fourteen months after this case was tried.

¶11 We further held, however, that *Fish* presented *unique circumstances*. "On this record, in which the *single determinative issue* was whether the Defendant's claim of self-defense was critical and there were no other eyewitnesses to the shooting, we disagree with the [trial] court and hold that the specific act evidence was relevant to corroborating Defendant's version of the events leading up to the shooting." *Id*. at 122, ¶ 41, 213 P.3d at 271 (emphasis added). After finding the evidence admissible under the unique facts presented, we reiterated:

> This 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. We conclude such evidence may have been admissible for corroboration in this case because of the nature of the record. Defendant conceded that he shot the Victim and gave specific facts to police, the grand jury and witnesses of the events leading up to the shooting. His description of the Victim's conduct given immediately after the shooting is very similar to proffered evidence of prior acts of the Victim of which Defendant did not know when he made those statements. There was no other witness to the shooting who could testify. The State contested the credibility of the Defendant's statements about the events leading up to the shooting . . . . On this record those prior acts were highly relevant to the credibility of the self-defense claim.

Id. at 125, ¶ 49, 213 P.3d at 274.

¶12 The unique circumstances presented in *Fish* are not present here. First, self-defense was not "the single determinative issue" as it was in *Fish* because Downing did not emphasize his claim that he acted in self-defense. Second, unlike *Fish*, there is no evidence Downing's description of the victim's alleged conduct at the gas station was remotely similar, let alone "very similar," to the victim's alleged conduct in the alleged prior acts. Finally, and again unlike *Fish*, there were other eyewitnesses to the incident who testified regarding the victim's conduct. Under these circumstances, evidence of other specific acts of the victim were not admissible pursuant to *Fish*.

¶13 Within his argument on this issue, Downing also contends the exclusion of prior acts of the victim denied him the right to present a defense. While a defendant has a right to present a defense, in the exercise of this right, a defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *State v. Prasertphong*, 210 Ariz. 496, 502, ¶ 26, 114 P.3d 828, 834 (2005)(quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). *See also State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996) ("Although a defendant has a fundamental constitutional right to confront witnesses and present a defense, the right is limited

to the presentation of matters admissible under ordinary evidentiary rules, including relevance."). The exclusion of this evidence pursuant to established rules of evidence did not deprive Downing of the right to present a defense.

¶14 The trial court did not abuse its discretion when it precluded the admission of prior acts of aggression of the victim.

III. Admission of the Passenger's "Statements"

¶15 As the second issue on appeal, Downing argues the trial court erred when it admitted the hearsay statements of Downing's passenger. Prior to trial, the trial court granted Downing's motion in limine to preclude admission of any statements the passenger made to the victim after the incident.[3] The motion did not identify any specific statements or the types of statements at issue. The statements at issue on appeal, however, were not oral statements but consisted of nonverbal conduct that Downing contends the passenger intended to be an assertion. *See* Ariz. R. Evid. 801(a)(2) (a "statement" for purposes of the hearsay rules includes nonverbal conduct, but only if it is intended to be an assertion).

[3] Specifically, the court ruled other witnesses could not testify regarding the passenger's statements but the passenger could, however, testify regarding his own statements. The passenger did not testify at trial.

¶16 The evidence was introduced during the rebuttal phase of trial. On direct examination, the victim testified regarding the post-incident behavior of the passenger:

> Q. What did the passenger do after you were hit with the car?
>
> A. Just stood there.
>
> Q. Just stood there?
>
> A. He stood there until the defendant left.
>
> Q. Did he approach you?
>
> Defense Counsel: Objection, your honor.
>
> The Court: I will give you some leeway, but you know what can and cannot be addressed. Go ahead.
>
> Q. Did this person approach you?
>
> A. Yes.
>
> Q. Did he appear – describe his demeanor, [R.].
>
> A. Calm, and just walked slowly out of there.
>
> Q. But he approached you?
>
> A. Yes.
>
> Q. And without saying what he said, did you have a conversation with him?
>
> A. A brief one.
>
> Q. Did he appear to be upset with you?
>
> A. No.
>
> Q. Did he appear to be fearful of you?

A. No.

Q. Did he appear to be intimidated by you in any way?

A. No.

Q. And then what did he do after you had this conversation?

A. Shrugged his shoulders and left.

Q. So he shrugged his shoulders. How did he leave?

A. Just walked. Walked down 28th Drive.

Q. Walked away?

A. Yes.

Q. Didn't seem upset by this incident?

A. No.

On redirect, the victim testified further:

Q. He shrugged his shoulders and walked away?

A. Yes.

¶17 On appeal, Downing argues the passenger intended his post-incident behavior and demeanor to be assertions that he was not afraid of the victim. Downing argues the passenger's behavior and demeanor were, therefore, "statements" pursuant to Rule 801(a)(2) and constituted hearsay which was not admissible pursuant to any exception to the hearsay rule.

¶18 Downing did not raise this specific issue below and it is doubtful that merely saying "Objection, Your Honor" otherwise

communicated to the court that Downing was objecting to descriptions of the demeanor and behavior of the passenger as hearsay "statements." However, a motion in limine generally preserves for appeal any objection therein. *State v. Palenkas*, 188 Ariz. 201, 209, 933 P.2d 1269, 1277 (App. 1996). Further, an objection is not generally required when a motion in limine has been previously granted. *State v. Lichon*, 163 Ariz. 186, 189, 786 P.2d 1037, 1040 (App. 1989). In determining whether an issue was preserved through a motion in limine, however, "'[t]he essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived.'" *Id*., at 189, 786 P.2d at 1040 (quoting *State v. Briggs,* 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975)). While there is some question as to whether Downing's motion in limine and/or his objection were sufficient to preserve any issue regarding the admission of the behavior or demeanor of the passenger, we will assume the issue was properly preserved. Therefore, we review for abuse of discretion. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) (admission of evidence is reviewed for abuse of discretion).

¶19 We find no error. In order for conduct to be excluded as hearsay, "the conduct in question must be *intended* by the actor as an assertion, i.e., must be, in effect, the equivalent

of words expressing his or her belief of the existence of the fact sought to be proved." *State v. Printz*, 125 Ariz. 300, 303, 609 P.2d 570, 573 (1980) (emphasis added); Ariz. R. Evid. 801(a)(2). Mere speculation as to an actor's intent, however, is not sufficient to establish the actor intended the conduct to be an assertion. *State v. Ellison*, 213 Ariz. 116, 132, ¶ 56, 140 P.3d 899, 915 (2006). There must be specific evidence or circumstances that indicate the actor intended the conduct to be an assertion of the fact sought to be proved. *Id*. Here, there is only speculation that the passenger intended his conduct to be an assertion that he did not fear the victim. That a person stood with a calm demeanor and did not appear to be upset, fearful or intimidated and then shrugged his shoulders for unknown reasons and walked away is not evidence the conduct was intended to be an assertion of any fact. *See id*. (citing other jurisdictions which have held observations of physical demeanor such as crying and fear not hearsay; facial expressions, nervousness, low voice and repeatedly looking over one’s shoulder not hearsay; running to hide, shaking or trembling not hearsay; and further noting examples of conduct which would be inadmissible as hearsay include a nod of the head in response to a question or pointing a finger as a method of identification).

¶20 The trial court did not abuse its discretion when it admitted evidence regarding the post-incident behavior and/or demeanor of Downing's passenger.

IV. Conclusion

¶21 Because we find no error, we affirm Downing's conviction and sentence.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

___/s/_____
PATRICIA K. NORRIS, Judge

___/s/_____
MAURICE PORTLEY, Judge