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



DIVISION ONE
FILED: 03-18-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0798
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
AMJAD A. NASR,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-008907-001 DT

The Honorable Michael D. Jones, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Katia Méhu, Assistant Attorney General
Attorney for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorney for Appellant

B A R K E R, Judge

¶1 Amjad Nasr appeals his conviction for one count of assault, a class one misdemeanor and a domestic violence offense. He argues on appeal that the superior court committed reversible error in admitting evidence under Arizona Rule of Evidence ("Rule") 404(b) of an uncharged crime. For the reasons that follow, we find no reversible error and affirm.

Facts and Procedural Background

¶2 We view the evidence on appeal "in the light most favorable to sustaining the verdict, resolving all reasonable inferences against defendant." *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994). On January 4, 2007, S.C. went to a bar from 2:30 p.m. until 5:30 p.m. Nasr was watching her child at home and was trying to get in contact with her. At 5:30 p.m., S.C. answered a phone call from Nasr, they got into an argument and she told him that she was at work. S.C. rushed back to work and saw Nasr speaking to her supervisor. Nasr asked B.B., S.C.'s manager, where she was. B.B. testified that Nasr was angry "about something." B.B. called security at one point because Nasr was pounding on the supervisor's door trying to find S.C. Nasr and S.C. again got into an argument and she told him she had been drinking. Nasr told S.C. that she knew he would leave her if she used alcohol and drugs. As S.C. was leaving, B.B. asked her if she wanted him to call the police.

She gave him her home address and asked him to tell the police to go there.

¶13 The police responded and S.C.'s son opened the door and directed them to S.C. S.C. had blood coming from her lip, she looked "visibly upset," and complained of pain in her face. She told the police that Nasr was responsible for her injuries, including striking her face with a closed fist and pulling her out of the car by her hair.

¶14 At trial, S.C. denied telling B.B. to call the police or knowing why he did. She testified that she told the police that Nasr hit her to "get back at him for leaving" her because she was upset and wanted to punish him. S.C. denied that Nasr ever punched her or jammed her head into the car; instead, she testified that she punched herself in the face.

¶15 After a bench trial on June 25, 2008, the court found Nasr guilty of assault beyond a reasonable doubt, a class one misdemeanor. The court also found the offense to be one of domestic violence. At sentencing, the trial court suspended the imposition of sentence and ordered that Nasr be placed on supervised probation for two years with a thirty-day jail sentence.

¶16 Nasr filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections

12-120.21(A)(1) (2003), 13-4031 (2001) and 13-4033(A)(1) (Supp. 2008).

Discussion

¶7 Nasr argues that the trial court abused its discretion under Rule 404(b) for admitting B.B.'s testimony regarding a previous encounter with Nasr at S.C.'s work. This appeal concerns the following testimony by B.B. at trial:

[Appellee's counsel]: When you saw this man coming into the hospital and begin asking you for Sandra's schedule, did you know who this man was?

A: Only from my previous occurrence with him.

[Appellant's counsel]: Objection; relevance. Outside the scope of this incident; prior events.

The Court: If he's just seen him before, that goes to his ability to identify him, so I will allow that.

[Appellee's counsel]: Where did you see him before?

A: At the hospital as well. He had come into the back door of the kitchen looking for [S.C.].

. . . .

Q: When was the first time that you saw this man, that you met this man or saw him?

A: Two or three weeks prior to the event that we are discussing here.

Q: Where was that?

A: In the kitchen at the hospital.

Q: Okay. Did he introduced [sic] himself to you that day?

A: He did. Not by name. He said he was the husband of [S.C.], wanted to know where she was at. And I stated that he was in a restricted area, and if that [sic] he needed to see [S.C.] that he can catch her in the cafeteria on her break time.

Q: Do you know how he got into the restricted area?

A: There's a rear entrance to the hospital. There's a signage that says it's restricted, but it's still possible to enter as somebody else is passing through the doors. It's a tagged door. You have to slide your badge to get in. Typically people hang around and follow in after other people.

Q: Did you have a lengthy discussion with him at that time?

A: No. It was brief.

Q: Did you escort him out of the restricted area?

A: I believe that he left on his own, to the best of my recollection. Again that's been a year and a half ago.

Q: Did you have to call for any type of assistance such as security?

A: I think that -- on the first event or the second event?

Q: On the first event.

[Appellant's counsel]: Objection; relevance to the first event. It has no bearing on today's events.

The Court: Counsel.

[Appellee's counsel]: It does have bearing because it's a similar situation and the defendant was in the hospital when he was not supposed to be as he was on the occasion that we're on today.

[Appellant's Counsel]: It does not go to the fact as to whether he assaulted someone. That's what we're here on. Prior event does not lend anything to whether Mr. Nasr committed an assault.

The Court: No, but there's an allegation of 13-3601 for purposes of domestic violence issues and understanding the relationship, it could be relevant. I'll allow it.

[Appellee's counsel]: As to the status of the relationship, Mr. Nasr, on the first visit to the hospital, told you -- what did he tell you how he knew [S.C.]?

A. I believe he said he was her husband.

Q. So he told you that he was [S.C.'s] husband?

A. Yes.

¶18 Rule 404(b) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b).

¶9 We find the majority of testimony at issue was foundational and relevant to B.B.'s ability to identify Nasr and to determine the nature of S.C. and Nasr's relationship. Portions of the testimony went beyond identity, e.g., "Did you have to call for any type of assistance such as security?" However, the answer given did not respond to the question and went squarely to identity: "I believe he said he was her husband." Further, we presume the trial judge disregarded inadmissible evidence in reaching his decision. *State v. Fredrico*, 104 Ariz. 157, 158, 449 P.2d 936, 937 (1969); see also *State v. Padilla*, 110 Ariz. 392, 393-94, 519 P.2d 857, 858-59 (1974) (affirming presumption that judge did not consider improper evidence unless result clearly would have been different except for the improper evidence).

¶10 Our review of the record does not reflect that the alleged inadmissible evidence affected the trial court's decision in any way. The competent evidence, including testimony by B.B. and the police officer, as well as photographs of S.C., was sufficient to support the judgment.

Conclusion

¶11 For the foregoing reasons, we affirm Nasr's conviction.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

PETER B. SWANN, Judge