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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11-16-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 09-0505
)
 Appellee,) DEPARTMENT E
)
 v.) **MEMORANDUM DECISION**
)
 GRACIANO JIMENEZ JIMENEZ,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-132947-001 DT

The Honorable Christopher T. Whitten, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General) Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And
Angela Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender) Phoenix
by Louise Stark, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Defendant Graciano Jimenez Jimenez appeals from his convictions for aggravated assault with a deadly weapon, endangerment, and misconduct involving a weapon. He argues that the trial court (1) improperly precluded his cross examination of one of the victims and (2) violated his Fifth Amendment rights when it admitted hearsay evidence of his refusal to answer questions after being read his *Miranda*¹ rights. For reasons set forth more fully below, we affirm.

FACTS² AND PROCEDURAL HISTORY

¶2 Jose R.³ finished working around noon on May 25, 2008, and bicycled home to a trailer in Aguila, Arizona, that he shared with its owner, his friend Cecelio O. On his way there, Jose stopped and bought an "18-pack of beer." He consumed two beers in transit and an additional four beers once home while sitting outside listening to music on a couch directly in front of the trailer. Jose estimated that he consumed the additional four beers over a span of two hours.

¶3 During this time, defendant, who lived in a separate trailer nearby, was inside Cecelio's trailer with Cecelio's

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

³ We use the first initial of each victim's last name to protect his privacy as a victim. *State v. Maldonado*, 206 Ariz. 339, 341 n.1, ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

brother and some other people, also drinking beer. Defendant and his companions had been drinking for some time before Jose arrived home. At some point, when his companions left, defendant exited Cecelio's trailer and walked to his own trailer.

¶14 Approximately twenty-five minutes to a half-hour later, defendant exited his trailer; walked over to Jose, who was still sitting on the couch; and, without saying a word, punched Jose twice in the nose and forehead. Jose recovered and, said, "All right. It's on now," and the two began fighting each other with their fists. Using only his fists, Jose then beat defendant extensively in the face until he had defendant on the ground.

¶15 Cecelio was outside doing laundry and observed the entire fight. When he saw that Jose had gotten the better of defendant, he felt sorry for defendant and yelled to Jose to stop hitting defendant. Jose complied and started walking away from defendant backwards, telling defendant that he did not wish to fight anymore. However, defendant repeatedly called to Jose, stating "you better finish me off because if you don't, I am going to finish you off," which frightened Jose.

¶16 Jose continued to walk away backwards while still watching defendant. Defendant then stood up, pulled a revolver out of his waist area, aimed it at Jose's forehead, and fired.

Jose felt the bullet "whiz by" his head. The bullet also "came by close" to where Cecelio was standing and caused him to panic.

¶17 Although defendant continued to shoot the gun, it did not go off. Defendant started backing up, "trying to do something" to the gun. Jose did not know if defendant was attempting to reload it or to fix it, but he seized the opportunity to attempt to take the weapon away from defendant. A second fight ensued as the two wrestled over the weapon, "throwing blows" at each other and rolling around on the ground. Jose's hands were swollen from having hit defendant so much from both fights.

¶18 After Jose was finally able to take the gun away from defendant, Jose quickly walked into Cecelio's trailer so that they could call the police. But before they could make the telephone call, two Maricopa County Sheriff's officers arrived on the scene. They had been flagged down by a person who had told them that a "fight[] with guns" was going on at that moment at the trailer. Deputy DLJ contacted Jose, who gave him defendant's gun, while Deputy O dealt with defendant, who had blood on his face and appeared dazed. Due to his head injuries, as a precautionary measure, defendant was subsequently air-evacuated to a hospital in Phoenix.

¶19 Deputy O, who is a Spanish speaker, interviewed Jose and Cecelio at the scene. Both deputies also walked the entire

property looking for any additional physical evidence. They found no other weapons, pipes, hammers or sticks either on the property or inside Cecelio's trailer, and the physical evidence at the crime scene appeared to them to corroborate what Jose and Cecelio told them had happened between defendant and Jose.

¶10 The state charged defendant with attempted second degree murder, a Class 2 dangerous felony; aggravated assault, a Class 3 dangerous felony; endangerment, a Class 6 dangerous felony; disorderly conduct, a Class 6 dangerous felony; and misconduct involving a weapon⁴, a Class 1 misdemeanor. The state dismissed the disorderly conduct charge, and the matter proceeded to trial on the remaining offenses.

¶11 Defendant testified at trial and maintained that Jose had been the initial aggressor. He stated that Jose would not allow him to go inside Cecelio's trailer to take a shower and that Jose had hit him on the back of the neck with a hammer when he tried to force his way inside. He stated that he had then returned to his trailer to get his gun in order to give it to Cecelio for safekeeping, but that he did not have a chance to do so because "[a]ll of a sudden Jose was on top of [him] and . . . whacked the shit out of [him]." He maintained that he and Jose started fighting with their fists but that, when Jose could no

⁴ This charge was based on the fact that defendant did not have a permit to carry a concealed weapon, a fact that defendant subsequently conceded at trial.

longer use his hand, Jose had "grabbed a bottle" and "split" his head open. Defendant testified that it was at that point that he had fired the gun in the air, not at Jose, in order to make Jose stop beating him. Instead, Jose had picked up a four-foot stick and continued to beat him and break his finger.

¶12 On cross-examination, defendant admitted that the gun the deputies retrieved from Jose was his, that he did not have a permit to carry a concealed weapon, and that he had drunk between ten and eleven beers in the two-hour period before the fight began. He also admitted that he had been "very intoxicated . . . but . . . conscious."

¶13 The jury found defendant not guilty of attempted second degree murder but guilty of the three remaining offenses. It found that the aggravated assault and endangerment offenses were dangerous offenses. After a separate trial, the jury also found that the state had proven the aggravating circumstance that the offenses "involved the infliction or threatened infliction of serious physical injury."

¶14 On June 12, 2009, the trial court sentenced defendant to concurrent, presumptive prison sentences of 7.5 years on the aggravated assault offense and 2.25 years on the endangerment offense. It sentenced defendant to time served on the misconduct involving a weapon offense.

¶15 Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033 (2010).

DISCUSSION

(1) *Improper Preclusion of Cross-Examination of Cecelio*

¶16 On February 4, 2009, approximately nine months after the date of the incident and more than a month prior to trial, defense counsel, a defense investigator, and a Spanish speaking employee from the Public Defender's Office went to the trailer in Aguila hoping to speak with the person who had flagged down the deputies on the day of the crime and to also take some pictures of the crime scene. They learned that the individual who had flagged down the officers had moved back to Mexico, however, Cecelio was still living in his trailer. At that point, Cecelio was the named victim of the endangerment charge.

¶17 Defense counsel identified himself to Cecelio as defendant's counsel and reportedly advised Cecelio that, as a victim, he had an absolute right not to speak with him. He also informed Cecelio that "if he wanted to call up the county attorney to see whether or not he wished to talk to me, that was fine." However, defense counsel also told Cecelio that, if Cecelio wished to speak with him, he could do so while counsel was there taking pictures.

¶118 After Cecelio indicated through the interpreter that "he had no problem with talking to [him]," defense counsel "asked him some things about what occurred." Counsel also "took pictures with [Cecelio] [in posed] positions in the pictures also with potential weapons related to this case, including a hammer inserted into the photographs." According to defense counsel, Cecelio's statements were "pretty much similar to what was in the police report" except for his statement about the location of the couch on which Jose had been seated.

¶119 Prior to trial, the state moved to preclude (1) the photographs taken by defense counsel in February 2009, because they "did not fairly and accurately depict the scene as it was on May 25, 2008," and (2) any statements made by Cecelio when the photographs were taken because they were "taken in violation of Victims' Rights and were not recorded in any manner." Defense counsel acknowledged that he had not formally disclosed the names of the individuals who accompanied him to Aguila because he was not planning on using them as witnesses. He maintained that he had informed the former prosecutor on the case at a hearing a month after the visit that he had gone to the trailer, spoken with Cecelio, and photographed the scene.

¶120 The state's motion was initially discussed off the record on March 25, 2009, prior to jury selection. A record of the discussion was subsequently made in open court. The trial

court stated that it granted the state's motion because (1) the witnesses were never listed or formally disclosed, and (2) "the violation of victim's rights." Defense counsel's request to call the witnesses in rebuttal was also rejected by the trial court on the same bases.

¶21 On appeal, defendant argues that the trial court abused its discretion by not allowing him to cross-examine Cecelio about his statements to defense counsel in February 2009. We find no abuse of discretion.

¶22 Decisions regarding the admission or exclusion of evidence are left to the sound discretion of the trial court and will be reversed on appeal only if they "constitute a clear, prejudicial abuse of discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994) (citations omitted). "The prejudice must be sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed." *Id.* (citation omitted).

¶23 Arizona Rules of Criminal Procedure (Rule) 15.2(c)(1) provides that a defendant must disclose to a prosecutor the "names and addresses of all persons" the defendant intends to call as witnesses at trial "together with their relevant written or recorded statements." Rule 15.7(a)(1) provides that a trial court may preclude a party from calling a witness if the party has violated Rule 15.2. Furthermore, under Rule 15.7, the court

has the discretion to determine both whether to impose a sanction and which particular sanction would be just under the circumstances. *State v. Jackson*, 186 Ariz. 20, 24, 918 P.2d 1038, 1042 (1996); Ariz. R. Crim. P. 15.7(a).

¶24 The Arizona Constitution establishes that a victim of a crime has a right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. art. 2, § 2.1(5), Victims' Bill of Rights. The relevant statutory provision to the Victims' Bill of Rights states that a defendant's attorney or agent "shall only initiate contact with the victim through the prosecutor's office." A.R.S. § 13-4433(B) (2010). The trial court cited both defense counsel's violation of this provision as well as the counsel's violation of the discovery rules as the bases for its decision to preclude the use of any statements made by Cecelio. The record supports the trial court's decision.

¶25 Defense counsel had nine months to photograph the crime scene or attempt to locate the individual who flagged down the deputies. He did not attempt to do so until approximately one month prior to trial. Defendant concedes that he never disclosed the name of either the investigator or Spanish-speaking employee who accompanied him to the trailer, but argues that he "listed that a Public Defender investigator might be

called as a witness" and that he also noted that he "might use photographs of the crime scene" in his notice of defenses.

¶126 On February 20, defense counsel did have some discussion with the then prosecutor about the fact that he had taken photographs and had spoken with Cecelio. But apparently defense counsel still did not formally disclose the names of his investigator and translator nor any statements that Cecelio made to him before trial, despite the fact that counsel still had several weeks to do so. As the state noted at the March 25 hearing, at best, it was "disingenuous" for defense counsel to maintain that he had not disclosed the witnesses because he did not plan on calling them while at the same time claiming that the victim had made contradictory statements to them about the crime scene.⁵ Under these circumstances, the trial court did not abuse its discretion in precluding the evidence based on defense counsel's disclosure violations.

¶127 Nor did the trial court err in precluding the evidence based on the violation of the Victims' Bill of Rights provisions. Defense counsel argued to the trial court that he had "no idea" that Cecelio would be at the crime scene let alone that Cecelio would "acquiesce" to speak with him. He

⁵ Furthermore it appears that when the former prosecutor, a Spanish speaker, did contact Cecelio about his statements to defense counsel, Cecelio stated that "those were not the statements that he made."

maintained that that was the reason why he also had not tape recorded their conversation, because he had "gone out there initially to talk with the [person who flagged down the deputies] and just to take some pictures of the scene." Counsel argued that he should consequently be allowed to use the victim's statements to impeach the victim because he did not purposefully intend to violate the victim's rights.

¶128 On appeal, defendant renews this line of argument, contending that, once defense counsel encountered Cecelio, he had "no other option" but to explain who he was and what he was doing. According to defendant, "simply ignoring" Cecelio while they attempted to photograph the scene would have been "awkward." Consequently, because defense counsel initiated contact with Cecelio only in "the most general and unintentional way" and because the trial court never explained "what defense counsel should have done differently," the court erred in precluding the testimony based on a victim's rights violation.

¶129 There is no doubt that, when the defense team went to the scene of the crime on February 4, defense counsel knew that Cecelio was a victim in the case and also knew that Cecelio lived in the trailer that was on the scene of the crime. It is therefore difficult to suppose that counsel would not have had at least some intimation that Cecelio might be there when he arrived to photograph the area around his trailer. Defendant

laments that the trial court did not state what alternative actions defense counsel should have taken under the circumstances, but logic dictates that counsel could have and should have simply explained that he was there to take photographs and refrained from speaking to the victim concerning the actual crime without first contacting the prosecutor. As the trial court noted in rejecting defense counsel's arguments, even assuming that Cecelio agreed to speak with counsel, "when you have . . . language differences, so much of it comes down to the way things were said . . . non-verbal communications that went with the communication [to] the victim of his rights, that's why . . . any request to interview the victim has to go through the prosecutor." The trial court's concerns and reasoning are understandable in light of our Victims' Rights provisions and the fact that no record was made of the actual exchange between counsel and the victim in this case. Under these circumstances the trial court did not abuse its discretion in precluding Cecelio's February 4 statements based on the Victims' Bill of Rights violation.⁶

⁶ Defendant's cites *Champlin v. Sargeant*, 192 Ariz. 371, 965 P.2d 763 (1998) to argue that the Victims' Bill of Rights does not shield a victim from every contact with a defendant and his attorney. However, *Champlin* is inapposite as the issue in that case was whether a victim of one crime by defendant on one occasion could be interviewed about a separate crime he witnessed defendant commit on a separate occasion. 192 Ariz. at 375, ¶ 18, 965 P.2d at 767. Here, Cecelio was the victim of

¶130 Nor do we find that defendant has established that he was prejudiced by the trial court's preclusion of the statements. *Ayala*, 178 Ariz. at 387, 873 P.2d at 1309. The defense theory at trial was that Jose was the initial aggressor and that defendant had acted in self defense in firing his gun in order to stop Jose from beating him further with weapons that the deputies' flawed investigation failed to discover. Defense counsel conceded that the statements made by Cecelio were "pretty much similar to what was in the police report" except for his statement about the location of the couch on which Jose had been seated.

¶131 At trial, defense counsel sought to establish that the fight had occurred at a location other than the couch in front of the trailer as both Jose and Cecelio testified. He desired to use the allegedly contradictory statement about the location of the couch to impeach Cecelio's rendition of events by challenging Cecelio's testimony that he had been able to observe the entire fight. The record shows that defense counsel had sufficient opportunity to do this at trial without the use of Cecelio's February 4 statements.

¶132 At trial, defense counsel elicited testimony from Cecelio that he and Jose were friends and had been living

endangerment because of the same acts that rendered Jose the victim of attempted second degree murder and aggravated assault.

together for several months. Counsel was able to get Cecelio to concede that there "could have been" items, such as a stick, hammer, or pipe, in an area around the side of the trailer that the deputies had not fully photographed, which supported defendant's arguments that the deputies simply accepted the victims' contention that the fight had taken place near the couch in front of the trailer and had not done a thorough investigation. Defense counsel also called into question Cecelio's eyesight by having Cecelio testify that "[i]t's not very good, you know, it's not" and by highlighting the fact that Cecelio was unable to see defendant clearly enough to identify him in the courtroom without getting closer to him. Defense counsel therefore had adequate opportunity during cross-examination to confront Cecelio concerning his rendition of the facts and his ability to view what occurred on the day of the crime.

¶133 Defendant has failed to show that the trial court's exclusion of any statements Cecelio may have made on February 4 prejudiced either his cross-examination of the victim or his theory of defense. The trial court's denial of the use of the statements for impeachment purposes was not an abuse of its discretion. See *State v. Bracy*, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985) (citation omitted) (test of reasonableness of limit of cross-examination is whether jury is otherwise in

possession of sufficient information to assess bias and motives of witness); see also *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980) (no violation of confrontation rights where cross-examination otherwise provides jury with sufficient testimony to weigh credibility of witness).

¶34 Furthermore, the jurors also heard defendant's version of events and it was up to them to decide which version, defendant's or Jose's and Cecelio's, they found more credible. *In re Pima County Juv. Action No. 63212-2*, 129 Ariz. 371, 375, 631 P.3d 526, 530 (1981).

(2) *Testimony Regarding Invocation of Fifth Amendment Rights*

¶35 Defendant argues that the trial court improperly admitted testimony regarding defendant's invocation of his Fifth Amendment right to remain silent in order to suggest that defendant had something to hide and, thus, bolster the state's case. Our review of the record reveals this argument to be without merit.

¶36 A trial court's rulings regarding the admission or exclusion of evidence generally are reviewed for an abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369, ¶ 37, 956 P.2d 486, 496 (1998). In reviewing a trial court's evidentiary rulings, we give deference to the trial court's factual findings but review its legal determinations de novo. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996).

¶137 Concomitant with defendant's self-defense theory was his theory that the authorities had done a poor job of investigating what had actually occurred on the day of the crime. Defense counsel contended that the deputies had simply accepted Jose's and Cecelio's version of the events and, consequently, had only identified evidence that corroborated the victims' stories. Hence, for example, counsel's suggestion, through his cross-examination of Deputies DLJ and O, that they overlooked a hammer, pipe and four-foot stick that were also at the crime scene because Jose and Cecelio failed to mention that Jose had used those items to assail defendant. In line with these arguments, defense counsel repeatedly asked the deputies questions that implied that the deputies' conclusion that the evidence at the scene corroborated the victims' rendition was skewed because no one ever attempted to question defendant about his version of the facts.

¶138 As a result of defendant's questioning of the deputies, the prosecutor elicited testimony from Detective H that a detective had, in fact, attempted to speak with defendant at the hospital but that defendant had invoked his right to remain silent. During cross-examination, defense counsel questioned Detective H about the fact that a Spanish-speaking hospital security guard had actually read the *Miranda* card for the detective that went to speak with defendant at the hospital.

Through his questioning, counsel was able to suggest that the detective, not being a Spanish speaker himself, could not have known whether defendant was properly *Mirandized* by the security guard and that, had defendant understood his rights, he might have chosen to speak with the detective. Counsel also suggested that defendant might not have understood what was happening at the time because he was not awake or because he was under treatment. The detective responded by stating that defendant "was able to answer that he didn't want to speak to the detective, and that the deputy said that he had seen [defendant] up and walking around." When defense counsel moved to strike the response, the trial court denied the motion. However, the trial court later sustained defense counsel's motion to strike when the prosecutor asked Detective H on redirect whether defendant had in fact answered the security guard by saying that "he didn't want to talk to the officer."

¶139 At the conclusion of Detective H's testimony and out of the presence of the jurors, the trial court noted that it had permitted the state to elicit the fact that defendant had invoked his right to remain silent "because there was an implication that the police investigation was incomplete because [the police] never talked to [defendant]." However, court cautioned that the implication had "certainly been met" and

that, should the defendant take the stand, the state would not have "carte blanche" to go into the matter further.

¶140 When defendant testified, defense counsel asked him if he remembered being questioned by the authorities at the hospital. He responded that he did not remember what had happened at the hospital because of his head injuries. The prosecutor did not ask defendant any questions about his contact with the detective at the hospital. Furthermore, the prosecutor did not argue that defendant's invocation of his right to remain silent suggested that defendant had something to hide or otherwise supported an inference that he was guilty.

¶141 In general, to be "constitutionally proscribed," a comment on a defendant's invocation of his right to remain silent "must be adverse; that is, it must support an unfavorable inference against the defendant and, therefore, operate as a penalty imposed for exercising a constitutional privilege." *State v. Mata*, 125 Ariz. 233, 238, 609 P.2d 48, 53 (1980); see also *State v. Palenkas*, 188 Ariz. 201, 212, 933 P.2d 1269, 1280 (App. 1996) (holding that prosecutor violated defendant's due process rights by using evidence of refusal to consent to warrantless search "to induce the jury to infer guilt"). Defendant's invocation of his right was not used by the state to "support the unfavorable inference" that defendant was guilty because of his exercise of the right. Instead, the state used

the evidence only to rebut defense counsel's implication that the Sheriff's Office investigation of the case, and the evidence gathered as a result, was incomplete because law enforcement had chosen to disregard defendant's side of the story as well as any implication that defendant had not fully understood his options because his *Miranda* rights were read improperly. The trial court permitted the evidence for this reason alone. It was well within the trial court's discretion to do so. See, e.g., *State v. Ikirt*, 160 Ariz. 113, 116, 770 P.2d 1159, 1162 (1989) (introduction of failure to take polygraph not fundamental error where purpose of evidence to correct false impression left in mind of jurors after remarks by witness regarding offer to take one).

¶42 Furthermore, defendant "opened the door" to the state's line of inquiry by creating the false impression that the officers never even attempted to obtain defendant's side of the story. See *State v. Kemp*, 185 Ariz. 52, 60-61, 912 P.2d 1281, 1289-90 (1996) (party cannot complain of a result he brought about by creating false impression). Under such circumstances, permitting the state to elicit otherwise excludable testimony to rebut the false impression is not error. *Id.*

CONCLUSION

¶43 For the foregoing reasons, we affirm defendant's convictions and sentences.

_/s/ PHILIP HALL, Presiding Judge

CONCURRING:

_/s/ SHELDON H. WEISBERG, Judge

_/s/ PETER B. SWANN, Judge