IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LARRY GRANT GENTRY, *Appellant*.

No. 1 CA-CR 18-0357
FILED 7-30-2019

Appeal from the Superior Court in Maricopa County
No. CR2016-127930-001 DT
The Honorable Danielle J. Viola, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michelle L. Hogan
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade
Counsel for Appellant

OPINION

Judge Jon W. Thompson delivered the opinion of the Court, in which Presiding Judge Michael J. Brown and Judge Kenton D. Jones joined.

T H O M P S O N, Judge:

¶1 Larry Grant Gentry (defendant) appeals from his conviction and sentence for one count of manslaughter. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 In December 2015, the victim, M.R., and defendant's step-daughter, Autumn, had a son together. The couple lived with their son in the same apartment complex as defendant and Autumn's mother, Traci. Defendant and Traci shared their apartment with various other family members.

¶3 On June 12, 2016, M.R. brought his son to defendant and Traci's apartment. Shortly thereafter, Traci noticed the baby had bruises and a possible bite mark on his body. Traci confronted M.R. and Autumn about the injuries and they started to argue. Frustrated, M.R. attempted to take his son out of the apartment but Traci would not allow it.

¶4 Aware of the confrontation, defendant left the apartment for the grocery store. Upon defendant's return, he saw M.R. push Autumn. Defendant went into his bedroom, retrieved a gun, and told M.R. to leave. Defendant eventually discarded the gun and the two men continued to argue. To avoid further escalation, M.R. and Autumn went back to their apartment, leaving their son with Traci.

¶5 Within minutes, M.R. returned to defendant's apartment, walked inside, and asked, "are you going to shoot me?" Defendant told M.R. to leave, but M.R. refused and walked "slightly" toward defendant. Defendant reached for the gun and Traci attempted to wrestle it from his grasp. When defendant gained control of the gun, he instructed a family member, who was standing near M.R., to move away and shot M.R. a total of ten times in his legs, arms, shoulders, back, and torso. M.R. died from the gunshot wounds.

¶6 After shooting M.R., defendant walked over to his body, lit a cigarette, and said, "he deserved it." When officers arrived, defendant told them he shot M.R. Defendant would later claim that M.R. reached for defendant's gun, that he feared M.R. would use the gun on him and his

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[1] We view the facts in the light most favorable to sustaining the verdict. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

family, and that he was in "protection mode." Defendant had no visible injuries and none of the family members who were present during the offense could corroborate his claim that M.R. attempted to take his gun.

¶7 The state charged defendant with one count of manslaughter, a class 2 dangerous felony. A jury found him guilty as charged and found that two aggravating factors applied. The trial court sentenced him to a slightly aggravated term of thirteen years in prison. Defendant 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) (2019), 13-4031 (2019), and -4033(A)(1) (2019).[2]

DISCUSSION

A. *Batson* Challenge

¶8 Defendant challenges the state's peremptory strike of a racial minority juror and argues the trial court erred by denying his *Batson* challenge. We will uphold the denial of a *Batson* challenge absent clear error. *State v. Newell*, 212 Ariz. 389, 400, ¶ 52 (2006). The court is in the best position to assess a prosecutor's credibility, and we extend "great deference" to the court's ruling. *See Batson v. Kentucky*, 476 U.S. 79, 98 n. 21 (1986).

¶9 Equal protection prohibits the use of a peremptory strike to exclude a potential juror solely on the basis of race. *Id.* at 89. A *Batson* challenge is comprised of a three part analysis: (1) the opponent of the strike must make a *prima facie* showing of racial discrimination; (2) if shown, the striking party must then provide a facially race-neutral basis for the strike; and (3) if provided, the opponent must show the facially-neutral explanation is merely a pretext for purposeful discrimination. *Newell*, 212 Ariz. at 41, ¶ 53 (citations omitted). The second step is satisfied unless the reasons provided are inherently discriminatory. *Id.* at ¶ 54 (citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991)). The third, fact-intensive step requires consideration of the plausibility and credibility of the facially-neutral explanation. *See Miller–El v. Cockrell*, 537 U.S. 322, 339-40 (2003).

¶10 As relied upon by defendant, in *State v. Lucas*, 199 Ariz. 366, 369, ¶ 12 (App. 2001), we held that any discriminatory reason provided by

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[2] We cite to the current version of any statute unless the statute was amended after the pertinent events and such amendment would affect the result of this appeal.

the striking party taints any other non-discriminatory reasons for the strike. *Id*. at 368-69, ¶¶ 11-12. In *Lucas*, we found that the non-neutral reason provided by the state for striking the only African-American juror, namely that the juror was a southern male and would have a negative view of the pregnant prosecutor, tainted the entire proceedings and constituted reversible error. *Id*. at ¶¶ 9-12.

¶11 Here, defendant challenged the state's peremptory strike of Juror No. 28, who was the only remaining African-American juror. The state provided the following reasons in support of striking Juror No. 28: (1) Juror No. 28 had a pre-planned trip that may have caused a minor conflict in the final days of trial; (2) her family members and son's father had prior felony convictions; (3) she had a blended family, including step-children and biological children in her household; and (4) her husband served in the military and worked at a bank. The state noted that testimony may be presented that defendant had a blended family, served in the military, and worked at a bank. The state argued the similarities between the juror's husband and defendant, the juror's ties to individuals with prior convictions, and her upcoming trip all might impact her ability to be impartial in this case. Though the trial court noted that the conflict with Juror No. 28's trip could be avoided, it found the state provided "a sufficient race-neutral explanation for the strike" and denied relief.

¶12 The state provided multiple facially-neutral reasons for its peremptory strike of Juror No. 28, none of which were purposefully discriminatory based on the juror's race or gender. There is no indication the underlying reason for the strike was that the juror would identify with defendant because they were both African-American, but because of the similarities between her husband's family and employment history. Contrary to defendant's contention, the state's explanation, which was not inherently or purposefully discriminatory, did not taint the proceedings. *Id.* at ¶¶ 11-12. The trial court did not clearly err by concluding the state's strike did not violate *Batson*.

¶13 Defendant further asks that we adopt the approach to peremptory challenges established in Washington, which carves out a list of reasons presumed invalid and expands the third step of the *Batson* analysis to include an "objective observer" standard. *See* Wa. R. Gen. G.R. 37(h); *State v. Jefferson*, 429 P.3d 467, 481, ¶ 68 (Wash. 2018). We are neither bound by Washington state law, nor are we inclined to ignore well-established Arizona legal precedent. *See State v. Olague*, 240 Ariz. 475, 481, ¶ 23 (App. 2016) ("Stare decisis . . . requires special justification to depart from existing precedent.").

B. Preclusion of Evidence Regarding Victim's Other Acts

¶14 Defendant argues the trial court erred when it precluded "other act" evidence that Autumn was pregnant when the victim assaulted her, claiming the court applied the incorrect relevancy standard and prevented him from presenting his justification defense. We review the court's evidentiary rulings for abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60 (2004). "An abuse of discretion occurs only when the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Gomez*, 211 Ariz. 111, 114, ¶ 12 (App. 2005) (citation omitted).

¶15 Though constitutionally protected, a defendant's right to present a defense is not without limitations. *United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."). Defendants are still beholden to the trial court's application of ordinary evidentiary restrictions and rules. *State v. Hardy*, 230 Ariz. 281, 291, ¶ 49 (2012) (citations omitted). As with all litigants, defendants must show that proffered evidence is both relevant under Arizona Rules of Evidence (Rule) 401 and 402, and its probative value is not substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence" under Rule 403. *See* Ariz. R. Evid. 401 (evidence is relevant if it has "any tendency to make a fact more or less probable" and "the fact is of consequence in determining the action"); 402 (irrelevant evidence is inadmissible); 403 (balancing test).

¶16 In Arizona, a defendant facing homicide charges has the right to present a justification defense under a litany of theories. *See* A.R.S. §§ 13-404 (self-defense), -405 (use of deadly physical force), -406 (defense of third person), -407 (defense of premises), -411 (use of force in crime prevention), -418 (defense of residential structure). To bolster such a defense, other acts of violent conduct by the deceased victim, if known by the defendant, may be admissible to show the impact on the defendant's state of mind at the time of the alleged crime and the reasonableness of his actions. *See* Ariz. R. Evid. 404(b); *State v. Taylor*, 169 Ariz. 121, 124 (1991).

¶17 If proffered for this purpose, the defendant must still prove such evidence is admissible under Rules 401, 402, and 403. *See State v. Robles*, 135 Ariz. 92, 95 (1983). In the context of Rule 404(b), we have recognized there are "considerations unique to the balance of probative value and prejudice" because of the effect other act evidence may have on

the jury. *State v. Salazar*, 181 Ariz. 87, 91 (App. 1994); *State v. Fish*, 222 Ariz. 109, 125, ¶ 51 (App. 2009). When applying the Rule 403 balancing test to other act evidence, trial courts must exclude any inflammatory details not relevant to its "probative essence." *State v. Hughes*, 189 Ariz. 62, 70 (1997) (citing *Salazar*, 181 Ariz. at 92).

¶18 As relevant here, defendant moved *in limine* to admit evidence of M.R.'s other acts of violence under Rule 404(b), including the following: (1) in August 2015, M.R. hit and damaged the wall of defendant's freezer; (2) in August 2015, M.R. hit Autumn in the face with a table when she was pregnant; (3) in December 2015, M.R. pushed Autumn to the ground when she was pregnant, causing her to go into early labor; (4) in March 2016, while M.R. was holding their baby, he attempted to kick Autumn, fell to the ground, and hit the baby's head; and (5) on the date of the offense, M.R. pushed Autumn and their son had signs of physical abuse on his body. Defendant argued this evidence was admissible to show defendant had a justifiable reason to fear for his safety. The state objected, arguing the other acts were largely taken out of context, irrelevant, and unfairly prejudicial.

¶19 At evidentiary hearings, defendant provided testimony and supporting documentation that M.R. committed the other acts and defendant knew of them before committing the alleged offense. The trial court granted defendant's motion in part, allowing admission of each of the listed acts.[3] The court, however, ordered that any mention of pregnancy or early labor be precluded under Rule 403, finding that the detail had:

> very little, if any, probative value as to whether the Defendant may have felt the need to use deadly physical force. The fact of the pregnancy is prejudicial and raises a greater possibility that the jury would be misled by focusing on the unborn baby as opposed to the Defendant's state of mind. The danger of unfair prejudice substantially outweighs any probative value related to the circumstances of the pregnancy.

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[3] The trial court further denied the state's motion to reconsider the ruling and the state sought special action review. This court accepted jurisdiction but denied relief. *State v. Viola in & for Cty. of Maricopa*, 1 CA-SA 17-0236, 2017 WL 4927684, at *2, ¶ 8 (Ariz. App. Oct. 31, 2017) (mem. decision).

¶20 At trial, defendant was able to present other act evidence in line with the trial court's ruling. Notably, the jury heard testimony that, within the same month, M.R. pushed Autumn to the ground and she gave birth to their son "a month early." Further testimony was elicited from defendant that he knew of the other acts.

¶21 The trial court did not, as defendant argues, apply the incorrect evidentiary standard. The court properly found the other act evidence was relevant and offered for a proper purpose under Rule 404(b). *See* Ariz. R. Evid. 401, 404(b). Applying the Rule 403 balancing test, the court then precluded testimony that Autumn was pregnant when two of the other acts occurred. *See* Ariz. R. Evid. 403; *Taylor*, 169 Ariz. at 124. The court acted within its broad discretion in suppressing a particularly inflammatory detail from the other act evidence and exclusion did not impact its "probative essence." *See Hughes*, 189 Ariz. at 70. The jury heard that defendant, an adult male, feared M.R. because of the prior acts of violence against Autumn. Preclusion of testimony that M.R. assaulted a pregnant female or somehow injured his unborn son did not negate the probative purpose of the other act evidence, and the court did not abuse its discretion.

¶22 Even if we found that the trial court abused its discretion, any error was harmless. *See State v. Bible*, 175 Ariz. 549, 588 (1993). The jury heard testimony that Autumn went into early labor in the same month M.R. pushed her to the ground and could have inferred that Autumn was pregnant during the assault. *See State v. Aguilar*, 169 Ariz. 180, 182 (App. 1991) ("jurors may rely on their common sense and experience"). Based on this record, the court's preclusion of such testimony, even if plausibly erroneous, was harmless.

C. Justification Instructions

¶23 Defendant next contends the trial court erred in providing incomplete justification instructions under A.R.S. §§ 13-407 and -411(A), and in providing the exception listed in A.R.S. § 13-419(C)(2). He argues that the court's error prevented him from receiving a fair trial. Because defendant failed to raise specific objections to the challenged instructions at trial, we limit our review to fundamental, prejudicial error. *State v. Escalante*, 245 Ariz. 135, 140, 142, ¶¶ 12, 21 (2018); *State v. James*, 242 Ariz. 126, 133–34, ¶ 26 (App. 2017).

¶24 A defendant is entitled to a justification instruction if the record contains the "slightest evidence" that such an instruction is merited.

State v. Hussain, 189 Ariz. 336, 337 (App. 1997). The instruction, however, need not be provided if it "does not fit the facts of the particular case, or is adequately covered by the other instructions." *Id.* We view jury instructions in their entirety when determining whether they adequately reflect the law. *State v. Gallegos*, 178 Ariz. 1, 10 (1994).

¶25 Here, the trial court provided justification instructions on: (1) self-defense under A.R.S. § 13-404; (2) use of deadly physical force under A.R.S. § 13-405; (3) defense of a third person under A.R.S. § 13-406; (4) use of physical force in defense of premises under A.R.S. § 13-407; (5) use of force in crime prevention under A.R.S. § 13-411(A); (6) use of force in defense of residential structure under A.R.S. § 13-418; and (7) presumptions under A.R.S. § 13-419(A) and (B), with the exception listed under A.R.S. § 13-419(C)(2). The court also instructed the jury that the state must prove defendant's actions were not justified beyond a reasonable doubt and that the jurors must look to the instructions as a whole.

1. Instruction Under A.R.S. § 13-407

¶26 Defendant contends that the trial court erred in limiting the language of its instruction on the use of physical force in defense of premises under A.R.S. § 13-407(A) to the threatened use of deadly physical force in defense of premises. He argues the court should have added language from A.R.S. § 13-407(B) that the use of deadly force under subsection A is justified in defense of oneself or third persons.

¶27 Though the trial court did not give an instruction specifically as to A.R.S. § 13-407(B), it instructed the jury on self-defense under A.R.S. § 13-404, the use of deadly force under A.R.S. § 13-405, and defense of a third person under A.R.S. § 13-406. The language from A.R.S. § 13-407(B) merely reiterates that deadly force may be justified as described in A.R.S. §§ 13-405 and -406. Thus, the language from A.R.S. § 13-407(B) was adequately covered in other instructions. *See Hussain*, 189 Ariz. at 337.

2. Instruction Under A.R.S. § 13-411(A)

¶28 Defendant argues the trial court erred in limiting the enumerated crimes to burglary in the second degree, A.R.S. § 13-1507(A), and aggravated assault, A.R.S. § 13-1204(A)(2), in its instruction on the use of force in crime prevention under A.R.S. § 13-411(A). He argues the court should have defined aggravated assault as both an assault with a deadly weapon or dangerous instrument under A.R.S. § 13-1204(A)(2), and an assault causing serious physical injury under A.R.S. § 13-1204(A)(1). He further argues the court erred in failing to provide a definition of

aggravated assault under A.R.S. § 13-1204(A)(5), an entry into a residence with the intent to commit an assault, as a possible felony for the purposes of burglary in the second degree under A.R.S. § 13-1507(A).

¶29 At trial, defendant testified that M.R. charged into his home, would not leave, and attempted to take his gun. Defendant then requested the trial court provide a jury instruction on the use of force in crime prevention under A.R.S. § 13-411(A), listing aggravated assault and burglary in the second degree as the enumerated crimes. The court granted the request, and defendant approved the instruction as listed and defined. In defendant's closing argument, the court allowed him to argue that an aggravated assault under A.R.S. § 13-1204(A)(5) could be the underlying felony for purposes of burglary in the second degree. Without objection, the court found it sufficient to provide instructions on burglary in the second degree without defining every underlying felony.

¶30 The instruction adequately covered defendant's theory of the case. *See Hussain*, 189 Ariz. at 337. The trial court provided the instructions per defendant's request and did not limit his argument as to what constitutes the relevant enumerated crimes under A.R.S. § 13-411(A). *See State v. Rushing*, 243 Ariz. 212, 217, ¶ 14 (2017) ("The invited error doctrine prevents a party from injecting error into the record and then profiting from it on appeal.").

3. Instruction Under A.R.S. § 13-419(C)(2)

¶31 Defendant further argues the trial court erred in instructing the jury about the exception listed in A.R.S. § 13-419(C)(2), as it was not supported by the evidence.

¶32 At defendant's request, the trial court instructed the jury on the defense of a residential structure under A.R.S. § 13-418, as well as the instruction that the use of force under A.R.S. § 13-418 is presumed reasonable under A.R.S. § 13-419(A)-(B). The court also gave an additional instruction that the presumption does not apply when the person against whom deadly physical force was threatened or used is the parent of a child sought to be removed from the residential structure under A.R.S. § 13-419(C)(2).

¶33 Though not M.R.'s sole purpose for returning to the apartment, M.R. attempted to remove his son from defendant's apartment shortly before the shooting and the instruction was reasonably supported by the evidence presented at trial. Our courts have long held that a party is entitled to an instruction on any theory reasonably supported by the

evidence. *See State v. Rodriguez*, 192 Ariz. 58, 61 (1998). Defendant has failed to establish why this court should adopt a heightened proof standard for parties requesting an instruction under A.R.S. § 13-419(C)(2). *State v. Hickman*, 205 Ariz. 192, 200, ¶ 37 (2003) (appellate courts will not depart from precedent absent compelling reasons).

¶34 In sum, the record does not support defendant's contention that the justification instructions were so deficient as to require reversal. The trial court provided a litany of justification instructions and modified the statutory language only to fit the facts of the case. *See Gallegos*, 178 Ariz. at 10. We therefore find the trial court did not commit error, fundamental or otherwise.

CONCLUSION

¶35 For the foregoing reasons, we affirm defendant's conviction and sentence.

BROWN, J. and JONES, J., specially concurring:

¶36 The Honorable Jon W. Thompson passed away on July 22, 2019. Judge Thompson signed this decision before his death. We concur fully in the decision.

AMY M. WOOD • Clerk of the Court
FILED: AA