IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*

v.

COREY HARVEY, *Appellant*.

No. 1 CA-CR 12-0582
FILED 12-19-2013

Appeal from the Superior Court in Maricopa County
CR2012-113139-001
The Honorable Shellie F. Smith, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jeffrey L. Force

Counsel for Appellant

MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Patricia K. Norris and Judge Michael J. Brown joined.

G E M M I L L, Judge:

¶1 Corey Harvey appeals from his conviction for aggravated domestic violence, a class 5 felony. Harvey's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record, and finding no arguable question of law, he asks this court examine the record for fundamental error. Harvey was afforded the opportunity to file a *pro se* supplemental brief, and he has done so. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). For the following reasons, we affirm.

BACKGROUND

¶2 In August 2012, Harvey was convicted for Aggravated Domestic Violence, a class 5 felony, in violation of Arizona Revised Statutes ("A.R.S.") §§ 13-1203, -3601, and -3601.02 At trial, the State presented evidence that on February 29, 2012, M.H., who was the victim as well as Harvey's wife, drove with Harvey to pick up her sister, C.S., from work. According to M.H., when they arrived home, Harvey said something that upset her.

¶3 As conversation between Harvey and M.H. continued, M.H. became angry and punched a hole into the wall. M.H. testified that as her family came down the stairs, M.H. and Harvey started to argue, and she grabbed an iron and swung it at Harvey. M.H. testified that she hit Harvey on the arm with the iron and received scratches on her neck when Harvey grabbed her neck to brace himself. M.H. also testified that C.S. was standing next to her when she swung the iron at Harvey. M.H. testified that C.S. called the police, and when they arrived, M.H. told them she did not want to talk. Finally, M.H. indicated that she did not tell the police at the scene about the iron, but tried to tell them at a later date.

¶4 C.S. testified that she did not remember whether M.H. grabbed the iron when she took her children outside. C.S. also said that

she never saw Harvey touch M.H. during the argument. Both of C.S.'s children, T.S. and D.S., testified that they remembered the argument but did not see Harvey or M.H. touch each other. Both T.S. and D.S. did not remember specific statements they independently made to police.

¶5 Officer Molenkamp, who interviewed the witnesses at the scene, testified that C.S. told him that, during the argument, Harvey's arm was fully extended with his hand around M.H.'s throat. Officer Molenkamp also recounted that C.S. told him that Harvey slammed M.H. into the wall several times while she repeated, "Let me go. Let me go." Officer Molenkamp testified that both children, D.S. and T.S., corroborated that story at the scene, but T.S. told the officer that Harvey had two hands around M.H.'s neck. At trial, the State introduced into evidence two previous domestic violence convictions that occurred in 2008. Subsequently, the jury found Harvey guilty of aggravated domestic violence.

¶6 After the jury found Harvey guilty, the trial court conducted a hearing on aggravating circumstances. The jury found two aggravating circumstances proven beyond a reasonable doubt: physical, emotional, or financial harm to the victim, and domestic violence committed in the presence of a child. Based on the guilty verdict, the court found Harvey in automatic violation of his probation for a previous conviction in 2010.

¶7 At the sentencing hearing, Harvey admitted to felony convictions from 2008 and 2010. At the hearing's conclusion, the court found two aggravating circumstances and no mitigating circumstances. Harvey was sentenced to 6 years imprisonment with 77 days of presentence incarceration credit. Harvey timely appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

ANALYSIS

¶8 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001). In his supplemental brief, Harvey raises three arguments, which we examine in turn.

I. Admissibility of the Victim's Out-of-Court Statements

¶9 First, Harvey argues that the trial court erred by admitting the victim's out-of-court statements under the forfeiture by wrongdoing doctrine. Harvey likewise asserts that admitting the victim's statements violated the Confrontation Clause, that the statements were protected by the anti-marital fact privilege, and that the statements were inadmissible hearsay.

¶10 In this case, the State sought to introduce statements made by the victim, M.H, and her sister, C.S. At a pre-trial evidentiary hearing on the State's motion in limine regarding forfeiture by wrongdoing, the State admitted that M.H. had not been served a subpoena. C.S. had been served a subpoena, however, since the motion's filing, but the State maintained that the motion was necessary because they were concerned that C.S. would feign memory loss or fabricate a different story at trial**.** The State called witnesses to testify at the hearing that the State was unsuccessful in serving subpoenas on either witness. Likewise, witness testimony and audio recordings of phone calls between M.H. and the defendant were introduced to show that Harvey engaged in manipulation and intimidation to prevent the witnesses from testifying at trial. The court found, by a preponderance of the evidence, that the State made diligent efforts to serve both M.H. and C.S., that C.S. had been served, and that Harvey engaged in conduct to dissuade and prevent the witnesses from testifying at trial. As a result, the court held that the statements made at the time of the offense were admissible under the forfeiture by wrongdoing doctrine and would not be treated as inadmissible hearsay and that Harvey's right to confrontation had not been violated.

A. Forfeiture By Wrongdoing

¶11 Under the Arizona Rules of Evidence, a "statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result" is "not excluded by the rule against hearsay if the declarant is unavailable as a witness." Ariz. R. Evid. 804(b)(6). The declarant is considered unavailable if she "refuses to testify about the subject matter despite a court order to do so" or "testifies to not remembering the subject matter." Ariz. R. Evid. 804(a)(2)-(3). This court has observed that witness tampering is "wrongdoing" that can result in forfeiture. *State v. Franklin*, 232 Ariz. 556, 559, ¶ 15, 307 P.3d 983, 986 (App. 2013). We review a court's determination on the admissibility of evidence under an abuse of

discretion standard. *State v. Bronson*, 204 Ariz. 321, 324, ¶ 14, 63 P.3d 1058, 1061 (App. 2003).

¶12 In this case, the admissibility of M.H.'s out-of-court statements on a forfeiture by wrongdoing theory is ultimately moot. At the time of the pre-trial evidentiary hearing, M.H.'s availability to testify at trial was in question, and the State sought assurances that her statements at the scene of the crime would be made available to the jury. M.H. testified at trial, and in doing so, her statements became admissible on another ground, as we note *infra*. Even if we did not consider this issue to be moot, the trial court did not abuse its discretion in holding that forfeiture by wrongdoing applied to Harvey at the time of the pre-trial evidentiary hearing.

B. Confrontation Clause

¶13 Harvey argues that by granting the State's pre-trial motion to admit M.H.'s statements under forfeiture by wrongdoing, the trial court violated his constitutional rights under the Confrontation Clause. Under the Sixth Amendment to the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The United States Supreme Court has recognized that testimonial statements made out-of-court are barred under the Confrontation Clause unless "the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" witnesses. *Crawford v. Washington*, 541 U.S. 36, 59, (2004). The court noted, however, that when the declarant testifies at trial and is subject to cross-examination, "the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 59 n. 9,; *See also State v. Roque*, 213 Ariz. 193, 222, ¶ 115, 141 P.3d 368, 397 (2006) (finding that "[b]ecause victims made their statements in court and stood subject to cross-examination, no confrontation issues arose"). Here, the Confrontation Clause was not violated because M.H. was eventually served with a subpoena, testified at trial, and was cross-examined. Thus, the trial court did not err.

C. Anti-Marital Fact Privilege

¶14 Harvey also asserts that the statements of M.H. violated the anti-marital fact privilege. In Arizona, the anti-marital fact privilege provides, in part, that a wife shall not be examined as a witness "for or against her husband without his consent, as to events occurring during

the marriage, nor can [she], during the marriage or afterwards, without consent of the other, be examined as to any communication made by one to the other during the marriage." A.R.S. § 13-4062(A)(1). However, this exception does "not apply in a criminal action or proceeding for a crime committed by the husband against the wife[.]" *Id.* Because M.H. was the victim of aggravated domestic violence committed by her husband, the anti-marital fact privilege did not apply and the State could call M.H. as a witness.

D. Hearsay Arguments

¶15 Harvey further argues that M.H's statements that were allowed into evidence based on the trial court's granting of the State's pre-trial motion are inadmissible hearsay. We conclude otherwise, however, because the State introduced M.H.'s out-of-court statements after she testified about the incident and her testimony was inconsistent with the previous statements made to Officer Molenkamp at the time of the offense. M.H.'s inconsistent testimony made her out-of-court statements admissible as prior inconsistent statements. Ariz. R. Evid. 801(d)(1)(A).

¶16 The trial court did not abuse its discretion by admitting M.H.'s out-of-court statements. Accordingly, we find no error.

II. The Standard of Proof for Admitting Evidence Under Forfeiture by Wrongdoing

¶17 Harvey argues that preponderance of the evidence was not proper for determining the admissibility of evidence under forfeiture by wrongdoing. Instead, Harvey proposes that the standard should be proof beyond a reasonable doubt.

¶18 While the Arizona Rules of Evidence do not define the standard of proof for forfeiture by wrongdoing, several courts have opined that the proper standard is preponderance of evidence. The Supreme Court of the United States has noted that even though the Federal Rules of Evidence do not define the standard of proof by which courts ought to make admissibility determinations, the traditional requirement was that admissibility questions are "established by a preponderance of proof," regardless of the burden of proof on the substantive issues. *Bourjaily v. United States*, 483 U.S 171, 175 (1987). In *United States v. Mastrangelo*, the United States Court of Appeals for the Second Circuit held that when a defendant engages in misconduct to

procure the absence of a witness, the defendant waives his Confrontation Clause rights to prevent prior testimony of that witness, and the proper standard for finding that waiver is preponderance of the evidence. *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982). This court has followed the reasoning in *United States v. Mastrangelo* and stated that "the government has the burden of proving by a preponderance of the evidence that the defendant was responsible for the witness's absence." *State v. Valencia*, 186 Ariz. 493, 498, 924 P.2d 497, 502 (App. 1996). *See also* Ariz. R. Crim. P. 16.2(b) ("The prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence in which the prosecutor will use at trial."). Therefore, the preponderance of the evidence was the proper standard in determining whether Harvey engaged in forfeiture by wrongdoing by attempting to prevent the witnesses from testifying.

III. Admissibility of Prior Bad Acts Evidence

¶19 Finally, Harvey argues that the trial court erred in admitting evidence of other bad acts to rebut Harvey's defense of self-defense. Under Arizona Rule of Evidence 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as . . . absence of mistake or accident." Ariz. R. of Evid. 404(b). We review the trial court's admission of prior bad acts for abuse of discretion. *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶20 In order to admit evidence of prior bad acts, "the trial court must find that the evidence is admitted for a proper purpose under Rule 404(b), is relevant under Rule 402, and that its probative value is not substantially outweighed by unfair prejudice under Rule 403." *Id.* Additionally, the court must give a limiting instruction if requested. *Id.* In the instant case, the State filed a pre-trial motion under Rule 404(b) arguing that the jury should be able to hear evidence that, in a similar domestic violence case involving the same victim, Harvey also claimed self-defense. The State sought to use the evidence to show lack of mistake and to allow the State to prove beyond a reasonable doubt that Harvey did not act in self-defense. The court took the issue under advisement and granted the State's motion, holding that the acts were relevant to the issues at trial, were not presented for the purpose of showing character, and that the probative value was not substantially outweighed by any

potentially prejudicial effect. The court also gave a limiting instruction regarding the other acts.

¶21 At trial, Officer Wade Kamman testified, who responded to the March 2008 domestic violence incident**.** Officer Kamman testified that M.H. told him she was hit and head-butted by Harvey after she hit a hole in the bedroom wall. He testified that Harvey told him M.H. hit him several times, so he had to push and hit her. On cross-examination, Officer Kamman testified that Harvey pled guilty to domestic violence. After the State rested, Harvey called M.H. to testify about the March 2008 incident. M.H. said that she head-butted Harvey. In closing arguments, the State argued that Harvey claimed self-defense in both the 2008 incident and the current domestic violence offense.

¶22 We agree with the trial court's reasoning for allowing the evidence, and even though Harvey did not request a limiting instruction, one was given to the jury regarding the other acts. The trial court did not abuse its discretion in admitting Harvey's prior acts.[1]

CONCLUSION

¶23 Having considered defense counsel's brief and examined the record for reversible error, *see Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find no fundamental, reversible error. The evidence presented supports the conviction and the sentence imposed falls within the range permitted by law. As far as the record reveals, Harvey was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure. Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Harvey of the disposition of the appeal and his future options, unless counsel's review

[1] Harvey is correct in pointing out that his probation officer testified that she was a "probation officer" even though she was not supposed to identify her position or occupation. No objection was made at that time, however, and no fundamental error occurred by virtue of her statement.

reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Harvey has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.