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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

NIKATDAM ARIEVA, *Appellant*.

No. 1 CA-CR 14-0557
FILED 10-4-2016

Appeal from the Superior Court in Maricopa County
No. CR2010-006557-001
The Honorable Samuel A. Thumma, Judge
The Honorable Pamela S. Gates, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Craig W. Soland
Counsel for Appellee

Michael J. Dew Attorney at Law, Phoenix
By Michael J. Dew
Counsel for Appellant

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Patricia A. Orozco and Judge Jon W. Thompson joined.

S W A N N, Judge:

¶1 Nikatdam Arievea appeals her convictions for arson of an occupied structure, a class 2 dangerous felony, and attempted fraudulent schemes and artifices, a class 3 felony. Arievea contends that the superior court abused its discretion by admitting evidence of a previous fire as part of a common plan or scheme under Ariz. R. Evid. 404(b). She asserts that the state failed to establish by clear and convincing proof her involvement in the previous fire and made no showing that even if she had been involved, the earlier fire was part of “a particular plan of which the charged crime is a part.” She also argues that the trial court erred by refusing to order the disclosure of the identity of a confidential informant. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2009, Arievea’s house was set on fire. She was charged with arson of an occupied structure and attempted fraudulent schemes and artifices for her role in the fire. The state sought to introduce evidence of a 2007 fire at Arievea’s rental trailer as part of a common plan or scheme for the 2009 fire under Rule 404(b), alleging that both were intentionally set.

¶3 The court held a four-day evidentiary hearing where it heard evidence that the trailer involved in the 2007 fire had been vacant and was not connected to electricity. An insurance adjustor also testified that the damage suggested to him that an accelerant had been used. After the fire, Arievea claimed a \$45,000 loss for three snow-cone vendor carts that she said were inside the trailer. When the adjustor questioned the absence of any debris from the carts in the rubble, she told him the snow-cone carts “must have been stolen before somebody put the place on fire.” She withdrew her claim for the snow-cone carts only after she learned that she could recover only \$500 under her homeowner’s policy for business property that was not on her residential premises. Two years later, in an examination under oath, she identified the equipment missing or destroyed in the 2007 fire as one hot-dog cart. Before the 2009 fire, Arievea moved equipment stored in the backyard inside the house.

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¶4 After the hearing, the court found that the state had established the requisite evidentiary basis for admission of the 2007 trailer fire, and that evidence of the fire was admissible to show “motive, intent, knowledge, lack of mistake or accident or preparation,” as well as to show a common plan or modus operandi under Rule 404(b). The court also found that the probative value of the evidence of the 2007 trailer fire was not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury.

¶5 At trial, a different judge initially mistakenly limited the jury’s use of the evidence to establish “common plan, modus operandi.” During deliberations the jury asked “[H]ow do we consider this to establish the defendant’s common plan but not as a character trait? What is the difference between one’s common plan, modus operandi and one’s character trait?” The court then expanded the permissible uses to establish “motive, intent, knowledge, lack of mistake or accident, preparation and common plan/modus operandi” and allowed additional argument.

¶6 Arieva filed a motion for discovery on the identity of the anonymous tipster who informed the fire department that a man named Michael Agra was going to burn a house down at an unknown location. Based on the tip, investigators had placed a tracking device on Agra’s car and followed him to Arieva’s neighborhood. When Agra returned to his car, investigators observed that Arieva’s house was on fire. The court reasoned that

from the information provided to the court by the parties, the tipper neither helped set the March 1, 2009 fire nor did he or she observe that crime or participate in any scheme or artifice to defraud. Nor has Defendant made any showing that the tipper is likely to have evidence bearing on the merits of the case or that nondisclosure of his or her identity would deprive Defendant of a fair trial.

The court declined Arieva’s motion.

¶7 The jury found Arieva guilty on both counts and found several aggravating circumstances and dangerousness for the arson count. The court sentenced her to 8.5 years in prison for the arson and suspended the sentence for the attempted fraudulent schemes and artifices, placing her on two years of probation. Arieva appeals.

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DISCUSSION

I. 2007 FIRE AS A COMMON PLAN OR SCHEME

¶8 Arieva asserts that the state failed to establish her involvement in the 2007 trailer fire by clear and convincing proof and had made no showing that even if she had been involved, the 2007 fire was part of “a particular plan of which the charged crime is a part.” Arieva contends that the superior court abused its discretion under Rule 404(b) in admitting evidence of the 2007 fire as part of a common plan or scheme encompassing the 2009 fire.

¶9 Other-act evidence is admissible under Rule 404(b) if the state can prove by clear and convincing evidence that the defendant committed the other act; it is offered for a purpose other than to show propensity to commit the charged act; its relevance is not substantially outweighed by the potential for unfair prejudice under Rule 403; and the court provides a limiting instruction if requested under Rule 105. *State v. Mott*, 187 Ariz. 536, 545 (1997); *State v. Vigil*, 195 Ariz. 189, 191, ¶ 14 (App. 1999). We review a trial court’s decision to admit evidence under Rule 404(b) for abuse of discretion. *State v. Forde*, 233 Ariz. 543, 559, ¶ 42 (2014).

¶10 While the exact cause of the 2007 trailer fire was undetermined, the circumstances gave rise to a credible inference that Arieva had attempted to profit from it. The trailer’s abandoned condition and the investigator’s testimony about possible accelerant use could indicate that the fire was intentional. Additionally, Arieva’s claim for \$45,000 for the vendor carts, which she then withdrew upon discovering she could only recover \$500, could give rise to an inference that she was attempting to profit from the fire. On this record, the court did not abuse its discretion in finding that the state had met its evidentiary burden to admit Arieva’s conduct with respect to the 2007 trailer fire under Rule 404(b).

¶11 The evidence also supported the trial court’s finding that the 2007 fire was admissible to show a common scheme or plan under Rule 404(b). A “common scheme or plan” is a “particular plan of which the charged crime is a part.” *State v. Ives*, 187 Ariz. 102, 109 (1996) (citation omitted). The analysis “focus[es] on whether the acts are part of an overarching criminal plan, and not on whether the acts are merely similar.” *Id.* Arieva acknowledged in the 2009 examination under oath that she had moved “slush machines” that had been stored in her backyard into her

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residence before the 2009 fire.¹ The 2007 and 2009 fires were thus specifically linked by the fact that Arieva sought to use each fire to collect insurance proceeds for similar unused restaurant equipment. The evidence also demonstrated that Arieva applied the knowledge she gained from the treatment of her claim of loss in the 2007 fire to the 2009 arson, by moving the restaurant equipment from the backyard, where it had been stored, into the residence.² On this record, the court did not abuse its discretion in finding that Arieva's conduct surrounding the 2007 trailer fire and before and after the 2009 charged fire were part of a common scheme or plan.

II. THE ANONYMOUS TIPSTER

¶12 Arieva argues that the superior court abused its discretion in denying her motion to disclose the identity of the confidential informant.

¶13 We review rulings on discovery requests for abuse of discretion. *State v. Connor*, 215 Ariz. 553, 557, ¶ 6 (App. 2007). To overcome the basic policy of protecting an informant's identity, "[t]he burden is upon the defendant to make a showing that the informant is likely to have evidence bearing upon the merits of the case and that nondisclosure of his identity would deprive defendant of a fair trial." *State v. Martinez*, 15 Ariz. App. 430, 433 (1971); *see also* Ariz. R. Crim. P. 15.4(b)(2) ("Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify shall not be required where disclosure would result in substantial risk to the informant or to the informant's operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the accused.").

¹ Arieva claimed that she was unable to move a number of snow-cone carts from her backyard, and they remained in the backyard at the time of the charged fire. A Phoenix Fire Department investigator testified, however, that he did not see any carts outside the house after the fire.

² The two fires were also linked by similarly suspect claims of theft. Arieva reported the theft of a washer and dryer from the trailer weeks before the 2007 fire. The remains of a washer, however, were visible in the trailer after the fire. Again in 2009, Arieva reported the theft from her residence, a day after the fire, of \$4,000 in cash and a box containing \$50,000 in jewelry, a claim that the investigating police officer testified was inconsistent with the evidence at the scene.

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¶14 Arieva failed to meet her burden. She relied on speculation that the anonymous tipster was somehow involved in the fire or could be of help in impeaching the credibility of Agra at trial. “Speculation as to possible assistance in the defense of a case which would be afforded by disclosure of the informer’s identity is not a sufficient basis for requiring that disclosure.” *State v. Superior Court (Hale)*, 147 Ariz. 615, 617-18 (App. 1985) (citation omitted). Nor did her constitutional right to confront witnesses against her entitle her to disclosure of the anonymous tipster’s identity. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (holding that the right to confrontation is a trial right, and “does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony”). Finally, Arieva has failed to show that the anonymous tipster had any evidence “material . . . to guilt or punishment,” as necessary for disclosure of the tipster’s identity pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¶15 Arieva also argues that the court “refused to conduct an *in camera* inspection of the State’s evidence concerning the identity and whereabouts of the tipster.” Defense counsel, however, did not tell the court what he wanted reviewed *in camera*, and how that might change the court’s decision; moreover, the court indicated its willingness to review anything submitted. Nor does Arieva explain why the state’s evidence “concerning the identity and whereabouts of the tipster” might have prompted the court to direct disclosure of the tipster’s identity. Under these circumstances, we find no error.

CONCLUSION

¶16 For the foregoing reasons, we affirm Arieva’s convictions and sentences.



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