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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

EMERY GILBERT HUME,
Appellant.

No. 1 CA-CR 15-0518
FILED 7-12-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-107052-001 DT
The Honorable Daniel J. Kiley, Judge

AFFIRMED

COUNSEL

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

Maricopa County Public Defender's Office, Phoenix
By Terry J. Reid
Counsel for Appellant

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MEMORANDUM DECISION

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

O R O Z C O, Judge:

¶1 Emery Gilbert Hume appeals his convictions and sentences for one count of disorderly conduct, a class six felony and repetitive offense and one count of disorderly conduct, a class one misdemeanor. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶2 A grand jury indicted Hume for aggravated assault, disorderly conduct, and criminal damage. Before opening statements and over Hume’s objection, the court ruled that it would try the misdemeanor disorderly conduct and criminal damage offenses at the same time the jury tried the aggravated assault charge. Any evidence relevant only to the misdemeanor charges was to be heard outside the presence of the jury.

¶3 Shortly after midnight in February 2014, police officers responded to a 911 caller reporting loud banging on the door of an apartment. The pounding could be heard off and on throughout the call, which, with some redactions, was played for the jury. Before police arrived, the caller reported hearing glass breaking. When officers arrived at the apartment complex, they heard loud sounds and saw Hume kicking a second-story apartment door. Hume appeared “angry and heavily intoxicated.” Hume refused to come down the stairs, and instead told the officers, “[c]ome and get me. Let’s go.”

¶4 One of the officers started to go up the staircase just below Hume when he saw that Hume had a jagged piece of glass in his raised fist; feeling threatened, the officer stopped where he was and drew his firearm. The other officer took another set of stairs to the second floor, and repeatedly instructed Hume “to drop the glass . . . [o]r he would be Tased.” When Hume ignored him, the officer deployed his Taser, causing Hume to collapse. After the officers handcuffed Hume and escorted him down the

¹ “We view the facts in the light most favorable to upholding the convictions.” *State v. Yonkman*, 233 Ariz. 369, 371, ¶ 2 (App. 2013).

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stairs to await medical personnel they reported Hume said, “[i]f you guys didn’t Tase me, I would have kicked your asses.” Later, Hume could not recall any of the events.

¶5 The court entered judgment of acquittal on the misdemeanor criminal damage charge and convicted Hume of the misdemeanor disorderly conduct charge. The jury acquitted Hume of the aggravated assault charge, but found him guilty of both lesser-included offenses; assault and disorderly conduct. The jury also found that the disorderly conduct offense was a dangerous offense. At the State’s request, the court dismissed the assault conviction. The court sentenced Hume to 3.75 years’ imprisonment on the felony disorderly conduct conviction as a repetitive offense, and to a concurrent term of six months’ imprisonment on the misdemeanor disorderly conduct conviction. Hume filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1, 13-4031, and -4033.A (West 2016).²

DISCUSSION

I. Admission of the 911 Call

¶6 Hume argues that the trial court abused its discretion in admitting evidence of the first eight minutes of the 911 call. He contends that the caller’s chronicle of Hume’s conduct, along with his pounding and shouting heard in the background, was “other-act” evidence not admissible as “intrinsic evidence” or for any proper purpose under Rule 404(b), Arizona Rules of Evidence. The court ruled the 911 call was admissible as “intrinsic evidence” of the charged offense of aggravated assault on the officers because “it refers to acts that are so closely related to the charged act that it cannot fairly be considered other acts.” Alternatively, the court ruled that the call was admissible as relevant “other-act evidence,” permissible under Rule 404(b) to show “defendant’s demeanor and his actions in the minutes leading up to his encounter with the police.” The court further found the evidence was relevant and not unfairly prejudicial, and instructed the jury the call could “be considered for the purposes of explaining the reason why the police responded to the apartment complex and of the events that were occurring when they arrived and as evidence of the defendant’s demeanor and state of mind when the police arrived at the scene.” The court warned the jury, however, that the call could not be considered as “evidence of the defendant’s character or character trait.”

² Absent a change material to our decision, we cite to the most current version of a statute.

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¶7 We review a court's evidentiary rulings for abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167 (1990). Under Rule 404(b), evidence of other acts or crimes is admissible unless offered "to prove the character of a person in order to show action in conformity therewith." Evidence otherwise admissible under Rule 404(b) may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. *See Ariz. R. Evid. 403*. Evidence is unfairly prejudicial if it "has an undue tendency to suggest [a] decision on an improper basis, such as emotion, sympathy or horror." *State v. Mott*, 187 Ariz. 536, 545 (1997). The court must provide an appropriate limiting instruction if requested. *Id.*

¶8 Hume argues that the risk that the jury would be confused or misled by the call outweighed any relevance it had under Rule 404(b); a risk that was not mitigated by the court's limiting instruction and was aggravated by the prosecutor's closing argument. Hume specifically argues that the jury could have improperly considered his conduct during the 911 call as demonstrating his propensity to commit the aggravated assault, or the jury could have been confused and convicted him of disorderly conduct for disturbing the peace and quiet of the caller, and not the named victim; the officer. He also argues that the first eight minutes of the call was unnecessarily cumulative, consisting of his repeated pounding on the door, which served "only to inflame the jury."

¶9 The court did not abuse its discretion in admitting the 911 call under Rule 404(b). The initial eight minutes of the call were relevant, as the court found, to show why the officers responded to the apartment complex, and to prove that the officer was engaged in the execution of his "official duties" at the time of the assault, to show Hume's demeanor, relevant to whether the officer was placed in "reasonable apprehension of imminent physical injury," and to show Hume's state of mind, which was relevant to show he "intentionally" placed the officer in reasonable apprehension of imminent physical injury. *See A.R.S. § 13-1203.A.2 and -1204.A.8(a)*.

¶10 Hume also argues the limiting instruction was inadequate because it did not specifically prohibit the jury from determining "that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense." Because Hume did not raise this argument below, we review for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). On fundamental error review, the defendant bears the burden of establishing that the court erred, that the error was fundamental in nature, and that he was prejudiced thereby. *Id.* at 567, ¶ 20. Error is fundamental when it goes to the foundation of the defendant's case, takes from him a right essential to his defense, and is error

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of such magnitude that he could not possibly have received a fair trial. *Id.* at 567-68, ¶ 20. To prove prejudice, the defendant must show that a reasonable jury or judge could have reached a different result absent the error. *Id.* at 569, ¶ 27.

¶11 Hume has not met this burden. The instruction, although incomplete, *see* Revised Arizona Jury Instructions (RAJI) Standard Criminal 26A, adequately conveyed the limited purposes for which the jury was to consider the 911 call. *State v. Noriega*, 187 Ariz. 282, 284 (App. 1996) (“A set of instructions need not be faultless; however, they must not mislead the jury in any way and must give the jury an understanding of the issues.”). The prosecutor’s suggestion in closing argument that Hume’s willingness to use force to damage the apartment door showed that he “might be willing to use force against” the officer does not persuade us otherwise. One of the officers observed and heard the force with which Hume kicked the door before Hume threatened him with the shard of glass. The jury could also hear the force with which Hume kicked the door on the call. In context, it was not improper for the prosecutor to argue the officer’s fear Hume would actually use the shard of glass to injure him was reasonable, given Hume’s use of force against the door.

¶12 Moreover, the court instructed the jury as to the purpose of the admission and further provided that it was not evidence of Hume’s character. The court also instructed the jury that it “must not be influenced by sympathy or prejudice.” These instructions, which the jury is presumed to have followed, *see State v. LeBlanc*, 186 Ariz. 437, 439 (1996), mitigated, if not cured, any improper use of or confusion from this evidence.

¶13 Because we find the 911 call was properly admitted under Rule 404(b), we need not address whether the evidence was intrinsic.

II. Admission of Photos

¶14 Hume argues that the court abused its discretion in admitting photographs of the damage to the apartment door and of him without a shirt, displaying tattoos that a member of the jury might possibly assume showed gang affiliation. He argues that the unfair prejudice from these photos substantially outweighed any probative value because a juror in another trial asked if Hume’s tattoos were gang related.

¶15 At trial, Hume objected to the admission of photos of the damaged door as irrelevant to the aggravated assault charge. The court overruled the objection, reasoning that “evidence of damage to a door corroborates the [officers’] testimony that the defendant was seen kicking a

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door.” Hume also objected to the admission of photos of his tattoos as unfairly prejudicial and cumulative. The court admitted the photos, reasoning, “[l]ots of people have tattoos. I don’t think there’s anything prejudicial about that.” Admission of photographs is reviewed for abuse of discretion. *State v. Villalobos*, 225 Ariz. 74, 80, ¶ 21 (2010).

¶16 The court did not abuse its discretion in admitting photos of the damaged door. The evidence supported the court’s finding that the photos of the door visually depicted the damage from Hume’s kicking that officers testified they saw and heard when they responded to the apartment. The damage Hume inflicted to the door in turn showed his demeanor and state of mind before and at the time the officers arrived; relevant to prove the offense or lesser included offenses of aggravated assault. We are not persuaded by Hume’s argument for the first time on appeal that the prosecutor failed to supply adequate foundation for admission of the photos, because she failed to introduce evidence to show the condition of the door before the incident. Hume has failed to meet his burden on fundamental error review to demonstrate error, prove the error was fundamental, and that he suffered prejudice therefrom. *See Henderson*, 210 Ariz. at 567, ¶ 20. Hume elicited testimony from the officer who took the photo confirming he was not aware of the condition of the door before the events at issue and the jury was free to find that Hume’s kicking had not caused the damage. On this record, the court neither abused its discretion nor fundamentally erred in admitting these photos.

¶17 Likewise, the court acted well within its discretion in ruling that the photos of Hume were admissible: the photos were relevant; they were not cumulative, as each depicted a different view of Hume; and any unfair prejudice from the tattoos did not substantially outweigh their probative value. *See State v. Pandeli*, 215 Ariz. 514, 525, ¶ 29 (2007) (“[T]he mere presence of tattoos is not shocking or prejudice inducing.”).

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CONCLUSION

¶18 For the foregoing reasons, we affirm Hume's convictions and sentences.



Ruth A. Willingham · Clerk of the Court
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