IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BROOKE MARIE SHAFER, *Appellant*.

No. 1 CA-CR 16-0730
FILED 12-12-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-107095-001
The Honorable John R. Ditsworth, Judge

AFFIRMED AS CORRECTED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza C. Ybarra
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Lawrence S. Matthew
Counsel for Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Chief Judge Samuel A. Thumma joined.

T H O M P S O N, Judge:

¶1 Brooke Marie Shafer (defendant) appeals from her conviction and sentence for aggravated assault. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 Defendant and the victim, J.T., were involved romantically off and on for about twelve years. In 2013 they were living together, and J.T. purchased a Nissan Sentra for defendant to use. Towards the end of 2013, defendant and J.T. began having relationship problems, but continued living together.

¶3 On February 11, 2014, J.T. asked defendant to give him the keys to the Sentra. She refused to do so and left the residence. Early the next morning, defendant returned to dress for work, and J.T. demanded the car keys repeatedly and "very aggressively."[2] After defendant again declined to give him the keys, J.T. took tools outside to remove the Sentra's license plate. J.T. passed defendant outside on the sidewalk on the way to the car.

¶4 As J.T. was kneeling at the rear of the Sentra attempting to remove the plate, defendant got in and backed up, knocking the over three-hundred pound J.T. down and running over the left side of his body with two of the Sentra's tires. Defendant did not stop and drove away. She later returned to the scene and told police that she was unaware she had run over J.T., and that although she saw J.T. behind the Sentra she thought he had moved out of the way. J.T. testified that defendant "looked right at [him]"

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[1] We view the evidence in the light most favorable to sustaining the jury's verdict. *State v. Boyston*, 231 Ariz. 539, 542, ¶ 2 n.2 (2013) (citation omitted).

[2] Defendant testified that J.T. slammed her up against a wall and later grabbed her arm when he was demanding the keys.

as he lay on the ground after she hit him. J.T. was treated for injuries consistent with having been run over by a vehicle, including road rash, scrapes and bruises, an injured left ankle, and a cut on his right arm.

¶5 The state charged defendant with aggravated assault, a class 3 dangerous felony and domestic violence offense. A jury convicted her as charged. At sentencing, the trial court dismissed the finding of dangerousness, and, given her prior criminal history, sentenced defendant for a class three non-dangerous but repetitive (category three) offense and imposed a less-than-presumptive term of eight years in prison with credit for 224 days of presentence incarceration. Defendant filed a motion for new trial which was denied by the trial court. The court permitted defendant to file a delayed notice of appeal and she did so in October 2016. We have jurisdiction pursuant to Arizona Revised Statutes §§ 12-120.21(A)(1) (2016), 13-4031 (2010), and -4033(A) (2010).

DISCUSSION

¶6 Defendant raises two issues on appeal: 1) whether the trial court abused its discretion by precluding evidence that J.T. committed prior acts of domestic violence against defendant and was discharged from the military for sexual assault and assault, and 2) whether the trial court should have sua sponte instructed the jury on the defense of accident.

A. Precluded Evidence

¶7 Prior to trial, defendant filed a motion to admit Arizona Rule of Evidence 404(b) evidence seeking to admit evidence of prior bad acts committed by J.T. Specifically, defendant sought to introduce evidence that 1) J.T. pled guilty to assault and disorderly conduct in 2005 in a case where defendant was the victim, and 2) J.T. was court marshalled and received a bad conduct discharge from the military for committing a sexual assault sometime between 1994 and 1999. On the same day she filed the Rule 404(B) motion, defendant filed a motion for disclosure requesting the court to order the National Personnel Records Center to provide J.T.'s military discharge records to the defense. Noting that defendant's defense was "I didn't run [J.T.] over," the court found that evidence of the 2005 conviction and military discharge was not relevant, and was potentially unfairly prejudicial.[3] The court denied the Rule 404(b) motion "without prejudice

[3] Defendant noticed the defense of insufficiency of the state's evidence in her March 2014 notice of defenses and disclosure.

to you raising it again . . . should circumstances warrant it at trial." The court denied the motion for disclosure, noting that J.T.'s military records were not in the state's possession and that defendant had failed to demonstrate a need for the records sufficient to overcome J.T.'s victim's rights.

¶8 A few days before trial, defendant filed a motion for reconsideration/motion to admit evidence seeking again to admit the evidence of J.T.'s 2005 domestic violence conviction and his military discharge, as well as evidence of two 9-1-1 calls in 2013 and 2014 concerning altercations between defendant and J.T. In this motion, defendant stated that although she had previously cited Rule 404(b), a 404(b) analysis did not apply because J.T. was not the defendant. Instead, defendant argued that the evidence was relevant to her newly noticed defenses, "specifically self-defense and domestic violence."[4] Defendant also filed a motion for reconsideration of the military records disclosure ruling. After oral argument, the trial court denied both motions, and further ruled that while defendant would be allowed to use the defense of self-defense, she would not be permitted to raise the issue of self-defense in her opening statement.

¶9 After she was convicted at trial, defendant filed a timely motion for new trial pursuant to Arizona Rule of Criminal Procedure 24.1. She argued that the trial court's rulings excluding evidence of domestic violence and J.T.'s military discharge prevented her from receiving a fair and impartial trial because her claim of self-defense had been limited by the rulings. Defendant included a newly-obtained copy of J.T.'s military discharge record as an exhibit to the motion. The trial court denied the motion for new trial.

¶10 We review the trial court's decision to exclude evidence for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60 (2004). We likewise review a denial of a motion or new trial for an abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, 142, ¶ 52 (2000). We review de novo

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[4] Less than a week before trial, defendant filed a supplemental Rule 15.2 notice of defenses seeking to add the defenses of self-defense, use of force in crime prevention, and domestic violence. The state filed a motion in limine seeking to preclude defendant from arguing and introducing evidence of the supplemental defenses because the notice was untimely and the defenses were inapplicable to the facts of the case. The court denied the state's motion in limine, but later did not permit jury instructions on these defenses because the facts at trial did not support giving the instructions.

evidentiary rulings implicating a defendant's constitutional rights. *See State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006).

¶11 Defendant argues that the precluded evidence would have allowed the jury to properly assess both defendant's and J.T.'s credibility, would have corroborated defendant's version of the events, would have proven her mental state, was relevant to the defense of accident, and would have allowed her to present a complete defense and receive a fair trial.

¶12 Evidence must be relevant to be admissible. Ariz. R. Evid. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Ariz. R. Evid. 401. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403.

¶13 Here, the trial court properly could conclude that evidence of J.T.'s prior bad acts did not have a tendency to make any consequential fact in the case more or less probable. Defendant was charged with "[i]ntentionally, knowingly or recklessly causing any physical injury to [J.T.]" using a "deadly weapon or dangerous instrument." A.R.S. §§ 13-1203(A)(1) (2010), -1204(A)(2) (2010). J.T.'s prior bad acts in 1998 and 2005 and the 911 calls in 2013 and 2014 did not have anything to do with whether defendant knowingly, intelligently, or recklessly ran over J.T. in 2014. Even if J.T.s' bad acts had minimal relevance, their probative value was substantially outweighed by the danger of unfair prejudice. *See* Ariz. R. Evid. 403.

¶14 We find no abuse of discretion. Nor do we find a violation of defendant's due process rights.

B. Jury Instruction

¶15 Defendant next argues that the trial court should have instructed the jury on the defense of accident. She does not say what that instruction should have been. Because defendant failed to request that the jury be instructed on the defense of accident at or before trial, we review for fundamental error. *State v. King*, 158 Ariz. 419, 424 (1988). We view jury instructions in their entirety when determining whether they correctly state the law. *State v. Cox*, 217 Ariz. 353, 356, ¶ 15 (2007). It is not error to fail to give an unrequested instruction concerning accident if the jury instructions as a whole cover the essential issues of the case. *State v. Postell*, 20 Ariz.

App. 119, 121-22 (1973). We may also take into account closing arguments of counsel when assessing the adequacy of jury instructions. *State v. Bruggeman*, 161 Ariz. 508, 510 (App. 1989). Defendant argues that the instuctions as a whole failed to cover the essential issues.

¶16 We disagree. Here, the court instructed the jury that it was to determine the facts of the case from the evidence produced at court (which included defendant's testimony giving her version of the incident—that she did not see J.T. outside or know he was behind the car when she backed up or that she had hit him). The court further instructed the jury that the crime of aggravated assault required proof that defendant "intentionally, knowingly or recklessly caused a physical injury to another person," and that "[b]efore you may convict the defendant of the charged crime, you must find that the state proved beyond a reasonable doubt that the defendant committed a voluntary act." The court defined all three mental states. The court defined voluntary act: "[a] voluntary act means a bodily movement performed consciously and as a result of effort and determination. You must consider all the evidence in deciding whether the defendant committed the act voluntarily." The court instructed the jury on the presumption of innocence, the burden of proof, defined reasonable doubt, defined direct and circumstantial evidence, and gave an instruction on the credibility of witnesses.

¶17 In addition, the court instructed the jury that the attorneys' closing arguments were intended to help the jury understand the law and the evidence. Defendant's counsel argued that defendant was not guilty of committing aggravated assault, because "[w]hat happened on February 12th was an accident, pure and simple, an accident." Defense counsel further argued that defendant "did not do this consciously," and that she "did not do this intentionally, and she wasn't even reckless. There was no voluntary act here." The state argued that the evidence showed that defendant intentionally, knowingly, or recklessly assaulted J.T. because "[s]he saw [J.T.] behind her and still opted to get into the car, start [the] engine, and back up," and that this was not mere "accident."

¶18 Because the instructions and arguments fairly covered the issues in this case, we find no error, fundamental or otherwise.

CONCLUSION

¶19 For the foregoing reasons, we affirm defendant's conviction and sentence. Because our review of the 9/25/2014 sentencing minute entry and the sentencing transcript indicates that page two of the minute

entry wrongly states that count 1 was "Non Dangerous- Non Repetitive," we correct the minute entry to state the offense was "Non Dangerous-Repetitive."

AMY M. WOOD • Clerk of the Court
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