IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RUSSELL LAWRENCE ANAYA, *Appellant*.

No. 1 CA-CR 16-0839
FILED 12-12-2017

Appeal from the Superior Court in Coconino County
No. S0300CR201600364
The Honorable Cathleen Brown Nichols, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Elizabeth B. N. Garcia
Counsel for Appellee

Coconino County Public Defender's Office, Flagstaff
By Brad Bransky
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Michael J. Brown and Judge Jennifer B. Campbell joined.

T H O M P S O N, Judge:

¶1 Russell Lawrence Anaya appeals his conviction and sentence for unlawful flight from a law enforcement vehicle. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 In the days leading up to April 25, 2016, a Flagstaff detective issued an attempt-to-locate (ATL) bulletin for Anaya. Based on his knowledge of an ongoing investigation, the detective included a warning that Anaya may be armed.

¶3 On April 25, 2016, an undercover police officer conducting surveillance at Anaya's last known address saw a man exit the residence and drive away on a motorcycle. The officer followed, positioned his unmarked vehicle within two car-lengths of the motorcycle, and positively identified the motorcyclist as Anaya.

¶4 Within moments of this identification, Anaya "look[ed] back," made eye contact with the officer, and "t[ook] off." The officer pursued as Anaya wove through city streets at an "accelerated" speed. Eventually, however, Anaya turned onto an off-road trail, and the officer was unable to follow. The officer watched Anaya crest a ridge and disappear from view, then radioed for help and broadcast Anaya's location.

¶5 Responding patrol officers located Anaya and activated their vehicles' emergency lights and sirens, but were unable to stop him. When one patrol officer cornered him, Anaya responded by riding down a "steep hill," so the officers terminated pursuit.

¶6 Five days later, officers apprehended Anaya pursuant to an arrest warrant. The state charged Anaya with one count of unlawful flight

---

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

from a law enforcement vehicle, and further alleged prior felony convictions and aggravating circumstances. After a three-day trial, the jury found Anaya guilty as charged. Anaya stipulated to having two historical prior felony convictions, and the trial court, after weighing the aggravating and mitigating factors, imposed a maximum term of six years' imprisonment. Anaya timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2016), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

I. Alleged Admission of Other Act Evidence

¶7 Anaya contends the trial court improperly admitted other act evidence.

¶8 Before trial, Anaya moved in limine to preclude, among other things, evidence that law enforcement officers believed he may be armed during the chase. He argued the evidence was inadmissible under Arizona Rules of Evidence (Rule) 401, 403, and 404, and claimed it "would only serve the improper purpose of appealing to the passions and fears of the jury[.]" In response, the state argued the evidence explained the police officers' caution during the pursuit, and further asserted the evidence "prove[d] motive, intent and an element of the offense."[2]

¶9 After a hearing on the motion, the trial court found the challenged evidence was "intrinsic to the case" and therefore not subject to Rule 404(b). The court further found the evidence was relevant and more probative than prejudicial.

¶10 At trial, nine officers testified regarding their knowledge of the ATL and the attendant warning that Anaya may be armed. One of the officers also explained that during the ATL briefing, she learned the

[2] To ameliorate any potential prejudice, the state suggested the trial court instruct the jury that (1) Anaya was never found in possession of a firearm, and (2) no charges resulted from the unrelated investigation. No such instruction, however, was submitted to the jury.

department had "two ongoing investigations" regarding Anaya "discharging [a] firearm."[3]

¶11 "We review a trial court's ruling on a motion in limine for an abuse of discretion." *State v. Gamez*, 227 Ariz. 445, 449, ¶ 25 (App. 2011). "Absent a clear abuse of discretion, we will not second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Rodriguez*, 186 Ariz. 240, 250 (1996).

¶12 Rule 404 governs the admission of character and "other act" evidence. Section 404(b) prohibits evidence of other crimes, wrongs or acts to prove the defendant's character to act in a certain way, but allows such evidence for non-propensity purposes, such as showing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). By its express terms, Rule 404(b) applies only to evidence of "other crimes, wrongs, or acts." Ariz. R. Evid. 404(b); *see also State v. Ferrero*, 229 Ariz. 239, 242, ¶ 13 (2012).

¶13 In this case, the evidence that law enforcement believed Anaya may be armed was offered for a non-propensity purpose. On its face, it was introduced to explain the officers' state of mind during the chase. As a practical matter, it had some relevance to the defense counsel's questions regarding the officers' failure to activate their cameras during the chase. The evidence tended to show that the officers were preoccupied taking precautionary measures, and consequently failed to activate their cameras, due to their belief that Anaya may have been armed. The ATL provided the foundation for the officers' belief. The evidence does not constitute character evidence under Rule 404 as it was not meant to indicate that Anaya had committed a prior wrongful act involving a firearm.[4] We need not specifically decide whether the challenged evidence constitutes an "other act," or amounts to intrinsic evidence.

¶14 Even if the challenged evidence may be deemed irrelevant, any erroneous admission was nonetheless harmless. *State v. Davolt*, 207

---

[3] Anaya did not object to this testimony at trial and does not directly challenge it on appeal.

[4] While the one officer's testimony at trial regarding two cases she had learned about pertaining to Anaya allegedly discharging firearms does present a Rule 404(b) issue, we conclude *infra* ¶ 15 that any error was harmless.

Ariz. 191, 209, ¶ 64 (2004) ("We assess the erroneous admission of evidence for harmless error."). "Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict." *Id*. The state has the burden to establish that the error is harmless, *State v. Gunches*, 225 Ariz. 22, 26, ¶ 24 (2010), and we can find such error "when the evidence against a defendant is so overwhelming that any reasonable jury could only have reached one conclusion," *State v. Anthony*, 218 Ariz. 439, 446, ¶ 41 (2008).

¶15 Here, the properly admitted evidence against Anaya was overwhelming. Based on their previous contacts with Anaya, four officers positively identified him as the motorcyclist during the chase. In addition, numerous officers testified they witnessed a motorcyclist flee and eventually elude multiple marked police cars with activated lights and sirens. Given the strength of this evidence, the trial court's admission of the challenged evidence, even if plausibly erroneous, was harmless.

II. *Batson*[5] Challenge

¶16 Anaya challenges the state's peremptory strike of a racial minority juror and argues the trial court erred by denying his *Batson* challenge.

¶17 In *Batson*, the United States Supreme Court "held that using a peremptory strike to exclude a potential juror solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment." *State v. Newell*, 212 Ariz. 389, 400, ¶ 51 (2006) (citing *Batson*, 476 U.S. at 89). We uphold the denial of a *Batson* challenge absent clear error. *Id*. at 400, ¶ 52. Because the trial court is in the best position to assess a prosecutor's credibility, which is a primary factor in evaluating the state's motive for exercising a peremptory strike, we extend "great deference" to the trial court's ruling. *State v. Roque*, 213 Ariz. 193, 203, ¶ 12 (2006) (internal quotation omitted).

¶18 A *Batson* challenge is comprised of three steps. *Newell*, 212 Ariz. at 401, ¶ 53. First, the defendant must make a prima facie showing of racial discrimination. *Id*. If such a showing is made, the prosecutor must then present a race-neutral reason for the strike. *Id*. Finally, if the prosecutor provides a facially neutral basis, "the trial court must determine whether the defendant has established purposeful discrimination." *Id*.

---

5 *Batson v. Kentucky*, 476 U.S. 79 (1986).

(internal quotation omitted). "To pass step two, the explanation need not be persuasive, or even plausible," but "implausible or fantastic justifications may (and probably will) be found to be pretext[ual]" when the trial court determines whether the defendant has proven purposeful discrimination. *Id*. at ¶ 54 (internal quotations omitted).

¶19 During jury selection in this case, Anaya challenged the state's peremptory strike of Juror No. 10, who is a member of a racial minority. Specifically, defense counsel argued the state's strike of "one of two nonwhite members of the jury" was "inappropriate." The trial court questioned whether defense counsel had made a sufficient prima facie showing, but nonetheless asked the prosecutor to state his basis for the strike. The prosecutor offered race-neutral reasons, noting Juror No. 10 was quite young (22 years old), had no family, and resided outside Flagstaff city limits. The prosecutor explained that jurors' familiarity with Flagstaff streets would be particularly helpful given the unique facts of the case, and stated his belief that jurors who were also parents would view dangerous driving more seriously than their childless counterparts. In response, defense counsel noted that another, non-minority juror resided outside of Flagstaff, yet she was not stricken.

¶20 In evaluating the prosecutor's proffered reasons, the trial court noted that two minority jurors remained on the panel, and concluded Anaya had failed to make a prima facie showing of racial discrimination. *See State v. Hardy*, 230 Ariz. 281, 285, ¶ 12 (2012) ("Although not dispositive, the fact that the state accepted other minority jurors on the venire is indicative of a nondiscriminatory motive.") (internal citation omitted). Moreover, the trial court found the prosecutor's race-neutral reasons were not pretext and there was no evidence of purposeful discrimination. At that point, defense counsel offered nothing further to support his challenge, other than noting that none of the jurors self-identified as "Hispanic."[6]

¶21 Anaya argues a comparative analysis of the similarities between stricken and retained jurors demonstrates racial bias. When asked to explain the basis for his challenge in the trial court, however, defense counsel noted only that one empaneled non-minority juror (Juror No. 9) resided outside of Flagstaff. Unlike Juror No. 10, Juror No. 9 is forty years old, married, and a parent. Therefore, Juror Nos. 9 and 10 were not similarly situated with respect to all the enumerated factors. Because

[6] Although Juror No. 8 stated he does not "recognize the [Hispanic] label," he acknowledged that he has an "indigenous" and "Spanish blood line."

Anaya did not present in the trial court the more "detailed comparisons" he sets forth on appeal, we do not consider them. *State v. Escalante-Orozco*, 241 Ariz. 254, 272, ¶ 37 (2017) (explaining the appellate court would "not examine more detailed comparisons" of "the jurors who were stricken and those who remained on the panel" than were "presented to the trial court") (internal quotation omitted). Thus, on this record, Anaya failed to present any evidence that the peremptory strike was the result of purposeful racial discrimination. There is no basis to conclude the prosecutor's race-neutral reasons for the strike were pretext, and the trial court did not clearly err by concluding the state's strikes did not violate *Batson*.

CONCLUSION

¶22 We affirm Anaya's conviction and sentence.

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