DIVISION ONE
FILED: 06-03-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0221
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ARABELL MONTREAL KING,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-163607-001 SE

The Honorable Barbara L. Spencer, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

James Haas, Public Defender — Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Arabell Montreal King (defendant) appeals from her convictions and sentences for two counts of forgery, class six felonies. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). The facts relevant to the issue raised on appeal are as follows.

¶3 On August 13, 2008, Chris Martinez asked defendant, his sister-in-law, to deposit a check into his bank account. The check (No. 1150) was written payable to Chris Anthony Contrearas Martinez in the amount of $1,925 and purportedly signed by M.D. (the victim). Defendant drove to a branch of Arizona Federal Credit Union located in Gilbert and deposited the check using the drive-through teller window. Five minutes later, using an A.T.M. at the same branch, defendant withdrew $400 from Martinez' account using the A.T.M. card and pin number he provided her. Approximately an hour later, at another Arizona Federal Credit Union branch in Mesa, defendant cashed a check Martinez wrote to her from his checking account in the amount of $1,300. Defendant then met with Martinez and gave him the cash and he gave her $200.

¶4 On August 16, 2008, Martinez again asked defendant to deposit a check into his bank account. The check (No. 1147) was written payable to C. Anthony C. Martinez in the amount of $1,350 and purportedly signed by the victim. Defendant returned

to the Gilbert branch of the Arizona Federal Credit Union and deposited the check using the drive-through teller window. A short while later, defendant drove to the Mesa branch of Arizona Federal Credit Union and used Martinez' A.T.M. card and pin number to withdraw $320 from the A.T.M. Defendant then drove to a third branch of Arizona Federal Credit Union and cashed a check Martinez wrote to her from his account in the amount of $1,030. Finally, defendant met with Martinez and gave him the cash and he gave her $100.

¶5 On September 2, 2008, the victim checked her Arizona Federal Credit Union account online in order to pay her mortgage. She discovered that her checking account had been depleted and quickly ascertained that two checks she did not issue or authorize had been drawn against her account. The victim went to a branch of the credit union and reported that the two checks had been fraudulently issued. She explained that she knew Martinez, her brother-in-law, but she did not write the checks to him and did not give him permission to possess or write the checks.

¶6 During his investigation of this case, Detective P.V. interviewed defendant on three occasions. After advising defendant of the *Miranda*[1] warnings, Detective P.V. asked defendant about her involvement with the checks. Defendant

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

acknowledged that she deposited the checks and "admitted that she was wrong and she didn't realize that [the victim] would be so upset." Defendant explained that the victim had refused to pay Martinez for work he had done on her vehicle so he took the checks as payment.

¶7 On October 20, 2008, defendant was charged by indictment with two counts of forgery, class four felonies. The State also alleged that defendant had two historical prior felony convictions.

¶8 Defendant pled not guilty and the matter proceeded to trial. The only contested issue was whether defendant knew the checks were forged and possessed them with an intent to defraud the victim. *See* Ariz. Rev. Stat. (A.R.S.) § 13-2002(A) (2010) (setting forth elements of forgery). Defendant claimed she did not know the checks were forged.

¶9 After a three-day trial, the jury found defendant guilty as charged. The trial court sentenced defendant to two concurrent, presumptive ten-year terms of imprisonment. Defendant appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

¶10 As her sole issue on appeal, defendant contends that the trial court erred by admitting evidence, over defense

counsel's objection, that she made two A.T.M. withdrawals from Martinez' account and cashed two checks Martinez issued from his checking account. Specifically, she claims that this was prejudicial other-act evidence that should have been precluded by Arizona Rules of Evidence 403 and 404(b).

I. Rule 404(b)

¶11 Pursuant to Rule 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." "We review the admission of other act evidence for an abuse of discretion." *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996).

¶12 "'Other act' evidence is 'intrinsic' when (1) evidence of the other act and evidence of the crime charged are 'inextricably intertwined' or (2) both acts are part of a 'single criminal episode' or (3) the other acts were 'necessary preliminaries' to the crime charged." *State v. Andriano*, 215 Ariz. 497, 502, ¶ 18, 161 P.3d 540, 545 (2007) (quoting *Dickens*, 187 Ariz. at 18-19 n.7, 926 P.2d at 485-86 n.7 (1996)). When other act evidence is intrinsic to the charged crime, it is not subject to preclusion under Rule 404(b). *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 56, 25 P.3d 717, 736 (2001) ("[I]ntrinsic evidence is admissible absent Rule 404(b) analysis.").

¶13 During opening argument, the prosecutor informed the jury that defendant "[n]ot only . . . deposit[ed] [the victim's] checks, but she also made withdrawals on the same date." Defense counsel immediately objected and the trial court heard argument from both parties on the matter outside the presence of the jury. Defense counsel requested a mistrial, arguing that the State was attempting to introduce evidence of uncharged criminal acts. The prosecutor responded that defendant's behavior associated with the withdrawals, namely, going to different branches to make A.T.M. withdrawals and cash checks, provided evidence that defendant knew the victim's checks were forged and that she "was an active participant" in the "scheme."

¶14 Initially, the trial court ruled that the evidence that defendant made two A.T.M. withdrawals from Martinez' account was admissible because those withdrawals were "part of the same transaction" as the deposits of the victim's checks, but evidence that defendant cashed two of Martinez' checks was inadmissible because they were "clearly 404(B) evidence." Defense counsel again argued that evidence of the A.T.M. withdrawals would "raise [a] question in the jury's mind" and lead the jurors to believe that defendant had stolen Martinez' A.T.M. card. The prosecutor countered that the State was not alleging that the A.T.M. card was stolen or that defendant had committed any criminal acts other than those charged. Instead,

the prosecutor argued that Martinez lawfully provided defendant with his card and pin number and the withdrawals were part of their overarching forgery scheme. The trial court then recessed and took the matter under advisement.

¶15 After a brief recess, the trial court ruled that the A.T.M. withdrawals were part of "the same transaction" and were evidence of defendant's "intent to defraud" the victim. The trial court then reversed its earlier ruling regarding the checks drawn against Martinez' account and found that they were also admissible because defendant's cashing of those checks was "part of a single criminal episode."

¶16 Following the trial court's evidentiary ruling, the State resumed its opening argument and again informed the jury that defendant made withdrawals from Martinez' account, but specifically stated that Martinez had given her permission to do so and that she had lawful possession of his A.T.M. card and pin number. When the State called Detective P.V. to testify about his questioning of defendant, he stated that defendant legally possessed and used Martinez' A.T.M. card to make the withdrawals. Detective P.V. also testified that the two checks defendant cashed against Martinez' account were "legal" checks. On cross-examination, defense counsel also elicited testimony from the detective that the checks defendant cashed against Martinez account were "lawfully deposited."

¶17 Defendant contends that the trial court abused its discretion by finding her A.T.M. and check-cashing withdrawals from Martinez' account were intrinsic evidence of the charged crimes and therefore not subject to Rule 404(b) preclusion. We disagree.

¶18 Defendant's A.T.M. and check-cashing withdrawals from Martinez' account were not "discrete offenses, identical to but occurring at different times than the ones charged," which we have held are not intrinsic. *State v. Garcia*, 200 Ariz. 471, 477, ¶ 33, 28 P.3d 327, 333 (App. 2001). Rather, these events occurred within hours of defendant's deposits of the victim's checks and the withdrawals provided both Martinez and defendant an immediate monetary benefit from the forgeries. Indeed, with regard to check number 1147, defendant withdrew the precise amount deposited with the victim's check. Thus, the withdrawals were closely related to the charged crimes and, as the trial court found, part of a single criminal episode and therefore intrinsic evidence of the underlying forgeries.

II. Rule 403

¶19 Evidence "having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable" is relevant and generally admissible. Ariz. R. Evid. 401, 402. Pursuant to Rule 403, however, relevant evidence "may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "To establish that the evidence was unfairly prejudicial, [defendant] had to show that it suggested a decision on an improper basis, such as emotion, sympathy, or horror." *Higgins v. Assmann Electronics, Inc.,* 217 Ariz. 289, 299, ¶ 39, 173 P.3d 453, 463 (App. 2007) (internal quotation omitted). We review a trial court's ruling on prejudice for an abuse of discretion "[b]ecause the trial court is best situated to conduct the Rule 403 balance." *State v. Canez*, 202 Ariz. 133, 153, ¶ 61, 42 P.3d 564, 584 (2002).

¶20 The only disputed issue at trial was whether defendant knew the checks were forged and possessed them with the intent to defraud the victim. Evidence of defendant's unusual behavior after she made the deposits, namely, making separate withdrawals at multiple credit union branches, in combination with her receipt of $300 from Martinez, was highly relevant and probative in that it undermined defendant's claim that she had no knowledge that the checks were forged. This evidence did not confuse the issues or mislead the jury; rather, it was directly related to the defense and the crimes charged. Thus, although the evidence substantially undermined defendant's claims, it was

not unduly prejudicial and the trial court did not abuse its discretion by admitting it.[2]

CONCLUSION

¶21 Defendant's convictions and sentences are affirmed.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
PATRICK IRVINE, Judge

[2] Defendant argues that the trial court failed to make an express Rule 403 finding on the record. Although a trial court conducting a Rule 403 analysis should explain its weighing process on the record, *see Shotwell v. Donahoe*, 207 Ariz. 287, 295-96, ¶ 33, 85 P.3d 1045, 1053-54 (2004), we decline to find reversible error on this basis, *see Higgins*, 217 Ariz. at 298-99, ¶ 37, 173 P.3d at 462-63.