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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/26/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0511
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MESCHELL ARIN LANSMAN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-1127

The Honorable Steven F. Conn, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Adriana M. Rosenblum, Assistant Attorney General
Attorneys for Appellee

Carlene H. Lacey, Mohave County Public Defender Kingman
By Jill L. Evans, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 Meschell Arin Lansman ("defendant") appeals her convictions and sentences for two counts of aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶2 Defendant and victim lived together for a little over a year. Victim moved out in June 2008. The couple had a "rocky" break-up, but continued to communicate. On July 15, 2008, victim met defendant for lunch. After an argument ensued, victim left. Approximately twenty minutes later, victim called defendant to discuss the argument. The second time victim called, a man answered defendant's phone and identified himself as "James." Victim could hear "a couple other guys in the background." James told victim to "leave [defendant] alone or else," and said, "I can come to your house and I'll handle you." After the call ended, the "guys" called victim three more times, but victim hung up on them. Defendant then called victim and said, "You're going to get yours. You think you're slick, some kind of player." Victim hung up the phone, and after some text message exchanges, decided to take a nap before going to work.

¶3 Victim heard a knock at his door and saw a stranger on his doorstep. He grabbed a pair of brass knuckles because he

¹ We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

had a feeling it was the "guys" from the phone conversations. When victim walked outside, the man who had knocked was at the end of the driveway. Victim saw two other men and defendant's van. Victim asked, "Do you have a problem? Can I help you?" to which the man responded, "You got a problem?" Victim said, "Apparently you're the one with the problem. You're at my house." He then looked over at defendant, gave her a "dirty look," and "flipped her off." The man standing next to the van punched victim in the face. Victim pulled the brass knuckles from his pocket but immediately lost them. All three men began hitting and kicking victim.

¶4 Victim eventually fell to his elbows and knees, and the men kicked him, pulled his hair, and tried to punch him in the face. He was never able to punch any of the men. The men jumped in the van twice, but exited and again beat victim. Victim heard defendant say, "Okay. He's bleeding. We got him." A neighbor yelled, "The cops are coming. I already called the cops." Defendant said, "The cops are coming. Let's go." They then drove off. The neighbor witnessed the incident.

¶5 Victim suffered a broken nose and extensive bruising. He sent a text message to defendant asking why he had been assaulted. She responded, "None of that was supposed to happen. They promised me. You know that I wouldn't want anything to happen to anyone like that. I'm sorry."

¶16 Defendant was charged with one count of aggravated assault, a class 4 felony, and one count of aggravated assault, a class 6 felony. After a two-day trial, the jury found defendant guilty of both counts. Defendant received three years' probation, including ninety days in jail and an order to pay restitution.

¶17 Defendant filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033 (2010).

DISCUSSION

¶18 Defendant argues that statements made by her co-defendants to law enforcement should have been admitted at trial under either Arizona Rule of Evidence ("Rule") 804(b)(3) or Rule 804(b)(7).² We review the trial court's admission or exclusion of evidence for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990).

¶19 The co-defendants did not testify at defendant's trial. They asserted their Fifth Amendment rights against self-incrimination because they were awaiting sentencing following guilty pleas.

² In 2010, the residual exception was renumbered from Rule 804(b)(5) to 804(b)(7). We cite to the renumbered version of the rule as no substantive changes were made.

¶10 Two days after the assault, a sheriff's deputy interviewed the three co-defendants: James Deforte, Joseph Deforte, and Eric Heberling. Their statements were almost identical. The co-defendants related the following version of events: The three men and defendant were at Joseph's house. Defendant was on the phone with victim. Joseph got on the phone and told victim that defendant did not want to talk to him and to leave her alone. The group left in defendant's van en route to Tequila Bob's and Eric's DUI class when defendant took a detour and ended up near victim's house. Defendant said she was "going to tell [victim] to stop calling her." When they arrived, victim was already outside and approached the van. James got out of the van and told victim to stop calling defendant. Victim took his hand out of his pocket, and James saw that he had brass knuckles. Victim hit James in the shoulder, causing him to fall to the ground. Joseph then jumped out of the van and "went after" victim. Eric stated that he separated Joseph and victim, and the group started to get in the van, but then victim kicked at him, and Eric moved out of the way and hit victim in the face. The group then left.

¶11 Rule 804(b)(3) provides that a statement against interest is admissible when the declarant is unavailable as a witness. Here, the unavailability prong is satisfied because the co-defendants invoked their Fifth Amendment rights to remain

silent, and the trial court quashed subpoenas that the defense had served on them.

¶12 A statement against interest is:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement[.]

Id. Not only must the statements be against the declarants' interests, but when a defendant wishes to offer the statements to exculpate herself, as here, there must also be corroborating circumstances that "clearly indicate the trustworthiness of the exculpatory statement[s]." *State v. LaGrand*, 153 Ariz. 21, 27, 734 P.2d 563, 569 (1987).

¶13 A statement against interest does not have to be a "direct confession of guilt," but it must be of some "probative value in a trial against the declarant." *Id.* (citations omitted); see also *State v. Lopez*, 159 Ariz. 52, 54, 764 P.2d 1111, 1113 (1998) ("Subjecting oneself to criminal liability qualifies as a declaration against interest."). Each statement must be scrutinized in a fact-intensive inquiry to determine if

it is truly self-inculpatory in light of the totality of the circumstances. *State v. Nieto*, 186 Ariz. 449, 455, 924 P.2d 453, 459 (App. 1996) (citing *Williamson v. United States*, 512 U.S. 594, 603-604 (1994)). Confessions of co-defendants may be admissible if they are "truly self-inculpatory, rather than merely attempts to shift blame or curry favor." *Williamson*, 512 U.S. at 603; see, e.g., *United States v. Hazelett*, 32 F.3d 1313, 1317 (8th Cir. 1994) ("statement admitting guilt and implicating another person, made while in custody may well be motivated by a desire to curry favor" with the police and do not qualify as a statement against interest (citation omitted)).

¶14 Self-inculpatory confessions do not make a confession's non-self-inculpatory parts more credible. *Williamson*, 512 U.S. at 599-600 ("One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."). Only those portions that actually incriminate the declarant are admissible under the exception. *LaGrand v. Stewart*, 133 F.3d 1253, 1267-68 (9th Cir. 1998).

¶15 Here, the proffered statements do not expose the declarants to criminal liability. Although each co-defendant admitted being at victim's home and getting out of the van at some point, none of the statements was "truly self-inculpatory." James said it was the victim who "came up to the van" as soon as

they arrived. He claimed he was only speaking to victim when victim punched him with the brass knuckles. James never admitted touching victim or participating in the assault. Joseph stated he got in a "wrestling match" with victim, but never admitted hitting or kicking victim. Joseph claimed they tried to leave several times, but victim prevented them from doing so. Eric admitted hitting victim in the face, but stated he did so only after victim tried to kick him.

¶16 Each of the statements characterized victim as the aggressor and co-defendants as the victims. Each co-defendant portrayed himself as acting in self-defense or in defense of others. James even advised a deputy that he did "not desire prosecution."

¶17 Moreover, defendant glosses over the fact that, even if the co-defendants' statements qualified under the Rule 804(b)(3) exception, only those portions that are actually incriminating to the declarants would be admissible. At most, this might include Joseph's statement about a "wrestling match" or Eric's admission to hitting victim in the face. Neither of these statements tends to exculpate defendant.

¶18 Furthermore, no corroborating circumstances clearly indicate the trustworthiness of the co-defendants' statements. Trustworthiness is determined by many factors, including the existence of supporting and contradictory evidence, the

relationship between the declarant and the listener, the relationship between the defendant and the declarant, the number of times the statement was made, the length of time between the event and the statement, the psychological and physical environment at the time of the statement, and whether the declarant benefits from the statement. *LaGrand*, 153 Ariz. at 27-28, 734 P.2d at 569-70. Here, there is not merely a lack of corroborating circumstances, there is ample contradictory evidence.

¶19 An independent eyewitness, victim's neighbor, testified that the co-defendants closed in on victim all at once, with one "behind him [who] hit him in the back of the head" and "one on the side and one in the front." According to the neighbor, victim was not able to fight back and tried to protect himself by covering his head. At one point, the neighbor saw one man grab victim by his hair and swing him into the street. When victim was down on "all fours," the neighbor saw the men get out of the van and start kicking him in the head, ribs, and stomach.

¶20 The victim's testimony also refuted the co-defendants' statements. So too did defendant's after-the-fact text messages apologizing for the assault. The co-defendants' statements are also inconsistent with the physical injuries sustained by victim. Additionally, the fact that the statements were given

two days after the assault casts further doubt on their truthfulness, as the co-defendants would have had ample opportunity to discuss and agree upon a version of events. Finally, the statements were made to law enforcement, which does not bolster their credibility because they could have been made "in an attempt to curry favor and obtain a reduced sentence." *LaGrand*, 153 Ariz. at 27, 734 P.2d at 569. We agree with the trial court that the proffered statements did not meet the requirements for admissibility under Rule 804(b)(3).

¶21 Rule 804(b)(7) provides a residual exception to the hearsay rule when a declarant is unavailable to testify. It states:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Ariz. R. Evid. 804(b)(7).

¶122 The record does not establish (nor does defendant contend) that the defense complied with the notice requirements of Rule 804(b)(7). A statement may not be admitted under the residual exception unless its proponent advises the opposing party "sufficiently in advance of the trial," of the "intention to offer the statement and the particulars of it, including the name and address of the declarant." *Id.* Defendant did not disclose her reliance on Rule 804(b)(7) until trial was underway. More fundamentally, for the same reasons discussed in connection with Rule 804(b)(3), the co-defendants' statements lacked "circumstantial guarantees of trustworthiness." *Id.* They were thus inadmissible under Rule 804(b)(7).

¶123 Defendant also asserts that excluding the co-defendants' statements denied her the right to present a defense. The right of an accused to present witnesses in her own defense is fundamental. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). However, an "accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). The exclusion of the co-defendants' statements was not a result of rigid or mechanistic application of the rules of evidence. The court ruled only after analyzing the corroborating and

