DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0381
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
GARY WAYNE GIPSON, JR.,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-159515-001 DT

The Honorable J. Richard Gama, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 Gary Wayne Gipson, Jr., appeals from his convictions and sentences for manslaughter and discharge of a firearm at a structure. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Gipson and Billy Jr. were friends.[1] Billy Jr. and his father drove to Gipson's house one night. As his father waited in the car, Billy Jr. argued with Gipson outside Gipson's front door. The altercation escalated, and both men punched each other. Gipson then pulled out a handgun and shot Billy Jr. at least twice. Billy Jr. ran back to the car. Gipson continued shooting and struck the car numerous times as it drove off. Billy Jr.'s father drove his wounded son home, and Billy Jr. subsequently died from the gunshot wounds.

¶3 The State charged Gipson with premeditated first-degree murder, unlawful discharge of a firearm at a non-residential structure and aggravated assault. In his notice of defenses, Gipson designated self-defense and other theories.

¶4 Prior to trial, the State moved *in limine* to preclude testimony that Billy Jr. "always carried a gun," arguing gun possession does not evidence a tendency to be violent. The court granted the State's motion as it pertained to testimony by

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Gipson. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

third persons, but held Gipson could testify about specific incidents of Billy Jr. carrying a gun because such evidence was relevant to Gipson's state of mind at the time of the incident.

¶5 At trial, Billy Jr.'s mother testified that she and Billy Jr. were partners in a trucking company that leased trucks from Gipson. After she testified on cross-examination that Billy Jr. was current on the insurance premiums on a leased truck, Gipson moved to allow testimony from his insurance agent that he, Gipson, was paying the premiums. The court denied Gipson's request, finding the issue was collateral to his justification defense.

¶6 Without a request from either the State or Gipson, the court determined to instruct the jury on lesser-included offenses as to the first-degree murder charge. Explaining it had "an independent responsibility to instruct on the facts as [it] understood the facts," the court overruled Gipson's objection and instructed the jury on second-degree murder and manslaughter by sudden quarrel or heat of passion.

¶7 The jury found Gipson not guilty of first-degree murder but guilty of manslaughter and guilty of discharging a firearm at a non-residential structure. It was unable to agree on the aggravated assault charge. The superior court sentenced

Gipson to concurrent prison terms, the longest of which is 18 years for the manslaughter conviction.[2]

¶8 Gipson timely appealed. 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(A)(1) (2010).

DISCUSSION

A. Manslaughter Instruction.

¶9 Gipson first argues the superior court erred in giving a manslaughter instruction. As Gipson notes, Arizona law no longer imposes a duty on the court in a homicide case to instruct the jury *sua sponte* on all lesser-included offenses supported by the evidence. *See* comment to Ariz. R. Crim. P. 21.3(c). Nevertheless, assuming for purposes of argument only that the State objected to the instruction (a contention the record does not entirely support), we are aware of no authority for Gipson's contention that a court errs by choosing to give a proper lesser-included instruction over both sides' objections.[3]

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[2] The jury found that the offenses were dangerous and that the State had proved the aggravating factor of emotional or financial harm to Billy Jr.'s immediate family.

[3] Gipson does not dispute that the evidence supported the manslaughter instruction; nor does he contend the instruction improperly stated the law.

B. Victim's Propensity to Carry Firearms.

¶10 As noted, the court allowed Gipson to testify about prior occasions in which he was aware that Billy Jr. carried a handgun. On appeal, Gipson argues the court erred by precluding other witnesses from testifying that Billy Jr. regularly carried a handgun. Gipson argues the ruling prevented him from offering evidence of his state of mind and evidence that Billy Jr. was the first aggressor. We review this contention for an abuse of discretion. *State v. Zamora*, 140 Ariz. 338, 340, 681 P.2d 921, 923 (App. 1984).

¶11 A defendant who asserts self-defense generally may offer proof of the victim's reputation for violence. *State v. Birdsall,* 116 Ariz. 196, 198, 568 P.2d 1094, 1096 (App. 1977); *see* Ariz. R. Evid. 404(a)(2). Nevertheless, "the possession of a pistol is of minimal probative value on the possessor's aggressive character . . . ." *Zamora*, 140 Ariz. at 340, 681 P.2d at 923. We conclude the superior court did not abuse its discretion in precluding other testimony concerning Billy Jr.'s habit of carrying a handgun because it was irrelevant to whether he was the first aggressor. *See* Ariz. R. Evid. 402 ("Evidence which is not relevant is not admissible.").

¶12 Moreover, even if the court erred by precluding the testimony, the error did not prejudice Gipson's defense. *See State v. Ybarra*, 97 Ariz. 200, 202, 398 P.2d 905, 907 (1965)

(for trial error to be reversible, it must prejudice the defendant); *State v. Hatch*, 225 Ariz. 409, 413, ¶ 15, 239 P.3d 432, 436 (App. 2010) (same). Gipson himself testified that Billy Jr. carried a gun on other occasions and testified he saw Billy Jr. with a gun during the incident at issue. Finally, other witnesses testified that Billy Jr. had a reputation for being "hot headed," "very aggressive," "combative" and "volatile." Accordingly, the court's ruling did not preclude Gipson from offering evidence of his own state of mind and circumstantial evidence that Billy Jr. was the first aggressor.

C. Testimony Regarding Insurance Payments.

¶13 Gipson also argues the superior court abused its discretion in precluding him from offering testimony by his insurance agent that he, Gipson, paid the insurance premiums on a truck he leased to Billy Jr. He sought to offer this testimony "to rebut the State's theory that the shooting occurred over a money dispute."

¶14 The superior court did not abuse its discretion in excluding the testimony based on its conclusion that the issue was collateral. *See*, *e.g.*, *State v. Davis*, 117 Ariz. 5, 7, 570 P.2d 776, 778 (App. 1977) ("The admission or exclusion of testimony as to immaterial or collateral matters for the purpose of impeachment is left to the sound discretion of the trial court."). What started the fistfight that led to the shooting

was immaterial to the question of Gipson's guilt. Accordingly, the court did not abuse its discretion in precluding the rebuttal testimony.

CONCLUSION

¶15 For the foregoing reasons, we affirm Gipson's convictions and resulting sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
ANN A. SCOTT TIMMER, Judge