DIVISION ONE
FILED: 08/18/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 10-0385
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
SCOTT BENNETT SIMPSON, Appellant.	)	

Appeal from the Superior Court in Coconino County

Cause No. CR 2008-1059

The Honorable Charles D. Adams, Judge (Retired)

AFFIRMED

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D O W N I E, Judge

¶1 Scott Bennett Simpson ("defendant") appeals his conviction for aggravated assault in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 The victim and defendant were romantically involved and lived together for two years in defendant's home. After their relationship ended, the victim ordered two cell phones that were mistakenly delivered to defendant's home. This situation led to an angry telephone conversation and an in-person altercation at defendant's home. When Officer Turley arrived on the scene, the victim was pointing at defendant, who was standing in his driveway; she said, "I don't know what you can do but that person just held a gun against my head."

¶3 Defendant denied having any weapons, but consented to a pat down search.[2] Officer Turley frisked defendant, then stepped back approximately five feet and asked what had happened. Defendant said he was at a bar when the victim called

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[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against the defendant. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997). Because defendant challenges only the denial of his motion for mistrial and motion to suppress, we confine our discussion to the facts and proceedings relevant to those issues.

[2] Defendant provided a different version of events at the suppression hearing, testifying he did not consent to the search and that he was interrogated in his garage.

about the cell phones mistakenly sent to his home. The victim entered his house and took one of his rifles to use as leverage to retrieve her phones. When defendant arrived home, the victim was in her car without the rifle. Defendant was upset with her for entering his house. He threw her on the ground by her hair and held a pistol against her face. He told her "she had f***ed up and that she was on his property now." Defendant admitted to Officer Turley that he held a gun to the victim's head "[b]ecause she entered his property." Officer Turley handcuffed defendant and took him to the rear of the patrol vehicle.

¶4 After Officer Turley spoke with the victim, he returned to defendant and told him he was under arrest for aggravated assault with a deadly weapon. He read defendant his *Miranda*[3] rights. Defendant said he understood his rights and would answer questions. Defendant said "he didn't think he did anything wrong because Arizona is a right to shoot state."[4]

¶5 After a voluntariness hearing, the trial court ruled defendant's statements were voluntary and denied his motion to suppress. The court concluded Officer Turley's initial questions were investigatory in nature, that the objective indicia indicated defendant was not in custody, and that it was

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

[4] The victim was arrested for residential trespassing.

"entirely reasonable for the officer to focus . . . on the person accused of having a gun and for him to do a Terry frisk."

¶6 A jury trial commenced. During the State's case-in chief, the victim alluded to certain past behaviors. For example, she testified she wanted police officers at defendant's house because she "knew that [defendant] was angry, and [she] had known him for a while and lived with him, and [she] knew [she] needed the police there." When the prosecutor asked the victim why she did not leave defendant's home after he became angry on the phone, the victim responded, "There are so many answers to that question, I don't even know why exactly I didn't. I had dealt with the defendant angry before." The defense objected and requested a mistrial, arguing the response was "invited" and that the prosecutor "has been instructed to advise this witness, and now these jurors are going to walk away from this with this notion that there was this history of this conduct." The court struck the answer, but denied a mistrial, explaining, "Anger is a human emotion, everybody experiences it, including the members of the jury. Now, we've not heard about any physical abuse, we have not even heard about verbal abuse outside the context of . . . our incident."

¶7 The jury found defendant guilty. The court sentenced him to the minimum term of five years' imprisonment. Defendant timely appealed. We have jurisdiction pursuant to the Arizona

Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

DISCUSSION

1. Motion for Mistrial

¶8 Defendant argues the victim's testimony denied him a fair trial and should have resulted in a mistrial. We defer to the trial court's factual determinations, but review questions of law *de novo*. *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009).

¶9 A mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted) (internal quotation marks omitted). In determining whether to grant a mistrial, a court should consider: (1) whether the evidence called jurors' attention to matters they would not be justified in considering in reaching a verdict; and (2) the probability that the testimony influenced jurors. *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989). We review the denial of a mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). A trial court's discretion is very broad because it "is in the best position to

determine whether the evidence will actually affect the outcome of the trial." *Jones*, 197 Ariz. at 304, ¶ 32, 4 P.3d at 359.

¶10 Assuming, without deciding, that the victim's testimony was improper because it violated a pretrial ruling on defendant's motion in limine, we nevertheless find no abuse of the trial court's broad discretion. The court determined that, because the remarks were not specific to any particular action or statement by defendant, jurors were unlikely to be improperly influenced. We agree. Indeed, the vague, fleeting statements at issue cannot reasonably be characterized as bad act evidence. *Jones,* 197 Ariz. at 305, ¶¶ 34-35, 4 P.3d at 360 (finding no abuse of discretion in allowing unsolicited vague references about a dissimilar crime). The victim never identified a specific crime, wrong, or other bad act that defendant allegedly committed. Defendant himself acknowledges the victim merely "*alluded* to the prior act evidence." (Emphasis added.) The references to past conduct are extremely vague and simply do not rise to the level of prior bad acts within the meaning of Arizona Rule of Evidence ("Rule") 404(b). *See Peyton v. Commonwealth*, 253 S.W.3d 504, 517 (Ky. 2008) (holding deputy's statement that he had dealt with the defendant on many different occasions was "vague and did not allude to any particular bad act [the defendant] committed" and, thus, did not fall under Rule 404(b)); *State v. Trout*, 757 N.W.2d 556, 558, ¶ 10 (N.D.

2008) (finding detective's testimony about "some other information" obtained by police, and detective's call to defendant's employer to "check up on another incident that occurred in his building" were "too vague to be unduly prejudicial"); *State v. Carbo*, 864 A.2d 344, 348 (N.H. 2004) (holding mistrial not warranted because testimony "did not unambiguously reveal evidence of specific bad acts").

¶11 Defendant contends that the allegedly improper testimony affected the verdict, pointing to two jury questions.[5] We, however, agree with the trial court's rejection of this claim. The court noted that jurors knew from the outset that the case involved domestic violence.[6] It also concluded defendant could still receive a fair trial and that jurors would decide the case based on the evidence before them.

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[5] The jury submitted the following questions after the victim testified:

> Were you, [victim], in an abusive relationship with [defendant] . . . [a]nytime during your relationship?
>
> Were there any incidents of violence by [victim] or [defendant] during their relationship.

Neither question was asked.

[6] At the beginning of *voir dire,* the court stated that defendant was "charged with the crime of aggravated assault, domestic violence."

¶12 Under the circumstances presented, where only vague and fleeting references were made to alleged bad acts, the trial court did not abuse its considerable discretion by denying defendant's mistrial requests.

2. Custodial Interrogation

¶13 Defendant next argues the totality of circumstances demonstrate he was in custody during initial police questioning, requiring suppression of his pre-arrest statements. We review the denial of a suppression motion for an abuse of discretion and will not reverse absent clear and manifest error. *State v. Eastlack*, 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994); *Zamora*, 220 Ariz. at 67, ¶ 7, 202 P.3d at 532. We review "only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, 76, ¶ 8, 179 P.3d 954, 956 (App. 2008).

¶14 *Miranda* protections apply to custodial interrogations. *State v. Smith*, 193 Ariz. 452, 457, ¶ 18, 974 P.2d 431, 436 (1999). Such interrogations are distinguishable from general, on-the-scene investigations. *Miranda*, 384 U.S. at 477-78. In determining whether an interrogation is custodial, we consider "the objective circumstances of the interrogation, not . . . the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511

U.S. 318, 323 (1994). We assess "whether under the totality of the circumstances a reasonable person would feel that he was in custody or otherwise deprived of his freedom of action in a significant way." *State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985). Relevant factors include whether objective indicia of arrest are present, the site of the interrogation, and the length and form of the questioning. *See State v. Fulminante*, 161 Ariz. 237, 243, 778 P.2d 602, 608 (1988); *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983).

¶15 The record here supports the conclusion that a reasonable person in defendant's position, prior to arrest, would not have felt "he was in custody or otherwise deprived of his freedom of action in a significant way." *Carter*, 145 Ariz. at 105, 700 P.2d at 492. Officer Turley's initial questions were limited and non-accusatory in nature. *See State v. Thompson*, 146 Ariz. 552, 556, 707 P.2d 956, 960 (App. 1985) (finding a police interview that was not protracted and was "investigatory rather than accusatory" tended to show the defendant was not in custody). The officer spoke in a "[c]alm, normal tone of voice," stood approximately five feet from defendant, and never directly accused defendant of a crime or suggested he was doing more than generally investigating what had happened. Officer Turley arrived alone and spoke with defendant in defendant's driveway, without restricting his

movement. Although the officer wore a uniform and drove a marked patrol vehicle, he did not draw any weapon or utilize force.

¶16 Officer Turley admitted at the suppression hearing that his initial focus was on defendant in order to protect himself and others in the event defendant had a gun. The officer's "focus," though, does not establish a custodial interrogation. *Stansbury*, 511 U.S. at 323-24 (holding "an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the Miranda custody inquiry."); *Cruz-Mata*, 138 Ariz. at 373, 674 P.2d at 1371 ("confronting an accused with evidence of guilt does not necessarily require administering *Miranda* warnings."). Further, the Supreme Court has recognized that an officer may approach a person to investigate possible criminal activity and make a limited search for weapons if he has reason to believe he is in danger. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *see State v. Starr*, 119 Ariz. 472, 475, 581 P.2d 706, 709 (1978) (allowing "general on-the-scene investigatory questioning" at the time of a frisk to determine if person should be released or held for further questioning) (citation omitted).

¶17 Defendant's reliance on *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008), is unpersuasive. The defendant

in *Craighead* was escorted to a storage room in his own home and was sitting on a box observing an armed guard by the door while six officers searched his house. *Id.* at 1088-89. In the case at bar, on the other hand, defendant was unrestrained in the familiar surroundings of his own driveway, with one police officer calmly asking about what happened. Even if the conversation occurred in the garage, as defendant claims, it would not convert the encounter into a custodial interrogation. The Ninth Circuit has recognized that only under certain circumstances does an in-home interview rise to the level of custodial interrogation, noting that the "element of compulsion that concerned the Court in *Miranda* is less likely to be present where the suspect is in familiar surroundings." *Id.* at 1083 (citation omitted).

CONCLUSION

¶18 For the foregoing reasons, we affirm defendant's conviction and sentence.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PATRICK IRVINE, Judge

/s/
LAWRENCE F. WINTHROP, Judge