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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 09/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0808
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
ANTHONY PATRICK JUAREZ,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-115020-003DT

The Honorable Lisa Ann Vandenberg, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Myles A. Braccio, Assistant Attorney General
Attorneys for Appellee

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Attorneys for Appellant

B A R K E R, Judge

¶1 Anthony Patrick Juarez ("Juarez") appeals his conviction for one count of taking the identity of another, a class three felony, with two prior historical felony convictions. He argues that the trial court abused its discretion in admitting evidence of prior bad acts, in violation of Arizona Rules of Evidence 404(b) and 403. For the reasons that follow, we find no reversible error and affirm.

Background

¶2 While conducting an ongoing investigation of a residence in West Phoenix, police officers observed Juarez fleeing the residence in a "[f]rantic" and "scared" manner. After asking him why he was fleeing, the police officers asked Juarez for identification. Juarez replied that his identification was in his wallet, which police officers removed and opened. They found identification information for at least four individuals besides Juarez inside Juarez's wallet. Juarez would eventually be tried for taking the identity of three of these individuals: Fredrick Douglass, Brandon Moore, and Charles Sutton. Among the identifying information for these three individuals was one Visa Turbo Tax card, issued in Brandon Moore's name, which was missing its activation sticker (the "Moore Turbo Tax card").

¶3 The information for a fourth individual included a birth certificate, a Social Security card, and a driver's

license belonging to a woman named Mindy Linns ("the Mindy Linns documents").

¶14 A "nervous" and "uncomfortable" Juarez initially claimed that he found the documents containing other people's information "in the street," and that he "didn't know any of these people." Juarez "later stated that the Turbo Tax Visa card was mailed to what is a vacant home next door to his, was accidentally placed in his mailbox," and was opened by his children and given to him. When Officer Kim asked Juarez if he knew Mindy Linns, Juarez said that Mindy was his girlfriend and that she knew he had her stuff. After Officer Kim said that he would like to contact Mindy Linns, Juarez "admitted that he lied earlier and that he didn't know Mindy Linns or any of the people whose identifying information [we] found in his wallet."

¶15 Police officers also found two Turbo Tax Visa cards (the "Turbo Tax cards") in the residence. These cards appeared not to have been activated because, as one police officer testified, "the stickers [were] still attached," and "generally speaking, when the stickers are still attached that means they have not been activated."

¶16 At trial, Douglass, Moore, and Sutton all testified that they had not given Juarez permission to use any identifying information, and in fact, had never met him before.

¶17 The jury found Juarez guilty of aggravated taking the identity of another. Juarez 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 (2001) and 13-4033(A)(1) (Supp. 2008).

Discussion

¶18 Juarez argues that testimony relating to the Turbo Tax cards and Mindy Linns violated Rules 404(b) and 403. A trial court has considerable discretion in ruling on the admissibility of evidence, and we will not reverse such a ruling absent a clear abuse of discretion or misapplication of the law. *State v. Hensley*, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984); *Conant v. Whitney*, 190 Ariz. 290, 292, 947 P.2d 864, 866 (App. 1997). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1983). "[T]hat the circumstances could justify a different conclusion than that reached by the [trial court] does not warrant the [appellate] court in substituting its judgment for that of the [trial court]. A difference in judicial opinion is not synonymous with 'abuse of discretion.'" *Quigley v. City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

1. The Turbo Tax Cards
A. Pertinent Facts

¶9 Juarez was not charged with regard to the two Turbo Tax cards (with stickers attached) that were found in the residence. Prior to trial, Juarez moved *in limine* to preclude the State from introducing evidence of these cards. The court granted this motion; however, it noted that

my ruling does not preclude the State from making a request when it's their opportunity to present rebuttal evidence as to the Court reconsidering the appropriateness of that evidence or testimony in rebuttal. But I won't make a ruling on rebuttal at this point without hearing the State's case and defense. But I will just warn defense that at this point it certainly seems plausible that the State will be able to make an argument that depending on the defense, that that evidence may be admissible as rebuttal.

¶10 At trial, while Juarez's counsel was questioning Juarez's daughter about her knowledge of the Moore Turbo Tax card, the daughter testified that she saw her younger brother run to the mailbox, rip open the envelopes, hold the card, and give the card to another Juarez child who ultimately gave the card to Juarez. During cross-examination, she said that she did not see a sticker on top of the Turbo Tax card, which provides a number to call to activate the card.

¶11 Outside the presence of the jury, the State requested that it be allowed to introduce rebuttal evidence regarding the two Turbo Tax cards found in the home in order to compare these

cards (with the activation stickers attached) to the Moore Turbo Tax card (with the activation sticker removed). The State argued that the fact that the activation sticker was removed demonstrated Juarez's intent to use the card. Over Juarez's objection, the court granted the request, provided that testimony was limited to the facts that the cards were found in the residence and that their activation stickers were intact.

¶12 The State then presented testimony from a police officer that he found the two Turbo Tax cards in the residence and that the cards had not been activated because the stickers were still attached. The State also called another police officer who testified that, in comparison, the Moore Turbo Tax card, which was found on Juarez, had been activated because its activation sticker was removed.

B. Admissibility Under Rule 404(b)

¶13 Rule 404(b) prohibits admitting evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). However, such evidence may "be admissible for other purposes," such as "intent." *Id.* Evidence admissible for any relevant purpose should generally be admitted, even if inadmissible for other purposes. *See United States v. Abel*, 469 U.S. 45, 56 (1984) ("[T]here is no rule of evidence which provides that testimony admissible for one purpose and

inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case.").

¶14 Here, Juarez did not respond to the State's assertion that the Turbo Tax cards were used to establish intent. After reviewing the transcript, it is clear that the two Turbo Tax cards were not used to argue that Juarez had used other identities besides the three for which he was on trial or to suggest that he had engaged in other crimes or bad acts. Nor were they used to suggest that he had a propensity to commit such crimes or acts; they were simply used as a basis for comparison to the Moore Turbo Tax card found in his wallet.

¶15 Once Juarez's daughter testified that the Moore Turbo Tax card lacked an activation sticker when her younger brothers retrieved it from the mail and gave it to Juarez, the State became entitled to rebut this testimony. It was well within the court's discretion to allow the State to rebut this testimony with testimony that the two Turbo Tax cards found in the residence contained activation stickers. The lack of an activation sticker on the Moore Turbo Tax card demonstrated that Juarez intended to use this card. Given that using evidence to establish intent is one of the express exceptions to Rule 404(b), Juarez's arguments fail.

¶16 Juarez relies on *State v. Woods*, 121 Ariz. 187, 589 P.2d 430 (1979), but that reliance is misplaced. In *Woods*,

police officers observed the defendant leaving a department store in a suspicious manner that suggested he might be carrying something inside the jacket he was wearing. *Id.* at 188, 589 P.2d at 431. The officers followed the defendant to a van. *Id.* at 188, 589 P.2d at 431. They eventually stopped the van and discovered several stolen items inside. *Id.* at 188, 589 P.2d at 431. One of the items in the van was an iron that had the department store tag attached to it. *Id.* at 188, 589 P.2d at 431. After investigating, the officers learned that the iron had a display tag on it, meaning that it was on display and would not have been sold unless the store had no others in stock. *Id.* at 189-90, 589 P.2d at 432-33. At trial, the State called a security officer from the department store who testified that she had visited the store and found it well-stocked with similar irons. *Id.* at 189-90, 589 P.2d at 432-33. The State used this evidence to suggest to the jury that the defendant had stolen the iron, although it was unable to prove that the iron had actually been stolen. *Id.* at 190, 589 P.2d at 433.

¶17 Here, in contrast, the State did not admit the Turbo Tax cards to suggest that Juarez had stolen these cards. Rather, the State used the evidence only to establish, by comparison, that the Moore Turbo Tax card had been activated and there was an intent to use it. Because the two Turbo Tax cards

were used only in a limited manner, to show intent with regard to Moore's card, the court's decision to admit them for this purpose did not violate Rule 404(b).

C. Admissibility Under Rule 403

¶18 Under Rule 403, 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403. Relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401.

¶19 The two Turbo Tax cards were relevant because they showed that such cards have an activation sticker that must be removed to activate the cards. Juarez argues that the prejudice created by the Turbo Tax cards far outweighed their relevance. However, once Juarez opened the door by introducing testimony that Moore's Turbo Tax card lacked an activation sticker when Juarez received it, the court was within its discretion in admitting contrary evidence. This is so even if there was a possibility of the jury inferring Juarez had inappropriately obtained other cards for which he was not being charged. Juarez could have requested a limiting instruction, but did not. We

have already determined that the relevance of the testimony about the Turbo Tax cards was to establish intent and that it therefore did not violate Rule 404(b).

¶20 To the extent that Juarez suggests that the timing of admission was unfairly prejudicial because the court had previously ruled that such evidence should be excluded, this argument fails because the trial court plainly reserved judgment on the admissibility of such evidence for rebuttal purposes. Even if the court had not reserved judgment on this issue, it was certainly within the court's discretion to adapt its prior ruling to changed circumstances. *State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980) ("The fact that the trial court previously ruled the evidence was inadmissible as prejudicial, does not mean the prejudice continues to outweigh its probative value throughout the trial.").

¶21 Thus, Juarez's claim that the trial court abused its discretion in admitting the Turbo Tax cards fails.

2. The Mindy Linns Evidence

A. Pertinent Facts

¶22 On the first day of trial, Juarez requested a ruling to preclude the State from entering the Mindy Linns documents into evidence. Juarez argued that since the State had not listed her as a witness, she would not be able to testify regarding lack of consent, and the testimony of a police officer

regarding this subject would be hearsay. The court agreed and precluded such evidence from being introduced; however, the court also noted that it was "not making a ruling with regards to whether or not the door would be opened and rebuttal evidence would be appropriate."

¶23 During trial, Juarez cross-examined Officer Kim about whether he had done any investigation to verify Juarez's story about how he had come to be in possession of the identification documents belonging to other individuals. The precise line of questioning was as follows:

[Juarez's counsel]: Did you conduct any investigation to try to find out if there were any witnesses who could support [Juarez's story]?

[Officer Kim]: I did not.

Q: What is your role in this case, are you the agent?

A: Yes, I am.

...

Q: So the decisions made in the investigation of this case are ultimately up to you, correct?

A: Correct.

Q: In other words, the buck stops with you?

A: Correct.

Q: So decisions as to whether to attempt to locate and identify and interview

witnesses, ultimately, that resides with you, correct?

A: Agreed.

¶24 On redirect, the State referred back to these questions and asked Officer Kim whether Juarez had ever volunteered a name of any individual who could corroborate his story. When Officer Kim replied affirmatively, Juarez's counsel objected. The court held a discussion at the bench out of the hearing of both the jury and the court reporter and ultimately permitted Officer Kim to answer the question. Officer Kim explained that Juarez had volunteered the name of Mindy Linns.

¶25 The State asked Officer Kim whether he had found any information relating to Mindy Linns in the wallet, and he replied, over Juarez's objection, that the wallet contained her driver's license, Social Security number, and birth certificate.

¶26 Responding to the State's questions, Officer Kim explained that when he had asked Juarez whether he knew Mindy Linns, Juarez had initially claimed that she was his girlfriend. After Officer Kim told Juarez that he would like to contact Linns, Juarez "admitted that he lied earlier and that he didn't know Mindy Linns or any of the people whose identifying information [Officer Kim] found in his wallet."

¶27 Later that evening, after excusing the jury, the court explained why it had allowed the State to ask questions regarding Mindy Linns and her documents:

When Officer Kim was testifying, defense counsel objected to the State inquiring about the defendant providing information on a person that could confirm his story. And at the bench, the Court found that defense counsel, in cross-examination, had opened the door to that information. And over defense counsel's objection, the Court did allow the State to continue to inquire with regards to the information when testified to by Officer Kim with regards to Mindy Linns.

Then counsel for the State asked to approach and requested to be able to admit documents that were referenced in Officer Kim's testimony with regards to Mindy Linns. And the Court sustained defense counsel's objection, those were still overly prejudicial.

B. Admissibility Under Rule 403

¶28 Analyzing the Mindy Linns evidence under Rule 403, we find that Juarez opened the door to this evidence and that any prejudice created by the evidence was self-inflicted. The court initially ruled that the Mindy Linns evidence would not be admitted; however, it clearly reserved ruling on the evidence for rebuttal purposes. Juarez could have avoided the disclosure of the evidence by not asking Officer Kim questions designed to cast doubt on his diligence or thoroughness. However, once he asked these questions, Juarez opened the door to further

inquiries on this subject. “[W]hen an attorney ‘opens the door’ to otherwise irrelevant evidence, another party may comment or respond with comments on the same subject, in the trial court’s discretion.” *State v. Roberts*, 144 Ariz. 572, 575, 698 P.2d 1291, 1294 (App. 1985); see also *State v. Woratzeck*, 134 Ariz. 452, 454, 657 P.2d 865, 867 (Ariz. 1983) (“When counsel opens the whole field of inquiry, he cannot assign its fruits as error on appeal.”).

C. Admissibility Under Rule 404(b)

¶29 Because Juarez did not raise the argument that the Mindy Linns evidence violated Rule 404(b) below, he waived this argument on appeal. “‘Absent fundamental error, if evidence is objected to on one ground in the trial court and admitted over that objection, other grounds raised for the first time on appeal are waived.’” *State v. Moody*, 208 Ariz. 424, 462, ¶ 120, 94 P.3d 1119, 1150 (2004) (quoting *State v. Neal*, 143 Ariz. 93, 100, 692 P.2d 272, 279 (1984)). Juarez does not argue that any error committed by the trial court was “fundamental error”; nevertheless, in the interest of administering justice, we address this issue.

¶30 “Fundamental error is error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial.” *State v. Smith*, 114 Ariz. 415, 420, 561 P.2d 739, 744 (1977). In deciding whether an error is fundamental, the

defendant must show that the error goes to the "foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Defendant has the burden to show prejudice. *Id.*

¶31 Here, no such error occurred. The Mindy Linns evidence was admitted because Juarez "opened the door" to this evidence as explained above. This was not error, but the logical application of a black-letter legal principle. Even if it had been error, such error would be harmless. The jury had before it independent proof that Juarez possessed the identifying information of three individuals without their consent. Given that Juarez has failed to show how the Mindy Linns evidence violated Rule 403 or was fundamental error, we find no error in its admission.

Conclusion

¶32 For the foregoing reasons, we affirm Juarez's conviction and sentence.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

/s/

JON W. THOMPSON, Presiding Judge

ANN A. SCOTT TIMMER, Judge