

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
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



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FILED: 03/25/2010  
PHILIP G. URRY, CLERK  
BY: GH

STATE OF ARIZONA ex rel. ANDREW ) 1 CA-SA 09-0316  
P. THOMAS, Maricopa County )  
Attorney, ) Department D  
)  
Petitioner, ) Maricopa County  
) Superior Court  
v. ) No. CR2009-132337-001 DT  
)  
THE HONORABLE CONNIE CONTES, ) **DECISION ORDER**  
Judge of the SUPERIOR COURT OF )  
THE STATE OF ARIZONA, in and for )  
the County of MARICOPA, )  
)  
Respondent Judge, )  
)  
ALDEANDRE GRAY, )  
)  
Real Party in Interest. )  
\_\_\_\_\_ )

The State of Arizona (State) petitions this Court for review from the trial court's grant of a motion in limine to admit other act evidence pursuant to Arizona Rule of Evidence 404(b) filed by Real Party in Interest (Gray).<sup>1</sup> Presiding Judge Patricia A. Orozco and Judges Diane M. Johnsen and Jon W. Thompson have considered this petition for special action and

<sup>1</sup> Unless otherwise specified, hereafter, an Arizona Rule of Evidence is referred to as "Rule \_\_\_\_."

the response. For the reasons explained below, we accept jurisdiction and grant relief.

The State filed an indictment against Gray charging two counts of aggravated assault and one count of resisting arrest as a result of his May 13, 2009 arrest. The May 13, 2009 arrest resulted from a domestic dispute call, which involved Gray and his girlfriend. Phoenix Police Officers Troy Tolbert and Tyken Solie responded to the call. Officer Solie spoke with Gray's girlfriend, and Officer Tolbert spoke with Gray, who was holding the couple's infant son. Gray alleges that Officer Tolbert said, "If you didn't have that baby in your arms, I'd punch you." Gray's girlfriend returned, took their son and Gray alleges that without physical provocation, Officer Tolbert punched Gray in the face.

In anticipation of trial, Gray filed a motion in limine to "Admit Other Act Evidence Pursuant to Rule 404(b)." In the motion, Gray argued he should be permitted to offer testimony and documents from the arresting officers' personnel files to establish the arresting officers' motives for arresting Gray. Gray argued this evidence would involve "prior incidents involving abuse of power by both officers." The prior incidents include past allegations made by two arrestees against Officers Tolbert and Solie that involve the use of excessive or

unprovoked force. Gray's motion in limine addressed both witness testimony and evidence from the arresting officers' personnel files. The transcript of the oral argument on the motion, however, reflects that Gray sought only to offer testimony from the arrestees regarding the alleged excessive force and to cross-examine Officers Tolbert and Solie about the prior incidents. After hearing oral argument and taking the matter under advisement, the trial court granted Gray's motion in limine admitting the other act evidence pursuant to Rule 404(b). Additionally, the trial court noted that the State would be permitted to present evidence that neither of these two incidents resulted in discipline for either officer and that the allegations were unsubstantiated.

#### **JURISDICTION**

We have jurisdiction to hear and determine this special action pursuant to Arizona Revised Statutes (A.R.S.) section 12-120.21.A.4 (2003) and Arizona Rule of Procedure for Special Actions 8(a). Special action jurisdiction is highly discretionary and is appropriate when there is no adequate remedy on appeal. *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 262, ¶ 4, 165 P.3d 238, 240 (App. 2007). Special action jurisdiction is appropriate where a petitioner would have no "plain, speedy, and adequate remedy by appeal." Ariz. R.P.

Spec. Act. 1(a). Because the State would be unable to appeal this issue if Gray were acquitted, it does not have an adequate remedy by appeal. We therefore accept special action jurisdiction and grant relief.

#### DISCUSSION

We will not reverse a trial court's ruling on the admissibility of other act evidence pursuant to Rule 404(b) absent an abuse of discretion. *State v. Coghill*, 216 Ariz. 578, 582, ¶ 13, 169 P.3d 942, 946 (App. 2007). "An abuse of discretion occurs when 'the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice.'" *State v. Fish*, 222 Ariz. 109, 114, ¶ 8, 213 P.3d 258, 263 (App. 2009) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983)).

In general, "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." Ariz. R. Evid. 404(b). However, there is an exception to the general rule of inadmissibility of other act evidence set forth in Arizona Rule of Evidence 404(b). Rule 404(b) states this type of evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Four separate provisions of

the Rules, often referred to collectively as the *Huddleston* factors, govern the admissibility of other act evidence. See *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988). "Rule 404(b) requires that the evidence be admitted for a proper purpose, Rule 402 requires that the evidence be relevant, Rule 403 requires that the danger of unfair prejudice not outweigh probative value, and Rule 105 requires that the judge give an appropriate limiting instruction upon request." *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 54, 25 P.3d 717, 736 (2001); see *Huddleston*, 485 U.S. at 691-92. Additionally, Arizona requires that the profferer of other act evidence "prove by clear and convincing evidence that the prior bad acts were committed" and the person whose other acts are in question actually committed those acts. *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997).

Even if we were to determine the other act evidence Gray seeks to introduce meets the four-factor *Huddleston* test, the evidence could not be admitted absent clear and convincing evidence that the other acts were indeed committed by Officers Tolbert and Solie. See *Terrazas*, 189 Ariz. at 582, 944 P.2d at 1196. The trial court did not find that the prior allegations of unprovoked force by Officers Tolbert or Solie were proven by clear and convincing evidence. Therefore, even assuming the

other act evidence would be admissible under *Huddleston*, the trial court abused its discretion in granting Gray's motion to admit the evidence.

**CONCLUSION**

For the above mentioned reasons, we accept jurisdiction and grant relief by vacating the trial court's order granting Gray's motion in limine to admit other act evidence of Officers Tolbert and Solie pursuant to Rule 404(b).

/s/

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PATRICIA A. OROZCO, Presiding Judge