IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SALIH ABDUL-HAQQ ZAID,
Appellant.

No. 2 CA-CR 2018-0159
Filed June 29, 2020

Appeal from the Superior Court in Graham County
No. CR201700169
The Honorable D. Corey Sanders, Judge Pro Tempore

REVERSED AND REMANDED

COUNSEL

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OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Salih Abdul-Haqq Zaid appeals from his convictions for manslaughter, two counts of aggravated assault, endangerment, disorderly conduct with a weapon, and unlawful discharge of a weapon. He contends the trial court (1) improperly precluded evidence of the victim's prior acts and reputation for violence; (2) provided the jury a misleading manslaughter verdict form, then failed to properly instruct the jury when it did not return a unanimous verdict on that count; and (3) convicted him of two offenses that were lesser-included offenses of other convictions, subjecting him to double jeopardy. Because the court improperly precluded evidence of the victim's reputation for violence and we cannot conclude the error was harmless, we reverse Zaid's convictions and sentences and remand for a new trial.

Factual and Procedural Background

¶2 The following facts are undisputed. One April evening in 2017, Zaid went to a bar in Safford, where he met Jared Garcia and Garcia's friend, J.R. After some initial pleasantries, the conversation turned to racially charged topics and became hostile. Tempers cooled, however, and the group continued to drink. Later, the encounter again became heated, and Garcia punched Zaid in the face over a perceived racial insult. The two again reconciled, and Garcia and J.R. introduced Zaid to R.C., another friend who had arrived. At some point, Zaid poured a beer onto the ground, and later toppled a beer bottle onto the floor, breaking it.

¶3 Zaid left the bar, but later returned. J.R. told Zaid he should not have come back and ushered him outside, followed by Garcia. After a brief encounter at Zaid's truck, Zaid shot Garcia with a rifle that had been in the truck. Zaid drove away from the scene and was arrested later that night. Garcia died from the gunshot wound.

¶4 The state charged Zaid with first-degree murder and several other offenses related to the shooting. At the end of a thirteen-day trial, a jury found Zaid guilty of manslaughter, two counts of aggravated assault, endangerment, disorderly conduct with a weapon, and unlawful discharge of a weapon. The trial court sentenced Zaid to concurrent terms of imprisonment, the longest of which was fifteen years. Zaid timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Evidence of Victim's Other Acts and Reputation

¶5 Zaid contends the trial court erred by precluding him from presenting evidence of the victim's prior violent acts and reputation for violence. Zaid sought such evidence to support his contention that he shot the victim in self-defense. We review a trial court's ruling excluding evidence for abuse of discretion, but review de novo its interpretation of the rules of evidence. *State v. Romero*, 239 Ariz. 6, ¶ 11 (2016).

¶6 Before trial, the court granted the state's motion in limine to preclude Zaid from presenting evidence of the victim's other violent acts and reputation for violence. The court found that this evidence was inadmissible to show the victim was the first aggressor or to show the defendant reasonably believed he was in danger because the state conceded that the victim was the first aggressor and Zaid conceded he was not aware of the victim's reputation for violence or other violent acts. The court also found that the evidence would confuse the issues, mislead the jury, and "be a waste of time regarding undisputed issues."

¶7 The trial court found the other act and reputation evidence inadmissible to corroborate Zaid's claim of self-defense for similar reasons. The court found that other defense witnesses could supply testimony that the victim was the first aggressor and that "[a]dmitting reputation or bad acts evidence creates a real risk the deceased victim would be put on trial for acts about which the defendant was completely unaware." The court added that "admitting this evidence would tend to do exactly what Rule 404(b) is designed to prevent, that is to show that the victim acted in conformity with his alleged violent character."

Offer of proof

¶8 As an initial matter, the state argues we should not consider Zaid's claim that evidence was improperly excluded because he did not make an offer of proof. A party may claim error in a ruling to exclude evidence only if the "party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Ariz. R. Evid. 103(a)(2). "An offer of proof is simply a detailed description of what the proposed evidence is." *State v. Bay*, 150 Ariz. 112, 115 (1986). An offer of proof serves two purposes: to put the trial court in a better position to determine whether it would be erroneous to exclude the evidence, and to enable an appellate court to determine whether any error was harmful. *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129 (1985).

¶9 Here, Zaid informed the trial court of the substance of the disputed reputation evidence. He related that many of the state's own witnesses had said in pretrial interviews that the victim had a violent reputation. At the motion hearing, the state conceded that while the victim had cleaned up his life recently, witnesses had stated he had a violent character. Thus, the substance of precluded testimony was clear: witnesses would have testified that the victim had a reputation for violence.

¶10 The state argues that the offer of proof was insufficient because it did not include "the basis for that reputation," and "[i]t may have been that [the victim] was simply not one to back down from a fight, rather than being an aggressor." But the substance of the reputation testimony would have been limited to general opinion and reputation evidence under Rules 404(a)(2) and 405(a), Ariz. R. Evid.; Zaid would not have been able to present details of any events that formed the basis for such testimony. And although the state suggests that the offer of proof was inadequate because Zaid did not provide "any affidavits, police reports, or witness interview transcripts," an attorney's description of disputed evidence is commonly a sufficient offer of proof. *See, e.g.*, *State v. Plew*, 155 Ariz. 44, 46 (1987) (considering merits of evidentiary issue where attorney made offer of proof via avowals of what the evidence would show); *State ex rel. Romley v. Dairman*, 208 Ariz. 484, n.5 (App. 2004) (treating counsel's avowals as an offer of proof). In any event, the substance of the evidence was apparent from the context, including the state's acknowledgment that witnesses had said the victim had a violent reputation.

¶11 The issue of whether the reputation evidence was improperly excluded was therefore adequately preserved for appeal. Because we conclude, *infra*, that any evidence of the victim's prior violent acts was properly excluded, we need not decide whether the offer of proof of other acts was adequate.

Victim's other violent acts

¶12 Zaid contends the victim's other acts were admissible under Rule 404(b), Ariz. R. Evid., "to show that [his] version of events was credible," as was the case in *State v. Fish*, 222 Ariz. 109, ¶¶ 41-54 (App. 2009). In general, Rule 404(b) precludes evidence of a person's other acts "to show the person's propensity to act in conformity with his or her character." *Fish*, 222 Ariz. 109, ¶ 43. Thus, a defendant may support his claim of self-defense with evidence of the victim's specific instances of violent conduct "only if the defendant knew of them," *State v. Connor*, 215 Ariz. 553, ¶ 13 (App. 2007), or to show motive, opportunity, intent, or another purpose other than

to show that the victim had a propensity for violence, *see Fish*, 222 Ariz. 109, ¶ 42.

¶13 Among these other valid purposes, a victim's prior violent act may be admissible under Rule 404(b) if it "corroborate[s the d]efendant's version of the events," and it is "not offered to show the [v]ictim's character to prove disposition to acts of a particular type." *Id.* ¶ 45. Rule 404(b) allows the victim's prior violent act for this purpose when it is "highly relevant to the credibility of the self-defense claim." *See id.* ¶ 49. A court may nonetheless exclude the other violent act under Rule 403, Ariz. R. Evid., "if 'its probative value is substantially outweighed by a danger of,' among other things, 'unfair prejudice.'" *State v. Scott*, 243 Ariz. 183, 187 (App. 2017) (quoting Ariz. R. Evid. 403); *see Fish*, 222 Ariz. 109, ¶ 53. In deciding whether to preclude a victim's otherwise admissible prior violent act under Rule 403, a court may consider factors such as the strength of the evidence of the prior violent act, the degree of similarity between the prior violent act and the event at issue, the need for the evidence, whether alternative proof would be effective, whether the prior violent act was recent or remote, and the degree to which the evidence would likely engender hostility in the jury. *See* 1 Kenneth S. Broun et al., *McCormick on Evidence* § 190.11 (8th ed. 2020) (listing admissibility factors for relevant other-crimes evidence in criminal cases).

¶14 In *Fish*, we determined the victim's prior violent acts were admissible under Rule 404(b) to corroborate the defendant's version of events and rebut the state's claim that the defendant's account of the victim's aggression was fabricated. *Id.* ¶¶ 46, 53-54. We identified circumstances that made the evidence highly relevant for these purposes. First, the victim's prior violent acts and the encounter with the defendant shared a unique detail: they involved confrontations over the victim's dogs. *See id.* ¶¶ 9, 49, 53. Second, the victim's manner of aggression in the prior confrontations was "very similar" to the defendant's description of the victim's aggression during his confrontation with the victim. *Id.* ¶ 49. Third, the defendant provided police with the description immediately after the incident—at a time when he did not know of the victim's prior violent acts and could not have fabricated his account based on them. *See id*. ¶¶ 46, 49.

¶15 And although in *Fish* we remanded the case to the trial court to determine whether the victim's prior violent acts were admissible under Rule 403, we identified circumstances germane to that determination. *Id.* ¶¶ 53-54. For example, in addition to noting the high degree of similarity between the victim's prior violent acts and the defendant's

account, we observed that no other witnesses to the incident existed—a circumstance suggesting a lack of alternate proof and an acute need for the evidence in that case. *Id*. ¶ 49. Moreover, the evidence of the other acts was strong: the defendant had provided affidavits from several witnesses containing detailed accounts of the victim's violent conduct when he had been confronted about his dog. *Id*. ¶ 9.

¶16 Unlike *Fish*, Zaid has not pointed to any details of the victim's prior violent conduct that presented substantial similarities to his account. Nor has he claimed to have recounted specific similarities before he had an opportunity to fabricate an account consistent with them. In no other way has he shown that the victim's prior violent acts were highly relevant to corroborate his version of events and rebut a claim of fabrication. The victim's prior acts thus would have supported Zaid's account only by showing that the victim was a violent person and was more likely to have acted in conformity with his violent character during the fatal encounter. When a victim's prior violent acts corroborate the defendant's account of self-defense only in that way, they are inadmissible under Rule 404(b). *See id*. ¶¶ 43, 45 (evidence of the victim's other violent acts may be admissible to corroborate the defendant's version of events only "if the evidence was not offered to show the [v]ictim's character to prove disposition to acts of a particular type").[1]

¶17 At any rate, the trial court would not have exceeded its discretion if it had precluded the evidence under Rule 403. Zaid has not established any reason the other violent acts would have been particularly probative, such as the complete lack of any other eyewitnesses or the high degree of similarity between the acts as was present in *Fish*. Indeed, Zaid conceded at oral argument that he had not provided the trial court with details of the victim's prior violent acts showing substantial similarities with the conduct he alleged in the fatal encounter. Therefore, he has not

[1]The state points out that in *State v. Machado*, 226 Ariz. 281, ¶¶ 13-16 (2011), our supreme court ruled that Rule 404(b) does not apply to third-party culpability evidence because the rule was intended to protect criminal defendants. And Zaid argues that reasoning would apply equally to self-defense cases. This contention—and Zaid's parallel contention that a self-defense claim is in essence a species of third-party culpability defense—were raised for the first time during oral argument. Accordingly, we decline to address them given the lack of comprehensive and timely briefing. *See State v. Sosnowicz*, 229 Ariz. 90, n.5 (App. 2012) (court does not consider claims first made at oral argument).

shown this evidence was as strong as in *Fish* or as necessary to support his theory of the case. Meanwhile, the evidence carried the risk that jurors might see the victim as a bad man who had gotten what he deserved. In sum, the trial court did not err in precluding Zaid from presenting evidence of the victim's prior violent acts.

Victim's reputation for violence

¶18 When a criminal defendant raises a justification defense, "he is entitled to offer at least some 'proof of the victim's reputation for violence.'" *Connor*, 215 Ariz. 553, ¶ 13 (quoting *State v. Zamora,* 140 Ariz. 338, 341 (App. 1984)). A defendant may offer reputation or opinion evidence of the victim's violent or aggressive character to show the victim's propensity for violence, even if the defendant did not know about that character. *See Fish*, 222 Ariz. 109, ¶¶ 20, 28 (citing Ariz. R. Evid. 404(a)(2) and 405(a)); *Connor*, 215 Ariz. 553, ¶ 13.

¶19 Although the court ruled that evidence of the victim's violent reputation was inadmissible to show that the victim acted in conformity with his violent character, Rule 404(a)(2) expressly permits it for that purpose—even where, as here, the defendant did not know of the victim's violent reputation. Nor would it unjustifiably put the victim on trial, as the trial court suggested. While learning of a victim's violent character risks that jurors might think the victim "got what he deserved," the probative value of evidence of the victim's violent character ordinarily justifies accepting that risk when doubt exists about who was the first aggressor. *See* 1 *McCormick*, *supra*, § 193.

¶20 Here, doubt existed about who was the first aggressor. Although the state may not have contested that the victim had punched Zaid inside the bar earlier that night, it did not concede that the victim was the first aggressor in the fatal encounter outside the bar. At trial, J.R. testified the victim did not have any weapons, was not approaching Zaid, and put his hands up and tried to run away when Zaid displayed the gun. R.C. also testified that no one had threatened Zaid before the shooting. Zaid, on the other hand, testified he had shot the victim in self-defense after the victim, J.R., and R.C. aggressively confronted him and the victim and J.R. had both physically attacked him. Moreover, after Zaid argued in closing that the shooting had been justified, the state vigorously argued in its rebuttal that Zaid had fabricated his account of defending himself against aggression. Thus, the issue of whether the victim was the first aggressor was disputed. Allowing Zaid to support his version of events via evidence of the victim's violent character would not have been, as the court

characterized it in precluding it under Rule 403, a "waste of time regarding undisputed issues."

¶21 The trial court therefore erred by precluding Zaid from presenting reputation and opinion evidence of the victim's violent character.

Harmless error

¶22 When a defendant preserves an issue for appeal by objecting to an error at trial, we review the error for whether it is harmless. *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.* "When reviewing whether a trial court's improper preclusion of a defense witness's testimony is harmless, we look to see whether there was other 'overwhelming' evidence of the defendant's guilt, or whether the witness's testimony would have been merely cumulative of other evidence in the case." *State v. Carlos*, 199 Ariz. 273, ¶ 24 (App. 2001) (quoting *State v. Fuller*, 143 Ariz. 571, 574 (1985)). Unless error is harmless, we must reverse the defendant's convictions. *State v. Sanchez-Equihua*, 235 Ariz. 54, ¶ 26 (App. 2014).

¶23 The state argues only that any error in precluding the evidence was harmless "given that the events that transpired in the bar were immaterial to whether Zaid had been justified in fatally shooting [the victim]."[2] But as we have discussed, the victim's reputation for violence was material to the fatal encounter outside the bar, potentially adding credibility to Zaid's testimony that the victim had aggressively confronted him in the parking lot. The state does not argue that the erroneously omitted evidence was cumulative of other evidence on that point, *see Carlos*, 199 Ariz. 273, ¶ 24, and it was not. Nor does the state argue that the evidence was overwhelming, *see id.*, and we cannot conclude that it was. Dark, grainy surveillance video of the bar parking lot, which does not fully show Zaid's truck or the area around it, sheds little light on the fatal

[2]At oral argument, the state contended that Zaid had made a number of incriminating admissions to police, including a denial that he acted in self-defense, thereby rendering any error harmless. However, the statements referred to are subject to interpretation, and arguably may have been more a lament over the circumstances in which Zaid found himself, rather than, as the state suggests, a confession. In any event, as noted above, we generally do not consider arguments raised for the first time at oral argument.

encounter. The case against Zaid therefore largely relied on the testimony of J.R. and R.C., who Zaid alleged were aggressors in the fatal confrontation. We will not weigh the credibility of these two witnesses against Zaid's credibility. *See Adams v. Indus. Comm'n*, 147 Ariz. 418, 420 (App. 1985) ("Credibility is not readily discernible by one who merely reads a cold record."). In sum, we cannot conclude the error was harmless.[3]

Disposition

¶24 Because the trial court erred in precluding Zaid from presenting reputation and opinion evidence of the victim's violent character, and we cannot conclude that the error was harmless, we reverse Zaid's convictions and sentences and remand for a new trial.

[3]Because we vacate Zaid's convictions and sentences and remand for a new trial, we do not consider his other claims on appeal.