IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MOHAMMED ALLEN DAVIS,
Appellant.

No. 2 CA-CR 2014-0435
Filed March 16, 2016

Appeal from the Superior Court in Pima County
No. CR20142319001
The Honorable Richard D. Nichols, Judge

VACATED AND REMANDED IN PART; AFFIRMED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Following a jury trial, Mohammed Davis was convicted of three counts of aggravated harassment. On appeal, Davis argues the trial court abused its discretion by admitting evidence of prior bad acts, denying his motion to sever offenses, and admitting hearsay that did not fall into an enumerated exception, and erred by denying his request for a jury trial to determine the fact of his prior convictions. Because we conclude the court erred by allowing the admission of hearsay, we vacate and remand Davis's conviction on count two, but otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the jury's verdicts. *State v. Ortiz*, 238 Ariz. 329, ¶ 2, 360 P.3d 125, 129 (App. 2015). S.D. and Davis began dating in November 2012, and S.D. became pregnant the next month. The two moved in together the following summer and, shortly thereafter, Davis began physically abusing S.D. In September 2013, S.D. obtained an order of protection against Davis, enforceable for one year, which prohibited any communications from Davis directed at S.D. He was later arrested and convicted of domestic violence against S.D. and remained in jail until May 2014.

¶3 All three of the communications that led to Davis's indictment in this case occurred while he was in jail. In November 2013, S.D. received a voicemail message from someone calling himself "Victor" and purporting to be Davis's cellmate. The caller stated that Davis had asked him to call S.D., tell her Davis loved and missed her, and inform her of Davis's upcoming court appearance. The following month, S.D. received a text message from Davis's sister, at Davis's direction, asking her to come to Davis's upcoming

court appearance. In April 2014, S.D. received another text message from Davis's sister, which contained a photograph of a letter from Davis that S.D. knew was directed at her from its language. She felt threatened and frightened by all three communications from Davis.

¶4 Davis was charged with stalking and three counts of aggravated harassment. The trial court denied his motion to sever the stalking charge from the aggravated harassment charges. On the second day of trial, the court granted Davis's motion for a judgment of acquittal on the stalking charge and the jury found Davis guilty of the three aggravated harassment charges. The court sentenced him to concurrent sentences, the longest of which is five years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Evidence of Prior Physical Abuse

¶5 Davis argues the trial court erred by admitting evidence of his prior physical abuse of S.D. He contends the evidence was not admissible under Rule 404 and any probative value was outweighed by its prejudicial impact. We review a court's ruling on the admission of other act evidence for an abuse of discretion. *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007).

¶6 Generally, "evidence of other bad acts is not admissible to show a defendant's bad character." *State v. Aguilar,* 209 Ariz. 40, ¶ 9, 97 P.3d 865, 867 (2004); Ariz. R. Evid. 404(a). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). When relevant, the victim's state of mind is another permissible purpose for admission. *State v. Connor*, 215 Ariz. 553, ¶¶ 33-34, 161 P.3d 596, 606 (App. 2007). Evidence of prior bad acts offered for a non-propensity purpose "may be admissible under Rule 404(b), subject to [Ariz. R. Evid.] 402's general relevance test, [Ariz. R. Evid.] 403's balancing test, and [Ariz. R. Evid.] 105's requirement for limiting instructions in appropriate circumstances." *State v. Ferrero,* 229 Ariz. 239, ¶ 12, 274 P.3d 509, 512 (2012).

¶7 A person commits aggravated harassment, as relevant here, "if, with intent to harass or with knowledge that the [defendant] is harassing another person, the [defendant] . . . [a]nonymously or otherwise contacts, communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses," while a valid order of protection is in force or if the defendant has been convicted under A.R.S. § 13-3601. A.R.S. §§ 13-2921(A)(1), 2921.01(A). "'[H]arassment' means conduct that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person." § 13-2921(E).

¶8 Davis's three communications through his sister and "Victor" appear to be facially innocuous. "Victor" stated Davis loved and missed S.D. and informed her of an upcoming court date. Davis directed his sister to ask S.D. to attend one of his court hearings. And Davis's letter to S.D., sent through his sister, does not, to the extent we understand it, appear on its face to be threatening. Additionally, S.D. knew that Davis was in jail when she received each of these communications. Evidence of Davis's prior physical abuse of S.D. therefore was relevant to demonstrate why S.D. reasonably felt alarmed, annoyed or harassed by these communications. *See* § 13-2921(A)(1), (E). This is a legitimate non-propensity purpose. *See Connor*, 215 Ariz. 553, ¶¶ 33-34, 161 P.3d at 606.

¶9 Davis contends the reasonableness of S.D.'s feelings could have been established through her "testimony explaining that she felt fearful." But the state was required to show not only that, subjectively, S.D. did feel alarmed, annoyed or harassed, but also that, objectively, a reasonable person would have felt alarmed, annoyed or harassed. § 13-2921(E); *see also State v. Brown*, 207 Ariz. 231, ¶ 10, 85 P.3d 109, 113 (App. 2004). Evidence that Davis had physically abused S.D. was therefore necessary to establish that, objectively, a reasonable person would have felt alarmed, annoyed or harassed upon receiving these seemingly innocuous communications while Davis was housed in jail. And the state "is

entitled to introduce all relevant, probative evidence at its disposal" within the limits of the rules of evidence. *United States v. Burgess*, 576 F.3d 1078, 1099 (10th Cir. 2009); *see also State v. Ramsey*, 211 Ariz. 529, ¶ 33, 124 P.3d 756, 767 (App. 2005) (relevant evidence admissible within bounds of United States Constitution, Arizona Constitution, and rules of evidence); *State v. Hall*, 136 Ariz. 219, 221, 665 P.2d 101, 103 (App. 1983) ("It is axiomatic that the burden is always on the state to prove all of the elements of the crime . . . beyond a reasonable doubt.").

¶10 Even if relevant and offered for a proper purpose, Rule 404(b) evidence must undergo a Rule 403 analysis. *State v. Terrazas,* 189 Ariz. 580, 583, 944 P.2d 1194, 1197 (1997); *see also* Ariz. R. Evid. 403. The trial court here found the admission of this evidence was "not more prejudicial than it [was] probative of the elements of the crime."

¶11 Because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice . . . it has broad discretion in deciding the admissibility" of the evidence. *State v. Harrison,* 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998). We view "the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *Id.*, *quoting State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989).

¶12 Evidence of Davis's prior physical abuse of S.D. likely was harmful and prejudicial, "[b]ut not all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent." *State v. Schurz,* 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott,* 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶13 Entirely apart from the testimony concerning physical abuse, the jury was informed that Davis had been convicted of domestic violence charges stemming from his abuse of S.D. and was in jail at the time of the alleged offenses, and that S.D. was pregnant during her relationship with Davis. And it was instructed to

consider the physical abuse evidence only to determine if S.D.'s feeling of harassment was reasonable.

¶14 In this context, S.D.'s testimony that Davis abused her while she was pregnant was not so unduly prejudicial as to have an "undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *Mott,* 187 Ariz. at 545, 931 P.2d at 1055; *State v. Newell,* 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (we presume jurors follow their instructions). We therefore cannot say the trial court abused its broad discretion in concluding that the probative value of the evidence was not "substantially outweighed by a danger of . . . unfair prejudice."[1] Ariz. R. Evid. 403; *see also Harrison,* 195 Ariz. 28, ¶ 21, 985 P.2d at 518.

¶15 Davis next argues that, even if relevant, the state's presentation of the evidence was "over-the-top[,] . . . gratuitous and unnecessary." *See Coghill,* 216 Ariz. 578, ¶ 19, 169 P.3d at 947 ("In the context of Rule 404(b), Arizona courts have emphasized the importance of the trial court's role in removing unnecessary inflammatory detail from other-act evidence before admitting it."). In particular, Davis objects to S.D.'s testimony that she had a black eye at her baby shower and at the hospital when she delivered her baby; that Davis choked, threw her to the ground, and threatened to kill her while she was pregnant; that S.D. told Davis's sister in a text message that Davis "beat the shit out of [her] when [her] baby was still inside of [her]"; and the state's admission of photographs of S.D.'s injuries.

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[1]Davis argues the admission of this evidence also deprived him of his constitutional rights to due process and a fair trial. He has not developed this argument in any way which would permit meaningful appellate review, thus waiving review of the issue. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). Moreover, because the evidence was properly admitted, his constitutional right to a fair trial was not violated. *See State v. Brito*, 183 Ariz. 535, 537, 905 P.2d 544, 546 (App. 1995) (constitutional right to fair trial "does not guarantee a trial unfettered by all harmful or prejudicial evidence").

¶16 Davis did not, however, object to this evidence below on the grounds that any particular item was unnecessarily inflammatory, single out anything as particularly prejudicial, or request that the evidence be sanitized. He has therefore forfeited review for all but fundamental, prejudicial error. *See State v. Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶17 A trial court may admit inflammatory evidence that is material or relevant, and reversible error occurs only when it is admitted solely to inflame the jury. *State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982). As already stated, this evidence was, by its very nature, prejudicial. But in the context of the other evidence presented, it was not unnecessarily inflammatory and was relevant to establishing the reasonableness of S.D.'s feelings of harassment, particularly in light of the ostensibly non-threatening nature of the communications and Davis's incarceration when they were sent. Davis has not pointed to anything that would indicate the evidence was admitted solely to inflame the jury. Consequently, no error, let alone fundamental error, occurred. *See id.*

¶18 Davis lastly argues "[t]he limiting instruction in this case was vastly inadequate to cure the trial court's error in admitting physical abuse evidence and did nothing to mitigate its unfairly prejudicial effect." The court instructed the jury that the evidence of physical abuse was "admitted only for the limited purpose of determining if any harassment experienced by [S.D.] was reasonable." We presume jurors follow their instruction. *Newell,* 212 Ariz. 389, ¶ 68, 132 P.3d at 847. Other than his conclusory claim that the instruction was inadequate, Davis has not demonstrated how this instruction failed to cure any prejudice or that the jury failed to follow it.

¶19 Davis additionally appears to contend the jury should have been instructed to disregard the evidence entirely because it was "admitted to prove an element for a charge that was ultimately not even at issue." Davis thus appears to rest this argument on the contention that the evidence was admitted solely to prove the stalking charge, on which the trial court granted Davis's motion for a judgment of acquittal. However, as discussed above, this evidence was relevant to the aggravated harassment charge as well, and was

probative to the jury's determination of whether S.D. reasonably felt alarmed, annoyed or harassed. This argument therefore fails.

Severance of the Offenses

¶20 Davis additionally argues the trial court erred by denying his motion to sever the stalking charge and the aggravated harassment charges. He reasons the evidence used to prove the stalking charge—Davis's prior physical abuse of S.D.—would not have been admissible in a separate trial on the aggravated harassment charges and severance was therefore necessary to promote a fair determination of his guilt or innocence. We review a court's ruling on a motion to sever for an abuse of discretion.[2] *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶21 We need not consider whether the trial court erred in denying the motion to sever because Davis cannot show he was prejudiced by the denial of his motion. "When a defendant challenges a denial of severance on appeal, he 'must demonstrate compelling prejudice against which the trial court was unable to protect.'" *State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (2003), *quoting Murray*, 184 Ariz. at 25, 906 P.2d at 558. As discussed above, the evidence of prior physical abuse would have been admissible in a separate trial on the aggravated harassment charges. Thus, Davis's contention that the evidence of prior physical abuse "was admitted only to prove stalking, yet such evidence had a prejudicial effect on [Davis] as to the aggravated harassment counts as well" is incorrect. The court did not abuse its discretion by denying Davis's motion to sever the offenses.

[2]The state contends Davis waived this argument by failing to renew his motion to sever during trial. Ariz. R. Crim. P. 13.4(c). But because the stalking charge was dismissed prior to the close of evidence, seemingly rendering the motion to sever moot, the application of Rule 13.4(c) in these circumstances is unclear. However, because the trial court's denial of the motion was not erroneous, we need not decide this issue.

Inadmissible Hearsay

¶22 Davis next argues the trial court erred by admitting the voicemail message left on S.D.'s cellphone because it was inadmissible hearsay and lacked the requisite foundation for an authorized statement. He argues the voicemail message was not an authorized party statement pursuant to Rule 801(d)(2)(C), Ariz. R. Evid., because "the State never established with evidence that 'Victor' was authorized to make the statement on behalf of [Davis]." We review a court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Bronson*, 204 Ariz. 321, ¶ 14, 63 P.3d 1058, 1061 (App. 2003). "A trial court abuses its discretion when it commits an error of law." *State v. Miller*, 226 Ariz. 202, ¶ 7, 245 P.3d 887, 891 (App. 2010).

¶23 Before trial, Davis moved to preclude the voicemail message from "Victor" stating Davis had asked him to call S.D., tell her Davis loved her, and tell her of his upcoming court date. He argued the voicemail was inadmissible hearsay and the state had not established that Davis had directed "Victor" to relay the message to S.D. The trial court concluded the voicemail was not hearsay, but a party statement by an authorized agent pursuant to Rule 801(d)(2)(C), and the proper foundation could be established with a detective's testimony that he took the recording from S.D.'s cellphone.

¶24 Rule 801(d)(2)(C) provides that a "statement . . . offered against an opposing party and . . . made by a person whom the party authorized to make a statement on the subject" is not hearsay. The party seeking to admit the statement must provide "independent proof of an agency relationship and its scope." *State v. Frustino*, 142 Ariz. 288, 294-95, 689 P.2d 547, 553-54 (App. 1984); *see also Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 425, 909 P.2d 486, 492 (App. 1995) (no evidence third-party authorized or acting as defendant's agent when he relayed defendant's defamatory statement to plaintiff and Rule 801(d)(2)(C) did not apply). "As with all vicarious admissions there must be evidence independent of the statement that the relationship justifying admission of the statement in fact existed." 1 Joseph M. Livermore, Robert Bartels & Anne Holt Hameroff, *Arizona Practice:*

Law of Evidence § 801:6, at 490 (rev. 4th ed. 2008). A court may consider the statement itself when determining if the declarant was authorized, but the statement "does not by itself establish the declarant's authority." Ariz. R. Evid. 801(d)(2).

¶25 Here, the state failed to present any evidence as to whether "Victor" was authorized by Davis to convey the message to S.D. The only evidence provided was that the voicemail came to S.D.'s cellphone and was traced back to an office line at the jail where Davis was being housed. Consequently, the state failed to provide "independent proof of an agency relationship and its scope" aside from the purported agent's statement and it thus did not meet the requirements for an authorized statement by an agent. *Frustino*, 142 Ariz. at 294, 689 P.2d at 553.

¶26 Furthermore, the voicemail was offered to prove the truth of the matter asserted—that Davis directed "Victor" to call S.D. on his behalf. It was therefore hearsay and does not fall under any of the exceptions allowing its admission. Ariz. R. Evid. 801(c), 803, 804. Consequently, the trial court abused its discretion by allowing its admission.[3] *Miller*, 226 Ariz. 202, ¶ 7, 245 P.3d at 891.

¶27 The state, relying on *State v. Garza*, 216 Ariz. 56, ¶ 41, 163 P.3d 1006, 1016 (2007), contends that party statements require no external indicia of reliability, and it was therefore not required to provide any proof that Davis had authorized "Victor" to make the call to S.D. But the court in *Garza* was referring to party statements "made by the party in an individual or representative capacity" pursuant to Rule 801(d)(2)(A), Ariz. R. Evid., *Garza*, 216 Ariz. 56, ¶ 41, 163 P.3d at 1016, and that reasoning is therefore not applicable to the statement by an agent. As noted above, when the state seeks to introduce a statement made by an agent authorized by the party it must provide independent proof the agent was, in fact, authorized by the party to make statements on the subject. *See Frustino*, 142 Ariz. at 294-95, 689 P.2d at 553-54.

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[3]Because we conclude the trial court erred by admitting this evidence, we do not discuss Davis's argument that the evidence additionally violated his Confrontation Clause rights.

¶28 "A trial error is harmless 'if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict' or sentence." *State v. Lizardi*, 234 Ariz. 501, ¶ 19, 323 P.3d 1152, 1157 (App. 2014), *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). The voicemail message was the only evidence supporting count two of the indictment. Consequently, its erroneous admission was not harmless, and we vacate the conviction on count two.

Prior Historical Felony Convictions

¶29 Davis lastly argues the trial court erred by denying his request for a jury trial on his prior historical felony convictions for sentencing purposes. We review de novo whether Davis was entitled to a jury trial on his prior historical felony convictions. *See Ortiz*, 238 Ariz. 329, ¶ 60, 360 P.3d at 138.

¶30 Section 13-703(C), A.R.S., provides that a defendant's sentence shall be subject to a higher sentencing range if he has been convicted of two or more historical prior felonies. Pursuant to *Apprendi v. New Jersey*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000); *see also Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2168 (2013) (jurisprudence on sentencing schemes has consistently "adhered to the rule . . . laid down in *Apprendi*").

¶31 Davis argues the statement in *Apprendi* that prior historical convictions do not require a jury trial was based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which has been "eroded" by subsequent Sixth Amendment jurisprudence. Davis therefore reasons that *Apprendi*'s exception for historical prior convictions is no longer valid and "contrary to the current state of law."

¶32 This argument, however, was expressly rejected by our supreme court in *State v. Ring*, 204 Ariz. 534, ¶ 55, 65 P.3d 915, 936-37 (2003). In *Ring*, the court noted that the "fact" of a prior conviction "does not raise Sixth Amendment concerns" as do other

facts which could enhance a defendant's sentence because "those convictions are themselves products of Sixth Amendment-compliant proceedings." *Id.* ¶ 60. Moreover, it found that no United States Supreme Court case had "expressly overrule[d] or cast[] cognizable doubt on" *Almendarez-Torres*. *Id.* ¶ 61. And because "[o]ur constitutional system requires adherence to the rule of law established in *Almendarez-Torres* unless and until the Court unequivocally disapproves its holding," our supreme court concluded "the Sixth Amendment does not require a jury to find prior convictions beyond a reasonable doubt." *Id.* ¶¶ 61, 63.

¶33 Davis has not cited any legal authority since *Ring* which would cast doubt on its conclusion. Nor has he explained why we should disregard our supreme court's conclusion in *Ring* that *Apprendi*'s finding, based on *Almendarez-Torres*, is still good law. *See State v. McPherson*, 228 Ariz. 557, ¶ 13, 269 P.3d 1181, 1186 (App. 2012) (court of appeals bound by decisions of supreme court). We therefore reject his argument and conclude the trial court did not err by denying his request for a jury trial on his historical prior felony convictions.

Disposition

¶34 For the foregoing reasons, we reverse Davis's conviction for count two and remand for a new trial consistent with this decision, and otherwise affirm Davis's convictions and sentences.