

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL ALEJANDRO CABALLERO,
Appellant.

No. 2 CA-CR 2019-0008
Filed March 18, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20174539001
The Honorable Jeffrey T. Bergin, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

STARING, Presiding Judge:

¶1 Daniel Caballero appeals from his convictions and sentences for aggravated assault with a deadly weapon and unlawful discharge of a firearm within city limits. Caballero challenges the aggravated assault conviction, arguing the trial court improperly excluded certain evidence.¹ We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *See State v. Kellywood*, 246 Ariz. 45, ¶ 2 (App. 2018). In 2017, Caballero was driving when the victim, who was on the phone,² ran in front of Caballero's SUV. Caballero braked, narrowly avoided hitting the victim, and repeatedly yelled, "Do you want to get hit?"

¶3 The two exchanged words, and Caballero got out of his SUV and "start[ed] coming toward" the victim. When he was approximately forty or fifty feet away, Caballero turned and walked back toward his SUV. Caballero got back into his vehicle, and then reversed "at least 150 or more feet" and one of his rear tires came up on the sidewalk, "pinn[ing]" the victim between the SUV and some adjacent bushes. As a result, the victim was near Caballero's passenger door. He sprayed mace in Caballero's face through the open passenger window, and then ran away and hid around a corner. Approximately five seconds later, Caballero fired his revolver twice. At some point thereafter, Caballero drove away.

¶4 After a jury trial, Caballero was convicted as described above and was sentenced to concurrent prison terms, the longest of which is five years. This appeal followed. We have jurisdiction pursuant to article VI,

¹Caballero does not challenge the unlawful discharge conviction on appeal.

²The victim was recording his phone call, and that recording captured audio of the incident.

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§ 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶5 On appeal, Caballero argues the trial court abused its discretion and denied him his right to present a complete defense by precluding evidence that would have impeached the victim's credibility. "We review a trial court's exclusion of evidence for an abuse of discretion, and we review de novo the interpretation of the Rules of Evidence." *State v. Romero*, 239 Ariz. 6, ¶ 11 (2016).

¶6 Before trial, Caballero sought to admit a police report regarding a 2015 altercation between the victim and a motorist at a gas station and a surveillance video that captured that altercation. According to the police report in the 2015 incident, the victim called 9-1-1 to report that he had been struck in the face by a woman at a gas station. He told the responding officer that when he had pulled his car up to the air compressor, a woman was already using it and "wasn't being considerate." He said that when the woman returned the hose to the dispenser, he grabbed it, and she struck him in the face with a closed fist. He then swung at the woman and hit something, but he was not sure if he had struck her. The victim also said the woman kicked his driver's-side door. The officer did not see any marks or redness on his face, but did observe a faint shoeprint on his car door.

¶7 The 2015 surveillance video captured the following: five minutes after the victim parked his car near the air compressor, the woman returned the air hose to the dispenser and, as the hose was retracting, he grabbed it from her hands and walked with it towards his car; the woman then stuck out her foot and tripped him; he stumbled forward, then turned around and shoved the woman into her vehicle. Both the victim and the woman then swung at each other and missed, and the woman kicked his driver's-side door. Although the video lacks audio, it appears to show the two exchanging words after attempting to strike each other. The video then shows the victim standing in front of the woman's vehicle near the license plate while apparently making a phone call.

¶8 Caballero moved to admit the 2015 police report and video pursuant to Rules 404(b) and 608(b), Ariz. R. Evid., and *State v. Fish*, 222 Ariz. 109 (App. 2009). He maintained the video showed the victim's motive and intent to use a disproportionate amount of force in response to insufficient provocation, his motive and intent to lie to police about what happened during his altercation with Caballero, and served to impeach his

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credibility. Caballero argued the evidence of the victim's prior acts was relevant to corroborating his version of events. He also asserted that because the victim's "aggressiveness and lack of credibility are vitally important to support" his justification defense at trial, he should be permitted to introduce the other-act evidence in order to present a complete defense and to confront and cross-examine the victim.

¶9 The trial court disagreed and explained that *Fish*, 222 Ariz. 109, on which Caballero relied, was distinguishable because there, evidence of the victim's prior acts was admitted "in order to substantiate or help prove the defense's position not only on self-defense but also on how specifically the victim [in that case] was approaching at that point," because the only living witness was the defendant and the facts of the prior acts and the current event were "very similar." The court concluded the 2015 incident involving the victim in this case was "a distinct event" occurring at least "two years earlier," ruled that Rule 404(b) applied, and precluded the evidence.

¶10 On appeal, Caballero maintains evidence related to the 2015 incident should have been admitted because evidence of the victim's "false allegations that he was not the initial aggressor" during that incident was relevant to show his motive and intent to lie to police in this case and to impeach his credibility. Specifically, he contends that the trial court erred in finding the 2015 incident was distinct from the present case and argues that "[t]his case falls squarely within the parameters of *Fish*." Caballero also appears to suggest the court's preclusion of the evidence violated his constitutional rights to present a complete defense and confront and cross-examine the victim. While, as noted, we review a court's ruling on the admission of other-act evidence for an abuse of discretion, *State v. Hulsey*, 243 Ariz. 367, ¶ 38 (2018), we review constitutional issues de novo, *State v. Moody*, 208 Ariz. 424, ¶ 62 (2004).

¶11 Rule 404(b) provides that, except for sexual-misconduct cases, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity" with that character, but "may, however, be admissible for other purposes, such as proof of motive, opportunity, [or] intent." This rule applies to other acts of alleged victims. *Fish*, 222 Ariz. 109, ¶ 42. Before admitting evidence of other acts, the court must find by clear and convincing proof that the person committed the act. *State v. Anthony*, 218 Ariz. 439, ¶ 33 (2008) (citing *State v. Terrazas*, 189 Ariz. 580, 582 (1997)). Further, "a proper purpose must be shown under Rule 404(b), it must be relevant under Rule 402, [Ariz. R. Evid.] the probative value of the evidence must not be substantially

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outweighed by its potential prejudicial effect under Rule 403, [Ariz. R. Evid.,] and the court must give a proper limiting instruction if requested under Rule 105[, Ariz. R. Evid.].” *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 12 (2018); *see also Fish*, 222 Ariz. 109, ¶ 43; *State v. Coghill*, 216 Ariz. 578, ¶ 13 (App. 2007).

¶12 When a defendant raises a justification defense, as Caballero did here, he is permitted to introduce evidence that the victim was the initial aggressor, but “he may do so only in limited ways.” *State v. Connor*, 215 Ariz. 553, ¶ 13 (App. 2007). A defendant may offer reputation or opinion evidence that the victim has a character trait of violence or aggressiveness. *See* Ariz. R. Evid. 404(a)(2) (permitting evidence of a pertinent character trait of the victim offered by an accused); Ariz. R. Evid. 405(a) (where evidence of a character trait is admissible such evidence is limited on direct examination to reputation or opinion evidence). And, a defendant may offer evidence of other acts of violence by the victim, but “only if the defendant knew of them . . . or if they are directed toward third persons relating to or growing out of the same transaction, or so proximate in time and place and circumstances as would legitimately reflect upon the conduct or motives of the parties at the time of the affray.” *Connor*, 215 Ariz. 553, ¶ 13 (quoting *State v. Zamora*, 140 Ariz. 338, 341 (App. 1984)). Further, “a defendant may not introduce evidence of specific acts unknown to the defendant at the time of the alleged crime to show that the victim was the initial aggressor.” *Fish*, 222 Ariz. 109, ¶ 35; *see also United States v. Gregg*, 451 F.3d 930, 935 (8th Cir. 2006) (“Evidence of specific instances of a victim’s prior violent conduct for purposes of proving a defendant’s state of mind . . . is only admissible to the extent a defendant establishes knowledge of such prior violent conduct at the time of the conduct underlying the offense charged.”).

¶13 Here, although the trial court did not expressly determine whether the victim’s acts in the 2015 incident were proven by clear and convincing evidence, the state did not dispute that the victim committed the acts depicted in the video. The state did, however, contend “it’s not absolutely clear” that the victim had lied to the police about what happened in the video.

¶14 In addition, the trial court did not specifically note whether the evidence of the victim’s 2015 acts was offered for a proper purpose under Rule 404(b), but concluded Rule “404(b) applies and . . . this is to be precluded at trial.” However, while the evidence was ostensibly offered under Rule 404(b) to show the victim’s motive and intent to use a disproportionate amount of force in response to insufficient provocation,

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“this stated purpose necessarily relates to [Caballero]’s state of mind and as such, to be admissible [Caballero] must have known of the prior specific conduct.” *See Fish*, 222 Ariz. 109, ¶ 45. Because Caballero was not aware of the 2015 incident at the time of the altercation with the victim here, evidence of those specific acts was not admissible for that purpose. And although Caballero asserts that the evidence should have been admitted to show motive and intent to lie to police, that purpose necessarily relates to attacking the victim’s character for truthfulness. *See id.* Therefore, we address that argument in our discussion of Rule 608(b).

¶15 Further, we disagree with Caballero’s assertion that his case “falls squarely within the parameters of *Fish*.” In *Fish*, this court concluded that because of the “nature of the record,” “evidence of specific acts of violence by the Victim when confronted about his dogs [was] relevant to corroborate [Fish’s] description of the events leading up to the shooting,” where Fish claimed he had shot the victim in self-defense. *Id.* ¶¶ 41, 49, 54. There, Fish sought to admit evidence of the victim’s other acts of violence which all involved the victim becoming “irrationally aggressive and threatening . . . [with] a wild look in his eyes” when confronted about his dogs. *Id.* ¶ 9. The facts of those acts were “very similar” to Fish’s description of the victim racing towards him “with his eyes crossed and looking crazy and enraged,” and “swinging his arms” after Fish had been chased by the victim’s dogs and fired his gun into the ground to disperse the dogs. *Id.* ¶¶ 2, 3, 49. Further, there were no other witnesses to the shooting. *Id.* ¶ 49. Based on that record, the victim’s other acts “were highly relevant to the credibility of the self-defense claim.” *Id.* The *Fish* court also made clear that it was addressing a unique set of facts and that its conclusion did “not mean that in any self-defense claim prior acts of a victim unknown to the defendant at the time of the alleged crime are always admissible to corroborate the defendant’s claim.” *Id.*

¶16 In this instance, the similarity between the incidents present in *Fish* does not exist. Additionally, unlike in *Fish*, there was another witness to the shooting, who testified that she had seen Caballero yell at the victim and quickly back his SUV towards him. She also testified that she had seen the victim mace Caballero and Caballero exit his SUV and aim and fire at the victim, who was running away. Moreover, to the extent the 2015 incident could be viewed as having some relevance in terms of corroborating Caballero’s version of events, the trial court could have reasonably concluded that any such relevance was substantially outweighed by the danger of unfair prejudice. *See Ariz. R. Evid.* 403. On this record, the court did not abuse its discretion in precluding evidence of the 2015 incident. *See Hulsey*, 243 Ariz. 367, ¶ 38.

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¶17 To the extent Caballero asserts the preclusion of this evidence violated his constitutional rights to present a complete defense and to confront and cross-examine his accuser, we disagree. The right to present evidence in support of a complete defense is not absolute; rather, the “right to present evidence in one’s defense is limited to evidence which is relevant and not unduly prejudicial.” *State v. Oliver*, 158 Ariz. 22, 30 (1988). Because the trial court properly excluded the evidence of the victim’s prior acts under Rule 404(b), we cannot say Caballero’s constitutional rights were violated. *See State v. Davis*, 205 Ariz. 174, ¶ 33 (App. 2002) (“[A] defendant’s constitutional rights are not violated where, as here, evidence has been properly excluded.”).

¶18 Finally, Caballero argues the other-act evidence should have been admitted under Rule 404(b) to show the victim’s motive and intent to lie to police about his interaction with Caballero and to impeach the victim pursuant to Rule 608(b). As noted, the trial court excluded the evidence pursuant to Rule 404(b); it did not address whether the evidence was admissible under Rule 608(b). Under Rule 608(b), “extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack . . . the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness.” Thus, under Rule 608(b), Caballero may have been permitted to inquire about the 2015 incident. But, because Rule 608(b) plainly prohibits extrinsic evidence, the police report and surveillance video were inadmissible to show the victim’s motive and intent to lie and to impeach his credibility.

Disposition

¶19 For the foregoing reasons, we affirm Caballero’s convictions and sentences.