IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DARLENE RUSHTON,
Appellant.

No. 2 CA-CR 2022-0093
Filed March 9, 2023

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR202001833
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

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Alice M. Jones, Deputy Solicitor General/Section Chief of Criminal Appeals
By Kevin M. Morrow, Assistant Attorney General, Phoenix
Counsel for Appellee

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MEMORANDUM DECISION

Judge Kelly authored the decision of the Court, in which Presiding Judge Brearcliffe and Judge Eckerstrom concurred.

K E L L Y, Judge:

¶1 Darlene Rushton appeals from her conviction for one count of aggravated assault. On appeal, Rushton contends the trial court committed fundamental error by admitting evidence of arguments she had with the victim before the offense. She also contends the prosecutor's statements in closing argument constituted fundamental error. Because we find no fundamental error, we affirm Rushton's conviction and sentence.

Factual and Procedural Background

¶2 We review the facts in the light most favorable to upholding the conviction. *State v. Robles*, 213 Ariz. 268, ¶ 2 (App. 2006). J.S., the victim, allowed Rushton to stay in one of the bedrooms of his home in Gold Canyon, Arizona, in July of 2020. Shortly thereafter, J.S. asked her to leave his home on multiple occasions. When asked to leave, Rushton would become upset, "stay[] upset," and go into "rages" that included slamming the door to the bedroom she was occupying, which prompted J.S. to remove its doorknob.

¶3 A few days later, J.S. told Rushton to leave the home because she had destroyed property, including framed pictures and a television. J.S. packed and removed some of Rushton's belongings from the home. Upon re-entering his home that day, J.S. went to the master bedroom and found Rushton on the bed, with a previously standing mirror laying on the floor. Fearing Rushton would break the mirror, J.S. told her to "stop it," and turned to pick up the mirror, at which time Rushton shot him in the neck.

¶4 Responding to a "9-1-1 hang up" call, law enforcement arrived to find Rushton in a "confused" state and J.S. bleeding on the bedroom floor. After asking Rushton to get up from where she had been lying on the bed, deputies found a nine-shot revolver beneath her. The weapon contained eight unfired cartridges and one fired casing. J.S. survived the shooting, but lost a kidney and sustained injuries to his vocal cords and hearing.

¶5 Rushton was charged with one count of aggravated assault on J.S., by intentionally, knowingly, or recklessly causing physical injury while using a deadly weapon or dangerous instrument, a class three dangerous felony pursuant to A.R.S. §§ 13-1203 and 13-1204(A)(2). After a jury trial, Rushton was convicted as charged and sentenced to the presumptive prison term of 7.5 years. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Evidence of Prior Arguments Between Rushton and J.S.

¶6 Rushton contends the trial court committed fundamental error by admitting J.S.'s testimony about their previous arguments. Rushton argues, "These statements by J.S., especially 'she stays upset,' 'she goes into rages' and continuously slammed the door . . . requiring the doorknob to be removed, are evidence of prior bad acts demonstrating Rushton's propensity to commit the charged offense."

¶7 Because Rushton raises this argument for the first time on appeal, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). To establish fundamental error, Rushton must show error that went to the foundation of the case, that took from her a right essential to her defense, or that was so egregious that she could not possibly have received a fair trial. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If fundamental error is established under one of the first two factors, this court must also conduct a "fact-intensive inquiry" to determine whether prejudice also occurred. *Id.* (quoting *Henderson*, 210 Ariz. 561, ¶ 26). The error has caused prejudice if, "absent error, a reasonable jury could have reached a different result." *State v. Martin*, 225 Ariz. 162, ¶ 14 (App. 2010). The defendant bears the burden of showing both fundamental error and prejudice. *Henderson*, 210 Ariz. 561, ¶¶ 19-20.

¶8 Generally, "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)(1). Yet, such evidence may be admissible for other purposes, including to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b)(2). When "evidence is offered for a non-propensity purpose, it may be admissible under Rule 404(b), subject to Rule 402's general relevance test, Rule 403's balancing test, and Rule 105's requirement for limiting instructions in appropriate circumstances." *State v. Ferrero*, 229 Ariz. 239, ¶ 12 (2012) (citing Ariz. R. Evid. 402, 403, 105).

¶9 Evidence of prior threats, violence, arguments, or other difficulties involving the same victim may be relevant and admissible to prove motive or intent when a defendant is charged with a violent crime. *State v. Hardy*, 230 Ariz. 281, ¶ 38 (2012), *abrogated on other grounds by Cruz v. Arizona*, 598 U.S. ___, n.1 (2023). Here, Rushton was charged with shooting J.S. in the neck after he told her to leave his home. Therefore, evidence that Rushton became angry and destroyed property when J.S. previously asked her to leave his home was admissible to prove her motive and intent on the date of the offense, and the trial court did not err, fundamentally or otherwise, by admitting it. *Escalante*, 245 Ariz. 135, ¶ 21.

¶10 Even if evidence of Rushton's prior arguments with J.S. were inadmissible under Rule 404(b), Rushton opened the door to their admission in opening statements. The state did not refer to any prior arguments between Rushton and J.S. in its opening statement. The prosecutor told the jury only of events that occurred the day of the shooting, which Rushton concedes was admissible evidence.

¶11 Rushton raised the events surrounding their prior arguments by mentioning the issue of the missing doorknob first in her opening statement. She told the jury, "You'll also see that there's a doorknob that will be—that formerly was on the door and is now in a room, a different room with the doorknob with a screwdriver." J.S. then testified about his prior arguments with Rushton, which prompted him to remove the doorknob, and Rushton did not object.

¶12 Opening statements are not evidence, but a party's opening statement may open the door to the admission of other-act evidence because "[t]he object of an opening statement is to apprise the jury of what the party expects to prove and prepare the jurors' minds for the evidence which is to be heard." *State v. Mincey*, 130 Ariz. 389, 405 (1981) (alteration in *Mincey*) (quoting *State v. Prewitt*, 104 Ariz. 326, 333 (1969)). Because jurors "ha[ve] the right to consider counsel's opening statement," the opposing party is permitted to present evidence to address it. *Id.* (quoting *State v. Adams*, 1 Ariz. App. 153, 155 (1965)).

¶13 Additionally, even if Rushton had shown fundamental error, overwhelming evidence of her guilt belies any claim of prejudice. *See Martin*, 225 Ariz. 162, ¶ 15 (no prejudice shown because other evidence supported defendant's conviction). Given the evidence presented at trial of the shooting itself and the events immediately preceding it, we conclude that a reasonable jury would have reached the same result even if no testimony regarding prior arguments had been presented. *Id.*

Prosecutor's Comments in Closing Argument

¶14 Rushton also contends on appeal that the state's rebuttal closing argument amounted to fundamental error. Rushton claims that a comment by the prosecutor "called attention to her failure to testify and warrants a new trial." Because Rushton did not object to this at trial, we review only for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19.

¶15 In her closing argument, Rushton emphasized the lack of any DNA, fingerprint, or gunshot residue tests presented by the state during the trial:

> Everything the State presented to you is based upon his word. There's no gunshot residue test. No fingerprint tests. There's no test of any kind. And there's—as the State just said, corroboration. They said everything is based on corroboration.
>
> What is the corroboration? Is a test a corroboration? That would verify what he said is true. If he said s[h]e shot him and learned fingerprints are on the gun and her DNA on the gun, that would be corroboration. But [J.S.] said she shot him and there's no fingerprints and there's no DNA. What does that tell you?
>
> Let's go a step further.
>
> What if [J.S.]'s DNA is on the gun? What if [J.S.]'s fingerprints are on the gun? Then you can make a huge mistake.

In rebuttal, the prosecutor said:

> Defense counsel talked a lot about testing. No testing. Again, he wants you to ignore everything that was said yesterday and testing. We want testing. It's absolutely the State's burden to prove this case to you beyond [a] reasonable doubt.
>
> Well, guess what? They can put on evidence, too. They have that ability. It's our

> burden, but they can do that. Nothing's prohibiting them from doing that. If they want testing so bad, they had a chance.

¶16 In a criminal trial, the state is required "to prove every element of a charged crime beyond a reasonable doubt." *State v. Johnson*, 247 Ariz. 166, ¶ 149 (2019). Therefore, the state "improperly shifts the burden when it implies a duty upon the defendant to prove his innocence or the negation of an element, and otherwise errs when it comments upon the failure of a defendant to testify or present a defense." *Id.* (citations omitted).

¶17 However, a prosecutor's comment on a defendant's failure to present exculpatory evidence to support his theory of the case is proper and does not shift the burden of proof, so long as the comment is not directed at the defendant's choice not to testify. *State v. Riley*, 248 Ariz. 154, ¶ 53 (2020); *State v. Sarullo*, 219 Ariz. 431, ¶ 24 (App. 2008). "Whether a prosecutor's comment is improper depends upon the context in which it was made and whether the jury would naturally and necessarily perceive it to be a comment on the defendant's failure to testify." *State v. Rutledge*, 205 Ariz. 7, ¶ 33 (2003).

¶18 Here, the prosecutor's comments were made in response to Rushton's arguments about the lack of forensic testing. The prosecutor emphasized the State's burden of proof, did not refer to Rushton at all, and merely stated that either party could have presented evidence of forensic testing. Taken in context, these comments did not shift the burden to Rushton because they did not imply a duty upon her to prove her innocence or negate an element of the offense. *See Johnson*, 247 Ariz. 166, ¶ 149. This was not fundamental error.

Disposition

¶19 We affirm Rushton's conviction and sentence.