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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID RENE GARCIA, Appellant.	2 CA-CR 2008-0054 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044702

Honorable Christopher C. Browning, Judge

REVERSED AND REMANDED

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E S P I N O S A, Presiding Judge.

¶1 After a jury trial, David Garcia was convicted of second-degree murder and sentenced to a presumptive term of sixteen years' imprisonment. On appeal, he argues the trial court wrongfully admitted evidence and incorrectly instructed the jury on the law. Finding that improper and prejudicial evidence was presented to the jury, we vacate his conviction and sentence and remand for a new trial.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction. *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In December 2004, Garcia met his friend, R., at a Tucson bar, where they drank alcoholic beverages and socialized with other patrons, including A. When the bar closed for the night, Garcia invited R. and A. back to his apartment to continue "partying," by consuming more alcohol as well as marijuana and cocaine. Garcia, a firearms collector, gave his guests a tour of his home, displaying his gun collection and tucking one of his guns into the waistband of his pants. Apparently, an argument ensued between Garcia and A., which continued for over an hour.[1] The altercation escalated and became physical, and a metal coat rack was overturned. At trial, R. testified that during the fight, A. threatened to take Garcia's gun and kill both R. and

[1]The details of this night are somewhat unclear because R., who admitted he had consumed marijuana and cocaine with the other two men, was the only witness who testified about the actual shooting and the state impeached his testimony. Before trial, R. told police officers he had not witnessed the events about which he later testified. The prosecutor and defense counsel both noted the conflicts between R.'s testimony and his pretrial statement, asking the jury to draw different inferences from R.'s changing story.

Garcia with it. He further testified that during the physical confrontation, Garcia struggled to separate himself from A. at which point Garcia drew his gun and shot A. several times, in quick succession. The evidence showed Garcia fired eleven shots, hitting A. ten times.

¶3 After the shooting, Garcia told R. to leave. Garcia then also left the apartment and encountered two of his neighbors. He gave one neighbor his cell phone and the other his wallet and asked them to call the police. When police officers arrived, Garcia was cooperative and accompanied them to the police station, where he gave a statement. Garcia was later indicted on one count of first-degree murder and ultimately convicted of second-degree murder. He was sentenced as outlined above and this appeal followed.

Discussion

Admission of Evidence

¶4 Garcia contends the trial court erred in admitting photographs of his apartment, which depicted a number of posters and a t-shirt from the movie *Scarface* (the *Scarface* evidence). Over Garcia's objections that these materials were both prejudicial and irrelevant, the trial court admitted them, accepting the state's argument that "a house full of posters involving a gangster lifestyle where disputes are settled with the use of weapons . . . [was relevant to show] whether he was acting out or whether he was acting in self-defense."

¶5 During his closing argument, the prosecutor focused the jury's attention on the *Scarface* evidence, saying,

> Take a look at the photographs. You'll get a feel, a very strong feel for the defendant. . . . I mean, this is—this is who the

> defendant is. He's Tony Montano, *Scarface* on cocaine with the weapons. These are all through his house.
>
> You look at the photographs and count how many pictures of Tony Montano *Scarface* he's got hanging on the wall in that place . . . .

Again, on rebuttal, the prosecutor discussed the *Scarface* evidence.

> Look at all the photographs of . . . Al Pacino with the machine guns . . . . That speaks volumes as to who this guy is. He doesn't have art hanging up there. He's got Tony Montano snorting cocaine on his walls. That's the guy he is.
>
> . . . .
>
> You don't need motive, but like you will not disrespect me in my house, F you, here you go. . . . He's all ramped up. He's all pumped up. Even the table has *Godfather* books, *Godfather* books. What's a Godfather? What's Tony Montano in these movies all about? You mess with me, I will kill you.

¶6 On appeal, Garcia argues this evidence was both irrelevant and also improperly used as character evidence. We review the admission of evidence and determination of relevancy for an abuse of discretion, *State v. Montano*, 204 Ariz. 413, ¶ 55, 65 P.3d 61, 73 (2003), and will not reverse on this basis unless "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297, n.18, 660 P.2d 1208, 1224 n.18 (1983). Generally, "[a]ll relevant evidence is admissible." Ariz. R. Evid. 402. And evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401.

But "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Ariz. R. Evid. 404(a). When a defendant asserts the defense of self defense, he or she may offer character evidence portraying the victim as violent or aggressive. Ariz. R. Evid. 404(a)(2). "[T]he prosecution may rebut this by proof of the victim's good character . . . [but] the Rule does not allow proof that the defendant had an identical, aggressive, assaultive character." 1 Joseph M. Livermore et al., *Arizona Law of Evidence* § 404.1, at 142-43 (rev. 4th ed. 2008).

¶7 Here, the state presented the character evidence ostensibly to show Garcia's state of mind. Our supreme court found the trial court had erred by admitting similar evidence on this basis in *State v. Rankovich*, 159 Ariz. 116, 120, 765 P.2d 518, 522 (1988). There, the defendant, like Garcia, argued he had killed a victim in self defense. In rebuttal, the state elicited testimony depicting the defendant as a self-described "gun nut" who "hate[ed] all Americans," arguing this evidence "establish[ed] [his] state of mind on the night of the killing" and showed he was "an angry, violent man, and that he was not motivated by self-defense." *Id*. The court rejected this rationale, declaring the state's use of this evidence "contrary to both the spirit and plain meaning of Rule 404(a)," and adding, "[t]he State may not introduce evidence of a person's violent nature in order to establish that he committed a violent crime." *Id*.

¶8 The case before us is even more compelling. Unlike in *Rankovich*, where the prosecutor elicited inadmissible testimony, the prosecutor here did not merely imply or allow the jury to infer Garcia was a violent person. Instead, he unequivocally and repeatedly argued the posters and memorabilia indicated "who [he] is," and that "[h]e's Tony Montano,'Scarface' on cocaine with the weapons." After emphasizing that Garcia was the character depicted, the prosecutor went on to define what it means to be Tony Montano, saying being Tony Montano is "all about . . . [y]ou mess with me, I will kill you." Thus, based only on some memorabilia in Garcia's apartment, the prosecutor ascribed to him the character of a fictional gangster and then argued Garcia acted in conformity with this character.[2] This was improper. *See State v. Hughes*, 189 Ariz. 62, 72, 938 P.2d 457, 467 (1997) (prosecutor's closing arguments made clear his desire for jury to focus on defendant's character); *Rankovich*, 159 Ariz. at 120, 765 P.2d at 522 (defendant's anger and anti-Americanism improper character evidence).

¶9 In its answering brief, the state concedes "[a]rguably, the movie posters found in [Garcia]'s apartment, without more, were not probative of his state of mind," but insists any error in admitting the evidence was harmless "because the evidence showed that [Garcia]

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[2]We note that on the rare occasions when character evidence is admissible, "proof may be made by testimony as to reputation or by testimony in the form of an opinion" and the proffered character trait may be rebutted with specific instances of conduct. Ariz. R. Evid. 405(a) (character evidence may be rebutted with specific instances of conduct). The evidence presented in Garcia's trial was neither opinion nor reports of specific instances of conduct, but merely photographs taken in his apartment.

did not kill [A.] in self defense." Error is harmless if we can say "beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶10 The state points to evidence Garcia did not act in self defense, including the number of shots he fired and R.'s testimony that A. fell to the ground after the first shot. It also contends, without citation to authority, that because the bulk of the prosecutor's closing argument "directed the jurors to a proper consideration of the evidence" and because the jury acquitted Garcia of first-degree murder and submitted insightful questions to the judge during deliberation, the *Scarface* evidence had no effect on the verdict. The state's position appears to be that any error in admitting this evidence was necessarily harmless because no reasonable jury would have acquitted Garcia on the basis of self defense and this jury was apparently a thoughtful one. But that argument misses the point. Even were we to agree that a self-defense justification was unavailable to Garcia, the error in admitting the *Scarface* evidence would still not be harmless if it contributed to the jury finding him guilty of the greater crime of second-degree murder rather than the lesser crime of manslaughter.

¶11 Although the quantum of evidence of a defendant's guilt is relevant to a harmless error analysis, *see Bible*, 175 Ariz. at 588-89, 858 P.2d at 1191-92, we do not assume error is harmless merely because there was properly admitted evidence of guilt. *See State v. Clark*, 181 Ariz. 42, 44, 887 P.2d 572, 574 (App. 1994) (error resulting from wrongfully admitted evidence not harmless even though court would have upheld verdict had

defendant challenged sufficiency of evidence). When a case is close, it becomes more difficult to determine whether improperly admitted evidence contributed to the outcome of the trial. *Id*. Here, the evidence against Garcia was far from overwhelming. R., the only eyewitness who testified about the shooting was impeached with a prior inconsistent statement. R. testified that A. had provoked the physical altercation and had threatened to kill both Garcia and R. He further testified that Garcia had been able to extract himself from the fight only briefly before he fired his weapon several times in quick succession. *Cf. Rankovich*, 159 Ariz. at 120, 765 P.2d at 522 (evidence of guilt overwhelming when two witnesses testified fight ceased, defendant paused and smirked before drawing weapon, and paused discernibly between first and second shots). Furthermore, Garcia presented evidence of A.'s violent tendencies as well as his own reputation for peacefulness.

¶12 The jury's questions during deliberations and eventual verdict also serve to undercut the state's assertion that the improperly admitted character evidence had no effect on its decision. The jury acquitted Garcia of first-degree murder, necessarily rejecting part of the state's theory of the case. It also submitted two questions about the legal effect of a fight between a victim and a perpetrator. In light of R.'s impeachment and indications the jury was significantly focused on the altercation between Garcia and A., we cannot say the prosecutor's reliance on the *Scarface* evidence did not color the jury's perceptions in

evaluating Garcia's role and culpability in the fight with A. leading to his death.[3] We therefore find Garcia entitled to a new trial without the improper and prejudicial *Scarface* evidence.

Jury Instructions

¶13 Garcia also contends the trial court erred by incorrectly instructing the jury on the definitions of manslaughter and second-degree murder and in instructing it as directed by our supreme court in *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996). Although we are remanding this case for a new trial on the charge of second-degree murder based on the erroneously admitted evidence, we nevertheless address this issue because it is one that is likely to recur.[4] *See State v. May*, 210 Ariz. 452, ¶ 1, 112 P.3d 39, 40 (App. 2005).

¶14 The jury was instructed that to find Garcia guilty of second-degree murder, the state had to prove he "intentionally caused the death of another person" or that he "caused the death of another person by conduct which he knew would cause death." The court then instructed the jury on the crime of manslaughter as follows:

> The crime of manslaughter requires proof of the following three things:

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[3]We note that several of the victim's family members spoke at Garcia's sentencing, characterizing him as "this guy that watched too many movies, wanted to play the act of a mafioso," and saying, "I mean, just from the decor of his home and the arsenal he had, he was a ticking time bomb," which further illustrates the impact of the prosecutor's improper argument.

[4]However, we do not address Garcia's third argument regarding the admission of evidence of the victim's blood alcohol concentration because this issue will not necessarily recur at a new trial.

> 1. The defendant intentionally killed another person; or, the defendant caused the death of another person by conduct which he knew would cause death or serious injury; and,
>
> 2. The defendant acted upon a sudden quarrel or heat of passion; and,
>
> 3. The sudden quarrel or heat of passion resulted from adequate provocation by the person who was killed.

The court further instructed the jury, consistent with our supreme court's directive in *LeBlanc*, that if it found Garcia "not guilty of the more serious offense or if [it] c[ould not] agree after a full and careful consideration of the evidence whether or not [Garcia was] guilty of the more serious crime, then [it] should consider the less serious crime." Garcia does not dispute that the second-degree murder and manslaughter instructions reflect the language of the relevant statutes, *see* A.R.S. §§ 13-1103(A)(2);13-1104(A), or that the court followed *LeBlanc*. Rather, he insists the interplay between these instructions creates an erroneous instruction on the law.

¶15 Although Garcia frames this issue as one revolving around the *LeBlanc* instruction, the crux of his argument appears to be his belief that the statutory distinctions between manslaughter and second-degree murder require a different instruction to correctly state the law. As he correctly points out, unlike the usual relationship between a lesser and greater offense, the lesser offense of sudden-quarrel or heat-of-passion manslaughter requires proof of "a different circumstance" than second-degree murder. *Peak v. Acuna*, 203 Ariz. 83, ¶ 6, 50 P.3d 833, 834-35 (2002) (noting unusual relationship between second-degree

murder and heat-of-passion or sudden-quarrel manslaughter); *see also* §§ 13-1103(A)(2); 13-1104(A). Thus, he maintains, as he did below, the state bore the burden of proving there was no sudden quarrel or adequate provocation in order for the jury to find him guilty of second-degree murder and the trial court's failure to so instruct the jury upon his request was error.[5] We review jury instructions de novo, reading them as a whole to ensure they enabled the jury to reach a legally correct decision. *State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d 662, 665 (2005).

¶16 In arguing that the instructions were unclear, Garcia makes much of the jury's questions to the trial court during its deliberations. The jury asked whether the state was required to prove the absence of a sudden quarrel or heat of passion before the jury could find Garcia guilty of second-degree murder. The jury also commented that manslaughter appeared to require "more" proof than second-degree murder. But the jury's apparent ability to comprehend the nuances of these statutes and what Garcia infers to be its "confusion" about the statutory scheme is irrelevant to the question of whether the instructions correctly stated the law. As we noted above, and as Garcia concedes, the trial court instructed the jury in accordance with the statutes. The trial court had no authority to rewrite the law to

[5]Although the decision to give or refuse to give requested instructions is reviewed for an abuse of discretion, *see State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d 662, 665 (2005), we review de novo the trial court's rejection of this particular instruction because Garcia claims the trial court thereby misstated the law. *See id*. (whether instructions correctly state law reviewed de novo).

accommodate Garcia's requested instruction, nor is it the province of this court to do so. *See State v. Gonzalez*, 216 Ariz. 11, ¶ 9, 162 P.3d 650, 653 (App. 2007).[6]

¶17 Finding the trial court properly rejected Garcia's requested jury instruction, we turn to his argument that it was error to instruct the jury in accordance with *LeBlanc* in this case. Garcia points out that because *LeBlanc* instructs that a jury must consider greater crimes before lesser ones, *id.* at 438, 924 P.2d at 442, the jury must deliberate on second-degree murder before it considers manslaughter. He maintains this creates error because second-degree murder and sudden-quarrel or heat-of-passion manslaughter share identical elements, but because the lesser crime requires proof of more elements than the greater, a jury could never reach a guilty verdict for the lesser offense of manslaughter when second-degree murder is also charged.

¶18 We recently addressed a similar argument in *State v. Garcia*, 220 Ariz. 49, 202 P.3d 514 (App. 2008).[7] In that case, the jury received the *LeBlanc* instruction as well as instructions on second-degree murder and manslaughter. *Id.* ¶¶ 2-3. Because the defendant there had not objected in the trial court, our review was limited to one for fundamental error and we found none. *Id.* ¶¶ 2, 8. We stated nothing in the record supported the defendant's contention that the instructions had confused the jury or that it had not considered the charge

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[6]Accordingly, we also reject Garcia's policy-based arguments on this issue because the statutes are clear. *See State v. Streck*, 221 Ariz. 306, ¶ 7, 211 P.3d 1290, 1291 (App. 2009) ("[w]hen we interpret a statute, our analysis begins and ends with its plain language if it is unambiguous").

[7]This case is unrelated to the present one.

of manslaughter as well as the charge of second-degree murder. *Id*. ¶ 7. Here, as Garcia correctly points out, he raised the issue in the trial court, therefore our review is not limited to fundamental error. He maintains that, unlike in *Garcia*, there is evidence—the jury's questions during its deliberations—that the jury was clearly troubled and confused by the relationship between second-degree murder and manslaughter and the instructions related to the two offenses.[8]

¶19 But the jury's astute questions actually undercut Garcia's claim that the *LeBlanc* instruction prevented the jury from deliberating on the charge of manslaughter. Rather, the jury's questions demonstrate it was well aware a different factor had to be proven to find Garcia guilty of manslaughter and had properly heeded the trial court's admonition

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[8]On the second day of deliberations, the jury submitted the following questions to the trial court:

> To convict the defendant of [second-]degree murder, does the State have to prove that there was no sudden quarrel or heat of passion and, the sudden quarrel or heat of passion resulted from adequate provocation by the person who was killed—items included in the lesser charge of manslaughter?
>
> It appears that more proof is required for manslaughter than second[-]degree murder?

After the trial court gave the jury supplemental instructions, the jury asked:

> Can the jury consider a finding of second[-]degree murder if we're unable to determine beyond a reasonable doubt whether the victim or defendant provoked any sudden quarrel or heat of passion or if there was even the circumstance of "adequate provocation" present during the time leading up to the shooting?

to consider all the instructions. Because the jury's questions show it considered both manslaughter and second-degree murder, we reject Garcia's argument that the jury was confused. Consequently, we need not consider Garcia's claim that the jury could not find him guilty of manslaughter rather than second-degree murder, nor need we decide if sudden-quarrel manslaughter is truly a lesser-included offense of second-degree murder.[9] As in *Garcia*, we follow the logic of his argument, 220 Ariz. 49, ¶ 7, 202 P.3d at 516, but see no reason to act on it. Nor is it our prerogative to overrule our supreme court, *see State v. Foster*, 199 Ariz. 39, n.1, 13 P.3d 781, 783 n.1 (App. 2000). We therefore conclude the trial court did not err by confining its instructions on second-degree murder and manslaughter to

[9]Contrary to Garcia's assertions, even were we to agree that sudden-quarrel manslaughter is not a lesser-included offense of second-degree murder, we are not convinced *LeBlanc* would necessarily be inapplicable. *LeBlanc* instructs, "the jury may deliberate on a lesser offense if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge." 186 Ariz. at 438, 924 P.2d at 442. Even if in Arizona manslaughter was not considered a lesser-included offense of second-degree murder, but rather a lesser, but non-included offense, *see Walker v. People*, 932 P.2d 303, 308 (Colo. 1997) (holding heat-of-passion manslaughter is lesser non-included offense of second-degree murder), *LeBlanc* was not concerned with the technical requirements of lesser-included offense jurisprudence, but the jury's ability to consider and reach an appropriate verdict if it could not agree on the more serious offense charged. 186 Ariz. at 438-39, 924 P.2d at 442-43. And, in *Peak*, our supreme court specifically referred to manslaughter as a "lesser offense" of second-degree murder which tends to cut against Garcia's assertion that in this context, there is a meaningful difference between a "lesser included offense" and a "lesser offense." 203 Ariz. 83, ¶ 6, 50 P.3d at 834. For these reasons, and because we reject Garcia's argument that the *LeBlanc* instructions prevented the jury from considering his culpability as to manslaughter, we also decline his invitation to revisit *LeBlanc*'s reliance on *State v. Wussler*, 139 Ariz. 428, 679 P.2d 74 (1984), and our own reliance on *LeBlanc* in *Garcia*.

the language of the statute or by giving the instruction prescribed by our supreme court in *LeBlanc*.

Disposition

¶20 Because we cannot say beyond a reasonable doubt Garcia's conviction was not influenced by improperly admitted evidence, we vacate his conviction and sentence and remand to the trial court for a new trial consistent with this decision.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

GARYE L. VÁSQUEZ, Judge