People v. Yusem, R.

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA0930
Adams County District Court No. 05CR1417
Honorable Harlan R. Bockman, Judge
Honorable Edward C. Moss, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Ryan A. Yusem,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by: JUDGE ROMÁN
Webb, J., concurs
Dailey, J., dissents

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: May 15, 2008

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Defendant, Ryan A. Yusem, appeals the judgment of conviction entered upon a jury verdict finding him guilty of menacing, a class five felony. We affirm.

I. Background

At the time of the offense in this case, defendant was a deputy with the Denver Sheriff's Department. On the evening of the offense, an agitated neighbor approached defendant and his former wife, who was a police officer, to alert them that she believed a deal was going to occur between someone in her apartment and drug dealers. She said the dealers would be driving a large black or white sport utility vehicle (SUV). Defendant and his wife had previously informed the neighbor that they had no authority to intervene because they were employed in different jurisdictions. However, the neighbor wanted them to do something about the situation. Defendant stated that he could not intervene, although he later testified that he would have tried to obtain the license plate number of the vehicle if he could.

Some time later, defendant was standing on his third-floor balcony, when he spotted a large white SUV moving through the

parking lot. The SUV would stop directly below defendant in front of the neighbor's apartment on the first floor. The SUV made a series of turns and stops, and defendant began to believe the people inside it were "stalking" him. When the SUV finally drove out of the apartment complex, defendant realized he needed to walk his dogs. He put on his bulletproof vest and placed his service weapon in its holster.

When defendant got to the bottom of the stairs, he saw the SUV again. He proceeded to walk his dogs, but was "spooked" by the actions of the driver of the SUV. Defendant cut through a playground area and lost sight of the SUV. However, when he arrived at a fire lane behind the complex, he noticed a minivan parked a number of yards away. Because someone was leaning into the passenger side window and talking to the occupants, defendant thought a drug deal might be occurring.

Defendant had allowed his dogs to run in the field next to the fire lane when he heard the minivan coming towards him. The evidence at trial was disputed as to how fast the vehicle was traveling. Defendant jumped to the side of the fire lane and

removed his weapon, held up his hand, and yelled at the driver to stop and back up. It was disputed at trial whether defendant pointed his gun at the driver or had it pointed at the ground. The occupants of the minivan were an apartment complex maintenance worker, his wife, and their two-year-old son. The driver backed a long distance away from defendant, who then reholstered his weapon and reported the incident to the police department.

II. Other Act Evidence

Defendant contends the trial court abused its discretion in permitting the apartment complex manager to testify regarding an encounter she had with defendant while he was wearing his weapon. We are not persuaded.

Evidence of other crimes or acts is not admissible to prove the bad character of a person in order to show that he acted in conformity with that character. Nonetheless, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. CRE 404(b); *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990).

Thus, other act evidence may be admissible if: (1) it is offered as relating to a material fact; (2) it is logically relevant by tending to make that material fact more probable; (3) it is probative for some logical reason other than that the defendant committed the crime charged because of his bad character; and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v. Rath*, 44 P.3d 1033, 1038 (Colo. 2002); *Spoto*, 795 P.2d at 1318.

A trial court's decision to admit evidence under CRE 404(b) is reviewed only for an abuse of discretion. *Masters v. People*, 58 P.3d 979, 996 (Colo. 2002). An abuse of discretion occurs if the trial court's ruling is manifestly arbitrary, unreasonable, or unfair. *See People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994).

A. Trial Court's Ruling

The People filed a motion to introduce evidence of another act that occurred approximately nine months prior to the incident in this case. In that incident, defendant went into the apartment complex manager's office. Defendant was wearing plain clothes, but he had his service weapon on his hip, uncovered and in plain view

of the manager. Defendant was angry, agitated, and was yelling at the manager about wanting a new apartment because of water damage in his unit.

At the conclusion of the hearing on the motion, the trial court ruled that the other act was admissible at trial. First, the court concluded the other act involving the manager was relevant to the material fact of whether defendant had knowingly placed the victim in fear of serious bodily injury, a fact of consequence for purposes of the felony menacing charge. Second, the court determined that the other act evidence was logically relevant under "the prosecution's hypothesis of modus operandi or scheme or plan or absence of mistake or accident to use a weapon in such a manner as to place others in fear of serious bodily injury."

In ruling on the third prong of the *Spoto* test, the trial court concluded that the relevance of the evidence was independent of the inference that defendant acted in conformity with a bad character. The court determined that the evidence showed defendant had a particular technique of using his weapon to intimidate or place others in fear. Finally, the court found the probative value of the

other act outweighed the danger of unfair prejudice. Because defendant was claiming that he acted in self-defense, the other act was highly probative of defendant's use of his weapon.

B. CRE 404(b) Analysis

Although we acknowledge that the question is very close, we uphold admission of the evidence by analyzing the *Spoto* factors somewhat differently than did the trial court. *See People v. Cousins*, ___ P.3d ___, ___ (Colo. App. No. 05CA1524, Nov. 15, 2007) (a trial court's decision may be defended on any ground supported by the record, even if that ground was not articulated or considered by the trial court).

First, the evidence of the other act related to the material fact of whether defendant acted in self-defense when he used his weapon to knowingly place the victim in fear of serious bodily injury. *See* §§ 18-1-704(1), 18-3-206(1)(a), C.R.S. 2007.

Second, because defendant raised the issue of self-defense, the evidence was logically relevant to defendant's intent in pulling his weapon out of its holster. *Cf. Spoto*, 795 P.2d at 1319 (evidence of the defendant's previous use of a weapon logically relevant to intent

because it suggested the defendant would display a gun when unnecessary for self-defense).

Third, the logical relevance of the evidence is independent of the intermediate inference that defendant acted in conformity with a bad character. The fact that defendant displayed his weapon when angrily confronting the apartment manager is probative of defendant's reasonable beliefs regarding the use of force. *See Douglas v. People*, 969 P.2d 1201, 1206-07 (Colo. 1998) (question for the jury was whether the defendant used force reasonably necessary to protect himself or whether he acted to menace his victims).

Finally, we must give the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice reasonably to be expected. *Rath*, 44 P.3d at 1043. Defendant testified that he was scared while he was walking his dogs, yet he remained outside while the threatening SUV was driving through the apartment complex. The evidence of the prior act was useful to assist the jury in determining whether defendant believed the degree of force he used was reasonably necessary when

he came across the victim's minivan, which was not the SUV he feared. Any unfair prejudice was plainly outweighed by the probative worth of the evidence.

Therefore, we conclude the trial court properly allowed this evidence to be admitted at trial.

III. Expert Testimony

Defendant contends the trial court denied his constitutional right to present a defense when it limited the testimony of his expert witness. Because defendant's expert wanted to testify about the sheriff department's policies, rather than the standard of the law, we disagree.

A defendant's right to present a defense is not absolute, but requires only that he be permitted to introduce all relevant and admissible evidence. *People v. Harris*, 43 P.3d 221, 227 (Colo. 2002); *People v. Grant*, 174 P.3d 798, 807 (Colo. App. 2007).

Expert testimony is admissible if the expert's specialized knowledge will assist the jury to understand the evidence or to determine a fact in issue. CRE 702; *People v. Shreck*, 22 P.3d 68, 74 (Colo. 2001); *People v. Pahl*, 169 P.3d 169, 182 (Colo. App. 2006).

While admissible expert testimony is not objectionable because it embraces an ultimate issue of fact, *see* CRE 704, "an expert may not usurp the function of the court by expressing an opinion on the applicable law or legal standards." *Id.* at 182.

A trial court has broad discretion to determine the admissibility of expert testimony under CRE 702, and its determination will not be overturned on appeal absent an abuse of that discretion. *Id.*

Here, the trial court determined that defendant's expert, who was a firearms trainer with the Denver Sheriff's Department, could testify regarding the training he gave deputies, including defendant, on the use of firearms. However, the court would not allow the expert to testify whether defendant was justified in drawing his weapon during the incident because the question was one to be determined under Colorado law, not under the policies of the Sheriff's Department.

After the prosecution cross-examined the expert regarding some of the Sheriff's Department regulations, defense counsel asked whether the training required a deputy acting in self-defense to

draw his weapon. The trial court disallowed the question. The court again concluded that the question was governed by Colorado law, not the Sheriff's Department training procedures.

We conclude the trial court properly exercised its discretion.

The jury was required to determine whether defendant reasonably believed the use of his weapon was necessary to defend himself. *See* § 18-1-704(1). It was not required to determine if he acted as a reasonable deputy sheriff. If the expert had been allowed to testify that defendant's use of his weapon was justified under his training, the jury could have accepted his opinion as definitive regarding defendant's state of mind. As the court correctly observed, justification under the sheriff's training was not the standard under the law. *Cf. People v. Wilkerson*, 114 P.3d 874, 877 (Colo. 2005) (observing that the danger that an expert witness could be understood as opining on the defendant's state of mind or vouching for the defendant's account of events is a proper matter for the trial court's exercise of its discretion).

Therefore, we conclude defendant was not denied his constitutional right to present a defense.

The judgment is affirmed.

JUDGE WEBB concurs.

JUDGE DAILEY dissents.

JUDGE DAILEY, dissenting.

I respectfully dissent from part II of the majority's opinion. In my view, the trial court abused its discretion – that is, erred – in admitting, pursuant to CRE 404(b), evidence of an earlier incident in which defendant, while armed with a gun, agitatedly confronted his apartment complex manager about wanting a new apartment unit.

Evidence of other bad acts is inadmissible (1) if its relevance depends only on an inference that the person has a bad character and acted in conformity therewith or (2) if, despite having relevance independent of an inference of bad character, its probative value is substantially outweighed by the danger of unfair prejudice. *See* CRE 404(b), 403; *People v. Rath*, 44 P.3d 1033, 1038 (Colo. 2002); *People v. Cooper*, 104 P.3d 307, 309 (Colo. App. 2004).

Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. CRE 401.

Here, the trial court concluded that the evidence of the earlier incident demonstrated a "pattern of behavior" of "using a firearm in a manner to intimidate" others, which was relevant to show an ongoing plan or scheme or modus operandi or motive, which, in turn, tended to establish the culpable mental state of the crime or refute defendant's claim of self-defense.

A single other incident does not a pattern make. Nor, in my view, was there anything about the other incident which tended to show a plan, scheme, modus operandi, or motive for the charged offense. The prior incident – involving, as it did, defendant wearing a visible firearm, while agitatedly speaking with an apartment manager – tends, at most, to show that defendant was capable of bullying others through the exhibition of his firearm.

Because defendant did not on that occasion touch or overtly threaten to use his firearm or claim that he was defending himself, the prior incident appears relevant to show but one thing, that is, that because defendant bullied someone on an earlier occasion, he most likely bullied the victim on this occasion too. This, in my view,

amounts to the impermissible use of a bad act to prove that defendant later acted in conformity with a bad character trait.

Even if the evidence had some legitimate probative value, that probative value was substantially outweighed by the danger of unfair prejudice.

Under a CRE 403 analysis, we do not assess the probative value of evidence in isolation, but, relative to other evidence in the case. *Rath*, 44 P.3d at 1041. Evidence must be excluded if its "incremental" probative value is outweighed by the danger of unfair prejudice. *Id.*

As used in CRE 403, "unfair prejudice" signifies an "undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror." *Masters v. People*, 58 P.3d 979, 1001 (Colo. 2002)(quoting *People v. Dist. Court*, 785 P.2d 141, 147 (Colo. 1990)).

Here, whatever "incremental" probative value the evidence had was minimal at best. No one disputed that, in the present case, defendant knowingly placed the victim in fear; the issue was,

whether defendant's action was justified by a perceived need to act in self-defense. In my view, the prior incident shed no light on whether defendant acted in self-defense in the present case. Yet, the potential for unfair prejudice to defendant was significant: the effect of the prior incident was to portray defendant as a bully and give the jury a substantial reason, unrelated to the merits of the charged offense, to find him worthy of punishment. *See generally* Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 1:02, at 6 (2006)("uncharged misconduct stigmatizes the defendant and predisposes the jury to find him liable or guilty").

Because, in my view, the other bad act evidence was not logically or, in the alternative, sufficiently legally relevant to a material issue in the case, I would conclude that the trial court abused its discretion in allowing its admission. *See People v. Spoto*, 795 P.2d 1314, 1319 (Colo. 1990)(evidence that defendant had entered former roommate's bedroom and placed unloaded gun against roommate's head was inadmissible in first degree murder case where defendant shot the victim after holding the same gun to the victim's neck).

Further, because this was otherwise a close case, evidence-wise, I believe that a reasonable probability exists that the trial court's error contributed to the defendant's conviction, and thus, was not harmless. *See generally Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000)(describing test for harmlessness of evidentiary error).

For these reasons, I would reverse defendant's conviction and remand for a new trial.