

STATE V. GONZALES

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SAVANNAH D. GONZALES,
Defendant-Appellant.

No. A-1-CA-36682

COURT OF APPEALS OF NEW MEXICO

October 30, 2018

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY, Daniel A. Bryant,
District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Allison H. Jaramillo, Assistant Appellate
Defender, Santa Fe, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: JULIE J. VARGAS, Judge, STEPHEN G.
FRENCH, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Defendant Savannah D. Gonzales appeals her conviction for aggravated battery of a household member, Daniel Lundquist (Victim). We issued a calendar notice

proposing to affirm. Defendant has responded with a memorandum in opposition. Not persuaded, we affirm.

Prior Bad Act Evidence

{2} Defendant continues to challenge the admission of prior bad act evidence. [MIO 3] “We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse.” See *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72.

{3} Here, Defendant had been found guilty of aggravated battery of a household member and she filed a de novo appeal in district court. [RP 3] In the district court trial, Victim testified that Defendant had hit him in the past. [MIO 3; DS 6] Defendant claims that these prior incidents were inadmissible prior bad act evidence. See Rule 11-404(B) NMRA. However, defense counsel signaled in opening statement that they would present evidence of Victim’s prior bad acts, i.e. that he was the aggressor in their prior altercations. [DS 6-7] Consistent with the opening statement, Defendant’s testimony referenced these prior bad acts. [DS 2-3] As a result, the admission of the prior bad acts of Defendant was admissible under Rule 11-404(A)(2)(b). Because Defendant had opened the door on prior bad act evidence, we conclude that the district court acted within its discretion in admitting this evidence irrespective of any claims of prejudice. See Rule 11-403 NMRA. It also follows that no prior notice was required because Defendant was presumed to know that prior bad act evidence would be admissible if she opened the door.

Comment on Right to Silence

{4} Defendant continues to claim that the court erred in admitting testimony on Defendant’s invocation of her right to be silent. [MIO 8] See generally *State v. DeGraff*, 2006-NMSC-011, ¶ 12, 139 N.M. 211, 131 P.3d 61 (discussing comments on silence). Here, Defendant’s brother testified that he picked Defendant up after the incident. [DS 5] Defendant was upset and appeared to have been in a physical confrontation. [DS 5] Defendant’s brother testified that he drove her to the police station, where an officer there did not get Defendant’s side of the story but instead treated her as a guilty party; as a result, he told Defendant not to say anything. [DS 5] Defendant’s docketing statement indicated that the brother’s comments were elicited by the prosecutor, who said “you told her not to speak to [the] officer[.]” [DS 9]

{5} Under these circumstances, the district court could construe the prosecutor’s comments as limited to an attack on the brother’s credibility as a defense witness. See *State v. Rojo*, 1999-NMSC-001, ¶ 55, 126 N.M. 438, 971 P.2d 829 (noting that test is whether prosecutor’s comments were directly aimed at a defendant’s right to remain silent). The brother had stated that he wanted to have the officers take pictures of Defendant’s injuries, because she was the victim. [DS 5] The prosecutor’s question was limited to his statement to his sister, and did not inquire into Defendant’s response. As such, the district court could construe this as limited to the brother’s own credibility.

{6} For the reasons set forth above, we affirm.

{7} **IT IS SO ORDERED.**

MICHAEL E. VIGIL, Judge

WE CONCUR:

JULIE J. VARGAS, Judge

STEPHEN G. FRENCH, Judge