DIVISION ONE
FILED: 08/09/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 10-0860
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
PABLO PENA PEREZ, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-122414-001 DT

The Honorable F. Pendleton Gaines, Judge

REVERSED AND REMANDED

Thomas Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Maricopa County Public Defender — Phoenix
by Terry Reid, Deputy Public Defender
Attorneys for Appellant

H O W E, Judge

¶1 Pablo Pena Perez appeals his convictions and sentences on three counts of child abuse. We vacate and remand for a new

trial because the trial court erroneously admitted other act evidence, and we cannot say beyond a reasonable doubt that it had no effect on the jury's verdict.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Perez. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005). The victim ("the child") was the two-year old daughter of Perla, Perez's girlfriend. The child suffered numerous broken bones, bruises, infections and other serious injuries between October 7, 2007, and January 22, 2008. During that period, Perez, Perla, the child, and Perla's other daughter lived in a one-bedroom house with Perez's mother, his two brothers, and one brother's girlfriend and her daughter.

¶3 The State charged Perez and Perla with five counts of child abuse. Two counts alleged that Perez intentionally or knowingly caused the child physical injury under circumstances likely to produce death or serious physical injury between January 19 and 21, 2008 (Count 1), and between January 12 and 22, 2008 (Count 2), class 2 felonies, in violation of Arizona

Revised Statutes ("A.R.S.") section 13-3623(A)(1) (West 2012).[1] Two counts alleged that he intentionally or knowingly caused the child physical injury or abuse under circumstances other than those likely to produce death or serious physical injury between January 12 and 22, 2008 (Count 3), and between October 7, 2007, and January 22, 2008 (Count 4), class 4 felonies, in violation of A.R.S. § 13–3623(B)(1). The State brought a fifth charge of child abuse against Perla, but later dismissed it and gave her immunity from prosecution because the State "need[ed] her as a witness" against Perez. Perez denied any wrongdoing and claimed that Perla abused the child.

¶4 Before trial, the State moved to admit evidence under Arizona Rule of Evidence ("Rule") 404(b), that Perez had "punched" Perla under her chin on an occasion while they lived together. The State contended that the punch caused a bruise under Perla's chin that matched the bruise found on the child's chin on January 18, 2009.[2] The State explained that Perez's punching Perla on the chin during an argument showed that the child was not injured by accident or mistake and identified Perez as the person who abused the child.

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[1] We cite to the current Westlaw version of applicable statutes when no revisions material to this decision have occurred since the dates of the offenses.

[2] The State also sought to admit evidence that Perez punched out two windows of his former girlfriend's house in 2007, but the State subsequently withdrew its request.

¶5 Perez's counsel objected, arguing that the State presented no evidence that he committed the other act and that

> the only nexus among these allegations is [his] character. In presenting this evidence, the State seeks to prove a violent character. This is strictly prohibited by 404(b). Even if the State were to show these events occurred and the Defendant was the cause of them, it doesn't strengthen the State's allegation of child abuse against the Defendant.

Perez also argued that the risk of prejudice outweighed any probative value under Rule 403.

¶6 At the hearing on the motion, the State argued that the evidence was admissible not only under Rule 404(b) but also under Rule 703 because, "in determining how the bruise was placed or given to [] the child," the child's doctor relied on Perla's statement that the bruise was similar to the bruise Perez inflicted when he punched her. Perez's counsel responded that the evidence was not necessary for the doctor's opinion and would prejudice Perez:

> To sit there and say essentially that the mother got punched so the daughter got punched would not only be highly prejudicial, it would be substantially more prejudicial than the probative value. They don't need that to establish why the doctor saying [sic] it was blunt-force trauma. That's clearly a bad act. And as not even a bad act that it [sic] can even be proven and, again, there is no documentation of, in fact, as the prosecutor already mentioned, Perla was granted——the fact my defense is going to be she is the abuser in this case,

> she is going to be saying he abused her, Perla, so he must have abused the child is really how the argument is going to go.
>
> And, Judge, that is just so inflammatory. That's far more inflammatory than needs to be . . . .

The trial court found that the evidence was admissible under Rule 404(b) to prove lack of mistake and intent. The trial court also noted that because Perez was not contesting that the other evidence was "the type of evidence . . . reasonably relied upon by experts in the field," it was admissible under Rule 703.

¶7 The trial court then weighed the probative value of the evidence against the prejudice under Rule 403, noting that "[t]here is a lot of prejudicial effect for the other act or for the basis [of] the expert's opinion on this." Although the State claimed that any prejudice could be "overcome by the limiting instruction," the trial court had its doubts:

> I think even with the limiting instruction—— I am sure you would, in all honesty, acknowledge there is still a big danger of the jury using this in a way exactly opposite that they are instructed. Limiting instructions are certainly required. It will certainly be required if requested by defense counsel, but they aren't going to cure the prejudice that would attach to evidence that [he] punched mom the week before, left a bruise on her chin, especially given that the defense choice [sic] between mom and dad as an abuser.
>
> . . . .

> The question is . . . who inflicted the blunt-force trauma. Who did these things? Even with a limiting instruction, the evidence . . . is really prejudicial.
>
> . . . .
>
> I am sorry, unfairly prejudicial. Danger of it being unfair prejudice. The jury using it for the wrong purpose. The jury, even in the presence of an instruction jumping from if he punched her and he is alleged to have punched the baby, we believe that he probably is the abuser when having to choose between the two of them. That is the danger.

Nevertheless, the trial court admitted the evidence, finding that its probative value "substantially outweigh[ed] any danger of unfair prejudice . . . but not by a lot." The court stated that it was "a close call."

¶8 Throughout the trial that ensued, the State repeatedly referred to the evidence that Perez punched Perla. In opening remarks, the prosecutor told the jury that it would hear evidence that Perez was the "aggressive one" and that he "admits that because he punched . . . Perla . . . he would do that to her daughter." At trial, Perla testified that she suspected that Perez abused the child because the bruise on the child's chin looked like the one Perez gave her when he punched her. She also testified over defense counsel's objections that Perez was always getting angry and "he always did that to me . . . or he'd kick me." Dr. Zimmerman testified that when she asked

Perla about the bruise on the child's chin, Perla told her that she thought "her boyfriend hit [the child]."

¶9 After Perez presented his defense that Perla——not he——abused the child, the jurors asked, among other things, how Perez's brothers treated their children and whether anyone living at the house was violent. The trial court notified counsel of the questions and let them decide whether to respond. The trial court subsequently informed the jurors that the questions would not be answered.

¶10 During closing argument, the prosecutor argued that the evidence of Perez's punching Perla was important in determining Perez's guilt:

> Another piece of crucial evidence that we have is this punch to the chin to shut the child up. How telling is that? How telling is it to know that Perla had received that same kind of bruise from the defendant when he wanted her to shut up, when she confronted him about a girlfriend that he had outside of their relationship? How telling is that to have a bruise that matches your child that you had received from the hands of the defendant?

¶11 After closing arguments, the trial court instructed the jurors that they could consider evidence of the other act only to determine intent or absence of accident or mistake and could not consider the evidence to establish Perez's character or propensity to commit the charged offenses. During their deliberations, the jurors asked questions about the meaning of

the phrase "care and custody" and whether other persons in the home had care or custody of the child when Perez was asleep and Perla was away. The trial court instructed the jurors to use the ordinary meaning of "care or custody" and left the other question unanswered.

¶12 The jury found Perez guilty of Counts 1 through 3, but acquitted him of Count 4. It also found two aggravating factors. Perez received consecutive prison sentences of seventeen years on Counts 1 and 2 and lifetime probation on Count 3.

¶13 Perez timely appeals. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(1).

DISCUSSION

¶14 On appeal, Perez argues the trial court abused its discretion by allowing evidence that he punched Perla and left a bruise on her chin that matched the one on the child's chin. We agree that the evidence of this other act was erroneously admitted under Rules 404(b) and 703. We also find that the State has not proved beyond a reasonable doubt that the error was harmless.

1. Rule 404(b), Evidence of Other Act

¶15 We review a trial court's decision to admit Rule 404(b) other acts evidence for an abuse of discretion. *State v.*

Villalobos, 225 Ariz. 74, 80, ¶ 18, 235 P.3d 227, 233 (2010). An abuse of discretion occurs when "the reasons given by the court [for its actions] are clearly untenable, legally incorrect, or amount to a denial of justice." *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 6, 210 P.3d 1283, 1285 (App. 2009) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983)).

¶16 Rule 404(b) allows the admission of evidence of other crimes, wrongs or acts to establish such things as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but not "the character of a person in order to show action in conformity therewith." To admit other act evidence, the State must (1) show by clear and convincing evidence that the defendant committed the act, and (2) offer the evidence for a proper purpose. *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 54, 25 P.3d 717, 736 (2001), *overruled on other grounds*, *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). Even if the evidence satisfies these requirements, it will nevertheless be inadmissible under Rule 403 if any undue prejudice inherent in the evidence substantially outweighs its probative value. *State v. Fish*, 222 Ariz. 109, 123, ¶ 43, 213 P.3d 258, 272 (2009).

¶17 The trial court abused its discretion in admitting under Rule 404(b) the evidence that Perez punched Perla's chin.

Although Perla's testimony that Perez punched her under the chin may have been sufficient under the clear and convincing evidence standard to establish that Perez committed the act,[3] *Vega*, 228 Ariz. at 29 n.4, ¶ 19, 262 P.3d at 633 n.4 ("The testimony of the victim is a sufficient basis on which to conclude by clear and convincing evidence that the incident occurred."), the evidence was not admitted for a proper purpose.

¶18 The State first contends that Perez's other act shows that he intended to abuse the child and that the bruise on the child's chin was not the result of mistake or accident. But the State cannot rely on this ground. Whether Perez abused the child unintentionally by mistake or accident was not at issue because he did not claim that he mistakenly or accidentally injured the child; rather, he completely denied the allegations and claimed that Perla abused the child. When a defendant completely denies that he committed the criminal act, other act evidence is inadmissible to show intent or lack of mistake or accident. *State v. Ives*, 187 Ariz. 102, 110-11, 927 P.2d 762, 770-71 (1996). Such evidence is admissible only when it rebuts

[3] The trial court did not expressly find that the State proved by clear and convincing evidence Perez committed the other act. We presume, however, that a trial court knows and correctly applies the rules of evidence. *State v. Warner*, 159 Ariz. 46, 52, 764 P.2d 1105, 1111 (1988). We may infer from the court's admission of the evidence that the court found the State satisfied its burden. *See State v. Vega*, 228 Ariz. 24, 29, ¶ 19, 262 P.3d 628, 633 (App. 2011).

a defense to the charges. *See Villalobos*, 225 Ariz. at 80, ¶ 19, 235 P.3d at 233 (holding that defendant's prior act of abuse of child-victim was admissible to rebut the defense that the defendant did not intend to hurt the victim and hit the victim as a "reflex").[4] Because Perez denied committing the physical acts that injured the child, evidence regarding intent or lack of mistake or accident in committing those physical acts was irrelevant and inadmissible.

¶19 The State nevertheless argues that intent was at issue despite Perez's complete denial that he committed the abuse because some of the child's injuries were consistent with accidental infliction. But the fact that someone——whether Perez or Perla——intentionally inflicted the injuries on the child was never questioned. "Unless there is some discernible issue as to defendant's intent (beyond the fact that the crime charged requires specific intent), the state may not introduce evidence of [other] acts as part of some generalized need to prove intent in every case." *Ives*, 187 Ariz. at 110, 927 P.2d at 770. To

[4] The State relies on *Villalobos* to argue that Perez's act was relevant to rebut his defense that Perla committed the acts of abuse. The Arizona Supreme Court indeed held in *Villalobos* that evidence that the defendant abused the victim on a prior occasion was admissible to rebut the claim that the victim's mother, not the defendant, committed the abuse. 225 Ariz. at 80, ¶ 19, 235 P.3d at 233. Unlike the evidence in *Villalobos*, evidence that Perez assaulted Perla does not——in any way permissible under Rule 404(b)——rebut Perez's claim that Perla abused the child.

hold otherwise would render invalid the rule prohibiting improper character evidence in specific intent crimes because "intent" would always be an issue. *Id*.

¶20 The State also contends that the evidence of the other act was admissible to prove identity because "identity was very much at issue." Although we agree that identity was at issue, the evidence of the other act did not show the identity of the abuser because the act was not sufficiently unique to identify Perez. Identity based on "other acts" usually requires the showing of a *modus operandi* or of some set of circumstances surrounding the two crimes that are "sufficiently similar as to be like a signature." *State v. Hughes*, 189 Ariz. 62, 68, 938 P.2d 457, 463 (1997) (citation omitted). Here, the evidence that Perez punched Perla under the chin does not establish a "signature" crime. Other than agreeing that the bruise on the child's chin could be "consistent" with someone hitting her under the chin, Dr. Zimmerman did not testify that the bruise had any particularly distinctive, unusual, or unique shape that would distinguish it or make it attributable to any particular person. We also see nothing distinctive or unique about the bruise in the photograph in the record. Indeed, Dr. Zimmerman testified that "anything that the child strikes or that strikes the child can cause a bruise."

¶21 The evidence that Perez punched Perla was not admissible for a proper purpose under Rule 404(b).

2. Rule 703

¶22 The trial court also erred in allowing evidence of the other act to come in under Rule 703. That rule allows an expert to testify to an opinion based on "facts or data" that are not admissible in evidence, as long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." The inadmissible facts or data underlying the expert's opinion may be disclosed to the jury "if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." The disclosed facts or data "are not admitted as substantive evidence, but only for purposes of showing the basis of the expert's opinion." *State v. Lundstrom*, 161 Ariz. 141, 146, 776 P.2d 1067, 1072 (1989). The evidence is not admissible to prove the truth of the matter asserted. *Id*. at 148, 776 P.2d at 1074. We review the trial court's admission of evidence under Rule 703 for an abuse of discretion. *State v. Tucker*, 215 Ariz. 298, 314, ¶ 58, 160 P.3d 177, 193 (2007).

¶23 Because Perez does not contest that his striking Perla under her chin was a type of fact or datum under Rule 703 that Dr. Zimmerman would reasonably rely on in determining the cause of the child's injuries, we accept the trial court's ruling on

that point for purposes of this appeal. We conclude, however, that the trial court abused its discretion in finding that the probative value of the evidence substantially outweighed its prejudicial effect.

¶24 The probative value of Perez's striking Perla was minimal. The purpose of admitting the evidence under Rule 703 was to help the jury evaluate Dr. Zimmerman's opinion that the child's injuries were caused by physical abuse, not to provide substantive evidence of guilt. *Lundstrom*, 161 Ariz. at 148, 776 P.2d at 1074. Although Dr. Zimmerman listened to Perla's statement that she believed that Perez hit the child because he had hit Perla in the past, Dr. Zimmerman did not base her opinion on that statement. Dr. Zimmerman testified that even "without any specific history of trauma," the child had "enough bruises" in "enough . . . protective body locations" that she determined that they were "most likely" inflicted injuries. Because Dr. Zimmerman's opinion that the child had been abused was based on the number, location, and severity of the injuries, Perla's statement was unimportant and had little probative value.

¶25 In contrast, the prejudicial effect was substantial. Evidence that, in the past, Perez had struck Perla hard enough to leave a bruise created a great risk that the jury would misuse the evidence and determine Perez's guilt on his

propensity for violence. *See Hughes*, 189 Ariz. at 68, 938 P.2d at 463 ("The natural and inevitable tendency . . . is to give excessive weight to the vicious record of crime . . . and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt . . . ."). The trial court's admonition that the evidence would be "offered only for the purposes of establishing the basis for the truth," did nothing to alleviate the risk of misuse, and arguably misstated the law. *See Lundstrom*, 161 Ariz. at 148, 776 P.2d at 1074 (holding that evidence under Rule 703 is not admissible to prove the truth of the matter asserted). Because the probative value of the evidence did not substantially outweigh the prejudice to Perez, the trial court abused its discretion in admitting the evidence under Rule 703.[5]

3. Harmless Error Review

¶26 Having determined the trial court erred by admitting evidence of the other act, we must still review for harmless

[5] Perez also argues that the evidence should have been excluded under Rule 403 because the prejudice of the evidence substantially outweighs its probative value. Although the test under Rule 403 (the evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice") is different from the test under Rule 703 (the evidence may be admitted if its probative value "substantially outweighs" its prejudicial effect), no separate analysis is required in this case. The probative value of the other act evidence is so minimal, and the risk of prejudice is so substantial, that the outcome under either rule is the same.

error. *Ives*, 187 Ariz. at 109, 927 P.2d at 769. Under harmless error review, the State has the burden to show "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). The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* (citation omitted). Because "[t]here is no bright line statement of what is and what is not harmless error," we assess the error under the totality of the record. *Id*.

¶27 The State argues that it presented "overwhelming" evidence of guilt based on (1) the timeline of the child's injuries, which coincides with times the child spent with Perez, (2) Perez's refusal to take the child to the hospital, (3) his text message to Perla saying that he was "sorry," and (4) his statements to Perla during a confrontation call. We disagree.

¶28 Although error is harmless if the evidence of guilt is so overwhelming that no reasonable jury could have reached a different conclusion, this is not such a case. *See State v. Anthony*, 218 Ariz. 439, 446, ¶ 41, 189 P.3d 366, 373 (2008). The issue before us is not whether the State presented sufficient evidence of guilt, but whether we can say beyond a reasonable doubt that the verdict was "surely unattributable" to

the allegation that Perez hit the child because he also punched Perla on the chin in a similar manner. *Id.* We cannot do so after reviewing all the evidence.

¶29 The evidence of guilt, while sufficient, was not overwhelming. Although the record indisputably shows that the child suffered horrible abuse, Perez disputed that he was the abuser and argued that Perla was the abuser. Perez presented numerous witnesses to support his defense and to contradict the State's evidence.

¶30 Several witnesses living at the home testified that they saw Perla hit the child on different occasions. One brother said that he saw Perla throw the child on the bed because she was crying. Another brother testified that he saw Perla hit the child on January 19, around the time alleged in Counts 1 through 3. He also described seeing Perla hit the child with a spoon on the head, covering the child with a blanket and punching her, and throwing the child on the bed. Perez's mother also testified that, on one occasion, she saw Perla hit the child's head on the doorframe while carrying her "like a football," and on another, she saw Perla slap the child's face. Perez's son, who frequently visited the home, stated that he saw Perla hit the child with a belt to stop her from crying.

¶31 Both brothers further testified that Perez had "never been left alone with [the child]" and there were "always people at the house." Perez's mother stated that Perez, not Perla, asked her to take the child to the hospital.

¶32 In addition, Perez's brother testified that Perla told him that she knew Perez was not guilty, but she had no choice but to testify against him and avoid charges against her. The brother's girlfriend also said that Perla told her she had to blame Perez for the abuse because she was being threatened with deportation. Perla also admitted that during the confrontation call, Perez denied hitting the child and claimed that he refused to hit the child even when Perla asked him to, because he "[did]n't have the heart to do something like that to a child."

¶33 After the jurors heard the evidence, they asked questions that showed they were struggling in determining whether Perez or someone else abused the child. They asked questions about others who may have had access to the child and had exhibited violent behavior toward children. One juror asked about the "whereabouts and schedules of others" in the house; another juror asked how Perez's brothers treated their children and whether they argued and fought with each other; and a third juror asked whether anyone else had "custody and care" of the child when Perez was away or asleep. The State has not shown beyond a reasonable doubt that the evidence that Perez struck

Perla under the chin did not tip the jurors in favor of finding Perez guilty.

¶34 Moreover, the State relied heavily on Perez's striking Perla as evidence of his guilt. In opening statement, the prosecutor argued that the other act identified Perez as the "aggressive one," and that "because [Perez] . . . punches Perla . . . he would do that to her daughter." In closing argument, the prosecutor again referred to the evidence as "[a]nother piece of crucial evidence" that shows Perez was the one who hit the child. The prosecutor's argument urged the jurors to find that Perez abused the child because he was "aggressive" and had "punch[ed] Perla" before. This argument not only highlighted the prejudicial effect of the other act evidence, but it logically contradicts Rule 404(b) ("[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

¶35 Although the trial court gave the jurors a limiting instruction on considering the other act evidence, it openly doubted whether such an instruction could negate the real danger that the jury would improperly rely on the other act evidence. Indeed, our supreme court has recognized that jurors do not always follow a limiting instruction when, as here, the evidence is highly prejudicial:

> [S]uch evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge. Studies confirm that the introduction of a defendant's [other] acts can easily tip the balance against the defendant.

Anthony, 218 Ariz. at 446, 189 P.3d at 373 (citing *Terrazas*, 189 Ariz. at 584, 944 P.2d at 1198).

¶36 We appreciate that the jury may have paid close attention to the timeline and acquitted Perez on Count 4 because "there was less specific evidence." Our review of the total record, however, does not leave us convinced beyond a reasonable doubt that the guilty verdicts rendered "in *this* case" are "surely unattributable to the" evidence that was erroneously admitted. *Bible*, 175 Ariz. at 588, 858 P.2d at 1191. Therefore, the law requires that we reverse Perez's convictions, and we remand for a new trial.

¶37 In light of our decision, we need not address whether the trial court also erred in admitting hearsay evidence. Because Perez's sentences are reversed, his argument that he did not receive full presentence-incarceration credit is moot.

CONCLUSION

¶38 For the reasons stated, we reverse Perez's convictions and sentences, and remand for a new trial.

/s/
RANDALL M. HOWE, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
MARGARET H. DOWNIE, Judge