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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/04/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0619
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBERT TIMOTHY JONES,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007186-001

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

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Attorney for Appellant

K E S S L E R, Judge

¶1 Defendant Robert T. Jones ("Jones") appeals his convictions and sentences for attempted first degree murder

(Count 1), aggravated assault (Counts 2 and 3), interfering with judicial proceedings (Count 8), misconduct involving weapons (Count 9), disorderly conduct (Count 10), and threatening or intimidating (Count 11). He argues the court abused its discretion in denying his motion to sever charges for trial. For the reasons that follow, we affirm Jones's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 In August 2009, a grand jury indicted Jones on the above counts and four counts of sexual assault or attempted sexual assault (Counts 4-7).¹ These charges arose from allegations of physical and sexual abuse made by Jones's wife ("V") following an incident on March 10, 2009.

¶3 V began a romantic relationship with Jones in February 2008. V continued a relationship with Jones after he was incarcerated in February 2008, and in June or July, she moved into his home. In November 2008, Jones was released from jail and moved back into his home with V. V testified that during the months between November 2008 and February 2009, Jones repeatedly physically, sexually, and verbally abused her. She also testified that during these months, Jones threatened to kill her if she in some way caused him to go back to jail. In mid-February 2009, V moved out of Jones's home.

¹ Jones was ultimately acquitted of the sexual assault charges.

¶4 On March 10, 2009, Jones called V, asking her for a ride to his home, promising that if she gave him a ride home, he would allow her to retrieve her belongings from his house, which she had been previously unable to do. To convince V that she would be safe, Jones suggested V bring her daughter with her, assuring V that he would never "do anything" in front of her daughter.² After they arrived at Jones's home and V began collecting her belongings, Jones held a gun to V's head and threatened to kill her. Jones pulled the trigger twice, but the gun did not fire. He attempted to fire the gun two more times without success. At that point, Jones began to choke, bite, and hit V on the head with the gun until he eventually threw a mirror on top of her.

¶5 Police responded to an emergency call from Jones's address, and when they arrived, they found V's daughter outside of the home waiving them down. V's daughter told police that Jones had just beat her mother with a gun. V reported the incident to police on the scene and later to a detective while in the trauma unit of the hospital. At that time, V did not report the previous abuse that had occurred prior to March 10, 2009 because she had been threatened and she was scared. Based on the events of March 10, 2009, the State charged Jones with

² V testified that Jones never physically abused her in front of her daughter.

Counts 1 through 3, and Counts 9 and 10.

¶6 Shortly after V was discharged from the hospital, she filed for divorce and obtained an order of protection against Jones. Between March 31, 2009 and August 2009, Jones sent six letters to V in which he apologized and expressed his guilt for what he had done. Because these letters violated the order of protection, the State later charged Jones with interfering with judicial proceedings (Count 8).

¶7 During an interview with the prosecutor in August 2009, V reported the abuse that had occurred between November 2008 and February 2009. She could not remember the exact dates of each instance of abuse, but she reported certain incidents that stood out in her mind as particularly traumatic. The State added Counts 4 through 7 and Count 11 based on V's interview.

¶8 Prior to trial, the State filed a motion pursuant to Arizona Rule of Evidence 404(b) to elicit testimony concerning Jones's assaults of V other than the charged crimes. Specifically, V planned to testify regarding Jones's other threats, harassment, and assaults against her that occurred prior to March 10, 2009 and to two letters she received from Jones while the criminal case was pending, none of which were charged acts. In response, Jones filed a motion to preclude evidence of other bad acts, arguing the evidence would unfairly prejudice him and was being offered only as inadmissible

character evidence. Jones also filed a motion to sever the charges related to the March 10, 2009 incident (Counts 1-3, 9 and 10) from the charged events that occurred before and after March 10, 2009 (Counts 4-8 and 11) pursuant to Arizona Rule of Criminal Procedure 13.4.

¶9 The trial court held an evidentiary hearing on the State's 404(b) motion, Jones's motion to preclude evidence, and Jones's motion to sever, holding the motion to sever was "intertwined" with the Rule 404(b) motions. After hearing counsel's arguments, V's testimony, and reviewing two letters Jones sent to V while the case was pending, the trial court denied Jones's motions to sever and preclude evidence, and granted the State's 404(b) motion to use evidence of Jones's other acts. The court found that the uncharged acts were admissible and their probative value was not outweighed by any undue prejudice. As to the severance motion, the court found that the evidence of the non-March 10, 2009 crimes would be cross-admissible, but did not make a finding that the probative value of such evidence outweighed any prejudice. After a ten-day trial, a jury convicted Jones of only Counts 1 through 3 and Counts 8 through 11.

¶10 Jones filed a timely notice of appeal from the judgment. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes

("A.R.S.") section 12-120.21(A) (1) (2003).

STANDARD OF REVIEW

¶11 Jones argues the court's refusal to sever charges was an abuse of discretion; however, the State argues that because Jones failed to renew his motion as is required by Arizona Rule of Criminal Procedure 13.4(c), the denial of severance is reviewed for fundamental error only. We review a trial court's ruling on severance for abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003). We likewise review a trial court's ruling on admissibility of evidence for abuse of discretion. *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996). If an appellant failed to renew his severance motion "during trial at or before the close of evidence," as required by Rule 13.4(c), we review for fundamental error only. *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996).

¶12 Jones filed his initial motion to sever in July 2010, and then filed two subsequent motions for reconsideration in October 2010 and sometime before June 6, 2011.³ The court held a hearing on each of the motions for reconsideration on December

³ Jones's second motion for reconsideration is not in the record on appeal. However, the State filed its response to Jones's second motion for reconsideration on June 6, 2011, and the court held a hearing on this motion the same day. The record supports an inference that Jones filed a second motion for reconsideration on the severance issue some time before June 6, 2011.

10, 2010 and on June 6, 2011, respectively, and after hearing counsel's arguments, the court denied the motions. Trial commenced on June 9, 2011. Jones renewed his motion to sever twice prior to the commencement of trial, but not "during trial at or before the close of evidence" as is required by Rule 13.4(c), and therefore he waived this issue on appeal. See *State v. Bruni*, 129 Ariz. 312, 316, 630 P.2d 1044, 1048 (App. 1981) (determining that although motion to sever was made and renewed prior to commencement of trial, because it was not renewed during trial or at the close of evidence, it was waived); see also *State v. Flythe*, 219 Ariz. 117, 120, ¶¶ 10-11, 193 P.3d 811, 814 (App. 2008) ("[O]ur courts have strictly applied the waiver provisions of Rule 13.4(c), particularly the explicit requirement that motions for severance be renewed during trial"); *State v. Pierce*, 27 Ariz. App. 403, 406, 555 P.2d 662, 665 (1976) ("Appellant's failure to renew the motion to sever [during trial] suggests that the prejudice now asserted to have resulted from the joinder may not have seemed so substantial to appellant in the context of the trial.") (citation and internal quotation marks omitted). Accordingly, we review the court's denial of Jones's motion to sever for fundamental error only.

DISCUSSION

¶13 The State argues that because Jones failed to assert a

fundamental error argument on appeal, he has abandoned this claim. We agree that Jones has not argued that the trial court committed fundamental error, and thus, we are not required to reach the merits of his claim. See *Flythe*, 219 Ariz. at 120, ¶ 11, 193 P.3d at 814 (denying review of appellant's severance claim when he failed to renew his motion to sever during trial and then failed to argue fundamental error on appeal); see also *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (explaining that opening briefs must set forth an appellant's position on the issues raised, and failure to argue that position usually constitutes abandonment and waiver); *State v. Scott*, 187 Ariz. 474, 478 n.5, 930 P.2d 551, 555 n.5 (App. 1996) (explaining that this Court is not obligated to search the record for fundamental error in an appeal on the merits). However, this Court has discretion to address the merits of Jones's claim even though Jones failed to argue fundamental error on appeal. "[W]aiver is a procedural concept that courts do not rigidly employ in mechanical fashion." *State v. Aleman*, 210 Ariz. 232, 240, ¶ 24, 109 P.3d 571, 579 (App. 2005); see also *State v. Smith*, 203 Ariz. 75, 79, ¶ 12, 50 P.3d 825, 829 (2002) (reaching argument because an appellate court may choose to address an argument otherwise waived); *Scott*, 187 Ariz. at 478 n.5, 930 P.2d at 555 n.5 ("Although we no longer have the obligation to search for fundamental error . . . we certainly

have the *authority* to address it”).

¶14 On the merits, Jones has not met his burden of establishing fundamental error on his severance claim. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005) (stating defendant bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice). Arizona Rule of Civil Procedure 13.3(a) allows for two or more offenses to be joined if they are “of the same or similar character,” or are “based on the same conduct or are otherwise connected together in their commission,” or are a “part of a common scheme or plan.” If severance of offenses “is necessary to promote a fair determination of the guilt or innocence,” of the defendant, the court may order severance. Ariz. R. Crim. P. 13.4(a). Furthermore, if offenses are joined solely because they are of the same or similar character, a defendant is entitled to severance unless evidence of the other offenses would be admissible if the offenses were tried separately. Ariz. R. Crim. P. 13.4(b). Denial of a motion to sever under Rule 13.4(b) requires reversal only “if the evidence of other crimes would not have been admitted at trial” for a proper evidentiary purpose. *State v. Aguilar*, 209 Ariz. 40, 51, ¶ 38, 97 P.3d 865, 876 (2004) (citation and internal quotation marks omitted).

¶15 Here, severance was not required because evidence of

the offenses that occurred before and after March 10, 2009 would have been admissible in a trial on the March 10, 2009 offenses under Rule 404(b), and therefore, Jones was not prejudiced. Evidence of the prior sexual assaults and threats (Counts 4 through 7 and Count 11), all of which were charged as domestic violence offenses, would have been admissible to demonstrate motive, intent, and premeditation for the March 10, 2009 offenses. See *State v. Gulbrandson*, 184 Ariz. 46, 60-61, 906 P.2d 579, 593-94 (1995) (holding that evidence of a previous assault was relevant to show motive, intent, and premeditation of the murder of the same victim); *State v. Jeffers*, 135 Ariz. 404, 418, 661 P.2d 1105, 1119 (1983) ("We have long held that where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible. . . . Evidence of prior trouble between the victim and the accused . . . tends to show the malice, motive or premeditation of the accused."); *State v. Featherman*, 133 Ariz. 340, 345, 651 P.2d 868, 873 (App. 1982) (holding evidence of a prior assault with a baseball bat was admissible to show malice and intent in a first degree murder case).

¶16 Likewise, evidence of Jones's violation of the order of protection (Count 8) committed after March 10, 2009 would also have been admissible at the trial on the March 10, 2009 offenses. Jones stipulated to sending six letters to V despite

the order of protection. In those letters, he apologized and expressed his guilt for what he had done on March 10, 2009. Jones's letters are not "other acts" evidence, but rather direct evidence that Jones committed the March 10, 2009 crimes. Moreover, Jones's letters would have been admissible to show consciousness of guilt. See *State v. Greene*, 192 Ariz. 431, 438, ¶ 21, 967 P.2d 106, 113 (1998) (holding defendant's letter in which he expressed his concern about a witness "informing on him" was relevant evidence of consciousness of guilt); *State v. Styers*, 177 Ariz. 104, 112-13, 865 P.2d 765, 773-74 (1993) (holding defendant's letters to a co-defendant describing what happened were relevant to show consciousness of guilt because it could be reasonably inferred that defendant's letters were an attempt to influence witness testimony).

¶17 Although the trial court did not make explicit findings regarding an Arizona Rule of Evidence 403 balancing test on the severance motion, there was no error because the record demonstrates the court considered the parties' arguments concerning unfair prejudice when making its ruling on Jones's severance motion. See *State v. Beasley*, 205 Ariz. 334, 337, ¶ 15, 70 P.3d 463, 466 (App. 2003) (holding the court was not required to make explicit findings that it balanced the probative value of evidence against unfair prejudice when the record revealed the parties argued unfair prejudice and the

court considered those arguments).

¶18 Our review of the record demonstrates Jones was not unfairly prejudiced. “Evidence is unfairly prejudicial only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.” *Gulbrandson*, 184 Ariz. at 61, 906 P.2d at 594; see also *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (“[N]ot all harmful evidence is unfairly prejudicial. . . . [E]vidence which is relevant and material will generally be adverse ‘Prejudice,’ as used in this way, is not the basis for exclusion under Rule 403.”). First, any undue prejudice was precluded by the trial court giving a proper limiting instruction⁴ pursuant to Arizona Rule of Evidence 105.⁵ See *Huddleston v. United States*,

⁴ The court gave the following limiting instruction to the jury:

Other acts. Evidence of other acts has been presented. You may consider these acts only if you find the State has proved by clear and convincing evidence that the defendant committed those acts. You may only consider those acts to establish the defendant’s motive, opportunity, intent, absence of mistake or accident.

You must not consider these facts to determine the defendant’s character or character trait or to determine if the defendant acting in conformity to the defendant’s character or character trait and therefore committed the charged offense.

⁵ Rule 105 states: “If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”

485 U.S. 681, 691-92 (1988); *State v. Atwood*, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992) (stating that Rule 105, along with the application of other evidentiary rules, provides assurance against unfair prejudice), *disapproved of on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). Second, the jury acquitted Jones of all of the sexual assault offenses that occurred prior to March 10, 2009. Since the jury found that Jones was not guilty of committing those acts, Jones cannot establish that the jury was somehow influenced by those acts in finding him guilty of the March 10, 2009 offenses. Thus, Jones has not established any undue prejudice. Accordingly, we find the court did not fundamentally err in denying Jones's motion to sever.

CONCLUSION

¶19 For the foregoing reasons, we affirm Jones's convictions and sentences.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
ANDREW W. GOULD, Judge