DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0610
	)	DEPARTMENT C
v.	)	
	)	**MEMORANDUM DECISION**
DAVID LELAND SPARKS, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-115964-001 DT

The Honorable John R. Hannah Jr., Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 David Leland Sparks ("Defendant") appeals from his convictions for assault and aggravated assault pursuant to Arizona Revised Statutes ("A.R.S.") sections 13-1203 and -1204

(2010), respectively. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 P.G. ("Victim") and Defendant were romantically involved and lived together for approximately eighteen months in Defendant's townhome. During the afternoon of March 11, 2008, Victim and Defendant were drinking at home.[2] According to Victim, Defendant was teasing the cat, and when she told him to stop, he ran at her, shook her, grabbed her hair, and forced her to the kitchen floor. Defendant then banged Victim's head on the floor and called her names. Victim tried to scream, but Defendant covered her mouth.

¶3 As Defendant was wiping blood off the floor, Victim walked toward the front door, and Defendant tackled her. As she tried to crawl away, he pulled on her ankles. Defendant then forced Victim to take a shower. He beat her head against the stairwell and bathroom walls.[3] After the shower, Victim ran outside in a towel and sought help from a neighbor who was

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

[2] Victim admitted she was intoxicated during the incident.

[3] Officers saw what appeared to be blood smears on the kitchen floor, a door, the stairwell wall, and in the bathroom.

driving away. The neighbor had Victim get in his car, and he called the police.

¶4 Police officers arrived, and the fire department was summoned to assess Victim's injuries. Victim had a laceration to the back of her head, and medical personnel later discovered a fractured sinus. Officers knocked on both the front and back doors of the townhome, shouting "Phoenix Police Department," and attempted to call Defendant on his phone. After approximately thirty minutes, when Defendant had not responded, officers started to pick the lock to the front door. Defendant opened the door and was taken into custody.

¶5 The State charged Defendant with aggravated assault, a class 4 felony; unlawful imprisonment, a class 6 felony; and assault, a class 1 misdemeanor. A jury trial commenced.

¶6 During the State's case-in-chief, Victim alluded to certain past behaviors. For example, she testified she and Defendant drank "every day" and that when Defendant drank, she tried to be on her "best behavior because any little thing could set him off, any little thing." After describing how Defendant attacked her on March 11, Victim explained she "knew better than to make a dash for the door" because she "was afraid he was going to attack me again." Victim stated she did not fight back "[b]ecause I knew that if I tried to try to fight back, he would be even more brutal." After testifying about Defendant forcing

her to take a shower, Victim stated she "knew from the past, I knew that -- not to -- to try to seem calm." Defendant did not object to any of this testimony.

¶7 After the State rested, Defendant testified that Victim was the one with the drinking problem and that she got violent when she was upset.[4] He described instances when she had thrown silverware at him, dented the door with a rock, and assaulted him by kicking, punching, or biting. On rebuttal, Victim testified that the physical altercations began four months after she moved in, that she "couldn't even count" how many times Defendant had harmed her, and that "when he was drinking very heavily he would sometimes become very abusive and violent and actually throw me out of the house."

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[4] Defendant also provided a very different version of the charged incident. He testified that Victim started an argument and then "got violent" and "grabbed a knife." As Defendant was attempting to wrest the knife from Victim, their legs tangled and they fell to the floor. A struggle ensued, and after Defendant got the knife from Victim he told her, "[T]hat's it, you're out of here." He then turned up the volume on the TV so he could not hear her yelling and went upstairs. Defendant did not answer the door when he heard knocking because he thought it was Victim. The jury was free to accept or reject Defendant's version of events. "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons,* 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974); *see also State v. Lehr,* 201 Ariz. 509, 517, ¶ 24, 38 P.3d 1172, 1180 (2002).

¶8 After the State began questioning Victim about a particular incident she had reported to police, defense counsel objected, arguing he had not opened the door to evidence about "prior allegations that are completely unsubstantiated." The trial court overruled the objection, finding Defendant had indeed opened the door. Victim then testified she did not "remember specifically that time," but knew she had scratches on her arms and that Defendant "actually picked me up by the seat of my pants and by the back of my shirt and tossed me out of the house." The defense questioned Victim about her lack of recall regarding this incident, and Victim responded, "I don't remember. It happened so many times, I don't remember the instance of that day that I called the police."

¶9 The jury found Defendant guilty of aggravated assault and assault. Based on evidence presented at trial, the court found Defendant had been convicted of a prior felony conviction, invoking mandatory prison and non-repetitive sentencing provisions. Defendant received a presumptive term of 2.5 years' imprisonment for aggravated assault and a concurrent term of 5 days' imprisonment for assault.

¶10 Defendant filed a timely notice of appeal. We have jurisdiction pursuant to the Arizona Constitution, Article 6, section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

A. Admissibility of Prior Bad Acts

¶11 Defendant argues the trial court improperly admitted evidence about prior bad acts, which was prejudicial and deprived him of a fair trial. We disagree.

¶12 As previously noted, Defendant did not object to much of the testimony he now challenges. When a defendant fails to object to an alleged trial error, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984); *see also State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991) (fundamental error is "clear, egregious and curable only via a new trial"). The defendant has the burden of persuasion in fundamental error review, and he must establish not only that fundamental error exists, but also that the error in his case caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d at 607.

¶13 Defendant asserts that the evidence was inadmissible under Arizona Rule of Evidence 404(b), which provides:

> [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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Generally, evidence of prior bad acts is not admissible to prove a defendant's propensity to commit the charged offense, but may be admissible to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*; *see also State v. Fierro*, 166 Ariz. 539, 547, 804 P.2d 72, 80 (1990). Before a court may admit prior bad act evidence, there must be clear and convincing proof "both as to the commission of the other bad act and that the defendant committed the act." *State v. Anthony*, 218 Ariz. 439, 444, ¶ 33, 189 P.3d 366, 371 (2008) (citation omitted). The court also must find that: (1) the prior act is offered for a proper purpose; (2) the act is relevant to prove that purpose; and (3) the probative value of admitting the evidence is not outweighed by the potential for unfair prejudice. *Id.* If requested, the court must also provide an appropriate limiting instruction. *Id.*

¶14 We find no error here, let alone fundamental error. The vague, fleeting statements made by Victim during the State's case-in-chief cannot reasonably be characterized as prior bad

act evidence. *See State v. Jones*, 197 Ariz. 290, 305, ¶¶ 34-35, 4 P.3d 345, 360 (2000) (holding trial court did not abuse its discretion in allowing unsolicited vague references concerning a dissimilar crime). Moreover, Defendant clearly opened the door to the later testimony to which he objected –- both through his own testimony and by his cross-examination of Victim.

¶15 Until Defendant opened the door, Victim did not identify any specific crime, wrong, or act that Defendant may have committed. Defendant himself characterizes her testimony as "irrelevant comments" that "suggest[ed] prior acts." The references to past conduct are extremely vague and simply do not rise to the level of a prior bad act within the meaning of Rule 404(b). *See Peyton v. Commonwealth*, 253 S.W.3d 504, 517 (Ky. 2008) (holding witness's statement that he had dealt with the defendant on many different occasions was "vague and did not allude to any particular bad act [the defendant] committed" and, thus, did not fall under Rule 404(b)); *State v. Trout*, 757 N.W.2d 556, 558, ¶ 10 (N.D. 2008) (finding detective's testimony about "some other information" obtained by police, and that detective called defendant's employer to "check up on another incident that occurred in his building" were "too vague to be unduly prejudicial"); *State v. Carbo*, 864 A.2d 344, 348 (N.H. 2004) (concluding mistrial was not warranted because testimony "did not unambiguously reveal evidence of specific bad acts").

¶16 Even Victim's testimony about the one prior incident she reported to police was vague and unspecific. Victim could not "remember specifically that time" or "day." Moreover, Defendant did not cite Rule 404(b) as a basis for his objection to this testimony. *See State v. Moody,* 208 Ariz. 424, 455, ¶ 120, 94 P.3d 1119, 1150 (2004) (holding that, absent fundamental error, if evidence is objected to on one ground in the trial court and admitted over that objection, other grounds raised for the first time on appeal are waived); *State v. Kelly,* 122 Ariz. 495, 497, 595 P.2d 1040, 1042 (App. 1979) (raising one objection at trial does not preserve another objection on appeal).

¶17 Furthermore, the trial court correctly ruled that Defendant opened the door to the challenged rebuttal evidence. "The general rule of rebuttal evidence is that the State may offer any competent evidence which is a direct reply to or in contradiction of any material evidence introduced by the accused." *State v. Shepherd*, 27 Ariz. App. 448, 450, 555 P.2d 1136, 1138 (1976); *see also State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980) (holding that otherwise inadmissible bad act evidence may become relevant for impeachment when a defendant's testimony opens the door).

¶18 Defendant testified that Victim was the aggressor and perpetrator of violence in their relationship, and he gave

specific information about her alleged past behaviors. The State was permitted to rebut that testimony and rehabilitate its witness. *See State v. Williams*, 133 Ariz. 220, 229, 650 P.2d 1202, 1211 (1982) (holding State could rehabilitate witness when defendant sought to impeach her credibility throughout trial by showing she was an alcoholic and a liar); *State v. Rhodes*, 112 Ariz. 500, 508, 543 P.2d 1129, 1137 (1975) (holding trial court had discretion to allow victim to testify as a rebuttal witness for "the purpose of contradicting the answers given by the defendant"); *State v. Tovar*, 187 Ariz. 391, 393, 930 P.2d 468, 470 (App. 1996) ("Once a defendant has put certain activity in issue by . . . denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied." (citation omitted)).

B. Limiting Instruction

¶19 Defendant also argues the trial court erred by not giving the jury a limiting instruction. We review for fundamental error because Defendant did not request a limiting instruction or object to the proffered instructions. *See Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d at 607.

¶20 Upon request, a court is required to instruct the jury to consider other act evidence only for the purpose for which it was admitted. Ariz. R. Evid. 105 (requiring a trial judge to give a limiting instruction upon request); *State v. Coghill*, 216

Ariz. 578, 582, ¶ 13, 169 P.3d 942, 946 (App. 2007). However, a "trial court's failure to *sua sponte* give a limiting instruction is not fundamental error." *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996).

CONCLUSION

¶21 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge