NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 11-0319
v.	DEPARTMENT B
RICARDO RAMIREZ, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-155341-001DT

The Honorable Paul J. McMurdie, Judge
The Honorable Arthur T. Anderson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

Bruce Peterson, Legal Advocate — Phoenix
By Thomas J. Dennis, Deputy Legal Advocate
Attorneys for Appellant

K E S S L E R, Judge

¶1 Ricardo Ramirez ("Ramirez") appeals his convictions on five counts of child molestation, three counts of sexual conduct

with a minor under fifteen years old, and three counts of sexual conduct with a minor fifteen years of age or older. The victim in all counts was the same, Ramirez's adopted daughter, J.R. Ramirez argues the trial court fundamentally erred and denied him due process by allowing the State to try the multiple offenses in one trial. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 Ramirez and his wife, Lori, adopted J.R. in 1997 when she was four years old. J.R. experienced behavioral problems, including Reactive Attachment Disorder. Persons with that disorder distrust adult caregivers and may have a tendency to lie and make false sexual accusations. J.R. and her family started counseling in April 2005.

¶3 During the summer of 2005, when J.R. was twelve years old, Ramirez began having sexual contact with J.R. On the first occasion, Ramirez touched J.R.'s vagina with his hand and performed cunnilingus. J.R. told Lori the next day and Lori confronted Ramirez. Lori believed Ramirez's denial and did not call the police. However, Ramirez called the Arizona Department of Economic Security's Child Protective Services ("CPS") department, although the record does not reveal what he told

[1] The factual history is derived from trial testimony, but the description of instances of defendant's sexual contact with the victim from 2005 through January 2008 comes solely from her testimony.

CPS. When CPS investigated, J.R. told CPS that she was unsure whether the incident happened and that she may have dreamed it. CPS determined J.R.'s claim was unsubstantiated and closed the investigation.

¶4 In March 2006, Ramirez twice touched J.R.'s vagina with his hand over a period of a few days. She was thirteen years old. After the second incident, J.R. told her teacher about the two incidents. At that point, the Maricopa County Sheriff's Office ("MCSO") investigated the allegations as well as the summer 2005 incident. Ramirez denied the incidents both during an interview and a confrontation call by J.R. A medical examination was normal, which was not inconsistent with the allegations. Due to lack of evidence, MCSO did not submit the allegations for prosecution and CPS determined the allegations were unsubstantiated.

¶5 In December 2006, Ramirez again touched J.R.'s vagina with his hand while driving J.R. to the therapeutic foster home in which she was living. She was fourteen years old. After J.R. confronted Ramirez during the act, he stopped. J.R. reported the incident to her counselor, who did not believe her. Later that month J.R. moved back to the home her mother shared with Ramirez.

¶6 In January 2007, Ramirez digitally penetrated J.R.'s vagina on two consecutive evenings. J.R. was still fourteen

years old. During the incident on the second evening, Ramirez made J.R. touch his erect penis. J.R. told her counselor, who told Ramirez and Lori about the accusations. Lori did not believe J.R. and J.R.'s counselor sent her to live in the therapeutic foster home again. CPS and MCSO investigated the allegations. Ramirez denied the allegations in a confrontation call, and no medical examination was performed. The county attorney took no action on the allegations.

¶7 Starting in January 2008, when J.R. was fifteen years old and living in Ramirez's home again, Ramirez began having sexual intercourse with J.R. before she left for school on Monday mornings and when no one else was in the house. J.R. did not tell anyone because she thought no one would believe her.

¶8 On the evening of August 31, 2008 to September 1, 2008, after Lori and J.R. went to bed, Ramirez entered J.R.'s room and began having sexual intercourse with J.R. Lori woke up and walked towards J.R.'s bedroom, and through J.R.'s barely-open door Lori saw Ramirez on top of J.R. moving up and down. Ramirez realized Lori had seen him, got up from the bed, and tried to explain away what Lori had seen. Lori touched Ramirez's buttocks to confirm he was naked, and she felt his

skin. Lori demanded Ramirez leave the home and called the police.[2]

¶9 MCSO interviewed J.R. and requested a medical examination. The examination revealed two injuries to J.R.'s hymen that were consistent with her account that Ramirez had raped her. The examiner took buccal swabs from J.R.'s body, which revealed semen on J.R.'s external genitalia and vaginal swabs, as well as on her underwear. No sperm was found on the vaginal swab and underwear swab, indicating the person who deposited the semen was sterile. Ramirez is sterile.

¶10 DNA testing revealed that Ramirez's DNA matched the sample from J.R.'s vaginal swab at seven of sixteen loci, but the results were inconclusive as to the remaining nine loci and thus Ramirez could not be excluded from providing the sample. The likelihood of a match was 1 in 431 Caucasian males, 1 in 329 African-American males, and 1 in 31 Hispanic males, and Ramirez is of Hispanic descent. Also, Ramirez could not be excluded as a source of DNA on J.R.'s buttocks or her underwear. There was not enough information to draw any conclusions as to whether Ramirez was a source of DNA on J.R.'s external genitalia.

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[2] Another count alleged Ramirez digitally penetrated J.R.'s vagina during the same evening, but the trial court granted an acquittal as to that count under Arizona Rule of Criminal Procedure 20(a).

¶11 The State planned to try Ramirez for all of the above instances in one trial. Prior to trial, Ramirez moved to sever the counts, arguing that the instances between 2005 and 2007 were investigated and the evidence found to be insufficient for prosecution. Ramirez requested the counts be separated into four trials, or in the alternative, the 2005 through 2007 counts be tried separately from the 2008 counts. The State argued that the evidence regarding each count was cross-admissible because the evidence completed the picture of abuse, showed Ramirez's lewd disposition toward J.R., rebutted an argument of accident or mistake, and showed his knowledge of all acts.

¶12 The trial court denied Ramirez's motion without an explanation. The record at the time contained J.R.'s three taped interviews with MCSO, dated March 29, 2006, September 1, 2008, and May 5, 2009. The record also contained the results of two DNA tests, which were either inconclusive or showed Ramirez could not be excluded from depositing the DNA samples.

¶13 The case proceeded to trial. Neither after the State rested nor at the close of all the evidence did Ramirez renew his motion to sever.

¶14 In addition to the physical evidence and the testimony of the victim, Lori, and others involved in the investigations, the State also presented testimony of Ramirez's adopted son, Fernando. Fernando testified that Ramirez asked him to lie by

saying "[J.R.] had asked [Ramirez] to put semen, his semen in a bottle because she was curious, and that she dumped it over herself on accident." Ramirez told Fernando "to tell that [J.R.] had been asking for [Fernando] to do it, and [he] said no, that [he] told her no, so then she went and asked [Ramirez]."

¶15 The jury convicted Ramirez of child molestation and sexual conduct with a minor for the summer 2005 incident, two counts of child molestation for the March 2006 incidents, child molestation for the December 2006 incident, two counts of sexual conduct with a minor and one count of molestation for the January 2007 incidents, sexual conduct with a minor for the January 2008 incident, and sexual conduct with a minor for the August 2008 incident. Only the 2008 incidents occurred when J.R. was older than fifteen.

¶16 Ramirez timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 13-4033(A)(1) (2010).

DISCUSSION

¶17 Ramirez contends that the trial court erred by failing to sever the counts against him, arguing that the evidence of the 2005 through 2007 counts would have been inadmissible in a separate trial for the 2008 counts and vice versa. He contends

the error denied him his due-process right to a fair trial. Ramirez additionally argues that even if the evidence might have been cross-admissible, the trial court did not comply with the findings requirement of Arizona Rule of Evidence 404(c).

¶18 The State responds that severance was not required under Arizona Rule of Criminal Procedure 13.4(b) because the evidence related to each count would have been admissible as intrinsic evidence or under Rule 404(b) in each trial if the offenses were tried separately. The State alternatively argues that joinder was proper under Arizona Rule of Criminal Procedure 13.3(a)(2) "because the sexual offenses committed against [J.R.] [were] . . . 'based on the same conduct or [were] otherwise connected together in their commission.'" It also argues Ramirez invited any error related to Ramirez's argument that the court failed to conduct an analysis under Rule 404(c) or alternatively, that any error was not fundamental and prejudicial.

¶19 We conclude that even though the court erred in its denial of the motion to sever, Ramirez has not shown that such error was fundamental or prejudicial.

I. Standard of Review

¶20 We generally review a trial court's denial of a motion to sever for an abuse of discretion. *State v. Prion*, 203 Ariz. 157, 162, ¶ 28, 52 P.3d 189, 194 (2002). However, we review it

for fundamental error if the defendant did not renew the motion by the close of evidence. *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996); *see* Ariz. R. Crim. P. 13.4(c). Ramirez concedes that because he failed to renew his motion to sever, the Court reviews the trial court's decision for fundamental error. 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. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citation omitted). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error . . . caused him prejudice." *Id.* at ¶ 20.

II. Only Arizona Rule of Criminal Procedure 13.3(a)(1) provided the proper basis for joinder.

¶21 Joinder of offenses for trial is allowed when two or more offenses are: (1) "of the same or similar character"; (2) "based on the same conduct or are otherwise connected together in their commission"; or (3) "alleged to have been a part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a)(1)-(3). The State did not argue the offenses were part of a common scheme or plan under Rule 13.3(a)(3). Instead, it argued the offenses should be tried together because they were based on the same

conduct or otherwise connected, pursuant to Rule 13.3(a)(2), or were of the same or similar character, pursuant to Rule 13.3(a)(1).

¶22 Contrary to the State's argument, Rule 13.3(a)(2) does not support joinder of the charges against Ramirez. Rule 13.3(a)(2) requires that the separate crimes are "so intertwined and related that much the same evidence was relevant to and would prove both, and the crimes themselves arose out of a series of connected acts." *Prion*, 203 Ariz. at 162, ¶ 32, 52 P.3d at 194. Moreover, courts should interpret Rule 13.3(a)(2) narrowly and not as a catch-all provision to avoid the provision from becoming "a detour around [a] defendant's right to sever offenses joined because they are similar." *Id.* at 163, ¶ 35, 52 P.3d at 195 (quoting *State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996)). "The rules on joinder and severance are intended to further not only liberal joinder but also *liberal severance*. Where there is any doubt, it must be resolved in favor of the defendant." *State v. Roper*, 140 Ariz. 459, 462, 682 P.2d 464, 467 (App. 1984) (citation omitted).

¶23 Here, none of the offenses occurred at the same time, were connected together in commission, or involved the exact same conduct. *See Prion*, 203 Ariz. at 162-63, ¶¶ 32-33, 52 P.3d at 194-95. Nor can we say that the crimes arose out of a series of connected acts simply because they were against the same

victim. *Id.* The facts here are distinguishable from *Domis v. State*, 755 So. 2d 683, 685 (Fla. Dist. Ct. App. 1999), where the court found severance of four lewd acts against the same child was not required under a Florida rule allowing joinder for "connected acts or transactions." The court explained the acts were connected after considering "the temporal and geographical association, the nature of the crimes and the manner in which they were committed," noting that passage of time does not in and of itself require severance. *Id.* (citation omitted). Although the acts there occurred over an eighteen-month period, *id.* at 684, they were connected for purposes of joinder because all of the acts started in the same manner, all involved the same lewd act, three of the four were in the same location, and the victim reported all of the acts at the same time in a family meeting at which the defendant was present, *id.* at 685. Here, the acts occurred over several years, at different locations, involved different types of conduct, and were reported at different times in different settings.

¶24 Allowing joinder of the conduct here pursuant to the narrow provision of Rule 13.3(a)(2) would allow the State to detour around Ramirez's right to severance under Rule 13.4(b). Because the offenses could not be joined in one trial under Rule 13.3(a)(2), the only basis for joinder was Rule 13.3(a)(1).

¶25 Rule 13.3(a)(1) permitted the State to join the charges for trial because they were of the same or similar character. *See State v. LeBrun*, 222 Ariz. 183, 185, ¶ 6, 213 P.3d 332, 334 (App. 2009) (recognizing joinder of multiple charges of sexual misconduct against multiple victims under Rule 13.3(a)(1)). As Ramirez argues, the issue then becomes whether the trial court erred in denying Ramirez's motion to sever as a matter of right under Rule 13.4(b) because, as Rule 13.4(b) provides, severance is not required if the "evidence of the other offense or offenses would be admissible . . . if the offenses were tried separately."[3] To resolve that issue, we must examine Arizona Rule of Evidence 404(c).

III. The trial court erred in denying Ramirez's motion to sever, but the error does not require reversal.

¶26 When reviewing a denial of a motion to sever, we consider the facts available at the time of the motion. *State v. Tipton*, 119 Ariz. 386, 388, 581 P.2d 231, 233 (1978). The record must support a finding of cross-admissibility of offenses under Rule 404(c) or another rule of evidence. *State v. Aguilar*, 209 Ariz. 40, 51, ¶ 38, 97 P.3d 865, 876 (2004).

¶27 Under Rule 404(c): "In a criminal case in which a defendant is charged with having committed a sexual offense,

[3] Ramirez did not argue on appeal that he was entitled to severance under Rule 13.4(a), which allows severance when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense."

. . . evidence of other crimes, wrongs, or acts may be admitted . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." The court may admit the evidence only if it first finds that:

> (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
>
> (B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
>
> (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.

Ariz. R. Evid. 404(c)(1)(A)-(C). "In making that determination under Rule 403 the court shall also take into consideration" eight additional factors set forth in Rule 404(c)(1)(C)(i)-(viii). Ariz. R. Evid. 404(c)(1)(C). Rule 404(c)(1)(D) requires the trial court to "make specific findings with respect to each of (A), (B), and (C)."

¶28 Because the trial court did not state why it denied Ramirez's motion, we assume the court found that evidence pertaining to the various counts would be cross-admissible in

separate trials under Rule 404(c).[4] We make this assumption because, in responding to the severance motion, the State contended that the evidence of the other acts would be admissible to prove Ramirez's lewd disposition to J.R. and the State had filed a notice that it would seek to use the evidence to show a propensity under Rule 404(c).[5]

¶29 Addressing first Rule 404(c)(1)(A), Ramirez argues "[t]he State did not present sufficient evidence to allow the court to make a determination that [he] in fact committed the 2005 [to] 2007 offenses." Ramirez argues the only evidence regarding the 2005 to 2007 offenses was J.R.'s testimony, and "the trial court did not obtain or review the victim's interview CD to determine her credibility."

¶30 The Arizona Supreme Court's decision in *Aguilar* controls our decision that the trial court erred. There, the defendant moved to sever counts of sexual assault against different victims under Rule 13.4(b). *Id.* at 41, ¶ 3, 97 P.3d at 866. The only evidence to be presented at trial was defendant's admission that he had sexual contact with the

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[4] "We strongly urge trial courts to include in the record the reasons for their decisions so that appellate courts may review those decisions in a more directed and efficacious manner." *State v. Fisher*, 141 Ariz. 227, 236 n.1, 686 P.2d 750, 759 n.1 (1984).

[5] On appeal, however, the State does not contend the evidence would be cross-admissible under Rule 404(c); it argues instead that the evidence either was admissible under Rule 404(b) or because it was intrinsic.

victims, but it was consensual, *id.* at ¶ 2, and the victims' testimony, *id.* at 50, ¶ 35, 97 P.3d at 875. At the time the trial court ruled on the motion, the victims' testimony was not in the record. *Id.* at 49-50, ¶ 33, 97 P.3d at 874-75. The trial court denied the motion, finding the evidence of each offense would be cross-admissible under Rule 404(c) if the offenses were severed into separate trials. *Id.* at 41, ¶ 4, 97 P.3d at 866.

¶31 The Arizona Supreme Court reversed, finding that "the trial court had to make a credibility determination that the victims' accounts of the assaults were more credible than [the defendant's] for [it] to make the necessary finding that clear and convincing evidence established that the sexual contact in each incident was non-consensual." *Id.* at 50, ¶ 35, 97 P.3d at 875. The court could not have made the credibility determination because it "neither heard from the victims nor was presented with any prior testimony from them." *Id.* The court found the error was not harmless because the record was void of evidence to show the state met its burden. *Id.* at ¶ 37.

¶32 After *Aguilar*, this Court determined that audio and video recordings of victim statements may be sufficient to allow the trial court to find the evidence is clear and convincing as required by Rule 404(c). *LeBrun*, 222 Ariz. at 185, 187, ¶¶ 8, 15, 213 P.3d at 334, 336.

¶33 Here, as to the August 2008 offense, the evidence to be introduced at trial was J.R.'s and Lori's testimony about the offense, the results of the physical examination and of biological (semen) testing and DNA evidence, and Fernando's testimony about Ramirez's story about how Ramirez's semen was found on J.R. and her clothing. As to the 2005 through January 2008 offenses, the only evidence to be introduced at trial was J.R.'s testimony and the testimony of persons to whom J.R. complained of Ramirez's actions.

¶34 Although compact discs of J.R.'s interviews were in the record at the time of the severance motion, there is no evidence that the trial court reviewed the interviews. The State offered the court: "I do have video, or the disks of the victim interviews, if the Court needs those to render a decision." The court responded: "I don't see that as being an issue that [Ramirez's counsel] has raised . . . ." Ramirez's counsel answered: "No." The State again offered the evidence: "Well, it does in some way reflect upon the credibility of the victims' [sic] allegations that pre-date the 2008 allegations. So that's the only reason why. If the Court requests them, I can certainly provide them." The court stated: "All right. Okay" and then moved on to scheduling matters. Nothing in the record indicates the court requested the interviews the State offered or reviewed the interviews already in the record. Nor

was any of the other evidence to be offered at trial in the record.

¶35 Implied in *Aguilar*'s requirement that a trial court have before it sufficient evidence when determining if evidence is admissible under Rule 404(c) is the requirement that the court review such evidence when it is available. Here, without reviewing the evidence as to the pre-August 2008 offenses, the trial court could not have determined J.R.'s credibility. Therefore, the court erred in determining evidence of the pre-August 2008 offenses was cross-admissible because it did not review the available evidence needed to make such a determination pursuant to Rule 404(c).

¶36 The State argues that the evidence is cross-admissible either "as intrinsic evidence" or "pursuant to Arizona Rule of Evidence 404(b)," and is thus exempt from a Rule 404(c) analysis. Assuming, without deciding, that the trial court determined the evidence was cross-admissible as either intrinsic evidence or under Rule 404(b), the court erred by failing to make the required findings regarding the 2005 through January 2008 offenses.

¶37 Evidence of a defendant's lewd disposition toward a particular victim is a distinct exception to the general rule excluding character evidence and must be screened pursuant to the framework established in Rule 404(c), if it is offered to

show an aberrant sexual propensity to commit the offense charged. *State v. Ferrero*, CR-11-0127-PR at ¶11 (Ariz., Apr. 11, 2012) (adopting *State v. Garcia*, 200 Ariz. 471, 476, ¶¶ 30-31, 28 P.3d 327, 332 (App. 2001)). Although evidence that is intrinsic to the charged offense need not be screened pursuant to Rule 404(c), evidence is "intrinsic" only if it directly proves the charged offense or is performed contemporaneously with and directly facilitates the commission of the charged crime. *Ferrrro* at ¶¶ 19-20. However, admissibility of evidence of similar sexual acts against the same victim which is not offered to show a Rule 404(c) propensity and is not "intrinsic" is not analyzed under Rule 404(c), but may be admitted as evidence of intent, preparation, or plan under Rule 404(b). *Id.* at ¶ 12 (holding evidence of prior sexual acts against the same victim may be admissible if offered under Rule 404(b), subject to Rules 402, 403 and 105).

¶38 Here, under *Ferrero,* the 2008 offense was not intrinsic to the earlier offenses because evidence of the 2008 offense does not directly prove the earlier crimes and neither was contemporaneous with nor directly facilitated those crimes. To determine if the 2008 evidence would have been admissible for severance purposes pursuant to Rule 404(b), the trial court was required to conduct a "careful screening" of the evidence, which should have included an analysis under Arizona Rules of Evidence

402 and 403. *Ferrero, id.; State v. Fish*, 222 Ariz. 109, 123, ¶ 43, 213 P.3d 258, 272 (App. 2009) (stating for evidence to be admissible under Rule 404(b) a trial court must determine whether the evidence "[h]as sufficient probative value as not to be substantially outweighed by undue prejudice under Rule 403"). Thus, in undertaking that Rule 404(b) analysis to determine the motion to sever, the court in this case would have had to first weigh the probative value of the evidence against any undue prejudice. We must conclude the court did not properly perform that analysis because it did not view the evidence to determine if it would have been admissible.

¶39 Despite our conclusion that the trial court erred in presumably finding the evidence was cross-admissible, reversal is not required. First, the case as to the August 2008 act ultimately rests on the weight of the evidence of that incident. The evidence of that offense was so strong that any error from joining the earlier offenses in the same trial cannot be said to have affected the jury's verdict as to the August 2008 offense. *See Laird*, 186 Ariz. at 206, 920 P.2d at 772 (finding the evidence so strong, and the defense so incredible, that the court could "say with certainty that [defendant] was not denied a fair trial by improper joinder"); *Garcia*, 200 Ariz. at 478, ¶¶ 40-42, 28 P.3d at 334 (holding error harmless if after exclusion of contested evidence, court can conclude beyond a reasonable

doubt that evidence did not affect verdict); *see also Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607 (holding under fundamental error analysis, defendant must prove prejudice). Lori testified she witnessed Ramirez having sexual intercourse with J.R. J.R.'s physical examination corroborated her testimony, including two injuries to her hymen that were consistent with the allegations. Semen found on buccal swabs contained no sperm, which indicated the person who deposited it was sterile, and Ramirez is sterile. Further, Fernando testified that Ramirez asked him to offer an account of a false story of how Ramirez's semen was found on J.R. and her clothes. That evidence is so overwhelming that we conclude the introduction of J.R.'s testimony about the earlier acts did not affect the jury's verdict as to the August 2008 act.

¶40 Second, Ramirez was not prejudiced by admission of the August 2008 "other act" evidence in his trial on the prior alleged acts. As we have said, the evidence of the August 2008 offense was so strong that it plainly met the clear and convincing standard under Rule 404. The question is whether the probative value of that evidence was substantially outweighed by the danger of unfair prejudice in the jury's consideration of the earlier charges.

¶41 In this determination, we note the jury had sufficient evidence, separate and apart from the August 2008 evidence, that

Ramirez committed the earlier offenses. J.R. was unwavering in her testimony, such that the jury could easily believe J.R.'s testimony and convict Ramirez of the pre-August 2008 acts on her testimony alone. *See State v. Munoz*, 114 Ariz. 466, 469, 561 P.2d 1238, 1241 (App. 1977) ("[A] conviction may be based on the uncorroborated testimony of the victim unless the story is physically impossible or so incredible that no reasonable person could believe it. Although the appellant's and victim's version of the events are contradictory, her testimony alone provides sufficient evidence to support appellant's conviction." (citation omitted)).

¶42 Third, the State did not argue at trial that the August 2008 offense proved Ramirez had an aberrant sexual propensity to commit the prior offenses. Although the State had filed a pretrial notice that it intended to use that evidence to show a propensity under Rule 404(c), at trial it did not argue that any of the individual offenses showed Ramirez had an aberrant sexual propensity to commit the other offenses charged. Rather, in closing argument, the State argued the August 2008 acts "corroborated" J.R.'s accounts of the earlier charged offenses. The prosecutor cited the 2008 offense, along with other corroborative evidence, such as police testimony that J.R.'s statements to them in September 2008 were consistent with her earlier reports of Ramirez's sexual misconduct.

¶43 The parties appeared to understand the evidence was not being admitted for Rule 404(c) purposes because Ramirez did not object when the trial court denied his request for a Rule 404(c) instruction. Instead, the court instructed the jury that the "State must prove each element of each charge beyond a reasonable doubt." The court also instructed:

> Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count. You may find that the State has proved beyond a reasonable doubt, all, some, or none of the charged offenses.

The trial court's instructions mitigated any risk of prejudice that might have resulted from joinder. *See State v. Prince*, 204 Ariz. 156, 160, ¶ 17, 61 P.3d 450, 454 (2003) (holding "a defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt"). Therefore, although the court erred, the error was not fundamental and Ramirez was not denied due process.[6]

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[6] We decline to address whether Ramirez invited the error because although the court erred, the error was not reversible error.

CONCLUSION

¶44 For the foregoing reasons, we affirm the trial court's ruling and Ramirez's conviction.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
MICHAEL J. BROWN, Judge