

**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.

FILED BY CLERK

FEB 29 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2002-0369
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LEONARD IRWIN BACON, JR.,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200100478

Honorable Thomas E. Collins, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Nicholas Klingerman

Tucson
Attorneys for Appellee

Harriette P. Levitt

Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Leonard Bacon, Jr., was convicted of first-degree murder, possession of a deadly weapon by a prohibited possessor, and theft of a means of transportation. The trial court sentenced him to a natural life term of imprisonment for first-degree murder and consecutive, aggravated sentences totaling forty years for the two other felonies. On appeal, Bacon argues the court committed reversible error in making several evidentiary rulings. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Around 8:00 p.m. on June 17, 2001, Bacon's girlfriend, Carmen, and her friend, April, were involved in an argument with Julie at a convenience store in Willcox. Later that night, Julie and her two sisters spoke with Kenny K., who offered to show them where Carmen lived. Kenny, driving his vehicle, followed by Julie and her sisters in a separate vehicle, drove to an intersection near Carmen's trailer. Bacon immediately walked out of the trailer carrying a gun, approached the two vehicles, and made threatening statements. Kenny told Julie and her sisters to leave, and, as both vehicles drove away, Bacon fired the gun three times, striking Kenny once in the left hip. The two vehicles drove to a convenience store where Julie called the police. The officers observed bullet holes in the door of Kenny's vehicle and recovered a spent bullet from inside. During the subsequent investigation, they found two bullet casings in the street near Carmen's trailer.

¶3 In the meantime, Bacon told April that he needed to leave the trailer because he had just shot someone. Bacon did not own a vehicle, so he asked April to

drive him to a friend's house where he later was joined by Carmen's son, Jeremy. While there, Bacon telephoned his mother, Olympia B., who drove her vehicle to pick up Bacon and Jeremy, taking them to her house in Bowie to stay the night. Bacon telephoned Carmen three times during the late-night and early-morning hours, and, during the third telephone conversation sometime after 2:00 a.m., Bacon handed the phone to Jeremy. While Carmen was talking to her son, she heard a gunshot. When Bacon returned to the phone, Carmen asked "[w]hat's going on?" and he responded "[e]verything's going to be okay." Shortly thereafter, Bacon dropped the phone on the floor and Carmen heard a second gunshot. When Bacon returned to the phone, he told Carmen he had to go "clean up" and he would call her later.

¶4 Later that morning, Bacon and Jeremy drove Olympia B.'s vehicle to a house in Willcox where Bacon's sister, Olympia T., lived. After Bacon showered and changed his clothes, Bacon, Carmen, Jeremy, and one of Carmen's other children left Olympia T.'s house with Carmen driving the vehicle. When Carmen asked Bacon if he had shot and killed his mother the previous night, he "just looked at [her]"—she understood this to mean "yes." Before leaving Olympia T.'s house, Bacon told her: "mom is no longer here, no longer with us." After Bacon and the others left the house, Olympia T. tried calling Olympia B. several times before contacting the Willcox Police Department to conduct a welfare check. Around 6:45 that evening, two deputies went to Olympia B.'s house and found her body, partially covered by a blanket, with a gunshot wound to the head. Inside the house, deputies recovered two bullet casings and one "live round."

¶5 Bacon and Carmen drove Olympia B.'s vehicle to New Mexico where they saw a United States Border Patrol vehicle traveling behind them. Bacon told Carmen to pull to the side of the road and after she did so, he raised the hood of the engine compartment. When the border patrol agents stopped to offer assistance, Bacon told them they were traveling from Phoenix to Deming and had stopped because the engine was overheating. The agents described Bacon's demeanor as cooperative but "confused" and "nervous." Bacon hesitated when the agents asked for the vehicle's registration and eventually told the agents he had a gun in the glove compartment. Bacon admitted the weapon was his and agreed to be patted down. Inside Bacon's pocket, an agent found several bullets and a small baggie of marijuana. Bacon was arrested and subsequently was extradited to Arizona.

¶6 An autopsy revealed that Olympia B. had died from two gunshot wounds to the head, with the shots fired at very close range. Bacon's former wife, Shannon, identified the gun found in Bacon's possession as his, and she testified that he kept the gun with him and loaded at all times. Ballistics tests to determine if the bullets recovered from the Kenny K. shooting and the victim's body had been fired from Bacon's gun were inconclusive. Testing confirmed, however, that the bullet casings found at both scenes were fired from that weapon.

¶7 Bacon was charged with first-degree murder, possession of a deadly weapon by a prohibited possessor, and theft of a means of transportation. After a jury trial, he was convicted as charged and sentenced as described above. This appeal followed.

Discussion

Other-Acts Evidence

¶8 At trial, over Bacon’s objection, the state was allowed to introduce evidence of the altercation outside Carmen’s trailer that had occurred the day before Olympia B.’s murder. On appeal, Bacon argues “[t]he trial court committed reversible error” by admitting the [Kenny K.] shooting evidence because it did not prove motive, opportunity, or identity—as the court had found—was “excessively prejudicial,” and was irrelevant. “We review the superior court’s decision to admit other acts evidence for abuse of discretion.” *State v. Villalobos*, 225 Ariz. 74, ¶ 18, 235 P.3d 227, 233 (2010). A ruling constitutes an abuse of discretion when “the reasons given by the court . . . are clearly untenable, legally incorrect, or amount to a denial of justice.” *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶9 Four rules of evidence govern the admission of other-act evidence: “Rule 404(b) requires that the evidence be admitted for a proper purpose, Rule 402 requires that the evidence be relevant, Rule 403 requires that the danger of unfair prejudice not outweigh probative value, and Rule 105 requires that the judge give an appropriate limiting instruction upon request.” *State v. Nordstrom*, 200 Ariz. 229, ¶ 54, 25 P.3d 717, 736 (2001). To be admissible, the state must establish by clear and convincing evidence that the other acts were committed and that the defendant committed the acts. *Id.* Under Rule 404(b), “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Such evidence may be admissible, however, for other purposes, such as to

show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.*

¶10 The state argues on appeal, as it did below, that the Kenny K. shooting evidence was admissible to establish Bacon had a motive and opportunity to commit the subsequent murder. It reasons that Bacon intended to flee the state after he shot Kenny, that his mother afforded access to the only available vehicle,¹ and that “the jury could reasonably infer that she was an impediment to [his] flight” because she would not have allowed Bacon to use the vehicle to flee the state. After an evidentiary hearing, the trial court found there was clear and convincing evidence that Bacon shot Kenny just hours before the murder,² and Bacon does not challenge that determination on appeal. The court also concluded the evidence was admissible because it established motive, opportunity, and identity under Rule 404(b). Bacon contends the state’s theory is “fallacious” because other evidence established that Olympia B. was “ready and willing” to facilitate his escape so he did not have to kill her. However, although the victim may

¹Bacon, Carmen, nor Olympia T. had a vehicle.

²At the hearing on the state’s motion to introduce the evidence, the state suggested it would be “safest” if both the judge and jury determined that the other-act evidence was proven by clear and convincing evidence. The court apparently agreed, because it made an independent finding to that effect and instructed the jury “[it] may consider these other acts only if [it] find[s] they were proved by clear and convincing evidence.”

have been willing to give Bacon a ride from Willcox to her house in Bowie, nothing in the record suggests that she also was willing to let Bacon flee the state in her vehicle.³

¶11 The other factors for determining admissibility of other-act evidence also were established. Because evidence of motive is always relevant in a murder prosecution, *State v. Tuttle*, 58 Ariz. 116, 120, 118 P.2d 88, 90 (1941), the relevancy portion of the test for the admissibility of the Kenny K. shooting evidence under Rule 402 was met. And, we cannot say the trial court abused its discretion in finding the probative value of the other-act evidence was not outweighed by the danger of unfair prejudice pursuant to Rule 403. Moreover, Bacon requested, and the trial court gave, a limiting instruction to the jury on the appropriate use of the other-act evidence pursuant to Rule 105. To the extent there was conflicting evidence potentially undermining the state's theory, as Bacon contends, this goes to the weight of the other-act evidence, not its admissibility. *See State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995).

¶12 Additionally, we conclude the evidence was admissible because it was intrinsic to the crime committed.⁴ “‘Other act’ evidence is ‘intrinsic’ when evidence of the other act and evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to

³The state filed a motion in limine to introduce the testimony of Bacon's former wife, Shannon, who overheard Olympia B. tell Bacon he was not allowed to use her vehicle. Although the court granted the motion, the state never elicited the testimony.

⁴Although the trial court found the Kenny K. shooting evidence was “not intrinsic, inextricably intertwined, part of a single criminal episode, nor a necessary preliminary,” we are not bound by that determination and may affirm the court's decision if it was legally correct for any reason. *See State v. Sardo*, 112 Ariz. 509, 515, 543 P.2d 1138, 1144 (1975).

the crime charged.” *State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996). Intrinsic evidence is admissible without Rule 404(b) analysis, *Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d at 736, because Arizona courts allow the jury to hear the “complete story” even though it may reveal other prejudicial facts, such as that the defendant has committed other crimes. *State v. Collins*, 111 Ariz. 303, 305, 528 P.2d 829, 831 (1974); *State v. Villavicencio*, 95 Ariz. 199, 201, 388 P.2d 245, 246 (1964).

¶13 We take the additional step of addressing the intrinsic nature of the Kenny K. shooting evidence because Bacon asserts the trial court “allowed the state to go overboard in the introduction of this evidence, to the extent that [Bacon] was denied” his state and federal constitutional rights to due process. He maintains that more than half of the testimony at trial focused on the Kenny K. shooting, and “it strains the imagination to suggest that a limiting instruction could have mitigated [the danger of unfair prejudice].” We agree that, to the extent the evidence was relevant only for Rule 404(b) purposes, the court may have been able to limit the details about the Kenny K. shooting to those reasonably necessary to prove motive, opportunity, and identity. *See State v. Salazar*, 181 Ariz. 87, 91-92, 887 P.2d 617, 621-22 (App. 1994) (trial court should consider whether other-act evidence can be narrowed or limited and still meet purpose for which it was offered); *State v. Coghill*, 216 Ariz. 578, 583, 169 P.3d 942, 947 (App. 2007) (trial court committed reversible error by admitting details of other-act evidence not necessary for purpose offered).

¶14 Here, however, the jury reasonably could infer the Kenny K. shooting was the start of a string of events that led to the murder of Olympia B. Evidence of the earlier

shooting therefore was relevant, not only as proof of motive, but also to “complete the story” and to put the events surrounding Olympia B.’s murder into context. Thus, even if the trial court allowed the state to “go overboard” with the evidence of the previous shooting in the context of Rule 404(b), the Rule 403 concerns inherent in other-act evidence are not implicated when the evidence is offered as intrinsic evidence to complete the story. “The jury was entitled to have the alleged crime . . . fixed in the background of the accompanying events.” *Villavicencio*, 95 Ariz. at 201, 388 P.2d at 246. The trial court did not abuse its discretion in allowing the state to introduce evidence of the Kenny K. shooting.

Hearsay Evidence

¶15 Bacon next contends “[t]he trial court committed reversible error in allowing the introduction of inadmissible hearsay.” He argues the court erred in overruling his objection when the state asked Bacon’s former wife, Shannon, whether Olympia T. had ever stated she wanted her mother dead and Shannon answered “[y]es.” Bacon maintains Shannon’s testimony was “incompetent, irrelevant, and hearsay”; he did not open the door to it as the state argues; and it was not proper impeachment. “We review a trial court’s ruling on the admissibility of evidence for an abuse of discretion and will reverse such a ruling only upon a finding of clear prejudice.” *State v. Fischer*, 219 Ariz. 408, ¶ 24, 199 P.3d 663, 671 (App. 2008).

¶16 Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted and generally is inadmissible. Ariz. R. Evid. 801(c), 802. An out-of-court statement may be admissible, however, if the declarant testifies at the trial or

hearing and is subject to cross-examination concerning the statement, and the statement “is inconsistent with the declarant’s testimony.” Ariz. R. Evid. 801(d)(1)(A).

¶17 We conclude the trial court did not commit reversible error in admitting the testimony for at least two reasons. First, Bacon opened the door. The state called Carmen during its case-in-chief, and, on direct examination, she testified that Olympia T. had told her Bacon was considering “tak[ing] care of” their mother. The state never asked Carmen whether Olympia T. was a part of, or complicit with, Bacon’s plot. However, on cross examination, Bacon asked Carmen if Olympia T. had ever stated that she wanted her mother dead, and Carmen answered “yes.” Because Bacon first raised the subject of Olympia T.’s relationship with her mother, albeit through a different witness, he waived any objection to the admission of an out-of-court statement made by Olympia T. regarding her relationship with the victim, Olympia B.⁵ *State v. Garcia*, 133 Ariz. 522, 526, 652 P.2d 1045, 1049 (1982) (no error in admitting alleged hearsay testimony where defendant opens door). “Where the whole field of examination is opened by [the defendant], he opens the door to further inquiry and may not assign its fruits as error on appeal.” *Id.*

⁵The state contends Bacon opened the door to this line of questioning even sooner by asking Olympia T., and not one of the other witnesses, about her relationship with her mother. In particular, the state asserts that on cross-examination, “[Bacon] asked [Olympia T.] if she had a good relationship with [Olympia B., and Olympia T.] responded, ‘real close.’” However, the state apparently has misread the trial transcript because Bacon did not ask Olympia T. about her relationship with her mother; rather, he asked about his own relationship with his mother. It was not until Olympia T. was recalled to the stand, after both Carmen and Shannon had testified, that she described her own relationship with her mother.

¶18 Second, even assuming Bacon is correct that the trial court should have sustained his objection to Shannon's testimony on hearsay grounds, Bacon cannot show he was prejudiced by the court's ruling. *See State v. Williams*, 133 Ariz. 220, 225, 650 P.2d 1202, 1207 (1982) (reviewing admission of hearsay evidence for harmless error). If anything, Shannon's testimony that Olympia T. wanted her mother dead, coupled with evidence that Jeremy was involved in another murder and may have committed the murder of Olympia B., cast doubt on the state's case against Bacon. Thus, even if the trial court abused its discretion by improperly admitting hearsay evidence, we are satisfied beyond a reasonable doubt that the error did not contribute to or affect the verdict. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

Jail Letters

¶19 Bacon next claims the trial court erred by admitting into evidence two letters he had written while in the Cochise County Jail.⁶ At trial, the state sought to

⁶The first letter was addressed to the county attorney and stated:

My name is Leonard Bacon[.] I'm writing you this letter so that we may get the story straight in each and every one of the cases that pertain to me. We need to put to rest the lies and insinuations that other people were involved or have any knowledge as to why or how things to[ok] place[. T]here is no need to continue your investigations. Bring your video cam[er]a and my public def[en]der and you will go home with the facts you need to end this push[.]

The second letter was addressed to his public defender and stated:

[E]nclosed is a letter that I sent to the DA by myself. Thank you for your time and patience. Excuse me for being such a pain. Hope to end all these false allegations as fast as

introduce the letters as an admission of guilt. Bacon argued the letters should have been excluded because jail conditions were such that “he was being compelled to confess, under great duress and in a highly coercive situation.” He argues, for the first time on appeal, that the letters were irrelevant and constituted inadmissible hearsay evidence and were therefore improperly admitted.

¶20 Because Bacon did not raise these arguments below, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Furthermore, because he does not argue on appeal that the alleged error was fundamental, and because we find no error that can be so characterized, the arguments are waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Perjured Testimony

¶21 Bacon argues the state “knowingly introduced testimony of two admitted liars and perjurers,” and the introduction of this testimony constituted prosecutorial misconduct in violation of his constitutional rights to a fair trial and due process. “A defendant seeking reversal of a conviction for prosecutorial misconduct must establish that ‘(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the

possible so that we may continue with our lives. Would like to end all of this before Feb[ruary]. Way before!

misconduct could have affected the jury’s verdict, thereby denying [the] defendant a fair trial.”” *State v. Dixon*, 226 Ariz. 545, ¶ 7, 250 P.3d 1174, 1178 (2011), quoting *State v. Velazquez*, 216 Ariz. 300, ¶ 45, 166 P.3d 91, 102 (2007) (alteration in original).

¶22 At the hearing on pretrial motions, and in opening statements and closing arguments, both parties acknowledged the highly contradictory and inconsistent nature of the pretrial statements and testimony of certain key witnesses. However, Bacon never argued below, as he does on appeal, that the state knowingly elicited false testimony or that his fair trial and due process rights were violated by the testimony. Because he did not make these claims below, we review for fundamental error. See *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. And, as with the previous argument, because Bacon does not argue fundamental error and we find none, the arguments are waived. See *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650.

Disposition

¶23 For the reasons set forth above, Bacon’s convictions and sentences are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge