IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 3/21/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA,	)	1 CA-CR 12-0088
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
DOUGLAS EDWARD FUQUA,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300CR201100315

The Honorable Joseph L. Lodge, Judge (Retired)

AFFIRMED

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

H. Allen Gerhardt, Jr., Coconino County Public Defender — Flagstaff
Attorney for Appellant

K E S S L E R, Judge

¶1 Appellant, Douglas Edward Fuqua ("Fuqua"), appeals from his convictions and sentences for assault, aggravated

assault, kidnapping, and criminal damage. He argues that the trial court abused its discretion by denying his motion for new trial and that this Court should remand for resentencing because "the trial court did not understand the sentences imposed" and Appellee, the State of Arizona ("State") committed prosecutorial misconduct. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 The charges in this case arose from a domestic violence incident that occurred on April 22 and 23, 2011, between Fuqua and his then wife, Virginia. On April 22, Fuqua initially became upset when dinner was not ready quickly enough for them to take a ride before dark on his ATV ("quad"). His conduct escalated after Virginia informed him that her son had called to tell her that he would be coming into town for her birthday. Fuqua began calling Virginia a "dumb bitch" and "stupid," and repeatedly asked her if she was "going to leave" or "going to run." Virginia continually assured Fuqua that she was not going to leave and attempted to "diffuse" the situation and "calm him down," but Fuqua's agitation "progressed into a constant state."

[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Fuqua. *See State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶3 During the early morning of April 23, while they were in bed, Fuqua struck Virginia "[n]o less than 15 [times]" with a large blue coffee mug that Fuqua kept on his nightstand. Fuqua repeatedly asked her if she "was going to bring this up the next morning" and "show [him] these marks." Virginia promised him that she would not.

¶4 After the two arose the morning of April 23, Fuqua was still angry, "[the anger] never really left." Fuqua told Virginia that he did not like hitting her, but that she "caused all this." Fuqua then began drinking "a lot [of alcohol] quickly."

¶5 Over the course of the morning, Virginia's phone rang several times. She assumed it was her daughter, Jessica, or her mother calling because she "had not checked in" with them. Virginia did not answer her phone because the fact that it was ringing and it was "probably" her family calling "agitated" Fuqua. Things were "not pleasant," and Virginia did not want to "elevate the situation." However, when Jessica could not reach her mother she called Fuqua's phone. At that point Fuqua told Virginia to take the phone call because Jessica was "not going to stop [calling]."

¶6 Virginia called Jessica and "alerted her to the situation" without "say[ing] it like that." When Jessica asked Virginia if she should "get on a plane and come right now" and

whether Virginia "need[ed] help," Virginia replied, "yes." Fuqua, who was sitting on the couch next to Virginia during the conversation, began to state, "Go ahead, tell her, red alert, red alert[,] [r]ed alert, help, help, Mom needs you." Jessica heard Fuqua and told Virginia to "get out." So Virginia "just opened the door" and ran to her car and locked herself inside.

¶7 Fuqua followed Virginia to her car, pounded on the window, and yelled "[d]on't you leave, don't you go." When Virginia drove away, he "jump[ed] on the quad" and followed her. Fuqua began hitting the back of Virginia's car with his quad as she drove down the road, causing her to lose control of her car and hit a tree. After Virginia escaped from her car by exiting though a window, Fuqua hit her on the head, pulled her hair, and ordered her to get on the back of his quad. Fuqua kept hitting Virginia's head with his elbow and yelling at her during the ride back to his house, stating that her daughter would call the police and telling Virginia that she "caused this."

¶8 Once inside the house, Fuqua continued striking and kicking Virginia's head, face, and back while repeatedly telling her that he would kill her and that he was "not going back to prison because of you and you[r] dumb daughter." He retrieved a rifle, loaded it, held it so that the tip of the rifle was touching Virginia's forehead, and stated that he was going to "blow [her] brains out" because he was "not going back to prison

for you or for anybody else." He also began to strike Virginia with a closed fist as the "situation . . . elevated." When sheriff's officers arrived at the house, Virginia was able to "get their attention" by mouthing the words "help me" while pointing to Fuqua, so that the officers eventually separated the two and she was able to tell the officers what had happened.

¶9 The State charged Fuqua with two counts of assault, each Class 1 misdemeanors (Counts 1 and 4); two counts of aggravated assault, each Class 3 dangerous felonies (Counts 2 and 5); one count of kidnapping, a Class 2 felony; and one count of criminal damage in an amount over $10,000, a Class 4 felony.[2] The State charged the kidnapping and each of the assaults as domestic violence offenses. Fuqua's defense at trial was that Virginia had invented her accusations against him and that the car crash was entirely the result of an upsetting phone call Virginia received from her daughter. He conceded that he had followed Virginia in his quad, but maintained he followed her only to learn "what's going on" with her daughter. The jury found Fuqua guilty of all of the offenses as charged.

¶10 Fuqua filed a motion for new trial in which he argued that admission of evidence of an earlier January 2011 incident

[2] Before trial, the State agreed to sever three counts of misconduct involving a weapon, to amend the indictment, and dismiss one count of attempted murder.

"was error and so prejudicial that a new trial is warranted." The trial court denied his motion. Fuqua timely appealed.

¶11 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033(A)(2) (2010).

DISCUSSION

I. Evidence of a prior assault

¶12 On appeal, without any specific citations to the record or any specific argument, Fuqua argues that the trial court erred in finding that Fuqua "opened the door" to the introduction of the evidence of the January 2011 incident. He contends that "the State 'opened the door' to [his] response," and that he "opened no doors by responding." The sole legal authority he cites for his argument that a new trial is required is *State v. Wargo*, 140 Ariz. 70, 680 P.2d 206 (App. 1984).

A. Factual background

¶13 Prior to trial, the State sought to admit evidence in its case-in-chief of several of Fuqua's other acts involving Virginia as "intrinsic," "proper rehabilitation," and/or under Arizona Rule of Evidence ("Rule") 404(b). Among these was a January 2011 assault on Virginia where Fuqua made similar threats and displayed his rifle, and the following day Virginia

discussed the incident with Fuqua's pastor and the pastor's wife.

¶14 The trial court held a hearing and ruled that the State was precluded from introducing evidence of the January 2011 incident during its case-in-chief. However the court remarked that it would "see how the cross goes . . . [the evidence] may become relevant where we get over the [Rule] 403 hurdle and make it into a [Rule] 404(b) issue." In light of the court's ruling, the State agreed that it would not call either the pastor or his wife unless the door was opened.

¶15 Fuqua testified at trial. While cross-examining Fuqua concerning the April 2011 incident and why he chose to follow Virginia, the following exchange occurred:

> [State]: And why didn't you just give her some space and let her run off, if that's what she wanted to do?
>
> [Fuqua]: That's exactly how it happened.
>
> [State]: Except for the part of you driving up next to her in your quad, trying to look at her face, right, while she's driving down the road; that part happened, too, right?
>
> [Fuqua]: *I never tried not to give [Virginia] her space. She did anything she wanted to do.*

(Emphasis added.) Defense counsel objected, and the discussion of the issue was tabled while questioning of Fuqua proceeded.

¶16 During a recess, the State argued that, through his last statement, Fuqua opened the door to evidence of the January 2011 incident because Fuqua's last answer was a "fabrication" that was willfully intended to convey to the jury that he and Virgina had a "great relationship," and that the present accusations "came out of the blue." The State also noted that his question had been narrowly limited to the charged offense only, and that it was Fuqua "who chose, instead of explaining what he was doing on that occasion, to offer up a broad description of his dealings with [Virginia], and how he treated her."

¶17 The parties argued the issue at length during the trial, and the court and parties reviewed the reporter's transcript of the questioning. The trial court agreed with the State that Fuqua had "opened the door."

¶18 On rebuttal, the State re-called Virginia to the stand, and in the context of Fuqua's statement, asked her whether there was "ever a time when he didn't give you your space and didn't allow you to do what you wanted to do?" Virginia testified about the January 2011 incident that occurred at Fuqua's house.[3] She stated that "something had happened" and Fuqua woke up saying that she needed "to be hit over the head with a 2 by 4," she left her wedding ring at Fuqua's house with

[3] The couple maintained independent residences.

a note saying she left; Fuqua arrived at her house while she was in the shower and pulled her out of the bathroom. At that point, defense counsel objected "to any further answer."

¶19 The trial court recessed the jury and held another discussion with the parties. The State maintained that Rule 404(b), which permits the admission of evidence if it is relevant to "proof of motive, opportunity, intent, preparation, plan . . . absence of mistake, or accident," applied here. The State also avowed to the court that the evidence was not being used to assert that Fuqua was "a bad guy because he does [domestic violence]." Defense counsel argued that Virginia's testimony should be limited to the fact that Fuqua had not given her "space" in the manner Virginia had just testified, and that any "additional" evidence about what had occurred next would be "prejudicial" because it paralleled the conduct in the current offenses and implied that Fuqua had acted "consistent with his character." The trial court concluded:

> I think it's only fair, since I've already ruled that the door's been cracked open, that the State get to answer the question why going to her house and pulling her out of the shower is not the complete story. I think the State gets to give the complete story. [W]hether that's a violation of 404(B), smarter minds are going to get to decide that, but I've decided that the door's opened. He gets to ask that.

¶20 Upon resuming the stand Virginia went on to describe the incident. She testified that Fuqua had pulled her out of the shower and laid on top of her on the bed, then dragged her out of her room and when she "made a run for it" as they walked to the car, Fuqua chased and grabbed her and physically put her in his car. She testified further that when she tried to pull the car's steering wheel toward a neighbor to get the neighbor's attention, Fuqua grabbed her head and put it down on the floor of the car so the neighbor would not see her and then drove "to the woods" where he told Virginia he was going to kill her and that "he wasn't going back to prison." She also testified that she remained at Fuqua's home for "a couple of days," and that she subsequently sought refuge with Fuqua's pastor.

¶21 Fuqua's pastor testified that in January 2011 Virginia had come to his home seeking assistance and had stayed there for a period of time. When Virginia arrived, she appeared "shaken, afraid." At some point, he listened in on a telephone conversation that Virginia had with Fuqua using a speaker phone. When she asked Fuqua why he hit her, Fuqua replied "you know why I hit you" and stated it was because she was "emotional." The pastor also testified that Fuqua repeatedly asked Virginia "are you running" and that she would reply "no," but that Fuqua "just kept repeating [the question] over and over again."

B. The trial court did not abuse its discretion by admitting prior act evidence

¶22 The "standard of review for the admission or exclusion of evidence is abuse of discretion." *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990). This Court will not second-guess a trial court's ruling on the admissibility or relevance of evidence absent a clear abuse of discretion. *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997). We also review a trial court's denial of a motion for new trial for an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996).

¶23 "We will affirm the trial court's admission of prior act evidence if it is sustainable on any ground." *State v. Grainge*, 186 Ariz. 55, 57, 918 P.2d 1073, 1075 (App. 1996). Any evidence that is relevant and material will generally be harmful to the defendant, but it is only when evidence is unfairly prejudicial that it need be excluded. *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). "Unfair prejudice" is applied to describe evidence that has an "undue tendency to suggest [a] decision on an improper basis such as emotion, sympathy or horror." *Id*. (citation and internal quotation marks omitted). The trial court did not abuse its discretion in admitting rebuttal evidence of the January 2011 incident in this

case and, therefore, in subsequently denying Fuqua's motion for new trial.

¶24 Insofar as we may intuit Fuqua's mere invocation of *Wargo* as communicating a Rule 404(b) argument, the facts in that case are easily distinguishable from the facts in the present case and his reliance on *Wargo* is misplaced. In *Wargo*, the defendant claimed self-defense after he shot the victim in the shoulder. 140 Ariz. at 72, 680 P.2d at 208. During Wargo's cross-examination, the state elicited testimony that defendant had wanted to file charges for attempted assault and attempted murder of the victim. *Id*. at 73, 680 P.2d at 209. The trial court then permitted the state to introduce evidence of an assault on a third party, who testified that Wargo assaulted him but "denied" that he had dropped the charges against Wargo because Wargo wanted to file charges against the third party's niece. *Id*. The trial court found the evidence admissible under 404(b) because "the prosecutor convinced the trial court" that it was proof of "modus operandi, plan and course of conduct similar to what [Wargo] did in this case," the theory being that "after [Wargo] assaults somebody, he charges the victim with the crime in order to get them to drop the charges against him." *Id.* *Wargo* held that the trial court erred in admitting the evidence because it did "not tend to prove any of the elements of the crime for which [Wargo was] charged." *Id*.

¶25 Here, the January 2011 conduct involved the actual victim. Evidence of prior threats or violence against the same victim is relevant to prove motive or intent when a defendant is charged with a violent crime. *See State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995) (determining that evidence of a previous assault on the victim was admissible to show motive and intent); *State v. Williams*, 183 Ariz. 368, 377, 904 P.2d 437, 446 (1995) (determining that defendant's prior acts of aggression toward the victim's property show defendant's animosity toward the victim and were admissible for showing motive and intent). The evidence of the January 2011 assault was admissible to show motive and intent to counter Fuqua's statements that Virginia's allegations were fabricated, he never hit or restricted her in any way, and he only followed her car on the date of the present incidents to find out why she was upset. Furthermore, the record shows that the trial court in this case properly restricted the jury's consideration of the evidence to permissible purposes in its final instructions, and that the State did not use the evidence to argue or even imply that Fuqua was guilty because he was a bad person or had acted in conformity with the prior act. In fact, the State specifically told the jury that they were not to consider the January conduct to mean "if he beat her one time, so he beat her again," but to consider it in terms of Fuqua's intent when

considering his explanation of the car crash and the remainder of the events involving the offenses in this case.

¶26 Thus, without any specific contrary evidence from Fuqua, we presume that the jurors followed the court's instruction and only considered evidence of the January 2011 incident for the proper Rule 404(b) purposes of evaluating Fuqua's motive and intent. *See State v. Velazquez*, 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007); *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Furthermore, the trial court specifically found that, while certainly adverse to Fuqua, the probative value of the evidence of the January 2011 incident was not outweighed by unfair prejudice. *See Schurz*, 176 Ariz. at 52, 859 P.2d at 162. Again, without any reference to specific evidence to the contrary, and in light of the State's proper use of the evidence and the court's limiting instruction, we find no indication that the evidence was unfairly prejudicial in this case. Therefore, to the extent that the trial court admitted the evidence for 404(b) purposes, it did not abuse its discretion in so doing. *See Robinson*, 165 Ariz. at 56-57, 796 P.2d at 858-59.

¶27 In any event, the evidence of the January incident was introduced in this case only for rebuttal purposes after the trial court found that Fuqua opened the door in his response to

the State's question. We agree with the trial court that the evidence was properly admitted for that purpose.

¶28 A defendant may "open the door" to Rule 404(b) evidence by denying certain facts that are contradicted by previously excluded evidence. *State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980). Thereafter, the defendant cannot rely on the previous ruling excluding evidence. *Id*.

¶29 Fuqua claims that the State opened the door by his question. But the record shows that the question the prosecutor posed concerning why he had not given Virginia "space" and let her "run off" pertained specifically to the day of the charged offenses in this case. It was Fuqua who chose to answer a specific question by interjecting his general affirmation that he "*never* tried not to give [Virginia] her space." (Emphasis added.) It is well-established that in Arizona "cross-examination may extend to all matters covered by direct examination, and to any other matter within the knowledge of the witness having relevancy to the issues at the trial." *State v. Mincey*, 130 Ariz. 389, 405, 636 P.2d 637, 653 (1981) (citation and internal quotation marks omitted). The trial court did not abuse its discretion in admitting the evidence for this purpose. *See Robinson*, 165 Ariz. at 56-57, 796 P.2d at 858-59.

II. Remand for resentencing is unnecessary

¶30 Fuqua claims that the trial court committed several errors in imposing his sentences which require that we remand for resentencing. Because he did not raise any of his claims before the trial court, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). "Imposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002). To prevail under a fundamental review standard, Fuqua must establish both that fundamental error exists and that it caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Fuqua has failed to establish either.

¶31 The trial court sentenced Fuqua to six months in jail for Count 1, misdemeanor assault; 11.25 years in prison for Count 2, aggravated assault; 15.75 years in prison for Count 3, kidnapping; six months in jail for Count 4, misdemeanor assault; 7.5 years in prison for Count 5, aggravated assault; and 1 year in prison for Count 6, criminal damage. The court ordered that all the sentences be served consecutively for a total of 36.5 years and awarded Fuqua 277 days of presentence incarceration credit.

¶32 Fuqua maintains that the trial court improperly imposed consecutive sentences because that signifies that he

will have to serve his jail sentence on Count 4, his second misdemeanor assault conviction, when he completes his prison sentence on Count 3, his felony kidnapping conviction, and then be returned to prison to complete his prison sentence on Count 5, his felony criminal damage conviction. As the State notes, the minute entry order specifies that the jail terms for both misdemeanor offenses began on the date of sentencing, January 25, 2012, and the trial court also credited Fuqua with 277 days of presentence incarceration credit for each of the misdemeanor offenses. Therefore, Fuqua has completed both of these jail sentences.

¶33 Fuqua maintains that the trial court improperly imposed a "day for day flat time" sentence and that the signed minute entry order referencing all counts that states "[Fuqua] must serve 100% of the sentence imposed," is also "false." Fuqua cites no authority or rule in support of his argument.

¶34 The trial court found, and Fuqua admitted, that Fuqua had two prior historical felony convictions and that he was therefore a repetitive offender. The jury found that Counts 2 and 5, aggravated assault, were each dangerous offenses.

¶35 A.R.S. § 13-703(O) (Supp. 2012), provides that a person who is sentenced as a "repetitive" offender "is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis, except as specifically

authorized by [A.R.S.] § 31-233, subsection A or B, until the sentence imposed by the court has been served, the person is eligible for release pursuant to [A.R.S.] § 41-1604.07 or the sentence is commuted."[4] Section 13-704(G) (Supp. 2012) governing sentences for dangerous offenders contains similar language. Furthermore, A.R.S. § 41-1604.07 (2011) governing earned release credits provides that a prisoner who is eligible for earned release credits "shall be allowed an earned release credit of one day for every six days served, including time served in county jails, *except for those prisoners who are sentenced to serve the full term of imprisonment imposed by the court*." (Emphasis added.) Fuqua has failed to show that he falls into any exception to the statutes or why the statutes are not applicable in his case. He has therefore failed to show that the court's imposition of "flat time" constitutes error. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶36 Fuqua complains that the trial court erred because it imposed an illegally mitigated sentence of only one year in Count 6, the criminal damage offense, a Class 5 felony. According to Fuqua, this anomaly demonstrates the trial judge's overall "lack of understanding" of his sentencing. The court appears to have erred in designating this offense "non-

[4] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

repetitive." It is true that, even as a first-time offender, the presumptive prison term for this charge would be 1.5 years and the minimum .75 years.

¶37 A sentence is illegal if it is in excess of the range authorized by statute for a particular crime, *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991), or if the court fails to impose a sentence in conformity with the mandatory sentencing statutes, *State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995). However, if the state does not challenge an illegally lenient sentence, as in the present case, this Court is without jurisdiction to correct it. *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990). Under these circumstances, where the error clearly inures to defendant's benefit, defendant fails to prove prejudice. *Id*.

¶38 Fuqua also argues that the prosecutor erred because he "vouched for the righteousness of the State's position by quoting the personal opinion of a former prosecutor who is now a Judge" about Fuqua's character in 2002. Fuqua does not direct us to any particular parts of the prosecutor's statements at sentencing to which he objects, and only cursorily cites *State v. Moore*, 108 Ariz. 215, 221-22, 495 P.2d 445, 451-52 (1972), for the proposition that our supreme court has in the past "noted the improper conduct of an individual prosecutor and taken corrective action."

¶39 The misconduct in *Moore* occurred during the course of a trial and is simply not on point with the issue here, which concerns the State's arguments to the trial court in the context of sentencing. *See* 108 Ariz. at 219-21, 495 P.2d at 449-51. The State reviewed the nature of Fuqua's prior domestic violence convictions and his subsequent conduct to support a recommendation that the court should impose maximum consecutive sentences for a total of 63 years in prison. The State was entitled to make a sentencing recommendation based on the relevant evidence and the prosecutor's statements, and in so doing did not constitute vouching or misconduct. *See* Ariz. R. Crim. P. 26.7.

¶40 Although a judge may be aided by the sentencing recommendation of the state and its agents, "it is fundamental that [the judge] is not bound by any of these suggestions." *State v. Patton*, 120 Ariz. 386, 389-90, 586 P.2d 635, 638-39 (1978). Furthermore, the trial court is presumed to know the law and to follow it. *State v. Williams*, 220 Ariz. 331, 334, ¶ 9, 206 P.3d 780, 783 (App. 2008). Clearly, the trial judge here did not follow the State's recommendation by imposing a total sentence that was almost half the time that the State recommended. Therefore, even if we assumed the prosecutor's comments were improper, Fuqua fails to show that such comments prejudiced him. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d

at 607. Fuqua has failed to establish sentencing error, and thus, resentencing is unecessary.

CONCLUSION

¶41 For the foregoing reasons, we affirm Fuqua's convictions and sentences.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
JOHN C. GEMMILL, Presiding Judge

/S/
JON W. THOMPSON, Judge