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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DANIEL TODD HUSET, *Appellant*.

Nos. 1 CA-CR 16-0800
1 CA-CR 16-0907
(Consolidated)
FILED 12-12-2017

Appeal from the Superior Court in Maricopa County
No. CR2016-103481-001
The Honorable Jose S. Padilla, Judge

AFFIRMED IN PART, VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Justice Rebecca White Berch¹ delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Peter B. Swann joined.

B E R C H, Justice:

¶1 Daniel Todd Huset appeals his convictions and resulting restitution award. For the following reasons, we affirm the convictions, vacate the restitution award, and remand for a new restitution hearing.

FACTS AND PROCEDURAL BACKGROUND²

¶2 A realtor hired Andrew Ordanza to do electrical work on a house the realtor had listed for sale. While working in the garage and attic areas of the house, Ordanza saw Huset walking through the neighborhood. Huset approached Ordanza and asked him for a bottle of water. Ordanza responded that he did not have one, but Ordanza could get a drink from the outside spigot. Huset inquired whether anyone was home, to which Ordanza responded negatively, then went back to work. Huset knocked on the front door, then entered the house to get a drink of water.

¶3 Soon thereafter, Ordanza, who was by then back up in the attic of the house, heard glass breaking inside the house. He went to his truck, called the realtor, and told her “to call 9-1-1.” After the realtor made the call, the dispatcher contacted Ordanza. To avoid a confrontation with Huset, Ordanza drove to a nearby church and met with the realtor. As he waited for the police to arrive, he saw Huset walking on a sidewalk and relayed Huset’s location to the dispatcher.

¶4 Two Maricopa County Sheriff’s Office deputies drove to the area and contacted Huset after being flagged down by the realtor, who pointed in Huset’s direction. The deputies called to him to get his attention, but Huset became agitated. The deputies drew their firearms and placed

¹ The Honorable Rebecca White Berch, retired Justice of the Arizona Supreme Court, has been authorized to sit in this matter pursuant to Article VI, Section 3, of the Arizona Constitution.

² “We view the facts in the light most favorable to sustaining the jury’s verdicts.” *State v. Hancock*, 240 Ariz. 393, 395, ¶ 2 (App. 2016).

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him under arrest. A posse member transported Huset back to the house, where Huset was interviewed by Deputy Barnett.

¶5 Ordanza and the realtor returned to the house and discovered that a glass table and several decorations belonging to the realtor were damaged. The back door of the house appeared to have been kicked and was also damaged.

¶6 The State charged Huset with one count of criminal trespass in the first degree, one count of criminal damage, and one count of disorderly conduct. The jury found Huset guilty as charged. In addition to sentencing Huset to prison, the court ordered him to pay the realtor \$4,067.37 in restitution. Huset appeals, and we have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) section 12-120.21(A)(1).

DISCUSSION

¶7 Huset argues that the State elicited other-act evidence, in violation of Arizona Rule of Evidence 404(B). He also challenges the court’s restitution order.

A. Rule 404(b) other-act evidence

¶8 Rule 404(b) generally precludes evidence of a defendant’s “other crimes, wrongs, or acts” to show that a defendant acted in conformity with those acts. Huset argues on appeal that the court abused its discretion by allowing the State to introduce “other act evidence concerning [his] post-arrest statements and conduct to prove that [his] pre-arrest conduct conformed to that of [his] post-arrest conduct.”

¶9 The State asserts that Huset failed to object to the admission of the statements on Rule 404 grounds in the trial court, and so this court should review Huset’s argument only for fundamental error. Huset claims he did object by filing a motion in limine asking the court to preclude some of Huset’s profane and inappropriate statements based on “the Arizona Rules of Evidence . . . 401, 402, 403, 404, 801, 802, and 803 as well as Arizona Rules of Criminal Procedure Rule 15” (emphasis added). But Huset’s motion developed its objections on relevance and prejudice grounds only by arguing that the statements at issue “are not relevant under Rules 401 and 402 and they are overly prejudicial and should be precluded by Rule 403.” With respect to two particular comments (i.e., “Maricopa County Pussy’s Office” and that if an officer didn’t know who he was, he “could fuck off”), the motion asserted that these “are overly prejudicial and should be precluded by Rule 403.” No argument whatsoever was made under Rule

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404; indeed, that rule is never again mentioned in the motion in limine.³ The transcript of argument on the motion does not contain any mention of Rule 404, and nothing in it suggests that the court considered or ruled on Rule 404 grounds. Moreover, no objection on Rule 404 grounds was made at trial.

¶10 Objections “not raised with specificity and addressed in the trial court” are generally deemed waived. *Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 177, ¶ 13 (App. 2004). That is the situation here. Huset did not make a sufficient argument—or indeed any argument—on Rule 404 “to allow [the] trial court to rule on the issue.” *State v. Kinney*, 225 Ariz. 550, 554, ¶ 7 (App. 2010). We therefore review the asserted error for fundamental error. *State v. Martinez*, 230 Ariz. 208, 214, ¶ 25 (2012). To prevail in a fundamental error challenge, “a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.” *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20 (2005).

¶11 Fundamental error is difficult to prove. Error is fundamental only if it is so substantial that it “goes to the foundation of [the] case,” “takes away a right that is essential” to the defense, and is of “such magnitude that [the defendant] could not have received a fair trial.” *Id.* at 568, ¶¶ 23–24.

¶12 Rule 404(b) prohibits use of “other crimes, wrongs, or acts” to show that a defendant acted “in conformity therewith”; that is, the prosecution cannot attempt to prove that a defendant did some bad acts to show that he had a “propensity to act in a certain way” and so must have

³ The motion sought to preclude:

....

3. Any testimony regarding statements given to police by Mr. Huset at the time of his arrest. Specifically regarding Mr. Huset’s use of foul language. . . . [T]hese comments are not relevant under Rules 401 and 402 and they are overly prejudicial and should be precluded by Rule 403.

4. [Huset’s] statements using foul language such as “Maricopa County Pussy’s Office” and “If I didn’t know I could fuck off.” These comments are not relevant under Rules 401 and 402 and they are overly prejudicial and should be precluded by Rule 403.

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done the act charged here. *State v. Ferrero*, 229 Ariz. 239, 241, ¶ 9 (2012). But “other acts” may be used to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Rule 404(b).

¶13 At trial, the State argued that the loud, profane statements helped to establish Huset’s identity—that Huset was the same man observed by Ordanza—a proper Rule 404 purpose, although that issue did not seem to be contested. Once evidence is admitted for a proper purpose under Rule 404(b), the court and parties should endeavor to limit the jury’s use of the evidence to that purpose. *See State v. Hargrave*, 225 Ariz. 1, 8, ¶ 10 (2010). But here, the evidence was not necessarily admitted under Rule 404(b), as there was no objection on that ground and no request by Huset for a jury instruction limiting the use of the statements to establishing identity.

¶14 Huset did object to the admission of the statements on the grounds that they were irrelevant (in the motion in limine) and that they were prejudicial (in the motion and at trial). But we conclude that the court did not abuse its discretion in finding the evidence relevant and in further finding that a defendant’s behavior in a criminal case will often reflect poorly on him, and the poor reflection, while likely prejudicial in the jury’s eyes, is not unfairly so. *See Ariz. R. Evid. 403* (setting forth unfair prejudice standard). We find no abuse of discretion in those rulings. *See State v. Gamez*, 227 Ariz. 445, 449, ¶ 25 (App. 2011) (stating abuse of discretion standard of review).

¶15 It is the State’s use of the statements to attempt to prove actions in conformity that present the more difficult issue. But as to these, there was no objection. On appeal, then, it is Huset’s burden to prove fundamental error—that the error went to the foundation of the case, was of such magnitude that Huset was denied a fair trial, or took away a right essential to his defense. *Henderson*, 210 Ariz. at 568, ¶ 24.

¶16 Huset was charged with criminal trespass, criminal damage, and disorderly conduct. All were proven with substantial evidence. Huset acknowledged at trial that his speech to police was loud and that it could not be characterized as polite. He makes little argument that, given this, the jury might have been unduly prejudiced by evidence that he swore or was otherwise disrespectful toward the police. The statements at issue, although crude, were not of a type or magnitude to create unfair prejudice against the defendant that would deprive him of a fair trial. We conclude that fundamental error has not been shown.

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B. Restitution Award

¶17 Huset challenges the superior court's restitution award. Huset argues that the trial court abused its discretion by awarding "a windfall to the victim in the form of anticipatory 'lost wages' which were never lost and over-compensation for a used glass table."

¶18 "A trial court has discretion to set the amount of restitution according to the facts." *State v. Barrett*, 177 Ariz. 46, 47 (App. 1993). Thus, we review a restitution order for an abuse of discretion. *State v. Lewis*, 222 Ariz. 321, 323, ¶ 5 (App. 2009). The court abuses its discretion "when it misapplies the law or predicates its decision on incorrect legal principles." *Id.* at 324, ¶ 5.

¶19 In Arizona, victims have a constitutional right "[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury." Ariz. Const. art. 2, § 2.1(A)(8). The person convicted of the offense must pay the victim "the full amount of the economic loss as determined by the court and in the manner as determined by the court." A.R.S. § 13-603(C). "A loss is recoverable as restitution if it meets three requirements: (1) the loss must be economic, (2) the loss must be one that the victim would not have incurred but for the criminal conduct, and (3) the criminal conduct must directly cause the economic loss." *Lewis*, 222 Ariz. at 324, ¶ 7 (quoting *State v. Madrid*, 207 Ariz. 296, 298, ¶ 5 (App. 2004)).

(a) Wages

¶20 "Economic loss" includes "lost earnings and other losses that would not have been incurred but for the offense." A.R.S. § 13-105(16). Lost earnings encompass "not only wages lost due to an injury caused by the criminal conduct, and wages lost because of a trial appearance made mandatory by subpoena, but also [wages lost due to] the victim's voluntary attendance" at court hearings. *State v. Lindsley*, 191 Ariz. 195, 198 (App. 1997). A restitution award must, however, be based on "proof and not speculation." *State v. Iniguez*, 169 Ariz. 533, 538 (App. 1991). Economic loss does not include "damages for pain and suffering, punitive damages or consequential damages." A.R.S. § 13-105(16).

¶21 The victim in this case is a realtor who earns her money through commission on home sales, not through hourly wages. She testified that her presence at trial limited her ability to attend to her business, which includes making phone calls to obtain business. Although she could not say with certainty whether she had lost any business or

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opportunities to sell homes as a direct result of appearing in court, the court awarded her lost wages by dividing her annual income down to an hourly wage and then multiplying the hourly wage by “an eight-hour workday times six days.”

¶22 Restitution is designed to ensure that victims receive prompt economic compensation for actual losses. *See State v. Guilliams*, 208 Ariz. 48, 52, ¶ 12 (App. 2004). Here, no evidence was presented showing whether the hearings the victim attended lasted eight full hours per day. Thus, we cannot determine whether the victim actually lost eight hours of work each day, or whether she was unable to work at all during those days. As a result, we vacate the award and remand to the trial court so it can conduct a new restitution hearing and grant an award consistent with the time the victim actually lost as a result of the hearings.

(b) The glass table

¶23 The court also awarded the realtor \$1,500 for a damaged glass table. Huset argues that “[t]he trial court abused its discretion by ordering Mr. Huset pay \$1,500 for the glass table because the economic loss was less than \$500.”

¶24 “Arizona’s statutory scheme requiring restitution in criminal cases is based on the principle that the offender should make reparations to the victim by restoring the victim to his [or her] economic status quo that existed before the crime occurred.” *In re William L.*, 211 Ariz. 236, 239, ¶ 11 (App. 2005). “[I]n assessing restitution for a loss of personal property, the measure of the victim’s full economic loss is the fair market value of the property at the time of the loss.” *State v. Ellis*, 172 Ariz. 549, 550 (App. 1992). “Evidence of fair market value may include, among other things, whether the property was new when purchased, the original purchase price, how much time the owner has had the use of the property and the condition of the property” at the time of loss. *Id.* at 551. We give courts “wide discretion in setting restitution based on the facts of each case.” *State v. Dixon*, 216 Ariz. 18, 21, ¶ 11 (App. 2007).

¶25 The victim testified that she purchased the table for \$500 from a friend, but she bought it from a friend who needed to sell it quickly. When she conducted a Google search to determine a price for a replacement table, she discovered that the price of a replacement table of similar quality was \$1,500. The court did not, however, consider whether the table should or could be repaired instead of replaced. Thus, on remand, the court should

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consider whether the repair cost would be less than the replacement cost and, if so, it should order an award consistent with that cost.

CONCLUSION

¶26 We affirm Huset's convictions, vacate the restitution award, and remand this case for a new restitution hearing.



AMY M. WOOD • Clerk of the Court
FILED: AA