IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

CARLOS MARTINEZ, JR., *Appellant*.

No. 1 CA-CR 16-0667
FILED 3-29-2018

Appeal from the Superior Court in Maricopa County
No. CR2014-160135-001
The Honorable Michael D. Gordon, Judge
The Honorable Theresa A. Sanders, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

Maricopa County Office of the Legal Advocate, Phoenix
By Frances J. Gray
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Michael J. Brown delivered the decision of the Court, in which Judge Jennifer B. Campbell and Judge James B. Morse Jr. joined.

B R O W N, Judge:

¶1 Carlos Martinez appeals his convictions and sentences for second degree burglary, criminal damage, sexual abuse, and aggravated assault. He argues the trial court erred by giving an erroneous jury instruction, applying the legal principles of that erroneous instruction when admitting evidence, allowing irrelevant and prejudicial evidence, and denying his motions for mistrial. He also argues the prosecutor's misconduct deprived him of his right to due process. Because we find no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 Martinez and one of the victims, C.S., met in April 2013 and dated "[o]ff and on for one year." The other victim, C.C., lives in the same apartment complex as C.S.

¶3 In April 2014, Martinez kicked down C.S.'s patio door, damaging "[t]he entire door." C.S. called 9-1-1. C.C. heard a dispute outside and saw a man chasing C.S. C.C. also called 9-1-1. The apartment manager saw Martinez yelling at C.S. and told him to leave. After jumping a fence, Martinez attempted to flee but police arrested him. He later pled guilty to criminal trespass and was sentenced to one year in prison.

¶4 Late one evening in December 2014, about a week after Martinez was released from prison, C.S. heard a noise coming from her guest bedroom. She found Martinez climbing through the bedroom window and told him to leave, using a "very loud voice." He ignored her demand and instead forcibly removed her clothes, put his hands on her chest, and touched and licked her breasts. When Martinez thought C.S.

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

called him by the wrong name, he apparently became upset and left the room. C.S. covered herself with a blanket and ran from the apartment.

¶5 After knocking on several neighbors' doors, C.C. answered and saw Martinez standing nearby while C.S. frantically told him what had occurred. After C.S. told C.C. to call the police, she turned toward her apartment to check on her dog's safety. Martinez began following her again, at which point C.C. stuck out his arm and told Martinez to stop. When Martinez did not respond, C.C. yelled at C.S. to come into his apartment, but Martinez blocked her way. C.C. went back into his apartment to grab his phone and pistol, and upon return, told Martinez to leave or he would call the police. Instead, Martinez tried to tackle C.C., backing him up until he hit the apartment wall. Realizing he could not win a physical confrontation, C.C. shot Martinez. Martinez fled but soon came to rest in a "grassy area" of the apartment complex; he was then taken to the hospital for surgery.

¶6 The State charged Martinez with second degree burglary, kidnapping, two counts of sexual assault, two counts of aggravated assault, and sexual abuse, committed against C.S. The State also charged Martinez with preventing use of a telephone in an emergency and aggravated assault, committed against C.C., and with criminal damage for the damage to the exterior of the apartment complex. Martinez provided notice of several defenses, including consent, mere presence, lack of specific intent, no criminal intent, insufficient evidence, and denial. Pursuant to Arizona Rule of Evidence ("Rule") 404(b), the State moved to admit evidence of the April incident, arguing it was proper for the purpose of proving motive, intent, and lack of consent. Among other things, the State also sought to admit the following uncharged conduct related to the April incident: Martinez grabbed C.S. and started kissing her, threw her dog against the breakfast bar, and yelled obscenities.

¶7 Judge Sanders granted the State's Rule 404(b) motion in part, limiting evidence of the April incident during the State's case-in-chief to the unlawful entry, how Martinez entered, C.S.'s lack of consent, and that C.S. called the police. Judge Sanders also ruled that the evidence would be admitted for a proper purpose (to show "intent and knowledge"), it was relevant, and its probative value substantially outweighed the potential for unfair prejudice. The State was not allowed "to get into a felony, or that he was convicted, or that he was incarcerated," but Judge Sanders warned that the door could be opened to such evidence during trial.

¶8 Before trial, Martinez submitted proposed jury instructions, which included Revised Arizona Jury Instruction Standard Criminal 26A ("RAJI 26A"): "Other Acts—to establish intent and/or knowledge." Martinez also submitted a motion in limine to exclude several pieces of evidence, including evidence derived from his criminal trespass and related incarceration, except as allowed previously by Judge Sanders.

¶9 Judge Gordon presided over the ensuing 22-day jury trial. During the second day, the State mentioned that it "assum[ed] [] the Court [was] going to give an Other Acts instruction." The court responded: "Other Acts instruction. Yes, of course." Martinez did not object. The State then took the position that a more expansive presentation of evidence relating to the April incident was necessary to meet the burden of proving by clear and convincing evidence that the incident occurred.

¶10 On day five and six, C.S. testified about the April incident, explaining that she called the police after Martinez came over to her apartment uninvited and damaged her door by kicking it down. When asked whether she called the police after finding Martinez in her apartment during the December incident, C.S. said the following: "He wouldn't—there's no way. He—I don't know if I'm allowed to say this part, but he's broken into my place before and stolen my phone and . . . ." Martinez's counsel, cutting off her testimony, objected and moved for a mistrial. In response, the court struck the answer, explained that "[i]t's not to be considered" and that "[i]t was nonresponsive," and directed counsel to "try the question and answer again."

¶11 After C.S.'s testimony on day five, the court considered Martinez's pending motion in limine. During the ensuing discussion, Martinez asked the court to limit any further testimony of the April incident because it would waste the jury's time and confuse the issues. The court ruled that because the State must meet the burden of clear and convincing evidence, the State could "bring in the percipient fact witnesses," including the apartment manager, Officer Hathaway, and Officer Roa, but that the "fact of conviction [was] a bridge too far" because "it [was] violative of [Rule] 403." The court also ruled that C.C. could testify "about his knowledge that law enforcement had been called previously, referring to the [April] incident, that he understood it to involve an ex-boyfriend . . . and that impacted his conduct on the night in question."

¶12 The State then sought admission of additional evidence surrounding the April incident, including Martinez's flight from police, arrest, admission of guilt, and conviction, so the State could prove by clear

and convincing evidence that the April incident occurred. Martinez argued the additional evidence would subject him to a "mini-trial about a prior incident" and that the probative value of the additional evidence was "not substantially outweighed by the danger of unfair prejudice." Mentioning throughout the discussion that the State had to prove to the jury by clear and convincing evidence that the April incident occurred, and that it had to "weigh the [Rule] 403 issues as the rules provide," the court ruled that the April incident remained admissible, meaning the State could admit evidence during its case-in-chief about the unlawful entry, how Martinez entered, and that C.S. called the police. The court also ruled that the State could introduce evidence of Martinez running from the scene during the April incident and that he was "detained," but precluded any reference to Martinez being "arrested" or convicted, or that he was incarcerated until December 1, 2014.

¶13 During C.S.'s cross-examination, defense counsel introduced photographs of Martinez that police found on C.S.'s cellphone. C.S. acknowledged that the pictures were on her phone at the time of the December incident and that most of them "were e-mailed to [her] and saved on [her] cell phone." The State argued defense counsel opened the door to admit evidence that Martinez was incarcerated after the April incident until the December incident based on the suggestion that Martinez and C.S. had a "friendly relationship" at the time of the December incident. Over defense counsel's objection, the court ruled that C.S. could testify that Martinez was incarcerated since the April incident and that the jury would be instructed to only consider the fact of incarceration to "assess the credibility of when the photographs were in fact sent."

¶14 During re-direct, the State asked C.S. if Martinez was "unavailable for photos because he was incarcerated from April 7th, 2014, to a few days before he sexually assaulted [her]," and Martinez objected, explaining that the State, instead of asking whether Martinez was incarcerated after the April incident, violated the court's order by mentioning the specific dates of incarceration. The court agreed and told the jury "not to consider the question, as phrased, for any purpose." The State then appropriately rephrased the question.

¶15 Several days later, Martinez filed a motion for mistrial based on the prosecutor's misconduct in mentioning the specific dates of incarceration. The court denied the motion, finding that "while the State transgressed this Court's order with respect to the introduction of the evidence, there's no reason for the Court to think that it was intentional or that there was any attempt to gain advantage from the transgression." The

court also found there was "no material risk of prejudice." On day 10, the State asked that C.C. be allowed to testify as to what he observed during the April incident. Over Martinez's objections, the court ruled that C.C. could "testify that he heard the victim screaming," and that "he went outside" and "saw [C.S.] in a . . . domestic dispute." The court clarified, however, that C.C. could not testify about C.S. being attacked. Except for the portion of his testimony saying he heard "a woman frantically yelling for help," which was stricken after Martinez objected, C.C.'s direct testimony complied with the court's ruling.

¶16 During cross-examination, Martinez asked C.C. about his guns and ammunition, shooting habits, "pill bottles" for "oxycodone," and his decision to shoot an unarmed man. He also introduced photographs of C.C.'s guns, ammunition, empty shell casings, and targets. C.C. testified he was a "little protective of [C.S.]." The State asserted that Martinez opened the door for it to ask C.C. why he was protective of C.S.; Martinez objected. After questioning C.C. outside the presence of the jury, and ascertaining that C.C. became protective of C.S. because he saw her "attacked earlier that year," the court found that Martinez opened the door to C.C. testifying about what he saw during the April incident, but prohibited C.C. from calling it an "attack."

¶17 Before continuing C.C.'s testimony on re-direct, the State again brought up the issue of C.C.'s testimony on the April incident, seeking to introduce evidence that C.C. saw C.S. being chased during the April incident and that "[C.C.] had a gun on that day . . . and he chose not to use it." The State asserted Martinez opened the door to this evidence and that it was necessary to rebut the impression that C.C. was "a crazed gunman who shoots at the earliest opportunity available." The court agreed and allowed the testimony, explaining the State should have the opportunity to respond to the defense's theory that C.C. is "trigger-happy" or is a "person who has a target hanging over his bed," "ammunition all over his apartment," and "pill bottles all over the house." C.C. then testified according to the court's rulings, except when he stated that he became protective of C.S. because "she had already been attacked"; the court struck the statement and directed the jury not to consider it.

¶18 Martinez requested a mistrial again because C.C. testified that C.S. had previously been "attacked." The court denied the motion. Noting that it had struck C.C.'s statement from the record, the court found the State's question about why C.C. was protective of C.S. was not an attempt by the State to admit evidence covertly, but that the use of the "word 'attacked' to characterize having seen [C.S.] chased around and argued [sic]

is not of such a weight that the jury can't set it aside, won't set it aside and won't follow this Court's instructions on the matter."

¶19 On day 17, the State introduced 19 crime-scene photographs of C.S.'s apartment shortly after the April incident. The parties agreed the photographs concerned the same issue, "the manner of entry," but Martinez objected, arguing the photographs would "inflame the jury because of the broken nature of the doors" and would be cumulative because "evidence of the manner of entry" was already introduced. The court overruled the objection, finding the "evidence [was] relevant and that its prejudicial value d[id] not outweigh its probative effect."

¶20 The State then called four additional witnesses to testify about the April incident. Sergeant Hanafin testified that he observed the splintered patio door and interviewed a witness that called 9-1-1. The State asked the officer, "Do you know if the defendant was arrested in this case?" Martinez objected because the court previously ruled that the State could only elicit testimony that he was "detained," not arrested. The court sustained the objection and the State properly rephrased the question.

¶21 Outside the presence of the jury, Martinez moved for a mistrial, arguing the State's question to Officer Hanafin about whether Martinez was arrested was in violation of the court's ruling that excluded the use of the term "arrested." Martinez asked the court to consider the cumulative effect of the latest violation because it was "further prejudicing Mr. Martinez's right to a fair trial on the charged offenses from [the December incident]." The State countered that there was little difference between using "arrested" and "detained," and noted, again, that it had to "show by clear and convincing evidence that the 404 happened." Although recognizing that Martinez was "building a stronger case for a mistrial," the court denied the motion because it did not "believe that it was done intentionally."

¶22 The apartment manager testified that during the April incident she saw Martinez yelling at C.S., who was crying, and told Martinez "to leave the community" and that the police had been called. Martinez then jumped a fence and ran away. C.S. later ordered repairs for the damaged door and screen. Officer Hathaway testified that as he was responding to the April incident, one of the officers on scene reported that a subject named Carlos "was last seen jumping one of the walls and leaving the complex." Hathaway called out "Carlos" when he saw Martinez, who was subsequently "detain[ed]" after attempting to run away. Officer Roa testified that he responded to a "domestic dispute," and that he helped

search for a person named Carlos. Roa eventually located him with Hathaway's help, yelled at Martinez to stop, ran after him, tackled him, and "handcuff[ed]" and "detained" him.

¶23 On day 19, the State sought a ruling on the admissibility of a redacted recording of the 9-1-1 call C.S. made during the April incident. Martinez argued the call was inadmissible because it would "inflame the passions of the jury and invoke [] sympathy for the victim and not for any other legitimate evidentiary purpose." Martinez also argued that the content of the call had been brought in through other witnesses, such as C.S.'s testimony and the other witnesses that had testified about the April incident. The court asked counsel whether Martinez was "holding the State to its burden of proof with respect to 404(b), requiring the State to prove by clear and convincing evidence that this conduct occurred," to which Martinez's counsel replied "[y]es." The court also asked whether the parties had given it "a 404(b) instruction"; both parties responded "[y]es," with Martinez's counsel specifying that she thought it was "26A."

¶24 After further discussion on the admissibility of C.S.'s 9-1-1 call, the State argued, in part, that the probative value of the call outweighed the prejudicial effect. Specifically, after referencing the clear and convincing evidence standard, the State argued that, "other than [C.S.]'s testimony," they needed the 9-1-1 call to show Martinez "was the person who entered into [C.S.]'s apartment" during the April incident. The court ruled that, although "the defendant ha[d] not been charged with this offense," it is "being used as other acts evidence" and "falls within the core of the 404(b) conduct being alleged, for which the State has to prove by clear and convincing evidence." In "weigh[ing] the potential for prejudice against the relevance," the court found that the "[p]rejudice d[id] not outweigh the relevance" and thus, overruled the objection and allowed the State to play the 9-1-1 call to the jury.

¶25 When settling the final jury instructions, both parties agreed to the following instruction, which tracks the language of RAJI 26A:

> Evidence of other acts has been presented. You may consider these acts only if you find that the State has proved by clear and convincing evidence that the defendant committed these acts. You may only consider these acts to establish the defendant's intent and/or knowledge. You must not consider these acts to determine the defendant's character or character trait, or to determine that the defendant acted in conformity

with the defendant's character or character trait and therefore committed the charged offense.

¶26 During closing arguments, the State argued it had satisfied its burden of proving to the jury by clear and convincing evidence that the April incident occurred, pointing to the testimony of the several witnesses who provided their recollection of the incident, as well as the 9-1-1 call, the 19 photographs, and the fact that Martinez fled from the apartment complex. The State also argued that the April incident could be used to "establish [Martinez]'s intent," and, over Martinez's objection, could be used "to show lack of consent," including whether C.S. consented to sexual contact.

¶27 The jury found Martinez guilty of committing second degree burglary, sexual abuse, and criminal damage against C.S., and committing aggravated assault against C.C. He was acquitted on the remaining charges. After sentencing, Martinez timely appealed.

DISCUSSION

A. Jury Instruction - Invited Error

¶28 Martinez argues the trial court (1) structurally erred in giving RAJI 26A because the instruction allegedly lessened the State's burden of proof and deprived him of his right to a jury verdict of guilt beyond a reasonable doubt; and (2) "misapplied the law" in allowing the State the opportunity to prove to the jury that the April incident occurred by clear and convincing evidence, the standard outlined in RAJI 26A. The State counters that Martinez is precluded from raising these claimed errors on appeal because he invited them.

¶29 The invited error doctrine is meant to prevent parties from injecting an error into trial proceedings and then profiting from that error on appeal. *See State v. Logan*, 200 Ariz. 564, 566, ¶ 11 (2001). In *Logan*, the defendant submitted a proposed theft instruction that was identical to the theft instruction used by the trial court. 200 Ariz. at 565, ¶ 4. After the jury returned a guilty verdict on all charges, the defendant moved for a new trial, arguing "the theft instruction was insufficient because it failed to include" the required statutory language. *Id.* at ¶ 5. The court denied the motion. *Id.* On review, our supreme court applied the invited error doctrine in declining to review the defendant's requested instruction "as a ground of error," which he alleged was fundamental error, because "the defendant requested the challenged instruction." *Id.* at 567, ¶ 15.

¶30 Similar to *Logan*, Martinez is precluded from asserting error on appeal. Although it is apparent from the record that the State, pursuant to RAJI 26A, was seeking to prove to the jury that the April incident occurred by clear and convincing evidence, at no point did Martinez object or argue that this was not the State's burden. Instead, even before the State began referencing its burden, Martinez proposed RAJI 26A, which provides that the State must prove to the jury by clear and convincing evidence that the other acts occurred. Thus, even assuming the court "misapplied the law" by allowing the State to prove to the jury by clear and convincing evidence that the April incident occurred, and in instructing the jury according to RAJI 26A, Martinez cannot challenge these errors on appeal, regardless of whether he labels them as fundamental or structural. *See Logan*, 200 Ariz. at 565, ¶ 8 ("We have long held that when a party requests an erroneous instruction, *any resulting error is invited* and the party waives his right to challenge the instruction on appeal.") (emphasis added); *see also State v. Diaz*, 223 Ariz. 358, 360, ¶ 11 (2010) ("Regardless of how an alleged error ultimately is characterized, however, a defendant on appeal must first establish that some error occurred.").

¶31 Martinez points to several incidents in the trial court, contending they show the State was the source of the errors or that he acquiesced to the errors. *See State v. Lucero*, 223 Ariz. 129, 136, ¶ 19 (App. 2009) (recognizing a difference between "affirmative invitation of error and passive acquiescence"). For example, he references the second day of trial when the court responded "of course" after the State mentioned that it assumed "the Court [was] going to give an Other Acts instruction"; the State's repeated assertions throughout trial that it had to prove to the jury by clear and convincing evidence that the April incident occurred and the court's acceptance of those assertions; and the State's proposed jury instructions, filed on trial day 19. These incidents, and others identified by Martinez, do not affect our conclusion that Martinez invited the errors he now complains of regarding RAJI 26A, which he requested be given to the jury. *See State v. Yegan*, 223 Ariz. 213, 219, ¶ 21 (App. 2009) (holding that even though the defendant submitted his proposed instructions after the State submitted its proposed jury instructions, he "was still responsible for submitting an erroneous instruction," and therefore invited the claimed error).

¶32 In sum, the State and the trial court followed Martinez's lead in concluding that the State had the burden of proving by clear and convincing evidence that the other acts occurred and thus, Martinez is responsible for any errors flowing from that decision. We recognize, however, that in pursuing its goal to prove the other acts, the State

repeatedly suggested that certain evidence relating to the April incident was necessary to meet the burden imposed by RAJI 26A. Nothing in this decision should be construed as suggesting that Rule 404(b) evidence may be admitted simply because the State must meet such a burden at trial. Other acts evidence is admissible if it is relevant and helps prove a proper purpose under Rule 404(b). *State v. Connor*, 215 Ariz. 553, 563, ¶ 32 (App. 2007). The probative value of Rule 404(b) evidence is measured under Rule 403 by how probative the evidence is in proving a proper purpose, not in how probative it is in helping the State prove to the jury by clear and convincing evidence the other acts occurred. *See State v. Gonzales*, 140 Ariz. 349, 351 (1984) ("In determining whether the probative value of evidence outweighs the danger of prejudice and confusion, the trial court must examine the purpose of the offer."), *overruled on other grounds by State v. Mott*, 187 Ariz. 536, 544 (1997). Thus, other acts evidence is admissible only if it complies with the process outlined by our supreme court in *State v. Anthony*, 218 Ariz. 439, 444, ¶ 33 (2008).

B. Admissibility of 404(b) Evidence

¶33 We review evidentiary rulings for an abuse of discretion. *State v. Garcia*, 224 Ariz. 1, 11, ¶ 32 (2010). "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). But such evidence may be admitted for other purposes, such as motive, intent, preparation, and knowledge. *Id.* The rule's "list of relevant purposes for which evidence of other crimes, wrongs or acts may be admitted is not exhaustive." *State v. Via*, 146 Ariz. 108, 122, (1985). Before admitting other acts evidence, the court must find that clear and convincing evidence shows the defendant committed the prior act, and "the prior act evidence is relevant and [] its probative value is not substantially outweighed by unfair prejudice." *Garcia*, 224 Ariz. at 11, ¶ 33. The court must also find that the other act evidence is "offered for a proper purpose under Rule 404(b)," and give an appropriate limiting instruction if the defendant so requests. *Anthony*, 218 Ariz. at 444, ¶ 33.

¶34 Under Rule 403, the court "may exclude relevant evidence if its probative value is substantially outweighed by" a number of factors, for example, unfair prejudice. "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *Mott*, 187 Ariz. at 545. Before proceeding to a Rule 403 analysis of other acts evidence, the court must determine if the evidence is "relevant to prove a proper purpose." *Connor*, 215 Ariz. at 563, ¶ 32. We "view[] the evidence in the light most favorable to its proponent,

maximizing its probative value and minimizing its prejudicial effect." *State v. Ortiz*, 238 Ariz. 329, 333, ¶ 5 (App. 2015) (internal quotation omitted). And we recognize that trial judges are "in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice." *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21 (App. 1998).

¶35 Martinez does not dispute there was clear and convincing evidence showing he committed the alleged acts during the April incident. Our review of the admissibility of the other acts evidence is therefore limited to whether the court abused its discretion when it found such evidence was relevant and whether the probative value of the evidence was substantially outweighed by unfair prejudice.

¶36 As part of his challenge to the court's Rule 404(b) rulings, Martinez identifies the following evidence in his opening brief, claiming that the admission of each item was in error: (a) "testimony of six additional witnesses, five of whom had no involvement in the December 8 charges"; (b) "18 photographs of the damaged door"; (c) "maps and photographs of Martinez'[s] route through the complex and out onto the street"; (d) "six-minute recording of [C.S.] screaming and crying on the telephone with the 911 operator"; (e) testimony "that Martinez had broken into [C.S.]'s apartment and stolen her phone on a different occasion"; (f) a statement "that he was incarcerated from April 7 until a few days before he sexually assaulted [C.S.]"; (g) testimony "that he had attacked [C.S.] on a prior occasion"; and (h) a statement "that he had been arrested on April 7."

¶37 Martinez does not parse out these items to explain why they were unfairly prejudicial under Rule 403; thus, we decline to revisit the court's individual rulings on each item. *See State v. Gonzales*, 181 Ariz. 502, 511 (1995) (finding argument that certain evidence "should have been excluded under Rule 403" to be "without merit" because the defendant "pointed to nothing that would suggest that this evidence was unfairly prejudicial"). Accordingly, we consider the Rule 404(b) evidence, as outlined above in the factual background section, as a whole. We then consider "[C.C.]'s expanded testimony regarding his observations of the April incident as well as his call to 911" and C.S.'s testimony that "Martinez was incarcerated following the April [] incident."

¶38 Martinez argues the court erred by subjecting him to a mini-trial, meaning the charged crimes were conflated with the other acts, which in turn "lessen[ed] the State's burden of proof on the charged offenses and taint[ed] the trial with a massive amount of irrelevant, unfairly prejudicial evidence and innuendo that Martinez had a prior conviction. He also

argues that evidence of the April incident should not have been expanded beyond C.S.'s testimony "pursuant to Rule 403 because it was unnecessary to any probative purpose."

¶39 Judge Sanders's Rule 404(b) ruling did not restrict who might testify, nor did it specifically limit what kind or quantity of evidence the State could rely on; she explained that evidence of Martinez's felony, conviction, or incarceration could be admitted if he opened the door, or in other words, if he presented evidence that made this evidence highly probative in rebuttal. Even though Martinez was necessarily subjected to a mini-trial of sorts, we fail to see how that would constitute error, much less reversible error. Evidence relating to the April incident was admissible to establish Martinez's intent and knowledge in committing the charged acts stemming from the December incident.

¶40 The "other acts" were not conflated with the charged crimes, the State's burden to prove the charged offenses were not lessened, and the trial was not tainted with irrelevant evidence. In RAJI 26A, the jury was instructed to consider the other acts to establish intent and knowledge, not for proving he acted in conformity with any character trait or that he "committed the charged offense." The jury also was instructed that the "State must prove each element of each charge beyond a reasonable doubt," and that it was to find Martinez guilty only if it was "firmly convinced" he was "guilty of the crime charged." Jurors are presumed to follow the instructions they are given. *State v. Dunlap*, 187 Ariz. 441, 461 (App. 1996).

¶41 Nor are we persuaded by Martinez's related argument that the superior court "erred by confusing relevance with probative value." Martinez does not explain where in the record this occurred. Our review of the record shows that the court used the term "relevance" instead of "probative value" on one occasion, when it ruled on the admissibility of C.S.'s 9-1-1 call. The court did not confuse probative value with relevance, however, because it explicitly stated it was addressing "the question of 403." And before making a final ruling, the court disposed of Martinez's relevance objection. The court then considered "whether [the evidence's] probative value is outweighed by its prejudicial effect"; only after this pronouncement did the court inadvertently refer to "relevance" instead of "probative value."

¶42 We also reject Martinez's assertions that the trial was tainted with unfairly prejudicial evidence and improper innuendo that Martinez had a prior conviction. Martinez asserts that evidence of the April incident was unfairly prejudicial because it "lure[d] the factfinder into declaring

guilt on a ground different from proof specific to the offense charged," i.e., "that Martinez had recently been convicted of a very similar crime against the same victim." Again, evidence of the April incident was admitted to show intent for and knowledge of the crimes committed during the December incident, not for any other improper purpose or objective.

¶43 Martinez also suggests the other acts evidence was unfairly prejudicial because of the sheer quantity of evidence presented on the April incident, especially when contrasted with the amount of evidence presented on the December incident. Martinez does not point us to any authority where prejudice considerations may be based on comparing the amount of evidence presented on the crimes charged with the other acts evidence. Even assuming this is a proper consideration, during the 22-day trial substantially more evidence was presented on the December incident than the April incident, which was reflected in the jury's questions to witnesses and the closing arguments.

¶44 We are not persuaded that the other acts evidence admitted after C.S.'s testimony "was unnecessary to any probative purpose." The only explanation Martinez offers for this broad assertion is that he "did not dispute [C.S.'s] testimony regarding the April 7 incident and he did not attack her credibility on this issue." However, from our review of the record, we do not discern any evidence relating to the April incident that lacked probative value. *See, e.g.*, *State v. Schurz*, 176 Ariz. 46, 52 (1993) (holding that evidence of subsequent robbery was admissible to prove motive and identity).

¶45 As to the "expanded testimony" that C.C. called police, the court did not allow the content of his 9-1-1 call during the April incident to be admitted. Instead, the court allowed testimony that he called 9-1-1, "that he heard events happen, and that there was some sort of domestic disturbance." The court acted within its discretion in allowing C.C. to testify he called 9-1-1 because it showed why he was on a heightened state of alert during the December incident. This comports with the court's previous ruling, which allowed C.C. to testify about his knowledge of the April incident to show how it "impacted his conduct on the night in question."

¶46 Regarding the rest of C.C.'s "expanded testimony," Martinez "opened the door" to such evidence. "Where one party injects improper or irrelevant evidence or argument, the 'door is open,' and the other party may have a right to retaliate by responding with comments or evidence on the same subject." *Pool v. Superior Court In & For Pima Cty.*, 139 Ariz. 98, 103

(1984). This rule is frequently used when "evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal." *Id.* Here, even assuming C.C.'s testimony on the April incident was improper or irrelevant, *see supra* ¶¶ 16-17, we find no abuse of discretion. C.C.'s observations of the April incident became relevant and appropriate once he testified, on cross-examination, that he was indeed protective of C.S. In other words, his observations gave context for being protective of C.S. Also, the questioning and introduced photographs during cross-examination, coupled with C.C.'s testimony that he shot Martinez, gave the State an opportunity to respond to the defense's theory. *See supra* ¶¶ 16-17. For example, the State could present evidence that C.C. had a gun during the April incident, where he saw the domestic dispute between Martinez and C.S., yet chose not to use it. *Cf. State v. Hausner*, 230 Ariz. 60, 79, ¶¶ 79-80 (2012) (finding the defendant opened the door for his "ex-wife to testify to specific incidents of violence" because he testified "that he was non-violent and would never harm anyone or anything").

¶47 Finally, the court did not err in allowing C.S.'s testimony about Martinez's incarceration.[2] Although the court previously excluded evidence of incarceration, no abuse of discretion occurred in later allowing this fact to be presented to the jury because it became highly probative once Martinez's counsel, during cross-examination, showed the jury the pictures of Martinez on C.S.'s phone. *See State v. Martinez*, 127 Ariz. 444, 447 (1980) ("The fact that the trial court previously ruled the evidence was inadmissible as prejudicial, does not mean the prejudice continues to outweigh its probative value throughout the trial.").

¶48 The court did not abuse its discretion in admitting evidence relating to the events that occurred in connection with the April incident.

C. Motions for Mistrial and Prosecutorial Misconduct

¶49 We review motions for mistrial for an abuse of discretion. *State v. Hardy*, 230 Ariz. 281, 292, ¶ 52 (2012). "Mistrial is the most dramatic

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[2] Martinez has waived his brief references to independent corroboration and vouching because he failed to substantively argue these issues and cite supporting legal authority. *See State v. Carver*, 160 Ariz. 167, 175 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *Id.* (internal quotation omitted). When deciding whether to grant a mistrial based on witness testimony or prosecutorial misconduct, the court considers two factors: whether the testimony or statements highlighted matters that the jury would not be justified in considering; and the probability that the testimony or statements influenced the jury. *State v. Lamar*, 205 Ariz. 431, 439, ¶ 40 (2003); *State v. Lee*, 189 Ariz. 608, 616 (1997). The superior court "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Lamar*, 205 Ariz. at 439, ¶ 40.

¶50 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145 (2004) (internal quotation omitted). Prosecutorial misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." *Pool*, 139 Ariz. at 108-09. When considering a claim for prosecutorial misconduct on appeal, "a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998) (internal quotation omitted). The misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (internal quotation omitted).

¶51 When assessing individual instances of misconduct, we review for harmless error if the defendant objected in the superior court; otherwise we review for fundamental error. *State v. Martinez*, 230 Ariz. 208, 214, ¶ 25 (2012). "Prosecutorial misconduct is harmless error if we can find beyond a reasonable doubt that it did not contribute to or affect the verdict." *Hughes*, 193 Ariz. at 80, ¶ 32. To establish fundamental error, the defendant must show it is an "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 (2005).

¶52 After reviewing each error individually, we consider the cumulative effect of misconduct, and will reverse on that basis "if the

cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *State v. Roque*, 213 Ariz. 193, 228, ¶ 155 (2006) (internal quotation omitted), *overruled on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254, 267, ¶¶ 11-15 (2017). If the court finds that the prosecutor's misconduct was unintentional, we will not disturb the finding unless it is clearly erroneous. *See Lamar*, 205 Ariz. at 440, ¶ 45 (holding that the trial court's finding that "the prosecutor did not intentionally evade the trial court's order" was not clearly erroneous).

¶53 Martinez argues the court denied him due process and erred in denying his motions for mistrial based on the following testimony or statements: (1) the prosecutor's question about whether Martinez was "unavailable for photos because he was incarcerated from April 7, 2014 to a few days before he sexually assaulted [C.S.]"; (2) the prosecutor's question asking Sergeant Hanafin whether Martinez was "arrested" after the April incident; (3) C.S.'s testimony that Martinez had stolen her phone on a prior occasion and the prosecutor's subsequent statement that C.S. not "talk about any other time" unless asked to do so; (4) C.C.'s testimony calling the April incident an "attack"; (5) the prosecutor's statements "vouching that Martinez had sexually assaulted [C.S.]"; and (6) the prosecutor's closing rebuttal argument that the other acts evidence "could be used as evidence of lack of consent as to the sexual offenses."

¶54 Even though during the first incident the prosecutor violated the court's order that the dates of Martinez's incarceration not be admitted, the court instructed the jury not to consider the prosecutor's question "for any purpose," and at the beginning of trial, told the jury that questions are not evidence. The court also instructed the jury to consider the fact of incarceration for a specific purpose—to date the photographs. On this record, we have no reason to believe the jury was improperly influenced. *See State v. Dunlap*, 187 Ariz. 441, 461 (App. 1996) ("Juries are presumed to follow their instructions.").

¶55 During the second incident, the prosecutor used the word "arrested," thereby violating the court's order. Because the prosecutor made this mistake only once, the error was neither pronounced nor persistent. Additionally, given that the jury heard testimony from C.S. that Martinez was incarcerated following the April incident, we are not persuaded that the prosecutor's question about whether Martinez was arrested after the April incident influenced the jury's verdict. *See People v. Edwards*, 306 P.3d 1049, 1087 (Cal. 2013) (finding no undue prejudice from

reference to "arrest" where other acts evidence described would lead jury to "surmise defendant had been arrested for that offense").

¶56 As to the third incident, the prosecutor's statement that "we're not going to talk about any other time" was one the jury was justified in hearing because the prosecutor had already referred to an "other time" in her opening statement—the April incident. Further, although C.S.'s remark that Martinez had stolen her phone was improper for the jury to consider, the court struck the answer and instructed the jury to disregard it. *See Dunlap*, 187 Ariz. at 461.

¶57 Regarding the fourth incident, C.C. used the term "attacked," contrary to the court's ruling. The court immediately struck the answer from the record, told the jury not to consider it, and found that C.C.'s use of the word "attacked" to describe C.S. being chased during the April incident was "not of such a weight that the jury . . . won't set it aside and won't follow this Court's instructions on the matter." C.C.'s use of the word "attacked" was not so prejudicial as to influence the jury's verdict or cause them to disregard it as the court instructed.

¶58 To the extent Martinez argues the court's rulings on his motions for mistrial denied him justice, we are not persuaded. Even assuming we are to consider them as a whole, the witness testimony and prosecutor statements were not so pronounced or persistent so as to permeate the entire 22-day trial.

¶59 We review the fifth incident for fundamental error because Martinez did not object in the trial court. Because Martinez makes no effort to show he was prejudiced by this conduct or even explain why this constitutes misconduct, he has not met his burden of showing fundamental error. *See Henderson*, 210 Ariz. at 567, ¶ 20 ("[A] defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.").

¶60 As to the sixth incident, we would normally review for harmless error because Martinez objected below. But he waived the argument on appeal by failing to cite supporting authority or substantively argue why using the April incident to show lack of consent was an improper purpose. *See State v. Carver*, 160 Ariz. 167, 175 (1989). Waiver aside, the argument lacks merit because the April incident was relevant to show Martinez intended to commit sexual assault and sexual abuse. *See State v. Scott*, 243 Ariz. 183, 187-88, ¶¶ 15-16 (App. 2017) (finding the court did not abuse its discretion in admitting evidence of the defendant's prior

sexual assault to refute the "defenses of consent and no specific intent" because "where [the defendant's] intent was at issue, [the defendant's] past act was relevant to prove that [the victim] did not consent").

¶61 We do not find persuasive Martinez's argument that the "prosecutor persistently engaged in a pattern of misconduct intended to obtain a conviction through propensity evidence by showing that Martinez had been convicted recently of committing similar acts, in the same location, against the same person." The prosecutor did not engage in persistent misconduct, and the fact that Martinez had been convicted for a crime committed during the April incident was never admitted at trial. Evidence of the April incident was not "propensity evidence," but was offered to prove intent and knowledge.

¶62 Finally, we reject the argument that the prosecutor attempted to portray Martinez "as a recidivist convicted criminal" or that the prosecutor improperly sought the admission of Martinez's incarceration. The State never produced evidence during trial showing Martinez had a prior conviction related to the April incident. The State was only allowed to elicit testimony from C.S. that Martinez was unavailable for "taking or sending photos" since the April incident because he was incarcerated. The jury was given a limiting instruction allowing them to consider the fact of incarceration only to date the photographs of Martinez on C.S.'s phone.

¶63 In considering the cumulative effect of the prosecutor's conduct, we find no reversible error. The court's findings that the prosecutor unintentionally violated the court's rulings associated with the dates of Martinez's incarceration and the term "arrested" are not clearly erroneous because the prosecutor's belief that she was not violating the court's incarceration ruling and explanation that she did not perceive any difference between the words "arrested" and "detained," provide substantial support for these findings.

¶64 In sum, Martinez has not established that the trial court abused its discretion in denying the motions for mistrial. Nor has he shown that he was denied due process as a result of any of the court's rulings or the prosecutor's conduct at trial.

CONCLUSION

¶65 We affirm Martinez's convictions and sentences.

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