

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

FABIAN MEZA, *Appellant*.

No. 1 CA-CR 17-0507
FILED 9-11-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-002028-001
The Honorable Peter C. Reinstein, Judge (Retired)

AFFIRMED

COUNSEL

Maricopa County Public Defender's Office, Phoenix
By Paul J. Prato
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Robert A. Walsh
Counsel for Appellee

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MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Randall M. Howe joined.

M O R S E, Judge:

¶1 Fabian Meza ("Meza") appeals his convictions and sentences. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 A grand jury indicted Meza on nine counts of sexual conduct with a minor, one count of sexual abuse of a minor, and two counts of public sexual indecency to a minor. All twelve offenses were against Meza's stepdaughter, M.E., who was then a child under 15 years of age. Meza pled not guilty.

¶3 Before trial, to show that Meza had a propensity to commit the crimes charged, the State moved to introduce evidence under Ariz. R. Evid. ("Rule") 404(c) of other instances of sexual abuse that M.E. disclosed in a forensic interview with police. The State also moved to introduce these other acts under Rule 404(b) to rebut Meza's defenses and complete the story of abuse for the jury. The parties agreed to waive an evidentiary hearing, and the superior court heard oral argument on admissibility and reviewed recordings of the forensic interviews. The superior court later concluded that the previous assaults were admissible under both Rule 404(b) and Rule 404(c).

¶4 At trial, M.E.'s mother testified that on December 12, 2015, Meza was acting suspiciously. She heard something coming from M.E.'s bedroom, and when she tried to open the door, she discovered it was locked. She banged on the door until Meza opened it, and she saw M.E. half-naked, pulling up her pants and underwear.

¶5 M.E. testified that on the day her mother found Meza in her bedroom, Meza kissed her, touched her breasts and vagina, and told her, in explicit terms, to perform oral sex on him. She testified that Meza began sexually abusing her when she was twelve or thirteen and the family lived in California. On several occasions, he made her engage in oral sex and masturbatory conduct. The abuse continued after the family moved to

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Arizona. She testified that Meza told her not to tell anyone because he would be locked away and her siblings would be taken away from her mother.

¶6 The superior court granted Meza's motion for directed verdict on one count of sexual conduct with a minor. The superior court read the jury the standard limiting instructions for both Rule 404(b) and Rule 404(c) other-act evidence. The jury found Meza guilty on Counts 6-10, which were allegedly committed on December 12, 2015, but acquitted Meza on the remaining charged offenses which were alleged to have occurred on a prior date.

¶7 Meza timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 13-4031.

DISCUSSION

¶8 Meza's sole argument on appeal is that the superior court failed to make appropriate findings under Rule 404(c) because the court did not specify when and where the prior acts that it admitted as evidence took place. We review the superior court's rulings on the admissibility of evidence for abuse of discretion. *State v. Rose*, 231 Ariz. 500, 513, ¶ 59 (2013).

¶9 Meza did not object to the sufficiency of the superior court's evidentiary ruling, nor did he object to M.E.'s testimony or the standard limiting jury instruction for Rule 404(c) evidence at trial. Accordingly, Meza has forfeited his argument on appeal absent fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). Under fundamental error review, Meza must show that (1) error occurred, (2) the error was fundamental, and (3) the error caused him prejudice. *Id.* at 568, ¶¶ 22-24, 26.

¶10 To admit other-act evidence under Rule 404(c), a court must find clear and convincing evidence that the other act occurred. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 30 (2004). Then, the court must find that the other act "provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged sexual offense." *Id.* The court must also find that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice; finally, it must consider the factors listed in Rule 404(c)(1)(C)(i)-(viii). *Id.*

¶11 Here, Meza failed to provide the transcript of the status conference where the superior court made its full findings. "When the

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record is not complete, we must assume that any evidence not available on appeal supports the trial court's actions." *State v. Lavers*, 168 Ariz. 376, 399 (1991). Thus, we may infer that the superior court made the requisite findings under Rule 404(c) and properly admitted the evidence. Even absent this inference, however, the record supports the superior court's actions. The minute entry admitting the evidence stated that the court reviewed the evidence submitted to the court, which included M.E.'s firsthand account of five distinct sexual acts that Meza perpetrated near his home in California when M.E. was between twelve and thirteen years of age. This account matched the testimony that M.E. later gave at trial. "The testimony of the victim is a sufficient basis on which to conclude by clear and convincing evidence that the incident occurred." *State v. Vega*, 228 Ariz. 24, 29, ¶ 19 n.4 (App. 2011).

¶12 Moreover, the record supports a finding that the evidentiary value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was probative in that it showed that Meza had a propensity to commit the alleged acts, completed the story of Meza's ongoing abuse for the jury, and rebutted Meza's defense of mistake. The superior court mitigated prejudice by giving the jury the proper limiting instructions. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006) (juries are presumed to follow instructions). Meza's argument of prejudice is further weakened by the fact that he was acquitted of several counts and received a directed verdict of not guilty on another count. *See State v. Garcia*, 200 Ariz. 471, 478, ¶ 42 (App. 2001) (concluding that the admission of unscreened other-act evidence was harmless in light of the strength of the case and the fact that the defendant was acquitted on several counts).

¶13 Finally, the very nature of the sexually explicit acts with a minor that M.E. described satisfies that requirement that the evidence demonstrate an aberrant sexual propensity. *See Vega*, 228 Ariz. at 29, ¶¶ 19-20 (holding that aberrant sexual propensity was established by one instance of touching 11-year-old girl's genitals over her bathing suit); *State v. Pierce*, 170 Ariz. 527, 530 (App. 1991) (holding that the sexual abuse of a 12-year-old girl by a 46-year-old man is sexually aberrant behavior). Further, the other acts were not too remote in time from the charged acts, they were instances of nearly the same conduct as the charged acts, and they occurred several times. *See Ariz. R. Evid. 404(c)(1)(C)(i), (ii), (iv)*.

¶14 Even if Meza could prove error under Rule 404(c), the evidence was also admitted under Rule 404(b). Meza did not object to the admission of the evidence under Rule 404(b) below, nor does he make such argument on appeal. "The proper consideration and use by the jury of

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evidence of a prior crime differs significantly depending upon whether it is admitted" under Rule 404(b) or Rule 404(c). *State v. Scott*, 243 Ariz. 183, 188, ¶ 17 n.3 (App. 2017). However, because Meza has waived any Rule 404(b) issue, see *State v. Carver*, 160 Ariz. 167, 175 (1989), he implicitly concedes that the jury would have properly heard the same evidence under Rule 404(b). In this context, his complaints about the lack of specific findings under Rule 404(c) cannot demonstrate the prejudice required for fundamental error review.

¶15 Meza fails to demonstrate that the superior court erred in admitting other-act evidence under Rule 404(c), and our review finds no error or prejudice.

CONCLUSION

¶16 For the foregoing reasons, we affirm Meza's convictions and sentences.



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