NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 02/22/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 09-0760
v.	DEPARTMENT A
FRANCISCO IGNACIO SOTO, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-153063-001 DT

The Honorable Sam J. Myers, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Judge

¶1 Francisco Ignacio Soto ("Appellant") appeals his conviction and sentence for aggravated assault. Appellant argues that his conviction should be reversed because the trial court allowed the prosecutor to introduce evidence of uncharged crimes

and bad acts, and commit misconduct by referencing and emphasizing those crimes and acts during closing argument. Appellant also argues that he should be credited for twenty additional days of presentence incarceration. Finding no error warranting reversal of Appellant's conviction, but concluding that the court erred in calculating his presentence incarceration, we affirm as modified.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On August 29, 2008, a grand jury issued an indictment, charging Appellant with one count of aggravated assault of a peace officer, a class two dangerous felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204 (Supp. 2010).[2] Before trial, defense counsel filed a notice of defenses that included accident, lack of specific intent, no criminal intent, insufficiency of State's evidence, and denial.

¶3 At trial, the State presented the following evidence: On August 9, 2008, at approximately 1:20 a.m., Officer Brown of the Phoenix Police Department responded to a "shots fired" call at Los Betos restaurant. Two witnesses provided Officer Brown with information and rode with him to a nearby residence. Shortly after arriving at the home, the witnesses directed the officer's

---

[1] We view the facts in the light most favorable to sustaining the verdict, and we resolve all reasonable inferences against Appellant. *See State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

[2] We cite the current version of the applicable statute if no revisions material to our analysis have since occurred.

attention to a gold Honda driving past them. Officer Brown and Officer Jones, another officer who had arrived at the scene, entered their respective patrol vehicles and followed the Honda as it pulled into the driveway of a nearby home and parked next to a Ford Expedition.

¶4 Concerned that the occupants of the Honda might be armed, the officers approached the Honda in a "V" formation, with Officer Brown approaching the passenger's side and Officer Jones approaching the driver's side. As the officers approached the Honda, Appellant began to exit the rear driver's side of the vehicle. Officer Brown commanded Appellant and the Honda's other passengers to put their hands up and "stay where [you] are." Although the others obeyed Officer Brown's commands, Appellant did not. While holding a beer in his hand, Appellant continued to exit the Honda, walked around the Expedition, and placed the beer on the Expedition's running board. As he did this, Appellant dropped his hands toward his torso several times. Officer Brown commanded Appellant to "keep [your] hands in the air," and "don't go there, don't go near [your] waist." A motion light from the home illuminated what appeared to be a handgun in Appellant's right front pocket. Officer Brown followed Appellant while he moved to the front of the Expedition. Appellant then turned around and pulled the weapon from his pocket with his right hand. Officer Brown fired two rounds, striking Appellant in his stomach and right

hand. Appellant dropped his weapon, fell forward, and hit the ground.[3] Officer Brown kicked the weapon away to ensure Appellant was not able to reach it.[4] A magazine containing two .380 caliber rounds was later found between two trash cans near the Expedition.

¶5 The jury convicted Appellant as charged, and further found the offense to be dangerous. The trial court sentenced Appellant to the presumptive term of 10.5 years' incarceration in the Arizona Department of Corrections, with credit for 234 days of presentence incarceration.

¶6 Appellant filed a timely notice of appeal. We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

ANALYSIS

¶7 Appellant acknowledges that the issues he raises are raised for the first time on appeal. To preserve an issue for appeal, a defendant must clearly raise that specific issue before the trial court. *See State v. Thomas*, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981). If a defendant fails to raise an issue below, the matter is waived absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

---

[3] Fire department personnel treated Appellant at the scene, and he was subsequently taken to a hospital.

[4] It was later determined the weapon Appellant had was a "BB gun" equipped with a "CO/2 cartridge" to enhance the speed of the projectile.

Fundamental error is that which goes to the foundation of the case, takes away a right essential to the defense, and is of such magnitude that a defendant could not have received a fair trial. *Id*. at 568, ¶ 24, 115 P.3d at 608. To prevail under fundamental error review, Appellant must prove that the trial court erred, the error was fundamental, and the error caused him prejudice. *See id*. at 567-68, ¶¶ 19-26, 115 P.3d at 607-08; *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991) (recognizing that before the reviewing court engages in fundamental error review, it must first conclude that the trial court committed some error). A defendant bears the burden to demonstrate prejudice and may not rely on mere speculation to carry that burden. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006).

I. The Introduction and Use of Uncharged Crimes and "Bad Acts" Evidence

¶8 Appellant contends that fundamental error occurred when the trial court allowed the prosecutor to introduce evidence of the "shots fired" incident at the restaurant and Appellant's ostensible possession of (and apparent attempt at hiding) the magazine containing the .380 caliber rounds. He maintains the prosecutor further committed misconduct by referencing and emphasizing these uncharged crimes and bad acts, *see* Ariz. R. Evid. 404(b), during closing argument.

¶9 Arizona Rule of Evidence ("Rule") 401 provides that evidence is relevant if it has "any tendency to make the existence

of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Evidence which is not relevant is not admissible," but relevant evidence is admissible unless prohibited on some other basis. Ariz. R. Evid. 402. Rule 404(b) prohibits admitting evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith." However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). Evidence admissible for any relevant purpose should generally be admitted, even if inadmissible for other purposes. *See United States v. Abel*, 469 U.S. 45, 56 (1984) ("[T]here is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case.").

¶10 In general, we review the admission or exclusion of evidence pursuant to Rule 404(b) for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990). In this case, however, the evidence that Appellant complains of was admitted in evidence without objection on Rule 404(b) grounds, and we therefore review its admission for fundamental error.[5] *See Henderson*, 210 Ariz. at 567-68, ¶¶ 19-26, 115 P.3d at 607-08.

[5] At trial, before testimony, defense counsel stipulated to the admission of two exhibits that were photographs depicting the

¶11 Additionally, for a conviction to be reversed based on prosecutorial misconduct, there must be misconduct by the prosecutor and a reasonable likelihood that the misconduct could have affected the jury's verdict, thereby denying Appellant a fair trial. *See State v. Tucker*, 215 Ariz. 298, 319, ¶ 88, 160 P.3d 177, 198 (2007) (citations omitted); *State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988) (stating that, to constitute misconduct, a prosecutor's remarks must call to the jurors' attention a matter they are not entitled to consider, and it must be probable that the remarks influenced the verdict (citation omitted)). Nonetheless, prosecutors are given wide latitude in their closing arguments to a jury. *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990) (citation omitted). Additionally, "[c]omments that are invited and prompted by opposing counsel's arguments are not improper if they are reasonable and pertinent to the issues raised." *State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) (citation omitted); *accord State v. Purcell*, 117 Ariz. 305, 308, 572 P.2d 439, 442 (1977) (recognizing that a defendant may not benefit on appeal from an error that he has invited (citation omitted)). As with the prosecutor's

---

magazine. Defense counsel, however, later objected to admission of the magazine itself on relevance and foundation grounds, arguing there was no evidence as to where the magazine came from and how it arrived at the particular location. The court overruled those objections and admitted both the magazine and the bullets contained in the magazine. Defense counsel also later introduced a photograph of recently purchased Mexican food found in the Honda, which was admitted in evidence upon stipulation.

introduction of the other crimes and "bad acts" evidence, Appellant did not object to the prosecutor's closing remarks or in any way seek remedial action by the court, and we therefore review Appellant's claim of misconduct for fundamental error. *See Henderson*, 210 Ariz. at 567-68, ¶¶ 19-26, 115 P.3d at 607-08.

¶12 Appellant is correct in contending that he was charged only with aggravated assault of the police officer and not with anything related to the earlier "shots fired" call or possession of the magazine found at the scene. Given the record before us, however, we disagree with his argument that "no logical connection" or "inference" existed for the prosecutor to discuss the "shots fired" incident or the magazine, and we find no error, much less fundamental error, in the admission of, and prosecutor's reference to, that evidence.

¶13 As demonstrated by Appellant's notice of defenses, his testimony and other testimony elicited by defense counsel at trial, and defense counsel's closing argument, a centerpiece of Appellant's defense was that he had no motive for his alleged actions; thus, his motive and intent for allegedly disobeying Officer Brown's orders and drawing his weapon on the officer was a significant issue at trial. Evidence of the "shots fired" call and Appellant's apparent attempt to hide the magazine was therefore relevant to dispel his claim that he lacked motive and provide a possible explanation for his charged actions. The evidence was

properly admitted as intrinsic evidence because it was a necessary preliminary to "complete the story" of why the police were in the neighborhood and sought to detain Appellant, was relevant to prove Appellant's possible motive in exiting the Honda and drawing his weapon on Officer Brown, and was "inextricably intertwined" with proof of the charged offense and Appellant's defense. *See State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 56, 25 P.3d 717, 736 (2001); *State v. Dickens*, 187 Ariz. 1, 18-19 n.7, 926 P.2d 468, 485-86 n.7 (1996); *State v. Cook*, 150 Ariz. 470, 472-73,724 P.2d 556, 558-59 (1986). Given the context in which the evidence was presented, we find no error, much less fundamental error, in the introduction of the evidence as intrinsic evidence of Appellant's motive and intent.

¶14 We also find no misconduct or other error in the prosecutor's closing argument. Before closing arguments, the jury was instructed that although the State was not required to prove motive, "you may consider motive or lack of motive in reaching your verdict." Both counsel then discussed the question of motive in their respective closing arguments. In her closing argument, the prosecutor simply commented on the unobjected-to evidence presented at trial and discussed reasonable inferences to be drawn from that evidence.[6] This commentary did not amount to error, much less

[6] The prosecutor also informed the jury that Appellant was not charged with, and the State could not prove, anything related to the "shots fired" call.

fundamental error. Further, immediately following the prosecutor's closing argument, the jury was dismissed, and although objections regarding the closing were discussed, defense counsel did not object to the prosecutor's limited discussion of the earlier shooting and the magazine. Instead, defense counsel chose to also argue motive in his closing.

¶15 In fact, defense counsel made motive the centerpiece of Appellant's defense. In his closing, defense counsel maintained that "motive plays a really big role in this case," and he argued the only reason Appellant "would [] pull an unloaded BB gun" on an officer was because he was either "completely stupid, or [] he wants to commit suicide by cop." Defense counsel further argued that Appellant's real motive "at that point, was to get [the other occupants of the Honda] to stop so they wouldn't get in more trouble by running away from the cops." Because Appellant's motive was an essential issue at trial, we find no error, much less fundamental error, in the prosecutor's decision to introduce and argue facts related to that motive.

¶16 Moreover, even if we were to assume *arguendo* that the prosecutor committed fundamental error by introducing and arguing the "shots fired" and magazine evidence, Appellant cannot show prejudice warranting reversal. *See Trostle*, 191 Ariz. at 16, 951 P.2d at 881; *Comer*, 165 Ariz. at 427, 799 P.2d at 347. The evidence of Appellant's guilt was overwhelming, and Appellant and

his witnesses were thoroughly discredited with their repeated inconsistent statements and conflicting testimony. We conclude that any possible error was harmless beyond a reasonable doubt.

II. Credit for Presentence Incarceration

¶17 Appellant also argues that he should be credited for twenty additional days of presentence incarceration. Although Appellant did not object at sentencing to the trial court's calculation of presentence incarceration, a court's failure to award the correct amount of credit constitutes fundamental error. *State v. Ritch,* 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). Further, when the record reflects a miscalculation in credit, we may correct the error by modifying the sentence without remanding to the trial court. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992); A.R.S. § 13-4037 (2010).

¶18 A defendant is entitled to receive a full day's credit for each day or partial day spent in custody for a crime. *See State v. Carnegie*, 174 Ariz. 452, 454-55, 850 P.2d 690, 692-93 (App. 1993). "Time actually spent in custody" means actual time incarcerated in a prison or jail, and does not simply refer to a restraint on one's freedom. *Id*. at 453, 850 P.2d at 691 (citation omitted). For purposes of determining presentence incarceration credit, "custody" begins when a defendant is actually booked into a detention facility. *Id*. at 453-54, 850 P.2d at 691-92 (citation omitted). A defendant does not, however, receive credit for the

day sentence is imposed because that is the day his or her sentence actually begins. *See State v. Hamilton*, 153 Ariz. 244, 245-46, 735 P.2d 854, 855-56 (App. 1987).

¶19 Appellant was shot and transported to the hospital on August 9, 2008. He remained in the hospital until August 23, 2008, when he was arrested and booked into custody. He remained in custody until February 22, 2009, when he was released after posting bond. The period from August 23, 2008, through February 22, 2009, includes 184 days. He was incarcerated again on the date of the verdict, July 22, 2009, and sentenced on September 30, 2009. The period from July 22 through September 29, 2009, includes 70 days. Therefore, Appellant should have received a total of 254 days of presentence incarceration credit, not 234. Based on the foregoing facts, Appellant is entitled to an additional twenty days of presentence incarceration credit.

CONCLUSION

¶20 Appellant's conviction and sentence are affirmed, as modified to reflect twenty additional days of presentence incarceration credit.

/S/
LAWRENCE F. WINTHROP, Judge

CONCURRING:

/S/
PHILIP HALL, Presiding Judge

/S/
JON W. THOMPSON, Judge