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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 09/20/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 10-0083  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
FRANK JEROME ALEJANDRO, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2008-107538-001DT

The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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By Kent E. Cattani, Chief Counsel,  
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Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Karen M. Noble, Deputy Public Defender  
Attorneys for Appellant

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**G E M M I L L**, Judge

¶1 Defendant Frank Alejandro appeals his conviction and

sentences on three counts of aggravated assault. For reasons set forth below, we affirm.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 On appeal we must view the facts in the light most favorable to sustaining the jury's verdicts, and therefore we resolve all reasonable inferences in support of the verdicts against Alejandro. See *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005). Evidence at trial revealed the following facts.

¶3 In the early morning hours of February 1, 2008, several undercover officers were surveilling a shopping area including a Verizon Wireless store in Glendale. The presence of the officers at this time and location was based on reports of several burglaries in the vicinity. The police considered the area a high crime area. The undercover officers noticed a white sport utility vehicle ("SUV") containing three persons. No other cars were in the area, and this piqued the officers' interest in the SUV. The SUV left the area but returned a few minutes later and then departed again at high speed. Shortly thereafter, the officers were put on notice that a silent alarm was going off at the Verizon store.

¶4 The undercover officers made a radio call to uniformed police describing the SUV and its location. Three uniformed officers, in three separately marked police cruisers, waited at

the police station for the SUV to pass by. The SUV passed their location speeding, and without its headlights on. The three uniformed officers turned on their sirens and flashers and followed the SUV. While being pursued, the SUV entered a residential neighborhood, and then one or more people within the SUV began shooting at the three officers. The officers slowed their vehicles to avoid being shot. The SUV stopped in a neighborhood cul-de-sac and the officers discovered that the occupants had fled. Officers located the passenger, who was Alejandro's brother, and they located Alejandro hiding within a private residence. The other occupant got away. At the scene, officers located some firearms and shell casings. Bullet slugs were also recovered from two residences in the area.

¶15 Alejandro was indicted on one count of burglary of the Verizon store; one count of unlawful flight from law enforcement vehicles; one count of criminal trespass; and three counts of aggravated assault, class 2 felonies. Prior to trial, Alejandro pled guilty to the burglary, unlawful flight, and criminal trespass charges. Alejandro attempted to stipulate to the pled-out charges several times but the State refused the stipulations. However, during *voir dire*, the pleas to the other charges were read to the jury.

¶16 During trial, undercover officers testified to the facts concerning the surveillance prior to the burglary.

Detective G. testified about his involvement with the investigation and he discussed his participation with a repeat offender program. Uniformed officers testified about the police chase and apprehension of Alejandro. Testimony about where Alejandro was apprehended was admitted. The jury was allowed to view a portion of the Verizon Wireless security video that recorded the burglary by the three men. The State based the aggravated assault charges on accomplice liability.

¶17 As the trial closed, the jury was given an instruction that inserted an "or" instead of an "and" when listing the elements the State must prove to convict Alejandro for aggravated assaults as class 2 felonies. The jury convicted Alejandro on all three counts of aggravated assault, class 2 felonies, and found the counts dangerous. Alejandro was sentenced to twenty-one years in prison for each count, to be served consecutively. Alejandro timely appeals. This court has 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 13-4033(A) (2010). Alejandro raises the following three issues on appeal.

#### **ADMISSIBILITY OF EVIDENCE**

¶18 Alejandro contends that the trial court abused its discretion when it allowed testimony from police officers concerning surveillance of the area near the burglarized Verizon

store, and testimony from a police detective concerning his participation in a repeat offender program.

¶19 We review admission of evidence based on whether the trial court abused its discretion. *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994). An appellate court will not "second guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997) (citation omitted).

#### **Surveillance Officers' Testimony**

¶10 Alejandro argues that allowing undercover officers to testify why they were surveilling the area near the burglary was impermissible character evidence relating to prior bad acts pursuant to Arizona Rules of Evidence 404(b) ("Rule(s)"). According to Alejandro, this testimony also had potential to mislead the jury into thinking that he was the one responsible for the prior burglaries in the area, which he argued would be unfairly prejudicial under Rule 403. Alejandro did not specifically argue Rule 404(b) evidence issues at trial; however both parties do so on appeal. Presumably because the issue was not clearly raised at trial, the court made no specific findings for admitting the surveillance officer testimony under Rule 404(b).<sup>1</sup>

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<sup>1</sup> Rule 404(b) does not permit admission of prior bad act evidence to prove the defendant's character "in order to show

¶11 An objection to the undercover surveillance evidence was made by an oral motion *in limine* concerning relevance and prejudicial effect. Regarding the surveillance evidence, counsel for Alejandro argued, "I don't know if it's necessary because the officers that are involved in the assault counts, they are not surveilling officers." Alejandro further specifically argued that "the reason the police were surveilling the Verizon Wireless store where the burglary happened, . . . is because there were reports of prior burglaries . . . . [T]here was no evidence that the defendant . . . [was] committing the other burglaries." He further argued "this is just another example of unnecessarily prejudicial evidence." The State had an opportunity to respond to this issue and it also focused on prejudicial effect. As already noted, Alejandro made no specific objection regarding 404(b) or prior bad act evidence at trial or by motion.<sup>2</sup>

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action in conformity therewith." There are some exceptions; prior bad act evidence is allowed to show "motive, opportunity, intent, preparation, plan, knowledge, [and] identity. . . ." Rule 404(b).

<sup>2</sup> We have examined the portion of the transcript referenced by Alejandro in his opening brief – specifically, the transcript from April 14, 2009 – and no mention was made of Rule 404(b) or "prior bad acts." It is the responsibility of the parties to identify the portion or portions of the record upon which they rely. See ARCAP 13(a)(2) and (6). Additionally, our independent review has not revealed any such argument or objection by Alejandro based on Rule 404(b) or "prior bad acts."

¶12 Our supreme court has explained that:

A party must make a specific and timely objection at trial to the admission of certain evidence in order to preserve that issue for appeal. A general objection, such as 'irrelevance,' will not be sufficient to preserve the issue for appeal. Further, an objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds.

*State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993) (internal citations omitted). Alejandro correctly points out that when "a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial." *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985) (citation omitted). However, this principle is inapplicable here because the objection raised in the motion was not grounded in Rule 404(b). Therefore, we find that the Rule 404(b) issue is waived because it was not raised at trial.

¶13 Furthermore, even if the Rule 404(b) argument is deemed preserved, we find no error. We agree with the State that it is not necessary to analyze the evidence under Rule 404(b) because this evidence is intrinsic to the aggravated assault offenses at issue. See *State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996)

(citing *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996)). "Rule 404(b) applies only to extrinsic, not intrinsic, evidence." *Id.* at 18 n.7, 926 P.2d at 485 n.7 (referencing *United States v. Swinton*, 75 F.3d 374, 377 (8th Cir. 1996)). "'Other act' evidence is 'intrinsic' when evidence of the other act and evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." *Id.* at 18-19 n.7, 926 P.2d at 485-86 n.7 (quoting *Coleman*, 78 F.3d at 156); *State v. Baldenegro*, 188 Ariz. 10, 15-16 (App. 1996). We conclude, therefore, that even if the Rule 404(b) arguments were preserved, the events here are inextricably intertwined and part of the same criminal episode, and thus, intrinsic.

¶14 We next address the preserved Rule 401 and 403 objections. "'Relevant' evidence means evidence having 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." Rule 401.

¶15 While the area was under surveillance, the undercover officers twice recognized the white SUV that Alejandro was driving during the early morning hours when



the burglary in question occurred. Undercover officers saw the SUV flee the scene at a high rate of speed. They provided a description of the SUV to uniformed officers and uniformed officers were also alerted by the Verizon security alarm. The uniformed officers began pursuing the white SUV based on the alarm and description. Alejandro's accomplice opened fire on the police from the SUV while Alejandro provided the evasive driving. Thus, these earlier facts are relevant to describe the series of events leading up to and including the aggravated assaults.

¶16 Regarding prejudicial effect, Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues."

Alejandro argued:

The fact that officers had the store area under surveillance because of prior burglaries in the high crime area contributed nothing to the aggravated assault charges other than to mischaracterize Mr. Alejandro and the others in the Suburban. There was no indication that any of the defendants had been involved in any prior burglaries in the area.

¶17 Officers' testified that they were present in the area where the Verizon store was located "because it had been getting hit quite a bit with burglaries" and they were "working in an undercover capacity watching some of the business store fronts."

Alejandro brought out on cross-examination by one officer that the surveillance team had no knowledge that any burglary was to take place that morning, nor did they have any knowledge that Alejandro was involved in the other burglaries in the area.

¶18 Alejandro might have requested a limiting instruction explaining to the jury that there was no proof that he had anything to do with the previous burglaries in the area. "However, the trial court does not err in failing to give a limiting instruction if trial counsel does not properly request [such] an instruction." *State v. Nordstrom*, 200 Ariz. 229, 247, ¶ 51, 25 P.3d 717, 735 (2001) (citations omitted). The record reveals that a limiting instruction was discussed with the trial court during a motion *in limine*, but Alejandro never requested nor presented a proposed limiting instruction regarding the officers' testimony to the court.

¶19 The surveillance officers' testimony was probative to explain when the events began, what transpired, and why Alejandro and the white SUV were involved in the subsequent police chase that led to the aggravated assaults. Any prejudice concerning a possible link to previous burglaries in the area and Alejandro was *de minimis*. Alejandro had an opportunity for a limiting instruction that was not exercised. Additionally, officers testified that police had no information connecting Alejandro with the "high crime area" or any previous burglaries

nor did they have any expectation that Alejandro was going to be involved with any burglary that particular morning. Therefore, we find that the trial court did not abuse its discretion by allowing the surveillance officers' testimony because the testimony was more probative than prejudicial.

#### **Repeat Offender Program Testimony**

¶20 Alejandro moved for a new trial on the basis that the testimony by Detective G. was prejudicial. Detective G. testified during initial direct examination that he was currently assigned to a Repeat Offender Program. In this program, Detective G. is responsible for conducting undercover surveillance and trying to apprehend repeat offenders concerning property crime.

¶21 This issue must also be addressed through the Rule 403 filter: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues."

¶22 The testimony elicited by the State from Detective G. was preliminary in nature. The State asked Detective G. to describe his present position and duties. After his answer, no further questions or answers mentioned the Repeat Offender Program, and no connection was made between Alejandro and the Program. Furthermore, the trial court offered to grant a limiting instruction to the effect that Detective G.'s "duties

at this time involved what has been called the repeat offender program, that program was not in existence at the time of this offense, and his being present at this scene or involved in the investigation has no involvement with that program or with this defendant." Alejandro refused any limiting instruction and did not make any further inquiry of the matter on cross-examination.

¶23 Even if Detective G.'s testimony about his current duties had limited probative value on the aggravated assault charges and the potential of unfair prejudice, we find no abuse of discretion in denying Alejandro's motion for new trial. See *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). The trial court is in the best position to assess whether such testimony warrants the significant relief of a new trial. *Id.* We agree that Detective G.'s brief mention of his position with the police department at time of trial would not likely be prejudicial to Alejandro and, significantly, Alejandro was offered the opportunity for a limiting instruction and could also have established on cross examination that the detective did not hold his current position at the time of the events at issue. On this record, we find no error.

#### **STIPULATION TO PLED COUNTS**

¶24 We review admission of evidence based on whether the trial court abused its discretion. *Ayala*, 178 Ariz. at 387, 873 P.2d at 1309.

¶125 Alejandro contends that the trial court abused its discretion when it admitted evidence of criminal trespass and evidence of the burglary of the Verizon store, and especially the store's surveillance video and the testimony from undercover officers. Alejandro argues that this evidence was unfairly prejudicial under Rule 403. Alejandro offered to stipulate several times to the facts of the offenses in which he pled guilty prior to trial. The State declined to stipulate.

¶126 Both parties rely on *State v. Leonard* in which this court held that "the state is not required to accept a stipulation when the prejudicial potential of the evidence is substantially outweighed by the state's legitimate need to prove the facts to which the defendant offers to stipulate." 151 Ariz. 1, 8, 725 P.2d 493, 500 (App. 1986). A trial court must perform a Rule 403 balancing to determine final admissibility of the evidence, however. *Id.* In *Leonard*, the defendant wanted to stipulate to two prior driving under the influence ("DUI") charges out of the presence of the jury. *Id.* at 7, 725 P.2d at 499. The State's purpose for denying the stipulation in *Leonard* was perceived, on that record, as encouraging the "jury to hastily conclude that 'if he's done it before, he's guilty now[,]'" regarding Leonard's current DUI charge. *Id.* at 8, 725 P.2d at 500.

¶127 Alejandro wanted the State to stipulate to the facts

of the unlawful flight charge, the burglary charge, and the criminal trespass charge. All three of these accepted pleas included details relevant to, and probative of, the aggravated assault charges. Those three pleas were entered and the jury was already on notice of Alejandro's pleas from *voir dire* and opening statements. Thus, unlike the situation in *Leonard*, here there was minimal prejudicial effect because the jury already knew that this event started with burglary at point A and moved rapidly to criminal trespass at point D. The entire episode included undercover surveillance at the location of the burglary, identification of the get-away vehicle, notification of the actual burglary, notification by undercover officers to uniformed officers describing the vehicle, the ensuing chase and unlawful flight, the firing upon the pursuing police officers – the issue at trial, and finally the apprehension of Alejandro in a neighborhood home where he had no permission to be.

¶128 If there had been no undercover surveillance the morning of the burglary, it is unlikely that there would have been flight from marked police cars followed by shooting. The purpose of the shots and aggravated assaults was, presumably, to escape or avoid capture and prosecution. Once Alejandro stopped the SUV, he subsequently hid from police in a home. One of the State's primary theories of the case was that all of the events were connected and integral to explain and prove the aggravated

assaults. The trial court balanced the theory and evidence against the prejudicial effect and admitted the evidence. There was no unfair "done it before, he's guilty now" prejudice (as in *Leonard*) because the details that begin and end this series of events are material to the State's case. Accordingly, the State was not required to accept the stipulations proposed by Alejandro, and therefore there was no error by the trial court.

#### **JURY INSTRUCTIONS**

¶129 On appeal, Alejandro points out an error in the jury instructions given by the court to guide the jury in determining if he committed class 2 aggravated assaults. But Alejandro did not object at trial to this error in the instructions. As a result, he has waived appellate review except for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). In order for Alejandro to prevail in his claim that the trial court's instructions constituted fundamental error, he must prove that a fundamental error occurred and that the error caused him prejudice. *Id.* at ¶ 20 (holding that defendant carries the burden of persuasion to prevent reversal on appeal for matters that are correctable at the trial level). An error is fundamental when it is "clear, egregious, and curable only via a new trial." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

¶130 A proper instruction defining the elements of class 2

aggravated assault would have stated that the jury must find that the defendant committed actual simple assault under A.R.S. § 13-1203A(2) (2010)<sup>3</sup> ("Intentionally placing another person in reasonable apprehension of imminent physical injury,") and that the defendant both (1) used a deadly weapon or dangerous instrument and (2) knew or had reason to know that the person assaulted was a peace officer. See A.R.S. § 13-1204(A)(2), (8), and (C) (2010). Instead, the trial court instructed the jury as follows:

The crime of aggravated assault requires proof of the following:

1. The defendant committed an assault; and
2. The assault was aggravated by at least one of the following factors:

The defendant used a deadly weapon or dangerous instrument, or the defendant knew or had reason to know that the person assaulted was a peace officer or someone summoned and directed by a peace officer performing official duties.

(emphasis added).

¶31 The State concedes that the trial court erred in this instruction. We agree. This error is regrettable and evidently overlooked by the court, the prosecutor, and defense counsel. An instructional error like this may be a fundamental error.

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<sup>3</sup> We cite to the current version of the applicable statute because no revisions material to this decision have since occurred.



But we need not decide whether the error was fundamental because, on this record, we conclude that Alejandro cannot demonstrate the prejudice required to warrant reversal of his convictions, even assuming that fundamental error occurred.

¶132 Determining prejudice under fundamental error review is a highly fact-based inquiry that the court analyzes on a case-by-case basis. *Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608. Alejandro must show that a reasonable jury could have reached a different result had the alleged error in the jury instruction not occurred. See *id.* at 569, ¶ 27, 115 P.3d at 609. "Jury instructions must be viewed in their entirety when determining whether they adequately reflect the law." *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994) (citing *State v. Haas*, 138 Ariz. 413, 425, 675 P.2d 673, 685 (1983)).

¶133 Alejandro argues that it is possible that the jury determined only simple assault occurred because the "or" instruction permits conviction with only one of the two aggravating elements. On these facts, however, we cannot conceive that a reasonable jury could fail to find either of the two elements of (1) use of a deadly weapon and (2) shots fired at police officers.

¶134 The evidence was overwhelming that shots were fired at the officers or their patrol cars. We do not think a reasonable jury could find that a deadly weapon was not used. The jury

knew from the beginning of trial that Alejandro had pled guilty to burglary and unlawful flight from a law enforcement vehicle. Alejandro's plea of guilty to unlawful flight demonstrates his knowledge that at least one police officer was pursuing. Additionally, the officers testified that their lights and sirens were activated, and Alejandro drove the SUV in an obvious effort to get away. We do not think a reasonable jury could find that Alejandro did not know that the people and cars pursuing them and being shot at by his accomplice were police officers and their patrol cars. On a different record, this instructional error might be fundamental, prejudicial, and reversible error. But on these facts we do not believe that Alejandro has demonstrated any prejudice from the error.

¶135 Finally, we address Alejandro's related argument regarding his defense of mere presence. Alejandro argued mere presence while driving the SUV and that he was not doing the shooting at police officers or otherwise. The jury instructions defined mere presence as follows: "[t]he fact that the defendant may have been present or knew that a crime was being committed does not in and of itself make the defendant guilty of the crime charged." The key here is that the jury determined, after proper instruction, that Alejandro had accomplice liability. He was guilty of the aggravated assaults even though he was the driver and not the actual shooter. His speeding away

and evasion of marked police vehicles was integral with the assaults. The error in the jury instruction defining aggravated assault did not impact Alejandro's defense that he was merely present during an assault and not the actual person committing the assault. Therefore, we find no reversible error based on the interaction of the mere presence defense with Alejandro's accomplice liability and the instructional error.

**CONCLUSION**

¶136 For the foregoing reasons, Alejandro's convictions and sentences are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PETER B. SWANN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
JON W. THOMPSON, Judge