IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCIS GARJAH TOGAR,
Appellant.

No. 2 CA-CR 2018-0338
Filed March 25, 2020

Appeal from the Superior Court in Pima County
No. CR20180293001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

OPINION[1]

Judge Brearcliffe authored the opinion of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Francis Togar appeals from his conviction after a jury trial for one count of second-degree burglary and the resulting term of probation imposed. On appeal, Togar contends the trial court abused its discretion in admitting other-acts evidence and denying his request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964). We affirm.

Factual and Procedural Background

¶2 We review the facts in the light most favorable to upholding the conviction. *State v. Robles*, 213 Ariz. 268, ¶ 2 (App. 2006). J.J., the victim, was ninety-seven years old at the time of the burglary, living in a senior-living facility. Togar was a temporary employee at the facility. In December 2017, J.J. told his daughter, Janet,[2] and his son-in-law, Adam, that he believed someone had taken money from his wallet. On January 1, 2018, Janet and Adam marked four twenty-dollar bills, photographed them, recorded the serial numbers, and put them in J.J.'s wallet. They also installed a motion-sensor camera in J.J.'s room. Although it was constantly recording, upon sensing motion, the camera software would send an alert to Adam's phone, and allow him to remotely view the captured video in real time.

¶3 The next day, the motion sensor on the camera alerted, and Janet and Adam watched the live video of a person in J.J.'s room. They immediately drove to J.J.'s facility, made sure he was safe, determined that

[1]This opinion was previously issued as a memorandum decision. *State v. Togar*, No. 2 CA-CR 2018-0338 (Ariz. App. Mar. 25, 2020) (mem. decision). On the state's motion to publish, we agree that reissuance as a published opinion is proper. *See* Ariz. R. Sup. Ct. 111(b). Our previous memorandum decision is hereby withdrawn and replaced with this opinion.

[2]Names of the victim's children are pseudonyms.

three of the marked bills were missing from his wallet, and called 9-1-1. Janet and Adam also showed the video to employees of the facility who identified Togar as the man in the video.

¶4 In speaking with a police officer, Togar first denied having taken any money, claiming that he only went into J.J.'s room to "check it out" after he heard a noise. The officer searched Togar and found three twenty-dollar bills that matched the bills Adam and Janet placed in J.J.'s wallet. After that discovery, Togar claimed he only took the money because he had dropped his wallet in J.J.'s room and had thought the bills were his because they were on the floor. The officer repeatedly told Togar that the video shows him reaching toward the nightstand, not reaching to grab something on the floor. The officer showed Togar the video from the hidden camera, but Togar maintained his explanation of the events. Togar was arrested and charged with a single count of second-degree burglary.

¶5 Before trial, Togar filed a motion *in limine* to preclude evidence of the earlier purported thefts of money from J.J.'s wallet.[3] Togar asserted that evidence of the prior thefts was "other bad acts" evidence under Rule 404(b), Ariz. R. Evid., and inadmissible because there was no evidence he had committed those thefts. Togar also argued, in anticipating that the state would offer the evidence to "complete the story," that evidence of the prior thefts was unnecessary to do so and would be unduly prejudicial under Rule 403, Ariz. R. Evid. The state argued that the evidence of the prior thefts was indeed admissible to "complete the story" of the crime for which Togar was on trial. It further argued that, because it did not intend to present evidence that Togar was responsible for the prior thefts, Rule 404(b) was inapplicable. The state also argued that "[p]recluding the jury from hearing that there had been prior thefts may lead the jury to draw its own conclusions" and thus confuse the issues or mislead the jury. The trial court denied Togar's motion, stating that Rule 404(b) does not apply because "we cannot attribute these other acts to the defendant with any sort of certainty." The court indicated that, without the evidence, the jury might assume some other reason for the placing of the surveillance camera, saying, "I think the potential for [a conclusion of previous elder abuse] is even more prejudicial than theft."

[3]No actual prior thefts were proven, but for the purposes of this decision we refer to the prior instances of J.J.'s missing money as "prior thefts."

¶6 At trial, Janet testified that, after J.J. reported the prior thefts, she came "up with a plan as to how to make sure if someone did that in the future, they would get caught." Both Janet and Adam testified about their placement of the camera and marking and photographing of the bills in J.J.'s wallet. The video from the hidden camera was shown to the jury during the state's case in chief. As described above, in addition to showing Togar entering J.J.'s room, it showed him reaching toward something in the area of the nightstand beside the bed, and then stepping back from the bed into the lighted bathroom to look at something.

¶7 Togar testified that he had entered J.J.'s room because he heard a noise "like somebody fell." He stated that, once he was in the room, his wallet and the cash in it fell out of his pocket when he reached for his phone. He stated that he then reached for and grabbed the cash that had been on the floor, thinking it was his money. In explaining why he stepped into the lighted bathroom, he said he did so to make sure all of his belongings were back in his wallet, including $2,500 and some business cards. He testified that he reached toward the nightstand to pick up J.J.'s money clip to get a better look at it because it bore a military design of some kind that he was interested in. However, Janet testified that the money clip was a gift that had only J.J.'s initials and roman numerals on it. Togar further claimed he did not take J.J.'s money "on purpose."

¶8 Adam testified he watched the video from the point "a little prior" to Togar entering the room and that "[t]here wasn't anything of any note going on prior." He also testified that the video did have sound, and before the point at which Togar entered J.J.'s room, "[t]he only sound during the video that [he] heard was . . . the click of the main apartment door as it closes when someone comes in." Janet testified that she spent several hours watching the video and did not hear any sounds before it showed Togar entering her father's room, other than that there could have been "vague sounds of somebody maybe moving." She also stated that, when law enforcement requested a copy of the video, she showed the full video to the police officer, and he requested that she make a copy just of "when [Togar] comes in and when he goes out." She, therefore, did not preserve a copy of the full video.

¶9 In closing argument, the state explained that, because there had been previous thefts, Janet set up the camera, took photographs of the serial numbers on the bills, and marked them. Togar objected, "regarding the motion in limine," and the trial court overruled the objection. The state went on to say, in discussing Janet's testimony about the planned

surveillance, that "hopefully, if someone were to steal from her father again, she would catch them."

¶10 As to Togar's pretrial request for a *Willits* instruction, Togar asserted that the officer's failure to preserve the entirety of the video, including the footage before Togar entered J.J.'s room, affected his ability to present a defense. And, also that, because he had informed the officer he had heard a noise when the state was still in possession of the full video, the state was on notice that the full video was of "significant evidentiary value." Consequently, Togar argued, under *Willits*, 96 Ariz. 184, "the jury should be instructed that it can draw an unfavorable inference about the State if it was proved that the State had destroyed evidence, and that this in turn '*could create a reasonable doubt as to the defendant's guilt*.'" The court denied Togar's request, concluding that the presence of noise on the video would not have the tendency to exonerate Togar of burglary—an element of which is that one enters and remains therein with felonious intent—because he may have developed the felonious intent while inside. The court also noted that no evidence suggested the video would have even picked up any such noise in the first instance.

¶11 Togar was convicted and probation imposed as described above. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

Other-Acts Evidence, Relevance and Prejudice

¶12 Togar argues that the trial court "erred in permitting the introduction of evidence of prior thefts" committed against J.J. at the facility "when there was no clear and convincing evidence that [Togar] committed those theft[s]." He contends that the state's closing argument—"hopefully, if someone were to steal from [J.J.] again, [Janet] would catch them"—told the jury that the prior thefts were committed by the same person who committed the present offense. Togar further argues that the evidence was "irrelevant for any proper purpose," and lacked any "probative value because there was no evidence that [Togar] was involved." He asserts the probative value of the evidence, therefore, was substantially outweighed by the danger of unfair prejudice. "We review a trial court's admission of evidence for an abuse of discretion." *State v. Tucker*, 215 Ariz. 298, ¶ 58 (App. 2007).

Other acts evidence and relevance

¶13 Under Rule 402, Ariz. R. Evid., "[r]elevant evidence is admissible" unless otherwise precluded by statute or rule, and "irrelevant evidence is not admissible." Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and the fact "is of consequence in determining the action." Ariz. R. Evid. 401. To be relevant, "[i]t is not necessary that such evidence be sufficient to support a finding of an ultimate fact; it is enough if the evidence, if admitted, would render the desired inference more probable." *State v. Paxson*, 203 Ariz. 38, ¶ 17 (App. 2002) (quoting *Reader v. Gen. Motors Corp.*, 107 Ariz. 149, 155 (1971)). "This standard of relevance is not particularly high." *State v. Oliver*, 158 Ariz. 22, 28 (1988).

¶14 Under Rule 404(b), Ariz. R. Evid., "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Other-acts evidence used to prove a character trait and then to show a person's action in conformity with that trait is commonly referred to as "propensity evidence." *See, e.g.*, *State v. Machado*, 226 Ariz. 281, ¶ 14 (2011). But, such other-acts evidence may be admissible for non-propensity purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). That is, despite also being propensity evidence, other-acts evidence may be nonetheless admissible if otherwise relevant under Rule 401 and 402, Ariz. R. Evid. *See State v. Leteve*, 237 Ariz. 516, ¶ 11 (2015) ("When other acts evidence is offered for a non-propensity purpose under Rule 404(b), it is also subject to Rule 402's relevance test . . . .").

¶15 The state concedes that the evidence of the prior thefts was inadmissible under Rule 404(b). It argues however that, because it did not present any evidence or argue that Togar committed the prior thefts, Rule 404(b) was not applicable. Instead, it argues, the evidence of the prior thefts merely "complete[d] the story" and was needed to explain Janet and Adam's reason and purpose behind installing the video camera and marking and photographing the bills in J.J.'s wallet.

¶16 Togar cites *State v. Ferrero* for the proposition that the use of "complete-the-story" evidence has been rejected by the Arizona Supreme Court. 229 Ariz. 239 (2012). In *Ferrero*, our supreme court clarified the admissibility of "*Garner*[4] evidence," that is, evidence of prior sexual contact

[4]*State v. Garner*, 116 Ariz. 443 (1977).

between the defendant and the victim, and other-acts evidence offered either for a non-propensity purpose under Rule 404(b) or as "intrinsic evidence." *Id.* ¶¶ 8-20. The court held that, if *Garner* evidence is offered to prove the defendant's aberrant sexual propensity, then it is admissible only if permitted by Rule 404(c). *Id.* ¶ 11. If it is offered for a non-sexual propensity purpose, then it should be analyzed under Rule 404(b). *Id.* ¶ 12. However, if the evidence is of an act that is "so interrelated with the charged act that they are part of the charged act itself," such is intrinsic evidence and not other-acts evidence at all, and thus not within the scope of Rule 404(b) or (c). *Id.* ¶ 20. It then defined evidence as intrinsic evidence "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *Id.*

¶17 In adopting this definition, and as relevant to Togar's argument, the court further stated, "The intrinsic evidence doctrine thus may not be invoked merely to 'complete the story' or because evidence 'arises out of the same transaction or course of events' as the charged act." *Id.* But, the court went on to say:

> Evidence that "completes the story," "arises out of the same transaction" as the charged act, or is "part and parcel" of the charged act may well qualify as intrinsic evidence, but those tests are broader than our formulation and should not be invoked to analyze whether evidence is intrinsic to the charged act.

Id. at n.4. Thus, contrary to Togar's contention, *Ferrero* does not reject the use of evidence to "complete the story" or to provide background to other admissible evidence. It merely establishes that evidence of a defendant's other acts may not be admitted as intrinsic evidence to avoid the Rule 404(b) and (c) analyses simply because it completes the story.

¶18 What each type of evidence discussed in *Ferrero*—Rule 404(b), Rule 404(c), and intrinsic—had in common was that each was evidence of earlier or substantially contemporaneous conduct of the defendant. Here, however, the state did not imply that Togar was responsible for the earlier thefts; it simply paraphrased Janet's testimony about her motivation for placing the camera and marking the bills. Thus, there was no argument or intimation that Togar was responsible for the earlier thefts, and therefore evidence of those thefts was neither other-acts evidence under Rule 404(b) nor evidence of conduct intrinsic to the charged act. Consequently, the *Ferrero* analysis is not relevant here.

¶19 Because the evidence in question was not evidence of other acts attributable to Togar, its admissibility under Rule 402 is analyzed, as is all evidence, for its relevancy under Rule 401, Ariz. R. Evid. Evidence of the prior thefts was relevant under Rule 401, Ariz. R. Evid. Several facts of consequence to this action are more probable to have occurred because Janet and Adam were concerned about someone stealing from J.J.—including that Janet and Adam marked bills, photographed the bills and recorded their serial numbers, placed those bills in J.J.'s wallet, set up a video camera to record the spot in the room where the wallet would be placed, monitored the camera's live feed, and then responded as they did when they saw someone in J.J.'s room in the night. The fact that they were concerned about someone stealing from J.J. is made more probable because the prior thefts occurred. As stated in the Advisory Committee Notes to the 1972 adoption of Rule 401, Fed. R. Evid.:

> The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

"When interpreting an evidentiary rule that predominately echoes its federal counterpart, we often look to the latter for guidance." *State v. Green*, 200 Ariz. 496, ¶ 10 (2001); *see* Ariz. R. Evid. 401 cmt. to 2012 amend. ("The language of Rule 401 has been amended to conform to the federal restyling . . . .").

¶20 The trial court's rationale for admitting the evidence of the prior thefts—that the jury would likely be confused without it and be

misled into far more prejudicial guesswork—was in line with the broad definition of relevancy under our rules. At its base, the court's determination was that the reason J.J.'s family acted as it did helped the jury understand the video evidence of Togar committing this crime and the marked bills found on his person, each of which was critical evidence in the case. Certainly, absent evidence of the prior thefts, Janet and Adam's conduct may have seemed irrational and paranoid, and evidence that substantiates their credibility as key prosecution witnesses is material and relevant on its own. *See State v. Mosley*, 119 Ariz. 393, 401 (1978) ("Generally, any evidence that substantiates the credibility of a prosecuting witness on the question of guilt is material and relevant, and may be properly admitted.").

¶21 "The trial judge is in the best position to determine the relevancy of [evidence] since he can consider all of the evidence together" and "determine which items have a 'tendency' to make the existence of a fact of consequence more or less probable than it would be without the evidence." *State v. Adamson*, 136 Ariz. 250, 260 (1983). Thus, "[i]n determining relevancy and admissibility of evidence, the trial judge has considerable discretion," *State v. Smith*, 136 Ariz. 273, 276 (1983), and "such discretion will not be disturbed on appeal unless it clearly has been abused," *Adamson*, 136 Ariz. at 259. The trial court here did not abuse its discretion in determining the relevancy and admissibility of the prior thefts, let alone clearly abuse its discretion, and we find no error in the admission of this evidence.

Prejudice

¶22 Although we conclude that the evidence of the prior thefts was relevant and admissible, Togar is correct that relevant and otherwise admissible evidence may nonetheless be barred if "its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403. Togar argues that the evidence of the prior thefts was unfairly prejudicial because it "had no probative value because there was no evidence that [Togar] was involved," and it merely stirred "outrage" and potentially played on the jury's emotions and was therefore improperly admitted. We conclude above that the evidence of the prior thefts had independent probative value—whether or not Togar was involved—and we also conclude there was no unfair prejudice.

¶23 "Our supreme court has held that '[u]nfair prejudice means an undue tendency to suggest decisions on an improper basis, such as emotion, sympathy, or horror.'" *State v. Butler*, 230 Ariz. 465, ¶ 33 (App. 2012) (quoting *State v. Schurz*, 176 Ariz. 46, 52 (1993)). Because the testimony about the prior thefts from J.J. was limited, and the state did not at any time imply that Togar was responsible for the prior thefts, there is insufficient basis to conclude that evidence of the two prior thefts had an "undue tendency to suggest decisions on an improper basis." *See Butler*, 230 Ariz. 465, ¶ 33. "'Because the trial court is in the best position to balance the probative value of the challenged evidence against its potential for unfair prejudice,' it has broad discretion to make that determination." *State v. Salamanca*, 233 Ariz. 292, ¶ 17 (App. 2013) (quoting *State v. Connor*, 215 Ariz. 553, ¶ 39 (App. 2007)). Under these circumstances, we cannot conclude that the explanatory value of the prior thefts—to provide the necessary background to the events and avoid jury confusion—was substantially outweighed by a danger of unfair prejudice.[5] The trial court did not abuse its discretion by admitting evidence of the prior thefts over the claim of undue prejudice.

¶24 Regardless, the overwhelming evidence here supports the jury's verdict that Togar "enter[ed] or remain[ed] unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A) (defining burglary in the second degree). Togar was captured on video in J.J.'s room, reaching toward J.J.'s nightstand, and looking through a wallet. Officers then searched Togar and found the marked bills, then missing from J.J.'s wallet, in Togar's pocket. Therefore, even if error had occurred, Togar cannot show prejudice given the overwhelming evidence supporting the jury's verdict. *See State v. Ramos*, 235 Ariz. 230, ¶ 18 (App. 2014) ("If overwhelming evidence of guilt exists in the record, we may conclude that a defendant has failed to meet his burden of establishing prejudice . . . .").

***Willits* Instruction**

¶25 Pursuant to *Willits*, 96 Ariz. 184, a defendant is entitled to an instruction permitting the jury to infer that missing or destroyed evidence would have been exculpatory when "police negligently fail to preserve" the evidence. *State v. Fulminante*, 193 Ariz. 485, ¶ 62 (1999). To be entitled to a *Willits* instruction, the "defendant must show (1) that the state failed to

[5]Togar could have requested a limiting instruction from the trial court under Rule 105, Ariz. R. Evid., but he did not.

preserve material and reasonably accessible evidence having a tendency to exonerate him, and (2) that this failure resulted in prejudice." *State v. Speer*, 221 Ariz. 449, ¶ 40 (2009) (quoting *State v. Murray*, 184 Ariz. 9, 33 (1995)). This "two-element test," most recently discussed by our supreme court in *State v. Glissendorf*, 235 Ariz. 147, ¶¶ 8-10 (2014), requires four inherent predicate showings: (1) that evidence existed; (2) which was destroyed (or not preserved) by the state; (3) which could have had a "tendency to exonerate" the defendant by being "potentially useful to a defense theory supported by the evidence"; and (4) prejudice. "We review the refusal to give a *Willits* instruction for abuse of discretion." *Fulminante*, 193 Ariz. 485, ¶ 62.

¶26 Togar argues here, as he did below, that he was entitled to a *Willits* instruction because the officer failed to preserve the entirety of the surveillance video, which would have been potentially useful to presenting a defense. Togar claims that the recording "potentially contained the sound [Togar] said led him to enter the room" and therefore supported his testimony. The state argues that Togar can only speculate that the deleted portion of the video might have contained the noise he claimed to have heard—that is, speculation that the evidence existed at all—and a *Willits* instruction is not appropriate where it is based solely on speculation.

¶27 Togar's argument is premised entirely on speculation that the full surveillance video recording would have actually contained the noise he claims he heard. But no evidence in the record suggests that the full video contained such a noise. Indeed, the only evidence was to the contrary; both Janet and Adam, the only two witnesses who actually saw (and heard) the full video recording, testified that they did not hear any such noise on the recording. Thus, there was no showing, beyond mere speculation, that sound attributable to a human fall was recorded on the video at all. Such speculation, particularly speculation contradicting testimony on the record, is insufficient to support a *Willits* instruction. *See State v. Smith*, 158 Ariz. 222, 227 (1988) (defendant not entitled to *Willits* instruction when defendant merely speculated that lost piece of paper would have contained information implicating another).

¶28 Additionally, even if the video contained such a sound, it still would not have had a "tendency to exonerate" Togar because the jury could have reasonably concluded that Togar formed the requisite intent while inside of J.J.'s room, even if he had a legitimate reason for originally entering. *See Glissendorf*, 235 Ariz. 147, ¶ 9 ("To show that evidence had a 'tendency to exonerate,' the defendant must do more than simply speculate about how the evidence might have been helpful."); *State v. Belcher*, 161

Ariz. 133, 134 (App. 1989) ("The requisite intent to commit burglary may be formed after a person enters . . . in all innocence."). Consequently, Togar has not proven that "there is a real likelihood that the evidence would have had evidentiary value." *Glissendorf*, 235 Ariz. 147, ¶ 9.

¶29 In short, the trial court did not abuse its discretion in denying Togar's request for a *Willits* instruction. Moreover, there was overwhelming evidence in the record to support the jury's verdict and thus Togar is unable to show the court's denial of his request for a *Willits* instruction was prejudicial. *See Ramos*, 235 Ariz. 230, ¶ 18.

Disposition

¶30 For the foregoing reasons, we affirm Togar's conviction and resulting disposition.