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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAYMOND JOHN BALLESTEROS, Appellant.	)	2 CA-CR 2012-0355 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112831001

Honorable Christopher Browning, Judge

AFFIRMED IN PART; VACATED IN PART

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E S P I N O S A, Judge.

¶1 Following a jury trial, Raymond Ballesteros was convicted of two counts of aggravated assault in violation of A.R.S. §§ 13-1204 (A)(3), (B), and 13-3601.[1] The trial court sentenced him to concurrent, presumptive prison terms of 4.5 years and ordered him to pay restitution. On appeal, he challenges the court's admission of testimony regarding statements he made following the assaults and a criminal restitution order (CRO) entered by the court at sentencing. For the reasons set forth below, we affirm the convictions and sentences but vacate the CRO.

Factual and Procedural Background

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). On July 30, 2011, police were dispatched to a home Ballesteros shared with his mother, the victim in this case. Upon arrival, the responding officer observed an injury to the victim's wrist and learned from her that Ballesteros had "beaten her up." The victim then was transported to the hospital, where she was treated by a doctor for fractures to her wrist and ribs. Ballesteros was charged with two counts of aggravated assault.

¶3 Prior to trial, Ballesteros filed a motion to preclude the testimony of J.R., the victim's neighbor, whom the state planned to examine about statements Ballesteros made following the assault. The trial court allowed J.R. to testify, and on direct examination she recalled telling Ballesteros in a telephone call after the incident that he

[1]Although A.R.S. § 13-3601 was amended on June 19, 2013, the relevant provisions of that section remain the same. *See* 2013 Ariz. Sess. Laws, ch. 213, § 1.

had broken his mother's arm. She testified that in response, he "was kind of sarcastic but he said[, 'O]h, I broke her little arm. . . . I could come back and finish the job.[']" On redirect examination, J.R. described this conversation slightly differently, stating that Ballesteros told her, "Oh, I broke her arm, I *should* come back and finish the job." (Emphasis added.).

¶4 Following his convictions on both counts, Ballesteros was sentenced as set forth above. This court has jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21, 13-4031, and 13-4033(A)(1).

Discussion

Admissibility of Inculpatory Statements

¶5 Ballesteros claims J.R.'s testimony should have been precluded under Rule 404(b), Ariz. R. Evid., which prohibits evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." According to Ballesteros, his statements to J.R. were used by the state to create an improper implication that "since Raymond stated an intention to harm his mother in the future, he must be a bad person who had also intended to hurt her on July 30, 2011." He thus claims the admission of J.R.'s testimony was improper because it suggested a propensity toward violence against the victim from which intent could be inferred.

¶6 Although Ballesteros raised this argument in his motion to preclude J.R.'s testimony, he did not object to J.R.'s testimony at trial. Typically, we review for

fundamental error any objection not raised at trial. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Lowery*, 230 Ariz. 536, ¶ 7, 287 P.3d 830, 833 (App. 2012). However, our supreme court has held that "where 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). "The essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived." *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975). As there was no express ruling on Ballestero's motion to preclude the challenged evidence, we must examine the record further to determine the appropriate level of appellate review.

¶7 On the same day Ballesteros filed his motion to preclude J.R.'s testimony, he also filed a motion to compel disclosure of her contact information. The trial court set the motions to be heard together, and the state filed its responses two days later. At the outset of the hearing, counsel for Ballesteros stated,

> There[are] two motions. One is to preclude in general, because I think what she has to say involves 404[(b)] evidence of potential of a bad act. It's also irrelevant and unduly prejudicial. . . . If she is going to be allowed as a witness, . . . I have asked the State to set up a Rule 15 interview.

¶8 At the conclusion of the hearing, the trial court ruled that J.R.'s testimony would be precluded only if the state failed to either make her available for an interview or disclose her contact information. It did not expressly rule on Ballesteros's motion to

preclude the testimony pursuant to Rule 404(b). Nevertheless, based on Ballesteros's argument at the hearing, we conclude the issue was squarely before the court and implicitly addressed in its minute entry of the same date. *Compare State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 22, 154 P.3d 1046, 1053 (App. 2007) (finding issue implicitly addressed and preserved for appeal notwithstanding absence of express ruling where litigant requested ruling and made court aware she had not abandoned motion), *with State v. Lujan*, 136 Ariz. 326, 327, 666 P.2d 71, 73 (1983) (motion in limine insufficient to preserve objection where state filed no response and movant made no record of court's failure to rule on motion). Accordingly, we review the trial court's implied ruling on Ballesteros's motion to preclude testimony under the abuse of discretion standard applied to evidentiary rulings. *See, e.g.*, *State v. Garza*, 216 Ariz. 56, ¶ 37, 163 P.3d 1006, 1016 (2007).

¶9 Relying on the intrinsic evidence doctrine, the state contends that J.R.'s testimony was outside the scope of Rule 404(b) because it was interrelated with the charged act, citing *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). In *Ferrero*, our supreme court narrowed the definition of intrinsic evidence, ruling that other-act evidence may be considered outside the scope of Rule 404(b) "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *Id.* at ¶ 20. Because Ballesteros's remarks to J.R. amount to an admission that he caused the victim's injuries, we agree that J.R.'s testimony tended to

directly prove the charges of aggravated assault and, therefore, was not subject to the strictures placed upon other-act evidence by Rule 404(b).

¶10 However, even if J.R.'s testimony were subject to Rule 404(b), we still would find no error in its admission. Rule 404(b) bars evidence of other crimes, wrongs or acts when used to show a defendant's propensity for criminal acts. *State v. Machado*, 226 Ariz. 281, ¶ 14, 246 P.3d 632, 634-35 (2011) (Rule 404(b) designed to prevent defendant from being convicted "simply because the jury might conclude from the other act that he was a 'bad man'"); *State v. Kiper*, 181 Ariz. 62, 65-66, 887 P.2d 592, 595-96 (App. 1994) (Rule 404(b) precludes evidence offered solely to show disposition to criminality). Evidence of prior acts "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b).

¶11 It is evident from the trial transcript that J.R.'s account of Ballesteros's statements was not offered as propensity evidence to improperly implicate Ballesteros. As noted above, Ballesteros's statements could be considered an admission of guilt and were introduced as such by the state. There was no need for a jury to draw inferences—improper or otherwise—about Ballesteros's character; it was sufficient that the statements themselves indicated Ballesteros had intentionally caused the victim's injuries. And proof of intent is a permissible purpose for other-act evidence under Rule 404(b). *See State v. Buot*, ___, Ariz. ___, ¶ 6, 306 P.3d 89, 90 (App. 2013) (defendant's prior threats to drive into oncoming traffic admissible evidence of intent, motive and absence

of accident where defense counsel repeatedly referred to second degree murder charge as accident and contended defendant lacked requisite intent).

¶12 Nor do we find the trial court abused its discretion by declining to exclude J.R.'s testimony pursuant to Rule 403, Ariz. R. Evid. *State v. Garcia*, 224 Ariz. 1, ¶ 33, 226 P.3d 370, 380 (2010) (probative value of other-act evidence must not be substantially outweighed by any danger of unfair prejudice to defendant). As Ballesteros notes, the identity of the victim's assailant and the extent of her injuries were not at issue. The challenged testimony was nevertheless highly probative evidence that the victim's injuries were not merely the unintended consequence of an argument between the two parties, as Ballesteros's counsel suggested, but were directly—and intentionally—caused by Ballesteros.

¶13 Although the victim agreed while testifying that the July 30 argument with Ballesteros had "become physical," she claimed not to remember whether Ballesteros touched her and stated only that he "may" have pushed her to the ground. However, she also stated she "might have tripped," a scenario Ballesteros's counsel alluded to at various points throughout the trial and in his opening statement and closing argument. When asked at trial about her testimony at the preliminary hearing, the victim conceded only that she "might have" testified previously that Ballesteros had pushed her and had "probably" kicked her.

¶14 Further, while there was testimony from the responding police officer and treating physician that the victim had told them Ballesteros had attacked her, she retreated

from those statements at trial, either by contradicting them or by casting doubt on her lucidity at the time. Accordingly, Ballesteros's statements to J.R. supplied highly probative evidence of his guilt.

¶15 Finally, while the statements made by Ballesteros did suggest a level of callousness, the incremental effect of these statements was not sufficient to outweigh their probative value, especially given the nature of the charges and the relationship between Ballesteros and the victim. *See State v. Villalobos*, 225 Ariz. 74, ¶ 23, 235 P.3d 227, 233 (2010) (considering nature of underlying charges and concluding incremental risk of prejudice not sufficient to outweigh probative value of autopsy photographs), *citing State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (evidence not unduly prejudicial where it added little to "'repugnance'" induced by underlying charges) (citation omitted in *Villalobos*). Accordingly, we find no abuse of discretion in connection with the trial court's decision to admit J.R.'s testimony.

Criminal Restitution Order

¶16 Ballesteros also challenges the trial court's entry at sentencing of a CRO requiring him to pay $17,058.11 in restitution and $445 in fees. We agree with Ballesteros that the court lacked authority to enter a CRO. In *State v. Lopez*, we held entry of a CRO before a defendant's sentence has expired "'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Therefore, the CRO entered at sentencing must be vacated.

Disposition

¶17 For the foregoing reasons, we vacate that portion of the trial court's minute entry order that imposed a CRO; in all other respects, Ballesteros's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge