IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARK JOSEPH TOVAR,
Appellant.

No. 2 CA-CR 2014-0144
Filed October 30, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20120605001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Mark Tovar was convicted of two counts of child molestation, three counts of sexual conduct with a minor under the age of fifteen, and four counts of sexual conduct with a minor.[2] The trial court imposed two life sentences and multiple presumptive terms totaling seventy-four years' imprisonment, all to be served consecutively. On appeal, Tovar contends the court abused its discretion in admitting other-act evidence under Ariz. R. Evid. 404 and committed fundamental error by failing to give the jury a limiting instruction. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the verdicts. *State v. Ellison*, 213 Ariz. 116, n.1, 140 P.3d 899, 906 n.1 (2006). Tovar was M.G.'s stepfather, and he began sexually molesting her when she was seven years old.[3] Sexual

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]All counts other than those of sexual conduct with a minor were deemed dangerous crimes against children.

[3]M.G. was born in December 1988.

touching escalated to oral sex when M.G. was about eleven, and to sexual intercourse when she was approximately fourteen years old. At fifteen, M.G. became pregnant by Tovar and had an abortion. When she was nineteen and living in her own apartment, M.G. became pregnant again and moved back into the family home. M.G.'s son was born in January 2009.[4] In June 2009, Tovar and M.G.'s mother divorced and M.G. continued to live with Tovar. In November 2009, M.G. had a second abortion. In 2010, she moved to California, where Tovar visited her several times and continued to have sexual intercourse with her. When M.G. was twenty-two years old, she revealed the history of abuse by Tovar to her step-sister S.F., and ultimately contacted police and reported it.

¶3 At the behest of police investigators, M.G. confronted Tovar in a recorded telephone call in which she accused him of sexual abuse, beginning when she was a young child. Tovar did not expressly admit or deny the abuse, but repeatedly apologized and said he had been using "a lot" of drugs at the time and that he "mentally wasn't all there." S.F., Tovar's biological daughter, also confronted him and he told her "it happened only one time when [M.G.] was . . . [thirteen]." And he said, "'Baby, you know I was doing a lot of drugs, and I didn't know what the hell I was doing.'"

¶4 A grand jury indicted Tovar on two counts of child molestation, three counts of sexual conduct with a minor under fifteen years old, and five counts of sexual conduct with a minor. Tovar was convicted and sentenced as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

[4]Subsequent paternity testing showed Tovar was the baby's father.

Other Acts Evidence

¶5 Before trial, the state filed a notice of its intent to introduce at trial specific instances of conduct pursuant to Arizona Rules of Evidence, 402 and 404(b) and (c). The notice included the following:

> Incident #1: In 2003-04, M.G. and Tovar were having sexual intercourse and, in August 2003,[5] M.G. discovered she was pregnant. She was fifteen years old. M.G.'s mother arranged for an abortion. Tovar knew about M.G.'s pregnancy and abortion.
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> Incident #5: M.G. "became pregnant again by [Tovar and] . . . decided to have the baby[, born January 2009] . . . . [P]aternity was established and confirmed [Tovar] is the father of that baby."
>
> Incident #7: Shortly before her nineteenth birthday, M.G. moved into her own apartment, but Tovar "would still come over . . . and sexually abuse her."
>
> Incident #8: Around Thanksgiving 2009, M.G. "had another abortion." She reported "she was pretty sure the child was [Tovar's] and that she went to the same

[5]This date appears to be an error. M.G.'s medical records indicate her first abortion occurred in July 2004, when she was fifteen years old.

> place, Planned Parenthood, as she had for the previous abortions."[6]
>
> Incident #10: M.G. moved to California in spring or summer 2010 and Tovar "would come to where she lived in California and would still make her do sexual things with him." Two or three times he came to California and rented a hotel room and M.G. reported that "sexual abuse would happen in the hotel room."
>
> Incident #11: M.G. stated that Tovar had "used drugs during the same time period he was sexually abusing her. That was later confirmed in the confrontation call that was conducted as part of th[e] investigation. [Tovar] blamed the sexual abuse on the fact that he was using drugs."

When the state brought a pretrial motion for admission of the evidence, Tovar objected on grounds that other acts must be supported by clear and convincing evidence and asserted "there is no real notice of the specificity of the allegations being proffered." He also argued admission of the other acts would result in unfair prejudice.

¶6 After a hearing, the court ruled admissible incident eleven as "supported by a voluntary statement of [Tovar]" and

[6]Although incident eight describes "previous abortions," only one other abortion is reported in the state's notice of intent, i.e., incident one, and at trial M.G. testified she had undergone two abortions.

found "the other incidents of specific conduct . . . admissible under Rule 404(c)."[7] It also found "clear and convincing evidence that these things happened, that the defendant committed them, that they are relevant to . . . the defendant ha[ving] a character trait giving rise to an aberrant sexual propensity to commit the offenses charged." It further determined "the evidentiary value of the proof of the other acts is not substantially outweighed by danger of unfair prejudice or the other factors mentioned in Rule 403[, Ariz. R. Evid]."

¶7 On appeal, Tovar contends the trial court committed reversible error by admitting the other act evidence under Rule 404. We review its ruling for abuse of discretion. *See State v. Villalobos*, 225 Ariz. 74, ¶ 18, 235 P.3d 227, 233 (2010) (Rule 404(b)); *State v. Garcia*, 200 Ariz. 471, ¶ 25, 28 P.3d 327, 331 (App. 2001) (Rule 404(c)). Such occurs "when 'the reasons given by the court . . . are clearly untenable, legally incorrect, or amount to a denial of justice.'" *State v. Herrera*, 232 Ariz. 536, ¶ 19, 307 P.3d 103, 112 (App. 2013), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (alteration in *Herrera*). We will affirm the trial court's ruling if correct for any reason. *State v. Carlson*, 237 Ariz. 381, ¶ 7, 351 P.3d 1079, 1085 (2015).

Rule 404(c), Ariz. R. Evid.

Incidents Five, Seven, Eight, and Ten: Sexual Contact After M.G. Turned Eighteen

¶8 Tovar argues that incidents of sexual contact following M.G.'s eighteenth birthday had "no bearing on whether [he] possessed a character trait that gave rise to a sexually aberrant

[7]The court denied admission of other instances listed in the state's notice, which are not at issue here.

propensity" to sexually abuse M.G. when she was a child. Citing as an example the relationship between celebrity Woody Allen and his stepdaughter Soon-Yi, Tovar contends the sexual relationship between himself and his "adult stepdaughter" was consensual and, although "taboo," "does not lead to the inference of the existence of an aberrant sexual propensity for molestation."

¶9 Before admitting propensity evidence under Rule 404(c), the trial court must find: (1) clear and convincing evidence that the defendant committed the other act[8]; (2) the other act provides a reasonable basis to infer the defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged sexual offense; and (3) the probative value of the other-act evidence is not substantially outweighed by the danger of unfair prejudice or other concerns mentioned in Rule 403. *State v. Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d 865, 874 (2004); Ariz. R. Evid. 404(c)(1). In weighing probative value and unfair prejudice, the court considers factors such as the remoteness of the other act, its similarity or dissimilarity, its frequency, the circumstances of the acts, relevant intervening events, and other similarities or differences. Ariz. R. Evid. 404(c)(1)(C).

[8]The language of the rule imposes no requirement that the other acts must occur prior to the charged acts in order to be admissible. Ariz. R. Evid. 404; *see, e.g.*, *State v. Hargrave*, 225 Ariz. 1, ¶ 10, 234 P.3d 569, 576 (2010) (evidence of defendant's prior or subsequent acts admissible for exceptions set forth in Rule 404(b)); *State v. Moreno*, 153 Ariz. 67, 68-69, 734 P.2d 609, 610-11 (App. 1986) (evidence of subsequent act admissible to show Rule 404(b) knowledge or intent); *see also State v. Marshall*, 197 Ariz. 496, ¶ 13, 4 P.3d 1039, 1043–44 (App. 2000) (other acts contemporaneous with charged acts would have been admissible as evidence of defendant's propensity to commit aberrant sex offenses upon the victim).

¶10 Although Tovar contends that the other acts occurring after M.G. turned eighteen were not relevant to show an aberrant sexual propensity, he acknowledges that other acts involving nonconsensual intercourse are admissible to prove an aberrant sexual propensity under Rule 404(c). *See Aguilar*, 209 Ariz. 40, ¶ 24, 97 P.3d at 872. He asserts, however, that a "significant amount of evidence" showed that the sexual relationship was consensual. He notes that M.G. continued to have sex with him after she had moved out of the family home, she "voluntarily chose to move back in[]to the family home before she gave birth to [her son]," despite having other options; and when M.G.'s mother divorced him and moved to California, M.G. remained in Tucson and rented a house with Tovar. He maintains, "[a]ll of these facts point to a consensual sexual relationship between two adults, and do[] not lead to the conclusion that [he] possessed a character trait for an aberrant sexual propensity to molest M.G. when she was under fifteen."

¶11 At trial, M.G. testified she had moved into an apartment three weeks before turning eighteen because she "thought that [the sexual incidents] would stop," but they did not. After her year-long lease ended, M.G. moved back into the family home "[b]ecause [she] was pregnant with [her] son" and would not be able to work to pay her rent following the birth of her baby. She further testified that after her mother moved to California, she had elected to remain in Tucson because she had a steady job and would otherwise be sleeping on the floor of her grandmother's California apartment with her baby and mother. She also stated that her grandmother was hostile towards her. She did move to California after "it became apparent that even if [she] had moved into [her] own apartment, he would still force his way in" and that there "wasn't anything that [she] could do to stop [him] on [her] own." M.G. testified that the sexual contact with Tovar "was nothing [she] had ever wanted to happen, whether [she] was 7 or 20."

¶12 Tovar maintains the evidence showed the relationship to have been consensual and therefore not indicative of aberrant sexual propensity. But his explanations of that evidence and the inferences to be drawn from it were not the only ones possible; M.G. testified that none of the sexual conduct with Tovar was consensual and explained the situations which might otherwise have appeared to indicate a consensual relationship.[9] We thus cannot agree with Tovar that the incidents occurring after M.G.'s eighteenth birthday were not relevant for purposes of Rule 404(c). As argued by the state, the trial court reasonably found these acts "relevant because they have a tendency to make the fact that [Tovar] forced sexual contact with M.G. during her childhood," and thus his aberrant sexual propensity, more likely.

¶13 Tovar further argues the trial court erred in admitting the evidence because its probative value was outweighed by the danger of unfair prejudice. *See* Ariz. R. Evid. 403, 404(c)(1)(C). Tovar notes that under Rule 404(c)(1)(C), when balancing the probative value of evidence against prejudice, the court considers such factors as the remoteness of the other act, the similarity or dissimilarity of the other act, frequency of other acts, and relevant intervening events. He contends the other acts committed when

[9]M.G. additionally testified that Tovar hit or restrained her when the abuse started at age seven, resisting did not help and after a while she stopped doing so, she determined it would be over more quickly if she did not fight, her passivity was a survival mechanism, her mother knew and fought with Tovar over the abuse but did nothing to remove M.G. from the environment, Tovar told her no one would believe her and if she told anyone she never would see her family again, and she told him she "wasn't his girlfriend." All of this rebutted the notion of a consensual relationship, and M.G. further explained that as an adult, she felt resisting would have required her to reveal the childhood abuse she was not ready to talk about.

M.G. was over eighteen were dissimilar to the charged acts. Unlike the charged acts, which involved molesting and assaulting a child, the other acts involved "sex between two adults" and occurred "when it was just the two of them together in her apartment, the home she later shared with [Tovar], or in [Tovar's] hotel room." He points to M.G.'s eighteenth birthday as a "significant intervening event between the charged acts and the other acts admitted under Rule 404(c)."

¶14 But the other acts are not so dissimilar from the charged ones. Like the charged acts, the other acts involved nonconsensual sexual activity between Tovar and his stepdaughter. M.G. stated that once "the sexual intercourse began" it was frequent and continued into her adulthood. Given the evidence of the nonconsensual nature of all the acts, the fact that M.G. had reached majority while they were occurring holds little significance as a "relevant intervening event." Rule 404(c)(1)(C). Because the other acts were similar to the charged acts, continuous over time, frequent, and with no intervening event of consequence, we cannot say the trial court erred in finding their probative value not "substantially outweighed by danger of unfair prejudice." Rule 404(c)(1)(C).[10]

Incident Eight: 2009 Abortion

¶15 Tovar argues the trial court erred in admitting Rule 404(c) evidence of M.G.'s 2009 abortion because there was no

[10]Tovar observes that under Rule 404(c)(1)(D), a trial court is required to make specific findings, and the state responds that the court did so. Because Tovar does not argue this issue, it is waived. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to argue claim on appeal constitutes waiver of claim); *see also* Ariz. R. Crim. P. 31.13(c)(1) (appellant's brief shall include argument containing party's contentions, reasons therefor, and supporting citations).

clear and convincing evidence he had "committed" the other act, which we take to mean that he had impregnated her, "at the time the court made its ruling." He points out that the allegation of incident eight describes M.G. as "pretty sure" the "child was [Tovar's]" and he asserts that "[i]f M.G. did not even have a firm belief that the child was [Tovar]'s, and just thought that it could possibly be [his], there was insufficient evidence for the court to find the standard of proof met."

¶16 "Clear and convincing evidence creates a high probability that a proposition is true, but need not establish that it is certainly or unambiguously true." *State v. Vega*, 228 Ariz. 24, n.4, 262 P.3d 628, 633 n.4 (App. 2011) (citations omitted); *see also State v. Roque*, 213 Ariz. 193, ¶ 76, 141 P.3d 368, 390 (2006) (clear and convincing is a lower standard than proof beyond a reasonable doubt). As the state points out, M.G. testified about her November 2009 abortion, stating it had been performed at Planned Parenthood, Tovar had taken her there, and she had not been "seeing anyone" around that time. She also testified she lived with Tovar throughout 2009. M.G.'s testimony satisfied the clear and convincing requirement of Rule 404(c)(1)(A),[11] *see Vega*, 228 Ariz. 24, ¶ 19, 262 P.3d at 633, and we see no error in admitting the incident.

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[11]In his briefs, Tovar intimates the trial court's ruling should be evaluated solely considering the evidence at the pretrial hearing and disregarding M.G.'s trial testimony. He cites no authority for that proposition, and we are aware of none; indeed, Tovar supports his argument regarding consent with trial testimony. Generally, a trial court may reconsider previous evidentiary rulings when evidence is introduced at trial. *See* Bennett Cooper et al., *Arizona Practice Series: Trial Handbook* § 4:2 (2014) (rulings on motions in limine "interlocutory" and reconsideration not barred absent prejudice to party), *citing Henry ex rel. Estate of Wilson v. HealthPartners of S. Ariz.*, 203 Ariz. 393, ¶¶ 19-20, 55 P.3d 87, 93

Rule 404(b), Ariz. R. Evid.

Incident Eleven: Drug Use

¶17 Tovar contends the trial court erred by admitting evidence of his drug use under Rule 404(b), as set forth in incident eleven, because it had no relevance "other than to show that [Tovar] was a bad guy who used drugs." He further maintains the state is mistaken in its assertion that this evidence qualified as intrinsic evidence, and therefore was not subject to Rule 404.

¶18 "[E]vidence of other bad acts is not admissible to show a defendant's bad character." *Aguilar*, 209 Ariz. 40, ¶ 9, 97 P.3d at 867; *see* Ariz. R. Evid. 404(b). But "'[e]vidence of other crimes is admissible when it is offered for any relevant purpose other than to prove the character of a person.'" *Id.* ¶ 10, *quoting* Morris K. Udall et al., *Arizona Practice: Law of Evidence* § 84 (1991). Rule 404(b) sets out examples "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but the list is not exclusive. *See Aguilar*, 209 Ariz. 40, ¶ 10, 97 P.3d at 868. In other words, under Rule 404(b), evidence is inadmissible "'if it tends to show a disposition toward criminality from which guilt on this occasion is to be inferred,'" but may be admissible if it "'establishes guilt in some other way.'" *State v. Torres*, 162 Ariz. 70, 73, 781 P.2d 47, 50 (App. 1989), *quoting State v. Ramirez Enriquez*, 153 Ariz. 431, 432, 737 P.2d 407, 408 (App. 1987).

¶19 First, we disagree with Tovar that the drug-use evidence was not intrinsic to the offenses here and thus outside the

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(App. 2002); *see also United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999) (trial judge may modify ruling on motions in limine at trial because unanticipated matters may arise). We also note the record suggests the trial court reviewed the recording of M.G.'s confrontation call with Tovar at the time of the pretrial hearing.

strictures of Rule 404(b). Evidence is intrinsic to a charged act "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *State v. Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (App. 2012). The intrinsic evidence doctrine 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.* Because Tovar's drug use, by his own admission, occurred contemporaneously with the charged acts and contributed to their commission, it can properly be deemed intrinsic to those acts.

¶20 We further disagree with Tovar that "there was no relevant reason to admit the evidence, other than to show [he] was a bad guy who used drugs." As previously noted, in a recorded confrontation call with M.G. that was provided to the jury, Tovar blamed the sexual abuse on the fact that he was using drugs. In the call, he repeatedly apologized to M.G. and told her he had been using "a lot" of drugs when they lived at the address where the abuse had started and he "mentally wasn't all there." Thus, the evidence of Tovar's drug use was not offered to prove his character, or that he had used drugs at all, but rather for a relevant purpose—to corroborate his implied admission and show a consciousness of guilt. *See Aguilar*, 209 Ariz. 40, ¶ 10, 97 P.3d at 867; *see also State v. Featherman*, 133 Ariz. 340, 344, 651 P.2d 868, 872 (App. 1982) (relevance of prior bad act may outweigh prejudice to defendant "'if the illegal conduct does more than discredit the character of the defendant'"), *quoting State v. Rose*, 121 Ariz. 131, 136, 589 P.2d 5, 10 (1978).[12]

[12]Tovar asserts that under *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996), because he had denied committing the charged acts, other act evidence may not be introduced to "prove those matters." In *Ives*, the court found other act evidence inadmissible under

¶21 Tovar maintains that, even if relevant, the relevance of the drug-use evidence was slight and its "probative value was greatly outweighed by the danger of unfair prejudice." Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. That Tovar had acknowledged prior drug use might have portrayed him in a bad light, but not all harmful evidence is unfairly prejudicial. *See State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997); *see also State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) ("evidence which is relevant and material will generally be adverse to the opponent"). "'Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.'" *Lee*, 189 Ariz. at 599-600, 944 P.2d at 1213-14, *quoting State v. Mott*, 187 Ariz. 536, 545–46, 931 P.2d 1046, 1055–56 (1997).

¶22 Tovar was not on trial for drug offenses, and the trial court reasonably could find that evidence of his past drug use was not so compelling or pejorative as to influence a jury to make a decision on an improper basis such as emotion or horror. Accordingly, we cannot say the court abused its discretion in finding the drug-use evidence more probative than prejudicial under the circumstances of this case. *See State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007) (trial court has broad discretion in deciding admissibility because it is in "'the best position to balance the probative value of challenged evidence against its potential for

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Rule 404(b) for the purpose of proving intent if the defense is a complete denial. *Id.* at 109-11, 927 P.2d at 769-71; *see also State v. Hughes*, 189 Ariz. 62, 69, 938 P.2d 457, 464 (1997) ("Where . . . the accused denies any involvement in the charged offense, the 'intent' exception of [Rule] 404(b) is not a proper basis for injecting prior misconduct into a proceeding."). But the drug use evidence here was not introduced to show Tovar's intent or lack of mistake.

unfair prejudice'"), *quoting State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998).

Limiting Instructions

¶23 Tovar next contends the trial court reversibly erred by failing to give a limiting instruction pursuant to Rule 404(c). He argues:

> Without informing the jury that it could not consider [Tovar's] drug use as character evidence, or that they had to find that the other acts showed that [Tovar] had a character trait that predisposed him to commit abnormal or unnatural sex acts, and that [Tovar] could not be found guilty of the charges simply because he had committed the other acts, or because he had a character trait that predisposed him to commit the charged offenses, it is very likely that the jury assumed that because [Tovar] was a bad guy who had sex with M.G. when she was over eighteen, so he must have molested her and had sex with her, like she claimed, when she was a child.

Tovar acknowledges that because he failed to request the instruction and failed to object to the lack of instruction, our review is limited to fundamental error. *See State v. Gallegos*, 178 Ariz. 1, 12, 870 P.2d 1097, 1108 (1994) ("[A] trial judge's failure to give an instruction . . . provides grounds for reversal only if such failure is fundamental error."). Tovar must therefore show "both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶24 Rule 404(c)(2) provides that a limiting instruction "shall" be given whenever evidence is admitted pursuant to Rule 404(c). *See State v. Hargrave*, 225 Ariz. 1, ¶ 23, 234 P.3d 569, 578 (2010) (limiting instruction properly given when jury hears evidence regarding sexual propensity); *see also Garcia*, 200 Ariz. 471, ¶ 27, 28 P.3d at 331-32 (when Rule 404(c) evidence admitted, court must give jury limiting instruction as to proper use). The comment to the rule advises:

> At a minimum, the court should instruct the jury that the admission of other acts does not lessen the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt, and that the jury may not convict the defendant simply because it finds that he committed the other act or had a character trait that predisposed him to commit the crime charged.

Ariz. R. Evid. 404(c) cmt. The trial court erred by not providing a limiting instruction pursuant to Rule 404(c)(2).

¶25 The state maintains, however, that Tovar was not prejudiced by the trial court's failure to give the required instruction because the court provided what it characterizes as an essentially equivalent instruction. *See State v. Garcia*, 224 Ariz. 1, ¶ 75, 226 P.3d 370, 387 (2010) (no error if substance of proposed instruction adequately covered by other instructions). The jury was instructed that "[e]ach count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision as to any other count." *See State v. Prince*, 204 Ariz. 156, ¶ 9, 61 P.3d 450, 452 (2003) (jurors presumed to follow instructions); *see also Garcia*, 224 Ariz. 1, ¶

75, 226 P.3d at 387 (to assess adequacy of jury instructions, instructions must be viewed in their entirety).

¶26 While the sufficiency of that instruction for purposes of Rule 404(c)(2) may be debatable, we conclude that the great weight of the evidence mitigated any prejudice from the absence of a more specific limiting instruction. M.G. testified in detail about Tovar's continuous abuse beginning when she was seven years old, her pregnancy when she was fifteen, the latter fact corroborated by her medical records, and that Tovar was the father. Although M.G.'s veracity and credibility were repeatedly challenged, her testimony was not significantly impeached.[13] Additionally, Tovar's statements during the recorded confrontation call with M.G. strongly indicated his guilt—he did not deny or question M.G.'s specific accusations of sexual abuse as a child, but instead apologized repeatedly and attempted to excuse his behavior. He further admitted at least one act of sexual abuse of M.G. when she was thirteen in his statement to S.F. Contrary to Tovar's claim that without the instruction, the jury may have "assumed that because [he] was a bad guy who had sex with M.G. when she was over eighteen" he did so when she was a child, there was no need for the jury to make such an assumption given the substantial and direct evidence of Tovar's guilt. Thus, although the court erred in failing to issue a limiting instruction, we conclude any resulting prejudice to Tovar was insufficient to require reversal. *See State v. Brown*, 204 Ariz. 405, ¶ 25, 64 P.3d 847, 853 (App. 2003) (trial court's failure to provide lesser-included offense instruction to which defendant entitled not reversible error where defendant not prejudiced); *see also State v. Moore*, 222 Ariz. 1, ¶¶ 67,

[13] The only contrary evidence was some inconsistency in certain details of M.G.'s years-spanning account and her mother's testimony denying knowledge of the abuse and stating that when M.G. had the abortion, Tovar told her the father was M.G.'s boyfriend.

69, 213 P.3d 150, 163-64 (2009) (erroneous jury instruction harmless in view of overwhelming evidence of defendant's guilt).

¶27 Finally, in passing, Tovar contends the trial court erred by failing to instruct the jury it could not consider his drug use as character evidence. But a court's failure to sua sponte provide a limiting instruction based on Rule 404(b) is not fundamental error. *See State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996); *State v. Williams*, 209 Ariz. 228, 234 n.3, 99 P.3d 43, 49 n.3 (App. 2004) (no limiting instruction regarding evidence admitted under Rule 404(b) required when none requested). Further, as noted above, the evidence of drug use at trial arose only in the context of Tovar's statements attempting to justify his behavior toward M.G.

Disposition

¶28 For all of the foregoing reasons, Tovar's convictions and sentences are affirmed.