IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LAM VAN DO,
Appellant.

No. 2 CA-CR 2014-0166
Filed April 29, 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NOT FOR PUBLICATION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. CR20121645001
The Honorable Paul E. Tang, Judge
The Honorable John E. Davis, Judge
The Honorable Howard Hantman, Judge

AFFIRMED

COUNSEL

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Counsel for Appellee

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

H O W A R D, Judge:

¶1 Following a jury trial, Lam Van Do was convicted of one count of sexual abuse. On appeal, he argues the trial court erred by allowing the admission of other acts evidence, by ordering restitution for medical expenses related to the victim's suicide attempts after the crime, and by sentencing him to a year of jail time as a condition of probation. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the jury's verdict[]." *State v. Tucker*, 231 Ariz. 125, ¶ 2, 290 P.3d 1248, 1253 (App. 2012). Do and K.B. worked together at a restaurant, and Do frequently harassed K.B. at work by hugging, kissing, and touching her inappropriately despite her protestations. This culminated in a final incident in April 2012, during which Do approached K.B. from behind, began to hug her, and wrapped one of his hands around her right breast. K.B. reported the incident to the police.

¶3 Do was indicted on and convicted of one count of sexual abuse for touching K.B.'s breast without her consent. The trial court imposed a three-year term of probation with sex offender conditions and sentenced him to a one-year jail term as a condition of probation. The court also awarded K.B. $10,538.51 in restitution, which included restitution for medical expenses incurred as a result of two suicide attempts that followed Do's sexual abuse. We have

jurisdiction over Do's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1), (3).

Other Acts Evidence

¶4 Do argues the trial court erred by admitting evidence that he inappropriately touched K.B. on prior occasions because the evidence "did not fall within a recognized exception" to the prohibition in Rule 404(b), Ariz. R. Evid., against admitting other acts evidence to show propensity.[1] Do challenges the admission of evidence that he hugged K.B. "every time they worked together" and would kiss her on the cheek, that in one incident he ran his hand up her leg and to her buttocks while she was preparing food, and that he tried to hug her when she arrived to work on the day of the charged incident. "We review [a trial] court's decision to admit other acts evidence for [an] abuse of discretion." *State v. Villalobos*, 225 Ariz. 74, ¶ 18, 235 P.3d 227, 233 (2010).

¶5 On the state's motion, the trial court held a hearing to determine the admissibility of this other acts evidence. During the hearing, the court asked Do if his defenses to the charge of sexual abuse included consent or accidental conduct, to which he replied, "[C]orrect, . . . this could have been accidental . . . . [T]here appears to have been a relationship where [Do and K.B.] hugged on some sort of basis." *See* A.R.S. § 13-1404(A) (sexual contact must be "intentional[] or knowing[]" and "without consent" of victim fifteen years of age or older).[2] In a ruling issued more than ten months

[1]Do appears to assert that allowing admission of this other acts evidence in violation of Rule 404(b) was also a violation of his constitutional right to a fair trial. But he has not developed this constitutional claim and therefore waives review of it. *See State v. Tarkington*, 218 Ariz. 369, n.1, 187 P.3d 94, 95 n.1 (App. 2008) (argument waived if not adequately developed).

[2]We refer to the version of § 13-1404 in effect in April 2012. The legislature recently amended § 13-1404 to prohibit consent as a defense in cases where the victim "was fifteen, sixteen or seventeen

before trial, the court ruled that "whether or not [Do] committed a sexual abuse . . . unintentionally or by mistake or accident is at issue" and that the other acts evidence was admissible to rebut the defense of mistake or accident.

¶6 On appeal, Do minimally challenges the trial court's pretrial decision to admit the other acts evidence, which the court correctly determined was admissible to show intent and absence of mistake or accident. *See* Ariz. R. Evid. 404(b); *Villalobos*, 225 Ariz. 74, ¶ 19, 235 P.3d at 233. Accordingly, we reject that challenge.[3]

¶7 Do further argues, however, the trial court erred in allowing the evidence because he never presented a consent or accident defense at trial. Rather, he denied the incident occurred. Do contends that "it was clear from [his] opening statements that [consent or accident] would no longer be raised as . . . defense[s] and were therefore not at issue." Thus, he claims, the court's earlier ruling "became erroneous."

¶8 But Do never informed the trial court that he had abandoned these potential defenses or asked the court to reconsider its previous ruling in light of his change in trial strategy. Nor did he object at trial to K.B.'s testimony detailing these other acts. And, despite discussions with the court about an instruction to the jury that it could "consider these [other] acts to establish . . . intent, knowledge, and absence of mistake or accident," he never objected to this instruction or requested a change in the instruction to reflect that he had not presented these defenses at trial.

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years of age and the defendant was in a position of trust." 2015 Ariz. Sess. Laws, ch. 209, § 3.

[3]Do argues the trial court erred in finding the other acts evidence "admissible to 'complete the story.'" Even if we were to assume this part of the pretrial ruling was in error, "[w]e are required to affirm a trial court's ruling if legally correct for any reason." *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012).

¶9 The trial court was not required to glean from Do's opening statement that he had abandoned the defenses of consent, mistake, or accident and then sua sponte reverse its prior ruling. Rather, if he wanted to preserve this issue for appeal, Do had an obligation to raise it by, at the very least, objecting to K.B.'s testimony on the other acts and giving the court an opportunity to reconsider its prior ruling in light of his change in trial strategy. *See State v. Lopez*, 217 Ariz. 433, ¶ 6, 175 P.3d 682, 684 (App. 2008) (must draw attention to specific issue to give state opportunity to discuss and court "opportunity to correct any error."); *see also State v. Vermuele*, 226 Ariz. 399, ¶ 10, 249 P.3d 1099, 1102 (App. 2011) ("An untimely objection . . . deprives the trial court of the opportunity to correct any errors before they become procedurally burdensome to undo."). Having failed to do so, he has forfeited review of this issue for all but fundamental, prejudicial error. *See Lopez*, 217 Ariz. 433, ¶ 6, 175 P.3d at 684. And "[t]o prevail under this standard of review, a defendant must establish 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).

¶10 Do has not shown that admission of the other acts evidence caused him prejudice. The trial court instructed the jury that it could not consider these other acts as propensity evidence. And although the court instructed the jury that it could consider these other acts as evidence to establish intent, knowledge, or the absence of mistake or accident, the court also instructed the jury that when "determin[ing] the facts . . . [it] may find that some instructions no longer apply."

¶11 "We presume that the jurors followed the court's instructions." *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). Consequently, we presume the jury did not consider the other acts as propensity evidence. We also presume that it disregarded the instruction that it could use the evidence to establish intent, knowledge, and absence of mistake or accident because Do's case at trial did not put his mental state or mistake or accident at issue.

¶12 Do argues, however, that the state "relied on the other act evidence to bolster its claim that the charged act had happened" and that, in *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997), our supreme court "recognized, even with a limiting instruction, such evidence is likely to influence the jury's decision on the issue." But the state, echoing the jury instructions, admonished the jury in its closing argument not to "use those other acts to say, well, if he did these things before he must have done this this time." And in *Terrazas*, the defendant was convicted following a bench trial, and the trial court in that case "stated that he probably would have reached a different conclusion if he had not received and considered [improper] prior bad act evidence." 189 Ariz. at 581, 584, 944 P.2d at 1195, 1198. Contrary to what Do suggests, *Terrazas* does not stand for the proposition that limiting instructions are ineffective to prevent a jury from improperly using other acts evidence as propensity evidence.

¶13 Relying on *State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1979), Do also appears to contend that the improper admission of other acts evidence is necessarily "prejudicial to a defendant's right to a fair trial." Yet, *Smith* itself undercuts this proposition. In *Smith*, our supreme court ruled that a police officer's testimony referring to other offenses committed by the defendant "was not so prejudicial as to require a mistrial or a reversal" and that, in light of other evidence presented by the defendant, "[a]ny error that might have resulted . . . was . . . harmless." *Id.* at 250-51, 599 P.2d at 206-07. Thus, *Smith* does not support Do's contention that any improper admission of this evidence must have prejudiced his case.

¶14 Consequently, Do has failed to meet his burden to show he suffered prejudice from any alleged error in admitting evidence of other inappropriate conduct with K.B. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. And we conclude the trial court did not abuse its discretion in allowing this evidence. *See Villalobos*, 225 Ariz. 74, ¶ 18, 235 P.3d at 233.

Restitution Order

¶15 Do next argues the trial court erred in awarding restitution for medical expenses incurred as a result of two suicide attempts by K.B. because these expenses were consequential losses that did not flow directly from Do's criminal conduct but instead from K.B.'s "voluntary choice[s]." "[W]e review a restitution order for an abuse of discretion." *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 411 (App. 2009). And "we view the evidence bearing on a restitution claim in the light most favorable to sustaining the court's order." *Id.*

¶16 A convicted person must "make restitution to . . . the victim of the crime . . . in the full amount of the economic loss" suffered by the victim. A.R.S. § 13-603(C); *see also* Ariz. Const. art. II, § 2.1(A)(8); A.R.S. § 13-804(B). For a loss to be recoverable as restitution, "'(1) the loss must be economic, (2) the loss must be one that the victim would not have incurred but for the criminal conduct, and (3) the criminal conduct must directly cause the economic loss.'" *Lewis*, 222 Ariz. 321, ¶ 7, 214 P.3d at 324, *quoting State v. Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). A restitution award cannot compensate for consequential damages. *State v. Wilkinson*, 202 Ariz. 27, ¶ 7, 39 P.3d 1131, 1133 (2002); *see also* A.R.S. § 13-105(16).

¶17 A loss directly caused by the criminal conduct is one that "flows directly from [the conduct] . . . 'without the intervention of additional causative factors.'" *Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d at 1056, *quoting Wilkinson*, 202 Ariz. 27, ¶ 7, 39 P.3d at 1133. We have described this standard for determining causation as a "'modified but for standard.'" *State v. Guilliams*, 208 Ariz. 48, ¶ 18, 90 P.3d 785, 790 (App. 2004), *quoting United States v. Vaknin*, 112 F.3d 579, 589 (1st Cir. 1997). Under this standard, the court may award restitution for expenses incurred to restore a victim's mental health when the victim's mental health suffered as a result of the defendant's criminal conduct. *See State v. Brady*, 169 Ariz. 447, 448, 819 P.2d 1033, 1033 (App. 1991) (moving expenses incurred to relocate from location of assault and restore mental health); *State v. Wideman*, 165

Ariz. 364, 369, 798 P.2d 1373, 1378 (App. 1990) (mental health counseling to family members of murder victim).

¶18 Do does not dispute the trial court's factual findings relevant to causation, but instead argues the court's decision to award restitution for losses related to the suicide attempts resulted from the court's "misapplication of the law and its decision to award restitution predicated on an incorrect strict 'but-for' standard of causation." The court did not apply a "strict 'but for' standard of causation," however. In its restitution ruling, the court acknowledged that not all economic losses incurred "but for" the criminal conduct are compensable and that the damages must be direct, rather than consequential. And the court specifically found not just that these expenses occurred "but for" the sexual abuse but also that they "came as a direct result of [the] trauma" K.B. suffered. Thus, the court applied the "modified but for standard" of causation in awarding restitution, even if it did not label the standard as such.

¶19 Do essentially asks us to rule, as a matter of law, that a trial court cannot award restitution to a victim for expenses incurred as a result of suicide attempts that can be characterized as "voluntary," which he appears to define as attempts during which the victim is "not psychotic, and is aware of what [he or she] is doing." He cites our decision in *State v. Reed*, 196 Ariz. 37, 992 P.2d 1132 (App. 1999), as support for his definition of "voluntary" suicide attempts.

¶20 In *Reed*, we were asked to decide whether "a suicide attempt and consequent hospitalization may constitute a voluntary waiver of a defendant's right to be present at his or her trial." *Id.* ¶ 5. The trial court had concluded that the defendant had waived his right after hearing testimony from two expert witnesses concerning the defendant's mental state, one of which testified the defendant "made a rational decision" to kill himself in order to avoid trial. *Id.* ¶ 4. We held that an absence due to a suicide attempt may, "depending on the circumstances, . . . be a voluntary waiver," and concluded that the trial court had not erred because the defendant "made a voluntary decision to try to end his life and thereby avoid his trial." *Id.* ¶ 7.

¶21 *Reed* is inapplicable to this case. Our analysis there concerned whether a defendant was competent to voluntarily waive his right to be present at trial, and it does not support a distinction between "voluntary" and "involuntary" suicide attempts in the context of determining causation. Further, both the trial court and this court in *Reed* had the benefit of expert testimony in the record that supported a distinction between suicide attempts made by a person who is aware of his actions and those made by a person who is not aware of his actions. *See id.* ¶ 7 (expert testified defendant "was not psychotic[,] he was able to understand the proceedings against him, and he understood what he was doing when he decided" to commit suicide). The record in this case does not contain any similar evidence to support drawing distinctions between types of suicide attempts.

¶22 Further, even if the distinction drawn in *Reed* did apply in the context of determining restitution, the record here does not support a conclusion that K.B.'s suicide attempts were "voluntary," as Do argues. K.B. testified at the restitution hearing that she had received a diagnosis of "severe depression and . . . anxiety"[4] and also explained her suicide attempts by stating that "when you're very depressed you can't control your thoughts." This testimony suggests K.B. may not have been fully aware of what she was doing or able to control her actions when she attempted suicide. And Do did not elicit testimony or submit any evidence that rebutted K.B.'s testimony or that otherwise supported a conclusion she had been aware of and in control of her actions during the attempts. Thus, rather than compelling a conclusion that K.B.'s suicide attempts were "voluntary" as Do defines that term, the record suggests the opposite.

¶23 Consequently, on the record before us, we cannot decide as a matter of law that Do's criminal conduct was not a direct

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[4]Do states that "the evidence showed that [K.B.] was simply depressed," but he does not define "simple" depression or explain how the evidence supports this characterization.

cause of the medical expenses from K.B.'s suicide attempts. And, because Do does not contest the trial court's factual findings, we conclude the court did not abuse its discretion by deciding these expenses were related to restoring K.B.'s mental health and awarding them as restitution. *See Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d at 411; *see also Brady*, 169 Ariz. at 448, 819 P.2d at 1033; *Wideman*, 165 Ariz. at 369, 798 P.2d at 1378.

Jail Term as Condition of Probation

¶24 Finally, Do argues the trial court erred by sentencing him to a one-year jail term as a condition of probation because the one-year jail term was an "attempt[] to . . . impose a longer period of incarceration than the law would allow if [Do had been] sentenced to prison time," given the presence of mitigating factors and absence of any aggravating factors or prior felony convictions. "We review a trial court's imposition of conditions of probation for an abuse of discretion." *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361, ¶ 10, 332 P.3d 587, 590 (App. 2014), *aff'd*, 710 Ariz. Adv. Rep. 6 (Apr. 7, 2015).

¶25 Do was convicted of a class five felony as a non-repetitive offense, and the trial court noted the existence of mitigating circumstances. Had the court sentenced Do to a term of imprisonment, it would have had the discretion to sentence him to anywhere from a mitigated .5 years to a presumptive 1.5 years in prison. *See* A.R.S. § 13-702(A), (B), (D). Thus, the one-year jail term as a condition of probation did not exceed what would have been allowed if the court had sentenced him to a term of imprisonment.

¶26 Do makes much of the fact that the trial court stated "there would be a good argument that defense counsel could make . . . that three quarters of a year would be an appropriate prison term" and that it explained to the victim that Do might serve only approximately eighty-five percent of any prison term he received. *See* A.R.S. § 41-1604.07(A) (earned release credits accumulate at "one day for every six days served"). But the court had the discretion to impose a one-year jail term as a condition of probation. *See* A.R.S. § 13-901(F) (court may require jail time as a condition of probation "as long as the period actually spent in confinement does not exceed

one year or the maximum period of imprisonment permitted under chapter 7 of this title . . . whichever is the shorter"). Thus, the trial court did not exceed any statutory limits by imposing a one-year jail term as a condition of probation. *See* § 13-901(F). And we find no abuse of discretion. *See Reed-Kaliher*, 235 Ariz. 361, ¶ 10, 332 P.3d at 590.

Disposition

¶27 For the foregoing reasons, we affirm Do's conviction and term of probation and the trial court's restitution order.