

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID EUGENE ACOSTA,
Appellant.

No. 2 CA-CR 2015-0089
Filed December 20, 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NOT FOR PUBLICATION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 Gila County
No. S0400CR201400020
The Honorable Peter J. Cahill, Judge

AFFIRMED

COUNSEL

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Counsel for Appellee

By Emily Danies, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 After a jury trial, David Acosta was convicted of one count of unlawful flight from law enforcement and three counts of endangerment. The trial court imposed concurrent and consecutive, enhanced, maximum prison terms totaling 10.5 years' imprisonment. On appeal, Acosta argues the court erred in admitting "other acts evidence" at trial under Rule 404(b), Ariz. R. Evid., and contends it erroneously found "emotional harm to the police officer victims" as an aggravating circumstance for sentencing purposes. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In January 2014, Detective Alicia Marquez of the Winslow Police Department (WPD) was driving through a residential neighborhood in a marked patrol vehicle when she observed a "late model Toyota" approaching from the opposite direction "at a high rate of speed."¹ The Toyota then "crossed over the median . . . into [her] lane of traffic" before continuing eastbound at an estimated speed of seventy-five to eighty miles per hour. As the Toyota passed her patrol vehicle, Marquez recognized the driver as Acosta from previous encounters with him. She immediately reversed direction, "got behind [him, and] activated [her] emergency lights and siren to initiate a traffic stop."

¹Winslow is in Navajo County.

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¶3 Instead of stopping, Acosta continued to speed through Winslow before turning south onto State Route 87. Shortly after, WPD officers arrived in two other patrol vehicles and joined the chase, pursuing Acosta through Winslow and onto the highway, “back[ing] off a couple times” to avoid endangering traffic, until they reached the “county line.” Once Acosta entered Gila County, two marked Department of Public Safety (DPS) units “took over,” and the WPD officers terminated their pursuit.

¶4 The DPS units, with lights and sirens activated, followed Acosta down Route 87 toward Payson travelling at eighty-five to ninety miles per hour. Over the course of the pursuit, Acosta threw several items, including a tire jack, out of his window at the DPS vehicles, which officers had to “steer[] . . . to avoid.” Eventually, a “stop stick” was deployed in Acosta’s path, which disabled his vehicle. Acosta initially refused to exit the Toyota but eventually complied with the arrest.

¶5 Acosta was charged with one count each of aggravated assault on a peace officer and unlawful flight from law enforcement and three counts of endangerment. The trial court dismissed the aggravated assault charge at the state’s request during trial, and the jury found him guilty on the remaining counts. Acosta was sentenced as described above, and timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A).

Other Acts Evidence

¶6 Acosta first argues the trial court erred in allowing the state to present “irrelevant other acts evidence” under Rule 404(b), Ariz. R. Evid. He contends evidence of the unlawful flight that occurred in Navajo County should have been excluded because it did not make any material fact more probable and the state “had plenty of testimony related to [his flight] from officers while in Gila County.” The state responds that the Navajo County evidence “falls squarely within the scope of Rule 404(b)” and was otherwise admissible as intrinsic evidence. We review a trial court’s evidentiary rulings for an abuse of discretion, *see State v. Lehr*, 227 Ariz. 140, ¶ 19, 254 P.3d 379, 386 (2011), and will affirm on any

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ground supported by the record, *see State v Salazar*, 216 Ariz. 316, ¶ 14, 166 P.3d 107, 110 (App. 2007).

¶7 Before trial, the state moved to admit evidence that Acosta had fled from law enforcement officers in Gila County because he had stolen a car in Navajo County, arguing the evidence was intrinsic to the charged crimes or, alternatively, admissible under Rule 404(b) to prove motive, intent, knowledge and absence of mistake or accident. The trial court granted the state's motion in part, ruling evidence of Acosta's traffic violations in Winslow, the high-speed chase involving Detective Marquez, and the fact that Marquez ended the pursuit for public safety reasons were all admissible under Rule 404(b). The court also excluded all "[s]tolen car references" as "unfair[ly] prejudic[ial]," noting its concern that "[t]he jury [might improperly] convict [] Acosta . . . [of the] Gila County crimes based on . . . sympath[y]" for the apparently "credible and persuasive" victim witness. The court acknowledged the Navajo County evidence could be considered intrinsic, but noted it "prefer[red] to address the matter as [one involving] other acts" because "the chase was broken off," with the first part "occur[ing] in another county," where Acosta was fleeing from Marquez, and the second part occurring in Gila County, where he was fleeing from the DPS officers.

¶8 Rule 404(b) precludes evidence of "other crimes, wrongs, or acts" to prove a person acted in conformity with his character, *see State v. Leteve*, 237 Ariz. 516, ¶ 11, 354 P.3d 393, 399 (2015), but such evidence may be admitted, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," Ariz. R. Evid. 404(b); *State v. Burns*, 237 Ariz. 1, ¶ 52, 344 P.3d 303, 320 (2015). But if the evidence is "so closely related to the charged act" that it is intrinsic to the charged crime, it is admissible "without regard to Rule 404." *State v. Herrera*, 232 Ariz. 536, ¶ 21, 307 P.3d 103, 112 (App. 2013), *quoting State v. Ferrero*, 229 Ariz. 239, ¶ 14, 274 P.3d 509, 512 (2012); *see also State v. Butler*, 230 Ariz. 465, ¶ 31, 286 P.3d 1074, 1082 (App. 2012) (evidence of acts so interrelated with charged act that they are part of charged act itself not analyzed under 404(b)). If evidence is not intrinsic but offered for a non-propensity purpose

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under Rule 404(b), it is also “subject to Rule 402’s general relevance test, Rule 403’s balancing test, and Rule 105’s requirement for limiting instructions in appropriate circumstances.” *Ferrero*, 229 Ariz. 239, ¶ 12, 274 P.3d at 512.

¶9 We agree with the state that the Navajo County flight evidence was intrinsic to the charged offenses. As the state notes, Acosta’s charges arose from a “single act of flight” that was severed out of “jurisdictional necessity.” But for the fact that the flight spanned two counties, it undoubtedly would have been charged as the same offense. *See Butler*, 230 Ariz. 465, ¶ 31, 286 P.3d at 1082. Moreover, the Navajo county evidence directly proved the unlawful flight charge because it showed that Marquez had a lawful reason to pursue Acosta and that Acosta had a “willful” intent or motive to evade a pursuing law enforcement vehicle. *See* A.R.S. § 28-622.01; *see also Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d at 513. The evidence also served to rebut Acosta’s defense, which was that he had been unable to stop due to a brake failure.

¶10 Having determined the Navajo County evidence was intrinsic to the charged crimes and therefore properly admitted on that basis, we need not decide whether the trial court erred in characterizing the events as separate. *See Salazar*, 216 Ariz. 316, ¶ 14, 166 P.3d at 110; *see also State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012) (we will affirm trial court’s ruling if legally correct for any reason). And, in any event, the court’s decision to “address the [evidence] as other acts” did not prejudice Acosta because it afforded him the extra protection of a Rule 404(b) admissibility screening that he would not have otherwise received. *See Ferrero*, 229 Ariz. 239, ¶¶ 21-22, 279 P.3d at 514 (intrinsic evidence not subject to Rule 404 admissibility screening).

¶11 In a thorough analysis, the trial court found the Navajo County evidence probative of Acosta’s “motive, intent, . . . knowledge, absence of mistake or perhaps accident.” *See* Ariz. R. Evid. 404(b). It deemed the acts relevant to show Acosta willfully fled law enforcement in Navajo County and to rebut his brake-failure defense. *See* Ariz. R. Evid. 401, 402. After conducting a Rule 403 balancing test, the court precluded evidence of the vehicle theft, but otherwise found the Navajo County evidence

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“significant[ly] probative” and “minimal[ly] prejudic[ial]” in light of the underlying charges. *See* Ariz. R. Evid. 403. Finally, the court provided the jury with an appropriate limiting instruction. *See* Ariz. R. Evid. 105; *cf. Ferrero*, 229 Ariz. 239, ¶ 12, 274 P.3d at 512. Accordingly, we see no abuse of discretion in the admission of the Navajo County evidence.

Aggravating Factor

¶12 Acosta lastly asserts his maximum sentences are improper because the trial court erroneously found as an aggravating factor “emotional harm to the police officer victims.” He contends the court erred by failing to “articulate any specific reason or rationale” supporting its finding “when the testimony of the victims d[id] not show the existence of any emotional harm.” We will not disturb a sentence within the statutory range absent an abuse of discretion. *State v. Hernandez*, 231 Ariz. 353, ¶ 3, 295 P.3d 451, 453 (App. 2013).

¶13 A trial court may impose a maximum sentence only if one or more aggravating circumstances enumerated in A.R.S. § 13-701(D) are found or admitted. A.R.S. § 13-701(C); *State v. Bonfiglio*, 231 Ariz. 371, ¶ 8, 295 P.3d 948, 950 (2013). That section lists twenty-five factors, including physical, emotional or financial harm to the victim, threatened infliction of serious physical injury, and prior felony convictions. *See* A.R.S. § 13-701(D)(1), (9), (11).

¶14 In imposing Acosta’s sentences, the trial court found and considered several aggravating circumstances, including the emotional harm suffered by the victims, the threat of serious injury to the victims and others, the malice with which “the crimes of endangerment . . . were committed,” and Acosta’s prior felony convictions.² Acosta challenges only the court’s emotional harm finding.

²Acosta voluntarily waived his right to have a jury determine aggravating circumstances – other than the fact of a prior conviction, which may be found by the court – and agreed to have the trial court make all such findings. *See* A.R.S. § 13-701(D).

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¶15 “Emotional harm . . . encompasses a variety of mental states, including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, depression . . . , and a host of other detrimental—from mildly unpleasant to disabling—mental conditions.” *State v. Coulter*, 236 Ariz. 270, ¶ 7, 339 P.3d 653, 657 (App. 2014), quoting Restatement (Third) of Torts § 45 cmt. a (2012). The phrase “emotional harm” is viewed broadly in the context of setting forth aggravating circumstances for sentencing, and any finding of emotional harm suffices to meet the requirement of § 13-701(D)(9). *Id.*

¶16 At the aggravation and mitigation hearing, DPS officer Jimmy Oestmann testified that the high-speed pursuit of Acosta on “an extremely mountainous curvy road” was “very risky” and “[e]xtremely stressful.” During the pursuit, Oestmann felt “concern[ed]” and “definitely fearful” for his safety. He further stated he did not “need to seek any counseling . . . [or] miss work . . . because of th[e] incident,” but he noted he “th[ought] about [that experience] often,” and it served as a reminder about “how dangerous that part of the job really is.” In light of this testimony and the inherently risky nature of the pursuit, which was exacerbated by Acosta throwing “lots of things, including . . . a five to ten-pound . . . [tire] jack” at the officers, there is no reason to disturb the trial court’s finding that Acosta caused emotional harm. *See Coulter*, 236 Ariz. 270, ¶ 7, 339 P.3d at 657.

Disposition

¶17 For the foregoing reasons, Acosta’s convictions and sentences are affirmed.