IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KATHLEEN R. GROSS,
Appellant.

No. 2 CA-CR 2015-0100
Filed February 3, 2016

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201401715
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 After a jury trial, Kathleen Gross was convicted of sexual conduct with a minor and contributing to the delinquency of a minor. On appeal, she asserts claims relating to the admission of certain evidence and the sufficiency of the evidence for the latter conviction. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In January 2014, Gross had sexual intercourse with the victim, Z.R., a sixteen-year-old boy. The two had a relationship that lasted for about a year. During the course of that relationship, Gross took the victim to get a tattoo. Gross and the victim acquired matching tattoos on their left and right thighs, respectively.

¶3 Gross was convicted as described above. The trial court suspended the imposition of sentence and placed Gross on a ten-year term of supervised probation. The court imposed concurrent jail terms, the longer of which was 90 days. It also ordered her to register as a sex offender. This appeal followed.

Admissibility of Evidence

¶4 Gross first challenges the admissibility of certain evidence under Rule 404(b), Ariz. R. Evid., claiming these pieces of evidence constituted "other crimes, wrongs, or acts."[1] The trial

[1]Gross claims to be challenging this evidence under Rules 403 and 404(c), Ariz. R. Evid., as well, but has presented no substantive argument on these points, and we therefore deem any such claims waived. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004).

court admitted a series of private Facebook messages between Gross and an acquaintance, J.M., as evidence. In one of those messages, Gross said, "I like [the victim's] balls . . . because they carry my babies." J.M. testified that Gross asked J.M. to babysit her children for a weekend so that Gross could take a trip to Las Vegas with the victim. Gross now contends these statements constituted evidence "of an ongoing sexual relationship" and were therefore evidence of separate crimes. We review a court's admission of other acts evidence for an abuse of discretion. *State v. Hausner*, 230 Ariz. 60, ¶ 68, 280 P.3d 604, 622 (2012).

¶5 Rule 404(b) forbids the admission of other "crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Gross claims the admission of these statements constituted evidence of acts of sexual congress other than the charged act. But, as the trial court concluded, neither the statement regarding the victim's testicles nor the request for babysitting demonstrated that Gross and the victim had any sexual contact beyond that described and charged in the indictment. Gross's statements did not establish, or even suggest, any specific sexual acts other than the charged act of sexual intercourse. We therefore cannot agree that such evidence could be characterized as proving "other crimes, wrongs, or acts" under Rule 404(b).

¶6 Moreover, Rule 404(b) does not forbid the admission of evidence that is "intrinsic" to the crime charged. *State v. Butler*, 230 Ariz. 465, ¶ 29, 286 P.3d 1074, 1081-82 (App. 2012). "[E]vidence is intrinsic in Arizona if it . . . directly proves the charged act." *State v. Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (2012). Gross's theory of defense was that the relationship between herself and the victim was emotionally intimate, but not sexual. These statements, while they did not demonstrate any additional acts of sexual conduct, did provide circumstantial evidence that the relationship was sexual in nature, thereby contradicting Gross's theory of defense. *Cf. State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) ("Arizona law makes no distinction between circumstantial and direct evidence.").

¶7 Gross also challenges the admission of testimony from the victim that she pressured him to "not say anything that would get her into trouble" and testimony from her estranged husband that

she attempted to threaten him into testifying in her favor. At the outset, we note that Gross did not object to this evidence and has therefore forfeited this claim absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). But even if this claim were not forfeited, it would fail. The evidence in question is intrinsic—evidence that a party has pressured or threatened a witness to prevent their testimony is admissible as proof of guilt. *See State v. Settle*, 111 Ariz. 394, 396, 531 P.2d 151, 153 (1975). The trial court did not abuse its discretion in admitting any of this evidence. *See Hausner*, 230 Ariz. 60, ¶ 68, 280 P.3d at 622.

Sufficiency of the Evidence

¶8 Gross next claims the evidence was insufficient to convict her of contributing to the delinquency of a minor. This conviction was based on Gross taking the victim to get a tattoo. Gross argues that "[t]he evidence did not establish that this act in some way affected the young man's moral character or contributed otherwise to his delinquency or dependency as a minor." Gross suggests that because the victim wanted a tattoo of his own volition, without any prompting on Gross's part, that Gross did not contribute to the victim's delinquency.

¶9 A person contributes to the delinquency of a minor if she "by any act, causes, encourages or contributes to the . . . delinquency of a child." A.R.S. § 13-3613. Delinquency is defined as "any act that tends to debase or injure the morals, health or welfare of a child." A.R.S. § 13-3612. To the extent Gross maintains that she did not contribute to the delinquency because the victim already desired to get a tattoo, this contention fails. Gross chose the tattoo and brought the victim to an individual that she knew would not request identification, thereby making it possible for the victim to acquire a tattoo. Furthermore, we have previously held that a minor's pre-existing delinquency is not a defense to contributing to his delinquency. *State v. Hixson*, 16 Ariz. App. 251, 253, 492 P.2d 747, 749 (1972).

¶10 Gross contends, in essence, that her effort to secure a tattoo for her juvenile victim in violation of Arizona law, *see* A.R.S.

§ 13-3721, without the permission of the victim's parents, did not contribute to his delinquency. Because she concretely participated in facilitating the boy's violation of the law by securing a tattoo artist who would not ask for identification, we summarily reject that suggestion.[2] Accordingly, we conclude the evidence was sufficient to sustain Gross's conviction for contributing to the delinquency of a minor.

Disposition

¶11 For the foregoing reasons, we affirm Gross's convictions and sentences.

[2]Although causing or encouraging a minor to violate the law generally does not per se constitute contributing to the delinquency of a minor, *State v. Cutshaw*, 7 Ariz. App. 210, 219, 437 P.2d 962, 971 (1968), here, Gross encouraged and aided the victim to get a tattoo in violation of a statute created for the protection of minors. *See Del E. Webb Corp. v. Superior Court*, 151 Ariz. 164, 167, 726 P.2d 580, 583 (1986) (noting distinction between "statutes intended for the protection of the general public and those 'exceptional' in the sense that they were intended to protect a particular class of plaintiffs against their own acts"); *cf. State v. Snyder*, 25 Ariz. App. 406, 407-08, 544 P.2d 230, 231-32 (1976) (because statute forbidding sexual conduct with minor was intended to protect minors from such conduct, consent of minor is not a defense).