IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SHANE BUSH,
Appellant.

No. 2 CA-CR 2015-0321
Filed March 16, 2017

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NOT FOR PUBLICATION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. CR20131707001
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Elizabeth B. N. Garcia, Assistant Attorney General, Phoenix
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Joy Athena, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Shane Bush appeals from his convictions and sentences for four counts of sexual conduct with a minor under the age of fifteen, four counts of sexual conduct with a minor while in a position of trust, and one count of attempted sexual conduct with a minor. For the following reasons, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 In spring of 2013, Alan learned that Bush, his adoptive father, was sexually abusing his younger siblings, Bella and Felix.[1] On April 11, Alan took his siblings to the movie theater. At the movie theater, Alan contacted the police. The police took Alan, Bella, and Felix to the police station, where they were interviewed.

¶3 That night, when the children did not return home, Bush attempted to commit suicide by "t[aking] a lot of pills." The next day, police executing a search warrant found him unconscious and transported him to a hospital. On April 14, Bush was released from the hospital and transported to the police station. A detective interviewed Bush, who made several inculpatory statements.

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[1]The victims in this case had identical initials. To protect their privacy and for ease of reference, we refer to the younger victim as Bella and the older victim as Felix. *See* Ariz. R. Crim. P. 31.13(c)(5) (allowing use of pseudonyms to identify victims of sex offenses). Although Alan was not a victim in this case under A.R.S. § 13-4401(19), this case nonetheless carries similar privacy concerns for him, and so we refer to him by pseudonym as well.

¶4 After a jury trial, Bush was convicted as noted above and sentenced to consecutive prison terms totaling 103.5 years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Duplicity

¶5 Bush first claims counts four through nine were duplicitous because they were "each predicated on allegations of the appellant having committed multiple similar acts on a daily, or near daily, basis."[2] Bush did not object on this basis at the trial court and has therefore forfeited review absent fundamental, prejudicial error. *See State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.3d 1177, 1178 (App. 2006).

¶6 Counts five through nine of the indictment described specific sexual acts with Felix and specified that the charge was "for the first time" the act occurred. Although testimony was admitted

[2] Although Bush labels his claim as one of a duplicitous indictment, his argument is based on the fact that the indictment "charge[d] a single act but . . . the state offer[ed] multiple criminal acts as proof," which constitutes duplicitous charges, rather than a duplicitous indictment. *See State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009). In his reply brief, Bush claims the duplicity in the indictment was clear because "the trial court was aware of the many potential criminal acts well before the jury trial because of the pretrial litigation of the other act evidence." Even assuming arguendo that the proposed admission of other-act evidence could render an indictment duplicitous, this argument comes too late. *See State v. Aleman*, 210 Ariz. 232, ¶ 9, 109 P.3d 571, 575 (App. 2005). Furthermore, a defendant who does not object to a duplicitous indictment prior to trial has waived the issue absent fundamental error, which, as explained below, Bush has not demonstrated. *State v. Hargrave*, 225 Ariz. 1, ¶¶ 28-29, 234 P.3d 569, 579 (2010). Also, as the state notes, because Bush's opening brief did not raise a duplicity claim as to counts one through three, any such argument is waived. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004).

that each of these sex acts occurred on multiple occasions, the indictment itself specified that the charges were "for the first time" each type of sexual conduct occurred. By definition, something can only occur "for the first time" once. Accordingly, multiple criminal acts were not introduced to prove the charges, and the charges were not duplicitous. *See State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009).

¶7 Count four of the indictment alleged that Bush "ha[d Bella] perform oral sex." Bella testified that sexual conduct between herself and Bush occurred "[e]very other day," and described instances of masturbation, sexual contact, sexual intercourse, and oral sex. The indictment for this count did not specify that the charge was for the first time the act occurred. However, the trial court noted that "[t]he prosecution has introduced evidence with the purpose of showing that there is more than one act upon which a conviction of Count Four may be based" and instructed the jury that "in order to return a verdict of guilty in Count Four, all jurors must agree that he committed the same repetitive act." The court went on to instruct the jury that they need not identify "the particular act agreed upon" in their verdict form, thus further clarifying that all members of the jury must agree that the same act occurred. By giving this instruction, the court cured the duplicity problem. *See State v. Waller*, 235 Ariz. 479, ¶ 33, 333 P.3d 806, 816 (App. 2014) (court may remedy duplicitous charge by "instruct[ing] the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty"), *quoting State v. Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d 844, 847 (App. 2008).

Other-Act Evidence

¶8 Bush claims the trial court erred in admitting evidence of uncharged acts of sexual conduct under Rules 404(b) and (c), Ariz. R. Evid. In general, we review a trial court's decision on the admission of such evidence for an abuse of discretion. *See State v. Garcia*, 200 Ariz. 471, ¶ 25, 28 P.3d 327, 331 (App. 2001). Bush is correct that the trial court erred in failing to make the findings required before admitting evidence under Rule 404(c), and "[a]n error of law constitutes an abuse of discretion." *State v. Cheatham*, 240 Ariz. 1, ¶ 6, 375 P.3d 66, 67 (2016); *see* Ariz. R. Evid. 404(c)(1)(D);

State v. Aguilar, 209 Ariz. 40, ¶¶ 30-31, 97 P.3d 865, 874 (2004). However, Bush did not object to the trial court's failure to make these findings and has therefore forfeited review absent fundamental, prejudicial error. *See State v. Williams*, 209 Ariz. 228, ¶ 40, 99 P.3d 43, 53 (App. 2004).[3]

¶9 But even if the error were preserved, as the state notes, a trial court's failure to make the necessary findings under Rule 404(c) may be harmless error "if the record contained substantial evidence that the requirements of admissibility were met." *Aguilar*, 209 Ariz. 40, ¶ 37, 97 P.3d at 875; *see State v. Vega*, 228 Ariz. 24, ¶¶ 17-18, 262 P.3d 628, 632-33 (App. 2011). If the evidence in the record is sufficient for the trial court to have made the relevant findings, the fact that the trial court did not make the findings will be harmless error. *See Vega*, 228 Ariz. 24, ¶ 17, 262 P.3d at 632-33.

¶10 To find that other-act evidence is admissible under Rule 404(c), a court must find clear and convincing evidence that the other act occurred. *Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d at 874. Then, the court must find that the other act "provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged sexual offense." *Id.* The court must find that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, and, finally, must consider the factors listed in Rule 404(c)(1)(C)(i)–(viii). *Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d at 874.

¶11 Here, unlike in *Aguilar*, the trial court reviewed first-hand accounts of the other acts. *See id.* ¶ 33. Alan, Bella, and Felix all described the same conduct that they later testified to at trial. The trial court also reviewed Bush's own statements that he engaged

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[3]In *State v. Vega*, 228 Ariz. 24, ¶ 8, 262 P.3d 628, 630 (App. 2011), this court held that the defendant had not forfeited his claim that the trial court erred in failing to make specific findings because he "expressly and unambiguously objected to the admission of the evidence on the ground that the court had failed to consider the requirements of Rule 404(c)." We find no such objection in the record here.

in sexual contact with Alan, Bella, and Felix. We therefore conclude the record contains substantial evidence to support a finding that the requirement of clear and convincing evidence was met. *See Vega*, 228 Ariz. 24, ¶ 19, 262 P.3d at 633.

¶12 The record also contains substantial evidence to support a finding that the other instances of conduct demonstrated an aberrant sexual propensity to commit the charged offenses. *See id.* ¶ 20. And the record further supports a finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice. The other acts were not too remote in time from the charged acts, they were instances of precisely the same conduct as the charged acts, and they occurred as frequently as every other day. *See* Ariz. R. Evid. 404(c)(1)(C)(i), (ii), (iv). The evidence that the other acts occurred was strong—at the time the trial court deemed the acts admissible, Bush had not denied that the acts occurred and in fact had given statements that largely matched those given by Alan, Bella, and Felix. *See* Ariz. R. Evid. 404(c)(1)(C)(iii). Accordingly, although the trial court erred in not making the findings required by Rule 404(c), the error was harmless because the record supports a finding that the evidence was admissible. *See Aguilar*, 209 Ariz. 40, ¶ 37, 97 P.3d at 875.

¶13 Bush also claims the trial court was required to hold an evidentiary hearing. But he did not request an evidentiary hearing at trial or object to the lack of such a hearing and has therefore forfeited review absent fundamental, prejudicial error. In any event, this court has stated that "an evidentiary hearing is not always required in all cases." *State v. LeBrun*, 222 Ariz. 183, ¶ 13, 213 P.3d 332, 336 (App. 2009). Unlike in *Aguilar*, here, at the time the court made its decision on the admissibility of the evidence, there were no "competing claims." *Id.* ¶ 12. Rather, Bush's statements largely matched those of the victims. The state submitted audio recordings of the victims' testimony, and, although the court did not specifically state that it had reviewed those recordings, nothing in the record indicates it did not. Accordingly, we conclude Bush has not met his burden of demonstrating fundamental error occurred.

Prosecutorial Misconduct

¶14 Finally, Bush claims the prosecutor committed misconduct and impermissibly shifted the burden in his closing argument. During closing argument, the prosecutor noted that Bush had recanted his earlier confession and claimed that he could not remember making the incriminating statements. The prosecutor then noted that Bush had not presented any "medical expert testimony" that would explain why he would make these statements if they were not true. Bush did not object to this comment and has therefore forfeited review absent fundamental, prejudicial error. *State v. Moody*, 208 Ariz. 424, ¶ 153, 94 P.3d 1119, 1155 (2004).

¶15 A prosecutor does not commit misconduct, or improperly comment on the credibility of a witness, by emphasizing reasons why a jury should or should not believe a particular witness. *See State v. Haverstick*, 234 Ariz. 161, ¶¶ 6-7, 318 P.3d 877, 880-82 (App. 2014). Here, Bush claims that, by noting that Bush had not produced any expert medical testimony, the prosecutor "suggest[ed] that the defendant's testimony could not be believable without expert testimony," thereby shifting the burden of proof. The prosecutor's comments, however, merely noted that Bush's story was implausible and highlighted the lack of evidence to support it. The comments neither shifted the burden nor constituted misconduct. *See State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008) ("When a prosecutor comments on a defendant's failure to present evidence to support his . . . theory of the case, it is neither improper nor shifts the burden of proof to the defendant . . . .").

Disposition

¶16 For the foregoing reasons, Bush's convictions and sentences are affirmed.